The Bar Review

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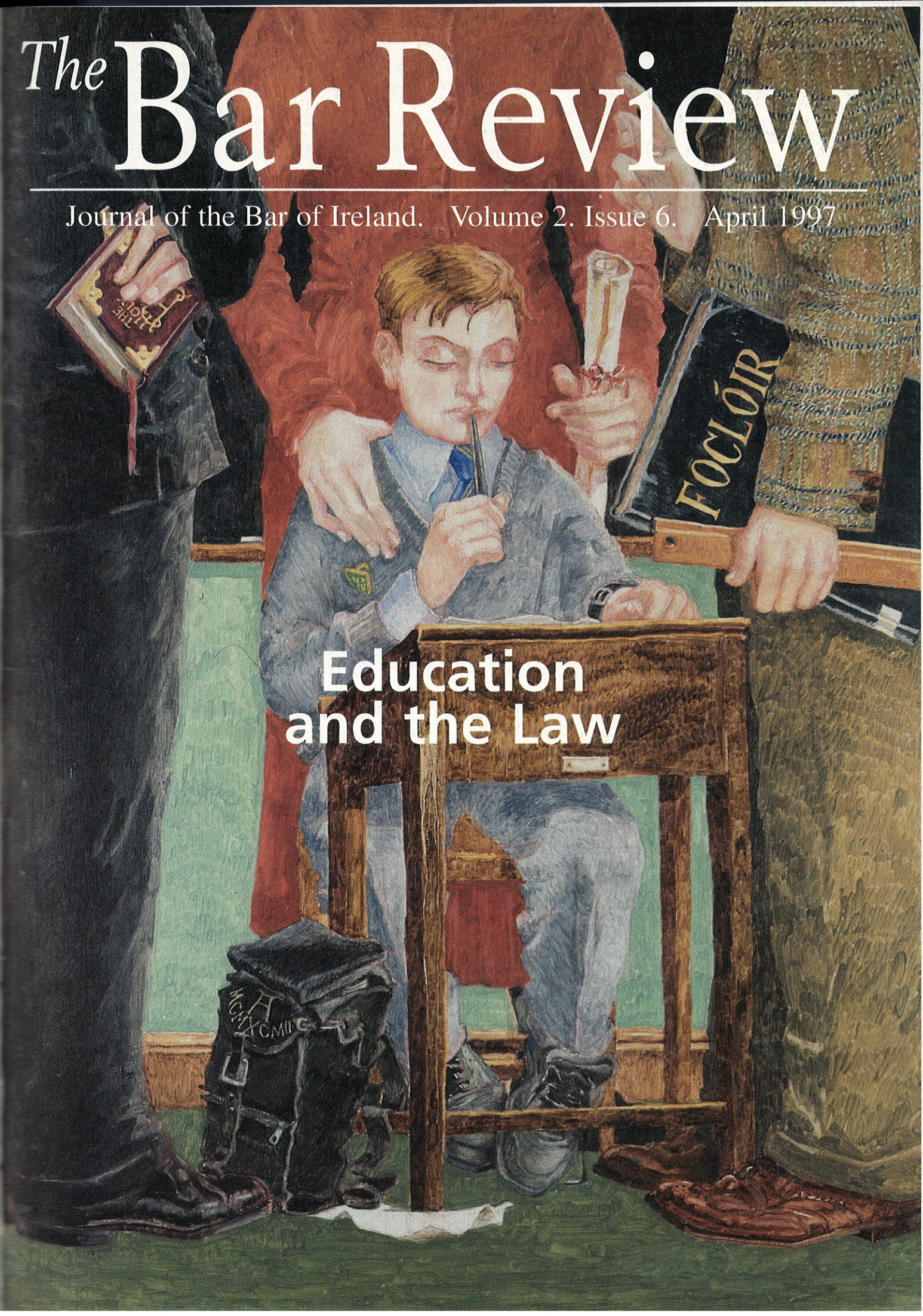
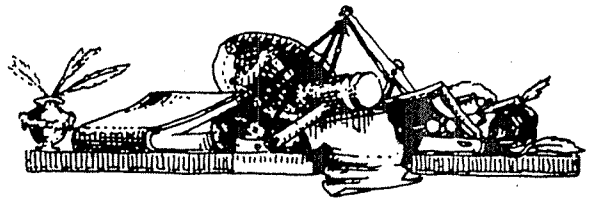


Education and the Law



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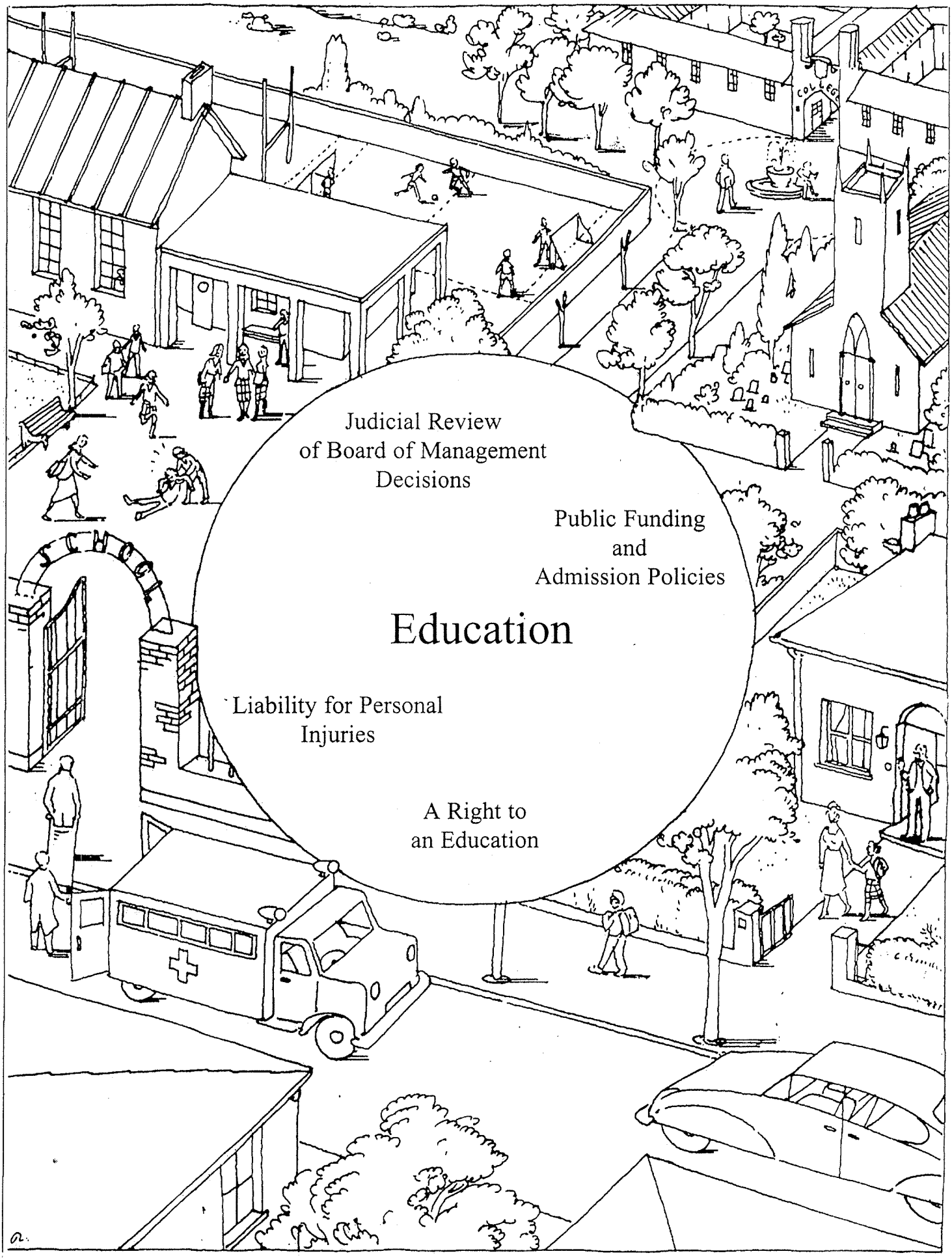
Judicial Review
of Board of Management
Decisions
Public Funding
and
Admission Policies
Education
Liability for Personal
Injuries
A Right to
an Education

Education and the Law

There are few areas likely to give rise to as emotive a response as the question of education and the standards and accountability to be achieved within this sector. Armed with strong constitutional protections, education is an issue which has an enormous significance for every parent and child. It is also a matter of interest to a very large group consisting of future parents. The present efforts towards the introduction of relationships and sexuality education in Irish schools together with the strong reaction against this in certain sectors shows that views upon the defining line between parental education and state intervention and support are far from uniform. The state must tread a delicate balance between preserving the rights of parents as the constitutionally recognised primary educators while at the same time ensuring that it fulfils its obligation to each child to ensure that proper and adequate educational resource are available for the provision of educational services.

The impact the law has on education issues has been steadily increasing in recent years. As negligence principles extend to encompass most walks of life, educators and educational institutions have not been exempt. Teachers and school boards of management must increasingly be aware not only of the social and intellectual duties imposed upon them but also of the legal standards of care which must be observed. School playgrounds and classrooms can still be viewed primarily as places of learning but also must now be viewed as sources of potential litigation. The principles of negligence, including issues of the child plaintiff and professional negligence, will be considered at a Bar Council conference on Personal Injuries on Saturday, 10th May in the King's Inns.

The impact of negligence principles in the educational field is not unique but is an example of their application as a part of everyday life in every stratum of society. In the education field there have been other very significant legal developments in recent times which are unique to this sector.

While the constitutional duty placed upon the state in relation to education has been longstanding, recent legal decisions such as O'Donoghue v. The Minister for Health, H.C., unrep. O'Hanlon J. 27th May, 1993 have clarified the extent of the constitutional duty. The Education Bill, 1997 proposed putting educational structures on a statutory basis for the first time in the history of the state. The task which such a piece of legislation must face is quite daunting as an attempt is made to provide for educational choice in the private and public sectors while balancing the interests of a large number of interest groups such as children, parents, teachers, management and religious groups to name but a few. The introduction of a statutory based education system will undoubtedly give rise to greater judicial reviewability of decisions reached within this statutory framework.

This edition of the Bar Review proposes to review legal aspects of Irish education. The role of the law of torts is considered, illustrating the impact of the private civil law in the relationship between children and their educators. Constitutional aspects of Irish education and statutory reform as well as the role of administrative law in the reviewability of decision making within this sector are also considered.

Bar Benevolent Fund AGM

Monday, 28th April,
at 4.15 pm
in the Law Library

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Joint Conference of Industrial Law Group of Scotland, Industrial Law Society of England and Irish Society of Labour Law.

Impact of European Law on Employment Law in Edinburgh
on Saturday, 31st May, 1997

Speakers: The Right Honourable, the Lord Rodger of Earlsferry
The Lord President of the Court of Session, Scotland

The Honourable, Lord Johnston, Scottish Judge of the EAT

The Honourable Mr. Justice, Morrison, President of the EAT

The Honourable Mr. Justice Hugh O' Flaherty
Judge of the Supreme Court, Ireland

Doris Littlejohn, President of the Industrial Tribunals in Scotland

Fee: Dinner and Conference: £95.00
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Bed and Breakfast at Carlton Hotel; £70.00 / £55.00

For further information, contact, Sile O'Kelly ext.4520

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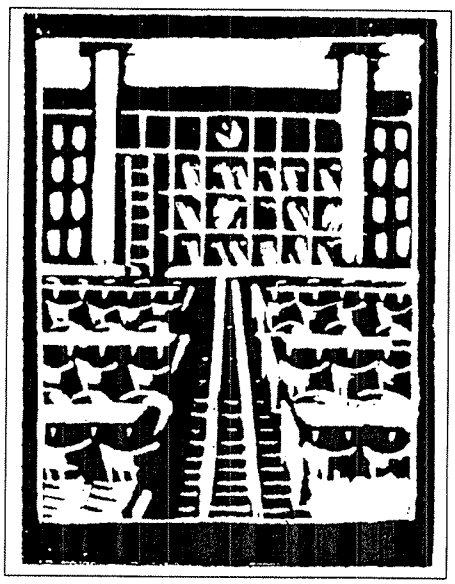
Marketing Directory for the Irish Bar

Members are invited to please return their completed form for the marketing directory if they have not already done so. Forms available from the Bar Council office and from the Issue Desk.



New High Court Judge Nominated

Congratulations and best wishes to Philip O'Sullivan, SC, upon his nomination for appointment to the High Court, and many thanks from the editorial board of the Bar Review for his kind support as a consultant editor of the Bar Review.

●

Bar Council Conference on Personal Injuries

King's Inns
Saturday, 10th May, 1997

"The Law of Negligence in Ireland today"

Topics: Professional Negligence
Damages in catastrophic injuries cases
Circuit Court damages
Uninsured drivers
The Child Plaintiff
The Impact of European Law on aspects of Recovery for Personal Injuries

Contact: Nuala Jackson, Continuing Legal Education Officer, ext 4891

●

King's Inns' Student Wins At World Debating Championships

Congratulations to Mr. James McDermott, a final year student in King's Inns who was selected best public speaker at the World Debating Championships held recently in the University of Stellenbosch, South Africa.

●

Union International Des Advocats Conference Philadelphia, September 3-7, 1997

Themes: The role of the lawyer in defense of human rights Practising International law in the age of the World Wide Web Lifting the judicial curtain: High Court judges from around the world decide a constitutional case

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All Law Library clubs and societies are invited to submit their constitution, details of membership, programme of events for the court year 1997/98 and a request for funding for that programme to The Secretary, Internal Relations Committee by 14th May next.

This information is required in order to facilitate budget preparations for the coming court year.

For queries, contact the secretary, Internal Relations Committee, at ext, 5014.

Constitutional Issues Raised in the Educational Bill, 1997

Gerard Hogan, Barrister

Introduction

One of the most remarkable features of the Irish education system has been the extent to which it has hitherto been regulated, if that is the appropriate word, by a system of non-statutory administrative circulars whereby the Minister has endeavoured to regulate everything from the length of the school year to issues of discipline. The confusion resulting from the habitual use of such circulars has, frequently been judicially deplored[1] and in McCann v. Minister for Education[2] Costello P. expressed his unease with the present system:

"The law should be certain and it should be readily accessible. The same applies to non-statutory administrative measures. In the case of primary and secondary education hundreds of millions of pounds are administered annually by means of a large number of administrative measures whose existence is known only to a handful of officials and specialists, which are not readily available to the public and whose effect is uncertain and often ambiguous[3]."

If, speaking from a purely legal perspective, the Education Bill, 1997[4] can be said to have one clear advantage it is that it attempts to regularise this unwieldy and totally unsatisfactory system of administration. Why it has taken so long to replace this present system with one based on a precise legal foundation is unclear. It may be, perhaps, that the Department of Education's experience with its last major legislative foray, the School Attendance Bill, 1942, was such an unhappy one that they were discouraged from promoting legislation in an area fraught with potential constitutional difficulties[5]. And even if there are aspects of the former Supreme Court's decision in the School Attendance Bill reference which might not now be followed today, in particular, the rather minimalist view which was taken of the Oireachtas's capacity under Article 42.3.2 to prescribe minimum standards of education and the Court's readiness to assume that the Minister for Education might exercise his statutory certification powers in an unconstitutional manner[6] the fact remains that the entire educational area bristles with constitutional difficulties.

Perhaps the fundamental problem is that some of the constitutional provisions in question lack a certain internal consistency and point in opposite directions. This is not so much a reflection on the drafting of the Constitution, as a recognition of the fact that Articles 42 and 44 in particular traverse an "ideological fault line in the Constitution" where liberal and secular values (e.g., the prohibition on the endowment of any religion in Article 44.2.2) clash with more traditional values (e.g., parts of Article 44:2.4 permitting State aid to schools under the management of a religious denomination)[7].

At all events, the 1997 Bill raises so many constitutional issues that for present purposes we must concentrate on a number of heterogeneous, albeit related, issues which arise from three major parts of the Bill which provide for:

- the establishment and functions of the new regional education boards;
- the recognition of the schools for the purposes of funding by public funds; and
- the establishment, composition and functions of boards of management for schools.

The Right of Publicly Funded Schools to Determine Admissions Policy

A number of provisions of the Bill seek to deal with the question of schools admissions policies. Sections 9(1)(b) and (c) are principally concerned with the aims and objectives of the Education Boards by providing that:

"9(1) The objects of an education board, as regards the education region for which it is concerned, shall be....

(b) to promote equality of access to, and participation in, education;

(c) to promote the right of parents to send their children to a school of the parents' choice having regard to the rights of patrons and the effective and efficient use of resources."

These sub-sections would not appear

to give any enforceable rights to any parent or child vis-a-vis any particular school. Instead, these provisions provide the statutory background by which the vires and reasonableness in law of decisions of the Education Boards can be judged, in the last analysis, by the courts[8]. Section 42(j), on the other hand, appears to impose an enforceable statutory duty on all schools to establish and maintain an admissions policy:

"A school shall provide an efficient and effective education to students in the school, as far as resources permit, and without prejudice to the foregoing, it shall do all or any of the following -.

(j) establish and maintain an admissions policy which provides, within the resources available, for maximum accessibility to the school."

It is very likely that a disappointed student who was refused access to a school whose admission policy did not comply with these statutory requirements could seek to have that decision quashed by the High Court, since a further consequence of this section in particular (and the Bill in general) is that the schools, along with the Education Boards when established, will be brought within the entire public law arena within the first time[9]. Indeed, a student who could show that he was wrongly refused access to a school in such circumstances would probably be able to obtain damages against the school for breach of statutory duty, since he came within the class of persons which the sub-section intended to protect[10].

Any such admissions policy must provide "within the resources available" for "maximum accessibility" to the school. Thus, in principle, a school must endeavour to be open within available resources (i.e., places, acceptable student ratios etc.) to all-comers. The sub-section thus makes no concession for the special position of denominational schools and their necessarily implied constitutional entitlement, subject to Article 44.2.4, to give preference to co-religionists as far as admissions policy is concerned. Article 44.2.4 provides that:

"Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school."

The following principles are either expressly or necessarily implicit in this provision:

i. The Oireachtas must legislate in a manner which provides State funding for denominational schools.
ii. Such funding must not be discriminatory as between the different religions.
iii. The rights of children to opt out of religious instruction must be respected by the school.
iv. The fact that children and parents have the right to opt out of religious instruction pre-supposes that a publicly funded denominational school cannot maintain a policy of religious exclusivity as far as admissions are concerned, since such any other construction would appear to undermine one of the objectives of Article 44.2.4.[11]
v. However, a denominational school cannot be forced to maintain a completely open admissions policy if the effect of this were to mean that the school were to be "swamped" with pupils from different denominations, so that the entire denominational ethos of that school were to be undermined.

The latter conclusion is reinforced by Article 44.2.5 which provides that each religious denomination is entitled to maintain "institutions for religious or charitable purposes." Again, the efficacy of this latter provision would plainly be undermined if institutions (including schools) so maintained were forced to operate a completely open admission policy.

Of course, section 42(j) could not attempt to sweep away the constitutional rights of denominational schools and, to that extent, the courts would presumably be hesitant to give it a construction which conflicted with these constitutional rights. If, however, this sub-section, as properly construed, had the effect of coercing a particular denomination school to admit all-comers so that its religious ethos was diluted to the point of non-existence, then it seems improbable the sub-section would survive constitutional challenge.

The right of the Minister to refuse to recognise a particular school

In addition to the powers mentioned above, the chief powers which the Bill proposes to make available to the Education Boards (and, by extension, the Minister) are those contained in ss. 35 and 36 whereby recognition of the school may be withdrawn. Section 36(1) provides that the Board and the Minister can put steps in train whereby the recognition may be withdrawn where they are satisfied that the statutory recognition requirements are not being met. As Article 44.2.4 envisages non-discriminatory State funding for denominational schools, the question arises as to the extent to which such funding may validly be subjected to certain conditions.

