The Bar Review

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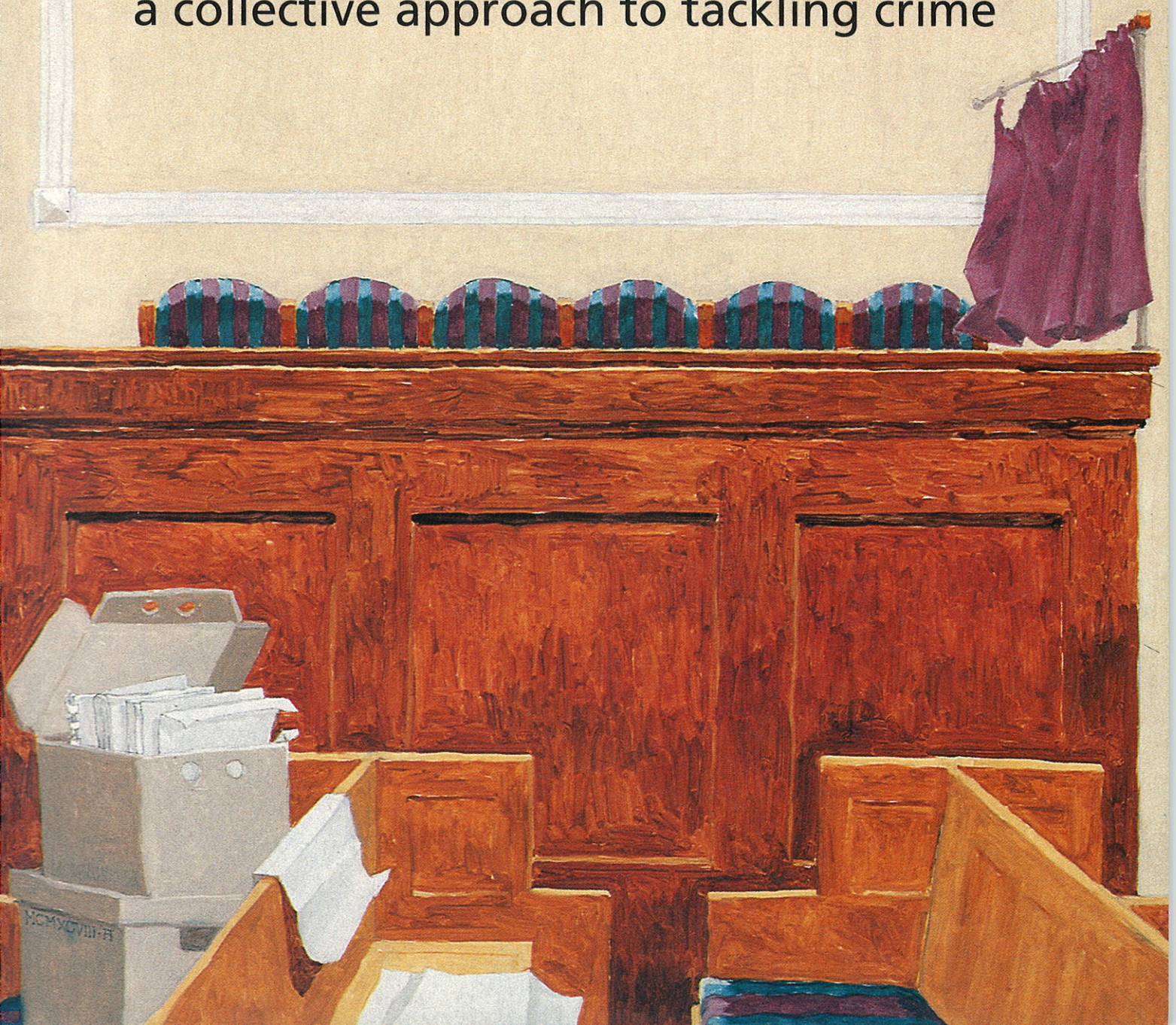
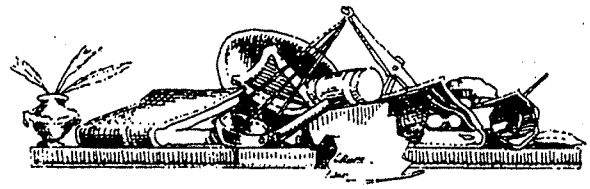
The Crime Forum: a collective approach to tackling crime





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Bar Council 1798 Commemoration

The Bar Council will hold an ecumenical service in St Michan's Church, Church Street, at 10.00am on Sunday, 17th May 1998. The purpose of this service is to commemorate members of the Bar who died during, or in consequence of, the 1798 rebellion. The ecumenical service will be conducted jointly by Canon David Pierpoint and Father Michaél McGréil with the Bar choir participating in the service. An Taoiseach, Bertie Ahern T.D. will be in attendance. Following the service there will be a reception in the Distillery Building.

We believe it appropriate to commemorate the bicentenary of the rebellion given its importance in Irish history and in particular the role played in it by members of the Bar. The ecumenical service will give members of the Bar an opportunity to participate in this commemoration. The choice of St. Michan's was inspired by the fact that the Sheares brothers, both of whom were barristers, are buried within its vaults. Their death warrant is also on display. In addition to the service the Bar Council has commissioned Patrick Geoghean, an historian attached to the Department of Modern History at UCD, to prepare a short pamphlet on the theme of the Irish Bar and 1798.

While the public at large is aware of the involvement of Wolfe Tone and the Sheares brothers in the United Irishmen, many other members of the Bar participated in the rebellion and indeed, in its suppression. Barristers like William Sampson and Thomas Addis Emmett were members of the National Executive of the United Irishmen. But not all the members of the Bar served either cause with distinction. Stella Tillyard in her recent biography of Lord Edward Fitzgerald, "Citizen Lord" has noted in respect of one Barrister as follows

> "Some of the best informers, like some of those whom they betrayed, were infatuated with conspiracy and excited by treason. Leonard McNally, a barrister who often acted for United Irish persons, lived for years on the dangerous edge of things, defending some United Irishmen in court, betraying others to Dublin Castle."

In contrast, John Philpott Curran defended many of those charged with offences arising out of the rebellion and did so with great skill and determination notwithstanding his repudiation of his clients deeds.

As the number of seats available in St. Michan's is limited, admission will be by invitation only. All those members of the Bar who wish to attend the service and reception should apply to the Bar Council for an invitation. Applications are to be made to Adeline Gogarty, Bar Council Office, Distillery Building, Church Street (tel: 804.5000). The invitations will be issued on a first come, first served basis. Where so required the invitation will be extended to the partner of a member.

Rory Brady S.C.
Chairman, Internal Relations Committee

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Congratulations

The Editorial Board of the Bar Review wish the Editor, Edel Gormally and her husband, Eamon Marray congratulations on the birth of their baby boy, Oisín. Best wishes to you all!

The Crime Forum

The Minister for Justice and his advisors deserve credit for having brought the Crime Forum into being. It has provided a basis for national discussion over the nine days of its hearing so far. It has brought together interest groups from a wide range of skills and backgrounds.

The Forum Hearings have raised a number of profound issues. The first of these is the almost total absence of statistics in relation to crime and the penal system in this country. The Forum has therefore been described in a recent Irish Times article as operating in a 'Research Vacuum'. While the Forum will report on the basis of the evidence before it, it is difficult to see how concrete steps can be taken without a clear statistical background informing future decision making. This cannot presumably be the work of the Crime Council which is to be set up.

Without resources the work of the Forum and any Crime Council will be futile. The ultimate question which must be asked is how much is this, or any government, prepared to spend in preventing crime effectively? However there is no doubt that there is a governmental willingness to provide resources for increased business spaces. To what extent however is any government prepared to give resources in order to create a prison system which has a genuine chance of rehabilitating criminals? To what extent is any government prepared to create custodial institutions which genuinely isolate drug users and non-drug users and which can demonstrably show there is a chance of rehabilitation of criminals.

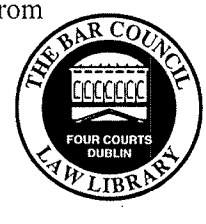
There is little doubt that social historians of the 21st Century will view the inaction of successive governments on prisons as one of the inequities of our century. All of our prisons, Mountjoy in particular, are monuments of inhumanity and lack of thought compounded by lack of resources. Perhaps more profoundly still the forum raises the issue as to whether prison actually works either as retribution, rehabilitation or as a place of isolation for convicted criminals.

But the need for resources is not confined to prisons. Despite some improvement there is still a substantive need for an amelioration of court room facilities for prisoners, jurors and witnesses. It is logically inconsistent for society to lecture criminals on their inhumanity to others while at the same time treating prisoners and suspects in a fundamentally inhuman fashion.

The relatively low key level of debate in the Forum also demonstrates the extent of which there has been a substantial degree of hype from some newspapers in relation to crime. Unquestionably crime pays and sells newspapers. There is undoubtedly an undercurrent of public concern in relation to the incidence of crime, particularly crimes of violence, but it in no way matches the degree of hysteria which we sometimes see in some of the tabloid headlines .

The Forum itself will not present recommendations. Rather it is intended that it will present the evidence in the series of findings.

Ultimately, in order to transform these findings, and the ultimate recommendations of the Crime Council into reality, it needs political will. This political will must come not just from the Minister for Justice but from the Department of Finance. It is that department which ultimately must decide that a rational allocation of resources demands a massive investment in the prevention of crime and the improvement of court and penal facilities. It is only a matter of time until the Department of Finance realises that the resources spent on crime are more than counter-balanced by what will be saved in the long run.



The Sporting Body

Liability for Sexual Assault

STEPHEN MCCANN, Barrister

Recent high profile prosecutions of persons charged with sexual assault involving children have led to demands that the injured parties be compensated in some form for the injuries they sustained by the accused. Whilst one might readily appreciate and accept the entitlement of an injured party in a case of such a nature to a form of monetary compensation, the difficulties encountered by injured parties in successfully prosecuting such claims are many and varied.

In a great many cases, allegations of sexual assault, particularly with regard to those perpetrated on children, only emerge many years after the assault is said to have taken place. In the last number of years, a great deal of jurisprudence has emerged in the Superior Courts with regard to the jurisdiction of the Superior Courts to award judicial stays on criminal proceedings, where it is alleged by the accused person that due to the lapse of time between the date of the offences, the matters being investigated, and a decision being taken to prosecute, that there has been created a real risk that the accused person might not be afforded a trial in due course of law[1]. If any applicant succeeds in preventing a criminal trial proceeding, it may well be that the alleged injured party may consider seeking a remedy in Tort against the alleged wrongdoer, or against the alleged wrongdoer's employer. The difficulties faced by the potential litigant in a situation like this are not difficult to envisage from a legal point of view. The effect of the Statute of Limitations, 1957, as amended by the Statute of Limitations (Amendment) Act, 1991 potentially provide any Defendant in civil proceedings with an absolute defence provided it can successfully plead the provisions of those Acts in any proceedings[2].

Parties

Leaving the question of whether the action by an alleged victim of sexual abuse may fail due to the defence raised by the Statute of Limitations, one of the most difficult hurdles faced by any potential Plaintiff is establishing who, in law, is responsible for the wrong done to them. It may well be that in very many instances, the alleged perpetrator of the sexual abuse will be a person with no assets against which any order of a Court might be executed against, or may be a person who is simply dead, or unable to be found. In such an instance, the potential Plaintiff will, no doubt, seek to have the abuser's employer responsible in law for the acts of the wrongdoer.

At common law a master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (i) a wrongful act authorised by the master, or (ii) a wrongful and unauthorised mode of doing some act authorised by the master[3]. It is submitted that in a large number of cases, particularly in Ireland, the normal master/servant, or employer/employee rules do not appreciate the situation with regard to sporting organisations. Many sporting organisations hold a legal personality which is very unclear, and the relationship between those who organise, co-ordinate and are responsible for the day to day running of the organisation may not have any relationship with the alleged wrongdoer (for example, a football coach, swimming instructor) which would make them *prima facie* vicariously liable for the wrongdoing of their subordinates. Added to this, the fact that assaults of a sexual nature invariably happen in private, it may well be that a potentially vicariously liable superior might avoid legal liability by claiming that he did not know, and could not ever have known, that the abuse was taking place. If this be so, the potential Plaintiff will be forced to establish that the superior ought to have known that the abuse was taking place. In *Johnson & Johnson v. C.P. Security* [1986] I.L.R.M. 559, the Courts' willingness to impose liability for the crimes of any employee was established. There, a security firm which undertook to protect the Plaintiffs' security was held vicariously liable for the theft of the Plaintiffs' property by one of the security officers. Having looked at some of the English authorities, and having quoted Lord Denning in *Maurice v. C.W. Martin & Sons Limited* [1965] 2 All E.R. 725, Mr. Justice Egan (as he then was) said:

> "..... I would be cautious in committing myself to a completely general proposition that a master would in every conceivable circumstance be held vicariously liable for the tort or criminal act of his servant committed in the course of his employment. I have no hesitation, however, in accepting that the principle of vicarious liability must apply in the present case where the employers were specifically engaged to safeguard the Plaintiffs' property".

If a Plaintiff can prove that the organisation on whom it is hoped to fix

vicarious liability, employed or otherwise engaged the services of a person to, for example, instruct children in certain sporting activities, it might be successfully pleaded by the Plaintiff that the alleged tort-feasor was specifically engaged to safeguard the Plaintiff's bodily integrity whilst in the course of his or her employment or engagement. The Irish Courts have accepted that in certain circumstances the breach of a persons constitutional rights may disclose an action in Tort[4]. It is submitted that if a potential Plaintiff can show that the body controlling the sporting organisation took insufficient steps to monitor the conduct of its subservient staff, then there may be grounds for proceeding against the organisation for that reason. The difficulties in establishing such negligence may be considerable, particularly if only one Plaintiff seeks to pursue an action, or where the alleged wrongdoer was employed or otherwise engaged to perform a specific purpose for a limited period.

Teachers, coaches, physical education instructors and all who act *in loco parentis* take on board the essential elements establishing the law relating to liability for civil negligence, i.e. (a) a duty of care, (b) to guard against foreseeable risks which, (c) if resulting in foreseeable damage, (d) creates a breach of duty (e) for the consequential liability for negligence. In this regard actions for personal injuries arising out of sexual assaults are no different from any other personal injury actions. What distinguishes them from road traffic accidents, and employers liability actions, for example, is the (perhaps highly understandable) unwillingness on the part of many institutions which control sporting organisations to admit a responsibility for the acts of persons involved in the coaching of sport, and, it would appear the absence of any insurance to cover claims of this nature. Whilst many civil actions are pending in the Irish Courts for assaults of this nature, it would appear that considerable difficulties present themselves to Plaintiffs seeking compensation for wrongs they claim done to them in the recent, or not so recent past. The present legal position in Ireland is tempered somewhat by the willingness on the part of certain bodies to make *ex-gratia* (without any admission of liability) payments to persons who sue them, but the result of this *ad hoc* system of compensation has meant that little in the way of advice can be given to potential Plaintiffs with regard to the chances of receiving such treatment from the organisation they seek to recover against. As has been noted earlier, the difficulties in suing club or other unincorporated associations may mean that a Plaintiff will have to overcome the established view that a member of a club cannot sue the unincorporated club of which he was a member[5]. The effect of this Rule may mean that in relation to small, local based clubs, which are largely self-financing and self-organising, having little in the way of State grants etc., a Plaintiff may have to maintain his or her action pursuant to the representative procedure provided by Order 15, Rule 9 of the Rules of the Superior Courts 1986[6].

Causes of Action

So far this article has concerned itself with the procedural hurdles with regard to instituting a civil action for sexual assaults. The various Torts that are committed when a sexual assault is perpetrated upon some person, are many and varied. As McMahon and Binchy have noted in their text book on *The Irish Law of Torts;*

> "the law has developed along specific avenues..... (including) the torts of battery, assault, intentional or reckless infliction of emotional suffering and false imprisonment. Whether these torts will continue to be the principal avenues of recovery for such types of interference remains to be seen. As several commentators have noted, there is a real possibility that they will be supplemented by a jurisprudence of constitutional infringements. Although the Supreme Court has recently evinced reluctance to rewrite the ingredients of Torts in the light of Constitutional guarantees, this does not prevent the Court from supplementing particular Torts with a parallel remedy for infringement of a Constitutional right."

In *People (D.P.P.) v M* [1994] 2 I.L.R.M. 541, Mrs. Justice Denham said on page 547 that "[child] abuse is a gross attack on human dignity, bodily integrity and a violation of Constitutional rights". The statement of Mrs. Justice Denham in that case does no more, it is submitted, than reiterate judicial acceptance of the Constitutional protections which are breached once a sexual assault is perpetrated on a person. The victim of sexual violence suffers an infringement of a right to bodily integrity[7]. If Constitutional rights are to exist, there must be some real means of enforcing them. If a person has a Constitutional right, but is prevented by operation of law from enforcing it, or having it protected and vindicated by others, it may be said that it is a hollow right indeed. In this regard, the concerns of many commentators as to the effect of the Statute of Limitations are well founded. If, on the one hand, the Courts are prepared to accept that a sexual assault constitutes a breach of a Constitutional right, it might be argued that compensation for the breach of that Constitutional right cannot be negated by statutory means.