It would seem that the Constitution implicitly envisages that at least certain types of conditions might be imposed. Thus, Article 42.3.2 provides that:

"The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education moral, intellectual and social."

The Minister would therefore clearly be entitled to insist that schools meet this basic requirement. It would be surprising if she could not also withdraw recognition of a particular school where, e.g., the funds were being squandered or being mis-appropriated. And although the courts have been strangely hesitant about extend-

ing the principles of proportionality as a means of testing the validity of administrative action impacting on constitutional rights[12], first principles suggest that the Minister cannot impose unfair or disproportionate burdens as a condition of the exercise of this constitutional right. In other words, she cannot condition the grant of aid with compliance with these other statutory requirements prescribed by the Education Bill if these statutory requirements are not in themselves objectively justifiable as necessary for the proper supervision of State funding and for valid educational objectives.

Thus, for example, a requirement that schools only employed duly qualified teachers would be an example of such an objectively justifiable educational requirement. On the other hand, a patron who did not comply with the gender balance requirements in respect of the Board of Management (s.43(4)) might find that recognition (and, by extension, funding) was withdrawn. The withdrawal of funding in such circumstances would appear difficult, if not altogether impossible, to justify in view of Article 44.2.4, since this would be an example of an "unconstitutional condition", i.e., a statutory requirement which conditioned the exercise of the constitutional right in question in a manner which was unrelated to objective educational reasons.

Funding conditions and Boards of Management

Section 37(7) purports to freeze the funding of schools in circumstances where no board of management has either been appointed or remains in existence. As the Bill presently stands, the effect of s.44 is to sanction a form of statutory take-over whereby real executive powers (including the right to appoint teaching staff[13]) will henceforth be vested in boards of management as opposed to patrons[14]. While opinions may differ on the desirability, as a matter of educational policy, of boards of management, it is difficult to contend that their establishment is necessarily essential to the efficient running of the school. Indeed, many of the finest and best schools have hitherto been run without the benefit of a board of management. In these circumstances, it would appear that section 37(7) is imposing yet a further "unconstitutional condition" by requiring that schools establish a form of management structure which is not necessarily related to educational standards or the efficient running of the school as condition of obtaining State funding. Here again there are doubts as to whether this sub-section would survive constitutional challenge if the matter were ever put to the test.

The property rights of school owners and Boards of Management

A further consideration is that the combined effects of sections 36, 43 and 44 impact very significantly on the rights on the rights of school patrons and school owners. While, of course, the rights of property owners contained in Article 40.3.2 and Article 43 are nothing as absolute as is sometimes supposed[15] is the key point here is that the executive responsibility for the running of the school is to be statutorily devolved on a board of management which, in turn, is subject to ultimate ministerial control. It is, of course, true that section 44(3) provides that nothing in the Bill shall be deemed to confer proprietary rights on the members of the Board, but this does not disguise the substance of the measure. It is difficult to see how a measure of this kind could survive constitutional challenge, since this form of statutory take-over of most of the key operational functions relating to the schools constitutes a far-reaching and wholly disproportionate attack on the property rights of the school owners, particularly as the Minister cannot point to any valid educational reason which would objectively justify such a far-reaching interference in the management of schools. One example should suffice to make this point: a school's reputation is often largely determined by the quality of its teaching staff. If the patron's right to appoint teaching staff is now to be transferred to the new Boards of Management, how could this be otherwise than an "unjust attack" on the patron's property rights within the meaning of Article 40.3.2?

Boards of Management and Article 44.2.5

This conclusion is further strengthened by Article 44.2.5:

"Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, moveable and immovable and maintain institutions for religious or charitable purposes."

The right of religious institutions to manage their own affairs and, by extension, to manage the schools which they maintain for religious or charitable purposes is, clearly, one which could not be negated on pain of the withdrawal of recognition without clear objective justification. Such justification would, for example, be present where the Bill sought to insist that public moneys were properly applied for the purposes for which they were voted by the Dail in accordance with legislation enacted by the Oireachtas. But it is hard to see why it is necessary to establish Boards of Management in order to meet such an objective. If this is correct, such a statutory requirements would appear to constitute a disproportionate interference with the right of religious denominations to maintain institutions for charitable (including educational) purposes.

A further example of constitutional problems is supplied by the gender balance requirements contained in section 43(4)[16]. Gender balance is doubtless very desirable - although there are many who might prefer that this would come about naturally and not by means of an artificial quota -

but the essential point Minister cannot condition the exercise of constitutional rights by reference to what amounts to quasi- ideological considerations.

This is essentially the import of the Supreme Court's decision in Re Article 26 and the Matrimonial Homes Bill[17] where it was held that legislation which provided, subject to immaterial exceptions, for the automatic transfer of the family home into joint names constituted an unconstitutional attack on the autonomy of the family to make its own decisions. While the subject-matter of this Bill is, of course, quite different, reasoning by analogy, it would seem the Oireachtas cannot interfere with the decision-making processes of denominational schools by forcing them to accept gender equity, unless that condition is clearly related (which the gender balance requirement clearly is not) to maintaining educational and other supervisory standards and is objectively justifiable by reference to such standards.

Conclusions

The 1997 Bill represents an ambitious attempt to legislate in an area where the Oireachtas has hitherto feared to tread. While there is much in the Bill that is legally and constitutionally sound, huge difficulties remain in other areas, especially with regard to the matters raised in cursory form in this article. As of the time of writing, it seems doubtful if the 1997 Bill will be enacted before the general election which, it appears, is imminent. If this were indeed to occur, it might be no bad thing since key areas of the Bill require fundamental re-examination having regard to the constitutional issues which have just been discussed. A bad experience in 1943 arrested legislative development and experiment in the education field for over fifty years. It would be a great pity were history to repeat itself with the present Bill, thus condemning another generation of patrons, teachers, students, parent and, indeed, their legal advisers, to rule by administrative circular from Marlborough Street. ●

1. See, e.g., O'Callaghan v. Meath VEC, High Court, November 20, 1990; McCann v. Minister for Education [1997] 1 ILRM 1.
2. [1997] 1 ILRM 1.
3. Id., 15.
4. All subsequent references to the Education Bill, 1997 are to the Bill as initiated. It is highly likely that significant changes will be made as the Bill progresses through the Oireachtas.
5. The 1942 Bill was found to be unconstitutional by the Supreme Court following an Article 26 reference by the President: Re School Attendance Bill, 1942 [1943] IR 334. See generally, Osborough, "Education in the Irish Law and Constitution" (1978) 13 Irish Jurist 145.
6. See generally Kelly, The Irish Constitution (Dublin, 1994) at pp. 1055-56. The last conclusion looks positively doubtful in view of the manner in which the presumption of constitutionality has been consistently applied to the exercise of statutory powers since East Donegal Co-Operatives Ltd v. Attorney General [1970] I.R. 317.
7. See, e.g., Whyte, "Religion, Education and an Intermediate Constitution" (1997). See also the comments contained in the Report of the Constitution Review Group (1996) (Pn. 2632) (at 385) to the effect that "there appears to be something of an internal tension between the provisions of the Constitution dealing with denominational education."
8. The Education Boards would each appear to be specialist bodies dealing with policy questions, so that the limited powers of judicial review in respect of such bodies enunciated in cases such as O'Keefe v. An Bord Pleanala [1993] 1 IR 39 and ACT Shipping Ltd v. Minister for Marine [1995] 3 IR 406 accordingly applies.
9. This means that, in principle, at least, judicial review will now be available by reason of such statutory changes, so that the reasoning contained in cases such as Murtagh v. Board of Management of St. Emer's National School [1991] 1 IR 482 will no longer apply to the new changed statutory regime.
10. See, e.g., Moyne v. Londonderry Harbour Commissioners [1986] IR 299.
11. A view shared by the Constitution Review Group: see Report, op.cit.,, pp. 385-6.
12. See, e.g., McCann v. Minister for Education [1997] 1 ILRM 1; Radio Limerick Ltd. v. IRTC, Supreme Court, January 17, 1997.
13. Section 48.
14. Section 44(3) is a saving clause which provides that nothing in the Bill will operate to confer any right or interest over land and buildings of the school in the board of management. In addition, s.45 provides a further safeguard in that the patron may, with the consent of the Minister, remove either an individual member of the Board or the Board itself for stated reasons.
15. Cf. the pithy comments of Costello P. in Daly v. Revenue Commissioners [1995] 3 IR 1, 11:

    "But legislative interference in property rights occurs every day of the week and no constitutional impropriety is involved."
16. Which provides that:
    "In making appointments to a board [of management] there patron shall ensure an appropriate gender balance as determined by the Minister from time to time among the membership thereof."
17. [1994] 1 IR 305

A Right to an Education

Mary Ellen Ring, Barrister

The long awaited publication of the Education Bill, 1997 in January has put statutory form on the constitutional provisions covering education for the first time in the history of the State. Further, the Bill has generated some public debate about the proposed form. As expected the concerns have centred on the control of the management of the schools and the position of, in particular, teachers under the proposed new structures.

The long title of the Bill states that the purpose of the Bill is

"... to make provision in the interests of the common good for the education of every child in the State, including any child with a disability or special educational needs, and to provide generally for primary, post-primary, adult and continuing education and vocational education and training;... "

The Bill establishes education regions with education boards for those regions. The objects of the education boards are set out in Section 9 of the Bill which include, among others, the requirement of the boards to ensure that there will be available to every person living within the education region "an appropriate level and quality of education, other than university or other third level education, to meet the needs of that person".

The statutory obligation to provide appropriate education echoes the provisions of Article 42.4 of the Constitution. In this Article the obligation rests on the State and is limited to the phrase "free primary education". Constitutional litigation has defined the scope of "education", with Chief Justice O'Dalaigh stating in Ryan v Attorney General (1965) IR 294 that

"Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral."

This view was endorsed by Mr. Justice O'Hanlon in May 1993 in O'Donoghue v The Minister for Health and Others. Dealing with a child who had a severe mental handicap Mr. Justice O'Hanlon was asked to examine the extent of the provisions of Article 42.3 and 42.4 of the Constitution. The relief sought included an Order of Mandamus compelling the Ministers for Health and Education to provide free primary education for the child and a declaration that in failing to provide for free primary education for the child he had been deprived of constitutional rights under various sections of the Constitution.

In hearing the case Mr. Justice O'Hanlon had the benefit of hearing expert witnesses and reading various publications dealing with the type of education that the applicant child would require. After a lengthy consideration of this evidence, Mr. Justice O'Hanlon held that there

"... is a constitutional obligation imposed on the State by the provisions of Article 42.4 of the Constitution to provide for the free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be."

Mr. Justice O'Hanlon went on to confirm that

"This process will work differently for each child, according to the child's own natural gifts, or lack thereof....a completely different programme of education has to be adopted and a completely different rate of progress has to be taken for granted..."

It is interesting that Mr. Justice O'Hanlon uses the phrase "basic elementary" education rather than "primary" education. The question of when "primary" or "basic elementary" education ends and other education begins is not clear. Certainly at the time the Constitution was being framed the social reality was that while most children attended and completed national school level, the same could not be said about secondary education. In the 1990s it is arguable that a Leaving Certificate or its equivalent is a recognition of having completed a "basic" education with some form of third level education becoming a standard requirement for advancement in the labour market. The proposal to increase the minimum leaving age to sixteen years soon would also appear to confirm the view that society's view of a 'primary education' has changed from the time that the Constitution was drafted.

The question of "providing for" education was considered in Crowley v Ireland [1980] IR102. The fact of this case revolved around the rights of children who had been deprived of education due to an industrial dispute in three schools in County Cork and

the corresponding obligation and duty of the State under the Constitution in such an instance. After a considerable period of time, the children, who had been educated by a retired teacher and unqualified local personnel, were taken by buses provided by the Minister for Education to neighbouring schools unaffected by the industrial dispute to be schooled.

The children complained about the actions of the teacher's union as well as the failure of the State to provide schooling within their local parish. As to the obligation of the State, the court looked at the provisions of the Constitution and in particular the words "provide for free education".

Chief Justice O'Higgins in his judgement considered the purpose of the wording of Article 42.4 when he held that:

"This Article was intended to avoid imposing a mandatory obligation on the State directly to provide free primary education. Such, if imposed, might have led to the provision of free primary education in exclusively State schools. Rather it was intended that the State should ensure by the arrangements that it made that free primary education would be provided."

It is interesting to note that Article 42.4 continues as follows,

" ...and when the public good requires it, (the State shall) provide other educational facilities or institutions with due regard, however, for the rights of parents especially in the matter of religious and moral formation."

This part of the Article was not specifically referred to in the court of the above case It could be argued that this section of the Article extends the State's obligation to actively providing education, as opposed to providing for education, where such education is not available otherwise and the provision of such education is in the public good. This might arise in the case of certain groups of children who are unable to receive appropriate education and where no group or organisation will supply the particular type of education required by these children. In particular due to financial or other constraints the education of these children would not be able to be undertaken by their parent(s) or guardian(s) and what limited education is available is not fully vindicating their personal right to education.

The constitutional right of the child to be educated was never questioned. This provision had already been recently confirmed in the decision of the Supreme Court in G v An Bord Uchtala [1980] IR 32. The Supreme Court held that this right sprang primarily from the natural right of the child to life and all that which flows from that right.

The Constitution acknowledges that the primary educator of the child is the family (Article 42.1) while at the same time requiring that children

". . . receive a certain minimum education, moral, intellectual and social." (Article 42.3.2)

Further, via its school attendance legislation the State requires that children who attend school remain in school until the age of fifteen years and if they fail so to do their parent(s) or guardian(s) may be prosecuted under the relevant legislation.

While the State does not have to run schools it does exercise some control for the purpose of granting money to schools run by religious orders or others. Such control is with a view to establishing and maintaining standards of education though whether persons interested in the provision of education would agree that such standards are maintained is another issue. Certainly the recent publicity surrounding the physical conditions of schools around the country would indicate that whatever about the standards of teaching, children have been receiving education in substandard conditions in many places.

In the absence of a legislative framework litigation clarified the constitutional framework. Therefore:

1) a child has a constitutional right to be educated,
2) the State recognises the family as the primary educator;
3) children are required to receive a certain minimum education:
4) the State shall provide for free primary education;
5) children are required to remain in school until a certain age;
6) and when the public good requires it the State shall provide other educational institutions.

Against this constitutional framework the courts have recently been called upon again to adjudicate as to the extent of the State's obligation to provide for education. In particular a growing number of children have found themselves outside of the formal system with no way back into that system.

The education of the child with special needs has always caused problems for teachers and schools alike. Some of these children had, and have, special needs due to physical or mental disabilities, while others have special needs due to behavioural or educational problems. Children with disabilities have had a limited education system available to them over the years. In many instances special schools for the different disabilities have been established but this has meant in many cases travelling long distances or the boarding of these children. In most cases it has also meant that the children have been educated otherwise than in the ordinary school system and has often resulted in these children being isolated, not only in work, but later in the labour market.

The children with educational problems have usually been dealt with in the mainstream system with the provision of remedial teachers to attend to the special requirements of these children. How- ever in many cases the remedial teaching has proved to be less than adequate or suitable for all the children in these classes. This is particularly so where various educational difficulties are combined in the classes and children do not fully benefit from such education. A further problem can arise for these children if their educational problems are not identified at an early stage though this is likely to happen in these days.

The challenge for parents, teachers and policy planners alike however centres on children with behavioural problems. These children can be as young as five or six years though the older the child the more severe the dis-

cipline challenge. A number of sources may contribute to the behaviour of these children with current labelling of these children being 'attention deficit disordered' or 'hyperkinetic conduct disordered'.

The manifestations of the behaviour of such children can be that a child is unable to concentrate for any significant period of time, may arrive at school in the morning but leave before the end of the school day, may actively disrupt a classroom/school, and more seriously, assault fellow students and teachers alike. For many of these children they and their parents are warned about continuing behaviour and the consequences that could befall the child if such behaviour is not stopped. In other instances one incident is serious enough to warrant a suspension or expulsion.

In the case of a suspension it has become common practice to make this suspension for an indefinite period. The practical result of an indefinite suspension is that for the children involved they are unable to secure alternative education. As the child is not technically excluded from his/her original school another school will not take that child on their rolls. Further the reality of the situation is that once one school suspends/expels a child no other school is anxious to take that child.

This practice however also leads to the ironic legal situation that parents are being prosecuted under the School Attendance Acts 1926 - 1967 for failing to send their children to school and yet the parents are unable to find another school to enrol their child in light of previous problems. Boys are being sent away to industrial schools because no other school intervention is available. Girls are not so dealt with as there is no industrial school for girls in the State.

The obligation to provide for children with special needs was considered in a number of cases by Mr. Justice Geoghegan in the High Court in March 1995. In F.N. v The Minister for Education and others [1995] 1 IR 409 the court considered the position of a twelve year old child who had been cared for by foster parents in the absence of his parents. He had been professionally assessed and found to require "containment for treatment". However as there is no provision in law for detention of young people who have not committed criminal offences, no statutory body or caring agency could hold the applicant child to provide therapeutic or other services. As a result of his behavioural difficulties the applicant child was also not receiving the education he was entitled to receive.

After hearing oral evidence and considering a number of reports prepared on behalf of the applicant Mr. Justice Geoghegan held that

"It is quite obvious on the evidence and reports before me that the Applicant is a child who is in urgent need of special treatment, attention and education. Furthermore, for the care of the child to be effective there would have to be an element of containment or detention. It is clear also that this Applicant is not an isolated case. "

The state submitted that its constitutional obligation did not extend beyond the services that were then being provided to him. However, on consideration of the legal authorities opened to him, Mr. Justice Geoghegan held

"...I would take the view that where there is a child with very special needs which cannot be provided by the parents or guardian there is a constitutional obligation on the State under Article 42.5 of the Constitution to cater for those needs in order to vindicate the constitutional rights of the child. It is not necessary for me to determine how absolute that duty is...".

The decision in this case was not appealed by the State.

Subsequent cases have invariably included children who have been out of education for a significant period of time. Some of the cases have originated as a result of school attendance proceedings or in some instances where children have been accused of criminal offences. Among the rights that these applicant children have sought to vindicate through the courts have been the right to an education. In the Eastern Health Board region secure units have been provided for children such as F.N. and education is included in the services. While the premises are run by the health board the education is provided by the Department of Education.

On the 20th of December 1996 Mrs. Justice McGuinness, in (S.C. v The Minister for Education, Ireland & the Attorney General unreported 20.12. 1996) considered the case of a ten year old child in a similar position to F.N., and looked at duties of parents in providing education for their children. In this case the child's parents had taken steps to get education for their son but this did not occur. School attendance proceedings were instituted but no suitable solution could be found for the applicant child and proceedings were commenced in the High Court. Mrs. Justice McGuinness found that

"the educational deprivation of the Applicant was due to the actions of his parents as well as to any default on the part of the Respondents. Article 42.4 of the Constitution imposes a duty on the State to provide for free primary education but Article 42 sections 1,2 and 3 emphasis much more strongly the rights of the parents in the education of their children. These rights, too, carry concomitant duties.... However once School Attendance Act proceedings in the District Court were initiated, the Respondents had intervened in the situation."

These recent cases along with the O'Donoghue case, have defined to date the extent of the constitutional obligation to provide education for all children. The fact that behaviour may be difficult does not of itself absolve the State from its obligation to defend and vindicate the rights of such children. The obligation included in the Education Bill 1997 to make available to every child within an education region such education that is of an appropriate level and quality underlines that constitutional obligation. How that will translates in practice remains to be seen. The area of policy is not for lawyers and the courts. What is clear however is the fact that to adequately provide for all children the Minister for Finance will have to have as central to such planning as the Minister for Education! ●

Judicial Review and School Management Boards

Conleth Bradley, Barrister

Introduction

The main differences between an application for judicial review in non-planning matters and in planning matters were succinctly outlined in an earlier issue of this journal[1] by James Macken, S.C. The article, inter alia, dealt with the procedural differences between the two types of judicial review. Arguably one of the most important questions facing putative applicants seeking relief by way of judicial review concerns the scope of judicial review, i.e. whether the person/body making a particular decision is amenable to the judicial review jurisdiction contained in Part V, Order 84, rules 18-27 of the Rules of the Superior Courts, 1986. Generally the scope of judicial review is closely associated to the public law element of the person/body to be reviewed. In the recent case of George Eogan v. University College Dublin[2], Shanley J. stated that the following matters should be taken into account in considering whether a decision is subject to judicial review:-

1. whether the decision challenged has been made pursuant to a statute;
2. whether the decision maker by his decision is performing a duty relating to a matter of particular and immediate public concern and therefore falling within the public domain;
3. where the decision affects a contract of employment whether that employment has any statutory protection so as to afford the employee any "public rights" upon which he may rely;
4. whether the decision is being made by a decision maker whose powers, though not directly based on statute, depend on approval by the legislature or the government for their continued exercise.

This case concerned the applicant's appointment as Professor of Celtic Archaeology which was made pursuant to Statute 1 which was a statute made under the provisions of the Irish Universities Act, 1908 and therefore the decision to appoint and the decision not to continue the applicant in office were amenable to judicial review. One area where this jurisdictional question, or the applicability of judicial review, has been most significant has concerned the decisions of school management boards.

School Management Boards and the Scope of Judicial Review

Three cases involving school management boards reflect the general uncertainty in the case law concerning the scope of judicial review. In The State (McMahon) -v- the Minister for Education & Scully & Others[3], Barrington J. granted the applicant[4] an order of certiorari quashing the Minister's decision and an order of mandamus directing the Minister to consider in accordance with law the question of whether she should approve the appointment of the applicant to a post of responsibility in the Pobalscoil Rosmini community school.

In this case the first named respondent was the Minister for Education and the remaining respondents comprised the Board of Management. The school was managed by a draft Deed of Trust, the first schedule of which; "the Instrument of Management" provided, inter alia, that the Board shall be responsible for the government and direction of the school. The second schedule dealt with the selection and appointment of new staff. The case centred on the promotion of a teacher already employed in the school by appointing him to a post of responsibility. When the relevant vacancy had arisen, the Board informed the Minister of its intention to fill same and a notice subsequently appeared on the staff notice board. The Board appointed a selection committee to interview the applicants and recommended the applicant as the best qualified candidate. The Board accepted this recommendation and sent the applicant's name to the Minister for approval and notified the applicant. The Minister, however, opined that the post of responsibility to which the Board had "purported to appoint" the applicant was a new post of responsibility which had not been approved by the Minister and that therefore the Minister was not in a position to confirm the applicant's appointment.

Briefly, the background to the case concerned a dispute between the Association of Secondary Teachers in Ireland (ASTI) who were of the view that the vacant post at Pobalscoil Rosmini should be filled by seniority and the Teachers' Union of Ireland (TUI) who were of the view that it should be filled on merit. The Board heard from both sides and agreed with the TUI as a result of which ASTI instructed its members not to apply for the post and eventually organised a strike at the school. In settling the strike, the Board agreed with ASTI that the dispute would be sent to arbitration but the applicant did not agree and no arbitrator was appointed.

Barrington J. identified various problems with the case such as;
the absence of "law specific to community schools or governing the appointment of teachers to posts of responsibil-

ity in them";
the fact that the school was managed by a "draft" Deed of Trust and not the usual deed; and,
the absence of any rules or procedures governing the promotion of a teacher already employed in the school to a post of responsibility.

The salary of the vacant post was paid for out of public funds administered by the Minister for Education pursuant to the provisions of the Appropriation Act. The applicant submitted that these funds must, in the absence of legislation, be administered "in accordance with some just or rational principle" and reliance was placed on the decision of the Supreme Court in the case of Latchford & Sons Limited v. The Minister for Industry and Commerce[5] which has been judicially recognised[6] as authority for the proposition that a ministerial or executive scheme for the application of public moneys, moneys derived by the Minister under the Appropriation of Funds Act, is binding on the Minister and that he cannot waive the scheme, alter it or impose conditions on the exercise of his own powers without giving reasonable notice of these alterations or the inclusion of these additional conditions.

While Barrington J. expressed some reservations about the applicant's interpretation of Latchford and its application to the case before him, he did find that the Minister was wrong to withhold the applicant's appointment because she took the view that the post to which the Board was purporting to appoint the applicant did not exist and that she should have addressed the issue of the applicant's suitability to the vacant post for which the Board had recommended him.

Interestingly, as far as the Board was concerned, Barrington concluded that he did not "consider it necessary or appropriate to make any Order against the Board of the School" and he discharged so much of the conditional order which related to it. On the facts of the case it is perhaps incorrect to interpret Barrington J.'s comments as meaning that the Board was not amenable per se to a state-side order and pro tanto judicial review. The gravamen of the applicant's case centred on an (subsequently found to be erroneous) interpretation of the facts by the Minister and it was therefore appropriate that the reliefs of certiorari and mandamus should be directed towards her. As Barrington J. commented, " It is proper to say that the Board has at all times adhered to the view that the Prosecutor [applicant] is the candidate best suited to the post."

In O'hUallachain v. Burke & Others[7] Murphy J. confirmed what was an already well established judicial reluctance to expand the areas whereby relief of way of an order of Certiorari would lie. The respondents comprised, inter alia, the Board of Management against whom the applicants were seeking an order of certiorari quashing certain decisions made by the Board rejecting applications for admission as pupils of the Portmarnock Community School. The applicants were the parents of 9 children whose applications for admission were rejected. The applicants submitted, inter alia, that the decision of the Board of Management was invalid because the Board did not possess the power which they purported to exercise to impose any criteria in relation to the admission of pupils to the school and that if the Board did have that implied power to impose any such criteria then as a matter of law the Board were bound to ensure:
(a) that such criteria were both lawful and fair;
(b) that due notice was given of the existence and terms of such criteria and,
(c) that the criteria were properly and fairly applied.

The first schedule of the Deed of Trust under which the school was legally constituted incorporated the "Instrument of Management" which stipulated that the Board of Management shall be responsible for the government and direction of the school subject to the provisions of the first and second schedules. Paragraph 10 of the second schedule also provided that "subject to the provisions of the Minister as to the general education or
character of the school and its place in the educational system, the Board shall have the general direction of the conduct and curriculum of the school." The applicants contended that the scheme under which the school was established was a matter of public law and therefore the decisions of the Board in implementing the scheme were subject to judicial review. Reliance was placed on Latchford[8], McMahon[9], and The State (Hayes) v. Criminal Injuries Compensation Board[10]. In Hayes it was decided that the requirements of natural justice applied to a ministerial scheme (the Criminal Injuries Compensation Tribunal was set up by direct executive act and not as the result of any statutory provision) that involves the making of ex gratia payments so that if the Tribunal were to act in excess of or without any jurisdiction provided for it under the scheme, or to determine matters arising under the scheme contrary to the principles of natural justice, its order "could and should be reviewed by the High Court on certiorari."

Murphy J., however, expressed "some misgivings" as to whether the principles laid down in Latchford and Hayes applied to this case and doubted whether one could validly equate the Deed of Trust in O'hUallachain with the publications of a ministerial scheme:

> "The deed of trust is a binding legal instrument which can be invoked and enforced at the behest of the parties thereto.....The relationship of course between the board of management and the principal and the other staff of the college or indeed between the students and the board of management and the principal and the other staff of the college or indeed between the students and the board of management are matters of comment and matters to be determined in accordance with private law. I believe that serious questions may arise as to the points or limit at which obligations under public law are determined and are replaced by the conditional rights recognised and enforced as private. However, it does seem to me that having regard to the views which I take of

the evidence and indeed the law that I should not attempt, indeed, I should seek to avoid, resolving the important issues which arise here by reference to any point which might be seen as technical or jurisdictional. I merely enter a caveat as to my acceptance of the arguments in relation to the application of public law to the actions or omissions of the board of management in the present case. And on that question I hope to consider at another time and in other circumstances and no doubt in conjunction with the views expressed by my distinguished colleague, Barrington J. in the McMahon case. However, assuming without necessarily holding that the decisions of the board of management are subject to judicial review, it is generally accepted that the headings under which administrative actions fall to be reviewed are those laid down by Lord Justice Diplock in his judgment in Council of Civil Service Unions & Others v. The Minister for The Civil Service[11] in a passage which has been adopted by my colleague Blayney J. in Murphy v. Minister for Social Welfare[12] ....."

Those headings referred to the principles of legality, irrationality and procedural impropriety. Murphy J. held that it would be irresponsible of the Board to admit an excessive number of students as to do so would involve a decline in educational standards, a danger to health and a very real risk to the safety of the students, and the decision of the board of management to limit the intake to 165 new students was a fair and reasonable decision based on sound argument.

Interestingly, the principle underpinning Murphy J.'s expressed "caveat" was to resurface in the case of Geoghegan v. Institute of Chartered Accountants[13] where Murphy J. held that decisions involving the Institute's disciplinary code were not amenable to judicial review. When the case came before the Supreme Court[14], the Court was split on this question with O'Flaherty and Blayney JJ. agreeing with Murphy J. and Denham and Egan JJ. holding that the Institute's disciplinary decisions were amenable to judicial review. Hamilton C.J. reserved his position on the issue. The Supreme Court in Geoghegan reflected the uncertainty and inconsistency apparent in the case law to date in relation to the scope of judicial review.

One of the most oft-quoted cases associated with the modus operandi of the Board of Management in the context of judicial review are the decisions of the High Court and Supreme Court in Murtagh v. Board of Governors of St. Emer's School[15]. This case concerned an eleven year old pupil who had refused to apologise to a teacher for misbehaviour and instead left a note which was deemed to be offensive to that teacher. The applicants were the pupil's parents who had an acrimonious meeting with the principal of the school and rejected the principal's right to deal with the matter. Later the Board of Management met and it was decided to suspend the pupil for three days. The applicants were granted leave to apply for judicial review for an order of certiorari to quash the Board's decision to suspend the pupil on inter alia the grounds that the Board was in breach of natural and constitutional justice in failing to allow the applicants make representations prior to the decision and that the Board acted in an unfair and biased manner.

On behalf of the Board it was submitted that an order of certiorari should not lie as there was not the necessary public element in the decision sought to be set aside, and although it was accepted that the decisions of the Board may in certain circumstances be amenable to an order of certiorari, matters of discipline it was suggested were in the private domain. Barron J. was of the view that matters of discipline in this case could not be described as being in the private domain. While he opined that the cases in which certiorari lie have not been clearly defined, it could be said in general that the body whose decision it is sought to quash must be discharging a function of a public nature affecting private rights and be under a duty to act fairly in coming to that decision. The public element was essential, but even then if the authority to make the decision is based upon a private contract certiorari would not lie.

On the facts of the case Barron J. refused the application and held that the Board had acted fairly in dealing with the matter. The Supreme Court dismissed the applicants' appeal. Hederman J. held that judicial review was a legal remedy available when any body or tribunal having legal authority to determine rights or impose liabilities and having a duty to act judicially in accordance with the law and the Constitution acts in excess of legal authority or contrary to its duty. In his view judicial review had no application to the facts of the case and that a three day suspension of a pupil from a national school either by the principal or the Board of Management of that school was not a matter for judicial review. McCarthy J. held that while no appeal had been taken from Barron J.'s decision that certiorari could lie, he was "not to be taken as accepting that Order 84 of the Rules of the Superior Courts, 1986, does apply to decisions of a Board of Management in circumstances such as here. In any event, the relief by way of judicial review is discretionary; I doubt if it is appropriate to a case such as this where the challenged decision is long spent, and cannot be reviewed." O'Flaherty J. opined that in his judgment "these proceedings .. should have been dismissed as quite inappropriate for judicial review."

Conclusion

While these cases illustrate an extremely cautious (if not negative) approach as to the suitability of judicial review where the decisions of a School's Board of Management are concerned, they should be interpreted in the light of their particular facts. Adopting the 'source of the powers test', a Deed of Trust is undoubtedly a private law instrument with its own private law avenue of redress and in relation to this issue alone Murphy J.'s comments in O'hUallachain about the inappropriateness of judicial review present a formi-

dable obstacle to a prospective applicant. However, as the judgments in the cases analysed above illustrate, the facts of the case which have led to the involvement of the Board and the extent of the Board's involvement may be determinative and adopting the nature of the powers test, the more governmental the nature of the power is, the greater likelihood that it will involve an element of public law. The following general comment has been made in relation to judicial review and education in England:

> "This study had identified two underlying reasons for the growth of judicial review in education, both of which have a significant constitutional dimension. The first is the breakdown of consensus between central and local government; the second is the growing recognition of fundamental rights in education."[16]

Given the cases to date the second reason may possibly provide the only fertile ground for a realistic challenge by way of judicial review to a decision of a School Management Board in this jurisdiction. ●

1. Vol. 2. Issue 4. Feb. 1997
2. High Court, Unreported, May 16,1996.
3. High Court, Unreported, December 21, 1985.
4. Under the former "State Side application", Mr. McMahon is more correctly described as the "prosecutor."
5. (1950) IR 33.
6. O'hUallachain v. Burke (1988) ILRM 693, 701, per Murphy J.
7. Ibid.
8. Ibid.
9. Ibid.
10. (1982) ILRM 210.
11. (1984) 3 ALL ER 935
12. High Court, Unreported, 19 July 1987.
13. High Court, Unreported, 9 July 1993.
14. Supreme Court, Unreported, 16 November 1995.
15. (1991) 1 IR 482.
16. Meredith "Judicial Review and Education" in Judicial Review - A Thematic Approach (ed. Hadfield), p.93.

Restoring Companies to the Register

Kilda Mooney, Barrister

Introduction

Section 311 of the Companies Act 1963[1] and Section 12 of the Companies (Amendment) Act 1982 provides for the striking off a company from the register of Companies. Such action will be taken in circumstances where the company has become defunct or where it has failed to make its annual returns as required by section 125 and 126 of the Principal Act.

Whatever the premise for the striking off of the company, serious consequences will automatically flow from such an action, not alone for the company itself but also for its creditors and possibly its employees[2]. Perhaps the most significant result of striking off is the fact of the company no longer constituting a legal entity. As such it may not sue or be sued in its own name and while Section 311(6) of the Principal Act stipulates that any liability of every director officer or member continues and may still be enforced, substantial difficulties may be created for any potential litigant.

Further from the date of dissolution the assets of the company become vested in the Minister for Finance as property of the State, pursuant to Section 28 of the State Property Act 1954. While certain creditors such as those with charges over land may maintain a relatively strong position in relation to the debt owing to them, others such as unsecured creditors and creditors with charges over personalty will find themselves facing perhaps insurmountable difficulties in enforcing their debt against a company which no longer legally exists.

Due to these and other reasons, either the company itself or alternative interested parties may wish to have the company restored to the register. Caselaw shows that the motives behind the bringing of such an application are both diverse and complex

At a most basic level the company itself may wish to be restored if they were struck off due to a failure on their part to comply with the annual returns requirements. The directors of the company may have other reasons for seeking the restoration such as in the case of Re Eden Quay Investments Ltd[3]. There the directors of a company, which had been dissolved for 18 years, successfully applied to have it restored upon discovering that shares owned by the company which had previously been regarded as worthless were in fact of considerable value. The company would not have been able to prove its claim in relation to those shares unless it was restored to the register. The court ordered that the company be restored.

Creditors of the company may wish to have the company restored so as to enable them to seek the distribution of any remaining assets of the company in order to satisfy their debts. See also the decision of the English High Court in Re Mixhurst Ltd.[4] where a company was restored in order to allow creditors to institute proceedings against it.

In Re Haltone (Cork) Ltd.[5] the Petioner, a creditor of the company, felt the statutory provisions of the Companies Acts 1963 to 1990 relating to the imposition of personal liability on the officers of the company would have greater effect in a situation where the company had been restored to the register[6]. The application to have the company restored was successful. Interestingly the Court also noted that any further progress in the proceedings against the company and its directors would be inappropriate until the company was restored to the register[7].

Application to have the Company restored to the Register

The application to restore the company to the register can be made by way of one of two procedures. The more straightforward method is by means of an application made to the Registrar of Companies. The second method is by means of an application to the High Court. The conditions and proofs necessary for each of these applications differ somewhat.

(1) Application to the registrar of companies

The application to the Registrar of companies is made pursuant to section 311A(1) of the Companies Act 1963 as inserted by section 246 of the Companies (Amendment) Act 1990.

The Proofs which are necessary to ground this Application consist of:-

1. That the application is being made by the company itself.
2. That the application is being made within twelve months of the dissolution of the company which pursuant to section 12(3) of the Companies (Amendment) Act 1982 is deemed to be the date on which the offical notice of the fact of the company being struck off is published in Iris Ofigiuil.
3. A form "H1" must be completed and

filed accompanied by a £500 filing fee. The details on this form include; the name of the Company, the date of dissolution and the signatures of the Directors.

4. All outstanding annual returns must be filed. Payment of a £150 filing fee must be made for each late return.

Where the Registrar is satisfied that all the necessary documentation is in order and that the appropriate fees have been paid the company will then be re-registered.

(2) Petition to the High Court

The alternative means of restoration is by way of an application pursuant to section 311(8) Companies Act 1963 and section 12(6) Companies (Amendment) Act 1982. Order 75 Rule 4, Rules of the Superior Courts 1982 directs that all such applications be made by way of petition to the High Court.

Again certain conditions apply. The petition must be made to the Court within twenty years of the date of dissolution of the company. Only certain parties will have the locus standi necessary to petition[8]. These will be either the company itself, any member of the company or any creditor of the company. In this regard it is interesting to note the decision of Re Aga Estate Agencies Ltd.[9] where the Court held that the petitioner must show they were of such a status at the time when the company was struck off the register.

This issue has also arisen in cases where the Revenue were attempting to restore company. In both Nelson Car Hire Ltd.[10] and in Supratone Ltd.[11] it was held that the Revenue were not creditors of the company as they had failed to raise an assessment on the company while it had been on the register[12].

The petition must be made on notice to the Registrar of Companies and to the Minister for Finance, (for whom the Chief State Solicitor will act) and other interested parties.

The nature of such an application to have a company restored was described in the English decision Re Portrafram Ltd[13] by Harman J as being quasi-administrative. He stated:

> "They are proceedings which do not, on the face of them, lead to the determination of any issue at all. They are a curious form of quasi-administrative proceedings, whereby the court on being satisfied of various matters, exercises a power given by the Parliament to resuscitate, by restoration to the register, a company which is then by Act of Parliament, deemed to have continued to exist at all times. No orders are made in favour of any person for money, declarations of right, injunctions or other substantive relief of any sort at all."

The Proofs which are necessary to ground this petition consist of:-

1. The Petition
2. Notice of Motion
3. The Grounding Affidavit.
4. A letter from the Registrar of Companies stating he has no objection to the restoration of the company.
5. All outstanding annual returns must be filed - again a late filing fee of £150 will be charged for each return made. The completed filing of the returns will be indicated in the letter from the Registrar.
6. A letter from the Chief State Solicitor giving the consent of the Minister for Finance to this application. Such letter should also contain the consent of the Minister for Enterprise and Employment.

Section 311(8) of the Principal Act provides that prior to making the order the court must be satisfied that either the company was carrying on business at the time of its striking off, or otherwise that it is just that the company be restored to the register. If satisfied of this and that the proofs are in order the court may exercise its discretion and order that the company's name be restored to the register. A copy of that order must then be delivered to the Registrar of Companies and on payment of a £500 fee the company's name will be entered onto the register once more.

Ultimately the success of this petition is dependant on the court exercising its discretion. The court may choose to use such discretion in a variety of ways such as in relation to the proofs they deem necessary. This was clearly seen in the decision of O'Hanlon J in Re Haltone[14] where the petitioner was a creditior of the company and therefore was not in a position to file annual returns on behalf of the company prior to the application nor to secure the co-operation of the company in this regard. O'Hanlon J acceded to the application to have the company restored to the register notwithstanding the absence of filed returns. The Petitioner was however made responsible for the payment of any fees involved in the restoration of the company to the register.