The remedies available at Common Law, assault and battery, intentional or reckless infliction of emotional suffering and false imprisonment, etc., may prove effective only as against the primary tort-feasors, that is to say those persons who, it is alleged, perpetrated the sexual assault. In order to ensure that other parties who may have a potential liability in proceedings are not absolved of any legal responsibility, those parties ought to be sued in negligence, breach of duty and breach of fiduciary duty also. In addition, an action in false imprisonment may be available to the potential Plaintiff[8]. The tort of false imprisonment consists in the act of arresting or imprisoning any person

without lawful justification, or otherwise preventing him without lawful justification from exercising his right of leaving the place in which he is. It may also be committed by continuing unlawful imprisonment longer than is justifiable. See *Weldon v. Home Office* [1990] 3 W.L.R. 465, at p. 470.

Damages

The most common form of redress sought by Plaintiffs in civil actions is an award of damages. In cases where abuse of this nature is alleged, a primary concern on the part of the Plaintiff may well be for an apology from the person who assaulted the Plaintiff, and an admission on the part of the vicarious wrongdoer that they, too, were at fault of having the principal wrongdoer in their employment or under their control. The level of damages in cases such as these are difficult, if not impossible to assess, largely because such settlements as are arrived at between Plaintiffs and Defendants remain undisclosed to the general public. For very good reasons, the Plaintiff might not wish to have any settlement made in his or her favour made known to the public. Having regard to the foregoing, the difficulties in assessing the quantum in cases where sexual assault is alleged is, and perhaps shall always remain, difficult to assess. Perhaps, regrettably, lawyers will only be able to evaluate the level of damages appropriate to each and every case, when yet more cases of this distressing nature come before our Courts.

Conclusion

The difficulties presenting themselves to both potential Plaintiffs and potential Defendants in cases wherein civil actions for sexual assault are alleged, are many and varied. A difficulty with regard to limitation periods still arises, a difficulty as to who are the appropriate parties in the actions must be assessed by the Plaintiff prior to instituting proceedings, and the question of appropriate compensation, if such is to be awarded must be assessed by Judges and/or Juries in the absence of any guidelines as to what is appropriate. Perhaps legislative and judicial activity in this sadly all too expanding area of Irish law might answer some of the questions which remain in this area. ●

1. Per McGuinness J., *P.C. v. D.P.P.* unreported Judgment delivered 1997. See also per Denham *J., B. v. D.P.P.* unreported Judgment delivered 19th February, 1997.
2. For a discussion of same see the Bar Review March, 1998 page 222 - 224.
3. See *Poland v. Parr (John) & Sons* [1927] 1 K.B. 236, 240; and Salmond and Heuston on the Law of Torts, twenty-first edition, Para 21.5. generally.
4. See *Kennedy v. Ireland and the Attorney General* [1988] I.L.R.M. 472.
5. See Nolan v. Fagan, unreported, High Court, 8th May, 1985 per Gannon J., and see also Robinson v. Ridley [1989] 1 W.L.R. 872., both decisions enunciating the general rule that membership of a committee does not imply any duty of care towards the members of the club.
6. Order 15, Rule 9 provides that "[Where] there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested."
7. See *Ryan v. Attorney General* [1965] I.R. 294.
8. *Weldon v Home Office* [1990] 3WLR 465

The Application of European Community Law to Sport

NIAMH HYLAND, Barrister

Introduction

Sport, like most areas of human activity, has not escaped the impact of European Community law, though it is unlikely the founding fathers of the Treaty of Rome would have realised that Treaty provisions would, in time, prevent football clubs seeking transfer fees for football players. EC law has had its greatest impact on rules which seek to limit sporting activity to players of a certain nationality.

Early Case-Law

The first time the European Court of Justice addressed the issue of the applicability of EC law to sport was in 1974, in Case 36/74 *Walrave & Koch v. Association Union Cycliste Internationale* [1974] ECR 1405 ("Walrave").

The facts were simple. The plaintiffs, who were of Dutch nationality, offered their services as pacemakers on motorcycles in medium distance cycle races with stayers, who cycled in the lee of the motorcycle. Under the rules of the world cycling championships at that time, pacemakers had to be of the same nationality as the stayer. The plaintiffs challenged this rule, relying on Articles 7, 48 and 59 of the EC Treaty. Article 7 (as it then was) prohibits discrimination based on nationality, Article 48 prohibits discrimination based on nationality as between workers and Article 59 prohibits restrictions on freedom to provide services.

The first issue the Court had to deal with was whether sport was subject at all to Community law. It held it was but only to the extent that the sport constituted an economic activity within the meaning of Article 2 of the Treaty. Where the activity had the character of gainful employment or remunerated service it came within the scope of Articles 48 to 51 or 59 to 66 of the Treaty. However, in a statement that it was later to significantly quantify, the Court held that the provisions did "not affect the composition of sports teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity".

It therefore referred the case back to the national court to decide whether, in relation to cycle races, the pacemaker and the stayer constituted a team or not.

The Court further held that Articles 7, 48 and 59 could apply to rules of sporting organizations, despite the fact that such rules emanated from private rather than public bodies. This was an important statement, since other Treaty provisions, such as Article 30 which establishes the principle of free movement of goods, are generally thought only to apply to Member States and not to private bodies.

The nationality of team members was raised again in Case 13/76 *Dona v. Mantero* [1976] ECR 1333 ("Dona"). In this case, a rule of the Italian Football Federation whereby only Italian players could take part in matches was challenged. The rule applied to professional and semi-professional players. The Court reiterated that sport was subject to Community law only to the extent that it constituted an economic activity. It therefore applied to professional or semi-professional football players who were engaged in gainful employment or remunerated service. Therefore the provisions on free movement of persons and services applied. However, following Walrave, the Court went on to limit the effects of its judgment by stating that these provisions "did not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and thus of sporting interest only, such as for example, matches between national teams from different countries".

It again remitted the case to the national court to decide if the match in question met these criteria or not.

Judgment in Bosman

For a number of years the question of restrictions in the practice of sport did not trouble the Court of Justice and then in 1995 the *Bosman* case came before it. In Case C-415/93 *Union Royale Belge des Societies de Football Association ASBL v. Bosman and Ors.*, [1995] ECR 1-4921 ("Bosman") Mr. Bosman, a Belgian professional footballer with F.C. Liege, challenged UEFA rules on the transfer of players and the nationality of players. He alleged, *inter alia*, that the rules had effectively prevented his transfer to US Dunkerque, a French football club.

Under the transfer rule, when a professional footballer's contract expired with one club, and another club wished to sign him up, the new club had to pay the old club a fee calculated on the basis of *inter alia*, his age and earnings.

Under the nationality rule, a club was prohibited in all official matches (championship, national or European Cup) from fielding more than three players which were nationals of other Member States, plus two 'assimilated' players.

Transfer rule

The Court referred to *Walrave* and *Dona* and noted that Article 48, which was directly effective, applied to the activities of professional sportsmen engaged in gainful employment.

In an important limitation of its ruling in *Dona* concerning the non-application of EC rules to matches not of an economic nature, it held that such a restriction on the scope of EC rules had to be limited to its proper objective, and could not be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.

It recalled that under Article 48, provisions deterring a national of a Member State from leaving his or her country of origin in order to exercise his or her right to freedom of movement constituted an obstacle to that freedom even if the provisions in question applied without regard to nationality. The transfer rule was likely to restrict the freedom of movement of workers who wished to pursue their activity in another Member State since any club in that Member State would have to pay the player's former club a transfer fee. The Court concluded that this meant the rules constituted an obstacle to the freedom of movement of Mr. Bosman.

The Court acknowledged that the rules could be justified if they pursued a legitimate aim compatible with the Treaty, were justified by reasons of public interest and were proportionate. The parties in the case submitted a wide variety of arguments justifying the rule, including the argument that the transfer rules were justified by the need to finance clubs which provide training for young players. The Court rejected this argument, pointing out that the amount of fees paid was unrelated to the actual costs borne.

It noted that Article 48 did not apply in the case of a player either transferring between clubs within his own Member State, or transferring from a club in a Member State to a club in a third country since the Community dimension arose in either situation.

Nationality rule

The Court referred specifically to Article 48(2) which states that freedom of movement entails the abolition of discrimination based on nationality between workers. It confirmed that this principle applied to rules of sporting associations which restricted the rights of nationals of other Member States to take part in football matches.

As for the justifications put forward by the defendants and by intervening Member State governments, the Court, following *Dona*, recalled that the only restrictions on nationality which could be accepted were in relation to specific matches between national teams representing their countries, which were not of an economic nature and were of sporting interest only. In the instant case, the nationality clauses did not concern specific matches between teams representing their countries but applied to all official matches between clubs and therefore to the essence of the activity of professional players.

Temporal effects of the judgement

Clearly, if all aspects of the Court's judgment had had retrospective effect, as is customary, the legal effect of a large number of completed contracts would have been called into question.

In order to prevent this situation, the Court noted that there had been some uncertainty as to whether the transfer rules were compatible with Community law. Therefore, in relation to compensation fees for transfer, training or development which had already been paid, or were still payable under an obligation which arose before the date of the judgment (15 December 1995), it was held that the judgment could not be relied upon to support claims except by people who had already instituted proceedings before that date.

The Wimbledon F.C. situation

The implications of EC law on sporting activities are being considered by Wimbledon F.C. ("Wimbledon"). Wimbledon are at present based in England but it appears that they are considering a move to Ireland. What legal principles would apply to Wimbledon F.C. if they decided to move to Ireland?

The relevant Treaty articles would appear to be primarily those relating to freedom of establishment, although the rules on free movement of persons and on competition are probably also relevant It is quite clear that according to the rules on the right of establishment, neither the UK government nor the Irish government could prevent Wimbledon leaving England and establishing itself in Ireland. Therefore the real issue concerns the restrictions that the Football Association of Ireland ("F.A.I".), possibly in conjunction with U.E.F.A., might impose upon Wimbledon. The most likely restriction would be a refusal by the F.A.I. to authorize Wimbledon F.C. to play their home Premier League games in Dublin on the basis, for example, that this would harm the development of Irish football.

It is not proposed to attempt to predict the attitude of the Court of Justice to such a refusal by the F.A.I. However, the following principles should be borne in mind.[1]

First, the rules on free movement of persons, right of establishment and free movement of services apply to private bodies such as the F.A.I. just as they do to Member States.

Second, a refusal to authorize Wimbledon to play home Premier League games in Dublin would inevitably have the effect of preventing Wimbledon from establishing itself in Ireland. This rule may be non-discriminatory, in that an Irish Club proposing to adopt the same course of action as Wimbledon would presumably be met by the same objections. However the fact that a rule is non-discriminatory does not mean it complies with the relevant EC provisions. The F.A.I. would still be obliged to show that the rule:

- was justified by imperative requirement in the general interest;
- was suitable for securing the attainment of the objective which it pursues;

Judicial Review: No Sportsman Need Apply?

EITHNE LEAHY, Barrister and SEAMUS WOULFE, Barrister

Law Library supporters of the Dubs may have shed a quiet tear recently at the end of Charlie Redmond's playing career, and the particular manner of same. Charlie had decided to retire from playing once he had finished assisting his club, Erin's Isle, in the 1997/98 All Ireland Club Football Championship. He hoped to round off his illustrious career by playing in the Championship Final in Croke Park on St. Patrick's Day. However, this denouement was spoiled when he was sent off, in controversial circumstances, in the Championship Semi-Final against Castlehaven (did the ball cross the line?) and suspended so as to miss the final. The decision of the GAA authorities to suspend Charlie Redmond therefore carried a particular sting in the circumstances in question.

Any legal adviser to Charlie Redmond could have been forgiven for thinking of the alluring formula: judicial review. The explosion of Judicial Review in this jurisdiction in the 1990s has seen all types of unwelcome decisions being challenged in the Courts, culminating recently in the extraordinary spectacle of Sinn Fein using the High Court to challenge the decision to exclude them from the political talks at Dublin Castle. The judicial review procedure offers some particular advantages at the outset. The application for leave to apply for judicial review is made *ex parte*, and the Applicant only has to demonstrate an arguable or stateable case. Crucially, an Order granting leave will normally include a direction that the grant shall operate as a stay of the proceedings under challenge. In other words, the coming into effect of the challenged decision will be postponed, normally for several months until the judicial review proceedings have been completely dealt with.

In the sporting context such a stay could be invaluable in postponing a suspension and allowing a sportsman or sportswoman to play in the up coming big match, and defer the suspension until later. Unfortunately for sportsmen and sportswomen, the Courts in both England and Ireland have taken a restrictive approach to the scope of judicial review in this area, and the amenability of decisions of sporting bodies to judicial review.

The Position in England:

The leading English authority is *Law -v- National Greyhound Racing Club Ltd.* In that case the Defendants, a company limited by guarantee, acted as the governing body for the discipline and conduct of greyhound racing in Great Britain. Stewards appointed by the Defendants suspended the plaintiff's trainer's licence for six months because he had in his charge a greyhound which had been doped in breach of the rules of racing. The Plaintiff issued an originating summons seeking inter alia, declarations that the stewards' decision was void and ultra vires. The Defendants applied to have the claim struck out for want of jurisdiction, contending that it should have been instituted by an application for judicial review under Order 53 of the English Rules of the Superior Courts. The application was refused. The Defendants appealed this refusal, contending that a complainant who alleged that a domestic tribunal, acting in abuse of its powers, had made a decision adversely affecting a member of the public or the public generally was required by section 31 of the Supreme Court Act 1981 to apply for judicial review and could not proceed by an action or an originating summons for a declaration or an injunction.

The appeal was dismissed. Lord Justice Slade referred to the insuperable difficulty faced by counsel for the Defendants in contending that judicial review was a procedure, and indeed the only procedure, available to the Plaintiff in the case, despite the fact that counsel accepted that the rules of racing of the National Greyhound Racing Club, and its decision to suspend the plaintiff in purported compliance with those rules, were not made in the field of public law.

He continued by stating that the National Greyhound Racing Club's authority 'to perform judicial or quasi-judicial functions in respect of persons holding licences from it is not derived from statute or statutory instrument or from the Crown. It is derived solely from contract.'[2]

Lord Justice Slade restated the principle that private or domestic tribunals have always been outside the scope of *certiorari* since their authority is derived from contract, that is, from the agreement of the parties concerned.

A series of subsequent cases were trapped by this binding precedent, up to the case of *R -v- disciplinary Committee of the Jockey Club ex parte Aga Khan* where the Court of Appeal refused again to extend the frontiers of judicial review to include sporting bodies. In 1989 the Aga Khan entered his filly *Aliysa* for the

Oaks at Epsom and she won the race. A sample of urine was taken from her. Upon analysis it was discovered that the sample contained a substance which under the Rules of Racing was a prohibited substance. Consequently, Aliysa was automatically disqualified from the race and her trainer, Mr. Stoute was fined £200 following an inquiry held by the disciplinary committee of the Jockey Club. The Aga Khan sought leave to apply for judicial review to quash the decision of the disciplinary committee. Leave was granted by Macpherson J. who warned that his first hurdle would be to establish that the decision of the committee was susceptible to judicial review.

The question of jurisdiction was raised as a preliminary issue. The Divisional Court held that on the authorities the Court did not have jurisdiction to entertain a motion for judicial review of a decision of the Jockey Club. The Aga Khan appealed the decision. The Court of Appeal dismissed the appeal on the grounds that although the Jockey Club regulated a significant national activity, exercising powers which affected the public, the Jockey Club, although incorporated by Royal Charter, was 'not in its origin, its history, its constitution or (least of all) its membership a public body'[4] and its powers were in no sense governmental.

Powers exercised by the Jockey Club were exercised over those who agreed to be bound by the Rules of Racing. As such it was a contractual relationship which gave rise to private rights on which effective action for private law remedies such as a declaration, an injunction and damages could be based without resort to judicial review.

Having stated the principle that public law remedies do not lie against domestic bodies as they derive solely from the consent of the parties, Lord Justice Farquharson referred to the Law case. He found that in principle it was difficult to see any distinction between the Greyhound Racing Association and the Jockey Club or the other governing bodies of the major sports. Furthermore he observed that many of the decisions of the Jockey Club through its committees will affect members of the public who have no connection with it, but he maintained there is a difference between what may affect the public and what amounts to a public duty and stated: 'Neither in its framework or its rules or its function does the Jockey Club fulfill a governmental role.'[5]

However, Lord Justice Farquharson did envisage certain special circumstances which might give a right to judicial review, such as failure by the Jockey Club to fulfill its obligations under the Charter by making discriminatory rules. Lord Justice Hoffman expanded on the matter as follows:

> 'It may be that in some cases the remedies available in private law are inadequate. For example, in cases in which power is exercised unfairly against persons who have no contractual relationship with the private decision-making body, the court may not find it easy to fashion a cause of action to provide a remedy.'[6]

However, the Lord Justice continued by stating that he did not think that one should 'try to patch up the remedies available against domestic bodies by pretending that they are organs of government'.[7]

The Irish Position:

In 1988 it appears to have been assumed, without the point being raised, that a decision of Board Luthchleas na hÉireann was amenable to judicial review, in *Quirke -v- Bord Luthchleas na hÉireann*.[8] The Respondent is the national body responsible for the control and management of amateur athletics in the state. In that case the Applicant, an International Athlete, failed to return to the drug testing room to give a required urine sample when asked to do so by an official of the Respondent. A subsequent decision of the National Committee of the Respondent to suspend him from all competition was quashed by Barr J. on natural justice grounds.