Consequences of Restoration of the Company to the Register

Once the company has been restored certain consequences will automatically flow. The property of the company will be restored, the company will become a legal entity once again and can therefore sue and be sued.

The legislation[15] specifically provides that the company once restored will be deemed to have continued in existance as if it had never been struck off. The court will in fact utilise its discretion to adapt situations in order to achieve this result. This is illustrated in a decision of the English Court in Re Boxco Ltd[16] where the court deemed the delivery of particulars of a charge as properly made despite them having in fact been delivered at a stage when the company was no longer on the register.[17]

Various parties may have been involved with the company subsequent to the date of its dissolution and the legislation attempts to protect such parties interests. Section311A(3) of the Companies Act 1963 provides that subject to any order of the Court the restoration of the company shall not affect the rights of liabilities of any company in respect of any debt or obligation incurred or any contract entered into, between the date of dissolution and the date of restoration of the company to the register.

Conclusion

Restoration of a company to the register is a powerful tool reversing as it does the consequences of the company being struck off. However conflicting interests may prevail and a commercially pragmatic approach is generally advised.

The procedure involved in restoring a company has been somewhat simplified by the insertion of section 311(A) of the Principal Act by section 246 of the Companies (Amendment) Act 1990 which now provides for the making of such an application to the Registrar of Companies within one year of the dissolution. Failure to be encompassed by this section still allows for the petitioning of the High Court. Once the necessary conditions are fulfilled and the Order is made the company will be treated as if the striking out had never occurred. ●

1. Hereinafter referred to as "the Principal Act".
2. See "Striking off the Register and Section 12 of the Comapnies (Amendment) Act 1982" Lyndon MacCann B.L. Gazette May 1990.
3. reported in the The Irish Times 12 April 1994.
4. (1994) 2 BCLC 19.
5. Unrep. decision of O'Hanlon 3., 7th February 1995.
6. Note the provision of Section 3 (ii) (6) of the Principal Act.
7. See also Stean Fashions Ltd.v. Legal & General Assurance Society Ltd., The Irish Times, 30th December 1994.
8. Unlike s.310 of the Principal Act where "any other person who appears to the court to be interested" may bring an application.
9. [1986] BCLC 346
10. (1973) 107 ILTR 97
11. (1973) 107 ILTR 105
12. However in both cases they were deemed to be "persons interested" within the neaning of s.310 of the Principal Act and the court therefore ordered that the companies in each case be restored to the register and the dissolutions be deemed void.
13. [1986] BCCC 583
14. ibid.
15. Section 311(8) of the Principal Act
16. (1970) ch. 442
17. See also re Donald Kenyon Ltd. [1956] 3 AER 596.

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Edited by Desmond Mulhere, Law Library, Four Courts, Dublin 7

Administrative Law

O'Malley v. An Ceann Comhairle & Ors.
Supreme Court: O'Flaherty J., Murphy J., Lynch J.
14/03/1997

Appeal; leave to seek judicial review refused; decision of An Ceann Comhairle disallowing full Dail question by applicant; Article 15.10 of Constitution; whether decision of An Ceann Comhairle amenable to judicial review proceedings; internal workings of Dail.
Held: Appeal dismissed; inappropriate for court to intervene with internal workings of Dail

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London Blackstone Press 1997
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Morgan, David Gwynn
The Separation of Powers in the Irish constitution
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Article

O'Connor, Hilda Ann
The Rights and Wrongs of State Aids
1997 ILTR 29

Aliens

Statutory Instrument

Aliens (Amendment) Order, 1997
S.I.86/1997
Commencement date: 17.2.97

Animals

Statutory Instruments

Control of Horses Act, 1996
(Commencement) Order, 1997
S.I.99/1997
Commencement date: 18.3.97 and 5.3.97

Diseases of Animals (Bovine Spongiform Encephalopathy) (Amendment) order, 1997
S.I.79/1997
Commencement date: 18.2.97

Diseases of Animals (Bovine Spongiform Encephalopathy) (Specified Risk Material) Order, 1997
S.I.80/1997
Commencement date: 21.2.97

Control of Horses Act, 1996
(Commencement) Order, 1997
S.I.99/1997
Commencement date: 18.3.97 and 5.3.97

Arbitration Law

Article

Mills, Oliver
International Enforcement of Foreign Arbitral Awards
1997 CLP 35

Commercial Law

Articles

FitzGerald, Kyran
World Trade Centre
1997 GILSI 21

Coughlan, Kevin
Pension Management
9(1997) ITR 187

Lavery, Paul
Commercial Secrets and the Employer / Employee Relationship
1997 CLP 54

Company Law

Re Aston Colour Print Ltd.
In the matter of the Companies Acts, 1963-1990
High Court: Kelly J.
21/02/1997

Examinership; presentation of petition for appointment of examiner; interim examiner appointed; hearing of petition; company in serious financial difficulties; whether petition properly presented; informal directors' meetings; discussions relating to appointment of examiner; whether board meeting held; whether will of board clearly ascertained; whether resolution passed
Held: Petition Struck Out; Petition Improperly Presented

Articles

Igoe, Pat
Business Concerns
1997 GILSI 18

Garvey, Hugh
Being Brought to Book under Section 204 of the Companies Act 1990
1997 CLP 27

Canniffe, Carrie Jane
Restraining a Creditor's Winding up Petition - the position since Truck and Machinery Sales Ltd v. Marubeni Komatsu Ltd
1997 CLP 30

Nolan, Sean
Reform of the Law relating to Mergers and Take-overs
1997 ILTR 26

Competition Law

Library Acquisitions

Korah, Valentine
Technology Transfer Agreements and the EC Competition Rules
Oxford University Press 1996
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Lavery, Paul
Criminal Liability of Directors, Managers and other Similar Officers under the Competition (Amendment) Act, 1996
1997 CLP 47

Conflict of Laws

Ewins and Ors. v. Carlton U.K. Television Ltd & Anor.
High Court: Barr J.
03/03/1997

Preliminary issue; jurisdiction; defamation claim; action arising out of a television documentary; first defendant supplied second defendant with a documentary which was transmitted by second defendant in Northern Ireland and this State; whether plaintiffs entitled to maintain action against the defendants in this jurisdiction; where libel has been published in several states, whether plaintiffs have a choice of jurisdiction; Article 5(3) Brussels Convention 1968 considered; Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988; place where 'harmful event' occurred; whether having elected to sue in this jurisdiction the plaintiffs claim for damages is limited to harm done to them in this State
Held: Plaintiffs had a choice of jurisdictions; claim for damages limited to harm done to them in the State

Constitutional Law

The Irish Times Ltd. & Ors. v. Ireland, Attorney General & Judge Murphy
High Court: Morris J.
18/02/1997

Judicial review; court order restricting right of applicants to report criminal trial while in progress; whether trial being 'administered in public' under Article 34.1 of Constitution; whether judge entitled to make order; whether real risk of unfair trial; whether any damage caused by improper reporting could be remedied by trial judge
Held: Trial not being "administered in public"; judge justified in reaching conclusion due to risk of unfair trial

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Consumer Law

Statutory Instruments

Consumer Information (Advertisements for Concert or Theatre Performances) Order, 1997
S.I.103/1997
Commencement date: 12.5.97

Retail Prices (Intoxicating Liquor) Order, 1997
S.I.108/1997
Commencement date: 11.3.97

Contempt of Court

Irish Shell Ltd. v. Ballylynch Motors Ltd. & Anor.
Supreme Court: O'Flaherty J., Murphy J., Lynch J.
05/03/1997

Appeal; interlocutory order restraining second-named defendant from selling motor-fuel for resale from premises connected with plaintiff; premises subsequently supplied in contravention with order on basis of incorrect representation of premises owner; whether second-named defendant in breach of order
Held: Order willfully disobeyed by second-named defendant due to failure to check accuracy of assurances

Contract Law

Walsh v. Butler & Ors.
High Court: Morris J.
21/01/1997

Preliminary issues; plaintiff claimed injury as a result of negligence on part of rugby club; whether plaintiff member of club at time of injury; rugby club rules; membership procedures; payment of subscriptions and election by general committee of club; contractual relationship between members and club; Registration of Clubs (Ireland) Act, 1904; whether formal election provisions can be set aside; lapse of membership
Held: Plaintiff not a member of the club at time of injury

Article

Kennedy, T P
A Rose by any Other Name : Quasi-Contract and the Judgments Convention
1997 CLP 60

Criminal Law

People (D.P.P.) v. Pringle
Supreme Court: Blayney J., Denham J., Barrington J., Murphy J., Lynch J.
04/03/1997

Compensation; conviction for capital murder and robbery quashed under s.2, Criminal Procedure Act, 1993; whether applicant entitled to certificate under s.9, Criminal Procedure Act, 1993 that there was miscarriage of justice so as to entitle him to compensation; whether onus of proof on applicant to show miscarriage of justice
Held: Onus of proof on applicant to show miscarriage; Court of Criminal Appeal correct in refusing to grant certificate; case referred back to Court so that applicant may renew application and adduce further evidence

People (D.P.P.) v. Meleady & Grogan
Supreme Court: Blayney J., Denham J., Barrington J., Murphy J., Lynch J.
04/03/1997

Compensation; convictions for malicious damage and assault quashed under s.2, Criminal Procedure Act, 1993; whether applicants entitled to certificate under s.9, Criminal Procedure Act, 1993 that there was miscarriage of justice so as to entitle them to compensation; whether onus of proof on applicants to show miscarriage of justice
Held: Onus of proof on applicants to show miscarriage; Court of Criminal Appeal correct in refusing to grant certificate; case referred back to Court so that applicants may renew application and adduce further evidence

O'Kelly v. DPP
High Court: O'Donovan J.
20/02/1997

Case stated from District Court; appellant convicted of handling stolen property; s.33(1) Larceny Act, 1916 as amended by s.3 Larceny Act, 1990; whether District judge on evidence available entitled to convict; failure to identify evidence relied upon; evidential requirements
Held: Appeal allowed; no evidence to entitle trial judge to convict

Statutory Instruments

Criminal Justice Act, 1994 (section 46(1)) Order, 1997
S.I.104/1997
Date signed: 4.3.97

Criminal Justice Act, 1994 (section 47(1))

Order, 1997
S.I.105/1997
Date signed: 4.3.97

Detention of Offenders (Restrictions on Privileges) Regulations, 1997
S.I.116/1997
Date signed: 12.3.97

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Criminal Liability of Directors, Managers and Other Similar officers under the Competition (Amendment) Act 1996
1997 CLP 47

Damages

Allen v. O'Suilleabhain & Mid Western Health Board
Supreme Court: Hamilton C.J., Blayney J., Murphy J.
11/03/1997

Appeal; personal injury action; plaintiff suffered back injury in course of employment; whether award for general damages excessive; measure to be applied for damages for pain and suffering to date and for future; fair and reasonable figure; regard to ordinary living standards; assessment of loss of earnings for future; mathematical error in computation; multiplier; tax exemption; s.5 Finance Act, 1990; whether plaintiff entitled to exemption from tax on entire income derived from award
Held: Appeal allowed

McCarthy v. Dunne & Ors.
High Court: Barr J
05/12/1996

Assessment of damages; assault on plaintiff; physical and psychological injuries; subjected to intimidation; continuing verbal abuse; post traumatic stress syndrome; special and general damages; injunctive relief not sought
Held: Special and general damages awarded; order restraining defendants from intimidating plaintiff or any member of family granted

E. C. Law

Emerald Meats Ltd. v. Minister for Agriculture & Ors.
Supreme Court: Hamilton C.J., Blayney J., Denham J.
03/03/1997

Appeal; allocation of meat imports pursuant to GATT quota under E.C. regime; plaintiff imported meat 'for and on behalf of' meat processors; whether plaintiff entitled to quota as 'importer' under regime; whether duty on Department of Agriculture to forward plaintiff's application to E.C. Commission; whether plaintiff entitled to general and/or special damages from State; whether Art. 177 reference required
Held: Plaintiff entitled to quota as importer; Department under duty to forward application; plaintiff entitled to general and special damages; Art. 177 reference not required

Statutory Instruments

European Communities (Cosmetic Products) Regulations, 1997
S.I.87/1997
Date signed: 20.2.97 Date received: 26.2.97

European Communities (Fresh Poultry Meat) Regulations, 1997
S.I.125/1997
Commencement date: 31.3.97

European Communities (Introduction of Organisms Harmful to Plants or Plant Products) (Prohibition) (Amendment) Regulations, 1997
S.I.126/1997
Date signed: 20.3.97

European Communities (Natural Habitats) Regulations, 1997
S.I.94/1997
Date signed: 26.2.97

European Communities (Personal Protective Equipment) (Amendment) regulations, 1997
S.I.81/1997
Commencement date: 10.2.97

Education

Statutory Instruments

Vocational education (borough of Drogheda vocational education area and County Louth vocational education area) amalgamation order, 1997
S.I.90/1997
Commencement date: 1.1.98

Vocational education (borough of Sligo vocational education area and County Sligo vocational education area) amalgamation order, 1997
S.I.92/1997
Commencement date: 1.1.98

Vocational education (borough of Wexford vocational education area and County Wexford vocational education area) amalgamation order, 1997
S.I.88/1997
Commencement date: 1.1.98

Vocational education (urban district of Bray vocational education area and County Wicklow vocational education area) amalgamation order, 1997
S.I.91/1997
Commencement date: 1.1.98

Vocational education (urban district of Tralee vocational education area
and County Kerry vocational education area) amalgamation order, 1997
S.I.89/1997
Commencement date: 1.1.98

Employment Law

Central Bank of Ireland v. Gildea
Supreme Court: Hamilton C.J., Barrington J., Keane J.
14/03/1997

Case stated; claim of unfair dismissal to Employment Appeals Tribunal (EAT) where EAT ordered his re-engagement; whether respondent employed 'by or under the State' within the meaning of s. 2(1)(h) of Unfair Dismissals Act, 1977; excluded categories of employment from ambit of 1977 Act; Civil Service Regulation Acts, 1924 and 1926; status of bank; Central Bank Act, 1942.
Held: Respondent not 'employed by or under the state'.

Flynn & Ors. v. Primark
High Court: Barron J.
12/02/1997

Appeal; Labour Court determination under Anti-Discrimination (Pay) Act, 1974; difference in pay between female workers and male comparators due to collective productivity agreements; whether Labour Court had made finding that there was objectively justifiable ground for difference in pay
Held: Labour Court had failed to consider whether difference in pay was objectively justified; matter remitted back to Labour Court

Statutory Instruments

Employment Regulation Order (Handkerchief and Household Piece Goods Joint Labour Committee), 1995
S.I.331/1995
Commencement date: 1.1.96

Employment Regulation Order (Handkerchief and Household Piece Goods Joint Labour Committee), 1997
S.I.114/1997
Commencement date: 17.3.97

Employment Regulation Order (Shirtmaking Joint Labour Committee), 1995
S.I.332/1995
Commencement date: 1.1.96

Employment Regulation Order (Shirtmaking Joint Labour Committee), 1997
S.I.113/1997
Commencement date: 17.3.97

Employment Regulation Order (Tailoring Joint Labour Committee), 1995
S.I.330/1995
Commencement date: 1.1.96

Employment Regulation Order (Tailoring Joint Labour Committee), 1997
S.I.112/1997
Commencement date: 17.3.97

Employment Regulation Order (Women's Clothing and Millinery Joint Labour Committee), 1995
S.I.333/1995
Commencement date: 1.1.96

Employment Regulation Order (Women's Clothing and Millinery Joint Labour Committee), 1997
S.I.115/1997
Commencement date: 17.3.97

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S.I.81/1997
Commencement date: 10.2.97

Occupational Pension Scheme (Family Law Act, 1995) Regulations, 1997
S.I.64/1997
Commencement date: 30.1.97

Occupational Pension Schemes (Oral Hearing) Regulations, 1997
S.I.77/1997
Date signed: 31.1.97

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Environmental Law

Statutory Instruments

Environmental Protection Agency Act, 1992 (Established Activities) Order, 1997
S.I.140/1997
Commencement date: 14.4.97

Environmental Protection Agency Act, 1992 (Ozone) Regulations, 1997
S.I.132/1997
Commencement date: 1.4.97

Waste Management (Licensing) Regulations, 1997
S.I.133/1997
Date signed: 27.3.97

Waste Management (Planning) Regulations, 1997
S.I.137/1997
Date signed: 27.3.97

Article

Flynn, Tom
Genetically Modified Organisms and the Environment : the Legal Issues
1997 IPELJ 17

Family Law

Statutory Instrument

Occupational Pension Scheme (Family Law Act, 1995) Regulations, 1997
S.I.64/1997
Commencement date: 30.1.97

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Family Snaps: Family Law (Divorce) Act, 1996
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Fish & Fisheries

Statutory Instruments

Cod (Restriction on Fishing) (No 2) Order, 1997
S.I.100/1997
Commencement date: 1.3.97 to 31.3.97

Cod (Restriction on Fishing) (No 3) Order, 1997
S.I.141/1997
Commencement date: 1.4.97 to 30.4.97

Haddock (Restriction on Fishing) (No 2) Order, 1997
S.I.143/1997
Commencement date: 1.4.97 to 31.5.97

Hake (Restriction on Fishing) (No 2) Order, 1997
S.I.145/1997
Commencement date: 1.4.97 to 31.5.97

Monkfish (Restriction on Fishing) (No 3) Order, 1997
S.I.142/1997
Commencement date: 1.4.97 to 31.5.97

Monkfish (Restriction on Fishing) (No 4) Order, 1997
S.I.144/1997
Commencement date: 1.4.97 to 31.5.97

Information Technology

Article
Kelleher, Denis
Legal Aspects of the Information Society
1997 ILT 37

Injunctions

S.P.U.C. Ltd. v. Grogan & Ors.
Supreme Court: Hamilton C.J., Blayney J., Denham J., Barrington J., Keane J.
06/03/1997

Appeal; interlocutory injunction granted prohibiting dissemination of abortion services information; whether injunction should be set aside; present state of law; Fourteenth Amendment to the Constitution; Regulation of Information (Services outside the State for Termination of Pregnancies) Act, 1995; whether decision in Attorney General (SPUC) v. Open Door Counselling Ltd. [1988] I.R. 593 correct; whether implied constitutional right to information; right to life of unborn; harmonisation of rights; changes in law; whether present state of law or law at time order was made should be applied
Held: Injunction lifted; information now lawful subject to conditions in 1995 Act; (per Hamilton C.J., Blayney J. and Barrington J., decision in Open Door Counselling not erroneous; per Denham J. and Keane J. Open Door Counselling decision erroneous)

Insurance

Article

Glancy, Simon
Health Risks
1997 GILSI 26

Judicial Review

O'Reilly & Ors. v. O' Sullivan & Anor.
Supreme Court: Hamilton C.J., Barrington J., Keane J.
26/02/1997

Certiorari; decision of county manager approving temporary halting site; whether manager's decision unreasonable and irrational; whether decision ultra vires; City and County Management (Amendment) Act, 1955; Housing Act, 1988
Held: Manager's decision ultra vires; order set aside

Walsh v. Irish Red Cross Society
Supreme Court: Hamilton C.J., O'Flaherty J., Blayney J., Denham J., Barrington J.
07/03/1997
Appeal; plaintiff member of Irish Red Cross Society; membership terminated; acted contrary to rules of society; whether decision of society amenable to judicial review; private law versus public law; whether society governed by private or public law; structure of society; s.1 Red Cross Act, 1938; membership rules; powers under rules; whether amendments to rules of retrospective effect; whether contractual element existed; whether society acted ultra vires
Held: Appeal dismissed; society amenable to judicial review; powers conferred by statue; acted ultra vires