In *Murphy -v- The Turf Club*,[9] however, the issue of amenability was addressed directly by Barr J. The Applicant was a race horse trainer under licence from the Respondent, which was the governing body responsible for horse racing in Ireland. The Applicant sought to challenge by way of judicial review a decision of the Respondent not to renew his Trainers Licence.

The Respondent opposed the application for judicial review, inter alia, on the grounds that the Applicant was not entitled to seek judicial review in respect of the matters complained of. Barr J. began his analysis by citing the oft-quoted dictum of Atkin L.J. in *R-v-The Electricity Commissioners*[10] "that *certiorari* and prohibition may issue whenever any body of persons having legal authority to determine questions effecting the rights of subjects, and having the duty to act judicially, acts in excess of its legal authority".[11] He stated that 'it is well settled that for this purpose 'legal authority' generally means statutory authority. *Certiorari* or prohibition will not issue to a body which derives its jurisdiction from contract or to a voluntary association or domestic tribunal which derives its jurisdiction solely from or with the consent of its members'[12] citing, *inter alia, the State (Colquhoun) -v- D'Arcy*.[13]

Barr J. then looked at the expansive decision of the English Court of Appeal in *R -v- Take-over Panel, exp. Datafin Plc*.[14] In that case it was held that in determining whether the decisions of a particular body were subject to judicial review, the Court is not confined to considering the sources of that body's powers and duties but could also have looked at their nature.

Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions the Court had jurisdiction to entertain an application for judicial review of the body's decisions. Applying these principles, Barr J. had no doubt that the relationship between the Applicant and the Respondent derived from contract and certain statutory provisions relating to the Respondent were not relevant to the issue before him. He was satisfied that the Respondent's duty to regulate the sport of horse racing in

Ireland, though having a public dimension, was not a public duty as envisaged by the Court of Appeal in the *Take - Over* Panel Case and in purporting to revoke the Applicant's training licence the Respondent was not exercising a public law function. On the contrary, the decision was that of a domestic tribunal exercising a regulatory function over the Applicant, being an interested person who had voluntarily submitted to the jurisdiction.

Barr J. went on to cite with approval the English Court of Appeal decision in the *Law* case, as discussed above. He regarded the Applicant's relationship with the Respondent as similar to that between dog trainers and the National Greyhound Racing Club in the *Law* case.

Both were contractual in nature and were based upon the voluntary submission of the trainers to the jurisdiction of the respective bodies which organised the sport of greyhound racing or horse/racing as the case may be. As in the *Law* case, judicial review was not open to Mr. Murphy. Barr J. concluded by pointing out that there was an alternative open to Mr. Murphy by way of an action against the Respondent for breach of contract and that was the course which ought to have been taken in the instant case.

Comment

The two leading cases on the scope of judicial review since Murphy have been *Geoghegan -v- The Institute of Chartered Accountants in Ireland*[15] and *Eogan -v- UCD.*[16] In *Geoghegan* Murphy J., in the High Court, relied on the sports cases discussed above in finding that disciplinary proceedings of the Respondent were not amenable to judicial review.

In *Eogan* Shanley J. set out certain factors which he felt may be taken into account in considering whether a decision is up to judicial review:

a. Whether the decision challenged has been made pursuant to statute;
b. 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;
c. 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;
d. 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.

It does not appear likely that one could urge a Court to depart from the *Murphy* approach based on invocation of the *Eogan* factors. If one takes, say, a disciplinary decision of the GAA authorities, only the second factor appears capable of assistance, and only on the basis of a broad application of same.

In conclusion, the *Murphy* approach appears firmly routed in this jurisdiction. A disgruntled sportsman or sportswoman cannot normally have resort to judicial review but is left with the alternative of an action of breach of contract as suggested by Barr J. in *Murphy*.

This alternative course of action was adopted by a Tipperary Gaelic Footballer, Derry Foley,[17] in July 1995. He even succeeded in getting an interim injunction in the High Court restraining his suspension and allowing his availability for selection in the Munster Final the following Sunday.

In the normal way, however, the breach of contract alternative is a far less attractive option than judicial review. As Gerard Hogan, S.C. pointed out in a 1996 lecture,[18] where a power is conferred by private law in general the donee of the power can exercise those powers in which ever way they please. Judicial scrutiny is much more heightened in the case of decisions governed by public law, where the powers must be exercised in accordance with fair procedures, reasonably, having taken every relevant consideration into account, and possibly having given reasons for the decision. It will normally be more difficulty to get an interim injunction on private law grounds than to get leave and a stay in judicial review proceedings.

It is interesting to note that the New Zealand Courts have adopted an unusual approach.

In the case of *Finnigan -v- New Zealand Rugby Football Union*[19] the New Zealand courts found that the New Zealand Rugby Football Union was amenable to a judicial review application. Judicial review was available because the court held that the Rugby Union was in a position of major national importance, even though it was a private and voluntary sporting association. The plaintiffs who were members of local football clubs and linked to the Union by contract were held to have *locus standi* to challenge the decision of the Rugby Union to send a team to tour South Africa. It will be interesting to see if this broad approach gets canvassed here as an alternative to the Murphy approach. For the present, however, an application for judicial review in the sporting context appears to be a non-runner. •

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1 [1983] 3ALL ER 300
2 Ibid.307
3 [1993] 2ALL ER 853
4 Ibid. 867
5 Ibid. 872
6 Ibid. 875
7 Ibid. 876
8 [1988] I.R. 83
9 [1989] I.R. 171
10 [1924] 1 K.B. 171
11 [1989] I.R. 173
12 Ibid. 173
13 [1936] I.R. 641
14 [1987] Q.B. 815
15 [1995] 3 I.R. 86
16 [1996] 1 I.R. 390
17 H.C. Record No. 1994 N0. 4414P
18 Recent Development in Judicial Review Procedure. Lecture delivered by Gerard Hogan S.C. to the *Continuing Legal Education Seminar*, June 15th, 1996.
19 [1985] NZLR 159

Report on the National Crime Forum

MARY ROSE GEARTY, Barrister

The National Crime Forum first sat on the 26th of February last. Over 24 separate bodies were represented on the panel including the Bar Council, the Law Society, Victim Support, the Combat Poverty Agency, the ICTU and the Chambers of Commerce of Ireland. Also present at each session were representatives from the Department of Justice, the Garda Síochaná, the Judiciary, the Prison Governors and the Probation and Welfare Service. The Forum sat in public for nine days, finishing on the 27th of March.

The stated purpose of the Forum, set up by the Minister for Justice, was to allow a balanced debate on crime and to ensure "that the public have an input into a comprehensive and cohesive national crime policy". With this in mind, members of the public and interested bodies were invited to address the Forum.

The topics discussed by the panel (and those who made submissions) ranged from causes of crime, management of crime, victims and the role of the media. Over 80 groups and individuals addressed the Forum during its nine days of sessions.

This huge mass of information has now to be digested and presented in coherent form by the members of the Forum, chaired by Professor Bryan McMahon. Their draft report is due in June of this year, and the panel has yet to visit Cork, Sligo and Limerick.

The Minister has stated that the report will lead to a White Paper on crime and the setting up of a crime council which will sit on a permanent basis.

Given the large number of subjects addressed and the variety of views put forward over the month in which the Forum sat, it is only possible to touch on a few of the concerns raised. However, there were a number of issues which were raised time and again, and a few points of particular interest to members of the Bar.

Lack of Criminological Research

The dearth of research into causes of crime and into the relative success of various penal policies has been commented on throughout the sittings of this Forum. The utter neglect of this essential basis for any informed approach to preventing and managing crime has left those operating within the system guessing as to what their next step should be. In a country with different socio-economic and cultural factors to those experienced elsewhere, it is deeply unsatisfactory to have to rely on statistics and studies from other jurisdictions in order to determine how our 'crime budget' should be spent.

Prisons or Probation?

A closely related point is the issue of prison building. Many bodies (including the Probation and Welfare Service and the Irish Penal Reform Trust) argued cogently in favour of a reallocation of monies away from the costly prison building programme and into the Probation Service and Community Service programmes.

Even more persuasive were the submissions made by those who concentrated on prevention of crime: The Matt Talbot Community Trust advocated better and more accessible educational facilities along with support and accommodation for the vulnerable, stressing in particular the need for special schools to cater for disturbed children. The submission from PACE concentrated on the benefits which employment can bring to potential offenders and to those who might otherwise reoffend. The Prison Officers' Association submitted that any serious examination of crime must begin at community level - schools, community welfare services and health services which have the first contact with those who go on to offend. It is only when the problems develop that the gardaí, courts and prisons become involved.

These representations seemed perfectly logical and sensible, but without facts and figures to prove the effectiveness of such alternative responses to crime, it has obviously been difficult to persuade successive governments to invest in such long term solutions. One could add that the long term solution is seldom one that appeals to the voter.

It is only fair to add in this context that the prisons in this country, notably Mountjoy, are badly in need of funds for modernisation and reform.

The question which must now be addressed by the Forum and ultimately by the Government, is how the funds should be divided and there is no doubt that the lack of criminological research carried out in this country can only hinder their deliberations.

Lack of Communication in the Criminal Justice System.

The apparent failure to liaise with other arms of law enforcement was commented on by several bodies. The judiciary were singled out as seemingly indifferent to the overcrowding in Irish prisons. It was accepted however, that those on the bench are increasingly aware of the benefits of probation reports and recommendations and use prison as a last resort.

The point such submissions overlooked is the inability of the judiciary to do other than impose a sentence (once it is the only option for the court) even when the individual judge knows that the offender is likely to be released within days - sometimes even that same afternoon.

The very fact that judicial frustration in this regard was not recognised by bodies such as the Prison Officers' Association makes their point about inter-agency communication very forcibly. Perhaps this is one area in which a permanent crime council could have an immediate effect.

Court Procedures

Most of the submissions which dealt specifically with court procedures were heard in the context of the session dealing with victims of crime. Victim Support put forward the disturbing suggestion that every complaint of domestic violence recorded by the gardai should be used in any "subsequent court charge in respect of domestic violence or grievous bodily harm". This body also suggested that consideration be given to introducing an inquisitorial system in the cases of minors and the mentally impaired, as opposed to the adversarial system now in place.

Victim Support also advocates the abolition of 'the Poor Box' seeing it as a substitute for convictions and fines.

The National Network of Rape Crisis Centres sought greater communication for the victim with counsel for the prosecution in any trial. It also recommended the abolition of the corroboration warning and a shift in the onus of proof in relation to the issue of consent in rape trials. Interestingly, this body, along with the Kilkenny Women's Refuge Project, sought separate legal representation for victims of rape but appeared to agree that the needs of such victims would be met (perhaps more satisfactorily) by a suitably qualified 'friend' in court i.e. someone who knows the procedures, is familiar with the physical layout of the courts and can support the injured party throughout the trial.

Conclusion

The effectiveness of this exercise can only be measured with time but the detailed submissions made and dedication of the members of the panel should be commended. It would be a waste of a wonderful opportunity to benefit from the collective experience of those involved in every level of the criminal justice system if the expected report is ignored or shelved. ●

'The Rights of Man in Ireland and the Role of Lawyers in 1798'

Excerpts from The King's Inns 1798 Commemorative Lecture

DR. MARTIN MANSERGH, Special Adviser to the Taoiseach

Henry Grattan once said of the Four Courts, which I am sure applies equally to King's Inns:

> "wherever you secrete yourself, the sociable disposition of the Irish will follow you and in every human spot of the kingdom you must submit to a state of dissipation and hospitality."

Wolfe Tone was another who passed through King's Inns. I always remember, working for the first time on materials for a Bodenstown Speech in 1982, the Taoiseach Charles Haughey looking up inquiringly, and remarking that: "He was a bit of a lad, wasn't he?" This remark would tend to be borne out by Wolfe Tone's own account of his law studies.

> "I arrived in London in January, 1787, and immediately entered my name as a student at law on the book of the Middle Temple; but this I may say was all the progress I ever made in that profession. I had no great affection for study in general, but that of the law I particularly disliked, and to this hour I think it an illiberal profession, both in its principles and practice."

He of course made good friends there, wrote a burlesque novel, enjoyed the good wine of a friend from Cork and his excellent collection of books (not law books). He soon foresaw that he would never be Lord Chancellor. After two years, he claimed he knew exactly as much about law as he did about necromancy, and returned to Dublin, bought £100 worth of law books, and determined, in earnest, to begin and study the profession to which he was doomed. He was called to the Bar in the summer of 1789, and went on the Leinster circuit.

> "On this circuit, notwithstanding my ignorance, I pretty nearly cleared my expenses; and I cannot doubt, had I continued to apply sedulously to the law, I might have risen to some eminence; but, whether it was my incorrigible habits of idleness, the severe dislike I had to the law or controlling destiny, I know not; but so it was, that I soon got sick and weary of the law. I continued, however, for form's sake, to go to the courts and wear a foolish wig and gown, for a considerable time, but as I was, modestly speaking, one of the most ignorant barristers in the four courts, and especially as I had neither the means nor the inclination to treat messieurs the attorneys and to make them drink, (a sacrifice of their respectability which even the most liberal-minded of the profession are obliged to make) I made, as may be well supposed, no great exhibition at the bar."

So it was out of disgust and want of success at the bar, that he turned his attention to politics, and the rest as they say is history. His reputation as a democrat post-1789 was the final coup de grâce to his career at the bar.

Sir Jonah Barrington KC claimed Tone was the most remarkable of the persons who lost their lives in consequences of a "wild democratic mania." Tone had been called to the Irish Bar, "but having been previously overrated, he did not succeed," despite some work that Barrington put his way. Tone was really a good-hearted person, but too light and visionary, "and, as for law, was quite incapable of imbibing that species of science." It was his belief that Tone could not have succeeded in any steady civil profession, as he was not worldly enough.

It is lawyers or in many cases lawyers manqués who create revolutions. It is equally lawyers who bolster and prolong the life of the old order. What they all have in common is the power of declamation and peroration, and lawyers have the art of appearing to endow all their utterances with a particular moral fervour, that strongly impresses those who do not see them practise this art in court everyday in support or defence of cases good, bad and indifferent, to borrow the favourite cliché of a former employer of mine who gives a lot of work to the libel lawyers.

Rights and principles are the very stuff of the law, of both revolt and reaction. Sometimes the same individuals at different times of their lives foster both. It was the Liberator Daniel O'Connell, who towards the end of his life reprimanded the zealots of Young Ireland:

> "I shall stand by Old Ireland. And I have some notion that Old Ireland will stand by me."

Thomas Davis was one of three out of Pearse's four gospels of nationalism, along with Wolfe Tone and John Mitchel, who were also called to the Bar, Padraig Pearse and Vladimir Ilyich Lenin were themselves both trained as lawyers, and made revolutions. It is impressive to think that the State brought into being as a consequence of the 1916 Rising has survived better than the world revolution that was supposed to begin in 1917 and that for a time diverted much the course of human development up a tragic cul-de-sac.

The 18th century was the age of eloquence, as well as the age of elegance. It was the lawyers above all, steeped in the classics, who practised eloquence. We have Grattan's magnificent speech on 16 April 1782, celebrating the Irish Parliament's Declaration of Independence, animated by what he called on an earlier occasion "a certain unquenchable public fire":

> "I am now to address a free people. Ages have passed away, and this is the first moment in which you could be distinguished by that appellation. I found Ireland on her knees. I watched over her with an internal solicitude. I have traced her progress, from injuries to arms, and from arms to liberty. Spirit of Swift, spirit of Molyneux, your genius has prevailed. Ireland is now a nation. In that new character I hail her, and bowing to her august presence, I say, Esto perpetua."

Wolfe Tone's genius was as an advocate or publicist. His *Argument on behalf of the Catholics of Irelands* ranks among the most influential pamphlets of the century with almost as galvanising an effect as Tom Paine's *Common Sense* of 1776, which demonstrated to American puritans that the Almighty did not like kings, and the Abbé Sièyes *What is the Third Estate*?

Tone began by outlining the abject condition of the country, despite its natural resources, its population of four million, "right in the track between Europe and America", a country yet unheard of, not half the consequence of Yorkshire or Birmingham. "The misfortune of Ireland is that it has no National Government". Corruption flourished, facilitated by religious intolerance and political bigotry. He was one of the most trenchant critics of the Constitution of 1782, which no Irishman of an independent spirit could acquiesce in as final. Commerce was subordinated to English interest.