Barry v. Medical Council & Anor.
High Court: Costello P.
11/02/1997

Certiorari; decision of Fitness to Practice Committee of the Medical Council under Part V, Medical Practitioners Act, 1978; whether Committee entitled to hold whole of enquiry in private contrary to applicantís wishes; whether applicant obtained fair and impartial hearing
Held: Committee entitled to hold whole of enquiry in private; hearing fair and impartial

Anisimova v. Minister for Justice
High Court: Morris J
18/02/1997

Order of mandamus sought; declaratory relief; injunction sought restraining respondent from making deportation order against applicant; Russian national arrived in jurisdiction via U.K.; applied for political asylum; application refused; whether Minister failed to act in accordance with U.N. Convention on the Status of Refugees and Stateless Persons,1951; Protocol on the Status of Refugees, 1967; whether Minister precluded from examining application for asylum; whether U.K. host third country; whether 'first safe country' principle applicable in refusing application for refugee status
Held: Reliefs refused; Minister not obliged to examine applicantís claim;

Landers & Ors. v. Garda Siochana Complaints Board & Ors.
High Court: Kelly J.
07/03/1997

Application to strike party from proceedings; proceedings claiming that D.P.P. acted ultra vires and unconstitutionally by failing to prosecute plaintiffs; whether plaintiffs entitled to add D.P.P. as additional defendant in plenary proceedings following granting of leave to apply for judicial review; whether proceedings as against D.P.P. should be struck out under Ord.19, r.27 or inherent jurisdiction of the court
Held: Plaintiffs entitled to add D.P.P. as additional defendant in plenary proceedings; plaintiffs not within scope of Court's jurisdiction to review D.P.P's decision; claim against D.P.P struck out

Landlord & Tenant

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Fancourt, T M
Enforceability of Landlord and Tenant Covenants
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Legal Profession

Statutory Instrument

Solicitors (Professional Practice, Conduct and Discipline) Regulations, 1997
S.I.85/1997
Commencement date: 1.4.97

Article

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1997 GILSI

Media Law

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Medical Law

Article

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Some Irish Judicial Decisions on Life & Death

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Planning Law

Statutory Instrument

Local Government (Planning and Development) (No 2) Regulations, 1997
S.I.121/1997
Commencement date: 1.4.97

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Macken, James
Outline Permissions : are they worth the paper they are written on?
1997 IPELJ 13

Phillips, Tom R
Select Review of Recent Planning Appeal Decisions by An Bord Pleanala
1997 IPELJ 3

Simons, Garrett
Travellers : Planning Issues
1997 IPELJ 8

Practice & Procedure

Irish Nationwide Building Society v. Charlton & Ors.
Supreme Court: O'Flaherty J., Murphy J., Lynch J.
05/03/1997

Discovery; negligence proceedings; application for further and better discovery; whether plaintiff had fully complied with obligations
Held: Appeal allowed; order for full discovery ordered

Skeffington v. Rooney & Ors.
Supreme Court: Keane J., Murphy J., Lynch J.
13/03/1997

Discovery; action for damages following an alleged assault by members of the Gardai; plaintiffs sought discovery of all documents in the possession of the Garda Siochana Complaints Board following its investigation into the alleged assault; whether public interest in disclosure of documents outweighed by public interest in ensuring the statutory functions of the Board are not frustrated; whether statutory immunity against disclosure; s.12 Garda Siochana (Complaints) Act 1986
Held: Discovery ordered; appeal dismissed.

Clery & Co. plc. & Anor. v. Dublin Corporation
High Court: Barr J
14/01/1997

Appeal; Circuit Court decision; whether interest payable on compensation awarded; Malicious Injuries Act, 1981 as amended by Malicious Injuries (Amendment) Act, 1986; whether interest payable under s.22 of Courts Act, 1981
Held: Right to interest on malicious injuries awards extinguished by s.5(4) of the Malicious Injuries Act, 1981; s. 22 of Courts Act, 1981 not applicable

Statutory Instruments

Courts (No 2) Act, 1986 (Commencement) Order, 1997
S.I.106/1997
Commencement date: 1.5.97

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S.I.111/1997
Commencement date: 2.4.97

District Court Areas (Variation of Days and Hours) (No 3) Order, 1997
S.I.117/1997
Commencement date: 2.4.97

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S.I.93/1997
Commencement date: 1.5.97 Shelved at N363.2.C5

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S.I.129/1997
Commencement date: 25.3.97

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S.I.118/1997
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Commencement date: 3.3.97
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S.I.96/1997
Commencement date: 3.3.97

Harbours Act, 1996 (Limits of Harbour of Dublin Port Company) (Alteration) Order, 1997
S.I.98/1997
Commencement date: 4.3.97

Dublin Docklands Development Authority Act, 1997 (Commencement) Order, 1997
S.I.135/1997
Commencement date: 27.3.97 and 1.5.97

Dublin Docklands Development Authority Act, 1997 (Establishment Day) Order, 1997
S.I.136/1997
Commencement date: 1.5.97

Social Welfare

Statutory Instruments

National Council on Aging and Older People (Establishment) Order, 1997
S.I.120/1997
Date signed: 19.3.97

National Social Work Qualifications Board (Establishment) Order, 1997
S.I.97/1997
Commencement date: 27.2.97

Social Welfare (Consolidated Contributions and Insurability) (Amendment) Regulations, 1996
S.I.416/1996
Commencement date: 20.12.96

Social Welfare (Consolidated Payments Provisions) (Amendment) (No 10) (One-Parent Family Payment) Regulations, 1996
S.I.426/1996
Commencement date: SEE SI

Social Welfare Act, 1996 (Sections 17, 18, 19 and 25) (Commencement) Order, 1996
S.I.425/1996
Commencement date: 2.1.97

Taxation

Gilligan v. Criminal Assets Bureau and Anor.
High Court: Morris J.
26/02/1997

Income tax; whether plaintiff wife chargeable person within chargeable period; s.105 Income Tax Act, 1967; whether ss.194 and 195 of 1967 Act applicable; assessability of husband in respect of income of both spouse; option to be treated either as a married couple or single persons; whether obligation on

plaintiff to prepare and deliver returns in prescribed form; s.10 Finance Act, 1988
Held: Plaintiff not chargeable; no obligation to prepare and deliver a return

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9(1997) ITR 156

Oliver, Terry
Tax and the Separated Couple
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Walpole, Hilary E
Tax Implications of Marital Breakdown
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Ward, John
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9(1997) ITR 162

O'Connor, Michael
Stamp Duties and Deferred Consideration including Earn-Outs
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Telecommunications

Statutory Instruments
Telecommunications (Miscellaneous Provisions) Act, 1996 (Commencement) (No 2) Order, 1997
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Commencement date: 10.3.97

Telecommunications (Miscellaneous Provisions) Act, 1996 (Commencement) (No 3) Order, 1997
S.I.110/1997
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S.I.72/1997
Commencement date: 7.2.97

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Statutory Instruments

Air Navigation (Personnel Licensing) (Amendment) Order, 1997
S.I.101/1997
Date signed: 3.3.97

Irish Aviation Authority (Airworthiness of Aircraft) (Amendment) Order, 1997
S.I.102/1997
Date signed: 3.3.97

At a Glance

European Provisions Implemented into Irish Law up to 11/04/97

Information compiled by Mary Smartt, Law Library, Four Courts, Dublin 7.

S.I.132/1997
EA Environmental Protection Agency act, 1992 s6 EA Environmental Protection Agency act, 1992 s53 EA DIR 92/72
Commencement date: 1.4.97

S.I.125/1997
EA European Communities Act, 1972 s3 (DIR 91/494, 93/121) Amends SI 3/1996
DIR 71/118, 90/539, 93/120, 80/215, 91/687, 92/66, 92/40
Commencement date: 31.3.97 Date signed: 20.3.97 Date received: 8.4.97

S.I.126/1997
EA European Communities Act, 1972 s3 (DEC 96/301) EA European Communities Act, 1972 s3 (DIR 96/76, 96/78) Amends SI 125/1980
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Abbreviations

BR - Bar Review

CPLJ - Conveyancer & Property Law Journal

DULJ - Dublin University Law Journal

GILSI - Gazette Incorporated Law Society of Ireland

ICLR - Irish Competition Law Reports

ICLJ - Irish Criminal Law Journal

IFLR - Irish Family Law Reports

ILT - Irish Law Times

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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Professional Indemnity Insurance in Perspective

John Bissett, Director, Coyle Hamilton

As a mark of its commitment to the consumers of its services, the Bar Council in 1989/90 introduced compulsory Professional Indemnity Insurance (PII) rules for all members into its Code of Conduct. This requirement was a statement of the importance to the Bar of ensuring the best quality service to its consumers while also ensuring protection to its members. Consumers of services are entitled not only to first class service but also to a guarantee of protection in the event of their being dissatisfied with the service provided. Where this dissatisfaction leads to actions of negligence against self employed professionals, such as barristers, who are unincorporated legal entities with unlimited liability, the professional's business and personal assets may be resorted to in meeting a monetary claim of damages.

Most such professions have now introduced some form of compulsory PII rules for their members to combine this guarantee of protection to both consumers and members.

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- Insurers cannot avoid liability on any grounds including misrepresentation non-disclosure or breach of policy conditions unless fraudulent.
- A Barrister is not required to contest any legal proceedings unless a mutually agreed Senior Counsel advises that such proceedings should be contested.
- Insurers will not admit liability for or settle any claim without the consent of the Barrister involved.

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Professional Indemnity Insurance is underwritten on what is known as a "claims-made" basis. This means that the policy must be in force on the date a claim is made, although not necessarily on the date the alleged act of negligence took place.

To demonstrate this point, consider that an act of alleged negligence is committed today. However, it may be that this act is not discovered for some time and so a claim may not be brought against a Barrister until long after the incident has taken place. Because PII is on this "claims-made" basis, it is the policy that is in force when the claim is actually made that responds to the claim.

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Coyle Hamilton is proud of its association with the Bar's Professional Indemnity Insurance scheme as an example of the Bar's commitment to the protection of its consumers and its members in the provision of first class legal services. In this regard, Barristers are advised to look at the level of cover they carry to ensure that at all times it is commensurate with the briefs they are taking on. ●

Schools and the Law of Negligence

Dympna Glendenning, Barrister

Parents are required by law to send their children to school between the ages of 6-15 years[1] unless they can demonstrate to the satisfaction of the schools' inspectorate that the children are receiving "a certain minimum education",[2] at home. It is well established in law that a schoolteacher or school authority owes a duty of care to pupils which arises from the fact that parents have entrusted their children to the care and control of the school.[3] Fundamental to the relationship between the pupil and the school is that the school undertakes to educate the pupil in as wide a sense as possible[4] which in turn gives rise to a variety of circumstances in which pupils may be injured.

The Standard of Care

More than 100 years have passed since Lord Esher's celebrated dictum in Williams v. Eady[5] that schoolteachers stand in loco parentis to their pupils during the course of the school day. Lord Esher's maxim, since modified, has been applied in so many cases since 1893 that it may be taken as well settled law that teachers are under a legal duty of care to take reasonable care that their pupils meet with no foreseeable injury while under their control. Mr. Justice Davies prudently adjusted that concept in Lyes v. Middlesex C.C.[6] when he held that the standard of care required of a teacher is "that of a reasonably prudent parent judged not in the context of his own home but in that of a school, in other words a person exhibiting the responsible, mental qualities of a prudent parent in the circumstances of school life." This doctrine which is generally referred to as "the careful parent test," has been firmly established in English case law and appears to have been adopted into Irish law by the leading cases of Lennon v. McCarthy[7], O'Gorman v. Crotty[8] and O'Connor and Murtagh v. Board of Management of St. Emer's National School[9].

However, some judges prefer the ordinary language of the law of negligence and they apply the test of reasonable care and reasonable foreseeability to the school situation[10].

The courts may also apply the "reasonable professional standard" in that they expect a professional person to apply "the average amount of competence associated with the proper discharge of the duties of that profession"[11].

When the Duty of Care Arises

The duty of care which a schoolteacher owes to a pupil derives from the teacher-pupil relationship and its ambit may be determined by the circumstances of the relationship at the material time[12]. Control and discipline on the one hand and care and protection on the other are viewed as two sides of the one duty i.e. the teacher's legal duty of care which is discharged through the medium of supervision and care of pupils[13].

It seems that schoolteachers are under a duty of care towards their pupils while they are on the school premises, whether in the schoolroom or in the playground[14]. The duty of second level teachers to supervise pupils, outside of specific classroom teaching duties, is unclear from Irish case law. However, in English law the case of Sim and Rotherham B.C.[15] established that the professional obligations of a second level teacher cannot be confined to the imparting of academic knowledge.

If a pupil is injured in school the courts seek to establish whether or not there was adequate supervision at the time of the accident and to determine whether suitable precautions were taken to prevent the foreseeable accident.

While legal precedent indicates that school authorities are responsible for their pupils during the official school day[16], it is conceivable that if the pupil-teacher relationship is habitually allowed to arise prior to opening time or to extend habitually beyond closing time, that a teacher/school's liability could be extended. In such circumstances a court could find that a school had assumed responsibility for its pupils beyond the limits of the school day or had given rise to an expectation of supervision outside of normal school routine times[17]. The authority of the school, it seems, may extend beyond the school itself and may not be strictly limited to the period during which the pupil is under its specific care. Case law indicates that if a pupil on his way to and from school behaves in a manner detrimental to scholastic discipline, the school may impose a sanction[18].

Liability for accidents to pupils arising before the official school routine commenced[19] was imposed on two Australian schools, in Geyer v. Downs[20] and Commonwealth of Australia v. Introvigne[21]. However, the judge in Mays v. Essex C.C.[22] took a different view in a similar type of case and stated

he did not believe that parents had any right to impose responsibility on teachers outside school hours: "life is full of physical dangers which children must learn to recognise and develop the ability to avoid. The playground is one of the places to learn."[23] An important element in the latter case was that the school principal had written to parents asking them not to send their children in too early. Furthermore, although the school authority had issued a circular stating that the school yard should be supervised for 15 minutes prior to opening time and after closing time, this circular had not been issued to the school in question or to neighbouring schools.

An unsuccessful attempt to extend the parameters of the school day in a primary school was made, inter alia, in Dolan v. Keohane and Cunninghan[24]. This case indicates that a school's duty to supervise does not extend to pupils waiting for a bus, some distance outside the school grounds after school hours[25]. It might be otherwise, however, if the bus was parked on the school premises as then the court might consider that the pupil-teacher relationship had not been severed.

In Mapp v. Gilhooley[26] Barr J. considered that the duty of care owed by a school authority to pupils while on its premises in the course of normal school activities is to protect them from foreseeable risks of personal injury or harm. This obligation may include a duty to ensure that they do not escape from the school on to a street where there is any significant volume of traffic. In Carmarthenshire C.C. v. Lewis[27] the House of Lords held that the teacher was not negligent when the plaintiff's husband was killed when trying to avoid a 4 year-old pupil who had strayed on to the road from the adjacent school. However, the court considered that the escape of the child was a foreseeable event so the school authority was held liable for failing to take sufficient precautions to prevent this escape. The case of Hosty v. McDonagh[28] suggests that this is the law in this country also. In the recent case of Nwabudike v. Southwark London Borough Council[29], although the plaintiff ran out of his primary school, during the lunch break into the path of a car, the court held that the school had not breached its duty of care to the pupil. Zucker J. stated that it was the duty of the school to take all reasonable and adequate steps to prevent a child leaving the premises at a time when he should have been in school but that no school could ever ensure that accidents would never occur, particularly when a child was determined to break the rules designed to protect him.

A school bus driver's duty of care to his child passengers was in issue in Mulcahy v. Lynch and Butler[30]. Mr. Justice Keane, applying McDonald v. C.I.E.,[31] ruled that there is a heavy responsibility on a driver approaching a school bus, which has stopped to allow children dismount, which can only be discharged by driving slowly, keeping a lookout and by blowing the horn in circumstances where the approaching car is obscured from view by the presence of the bus.

At Work and at Play

The degree of care required, expressed through supervision, alters with circumstances and may be stated to depend on the age, mental maturity of the pupil, the nature of the activity in hand, the degree of supervision required and the opportunity the teachers had, if any, to prevent or minimise the mischief complained of. [32]

It appears that the degree of supervision in playgrounds need not be as rigorous as that required in an academic class as courts have taken into account that a certain amount of "skylarking" or "horseplay" may occur at this time. As Barr J. stated in Mapp v. Gilhooley[33] "in the absence of a regime of draconian servitude, it is impossible to keep very young children under complete control while at play."

In recognition of the fact that a greater amount of disciplined behaviour is essential when pupils are under instruction[34] than when they are at recreation, the courts require a higher degree of supervision in the classroom than in the playground. In such circumstances an important element in establishing whether or not the duty of care was discharged is whether the teacher was following "good standard and approved practice"[35] in the conduct of the class.[36] During a practical class the risk of injury increases and the teacher, it seems, must be able to demonstrate the steps taken to prevent the foreseeable accident.[37]

As students approaching maturity generally require less supervision than younger children, the degree of care is generally less stringent than in the case of younger pupils[38]. When disciplining pupils it is necessary to strike a balance between a too rigid discipline and fostering sturdy independence[39], the latter having been recognised as an important educational aim in itself[40].

It is the general approach of the law to require that there be adequate supervision of tea-breaks and lunch-time and of arrival at and departure from school but the courts do not wish to impose too strict a standard. While the law has never required teachers to keep a vigilant watch on every pupil every minute of the school day[41] unless there is some reason to be put on the alert or to arouse suspicion[42], in the discharge of the duty of care it is essential to establish that there is an effective system of supervision in operation at the material time. With regard to the exercise of disciplinary control during sporting events and games, it appears that if a teacher knows or ought to have known that a game is being played in an unsuitable place or in a dangerous manner, they may be negligent if they do not take proper steps to prevent the danger[43]. Thus, games should be played according to the rules of the game and rough lay penalised[44]. Affutu-Nartoy v. Clarke[45] concerned a teacher who injured a school boy in a rugby tackle and sounds a warning bell regarding teacher participation in school games. In that case it was stated that a teacher could demonstrate the skills in a rugby game but not have physical contact with the students.

The Pure Accident

Clearly the law knows no remedy for

the pure accident as no legal liability arises in such a situation[46]. As Byrne J. stated in Healy v. Dodd: "Children and parents of children must realise that teachers are not insurers and that the teachers are not responsible for every accident in school hours. That would be an intolerable burden for the teacher". This point was well illustrated also in our High Court in Smith v. Jolly and Ors[47]. Because pupils are not insured for every accident during school hours[48] many schools have advised parents to take out personal accident insurance cover. It has been held however that it would be unfair and unreasonable to impose a duty on a school to have regard to the economic welfare of its pupils and a school was held under no duty to insure a pupil against accidental injury or to inform or advise a parent of the need to take out personal accident insurance[49].

School Tours

The risk of injury may be greater when pupils are on school tours especially when hill-walking, canoeing, sailing or skiing is involved. All reasonable steps to avoid foreseeable injury must be taken so appropriate supervision is required. Some English school tours illustrate how inadequately supervised school tours went wrong[50]. The case of Porter v. City of Bradford M.B.C.,[51] arose out of a field trip for twelve 15-16 year old students organised by a geology teacher. One of the group, P, had been rolling large stones down an incline at the base of which were five of his fellow pupils. Having remonstrated with him, the teacher proceeded up the glen with a group of more dedicated students of geology. P then commenced throwing stones from a bridge for a 15 minute period during which period he dropped a stone on a pupil's head fracturing her skull. Bennett J. in the High Court held the teacher was negligent as, in the light of the earlier occurrence, he was put on notice of P's mischievous propensities. This was a foreseeable danger and the teacher, the judge stated, should have used his best efforts to keep the party together. On appeal, Stephenson L.J. upheld the decision. While he stated that he did not wish to impose on teachers a duty of supervision which went beyond that of a reasonable parent in this context, this teacher had failed in his duty to supervise this particular set of pupils.