Writing in what he called "the days of illumination at the close of 18th century", a good phrase to describe the final decaying years of the Enlightenment, he demolished one by one arguments justifying distrust of Catholics, ranging from their attitude to oaths, the security of property, alleged ignorance and lack of education, their alleged Jacobitism despite the absence of a Pretender or any history of support for revolts, and finally the fear that Catholics with the franchise would attach themselves to France. He argued that Protestantism was no guard against corruption. Tone saw the most profligate venality and the most shameless prostitution of principle in assemblies, where no Catholic could by law appear.

> "Religion has at this day little influence on politics; and when I consider the National Assembly of Frenchmen and Catholics, with other great bodies which I could name, I confess, I feel little propensity to boast that I have the honour to be an Irishman and a Protestant.....What answer could we make to the Catholics of Ireland, if they were to rise, and with one voice, demand their rights as citizens?"

This pamphlet had an immense influence, especially on the Dissenters in the North. Tone subsequently became Secretary to the Catholic Committee, and he travelled the North, including Hillsborough Castle and Rostrevor, persuading people to join the United Irishmen, and trying to reduce sectarian tensions. He was more successful in uniting Protestant, Catholic and Dissenter under the common name of Irishman than any other Republican, before or since. When he was in exile in France, he succeeded in persuading a cash-strapped and distracted Directory to send two expeditions to Ireland, the Bantry Bay expedition and the landing at Killala, a considerable achievement. His speech from the dock, read out at Bodenstown each year now, on the basis of the text established by Marianne Elliot, established a model for subsequent patriots from Robert Emmet on.

Nations nearly always need outside help to win their independence. In Ireland's case, while Britain's strategic enemies receded steadily eastward over the centuries from Spain to France to Germany and finally the Soviet Union, (before disappearing over the horizon to somewhere like Iraq), it was actually Irish-American support in the United States that did the most to secure Irish freedom from the New Departure to the War of Independence.

Thomas Addis Emmet and William Sampson were lawyers who carried the spirit of the United Irishmen to illustrious legal careers in the United States, Emmet becoming Attorney General of the city of New York with the encouragement of Mayor Clinton, whose uncle had been Vice-President. As a book on the New York Irish edited by Ronald H. Bayer and Timothy J. Meagher notes, "the Clintonian political dynasty was always sensitive to the Irish, no doubt partly because it needed their growing vote." He stood firmly for equal rights.

The President's name has plenty of political resonance. In 1813 in a New York court, William Sampson, in defending the secrecy of confession, outlined the persecution to which Catholics had been subjected in Ireland. Religion had nothing to do with it. It was the love of plunder, power and confiscation:

> "that government that refused to tolerate Catholics, tolerated, instigated and indemnified a faction, whose deeds will never be forgotten ... Rape, murder and indemnity went hand in hand. And there it was, that a spectacle, new and appealing, for the first time, presented itself, and Presbyterian, churchman and Catholic were seen to ascend the

same scaffold, and die in the cause of an indissoluble union."

The United Irish exiles in America, Catholic and Protestant, succeeded in confirming a civil and religious liberty protected by the State, from which the far more massive wave of Irish emigrants of the Famine and post-Famine era would benefit.

The Sheares brothers, who were executed in 1798, and who lived in France in 1792 and were supporters of Brissot, were attracted by the French revolutionary ideal of the career open to talents. In one of the manifestos captured by the authorities, John Sheares urged among other things the following:

> "Raise all the energies of your society; call forth all the merit and abilities which a vicious government consigned to obscurity. We also swear, that we will never sheath the sword until every being in the country is restored to those equal rights, which the God of Nature has given to all men - until an order of things shall be established in which no superiority shall be acknowledged among the citizens of Erin, but that of virtue and talent."

It is very appropriate that Enniscorthy, which was the epicentre of the 1798 Rebellion in Wexford, should be the town, that will be home to the National 1798 Centre. In Wexford in 1798 the people rose only after great provocation. They were the first to bear the full brunt in modern times of the fight for Irish freedom and independence. As in most wars and revolutions, there was a good deal of confusion along with the intensity. There was heroism, there was bloodshed, there was tragedy, and some terrible things were done on different sides, often despite the best intentions of responsible leaders. In commemorating those who fought, those who died, and those who innocently and unjustly suffered on all sides, we are not called upon to approve everything that was done in the name of freedom, order or religion, or to justify all the horrors of war and atrocities which were repudiated by humane leaders on either side at the time. But we can and should feel a sympathy informed by the best historical knowledge for the fellow human-beings caught up in these events, often almost entirely involuntarily, sympathy for the hopes and fears of those who lived through times that have left their mark on our country and on our history to this day.

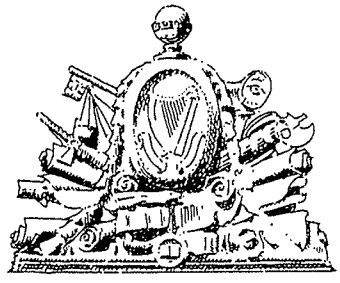
While the Nationalist and Republican tradition have tended to claim 1798 for their own, the fact is that 1798 is also part of the mainstream Presbyterian tradition, most of whose members would now see themselves as Unionist, and many of their ancestors' reforming democratic ideals fulfilled. That relates perhaps to the very different experience of the two communities in the intervening years.

Padraig Pearse wrote in *The Spiritual Nation*:

> "If we accept the definition of Irish freedom as 'the Rights of Man in Ireland', we shall find it difficult to imagine an apostle of Irish freedom who is not a democrat."

Obviously today, like Mary Wollstonecraft and Mary Anne McCracken in the 1790s, we would speak of 'the rights of woman' as well as 'the rights of man', and Pearse himself fully endorsed the full political equality of men and women. But what his comment underlines is that the Republican tradition inherited from 1798, 1848 or 1916 saw itself fundamentally as a democratic one. Historically, those revolts were the result of repression and exasperation with the denial or delay of democratic rights by a more powerful Government. It was not a rejection of democracy, but a case of people who believed they were being denied their democratic rights.

The bicentenary of 1798 is a very important one, particularly coming as it does in a year, when important peace negotiations are likely to reach a decisive phase. It is an opportunity in effect to go back to the beginnings of modern democratic politics in Ireland to look at the greater fluidity of positions in the 1790s, side by side with deep-seated, inter-communal tensions which persist to this day. We should look at the 1790s as a whole, at the political movements that were born then, and especially the United Irishmen, rather than just the military climax of rebellion. What people wanted to achieve politically as well as the different ways they set about achieving it are equally important.



The Irish Government are supporting the Commemoration of 1798 in a positive spirit of reconciliation, and in co-operation with many voluntary organisations North and South, without seeking to gloss over difficult issues or unpalatable realities. A deeper understanding of what happened, so that we can draw from it inspiration and instruction for our own time, as well as show respect for our forebears who suffered at the time, should be our objective, not any superficial or revisionist exercise.

The barristers' corps was not very active in 1798, but it was firmly on the side of the authorities. It was guilty of no atrocities, at any rate outside of the courtroom. It has been pointed out by Frank MacGabhann in a letter to the Irish Times of 25 Februar,y 1997 that a number of lawyers were expelled by the Benchers on 27 November, 1798 for "having been of a seditious and traitorous conspiracy of men styling themselves United Irishmen and having confessed themselves guilty of high treason." These included Thomas Addis Emmet, Arthur O'Connor, Matthew Dowling, and Edward Keane. Matthew Dowling, a Volunteer in the 1780s, was law agent to the Society of the United Irishmen, as well as Napper Tandy's attorney.

The single most important determinant of the 1798 Rebellion was mass-politicisation in the 1790s. The mainly middle-class United Irishmen joined forces with the people organised in the Defenders, who were especially

strong in what would later became the border areas. Sometimes, to make a political point in our own day, the positive ideals of the United Irishmen have been contrasted with the more one-dimensional popular goals and objectives of the Defenders. The reality of Irish nationalism through history is that lofty and tolerant ideals uniting the traditions have always needed to seek popular support, in the main only available from the tradition of the majority.

It was politicisation which created the explosive cocktail of political, social, religious and economic forces in the area. The reception of the ideology of revolutionary France was crucial; its primary impact was to widen and deepen pre-existing divisions within Irish political culture, between reformist and conservative elements, pushing one towards radicalism, the other towards repression as the 1790s progressed.

We need to adhere to the international perspective of the United Irishmen to link Bunker Hill, the Bastille and Boolavogue, to stress the enduring links which '98 forged with America, France and Australia. 1798 in Wexford was not just minor skirmishes, but part of a national and indeed international campaign, indelibly linked to what had been happening elsewhere - an Irish echo of the distant drums of the Atlantic Revolution. It was Ireland's first modern revolution.

Citizen Edward FitzGerald, sometime inhabitant of Leinster House, Wolfe Tone, Robert Emmet and many others among the leaders had a hardened revolutionary purpose. Unfortunately for them, things did not come together at the right time. A successful revolution had to wait another 120 years. Anyone who thinks that a form of rule devised in the twin interests of a monopolistic ascendancy and the strategic protection of a neighbouring country was likely to be peacefully dismantled without a struggle is doing little justice to the ruthless determination which opposed Irish freedom in even its mildest forms for so long.

Many of the Presbyterian United Irish Leaders of the North understood the need for equality and inclusion. They and their generosity of spirit remain to this day an honour to the tradition from which they came. They realised, sooner than most, that 'Croppies lie down', or as people would say today 'lower your expectations', was not a viable policy for the long run, and that it would damage what they wanted for themselves. The right to participate in an inclusive national democracy and in national political life is as valid an objective today as it was 200 years ago. Then rebellion played into the hands of their enemies, who wanted to create the conditions to carry a Union. Today, the real test is to hold united to an intelligent political strategy without reversion to violence.

We need to understand the reasons for the parting of the ways after 1798, how most of the Protestant radicals and their descendants came eventually to be supporters of the Union and in many cases allies of their earlier opponents the Orangemen, although threads of the radical Presbyterian tradition survived to the Home Rule controversies and even to this day.

It would be wrong to think that the United Irishmen belong exclusively to our present-day Nationalist tradition. They belong equally to the beginnings of a democratic tradition, which can be shared by all. Unionists and especially Presbyterians are entitled and should be encouraged to see in them part of their traditions. The Protestant churches collectively might acknowledge more freely the formative role that some of their number working with their leading Catholic contemporaries played in paving the way for the independent Ireland we have today.

Speaking personally, I would like to see Church leaders acknowledge clearly that this State today in no way threatens, either inside or outside its jurisdiction, any sane conception of the Protestant identity, and on the contrary is supportive of it in many different ways, as it is of other mainstream religious professions. In Northern Ireland itself, and not for any outside reason, it is the pockets of hardcore bigotry and sectarianism that belong to a bygone age, that are under serious threat from modern civilisation, including modern Christian thinking.

The sort of attitude that lumps Ecumenism, Romanism, Nationalism and Republicanism as related enemies all in the one basket, that would have been very reactionary paranoia even in the 1790s, has no future in a modern Britain, let alone a modern Ireland. Civil and religious liberty were conspicuous by their absence in the Ireland of the Penal Laws. It was not till 1791, when the Society of United Irishmen was founded, that the real struggle for them began. They wanted to substitute 14 July for the Twelfth as the day of celebration and as a more appropriate foundation day.

Commemorations are occasions to be handled sensitively. They revive old memories and frequently mixed feelings. A young Irish playwright, Conor McPherson, working in London at the moment, asked in a *New Statesman* article, of the era of the War of Independence, but it is equally applicable to 1798:

> "We owe our independence to the men and women, who gave their lives, and to their families who lost them, but we're often not sure how to think about them. Do we dwell on the great injustices they suffered and become increasingly upset about something which we can never really make right? Or do we simply embrace the future they've secured for us? Which is the best way to honour them?"

The periodic conflict since 1798 over a 200 year cycle and the development of very entrenched political differences over the past 100 years or more has made the achievement of any form of unity immensely difficult today. Yet the traditions have to be encouraged to come together and find some form of agreement and accommodation. That necessity is recognised on all sides. The projected form of union between Irishmen in the 1790s did not work or last. We have to find one that will, free of illusion, but not of generosity. •

Legal The Bar Review Update

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Judgment information compiled by the researchers in the Judges Library Four Courts, Dublin 7.
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Administrative

Ni Eili v. Environmental Protection Agency
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20/02/1998

Judicial review; certiorari; natural justice; regulation of emission of pollutants; integrated pollution control licence granted by respondent in order to operate a hazardous waste incinerator; whether decision to grant licence unreasonable and ultra vires; whether irrelevant considerations taken into account with regard to design of incinerator; whether sufficient evidence on which to base decision; whether failure to give reasons; duty and function of respondent considered; whether EU emission requirements complied with by respondent; Environmental Protection Agency Act, 1992; Environmental Protection Agency (Licensing) Regulations, 1994
Held: Certiorari refused.

Murphy v. Revenue Commissioners
High Court: **McCracken J.**
17/02/1998

Judicial review; civil service; increment payments based on performance; respondent deferred payment of long service increments; grievance procedure where increments not granted; whether under grievance procedure respondent entitled not to refer complaint to a Mediation Officer; onus on applicant to show entitlement to increments; whether applicant suffered direct loss of earnings as a result of decision; interpretation of word 'earnings'
Held: Respondent not entitled to refuse to refer complaint to the Mediation Officer; decision quashed.

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Local Government Act, 1991 (Regional Authorities) (Establishment Order) 1993, (Amendment) Order, 1998
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Local Government (An Chomhairle Leabharlanna) Regulations, 1997
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SI 469/1997

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Reflections on tribunals of inquiry
Brady, Rory
3(3) 1997 BR 121

Admiralty

Targe Towing Ltd. v. "Von Rocks"
Supreme Court: Barrington J., **Keane J.,** Lynch J.
22/01/1998

Maritime dredger; arrest; release; insurance indemnity claim; arrest of vessel sought in satisfaction of claim; whether dredger should be arrested; whether dredger is a 'ship' within the meaning of international law; definition of ship considered; whether concept of 'self propulsion' significant in determing characteristics of ship; Jurisdiction of Courts (Maritime Convention) Act, 1989; Art. 2 Arrest Convention, 1952
Held: Von Rocks deemed to be a ship within meaning of Convention; arrest of ship ordered

Agriculture

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Somers v. Kennedy
Supreme Court: Hamilton C.J., O'Flaherty J., **Murphy J.**
20/02/1998

Receiver; statement of affairs; costs and expenses in making statement of affairs; difference between amount claimed and amount allowed for costs incurred in preparing statement of affairs; whether fees other than accountancy fees should be allowed; purpose of statement of affairs; ss.319 & 320 Companies Act, 1963
Held: Accountancy fees allowed only

State (Plunkett) v. Registrar of Friendly Societies
Supreme Court: Hamilton C.J., **O'Flaherty J.**, Barrington J., Keane J., Barron J.
09/02/1998

Winding up; lending institution; conflict between Inspector and Liquidator; Inspector appointed by Registrar prior to liquidation to investigate affairs of company; whether inspector unnecessary once liquidator appointed; whether Inspector entitled to continue investigation once winding up commenced; payment of expenses of inspection; s.13(3) Industrial and Provident Societies (Amendment) Act, 1978
Held: No conflict between Inspector and Liquidator; Inspector entitled to continue investigation despite winding up proceedings

Coombe Importers Ltd., In re
High Court: **Shanley J.**
28/01/1998

Winding up; preferential debts; whether claim of revenue commissioners entitled to super-preferential status; remuneration paid to employees without PRSI deductions; whether PRSI sums have super-preferential status; s.120 Social Welfare (Consolidation) Act, 1981; s.285 Companies Act, 1963
Held: Super-preferential status cannot be afforded to sums which ought to have been deducted by employer

Feighery v. Feighery
High Court: **Laffoy J.**
25/02/1998

Oppression; director; shareholder; quasi-partnership; injunction sought restraining directors from convening an extraordinary meeting to consider removing petitioner as a director; whether the Court has jurisdiction to grant such relief; whether fair question raised; whether removal constitutes oppressive conduct; whether relationship between shareholders' and company is a quasi-partnership in order to seek relief; whether shareholders statutory power to remove director can be overridden; whether respondents in breach of fiduciary duty to petitioner; balance of convenience; damages; ss. 182 & 205 Companies Act, 1963
Held: Relief refused

C.H. (Irl) Inc. v. Credit Suisse Canada
High Court: **McCracken J.**
12/12/1997

Compulsory liquidation; financial assistance transaction; share purchasing; whether applicant company gave financial assistance for the purchase of shares by depositing monies by way of fiduciary deposit with respondent company as security; meaning of financial assistance; whether company had notice of the breach; meaning of notice considered; onus of proving notice on liquidator; whether transaction void against respondent; s.60 Companies Act, 1963
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Zockoll Group Limited v. Telecom Éireann
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Competition; abuse of a dominant position; Telecom Éireann; allocation of telephone numbers; application for particular telephone numbers; criteria applicable to allocation and withdrawal of telephone numbers; whether subscriber entitled to be allocated particular telephone numbers; whether Telecom Éireann entitled to withdraw telephone numbers; whether non-allocation and withdrawal of telephone numbers abuse of a dominant position; whether public law principles applicable to non-allocation and withdrawal of telephone numbers; whether conduct of Telecom Éireann fair and reasonable; s. 5 Competition Act, 1991; Article 86 EEC Treaty; Postal and Telecommunications Services Act, 1983; Telecommunications Scheme, 1994
Held: Telecom Éireann obliged to act fairly and reasonably in allocating and withdrawing telephone numbers; public law principles not applicable; withdrawal of telephone numbers was not fair and reasonable and so was invalid; subscriber entitled to be allocated numbers which had been applied for

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Bushell Ltd. v. Luxel Varese SAS
High Court: **O'Sullivan J.**
20/02/1998

Sole distributorship agreement; breach; damages; whether agreement to distribute both domestic and commercial products on an exclusive basis; meaning and scope of the agreement; whether agreement breached; whether plaintiff entitled to claim for losses incurred after expiration of notice period; whether plaintiff entitled to set-off claim
Held: Breach of agreement; damages awarded

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The Patents Act, 1992 a new international dimension
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Kennedy v. Tipperary County Council
Supreme Court: Hamilton C.J., **O'Flaherty J.,** Lynch J.
20/02/1998
Malicious injuries claim; compensation; damage; riot; elements of riot; whether intention to use force in exercise of common purpose; whether this element of riot present in instant case; s.18(1)(a) Malicious Injuries Act, 1981
Held: For trial judge to determine whether such common purpose existed

D.P.P. v. O'Kelly
High Court: **McCracken J.**
10/02/1998

Custody; information; regulations governing information to be given to persons in custody by Member in Charge of Garda station; whether Member in Charge must be satisfied that person understands this information; whether evidence that information was given hearsay; Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987
Held: Member in charge need not be satisfied that person understands information given; evidence that information given not hearsay

D.P.P. v. Colfer
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09/02/1998

Summons; defect; amendment; drink driving charge; District Judge dismissed charge as location of offence not described with sufficient particularity on summons; whether District Judge entitled to dismiss charge; whether defect a question of law or fact; whether judge should have exercised powers of amendment; whether amendment would prejudice accused; s.51 Courts (Supplemental Provisions) Act, 1961; r.88 District Court Rules, 1948
Held: District Judge not entitled to dismiss charge

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G. & T. Crampton Ltd. v. Building & Allied Trades Union
Supreme Court: **Hamilton C.J.,** O'Flaherty J., Barrington J. (ex-tempore)
12/12/1997

Industrial action; injunction; trade dispute; conduct of ballot; whether injunction should be granted to employer restraining picketing of premises by trade union; requirements to be fulfilled in relation to industrial action; whether members given a fair opportunity of voting; whether nature of industrial action should be particularised on ballot paper; whether fair question raised as to ballot; balance of convenience; damages; Industrial Relations Act, 1990
Held: Injunction granted; appeal dismissed

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Employment Regulation Order (Handkerchief and Household Piece Goods Joint Labour Committee) 1998
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Employment Regulation Order (Shirtmaking Joint Labour Committee) 1998
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Employment Regulation Order (Womens Clothing and Millinery Joint Labour Committee) 1998
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Phonographic Performance (Irl)Ltd. v. Cody
Supreme Court: Hamilton C.J., **Murphy J.,** Lynch J.
16/02/1998
Examination of witnesses; viva voce rule; affidavit evidence; infringement of copyright claim; dispute as to title of sound recordings; distinction between evidence going to the issues in the action and evidence of mere formal matters; order sought to have certain facts proved by affidavit rather than on viva voce evidence; whether court has discretion to allow facts to be proved by affidavit; whether 'sufficient reason' to depart from viva voce rule; whether defendants bona fide require production of witnesses; whether copyright title main issue or collateral; O.39 r.1 Rules of the Superior Courts
Held: Not entitled to depart from viva voce rule

Extradition

Byrne v. Conroy
Supreme Court: **Hamilton C.J.,**
O'Flaherty J., Lynch J.
19/02/1998

Extradition warrant; release sought; revenue offence; European Communities; appellant charged with non-payment of EC agricultural levy; whether such offence is a revenue offence; whether levy constitutes a tax within meaning of Irish legislation; nature and purpose of levies considered; characteristics of tax; whether courts in this jurisdiction will enforce a revenue claim of a foreign country; s.50 Extradition Act, 1965
Held: Offence not a revenue offence within meaning of Act; release refused

Fusco v. O'Dea
Supreme Court: **Hamilton C.J.,**
O'Flaherty J., Denham J., Barrington J., Barron J.
18/02/1998

Extradition warrant; release; political offence exemption; delay; whether warrant properly executed; whether extradition exemption applicable to respondent; whether it would be unjust, oppressive or invidious to extradite respondent due to lapse of time; whether 'other exceptional circumstances' render extradition unjust; interpretation of 'political offence exemption'; applicable law in determing whether an offence is a political offence; whether seriousness of offence to be considered; burden of proof; s.50 (2)(b) Extradition Act, 1965
Held: Appeal allowed; extradition ordered

Family

(P).M. v. (V).M.
Supreme Court: **Hamilton C.J.,**
Denham J., Barrington J.
20/02/1998

Child abduction; custody order; enforcement of order; child removed from foreign jurisdiction; request for recognition and enforcement of foreign custody order; decision relating to custody given in absence of respondent; whether requirements of Convention complied with in making order; whether instituting document duly served on respondent in sufficient time so as to prepare defence; Arts. 12 & 13 Luxembourg Convention
Held: Requirements of Convention not complied with; order refused

(G).H. v. (E).H.
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Maintenance; arrears; appeal against order reducing maintenance and cancelling arrears; respondent failing to pay; whether his financial circumstances had changed as claimed; whether estate in trust a sham; whether respondent attempting to deceive court by concealing true income
Held: No change in circumstances; original maintenance restored; arrears due

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Marriage; validity; psychiatric illness; prior to marriage petitioner unaware of respondent's condition; whether at date of marriage respondent competent; whether full, free and informed consent given by respondent
Held: Marriage void; condition ren-

dered respondent incapable of giving true consent

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Merrigan v. Minister for Justice
High Court: **Geoghegan J.**
28/01/1998

Judicial review; Garda compensation; natural and constitutional justice; irrationality; Garda application for leave to apply to High Court for compensation for injuries; Minister for Justice to grant leave if of opinion that injuries non-minor; refusal of leave without considering applicant's medical reports; whether injuries non-minor; whether refusal of leave in breach of natural and constitutional justice; whether refusal of leave irrational; s. 6(1) Garda Síochána Compensation Act, 1941
Held: Certiorari granted; injuries non-minor; refusal of leave irrational and in breach of natural and constitutional justice

McAuley v. Chief Superintendent Keating
Supreme Court: O'Flaherty J., Murphy J., **Lynch J.**
21/01/1998

Judicial review; disciplinary inquiry; bias; natural and constitutional justice; delay; investigation into alleged misdeeds of applicant; whether objective bias on behalf of respondent purporting to conduct inquiry; whether breach of disciplinary code by applicant; whether undue delay in conducting inquiry
Held: No bias or undue delay

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Ferriter, Cian
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Production Association Minsk Tractor Works v. Saenko
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Mareva injunction application; alleged fraud on plaintiff by defendant; whether criteria for granting injunction met; whether full and frank disclosure by plaintiffs; whether grounds for believing risk of assets being dissipated; whether intention established to dissipate assets in order to evade obligation to plaintiff rather than in ordinary course of business; whether adequate undertaking as to damages given
Held: Mareva injunction drastic remedy; criteria not met

Szabo v. Esat Digiphone Ltd.
High Court: **Geoghegan J.**
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Quia timet injunction; criteria applicable; future nuisance; proposal to erect a cellular mobile and personal communications base station near a national school; whether operation of such station injurious to health of school children; injunction sought to restrain intended development; principles applicable in regard to quia timet injunctions; whether strong probability of injury to health; whether just and reasonable to grant injunction; whether ordinary injunction principles apply
Held: Injunction refused

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Mulhern v. Bundoran U.D.C.
High Court: **Kelly J.**
30/01/1998

Judicial review; natural justice; legitimate expectation; taxi licences applications; decision by local authority that applicants application forms invalid as no fee submitted; fee requirement not brought to notice of applicant; whether decision ultra vires; whether decision unreasonable and contrary to natural justice and legitimate expectation; whether provision for fee mandatory pursuant to regulations; Road Traffic (Public Service Vehicles)(Amendment) Regulations, 1995
Held: Application valid; legitimate expectation applicable

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McDermott v. Sports Management Ltd.
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Personal injuries; duty of care; liability of sports club; injury sustained by plaintiff during aerobics class; whether defendants' liable for plaintiff's injuries; extent of duty of care owed by sports club to plaintiff in relation to sports classes; whether plaintiff allowed to enter class beyond her capacity; whether injury sustained constitutes an accident
Held: Defendants not liable; injury sustained as a result of an accident

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Personal injuries; damages; assessment; road traffic accident; whether damages awarded for future pain and suffering excessive
Held: Damages not excessive

Daly v. Guinness Peat Aviation Ltd.
High Court: **O'Donovan J.**
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Personal injury; causation; accident at work; collision with glass panel beside door; whether glass manifested; whether glazing sufficiently thick; whether plaintiff contributorily negligent given familiarity with premises; whether negligent medical treatment caused or contributed to subsequent long-term condition; whether medical consequences due to initial trauma; assessment of damages
Held: Liability apportioned; 85% due to initial trauma; 15% to negligent medical treatment

McCarthy v. Murphy
High Court: **McCracken J.**
10/02/1998

Personal injury; reasonable foreseeability; limits of liability; defendant's negligence caused moderate soft-tissue injury to plaintiff; subsequent depressive reaction; whether defendant liable for psychological condition; whether eggshell skull rule applied
Held: Psychological condition due to physical injury; physical injury of reasonably foreseeable type; consequently defendant liable for damage flowing from injury, as must take plaintiff as he finds her

O'Toole v. O'Halloran
High Court: **Kinlen J.**
05/02/1998

Negligence; road traffic accident: whether accident caused by loose chippings on road; whether Defendant negligent in leaving loose chippings on road
Held: Defendant not liable

Thomas v. Leitrim County Council
High Court: **McCracken J.**
19/12/1997

Occupiers' liability; apportionment of fault; local natural amenity developed by defendant; visiting plaintiff injured avoiding tree blocking path; whether defendant owed duty to plaintiff as licensee or invitee; whether defendants have material interest in tourists visiting area; whether reasonable care taken to inspect and maintain amenity; whether plaintiff took reasonable care for her own safety
Held: Defendant's duty to take reasonable care that premises reasonably safe for plaintiff invitee breached; plaintiff two thirds contributorily negligent

Nuisance

Superquinn Ltd v. Bray Urban District Council
High Court: **Laffoy J.**
18/02/1998

Negligence; nuisance; construction; excessive flooding; ineffective drainage of reservoir; resultant damage to plaintiff's property; determination of liability; whether defendant liable for damage; whether damage caused was foreseeable; whether flooding caused by an Act of God; whether the acts or omissions of the defendants caused the flooding
Held: Action dismissed; defence of Act of God succeeded

Planning

Coonagh v. An Bord Pleanála
High Court: **Budd J.**
26/02/1998

Planning and development; judicial review; certiorari; irrationality; criteria applicable to grant of leave to apply for judicial review; whether refusal of planning permission irrational; whether leave to apply for judicial review should be granted; whether substantial grounds for judicial review; s. 82 Local Government (Planning and Development) Act, 1963; s. 19(3) Local Government (Planning and Development) Act, 1992
Held: Leave to apply for judicial review refused

Irish Cement Limited v. An Bord Pleanála
High Court: **McCracken J.**
24/02/1998

Planning and development; judicial review; certiorari; irrationality; natural and constitutional justice; criteria applicable to grant of leave to apply for judicial review; whether grant of planning permission irrational; whether natural and constitutional justice observed before grant of planning permission; whether board entitled to have regard to unimplemented Traffic Management Plan; whether substantial grounds for judicial review; s. 82 Local Government (Planning and Development) Act, 1963; s. 19(3) Local Government (Planning and Development) Act, 1992
Held: Leave to apply for judicial review refused

Butler v. Dublin Corporation
High Court: **Morris P.**
19/02/1998

Planning permission; unauthorised use of lands; material change of use; time-limits; staging of pop concerts in a national public stadium; whether staging of concerts involves a change of use from pre-1964 use of lands; whether use of lands for non-sporting events is a pre-1964 use; whether use of lands for sporting events and pop concerts closely related; whether change in use material; comparison of noise levels for both events; whether planning legislation applicable to transient events; whether outside time limit for enforcement action
Held: Staging of pop concerts constitutes a material change of use

Garden Villa Construction Company Limited v. Wicklow County Council
High Court: **Morris P.**
16/02/1998

Judicial review; decisions susceptible to judicial review; irrationality; application for planning permission; date stamping of application by Planning Authority; applicant required to furnish further particulars of application; whether date stamping of applications a decision susceptible to judicial review; whether decision to require further particulars irrational; Art. 29 Local Government (Planning and Development) Regulations, 1994
Held: Planning Authority has no discretion whether to date stamp applications; date stamping not a decision susceptible to judicial review; decision to require further particulars of planning application not irrational

Ardoyne House Management Company Limited v. Bardas Atha Cliath
High Court: **Morris P.**
06/02/1998

Judicial review; certiorari; discretionary nature of remedy; planning and development; notices of intention to apply for planning permission; notices inadequate; applicants directed to publish revised notices; whether planning permission could be granted where applicants failed to publish revised notices; whether certiorari should be granted where appeal to board pending; Arts. 17(2) & 39 Local Government (Planning and Development) Regulations, 1994
Held: Planning permission could not be granted where applicant had failed to comply with direction to publish revised notices; certiorari appropriate remedy where pure question of law at issue; certiorari granted

Wicklow Heritage Trust Limited v. Wicklow County Council
High Court: **McGuinness J.**
05/02/1998

Judicial review; certiorari; prohibition; declaration; irrationality; locus standi; whether applicant company had locus standi; whether designation of a waste disposal site a reserved function; whether waste disposal site a material contravention of development plan; whether decision to designate waste disposal site irrational; whether decision to designate waste disposal site ultra vires in the absence of waste management plan; ss. 19, 22, 26 & 39 Local Government (Planning and Development) Act, 1963; European Communities (Waste) Regulations, 1979
Held: Applicant company had locus standi; waste disposal site a material contravention of development plan; declaration, orders of certiorari and prohibition granted

Blessington Heritage Trust Limited v. Wicklow County Council
High Court: **McGuinness J.**
21/01/1998

Judicial review; certiorari; prohibition; mandamus; declaration; locus standi; review of development plan by planning authority; review to take place at least every five years; extension of review period by Minister; whether development plan could be reviewed after expiry of review period; whether more than one extension of review period possible; whether extension of review period had retrospective effect; whether notice must be given of application to Minister for extension of review period;

whether applicant company had locus standi; ss. 19, 20, 21 & 21A Local Government (Planning and Development) Act, 1963
Held: Applicant company had locus standi; review period could be extended more than once; notice need not be given of application for extension of review period; development plan could not be reviewed after expiry of review period; extension of review period did not have retrospective effect; adoption of revised development plan invalid; declaration and order of certiorari granted

Birmingham v. Birr Urban District Council
High Court: **Morris P.**
20/01/1998

Interlocutory injunction; construction of halting sites by local authority; judicial review of construction; injunction sought to restrain construction; whether fair question to be tried; whether construction an exempted development; whether balance of convenience favoured grant of injunction; whether laches on part of applicants; ss. 4 & 29(3) Local Government (Planning and Development) Act, 1963
Held: Injunction granted; fair question to be tried existed; balance of convenience favoured grant of injunction; no laches on part of applicants

Practice & Procedure

Phonographic Performance (Irl) Ltd. v. Chariot Inns Ltd.
Supreme Court: Hamilton C.J., **Murphy J.,** Lynch J.
16/02/1998

Abuse of process; strike out; judge's discretion; copyright action; dispute as to copyright title; whether judge entitled to excise certain paragraphs of defence as being an abuse of process
Held: No discretion to excise paragraphs of defence

Chapman v. LaLavia
Supreme Court: **Hamilton C.J.,** O'Flaherty J., Denham J.
16/12/1997

Costs; proceedings relating to salvage of archaeological wreck; respondents awarded costs; whether trial judge correct in holding that the salvage of archaeological wrecks was a matter of public importance such as to justify respondents being awarded costs; whether trial judge failed to take lodgment into account; discretion of court in apportioning costs; O.99 r.1 Rules of the Superior Courts
Held: Order as to costs upheld