The Liability of the School Authority

It is well settled that the board of management is vicariously liable for the negligence of its teachers while they are acting in the course of their employment[52]. While the plaintiff may sue either the teacher or the board, or both jointly, it is unusual for the teacher alone to be sued, the board of management being the body of substance. However, when damages have been awarded against a board as a result of the serious or gross personal negligence of a teacher, the board retains the right in law to seek from the teacher as joint tortfeasor an indemnity or contribution. In practice this rarely occurs. As Professor Osborough points out the traditional tenet, which confers on an employer, answerable under vicarious liability the right to seek an indemnity or contribution from the primary wrong-doer, underscores the necessity for the teacher to be insured.[53]

While the liability of a school authority for injury sustained by a pupil attending the school, includes vicarious liability, it is not limited to it. When accidents arise as a result of structural defects in the school premises, liability, if any, rests with the school board as occupiers of the school premises and legal liability may arise from statute law[54] or common law[55].

In Murtagh v. Board of Management of St. Emer's National School[56] the Supreme Court recognised the in loco parentis position of the school authorities in the disciplinary context when it referred to the application of "ordinary disciplinary procedures inherent in the school authorities and granted to them by the parents who have entrusted the pupil to the school." However, in the wider context the notion that a school is "in loco parentis" may not fully state the legal responsibility of a school which in many respects goes beyond that of a parent. Murphy J. in Commonwealth of Australia v. Introvigne[57] stated that a school should not be equated to a home as often hazards exist in a home which it would be unreasonable to allow in a school. Rather, the judge held that the duty of a school authority is "to ensure that reasonable steps are taken for the safety of children, a duty the performance of which cannot be delegated to others[58], a duty akin to that duty owed by a hospital to a patient."[59]

More recently Boreham J.in Van Oppen v. Clerk to the Bedford Charity Trustees[60], held that in some respects a school's duty went beyond mere parental duty as a school may have special knowledge about some matters that the parent did not have and vice versa. While such knowledge did not enlarge the ambit of the schools' duty, the judge stated, it brings into account an important and sometimes essential consideration in deciding whether or not a school-teacher has discharged that duty.

Teachers also have duties to co-operate with the board as far as is necessary it to enable it to comply with its statutory duties. The first conviction of an English teacher under the Health and Safety at Work Act, 1984, s. 7 occurred when a highly-qualified science teacher was held to have failed to take reasonable care of his pupils by neglecting to use eye protectors which had been provided by the school authority[61]. Irish teachers also have parallel duties under section 9 of the Safety, Health and Welfare at Work Act, 1989, including a duty "to use in such manner so as to provide the protection intended, any suitable appliance, protective clothing, convenience, equipment or other means or thing provided...for securing his safety, health or welfare while at work...."

This brief review of the caselaw to date indicates the scope of the application of the law of negligence in the provision of education. The difficulty lies not so much in stating the principles of the law but in determining its application to the myriad of situations in which it is called to be applied. ●

1. School Attendance Acts 1926-1967.
2. The Constitution of Ireland 1937, Art. 42, s.2.
3. In Fitzgerald v. Northcote (1865) 4 F. & F. 656, Cockburn F.J. held that a parent when he places his child with a schoolmaster delegates to him all his own authority in so far as is necessary for the welfare of the child: Murtagh v. Board of Management of St. Emer's National School, unreported, H.C., 27th Nov., 1989; S.C.,[1991) I.L.R.M. 12.
4. Van Oppen v. Clerk to the Bedford Charity Trustees [1989) 1 ALL ER. 273 per Ralph Gibson L.J., cited with approval by Balcombe L.J. in Court of Appeal, 3 ALL. ER. 389, pp. 410-412.
5. (1893) 10 T.L.R. 41 C.A.
6. (1962) 61 L.G.R. 443.
7. Unreported, S.C., 13th July 1966.
8. (1946) Ir. Jur. Reps. 34.
9. Unreported, S.C., 7th March 1991.
10. Ryan v. Madden, (1944) I.R. 157: O'Gorman v. Crotty and O'Connor, 34 Irish Jurist Reports (1946): Beaumont v. Surrey C.C. (1968) 66 L.R.G. 580: Richard v. Victoria (1969) V.R. 138-9: Mapp v. Gilhooley, unreported, H.C., 7th Nov., 1989, see Irish Times Law Reports, 5th March, 1990.
11. Sim v. Rotherham B.D.C. (1986) 3 ALL. ER. 405.
12. Geyer v. Downs (1977) 138 C.L.R. 91 at 95.
13. D. Glendenning, "Legal Aspects of the Maintenance of Discipline in Primary Schools in Ireland", M.Ed. Thesis, Trinity College, 1988, citing Fitzgerald v. Northcote (1865) 4 F& F, 656; Williams v. Eady (1893) 10 T.L.R., 41 C.A.
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17. Good v. I.L.E.A. (1980) 10 Fam. Law 213.
18. Cleary v. Booth (1893) 1 KB 465: R. v. Newport (Shropshire) Justices ex parte Wright (1929) 2 K.B. 416: Spiers v. Warrington Corp. (1954) 1 Q.B. 61: The State (Smullen) v. Duffy and Others (1980) I.L.R.M. 46.
19. Before formal instruction began.
20. (1977) 138 C.L.R. 91-105.
21. 1981-1982 150 C.L.R., 285.
22. The Times, 11th Oct., 1975.
23. Cf. Commonwealth of Australia v. Introvigne (1981-1982) 150 C.L.R., 285.
24. Unreported, H.C., 14 Feb. 1992, Keane J.
25. In Good v.I.L.E.A. (1980) 10 Fam. Law. 213 C.A. the court held that the teacher's duty of are ended when the pupils left the school premises either to be collected by parents or to attend an adjacent play centre.
26. Mapp v. Gilhooley, H.C., 7th Nov., 1989, Irish Times Law Reports, 5th March, 1990, S.C., (1992) 2 I.R. 253. Because of the admission of the unsworn testimony of a minor, a retrial on the question of liability was directed in the Supreme Court. The new trial found for the school, which decision was upheld on appeal to the High Court.
27. [1955]A.C. 549 reversing the decision of the lower court.
28. Unreported, S.C., 29th May 1973.
29. The Times Law Reports, 28th June 1996.
30. Unreported, S.C., 25 March, 1993, Law Report, Irish Times, 12 July, 1993, p. 14.
31. (1971) 105 I.L.T.R. 13, per Budd J.
32. Mapp v. Gilhooley. H.C., 7th Nov., 1989 reported in Irish Times Law Reports, 5th March 199.
33. Ibid.
34. United Kingdom, Laws, Statutes etc., Halsbury's Laws, vol. 15, p. 561 citing Crouch v. Essex C.C. (1966) 64 L.G,R. at 240.
35. With no inherent defects, Roche v. Peilow (1986) I.L.R.M. in the context of the solicitor's profession.
36. Wright v. Cheshire C.C. (1952) 2 ALL.ER. 565.
37. Smith v. Jolly and Ors., Irish Times, 18-19th May, 1984, O'Hanlon J.: Mulligan v. Doherty, unrep., S.C., 17th May, 1966.
38. Mulligan v. Doherty, unrep. SC, 17 May 1966: Smith v. Jolly, HC, 17-18 May 1984, Irish Times, 18 May, 1984, p. 8 and 19 May, 1984, p. 18: Walsh v. Bourke, 25 Jan., 1985, Irish Times, 26 Jan., 1985.
39. Jeffrey v. London C.C. (1954) 52 L.G.R. 521, McNair J.: Simkiss v. Rhondda B.C. (1983) C.A.
40. Schade v. School District of Winnipeg, No. 1 and Ducharne, 19 (2nd) 199 at 305.
41. Rawsthorne v. Ottley and Others (1937) 3 All ER 902: Courtney v. Masterson (1949) Ir. Jur. Reps 6 at 7 (HC per Black J.): Lennon v. McCarthy, unrep. S.C., 13 July 1966: Watt v. Hertfordshire C.C. (1970) 1 All ER 535 at 538: Goode v. Inner London Authority (1980) 10 Fam. Law 213 Ch.
42. Moore v. Hampshire C.C., (1982) CA, 80 LGR at 481: Mapp v. Gilhooley, Law Report, Irish Times, 5 March, 1990.
43. Halsbury's Laws, vol. 15, p. 564 citing Gillmore v. West ham Corp. (1937)81 SJ 630. Cf. Ward v. Hertfordshire C.C. (1970) 1 W.L.R. 356
44. See Ralph v. L.C.C. (1947) 63 T.L.R. 546; Courtney v. Masterson (1949) Ir. Jurist Reps, 6 page 7
45. 1984
46. Webb v. Essex C.C., Times Educational Supplement, 12th Nov., 1954.
47. Irish Times, 18-19th May, 1984, O'Hanlon J.
48. Smith V. Jolly, unreported, Irish Times, 18 May 1984, p. 8: 19 May 1984, p. 18.

49. Van Oppen v. Clerk to the Bedford Charity Trustees, 1 All ER (1989) CA, p. 273: reported in The Independent, Law Report, 27 June 1989.

50. In 1988 four teenage pupils, who were left unsupervised for approximately 50 minutes while skiing, fell 300 feet to their deaths, The Times, 27th Jan., 1989: see similar cases in N. Harris, The Law Relating to Schools, Fourmat Pubs., 1990, p. 261.
51. 14th Jan., 1985 C.A., cited in N. Harris, op. cit,, p. 262.
52. Ryan v. Madden (1944) I.R. 157: McKeown v. Flynn (1935) I.L.T.R. vol. 61: Hosty v. McDonagh, unreported, S.C. 25th May, 1973.
53. W.N. Osborough, "Irish Law and the Rights of the National Schoolteacher," Pt. 1, vol 14 n.s.pp. 36-60 at p. 40, n.16: on this point see Hosty v. McDonagh, unrep., 25th May, 1973 and the allegations made by the 2nd named defendants in Cotter v. Ahern, H.C. 25th Feb., 1977.
54. Fire Services Act, 1981: Safety, Health and Welfare at Work Act, 1989: Occupiers' Liability Act, 1995.
55. McKeown v. Flynn 69 I.L.T.R. 61.
56. Unreported, S.C., 7th March 1991.
57. (1984) 150 C.L.R. 258 at 275.
58. Ibid, citing Cassidy v. Minister for Health (1951) 2 K.B., 343 at 363, per Denning J. citing Tarry v. Ashton (1876) 1 Q.B.D.314, 319: Dalton v. Angus (1881) 6 App.Cas.740, 829: Hughes v. Percival (1883) 8 App. Cas. 443, 446.
59. Ibid, p. 271 citing Ramsey v. Larsen (1964) 111 C.L.R. at p. 28. On the question of team negligence see Wilsher v. Essex Area Health Authority (1986) 3 All. E.R. C.A. 801-836.
60. (1989) 1 All ER, 273 at 287.
61. Cited in Times Educational Supplement, 21st Nov., 1986: The Head's Legal Guide, London: Croner, 1996, 3-101.

Appointing an Examiner: Learning to Live with the Culture of Corporate Rescue

John L. O'Donnell, Barrister

New legislation has traditionally received only a guarded welcome from legal practitioners. Wariness and caution are to be expected in the interpretation of new legal principles and the operation of novel procedural mechanisms arising out of any new act. The Companies (Amendment) Act of 1990 was no exception in this regard. Indeed the concept of corporate rescue introduced in the Act although well developed in the United States, Australia and the United Kingdom was virtually unheard of in this jurisdiction. The radical alteration of traditional priorities of debt provided for in the Act, as well as the office of "Examiner" were completely alien to most Irish legal practitioners. Lawyers attempting to understand and operate the legislation in the initial stages of its development were truly strangers in a strange land.

But the Irish legal system has come to terms with the operation of this legislation, to the extent that the concept now known as Examinership in some form or other is here to stay. A number of formal and informal requirements and procedures have been developed by the courts in order to allow the legislation to operate in a fair and balanced manner. Indeed the discretion given to the courts in the operation of the legislation is one of the hallmarks of the adaptability of the Act. The legislation appears to have been deliberately drafted in flexible terms. Initially the very wide terms of the Act itself as well as the inevitable "learning curve" meant that there were only mixed successes for companies who applied for court protection in the initial period after the legislation came in to effect. There are signs however that the refinement and development of the legislation has meant that many of the companies who would be unsuitable for examinership have been filtered out of the process. This article considers in broad terms some of the matters which practitioners might usefully consider in embarking on an application to have a company placed under court protection.

The decisions of the Supreme Court in Atlantic Magnetics[1] and Holidair[2] make it clear that a relatively low threshold is set for anyone seeking to place a company under court protection. The Supreme Court has now twice endorsed what is seen by it as the compelling philosophy behind the Act; that of corporate rescue through court protection. Any Petitioner seeking court protection is only obliged to show that it is "worthwhile" in all the circumstances to order an investigation by an Examiner into the company's affairs to see if it can survive, there being some prospect of survival. A more recent judgment of Keane J. in Butler's Engineering[3] (prior to his appointment as a Supreme Court Judge) does not radically alter the applicable legal standard. However it does appear to impose a significant evidential burden on any petitioner seeking court protection for an ailing company.

Before considering some of the principles adverted to in Keane J.'s judgment some general observations may be of assistance. The purpose of the legislation is not simply to save the jobs of directors or even of employees. There must be a core business which is capable of survival as a going concern in the company in order for it to merit consideration for court protection. While no minimum criteria are set down by the Act it is worthwhile for any petitioner to consider the size of the capital, the workforce, the turnover and the creditor and customer base of the company in question in advising on the suitability of any company for examinership. While property owning companies have been granted court protection[4] even where such a company had no employees this would be unusual. A court is far more likely to look at the capital, work-force turnover and creditor and customer base of a company in assessing its suitability for court protection. In particular a company which has a sizeable workforce who have no alternative prospect of employment if the company were to go into liquidation or receivership will often merit serious consideration in this regard[5] but this of itself is not enough.

The company seeking court protection should endeavour to do as much advance planning work on such an application as possible. Obviously companies will be unwilling to disclose their intention to apply for court protection to all and sundry for fear that creditors might seek to repossess goods and machinery or seek to have a receiver appointed. Nevertheless a company would be well advised where possible to take "soundings" of the likely reaction amongst its creditors and customers to an application for protection. The support of creditors and customers will help to convey a degree of business confidence in the company to the court hearing the petition and the more support available for this course of action the better.

In addition since the company requiring court protection is of necessity insolvent it will almost certainly require some form of investment to help it to survive as a going concern. While again understandably a company will be unwilling to show its hand at too early a

stage it is highly advisable that the company at least attempt to locate potential strategic investment partners prior to the hearing of the petition. The court will not necessarily expect any such potential investment partner to give a binding commitment to invest in the company at the stage of the hearing of the petition,but even an expression of interest in investing in the company is likely to be of some assistance.

The judgment of Keane J. in Butler's Engineering makes it clear that it is not enough simply to assert on Affidavit that there is an identifiable possibility that the company will survive as a going concern if any Examiner is appointed. A company will need to be able to establish by evidence to the court that it will be able to survive as a going concern during the period of examinership. This may be done by exhibiting evidence indicating the attitude of customers and suppliers. Evidence of the funding available to the company during the examinership period will also be of considerable significance. While an Examiner has power (under Section 9) to exercise the powers of the Directors if the court see fit (which power includes a power to borrow monies during the protection period) an Examiner should be slow to seek to exercise this power unless unavoidable. Therefore evidence of continued funding during the protection period which is sufficient to allow the company to survive on a going concern (either from suppliers, customers or banking institutions) should be exhibited to the Affidavit grounding the petition.

It should also be noted that any Petitioner applying for court protection is under an obligation to ensure that as full a picture as possible of the company's affairs are provided to the court both at the application for directions stage and at the subsequent hearing of[6] the petition. Indeed the court has held that an Examiner has a duty to return to report to the court if he discovers that misleading or inaccurate information was furnished to the court during the hearing of the petition. Therefore any practitioner drafting a Petition and Grounding Affidavit should be careful to set out the company's history, "warts and all" so as to ensure that there can be no allegation of concealment made subsequently at the hearing of the petition. Obviously the petitioning creditor will know less about the company's history and affairs than the directors or shareholders[7]. However such information as is before the court in the Petition and Affidavit should be truthful and accurate.

The last issue of significance which a practitioner may consider while drafting the Petition and Grounding Affidavit is whether or not there is a requirement for the appointment of an interim Examiner to the company. While interim Examiners were frequently appointed in the initial stages of the operation of the Act, they are less frequent now. One can see however that the appointment of an Examiner on an interim basis could assist in maintaining stability and public confidence in a public company particularly if that company has a high public profile or has a particularly large customer and creditor base.

Given the priority that an Examiner's fees and expenses attain under Section 29 of the Act, however, it may be that the appointment of an Examiner on an interim basis will only be on terms that he limit the fees and expenses incurred by him during the interim period to a certain figure, or that he does not grant certificates or borrow monies prior to the hearing of the Petition[8].

Lastly, practitioners should ensure that the necessary resolutions of the shareholders or board meetings of directors are in place in order to enable the shareholders or directors to present the petition, since a failure in this regard will lead to the striking out of the Petition.

Under Section 5 of the Act the period of protection commences with the presentation of the petition in the Central Office. The Petition having been presented in the Central Office an application for directions is then made by the Petitioner to the Judge assigned to the case on the same day[9]. The directions given by the court will deal with the parties to be served with the Petition (such as the company, certain secured, unsecured and preferential creditors), advertising of the Petition (in two daily Newspapers and Iris Oifiguil) as well as where appropriate the appointment of an interim Examiner. The date for the hearing of the petition will usually be stamped on the Petition by the Central Office Official who receives the Petition. It should be emphasised however that the work of the Petition does not end with the presentation of the Petition and the application for directions. The Petitioner, particularly if it is the shareholders or directors of the company should continue to inform creditors and customers and obtain as much support as possible for the company's Petition for court protection. In addition the Petitioner can help by locating and opening negotiations with potential investors so that at the very least clear evidence of significant interest on the part of an investor or investors will be available at the hearing of the Petition. In addition a Petitioner should ensure (where is it within his power to do so) that the company is capable of survival as a going concern during the protection period on the funding currently available to it.

This will frequently mean that a Petitioner will have to ensure that such funding remains available to the company during the protection period. It is clear also that such funding as is available to the company during the protection period to enable it to survive as a going concern must also be used to pay the company's ongoing PAYE/PRSI and VAT liabilities as they fall due during the period of Court protection. While the legislation does not provide that the Revenue Commissioners are to be treated as a special category of creditor in this regard, it is by now almost the universal practice of the Courts to direct that the ongoing (as distinct from historical) liabilities of the company to the Revenue Commissioners be paid during the course of the protection period.

Creditors (as well as directors, shareholders and other interested parties) may wish to file Affidavits in opposition or support of the Petition. A court has jurisdiction to adjourn the Petition in order to allow such Affidavits to be filed though if there has been adequate advertising and notice given of the hearing any such adjournment is likely to be only for a very short period of time. Having heard all of the relevant parties, including where appropriate any Receiver appointed by one or more of the secured creditors, a court will then

give its decision. If the court decides to appoint an Examiner the court may give certain additional directions. For example it may direct that certain creditors be served with notice of the Examiner's application to deliver his report under Section 15 of the Act in order to allow those creditors an ongoing involvement in the way in which the examinership is being conducted.

There remains the issue of costs. It seems clear that a Petitioner cannot recover the costs of presenting the Petition either by way of priority under Section 10 or otherwise, except perhaps in extraordinary circumstances[10]. Creditors supporting a Petition are unlikely to be awarded their costs since the view is generally taken that such a creditor supports such a petition in his own interest. Creditors who oppose a petition may get an Order for costs if their opposition is successful but there is unlikely to be more than one Order for costs made against the Petitioner and/or the company in this event. Any Examiner appointed on an interim basis will generally be allowed his costs of appearing at the Petition unless he has in some way misconducted himself or misconstrued his duties and obligations[11].