Hughes v. Commissioner of An Garda Síochána
High Court: **Laffoy J.** (ex tempore)
20/01/1998

Discovery; privilege; alleged unfair treatment by Garda Review Board; whether certain documents privileged considering legal principles and issues involved; whether in each case public interest in non-disclosure outweighs plaintiff's access in interests fair trial; whether documents relevant to proceedings; whether legal professional privilege applies
Held: Disclosure ordered where appropriate

Woodfab Limited v. Coillte Teoranta
High Court: **Shanley J.**
19/12/1997

Interrogatories; purpose of interrogatories; criteria governing leave to deliver interrogatories; whether interrogatories necessary for saving costs or disposing fairly of the cause; whether special necessity required that leave be granted; whether special necessity existed where interrogatories related to anti-competitive behaviour and internal workings of interrogated party; O. 31 r. 2 Rules of the Superior Courts
Held: Party seeking leave to deliver interrogatories must establish special necessity; special necessity did not exist simply because interrogatories related to anti-competitive behaviour or internal workings of interrogated party

Statutory Instrument

Jurisdiction of Courts and Enforcement of Judgments Act, 1993
(Section 7(4)) (Declaration) Order, 1997
SI 462/1997

Property

Browne v. Mariena Properties Ltd.
Supreme Court: **Barrington J.,** Lynch J., Barron J.
04/03/1998

Land; contract; non-disclosure; recission; specific performance; prior to sale of lands a notice was issued by Minister for Arts, Culture and the Gaeltacht designating lands as a Natural Heritage Area (NHA); whether such notice should have been disclosed under general conditions of the contract; whether vendor had actual knowledge of notice; whether purchaser entitled to rescind contract as a result of non-disclosure; whether Minister a 'competent authority' under general conditions of sale to issue notice; whether the notice affected the property for sale at time contract entered into; interpretation of 'affect';
Held: Purchaser not entitled to rescission; vendor did not have actual knowledge of notice; Minister not competent authority under general conditions of sale to issue notice

Browne v. Mariena Properties Limited
High Court: **Laffoy J.**
23/01/1998

Contract for sale of land; non-disclosure; recission; specific performance; notices affecting land; duty of vendor to disclose existence of notices affecting land; land within proposed Natural Heritage Area designation; advertisement in newspapers of proposed designation; whether advertisements were notices affecting land; whether advertisements issued by a competent authority; whether proposed designation notified to vendor; whether failure to disclose entitled purchaser to rescind contract; whether specific performance could be granted; Condition 35, Law Society General Conditions of Sale (1995 Edition)
Held: Advertisements were not notices affecting land; vendor not notified or given notice of proposed designation; specific performance granted

Articles

The easement of parking
Bland, Peter
2 (1997) CPLJ 26

The calculation of the purchase price in relation to the acquisition of a fee simple
Dwyer, James
1996(3&4) CPLJ 51

The Family Home Protection act and registered land a reassessment of Guckian v. Brennan
Mee, John
2(1997) CPLJ 58

Guidance for conveyancers regarding forged revenue stamps
O'Donnell, Rory
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Safety files - guidelines for conveyancers
O'Donnell, Rory
2 (1997) CPLJ 19

An overview of the law relating to powers of attorney and an analysis of the practical implications of the Powers of Attorney Act, 1996 for conveyancers
Pearce, Robert A
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Recent developments in residential tenancy law. Part 1
Ryall, Aine
2(1997) CPLJ 51

Sea & Seashore

Statutory Instruments

Sea Pollution (Control of Pollution by Noxious Liquid Substances in Bulk) (Amendment) Regulations, 1997
SI 515/1997

Sea Pollution (Harmful Substances in Packaged Form) Regulations, 1997
SI 513/1997
30/1/1998

Sea Pollution (Prevention of Oil Pollution) (Amendment) Regulations, 1997
SI 514/1997

Sea Pollution (Prevention of Pollution by Garbage From Ships) (Amendment) Regulations, 1997
SI 516/1997

Harbour Rates (Dingle Harbour) Order, 1997
SI 527/1997

Harbour Rates (Tralee and Fenit Pier and Harbour) Order, 1997
SI 528/1997

Social Welfare

Statutory Instruments

Social Welfare Act, 1995 (Section 15) (Commencement) Order, 1997
SI 493/1997

Social Welfare (Consolidated Payments Provisions) (Amendment) (no.11) (Increase for Qualified Adult) Regulations, 1997
SI 417/1994

Succession

(E).B. v. (S).S.
Supreme Court: **Keane J.,** Lynch J., Barron J.*
* dissenting
10/02/1998

Will; testamentary disposition; moral duty of testatrix; inter vivos gifts; whether testatrix failed in moral duty to make proper provision for appellant in accordance with her means; testatrix had made substantial inter vivos gift to appellant which was subsequently squandered; whether testatrix failed in moral duty not to make further provision for appellant in will; whether discretionary trust should have been established; whether testatrix under a moral duty to make provision for children of appellant; s.117 Succession Act, 1965
Held: Testatrix had not failed in her moral duty

Taxation

Revenue Commissioners v. Sisters of Charity of the Incarnate Word
High Court; **Geoghegan J.**
11/02/1998

Income tax; exemption; body of persons established for charitable purpose; whether necessary for body to be established within State; whether body established within State; ss. 333 & 334 Income Tax Act, 1967
Held: Body must be established within State to benefit from exemption; body established within State

Statutory Instrument

Taxes Consolidation Act, 1997 (Designation of Urban Renewal Areas and Tax Relief on Income From Certain Trading Operations) Order, 1997
SI 483/1997

Articles

BES after the goldrush
O'Halloran, Barry
1998(Jan/Feb) GILSI 20

Accounting principles and the computation of tax
Cuddigan, John
9(1997) ITR 434

The social welfare and tax implications of a personal injuries award
Hickey, Jack
3(3) 1997 BR 141

Stamp duty 1997
Lee, Richard
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Using Ireland's double tax treaties
O'Brien, Pat
9(1997) ITR 444

Guidance for conveyancers regarding forged revenue stamps
O'Donnell, Rory
1996(3&4) CPLJ 54

Telecommunications

Statutory Instruments

European Communities (Interconnection in Telecommunications) Regulations, 1998
SI 15/1998
(DIR 97/33)

Postal and Telecommunications Services Act, 1983 (Section 111(5)) Regulations, 1997
SI 517/1997

Torts

Articles

Nervous shock and the secondary victim
Bredin, Ken
3(3) 1997 BR 133

The social welfare and tax implications of a personal injuries award
Hickey, Jack
3(3) 1997 BR 141

Covering all angles
O'Halloran, Barry
1998(Jan/Feb) GILSI 15

The Occupiers' Liability act 1995
Evoy, Bernice
2(1997) CPLJ 42

Transport

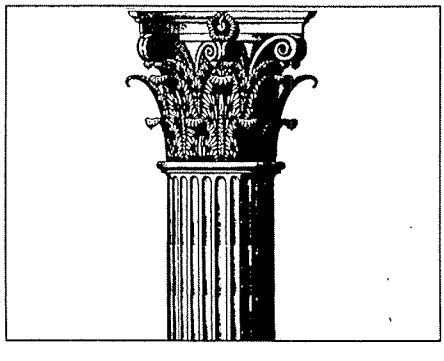
Statutory Instruments

Irish Aviation Authority (Eurocontrol) (Consolidated Route Charges) Regulations, 1998
SI 4/1998
12/1/1998

Dangerous Substances (Conveyance of Scheduled Substances by Road) (Trade or Business) (Amendment) Regulations
SI 458/1997

National Ambulance Advisory Council Order, 1998
SI 27/1998

European Communities (Minimum Requirements for Vessels Carrying Dangerous or Polluting Goods) Regulations, 1995 (Amendment) Regulations, 1998
SI 3/1998
(DIR 96/39)



At a Glance

European Provisions Implemented into Irish law up to 20/3/98

Information compiled by Ciaran McEvoy, Law Library, Four Courts, Dublin 7.

European Communities (Agricultural or Forestry Tractors Type Approval) Regulations, 1997
SI 446/1997
(DIR 96/63)

European Communities (Authorisation, Placing on the Market, use and Control of Plant Protection Products) (Amendment) (no 2) Regulations, 1997
SI 466/1997
(DIR 91/414, 97/57)

European Communities (Definition, Description and Presentation of Spirit Drinks) (Amendment) Regulations, 1998
SI 7/1998
(REG 1576/89, 1014/90, 1434/97) REG 3280/92, 3378/94, 1180/91, 1781/91, 3458/92, 2675/94, 1712/95, 2626/95, 2523/97)

European Communities (Non-Life Insurance and Life Assurance) Framework (Amendment) Regulations, 1997
SI 457/1997
(DIR 95/26)
DIR 83/349, 92/49, 92/96

European Communities (Interconnection in Telecommunications) Regulations, 1998
SI 15/1998
(DIR 97/33)

European Communities (Electromagnetic Compatibility) Regulations, 1998
SI 22/1998
9/2/1998
(DIR89/336, 91/263, 92/31, 93/68, 93/97)

European Communities (Fresh Meat) Regulations, 1997
SI 434/1997
(DIR 64/33, 91/497, 92/5, 92/120, 95/23, 91/498)

European Communities (Minimum Requirements for Vessels Carrying Dangerous or Polluting Goods) Regulations, 1995 (Amendment) Regulations, 1998
SI 3/1998
(DIR 96/39)

Safety, Health and Welfare at Work (Extractive Industries) Regulations, 1997
SI 467/1997
(DIR 92/91, 92/104)

ACTS OF THE OIREACHTAS 1997

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

1/1997 - Fisheries (Commission) Act, 1997
signed 12/02/1997
commencement on signing

2/1997 - European Parliament Elections Act, 1997
signed 24/02/1997
commenced 21/04/1997 by S.I. 163/1997

3/1997 - Decommissioning Act, 1997
signed 26/02/1997

4/1997 - Criminal Justice (Miscellaneous Provisions) Act, 1997
commenced in part on 04/04/1997

5/1997 - Irish Takeover Panel Act, 1997
commences in part

14/04/1997 by S.I. 158/1997
remainder commences 01/07/1997 by S.I. 255/1997

6/1997 - Courts Act, 1997
commenced on signing 20/03/1997

7/1997 - Dublin Docklands Development Authority Act, 1997
commences in part 27/03/1997
remainder commences 01/05/1997 by S.I 135/1997.

8/1997 - Central Bank Act, 1997
commences 09/04/1997 by S.I.150/1997

9/1997 - Health (Provision of Information) Act, 1997
commenced 01/04/1997

10/1997 - Social Welfare Act 1997
commenced in part in act
commenced in part by S.I. 161/1997 (08/04/1997)
commenced in part by S.I. 250/1997 (04/06/1997)
commenced in part by S.I. 248/1997 (09/06/1997)

11/1997 - National Cultural Institutions Act, 1997
commenced in part by S.I. 222/1997 (02/06/1997 & 01/01/1998)

12/1997 - Litter Pollution Act, 1997
commenced 01/07/1997 by S.I. 213/1997

13/1997 - Freedom of Information Act
signed 21/04/97

14/1997 - Criminal Law Act, 1997
commences 22/08/1997

15/1997 - Credit Union Act, 1997
commenced in part by S.I. 403/1997

16/1997 - Bail Act, 1997
to be commenced by.S.I.

17/1997 - Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997
signed 5.05.97

18/1997 - Family Law (miscellaneous provisions) Act,
signed 05.05.97

19/1997 - International Development Association (Amendment) Act, 1997
signed 07.05.97

20/1997 - Organisation of Working Time Act, 1997
sub-section 3 to be commenced by S.I.
remainder to commence 21/04/1998

21/1997 - Housing (Miscellaneous Provisions) Act, 1997
commenced 01/07/1997 by S.I. 247/1997

22/1997 - Finance Act, 1997
commenced in part by S.I. 313/1997

23/1997 - Fisheries (Amendment) Act
to be commenced by S.I.

24/1997 - Universities Act, 1997
commenced by S.I. 254/1997

25/1997 - Electoral Act, 1997
commenced by S.I.245/1997 & 233/1997

26/1997 - Non - Fatal Offences Against the Person Act, 1997
signed 19.05.97

27/1997 - Public Service Management (no.2) Act
commenced by S.I. 339/1997

28/1997 - Chemical Weapons Act, 1997
commenced 01/07/1997 by S.I. 269/1997

29/1997 - Local Government (Financial Provisions) Act, 1997
commenced by S.I. 263/1997 (apart from s7)

30/1997 - Youth Work Act, 1997
commenced 19/06/1997 by S.I. 260/1997

31/1997 - Prompt Payment of Accounts Act, 1997
commences 02/01/1998 by S.I. 239/1997

32/1997 - ICC Bank Act, 1997
commenced 21/05/97

33/1997 - Licensing (Combating of Drug Abuse) Act, 1997
commenced 21/06/1997

34/1997 - Hepatitis C Compensation Tribunal Act, 1997
to be commenced by S.I.

35/1997 - Registration of Title (Amendment) Act, 1997
signed 16/07/1997

36/1997 - Interperation (Amendment) Act, 1997
signed 04/11/1997

37/1997 - Merchant Shipping (Commissioners of Irish Lights) Act, 1997
commenced 18/11/1997

38/1997 - Europol Act, 1997
signed 24/11/1997
to be commenced by S.I.

39/1997 - Taxes Consolidation Act, 1997
signed 30/11/1997

40/1990 - Children Act, 1997
signed 09/12/1997

41/1997 - Transfer of Sentenced Persons (Amendment) Act, 1997
signed 17/12/1997

42/1997 - Tribunals of Inquiry (Evidence)(Amendment) Act, 1998
signed 18/12/1997

43/1997 - Courts (no.2) Act, 1997
signed 18/12/1997

44/1997 - Irish Film Board (Amendment) Act, 1997 signed18/12/1997
45/1997 - Appropriation Act, 1997 signed 19/12/1997

46/1997 - Scientific and Technological Education (Investment) Fund Act, 1997 signed 24/12/1997

Seventeenth Amendment of the Constitution Act, 1997 signed 18/11/1997

Government Bills in Progress

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

Adoption (no.2) Bill, 1996
Report - Seanad

Air Navigation and Transport (Amendment) Bill, 1997
Committee - Dail

Arbitration (International Committee) Bill, 1997
Committee - Dail

Asylum Seekers (Regularisation of Status)(no.2) Bill, 1998
1st Stage - Dail [PMB]

Central bank Bill, 1997
Report - Dail

Child Trafficking & Pornography Bill, 1997
1st Stage - Dail

Children Bill, 1996
Committee - Dail [re-introduced at this stage]

Children (Reporting of Alleged Abuse) Bill, 1998
Committee - Dail [PMB]

Court Services (no2) Bill, 1997
Report - Seanad

Criminal Justice (no.2) Bill, 1997
Committee - seanad

Door Supervisors Bill, 1997
2nd Stage - Dail [PMB]
Education (no.2) Bill, 1997
2nd stage - Dail

Eighteenth Amendment of the Constitution Bill, 1997
Committee - Dail [PMB]

Employment Equality Bill, 1997
Committee - Seanad
Employment Rights Protection Bill, 1997
2nd stage - Dail [PMB]

Family Law Bill, 1998
2nd Stage - Seanad

Finance Bill, 1998
Committee - Dail

Gas (Amendment) Bill, 1998
Seanad - 1st stage

Geneva Conventions (Amendment) Bill, 1997
Dail - 1st Stage

International War Crimes Tribunals Bills, 1997
1st stage - Dail

Jurisdiction of Courts and Enforcement of Judgments Bill, 1998
1st stage - Dail

Local Government (Planning and Development) Bill, 1997
Committee - Dail

Merchant Shipping (Miscellaneous Provisions) Bill, 1997
Committee - Dail

Minister for Arts, Heritage, Gaeltacht & the Islands (Powers & Functions) Bill, 1997
Committee - Dail

National Sports Council of Ireland Bill, 1998
1st Stage - Dail

Plant Varieties (Proprietary Rights)(Amendment) Bill, 1997
Committee - Dail

Protection of Workers (Shops)(no.2) Bill, 1997
2nd stage - Seanad

Roads (Amendment) Bill, 1997
Committee - Dail

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

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

Sexual Offenders Registration Bill, 1998
2nd Stage - Dail

Social Welfare Bill, 1998
Committee- Dail

Turf Development Bill, 1997
Committee - Dail

Abbreviations

BR - Bar Review
CLP - 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
IIPR - Irish Intellectual Property Review
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

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

The Uninsured Driver

SARA MOORHEAD, Barrister

Introduction

The law in relation to insurance of mechanically propelled vehicles in Ireland is primarily covered by the Road Traffic Act 1961 and in order to determine the situations in which the driver of such a vehicle is deemed to be insured, it is necessary at the outset to look at the relevant provisions of the Road Traffic Act 1961 as to situations of compulsory insurance.

In assessing the role of the Motor Insurer's Bureau of Ireland (MIBI) which deals primarily with claims arising out of the consequences of drivers being uninsured, it is necessary for all practitioners to know the situations in which insurance is required to enable them to assess whether a claim can be made to the MIBI.

Obligation to Insure

Section 56(1) of the Road Traffic Act 1961, provides that if a mechanically propelled vehicle is used in a public place, then liability for injury caused by the negligent use of the vehicle, must be insured by an approved Policy of Insurance. If it is not insured, then the user, or owner, are guilty of an offence.

Mechanically Propelled Vehicle

See Section 56(9) of the Road Traffic Act 1961 and SI 347/1992 at 2 and 5.

A mechanically propelled vehicle includes a semi-trailer or trailer, whether coupled or un-coupled, used in a public place.

A semi-trailer, is a drawn component of an articulated vehicle. A trailer is a vehicle attached to a mechanically propelled vehicle or a vehicle constructed or adapted for the purposes of being drawn by a mechanically propelled vehicle.

It should be noted that the use of a vehicle, includes use of a parked vehicle.

See Section 3 of the Road Traffic Act 1961.

"Public Place"

A Public Place, means any street, road or other place, to which the public have access with vehicles, whether as of right or by permission, whether subject to or free of charge.

In case law over the years, the Courts have given a very wide interpretation to the concept of a public place, and have not confined it to what the general public might consider to be a public place.

In *Stanbridge -v- Healy* [1985] ILRM page 290, Hamilton J., in determining that a laneway to a private house was not a public place, held as follows:-

> "The important part of that Statement, is his (See *Harrison -v- Hill* [1932] SC [J13]) reference to his interpretation of the words "the public" which he interprets as meaning the public generally and not a special class of members of the public, who have occasion for business or social purposes, to go to the farmhouse, or any part of the farm itself."

Hamilton J. went on to say that the people normally using Corduffstown House, were specified and any other persons would be actively discouraged and challenged from wandering in off the highway.

A wider interpretation of public place was given in more recent times in *Lynch -v- Lynch and Another*, High Court, unreported 13th October, 1995.

In this case, the Plaintiff was using her father's vehicle. She left the vehicle and it appears that due to a defective hand-brake, the vehicle moved, colliding with her and causing her severe personal injuries.

The accident happened in a car park and a question for determination by the learned High Court Judge, was whether it happened within a "public place".

At page 4 of this judgment, Judge Costello set out certain criteria that he thought, in general, could be used in determining whether a place was a "public place" or not, although he indicated that it largely depended on the facts of the case.

He held as follows:-

"(a) The obligation to insure is not limited to accidents which may occur on a street or road - an obligation to insure arises when a vehicle is used in a place other than a road and a street.

Accordingly, the fact that an accident occurs in a car park does not in itself absolve the company from liability under Section 76;

> (Please note that this was a case in which the Defendant was insured but the Insurance Company were indicating that they did not have to pay under Section 76 of the Road Traffic Act 1961 as the accident did not happen in a "public place".)

(b) The car park in which an accident occurs, may be on private property. This in itself does not absolve the company from liability. The car park will be a "public place" if it can be shown that the public has access to it with vehicles with the owner's permission;

(c) The car park will not become a "public place" merely because permission is given to allow it to be used as a short cut by persons on foot or by children for the purpose of playing games - the permission must be for "access with vehicles";

(d) The permission may be express or implied. Quite clearly, for example, the owners of a filling station give an implied permission to members of the public to enter the forecourt of the premises as do the owners of a cinema to members of the public parking their cars in a car park

provided by the cinema owners. In each case the car park is a "public place".

Judge Costello came to the conclusion, that the car park in this particular case was a "public place" in that there were no boundary walls between the factory and the roadway and there were no gates at the entrance. There were no notices restricting entry, and no gatemen were employed for those purposes. The car park was used by employees of the factory as well as suppliers and customers. Furthermore, it appeared that the factory was situated near a football ground and on a regular basis, members of the public attending football matches, parked their cars there. This case is a significant development of the concept of a "public place" and it appears to extend it far more widely than the interpretation set out in *Standbridge -v- Healy*. (See also *Richards -v- Dublin Corporation* and other Supreme Court unreported 12th June, 1996.)

Liability to Passengers - Cover required

In seeking to recover damages for personal injuries, against a vehicle that is not insured, practitioners are required to determine at the outset, whether it is a vehicle that is compulsorily insurable.

If it is not a vehicle that is compulsorily insurable, then the failure to insure means that the injured person can only claim against the uninsured driver and not against an Insurance Company or the MIBI.

The requirement to give cover is set out in Sections 56(1) (a) and (10), Section 65 (1), SI 14 of 1962 at 6 and SI 347/92 at 7.

Cover on a vehicle must include liability to passengers on that vehicle, where the vehicle is:-

(i) A Public Service Vehicle;
(ii) A vehicle constructed primarily for the carriage of one or more passengers;
(In *Cunningham -v- Thornton*, High Court unreported 21st July, 1972, it was held that where there are two constructions that could be put on the words "constructed primarily for", that in favour of the Plaintiff should succeed. The Courts have appeared to construe provisions as to excepted persons as against insurers if at all possible)
(iii) A station-wagon, estate car or other similar vehicle, constructed or adapted for alternative purposes, (including the carriage of one or more passengers) and which are fitted with seats, whether rigid, collapsible or detachable, in the area to the rear of the driver's seat.

Cover on a vehicle can exclude liability to passengers on that vehicle who are:-

(i) On any part of a vehicle, other than a large public service vehicle, unless that part is designed and constructed with seating accommodation for passengers, i.e. a fixed folding seat, permanently and securely installed in the vehicle;
(ii) Seats in a caravan attached to a vehicle, which combination of vehicles is moving in a "public place";
(iii) On a Motor Cycle, whether in a side-car or otherwise;
(iv) In or on a semi-trailer or trailer, when used in a "public place".

It should be noted that as of the 1st January, 1993, liability in respect of injury to persons on the vehicle insured, need not be insured if the vehicle is a motor cycle, van, lorry, truck, agricultural vehicle, tractor or civil engineering plant.

These persons are deemed to be excepted persons within the meaning of Section 65 of the Road Traffic Act 1961 and not required to be insured.

However, from the 31st December 1995, passenger cover must be provided on a vehicle, other than a cycle, which is designed and constructed with seating accommodation for passengers. This means that, for example, liability to passengers carried in the front seat of a van would be covered from that date.
(See SI 346/1992 at 4)

Compulsory Third Party Motor Insurance will not extend to passengers carried on vehicles not generally designed or constructed to carry passengers, e.g. Agricultural Tractors and Trailers and passengers in the rear of Goods Vehicles.
(See the Third EU Insurance Directive 90/232/EEC)

Even more importantly, from the 31st December, 1998, passenger cover must be provided on a cycle designed and constructed with seating accommodation for passengers, i.e. seating for one passenger behind the driver, or a seat in a side car, in each case, permanently and securely installed.

From those provisions, it will be seen that by the end of December ,1998, most vehicles on the public roadway, be they cars or cycles, will require to be compulsorily insured and the category of excepted persons, pursuant to Section 65 of the Road Traffic Act 1961, will have diminished considerably.

Therefore, the role of the MIBI will expand over the years as there will also be situations where if somebody has failed to insure a passenger, the MIBI will be required to compensate.

Section 76 of the Road Traffice Act 1961

In certain cases, there may be an approved policy of insurance on a motor vehicle, but for some reason the Insurance Company may repudiate liability. In those circumstances, the claimant (the injured person) still has their rights directly against the Insurance Company.

There are certain steps that must be taken by practitioners to enable them to enforce a Judgment under Section 76 of the Road Traffic Act 1961.

In pursuing a claim for personal injuries, in relation to a road traffic accident, the Solicitor will normally write an O' Byrne Letter to the Defendant. At that stage, the Solicitor may have insurance details regarding the Defendant's vehicle. In certain circumstances, the Insurance Company will indicate that they are still investigating whether the Defendant is on cover and may also indicate that there are difficulties.

In all these circumstances, it is advisable that if there is any possible doubt about the insurance cover held by

the Defendant at the time of the accident, practitioners should write to both the Insurance Company, who may cover the vehicle, and to the MIBI, who would be liable in the event that there is no insurance on the vehicle, by registered post, prior to the institution of proceedings.

If practitioners ultimately discover that there is insurance on the vehicle, but that the Insurance Company is failing to act for the Defendant because of some non-compliance with the policy, then practitioners will proceed to obtain judgment against the Defendant and then call upon the appropriate Insurance Company to pay the compensation and costs.

In default of such payment of compensation and costs, it is open to the Plaintiff to issue a Notice of Motion against the Insurance Company for Judgment.

In the alternative, upon instituting the proceedings, practitioners may become aware that there was no insurance operable at the time of the accident. In that regard, it would be necessary to add the MIBI in as a co-defendant to the proceedings.

(See below for further discussion of same)

Although it is advisable that a letter be sent to the MIBI prior to the institution of the proceedings against the Defendant, I consider that once they are notified prior to being added into the proceedings, the appropriate steps will have been taken. It should be noted that the Plaintiff will not be entitled to enforce the Judgment pursuant to Section 76 of the Road Traffic Act 1961, if the situation in which the accident occurred is not one involving compulsory insurance. For example, an Insurance Company can state that the accident did not happen in a "public place".

(See *Stanbridge -v- Healy* supra and *Lynch -v- Lynch and another*)

Vehicles which need not to be insured

Under Section 4 of the Road Traffic Act 1961, certain vehicles are not required to be insured.

These are defined as :-

(a) A vehicle owned by the State, or person using such vehicle in the course of his employment;

(b) A vehicle under seizure by a person in the service of the State, in the course of his duty or a person using such a vehicle in the course of his employment or;

(c) A member of the Garda Siochana or an Officer of any Minister, using a vehicle for the purpose of a test, removal or disposition of the vehicle in relation to the Road Traffic Act 1961 and respective regulations.

Exempted Persons

(See Sections 56, 60, 61, 68, and 69 for discussions of exempted persons)

It should be noted that exempted persons are distinct from excepted persons under Section 65 of the 1961 Act.

Exempted persons are persons covered by a particular agreement and at present are CIE, Bus Atha Cliath, Bus Eireann, Iarnrod Eireann, Telecom Eireann and Coillte Teoranta.

Under Section 78(2) of the Road Traffic Act 1961, a person shall not be an exempted person, unless there is in force an undertaking by him in terms approved of by the Minister, that he will deal with Third Party claims in respect of mechanically propelled vehicles, owned by him, on terms similar to those standing agreed from time to time between the Minister and the Bureau, in respect of the Bureau.

In this regard, these exempted persons are required to lodge certain documentation with the Accountant of the High Court, including a deposit of such amount as the Minister may specify. In essence, exempted persons, are State Sponsored Bodies, and they deal with claims in the same manner as the MIBI.

Excepted Persons

It is unnecessary to insure certain persons who are referred to as excepted persons. Sections 65(1)(a) and (1)(b) as amended of the Road Traffic Act 1961, allows an excepted person in relation to a personal injuries claim as follows:-(a) Any person claiming in respect of injury to himself sustained while he was in or on a mechanically propelled vehicle (or a vehicle drawn thereby) to which the relevant document relates, other than a mechanically propelled vehicle or vehicles forming a combination of vehicles, of a class specified for the purposes of this paragraph, by regulations made by the Minister provided that such regulations do not extend compulsory insurance for Civil Liability to passengers;

(b) Any part of a mechanically propelled vehicle, other than a large public service vehicle, unless that part of the vehicle is designed and constructed with seating accommodation for passengers; or

(c) A passenger seat in a caravan attached to a mechanically propelled vehicle, while such a combination of vehicles is moving in a public place.

In relation to an excepted person, an interesting decision in this area arose in the case of *Kenny (An Infant) -v- The Motor Insurer's Bureau of Ireland and the Minister for the Environment*, The Supreme Court unreported, 3rd April, 1995.

In this case, the Infant Plaintiff was to be found on the back of a truck which was not insured at the time of the accident. The truck was driven along for sometime with the Infant Plaintiff on the back. Subsequently, the Plaintiff was thrown off the back and a wheel then went over him after he had fallen to the ground.

The question in the case was whether the Plaintiff was an excepted person within the meaning of Section 65 subsection 2 or whether the MIBI were required to compensate him in a situation where the vehicle was not insured.

The Supreme Court held, in overturning the High Court, that the Plaintiff was not an excepted person and therefore was entitled to recover against the MIBI. Section 65(2) (b) provided that:-

> "References to injuries sustained while in or on a vehicle, include injuries sustained while, entering, getting on to, being put into or on, alighting from, or being taken out of or off the vehicle, and injury caused by being thrown out of or off the vehicle."

If the Plaintiff's injuries were caused by being thrown off the truck, then he would be an excepted person. If the injury was not caused by being thrown off the truck, he was not an excepted person.

The Court favoured the Plaintiff's Counsel's interpretation that the two steps must be divided, namely, being thrown off the truck and then the wheel going over him. In the first instance, the Plaintiff was excepted person, but that status ceased once he fell to the ground.

The Motor Insurer's Bureau of Ireland Agreetment

Under an Agreement dated the 21st December, 1988, and made between the Minister for the Environment and the Motor Insurer's Bureau of Ireland, the scope of the Bureau's liabilities extended extensively from dates specified in the Agreement with certain exceptions, for the compensation for victims of road traffic accidents involving uninsured or stolen vehicles and unidentified or untraced drivers, to the full range of compulsory insurance in respect of injury to persons and damage to property, under the Road Traffic Act 1961.

History of the Motors Insurer's Bureau of Ireland Agreement

The first Agreement was made in 1955 and amended in 1962. The MIBI was set up as an incorporated company, limited by guarantee. The 1988 Agreement, was far more extensive than that which preceded it, namely the 1964 Agreement. In relation to the 1964 Agreement, there was not a Statutory basis for compensation in relation to accidents caused by untraced or unidentified drivers. The only situation in which injured persons could recover was on an ex gratia basis.

Furthermore there was no claim allowed for property damage under the 1964 Agreement. Claims are now allowed in respect of certain property damage under the 1988 Agreement.

It must be noted from the outset, that the MIBI Agreement governs situations in which a wrongful Defendant drives a mechanically propelled vehicle in a situation in which there should have been compulsory insurance, and in which there was not.

Therefore, in advising any Clients in relation to their rights against such a Defendant, all practitioners must ask themselves, at the outset, whether the Defendant had failed to comply with the provisions in relation to compulsory insurance as set out in the Road Traffic Act 1961.

For example, at the moment, if a pillion passenger on a motor cycle seeks advice, they must be advised that if the driver of such motor cycle was not insured, and is liable for the accident, then they have no right of redress against the MIBI.

An interesting issue arises here when the motor cycle is in collision with another vehicle and the passenger, knowing the motor cycle is uninsured and has no means, chooses not to sue the driver of the motor cycle, it is open for the insured Defendant to plead Section 35 (1) of the Civil Liability Act 1961 which provides that where Plaintiff's damages were caused by concurrent wrongdoers, and the Plaintiff's claim against one wrongdoer has become barred by the Statute of Limitations or any other limitation enactment, then the Plaintiff shall be deemed to be responsible for the acts of such wrongdoer.

Thus if the insured driver is held to be 60% responsible and the uninsured driver 40% responsible, the Plaintiff will be held guilty of 40% contributory negligence for failing to sue the motor cyclist.

If, however, the motor cyclist is sued, the insured driver will ultimately end up paying 100% to the Plaintiff and will be left with a Notice of Indemnity or Contribution against an uninsured Defendant, which is worthless.

It has frequently been the case of recent time that in respect of Road Traffic Accidents, there has been an insured driver and the MIBI.

Certain decisions have taken the view, as have the MIBI, that it is incumbent on a Plaintiff to pursue the insured driver first and only if unsuccessful as against the insured driver, to seek an indemnity from the MIBI.

This would leave the Plaintiff in each case in the unfortunate position that they would be required to take an action against an insured driver and risk an Order for costs against them. Thereafter, if they did not succeed, they would be entitled to their indemnity from the MIBI.

I am of the view that the MIBI, while not liable unless the insured driver escapes liability entirely, are an appropriate co-defendant to proceedings where an allegation is made by another defendant that the actions that caused the accident were those of an unidentified or untraced vehicle.

In that regard, it also seems to be prudent for the MIBI to be present in such a case to be able to test the assertions made by the insured driver and also to be in a position to have control in respect of the quantum of awards.

In due course, if the MIBI seeks to adopt such an approach to cases, it is my opinion that such cases are going to involve double litigation arising out of one accident in that the Plaintiff will be required to run the case against the insured driver and perhaps be ultimately unsuccessful. They will then seek to pursue the MIBI and may be required to institute a second set of proceedings. This will involve two sets of costs.

I accept that the MIBI feel that there appears to be a surfeit of untraced and unidentified motor vehicles being blamed for accidents involving insured drivers which is giving rise to a plethora of actions. It may be that it is time for another change in the MIBI agreement which is to the affect that any passenger carried in an insured vehicle, should recover from the insurers of such vehicle in such a manner as akin to the strict liability provisions.