Conclusion

There now appear to be signs that a rescue culture has began to grow and develop in the business community in Ireland. While such a culture of necessity frequently envisages the larger creditors enduring pain for a fairly brief period this must be so if the process is to take into account the wider interests of other small creditors as well as employees of the company and indeed employees of other creditors also. In addition the wide discretion given to the Court as to how the legislation operates in practice means that justice is seen to be done in a fair and equitable manner to all concerned. The increasing success rate experienced by responsible companies applying for court protection appears to indicate that Irish practitioners as well as the judiciary have come to terms with the concept of corporate rescue inherent in the Companies (Amendment) Act of 1990. ●

1. Atlantic Magnetics Limited (1993) 2 IR 561
2. Re Holidair Liniuted and others (1994) 1 IR 434
3. Re Butlers Engineering Limited, Butlers International Limited and Data Inputs Limited (all under the protection of the Court) High Court (Unreported), 1 March 1996, Keane J.
4. Re Westport construction Company Limited (under the protection of the Court), High Court (unreported) 13th September of 1996, (Budd J.)
5. Re Wogans (Drogheda) Limited (No. 3) High Court (Unreported) 9 February 1993, Costello J.
6. Re Wogans (Drogheda) Limited (No. 2) High Court (unreported) 7th May 1992 (Costello J.)
7. In this regard it is worth noting that the obligation imposed by Section 3 (3) of the Act that a statement of the assets and liabilities of the company as they stand on a date not earlier than seven days before the presentation of the Petition be appended to the Petitioner is not required if the Petitioner is a Creditor or member of the company.
8. See in this regard re Aston Colour Print Limited, High Court (Unreported) 21st February 1997, Kelly J.
9. See Rules 4 & 5 of Order 75 A as well as the practice direction of the President of the High Court in this regard.
10. See re Merrytime (Ireland) Limited, High Court (unreported) 29th June 1992 (ex tempore) Murphy J. See also re Don Bluth Entertainment Limited (No. 2) High Court (unreported) 24th May 1993, Murphy J.
11. See Re Clare Textiles Limited (1993) 2 IR 213

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Judicial Discretion to Sentence Rapists to life

Casenote on DPP v JR, unreported Central Criminal Court Judgment of Carney J., 5 December 1996.

Marguerite Bolger, Barrister

The extent of judicial discretion available in sentencing a serious sex offender was examined by Carney J. in DPP v JR[1]. Carney J. reviewed his earlier decisions in DPP v Jackson[2] and G v DPP[3] both of which concerne young men convicted of sex offences, the seriousness of which lay at the extreme end of the scale of such offences. Concern was expressed in both cases at the likelihood that, upon release, the accused may have both a propensity and an opportunity to reoffend in the future. In both cases Carney J. had imposed life sentences which were later overruled by the Court of Criminal Appeal and the Supreme Court.

Preventative Detention

In Jackson Carney J. considered how he should use his discretion in sentencing the accused in a way that might best protect society in the future. He imposed what was clearly a preventative sentence, explaining that his objective was to protect women, and in particular prostitutes, by ensuring that the accused would not be released until it was safe to do so. Preventative detention was, however, firmly rejected by Hederman J. in the Court of Criminal Appeal to which the accused successfully appealed:

"The Court is satisfied that preventative detention is not known to our judicial system and that there is no form of imprisonment for preventative detention."

Hederman J. went on to reject the notion inherent in Carney J's judgment that one of the benefits of a life sentence would be that the authorities could decide when the accused was fit to be released, stating that "sentencing policy is exclusively a matter for the judiciary and not for the executive and therefore, it is for the Courts to impose the appropriate sentence".

Perhaps it is regrettable that the authorities are denied the opportunity to make a decision on the accused's release at some future date, based on his circumstances and condition as they then exist and at the same time ensuring that he is released on licence only, thereby keeping some measure of control over him. However it is clear that Irish sentencing policy is firmly based on dealing with the offender on the basis of the crime they have committed rather than how they might best be dealt with in the future.

A Plea of Guilty as a Mitigating Factor

In G v DPP the accused was also sentenced to life by Carney J., having pleaded guilty to twelve rapes upon his two nieces and the child of a neighbour. In his judgment Carney J. again emphasised the importance of preventing the accused from reoffending in the future.

> "I am faced in the present case with balancing the consideration that I am bound to take account of in favour of the Accused, against the public duty which I have in this case, bearing very heavily in mind, the factors that indicate to me that there is high propensity of offences of this nature being committed again in the future, and bearing in mind that the Accused is a relatively young man, quite a young man, so accordingly, in the conflict that exists between the matters that I have to take into account, I am giving total priority to the protection of the community and I am imposing a sentence which is designed to ensure that the Accused will not be released until the Minister's advisers are fully satisfied that there is no danger of the Accused re-offending".

The accused again successfully appealed, this time to the Supreme Court, primarily on the issue of his guilty plea as a mitigating factor. Finlay C.J. held that

> "the fact that the maximum sentence was imposed in a case where the trial judge unequivocally accepted the importance and genuineness of the admission and plea of guilty (which could not be described as inevitable) does constitute an error in the application of the principles applicable to sentencing particularly in a case of rape."

A guilty plea as a mitigating factor has long been a cornerstone of judicial discretion in sentencing. It has been accepted that a court may ignore mitigating factors in order to achieve a recognised penal objective, such as general deterrence or the prevention of fur-

ther offences, but this approach has most usually been adopted where a number of offenders with different histories are involved together in an offence of substantial gravity. Where there is no specific justification for withholding credit for mitigating factors the sentencer will normally be expected to make an appropriate reduction.[4]

The importance of a guilty plea as a mitigating factor in a case of rape was explained by the Supreme Court in The People (DPP) v Tiernan[5]. Finlay C.J. justified the approach on the basis, not only that the victim was saved from the ordeal of giving evidence, but also that a guilty plea may also be taken in some circumstances as an indication of some remorse and therefore as a ground for a judge imposing sentence to have some expectation that if eventually restored to society, even after a lengthy sentence, the accused may possibly be rehabilitated into it.

The inconsistency between that policy and a system that would permit preventative detention is obvious.

DPP v JR

In the light of the approach taken to his sentencing policy in the cases of Jackson and G, Carney J. was left in no doubt when sentencing in JR that he was not free to impose any form of preventative detention and that he was obliged to take into account the accused's plea of guilty. Given those clear guidelines from the Court of Criminal Appeal and the Supreme Court, and given the importance of a determinative sentence maintaining a proportionality as against a life sentence as it operates in practice, he outlined the factors both against and in favour of the accused.

The factors against the accused were:
1. The heinousness and multiplicity of his offences.
2. The continuing effects on his victims.
3. The grossest breaches of trust which these offences involved.

The factors in favour of the accused were:
1. His plea of guilty.
2. His statements of admission.
3. The dicta of Mrs. Justice Denham in the Supreme Court that the sentencer is concerned with neither retaliation nor revenge.

Taking all these into account, Carney J. sentenced the accused to fifteen years, a sentence three years less than that imposed by the Supreme Court upon the accused in DPP v Tiernan, having taken into account his guilty plea.

Can life ever be imposed for rape?

Carney J.'s judgment throws up the question whether, on the basis of present judicial sentencing policy, a life sentence can ever be appropriate in a case of rape.

It is clear from the Supreme Court's decisions in both Tiernan and G that, as a plea of guilty must be taken into account in mitigating a sentence, an accused who pleads guilty cannot be sentenced to life. However what Carney J. said in his judgement in JR was that "it is clear from the decisions of Courts binding on me that this sentence (of life) is not open to me in this case, particularly in the light of the Accused's plea of guilty."

This would seem to suggest that Carney J. did not consider a life sentence to be open to him even apart from the accused's plea of guilty. A similar attitude was taken in a more recent case where the accused did not plead guilty[6]. Having seen the victim give evidence by video link, Carney J. expressed a wish to sentence the accused to life imprisonment in order to "assuage her terror", but said that he was prevented from doing so as Irish law did not recognise preventative detention. The accused was sentenced to 17 years, which when compared to the 15 years imposed in JR, gives some indication of the appropriate reduction for a guilty plea.

It is submitted that precluding a life sentence in any rape case is not necessarily consistent with legislative intent and judicial policy. The law on rape has been amended by the legislature on a number of occasions over the years, most recently in 1990[7]. Thus, the penalty of penal servitude for life originally designed in legislation enacted over one hundred years ago, which penalty has never been altered, must be seen as having the modern approval of the legislature. There seems no reason in principle why a sentence of life should not be considered in an appropriate case.

The appropriateness of a life sentence was briefly considered, obiter, by Finlay C.J. in Tiernan where he commented that.

> "For over one hundred years the maximum sentence provided by statute for the crime of rape is penal servitude for life. It must, therefore, follow that the imposition of a sentence of twenty-one years could not of itself be considered wrong in principle".

It seems implicit from that comment that a sentence of life is, in theory, open to a court upon conviction in an appropriate case.

Whether judicial discretion in sentencing convicted rapists may extend to life in the light of Carney J.'s comments, remains an issue for future consideration. In the meantime, it can at least be clearly stated that in sentencing a convicted rapist, that a court cannot impose a preventative sentence and must take a plea of guilty into account as a mitigating factor. ●

1. Central Criminal Court, 5 December 1996.
2. Court of Criminal Appeal, judgment delivered (ex tempore) the 26th day of April 1993 by Hederman J.
3. (1995) 1 IR 587.
4. Thomas D.A. "Principles of Sentencing" 2nd ed (1979).
5. (1988) IR 250
6. The Irish Times, 22nd March, 1997.
7. CriminalJustice (Rape) (Amendment) Act 1990.

Eurowatch

Recent Cases Concerning the Brussels Convention

Carol Leland, Barrister

The application of the Brussels Convention was recently considered by the European Court. One case concerned a claim for maintenance, the other a matter of international trade.

F-v-L, case 295/95, judqment of the Court of Justice given on March 20th 1997.

In F-v-L the European Court considered a referral from the Dublin Circuit Family Court requesting an interpretation of the term "maintenance creditor " in section 5(2) of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters ("the Brussels Convention"). The reference was made under the Protocol of June 3 1971.

The case concerned a twenty eight year old unmarried woman, JF, an Irish national, resident in Dublin, who brought proceedings in the District Court for a maintenance order in respect of her daughter JF, born on July 3 1988[1]. The respondent to the proceedings, JL, a Belgian domiciliary[2] resident in Bruges, Belgium, resisted the claim for maintenance on two grounds. First he denied paternity and secondly he claimed that the District Court did not have jurisdiction to hear the matter under the terms of the Brussels Convention.

The Respondent relied on Article 2 of the Convention which states: "Subject to the provisions of this Convention, persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that State"

He denied that the case came within the terms of Article 5(2), which provides that a person domiciled in a Contracting State may, in another Contracting State, be sued in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the courts which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

The respondent argued that "maintenance creditor" in Article 5(2) by definition presupposed the existence of an order creating 'creditor' status. It was not therefore open to a maintenance claimant ie someone taking the first steps towards establishing the right to maintenance, to sue in the courts of the jurisdiction where they are either domiciled or habitually resident. The case had been dismissed in the District Court for want of jurisdiction. On appeal to the Dublin Circuit Family Court, Judge McGuinness referred to the interpretation section of the Jurisdiction of Courts and enforcement of Judgments (European Communities) Act 1988 ("the 1988 Act") which gave force of law in Ireland to the Brussels Convention. This section provides that maintenance creditor means "in relation to a maintenance order the person entitled to the payments for which the order provides" and maintenance debtor "means in relation to a maintenance order the person liable to make payments under the order".

The Respondent argued that in matters of jurisdiction, the basic rule as set out in Article 2 that defendants be sued in their State of domicile ought to be given a broad and comprehensive interpretation and any derogation from the general rule such as that in Article 5(2) ought to be construed narrowly. The definition of maintenance creditor in the 1988 Act could be given effect and be taken to exclude maintenance applications other than those relating to an order already granted.

In relation to the jurisdictional rules of the Brussels Convention the court considered the judgment of the European Court of Justice in Somafer SA v. Saar -Ferngas AG[3] as binding. In that case the European court stated:

> "Multiplication of the bases of jurisdiction in one and the same case is not likely to encourage legal certainty and the effectiveness of legal protection throughout the territory of the Community and therefore it is in accord with the objective of the convention to avoid a wide and multifarious interpretation of the exceptions to the general rule of jurisdiction contained in Article 2."[4]

This case is also considered as authority for the proposition that any interpretation of the Brussels Convention must be an autonomous one, independent of national interpretations and common to all member states. This was accepted by the Irish Supreme Court in Gannon -v- British and Irish Steampacket Company Limited. According to Finlay CJ. in that case:

> "Article 5(2) should not be interpreted only in accordance with Irish Law".

Given the narrow interpretation of maintenance creditor in the 1988 Act, and the clear necessity to interpret Article 5(2) in uniform fashion according to transnational principles, the Circuit Court Judge, stayed the proceed-

ings before her. She referred to the European Court of Justice the following question:

> " do the provisions of Article 5(2) of the Convention on Jurisdiction and enforcement of Judgments on Civil and Commercial Matters signed at Brussels on the 27th day of September, 1968 require as a condition precedent to the institution of proceedings in the Irish Courts by an applicant who is domiciled in Ireland against a respondent who is domiciled in Belgium that the applicant has previously obtained an Order for maintenance against the Respondent?"

Counsel on behalf of the respondent in her submissions disputed the pertinence of the question referred. She argued that as paternity itself was denied in the proceedings, this constituted a matter of status, thus reducing the question of maintenance to an ancillary matter. Thus it was submitted, that the applicant could not invoke the first part of 5(2) but had to satisfy the special requirements laid out in the second part of the section. The real question therefore, according to the respondent, was whether the Dublin District Court had jurisdiction to hear the proceedings if the convention did not apply.

Counsel on behalf of the Appellant in her submissions to the Court reiterated the need to give a uniform interpretation to the section and to allow the definition of maintenance creditor to include maintenance claimant. In support of this conclusion Counsel expounded the view that such an interpretation gave effect to the purpose of the Convention as set out by the committee of experts in the Jenard report[5]. The applicant's argument was supported by the Commission and by the Irish government in their observations to the Court.

The European court held that it did not have the powers to determine the form of question to be placed before it. Under the terms of the Protocol of June 3 the preliminary ruling procedure was clearly laid out. In accordance with the judgment of the Court in Enderby[6], it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the circumstances of each case, both the need for a preliminary ruling in order to enable it to deliver judgment, and the relevance of the questions which it submits to the Court.

In relation to the question before it, the Court held that it was settled law that the Court ought to give an autonomous interpretation to the terms of the Convention[7] to ensure that it is effective in relation to article 220 of the EEC treaty.

In the course of its judgment the Court set out its rationale as follows:

> "Such an autonomous interpretation is alone capable of ensuring uniform application of the Convention, the objectives of which include unification of the rules on jurisdiction of the contracting states, so as to avoid as far as possible multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued."

The Court held that as there was nothing in the wording of article 5(2) of the convention to imply that its meaning is to be determined exclusively in accordance with the lex fori, the meaning of "maintenance creditor" must also be interpreted autonomously.

As to the determination of the autonomous meaning, the Court agreed with the appellant that the appropriate principles were to be found in the objectives of article 5(2) of the Convention. The court held that the purpose of section 5(2) was to provide derogations from the general principle contained in article 2. In so providing each derogation sought to pursue a particular objective. According to the court, the derogation provided for in article 5(2) is intended to offer the person applying for maintenance, who is regarded as the weaker party in the proceedings, an alternative basis of jurisdiction. "In adopting that approach, the drafters of the Convention considered that the specific objective had to prevail over the general objective of the rule contained in the first paragraph of article 2, which is to protect the defendant as the party who, being the person sued, is generally in a weaker position."

Accepting that it was the intention of the authors of the convention in drafting Article 5(2) to enable a person in respect of whom a maintenance entitlement has already been adjudicated to sue under the convention for

(a) a new order fixing the amount of the maintenance if it has not already been fixed or
(b) varying the amount already fixed or
(c) requiring the maintenance to be paid where it is in arrears. It was a question of interpretation for the court to decide whether it was also the intention of the authors to confer equal protection to a person bringing a claim for maintenance on the basis of article 5(2) without having previously obtained an order.

The court held that the authors of the Article did in fact intend to give the maintenance claimant equal protection. Article 5(2), in the view of the Court refers to 'maintenance creditor' in general terms, without drawing any distinction between those already recognised and those not yet recognised as entitled to maintenance. In support of this view, the Court cited the Jenard report which stated in relation to article 5(2):

'...the Court for the place of domicile of the maintenance creditor is in the best position to know whether the creditor is in need and to determine the extent of such need'.

However, in order to align the Convention with the Hague Convention, Article 5(2) also confers jurisdiction on the courts of the place of habitual residence of the maintenance creditor. This alternative is justified in relation to maintenance obligations since it enables in particular a wife deserted by her husband to sue him for payment of maintenance in the courts for the place where she herself is habitually resident, rather

than the place of her legal domicile."

As regards maintenance payments, the Committee did not overlook the problems which might be raised by preliminary issues (for example the question of affiliation). However it was considered that these were not properly problems of jurisdiction.

From this reasoning the court decided that the convention was framed in such a way to apply to all actions concerning the maintenance matters including an initial action before a court to establish an entitlement to maintenance. Thus JF could initiate proceedings in Ireland under the Family law (Maintenance of Children and Spouses) Act 1976 for maintenance against the putative father of her child who was resident in Belgium.

The question of whether or not a query as to paternity constitutes a question of status and thus proves an obstacle to the application of the first part of Article 5(2) remains unanswered by the Court.

Case C-106/95 Mainschiffahrts-Genossenschaft EG (MSG) v Les Gravieres Rhenanes SARL. Judgement delivered by the court of justice on February 20th 1997.

This case concerned a claim for compensation for damage caused to an inland waterway vessel which was owned by the plaintiff (MSG, a German inland waterway transport co-operative) and chartered to the defendant (Les Gravieres Rhenanes, a company with its registered office in France) through an oral contract.

Following their oral agreement, the defendant did not react to a commercial letter of confirmation sent to him by the other Plaintiff. Furthermore the defendant continued to pay invoices without question or objection where those invoices contained a pre-printed reference to the courts having jurisdiction in relation to the contract. The question which arose was whether the oral agreement followed by the undisputed transactions was sufficiently binding to attract the provisions of Article 17 of the Brussels Convention.

Article 2 of the Brussels Convention sets out the general principle in relation to the law governing contracts concluded between parties in Contracting States. It provides that a person domiciled in a contracting State may, in another Contracting State, be sued "in matters relating to a contract, in the courts for the place of performance of the obligation in question".

Article 17 of the Brussels Convention states inter alia

"....If the parties , one or more of whom is domiciled in a contracting State, have agreed that a court or the courts of a contracting state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware. Where such an agreement is concluded by parties, none of whom is domiciled in a contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction."

The question for the court was whether or not

> "The third hypothesis in the second sentence of the first paragraph of article 17, must be interpreted as meaning that, under a contract concluded orally in international trade or commerce, an agreement conferring jurisdiction will be deemed to have been validly concluded under that provision by virtue of the fact that one party to the contract did not react to a commercial letter of confirmation sent to it by the other party to the contract and repeatedly paid money due on invoices without objection where those documents contained a pre-printed reference to the courts having jurisdiction".

The court had regard to the fact that case law had established the principle that the requirements laid down by Article 17 of the Convention ought to be strictly interpreted. Secondly the court emphasised that in the light of the amendment to Article 17 by the 1978 Accession Convention, consensus on the part of the contracting parties to a jurisdiction clause is presumed to exist where commercial practices in the relevant branch of international trade or commerce exist in this regard, of which the parties are, or ought to have been aware.

Adopting this reasoning, the Court held that the conduct of the parties in this case was such as to constitute consent to the jurisdiction contained in the clause, despite the absence of express agreement.

The Court further held that it was a matter for the national court to decide whether or not in the context of a particular case a particular commercial or trade practice exists practice exists and whether the parties to the contract were aware of it. However the court added that a practice will be held to exist in a branch of international trade where a particular course of conduct is generally followed by contracting parties operating in that branch, when they conclude contracts of a particular type.

The fact that the parties were aware of that practice is evidenced in particular where they had previously had trade or commercial relations between themselves or with other parties or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract , with the result that it may be regarded as being consolidated practice.

As an ancillary question based on the premise that the national court may find that no accepted practice such existed, the court considered whether or not an

oral agreement on the place of performance, which is designed not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts for a particular place have jurisdiction, is valid under Article 5(1).

The court answered this in the negative on the grounds that to do otherwise would be to frustrate the objective of article 5(1) which was to create a realistic link between the contract and the court which may be called upon to take cognisance of a dispute arising out of the contract.

The court noted that whilst the parties are free to agree on a place of performance for contractual obligations which differs from that which would be determined under the law applicable to the contract, without having to comply with the specific conditions as to form, they are nonetheless not entitled, having regard to the system established by the convention, to designate, with the sole aim of specifying the courts having jurisdiction, a place of performance having no real connection with the reality of the contract at which the obligations arising under the contract could not be performed in accordance with the terms of the contract.

As such an agreement such as that concluded between the parties could only be interpreted as coming under the terms of article 17 of the convention and therefore would be subject to specific requirements as to form. Article 5(1) had no application in regard to such clauses. ●

1. Pursuant to the Family Law (maintenance of Spouses and Children) Act 1976.
2. For the purposes of the convention
3. (case 33/78) reported at (1978) 23 ECR 2183.
4. Opcit p2191
5. OJ 1979 C59
6. Case C-127/92 Enderby (1993) ECR 15535, para 10.
7. In particular case C-125/92, Mulox IBC v Geels (1993) ECR 1-1045 and case C-383/95 Rutten v 997)

COURTS AND COURT OFFICERS ACT, 1995

THE JUDICIAL APPOINTMENTS ADVISORY BOARD

Appointment of One Judge of the Circuit Court

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

Practising Barristers or Solicitors who are eligible for appointment to the Office and who wish to be considered for appointment should apply in writing to the Secretary of the Board, Office of the Chief Justice, Four Courts, Dublin 7 for a copy of the application form. Completed forms should be returned to the Board's Secretary on or before Wednesday the 7th of May, 1997.

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

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

Canvassing is prohibited.

Dated the 23rd of April, 1997

SECRETARY,
JUDICIAL APPOINTMENTS ADVISORY BOARD

Electronic Publishing

Jennefer Aston, Librarian, Law Library

What can it do for lawyers?

Databases offer a much more versatile way of researching than relying completely on the indexing skills of a third party however consistent and expert they may be. The statement that legal research no longer ends with the printed page but in many cases no longer begins with the printed page sums it up. Often the most cost, or effort, effective way to begin particular research is on a database.

New ways of searching

The simplest of searches in print are by name of parties or by legal subject term. In an electronic service you can also search by single word, by phrase, for the occurrence of multiple words, alternate words, words which you are unsure how to spell (using a special character for the uncertainty SM*TH for SMITH or SMYTH), words that are near each other and many other more complex searches.

Imagine when you are reading a case and you come across a reference to another case that seems useful. Instead of getting up and walking off to get the next volume you simply click with the mouse and the text of the second case appears. With a similar click you can check which subsequent cases have considered your original case and display or read them on the screen. In statutory materials you would expect to click on the enabling Section and to have all the Statutory Instruments displayed. Similarly with amendments to statutes, you would expect to check and display amendments with a click instead of going to find many other volumes.

It is also possible to confine your research to cases heard by a particular Judge or Court or heard within a particular time frame.

Are there any disadvantages?

Yes, of course there are some. One of the main difficulties for users of legal electronic services is that they have to use a different way of asking the same question in each different service. In other disciplines publishers have designed their services so that users are able to use the one search package of their choice. Publishers have done this in a number of ways, either by supplying the data only or by designing their database so that it complies with an internationally used standard (Z39.50). Unfortunately this is not yet the case in law and lawyers and librarians must become multilingual to be successful in this new world. As an alternative survival technique I would advise that you learn how to use the services most useful to your particular needs and move on from there as and when you need to. A more short term problem is that screen size and definition are not yet adequate for prolonged reading in comfort.

What of books?

The last point together with the portable nature of books are obvious reasons for their immediate usefulness. Let me hasten to add that the new methods do not mean abolishing or in some situations even reducing the number of books in use.

In fact the experience in the US is that with more exposure to electronic research as a means of finding sources, the printed sources are then more widely used and in demand. Bibliophiles will be reassured to know that no less an authority than Cornell University when building a very large new library building stated that "it would be imprudent to develop a planning strategy for the next two decades with technology as the linchpin. Space planning between now and 2010 therefore has to do with creating hybrid buildings that maintain print collections alongside evolving information technologies."

Publishers and what it has meant for them

Many of the publishers of electronic services were and still are print publishers but there are also companies which started as electronic publishers. Both entities, whatever their background, face the same challenge: to provide what the lawyers need and want in a format that they can use at a price they can afford. Sounds obvious and it is, but the means of achievement are not.

Data capture - putting information in to computer format (usually by scanning or typing) - is an obvious task. This is a function where costs have reduced and quality has increased. Major factors in cost reduction have been improvements in technology and the availability of low cost labour internationally. Costs are directly affected by the type of material - a statutory database with hypertext links and dependent amendments will cost more than a more straightforward text.

Data analysis however is a far more critical activity and one which must be undertaken before capture can begin. This means knowing how and why each piece of data is going to be used. To create a successful database it is essential to analyse the data properly and down to the lowest degree possible.

The organisation of information and its various sections are immediately obvious when printed on a page. But in electronic form the computer must be told about each individual element of the data and the uses which are likely to be made of those elements.

For a publisher of both print and electronic information the benefit of a well designed database are considerable. While marketing the electronic service they can exploit this up to date material to produce printed text for a variety of other services.

It must be pointed out that it has been a difficult transition for many publishing houses. Major investment has been lost as it is overtaken by technology and/or new software. Simply providing an electronic format does not ensure success. Publishers have been forced to take the long term view of both the market and the return on investment. This is not for the faint hearted or those seeking quick returns. One welcome recent change is that publishers seem more conscious that they must provide what the customer wants.

It is worth noting a couple of interesting developments among the major publishers: CONTEXT will later this year co-operate with 2 print publishers to provide first, Lloyds Law Reports and secondly, Common Market Law Reports, Criminal Appeal Reports and Criminal Appeal Reports Sentencing. The second group are a joint venture with Sweet & Maxwell who already have a substantial electronic presence. Sweet & Maxwell will be providing daily updates via the Internet for all of the LIR suite of databases. This service is already available for some of those services to supplement the monthly Current Legal Information CD-ROM service. Butterworths will release the All England Law Reports in a Folio format as well as in Books on Screen format. This is in spite of the fact that Reed Elsevier (owners of Butterworths) recently sold Folio.

Perhaps publishers will increasingly regard themselves as data providers and leave the searching to the discretion of the purchaser.

The Internet

The Internet has had its own influence on electronic publishing. For those of you who are not users of the Net, I will keep this to a brief description of current uses and likely developments. For others a few useful or interesting sites appear at the end of the article.

For Irish materials there is a limited range of material useful for legal purposes. The Bar Council's Web Page (http://www.lawlibrary.ie/barcouncil) provides links to such appropriate sites[1].

US legal materials are available from a growing number of sites. Because primary materials are in the public domain they are available on the Net for every legislature and for each of the Five Circuits. This provides low cost access for a very wide range of users to all substantial primary materials. In addition the major Law Schools also provide access to journals.

Why has this not ruined the commercial publishers? One reason could be that the material on the Net is in its raw form, ie statutes are presented as passed, not as in force and are without commentary; case law references and citations are not consistent or updated, there are no headnotes, captions, subject terms etc. Law publishers find that their customers are prepared to pay for the value added element of their services by comparison.

In the UK, Crown copyright and control of statutory materials until recently restrained all publishers from developing statutory databases. Now UK Acts as passed and all Statutory Instruments as issued are on the Net. Several of the large publishers are in the process of developing their own statutory databases and the Statutory Publications Office already has a database.

Also in the UK case law was for many years the preserve, firstly of the shorthand writers and the Law Reporting Council, and then of commercial law reports. Little case law was available without charge. The House of Lords now publish their judgments on the Net and it remains to be seen whether this practice will spread to other courts.

UK publishers have been developing their Web sites to provide a current awareness service. In this regard Sweet & Maxwell seem well advanced, with Butterworths relaunching their site in the summer.

Many other common law countries have an increasing amount of primary materials available on the Net. Australia and New Zealand are particularly well served.

Ireland in the electronic world

By far the most important recent development is the plan to create a database of statutes for the Attorney's Office. The Office will be making the material available to Government, lawyers and the public alike. Because of the complex nature of the project it was decided that phase one of the project be the provision of the statutes "as published" in electronic form with appropriate search software. The experience in other common law jurisdictions would suggest that the ultimate goal for any statutory service is an "as in force" Statute book and this will be included in future phases. Further developments will include continued publication of the consolidated tables and the provision of a subject index.

Case law in Ireland has been available for some time on LEXIS but it must be presumed that further electronic developments must follow soon. It is safe to say that all the main publishers; Council of Law Reporting for Ireland; Round Hall Sweet & Maxwell; Butterworths Ireland; Law Society of

Ireland and Jordan's; have either published material in electronic form or have plans to do so.

Online Services

By far the best known of these is ITELIS (the Irish face of LEXIS) which pioneered electronic services for Irish materials. The establishment of LEXIS/NEXIS Europe will give a new focus to the service in expanding the range of EU and national materials available. Another development is likely to be the addition of secondary sources for Ireland.

WESTLAW Europe has been established with a similar purpose to its rival LEXIS. With a growing number of European subscribers the stage in Europe seems set to mirror the ongoing battle in the States between these two giants. WESTLAW has as yet a restricted range of European information but like LEXIS they are expanding the range of EU and national materials available. As part of the Thomson group it is to be presumed that they will have access to a range of UK, Scottish and Irish materials.

CELEX the EU Commission's official database is available on subscription from Luxembourg. There have been hopes that a revision of the search software and database will make this service more attractive. There are commercial versions of this database which provide a better search package but they suffer from the fact that they are not as up to date.

Internet Sites

legal links to UK & international sites
http://www.pavilion.co.uk
http://www.eu.int/cj/en
bin/today
http://www.irish-times.com/cgi
http://www.irlgov.ie

1. For a list of other electronic services see John Furlong's article in The Law Librarian vol 27 p189.

New Computer Room Opens in the Law Library

If you have not yet been down to the basement to check out the new computer room, do so soon. The change that it has effected in the basement is dramatic. Gone are the stacks of lesser used textbooks and a quiet self contained space for computer use has replaced them.

The new computer room stocks eight computers which are linked to a central printer. At present, it is open from 9.30 to 5.30, it is planned that it will shortly remain open until 8.00 pm

This new development is part of the continuing drive towards increasing the range and quality of services to Library members. At present, the computers can be used for wordprocessing. Consideration is being given to the introduction of individual email for members on the computers and also the licensing aspects of providing access to legal databases on the computers is being investigated.

Details of computer training in order to facilitate the use of the computers by as many members as possible will be publicised shortly. In addition procedures to ensure the equitable use of the computers among members will also be introduced.

The new service reflects the vision and commitment of the Library teams and staff to provide a first class information and back-up service to members and is a heartening indicator of the potential for continued development in the future. All thanks are to due to those members of library staff who rolled up their sleeves and got on with the task of clearing out the textbooks which were previously stored in the basement and relocating them elsewhere in the Library or placing them in storage.

Please pass on your comments on the new service to library staff to help us ensure that the service meets your needs in the most efficient manner possible.

Paul Moloney, Head, Library Development Team, Des Mulhere, Head, Library Services Team

COMPETITION LAW AND POLICY IN IRELAND ***by Patrick Massey and Paula O'Hare, Oak Tree Press Ltd, £24.95***

Where a barrister is asked to write a review in this journal, the primary task must be to indicate, clearly, whether the work in question should be bought and whether it will "form an essential part of any barristeris library". The answer is yes, undoubtedly. This book is indeed a major contribution to our knowledge of an area of law which is still at the primary stages of development. As such, it is not only desirable: it is essential.

The book is not an ordinary legal textbook however. Patrick Massey is an economist and member of the Competition Authority. Paula O'Hare is a much missed former colleague in the Law Library and is legal advisor to the Authority.

What they have sought to do in this book is not only to provide a survey of Competition Law but also to place that law in an economic context. The book is undoubtedly an argument in favour of competition law and policy. Historic public ambivalence with regard to competition is criticised, substantial doubts are cast on the role, scope and activities of government and semi-state bodies. What is novel from a legal point of view, is the description of the economic basis of

law upon which we, as practitioners, may be called on to advise and apply.

The authors pose a number of quite profound questions regarding Irish attitudes to Competition. They enquire whether there is a publicly expressed need or desire for a Statutory Competition Code such as we now have acquired. They raise the issues as to which economic theories Irish Competition Law seeks to embody. They seek to deal with the vexed issue of whether it is truly possible to give effect as a matter of Statute Law to what may well be exceedingly broad economic concepts such as the nature of a "market" for competition purposes, the concept of "dominance" and abuse as well as the more arcane aspects of "concerted practices".

The case for competition is forcefully put in the second chapter. The authors call on John Stuart Mill who, criticising the advocates of monopolies, observed "they forget that whatever competition is not, monopoly is; and that monopoly is all its forms is the taxation of the industrious for the support of indolence, if not of plunder".

There is a comprehensive survey of the models of competition structure by reference to the Chicago, Harvard and Austrian Schools of Economics. The authors take care to ensure that this descriptive background is comprehensible not only to economists but also to members of the legal profession.

Thereafter, a chapter is devoted to an economic survey of Irish industry. The legal practitioner will, perhaps, be on more familiar ground when the book turns to competition rules overseas, the development of Competition Law in Ireland and the provision and application of the 1991 and 1996 Acts, with particular reference to concerted practices and abuses of dominant position. Thereafter the survey is completed with reference to the law relating to Mergers, Intellectual Property.

The work then deals with the issue of Regulation versus Competition and Competition in the Energy and Telecommunications sectors.

I enumerate the chapters headings in order to illustrate a question which will necessarily arise. Is this book a work ol economics or one of law? The answers of the authors is, unhesitatingly, both. In their view any comprehensive understanding of competition law in an economic context.

From the purely legal standpoint perhaps the most interesting chapter deals with the issue of legal certainty and effective enforcement. The authors identify the difficulties which may arise in distinguishing, for example, aggressive competition and anti competitive behaviour. They refer to the fundamental problem of enlorcement of competition law summarised in the dictum of the economist Korah that all laws are pigeonholes and "any law prohibiting anti-competitive behaviour of necessity is an attempt to build the right-sized pigeonhole for behaviour about which experts disagree".

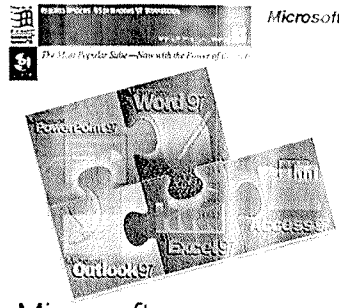
These chapters deal comprehensively with the Carrigaline Community Television, VHI, TSB, Kerry Co-Op and Masterfoods cases. It is one of the interesting aspects of this work that a total of twenty-three decisions of the Superior Courts are referred to, twenty-five decisions of the Court of Justice, ten decisions of the European Commission and thirty cases having a United States provenance. In total, just four British precedents are referred to, two of them from the 19th century.

Any review, to be worthy of the name, must contain some criticisms. None of these, however, should be taken as in any way detracting from the importance of the work which Mr. Massey and Ms. O'Hare have produced.

From the legal practitioners point of view the essential question in any textbook may well be whether the book tells one quickly how to advise, bring or defend a case in Competition Law. Does it rapidly inform the lawyer how to plead the case, the nature of the proofs and the type of expert evidence which may be necessary in this new and developing field? Does the book assist the lawyer in rapidly advising a client who may be the subject matter of an enquiry or a complaint to the Competition Authority or to the Commission? Does the book assist a legal adviser as to how, practically, to deal with the Competition Authority? Does the work deal with any technical defences which may be raised in a prosecution which may be brought under the Criminal Provisions of the 1996 Competition Act? Can the legal adviser look to this book for guidance as to advising a client who may be the subject of a "dawn raid"?

Many of these issues, I think, fall outside the scope and range of intention of the authors of this work. In any case, references are made in the course of the text to articles which deal more specifically with such aspects. (See also Competition Law Source Book, edited by Tony O'Connor and published by Sweet and Maxwell, 1996).

- John MacMenamin,
Senior Counsel



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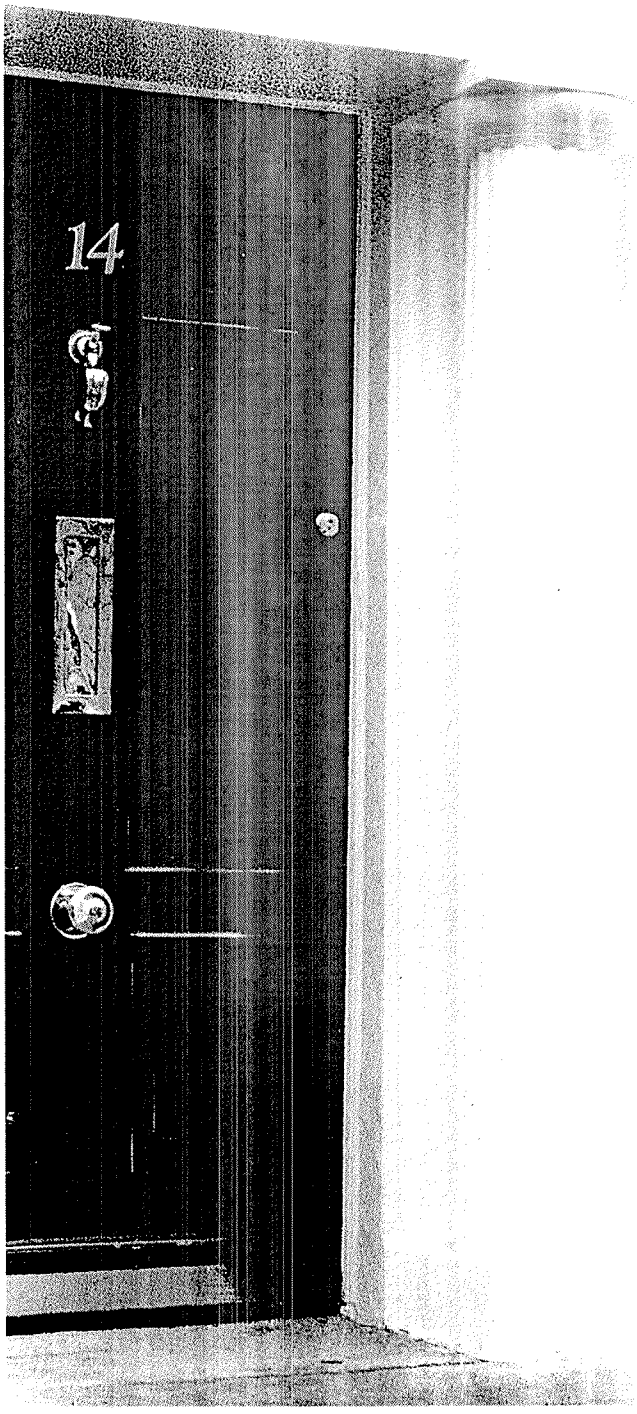

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This demonstration will take place on Monday 26th May at 2pm in the Law Library Building. All members of the Legal profession are invited to see how each element operates and we will take questions throughout the demonstration.

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