The 1988 Agreement is divided down into a number of sub-paragraphs and I propose to deal with each of them in turn, highlighting the important issues to be remembered.

PARAGRAPH 2 of the Agreement provides that-

(1) a person can make a claim to the MIBI for compensation;
(2) cite as co-defendants the MIBI in any proceedings against the owner or user of the vehicle giving rise to the claim, except where the owner

and user of the vehicle remain unidentified or untraced or;

(3) cite MIBI as sole defendant where the claimant is seeking a Court Order for the performance of the Agreement by the MIBI.

It should be noted that in relation to uninsured vehicles, the Plaintiff normally sues the owner and driver of the uninsured vehicle, together with the MIBI.

In relation to untraced or unidentified drivers, the MIBI only, is sued.

In certain circumstances, there may be a number of Defendants, some of whom are insured and some of whom are not insured.

In relation to liability, there are certain preconditions which must be complied with before the MIBI will be liable.

PARAGRAPH 3 of the Agreement governs these preconditions.

(a) Notice of Claim must be given in writing by registered post to the MIBI - not later than three years from the date of the accident giving rise to personal injuries or death;
(NB there is no provision for extension of the period of three years in the case of persons under disability)

(b) not later than one year from the date of the accident for property damage.

One question which appears not to have been addressed yet, is whether when a Plaintiff claiming for a combination of property damage and damages for personal injuries, does the lower limit of one year for property damage or the higher limit of three years for damages for personal injuries applies. I would err on the side of caution and advise that proceedings should be issued within one year or at the very least that proceedings for property damage be issued within the year and ultimately consolidated with proceedings in respect of personal injuries.

Notification of the claim by registered post is one of the most important conditions for practitioners to remember. As previously stated, that notification may not be given prior to the institution of proceedings, if the proceedings were originally instituted against the owner and driver of the vehicle only. Upon further investigation, practitioners may be advised to add the MIBI in as co-defendant or the MIBI may seek to be added in as a co-defendant.

In my opinion, they should still be notified prior to the institution of the proceedings against them, although the substantive proceedings are in being.

Paragraph 3 also provides that the claimant shall furnish the MIBI with all material information when reasonably required.

Many Insurance Companies acting on behalf of the MIBI, have taken the view that this entitles them to medical reports, prepared by the Plaintiff in contemplation of litigation. This matter was recently argued before Judge Smyth in the High Court in a case of McCormack -v- Bouileau and the MIBI.

The issue in this case was whether the Plaintiff was required to furnish all medical reports to the MIBI or simply agree to furnish medical information. The Plaintiff argued that the agreement did not require that they hand over medical reports, but simply to furnish information that would put the MIBI in the same position as any other Defendant. The Plaintiff further argued that the provisions of the MIBI agreement directing the Plaintiff to co-operate with the MIBI was to assist the MIBI to investigate, which could not extend to medical reports.

Judge Smyth held that the Plaintiff was obliged to furnish all medical reports on which he intended to rely at the hearing of the action rather than medical reports obtained.

(Please note a written Judgment is awaited in this regard)

In relation to other obligations on the claimant, it is necessary for the claimant to make such investigations as are required as to whether there was a policy of insurance operable in respect of the vehicle in question, at the time

One interesting issue that has arisen in recent times is whether there is an obligation on a claimant to ascertain the identity of an unidentified or untraced driver.

This has arisen in cases where a claimant is involved in a traffic accident, perhaps a rear end collision. Upon first viewing it appears that there is little or no damage to the vehicle, and the claimant is of the view that they have not sustained personal injuries. Discussion may well take place between the parties, in which no insurance details are exchanged.

Thereafter, the Plaintiff develops personal injuries and makes a claim against the Bureau. In certain cases of recent times, the Bureau has pleaded contributory negligence against claimants in such circumstances.

In a case of Baker -v- The Motor Insurer's Bureau and another, The Circuit Court unreported, Judge Dunne, in giving Judgment for the Plaintiff, deducted 25% contributory negligence for her failure to obtain insurance details from the other driver.

In my respectful submission, if the Motor Insurer's Bureau of Ireland wish to argue the concept of contributory negligence, they will have to amend the 1988 Agreement. The 1988 Agreement places obligations on claimants in respect of ascertaining whether there was an approved policy of insurance, but does not in any way exclude claimants who subsequently discover that they are injured.

Paragraph 3 also provides that a Judgment can be assigned to the Bureau, who can then pursue execution of the Judgment.

In the case of uninsured vehicles, the driver and owner of the uninsured vehicle may well be named as co-defendants. In that regard, the MIBI will seek co-operation from such uninsured driver and owner and ask them to sign a mandate.

There are a number of mandates that can be signed, namely, one simply allowing the MIBI to act and to compromise the proceedings, or an extended mandate which allows them to act but also agrees to reimburse them in relation to sums paid out, in the consideration of the appointment of legal advisers.

Over the years the question has been raised as to the validity of MIBI to act without such a mandate. The 1988 Agreement clearly allows them to do so. However, does a mandate which is signed by the Defendant, allowing the MIBI to act, allow the MIBI recover against such a Defendant afterwards? Furthermore, what is the position if the Defendant refuses to sign a mandate,

either allowing the MIBI to act, or agreeing to reimburse monies to them.

If an uninsured Defendant signs a mandate allowing the MIBI to act, but refused to agree anything in relation to reimbursement of monies, I think it is highly questionable whether the MIBI, having accepted such terms from the uninsured Defendant, could later seek to recover such monies from the uninsured Defendant.

The MIBI have a number of options open to them to seek to recover the monies against the uninsured Defendant. Quite clearly if the mandate is such that the uninsured agrees to reimburse monies to the MIBI then if they fail to do so, the MIBI is entitled to issue proceedings based on the mandate, stating that the uninsured Defendant agreed to the reimbursement of the monies.

It is more problematic where such a mandate does not exist.

There are two possible alternatives open to the MIBI in my opinion, namely, either:-

(a) To obtain an Assignment of the Judgment that the Plaintiff in the original proceedings obtained against the uninsured and seek to sue for any sums that they have paid out on foot of such an assignment or;

(b) to rely upon a claim in quasi-contract, where the doctrine of unjust enrichment applies.

The nature of that claim essentially is that the money has been paid by the Plaintiff to the use of and for the benefit of the Defendant. The payment must have been made either at the request of the other party, express or implied, or under compulsion. It seems to me that the MIBI is under compulsion now, pursuant to the terms of the 1988 Agreement, as they are obliged, if a Judgment remains unsatisfied against an uninsured for twenty-eight days to pay such monies. Thereafter, it seems to me that they would have a claim in quasi-contract against the uninsured for any monies paid over.

Even, if it is held that the payment by the MIBI is not a compulsory payment, merely a voluntary payment, it appears that the modern law is helpful to the MIBI in that if they can show that in the particular circumstances there was a necessity for the obligation to be assumed, then the law will grant right of reimbursement if in all the circumstances it would be just and reasonable so to do.

(See *Owen -v- Tate* [1976] Queens Bench.)

Therefore, to summarise, the MIBI can seek to recover any monies paid out by means of proceedings, either by way of Summary Summons on foot of Deed of Assignment seeking to recover monies due and owing, or in the alternative seeking declaratory relief by means of Plenary Summons, that the money was paid to the use of and for the benefit of the Defendant.

These claims have been successful in the past and I would refer to a case of *Irish Visiting Motorist's Bureau Limited -v- McNulty* [1990] 17939P in which such a claim was made, namely that the Plaintiff was due monies, the Plaintiff having paid the monies at the request of and on behalf of the Defendant, for the Defendant's benefit to Third Parties.

This was a case where the Defendant had a Plaintiff action and was to receive sums of money and ultimately Ms. Justice Carroll appointed a Receiver over such monies. No issue appears to have been made as to the rights of the IVMB to recover such monies.

(Note: I am indebted to Declan McGovern B.L. for the information in relation to the case of *IVMB -v- McNulty* and an opinion of Patrick Connolly SC regarding the validity of mandates and claims in quasi-contract.)

Satisfaction of Judgments

PARAGRAPH 4 of the 1988 Agreement provides for satisfaction of Judgments by the MIBI.

In practical terms these days, the MIBI acts as any other Insurance Company does and deals with the case by either allowing it to go to Court or settling it.

It is unusual these days for a Judgment to be obtained for a Plaintiff to have to seek execution against the MIBI.

After twenty-eight days the MIBI is obliged to satisfy the Judgment.

Excluded Claims

In certain circumstances, a claimant will be excluded.

PARAGRAPH 5 (1) provides that:-

(1) The driver or owner of a stolen vehicle or one obtained by violence, will not be entitled to recover;

(2) where the person injured or killed who sustained damage, knew or ought reasonably to have known that there was not in force an approved policy of insurance in respect of the use of the vehicle, the MIBI will not be liable.

The level of knowledge that a claimant should have has been discussed in two recent cases, namely, Kinsella -v- The Motor Insurer's Bureau of Ireland, Supreme Court unreported, 2nd April, 1993 and Cranny -v- Kelly and another, High Court, 5th April, 1996.

In the Kinsella case, the test applicable under Paragraph 5(2) was held to be not, would a reasonable person have known, but rather should a particular individual, having regard to all relevant circumstances, have known.

In this case the facts were that the Plaintiff owned a vehicle. It was at the time of the accident being driven by his aunt. It was never suggested that the Plaintiff knew that the use of the vehicle was not covered, but it was asserted that he should reasonably have known.

The Chief Justice, in determining the matter, held that the onus was on the Defendant to prove that a person claiming on foot of a Judgment in the circumstances in which the Plaintiff was claiming, either knew or should reasonably have known, that the use of the vehicle on the occasion, was not covered by insurance.

In this case, the Plaintiff knew that the use of the vehicle was not covered by his own insurance, but he believed, and it was accepted by the Court, that he believed that his aunt's driving was covered by her own policy and in evidence she agreed that she believed this to be the case. In all the circumstances, the Court held that the Plaintiff had a bona fide belief, although an incorrect one, in the fact that the driving of his aunt was covered by insurance.

This appears to give a wide interpretation to the concept of belief, with high onus on the Defendant and a subjective test as far as the Plaintiff is concerned.

See also *Curran -v- Gallagher and others*, Supreme Court, 17th May, 1997 which endorses the principles in the Kinsella case.

They reaffirm that the test to be applied was a subjective one. The Court has to consider whether the Plaintiff, having regard to all the circumstances, knew or should have known, that the use of the vehicle was not covered. It is also for the Court to consider whether the attitude and conduct of the Plaintiff at the time was blameworthy in so far as the actions of the Plaintiff condoned the commission of an offence. The onus of proving that the Plaintiff knew or should have known that the driver had no insurance, rests with the MIBI.

In the Cranny case the Plaintiff was the husband of the deceased and the case was concerned with whether the deceased had knowledge that the First Named Defendant was not insured to drive a vehicle.

Judge Lavan held, applying the principle in the Kinsella case, the deceased must reasonably have known that the vehicle was not insured and therefore the Plaintiff was precluded from recovering. It should be noted that when one uninsured vehicle is in collision with another uninsured vehicle, the MIBI does not participate.

In Pierse in *Road Traffic Law 2nd Edition* [1995] at page 567 he states as follow-

> "One must wonder about the fairness of this. A motorist who, for example, is innocent of the fact that he is driving an uninsured vehicle, is seriously injured by another uninsured vehicle, e.g. joy rider. Under the 1988 agreement, clause 5(3), he gets nothing. Presumably this subclause will be challenged at some stage. This challenge may be in the European Courts on the basis that clause 5(3) does not accord with Directive 84/5/EEC." (See Art 1. Clause 4 as amended by directive 90/323/EEC)

Another point to note here is that where passengers are carried in a vehicle which they know to be uninsured, which is in collision with another uninsured vehicle and one of the drivers of one of the uninsured vehicle is ultimately held to be negligent, the passengers being carried in the other uninsured vehicle of the blameless driver, will be entitled to recover against the MIBI.

It should be noted that the MIBI have additional grounds for refusal as follows:-

(1) That the Plaintiff was negligent or guilty of contributory negligence and all legal defences are open to the MIBI;
Where Judgment has been obtained in Default of Appearance or Defence as against an uninsured driver, the question then arises as to whether MIBI are entitled to mount a full defence to the proceedings, or whether the matter should be treated as an assessment.

In *Gurtner -v- Circuit* [1968] All England Reports page 328, it was held that the MIBI Agreement, although it created solely Third Party benefits, and was outside the doctrine of privity of contract, conferred rights.

(2) that wrong procedures have been followed;

(3) that the claimant is not an insured person and is perhaps an excepted person

(See Section 65 of the Road Traffic Act 1961 and also see Kenny Case for discussion of same)

Damage to Property

PARAGRAPH 7

Liability in respect of damage to property is covered in Paragraph 7 of the 1988 Agreement.

The key features are as follows:-

(1) The Bureau is not liable for damage to property occurring before the 31st December, 1992.

(2) The Bureau is not liable for damage to property caused by a vehicle the owner or user of which remains unidentified or untraced.
(This remains the position and is to be contrasted with entitlement to recover property damage where the vehicle is uninsured)

(3) The amount of the Bureau's liability for damage to property will not exceed the minimum cover required by the Road Traffic Act 1961, Section 56(2)(a) applying at the accident date.
(Since 31st December, 1990 [£80,000] See *Bus Eireann/Irish Bus -v- Insurance Corporation of Ireland*, High Court unreported May 1994 for a discussion of this issue where the limit was £1,000)

(4) In the case of an accident occurring on or after the 31st December, 1992, and the 30th December, 1995, inclusive, the Bureau's liability does not extend to the first £1,150 of damage to property suffered by any one property owner.

(5) In the case of an accident occurring after the 31st December, 1995, the Bureau's liability will not extend to-
(a) the first £175.00 of damage suffered by any one property owner caused by a stolen vehicle or when taken without the owner's consent;
(b) the first £350.00 of damage suffered by any one property owner caused by other uninsured vehicles;

Period of Agreement

The Agreement can be determined by the Minister for the Environment or by the MIBI on two years' notice.

In practical terms, all Insurance Companies within the State are members of the MIBI. In circumstances where the vehicle may have been insured for certain purposes but not the subject matter of the proceedings in question, normally the Insurance Company who would have insured the vehicle, handle the claim on behalf of the Bureau.

In other circumstances, the MIBI allocates the claims to each of the Insurance Companies.

PARAGRAPH 9 of the Agreement provides that all sums paid by an Insurer on behalf of the MIBI, towards discharge of liability of its policyholders shall be recoverable by it or by the MIBI from the policyholder.

PARAGRAPH 10 deals with Offers in Satisfaction.
In essence, this is akin to the tender or lodgement procedure, applicable in the Circuit and High Court.

It is open to the MIBI to make an offer. That offer can be in writing upon notification of a claim. If that offer is not accepted and the claimant gets less, then the normal rules in relation to costs and lodgements apply.

In practice these days, the MIBI appear to make lodgements with their Defences, or thereafter in the same manner as other Insurance Companies.

PARAGRAPH 11 deals with State Vehicles and Exempted Persons.
These have been discussed above. State Vehicles and Exempted Persons are only covered by the MIBI as long there is in force an approved policy of insurance in operation.

However, as previously stated, these parties are excluded from having to have an approved policy of insurance and in circumstances where that exclusion operates, they handle their own claims.
(See further Section 78 of the Road Traffic Act 1961)

Driving with or without consent

The provisions of the Road Traffic Act Section 1961 and the role of the MIBI and the role of Leasing Companies.

An interesting issue that has arisen in discussion in recent times is the interpretation of Section 118 of the Road Traffic Act 1961 in circumstances where a driver of a mechanically propelled vehicle has been uninsured at the time of an accident.

In certain cases of recent times, the Plaintiff has sued the MIBI. The MIBI has brought in the Leasing Company into the proceedings, as a Third Party and the issue has been raised as to whether the Leasing Company could be liable in lieu of MIBI.

In the Supreme Court Judgement of *Homan -v- Kiernan and Lombard and Ulster Bank Limited* [1997] 1 ILRM at page 384, the issue was considered.
Section 118 of the Road Traffic Act 1961, provides that:-

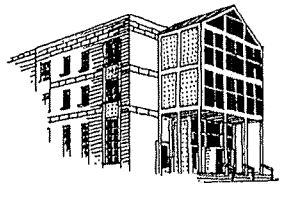
> "Where a person (in this section referred to as the user) uses a mechanically propelled vehicle with the consent of the owner of the vehicle, the user shall, for the purposes of determining the liability or non-liability of the owner for injury caused by the negligent use of the vehicle by the user, and for the purposes of determining the liability or non-liability of any other person for injury to the vehicle or persons or property therein caused by negligence occurring while the vehicle is being used by the user, be deemed to use the vehicle as the servant of the owner, but only in so far as the user acts in accordance with the terms of such consent."

In this case, the First Named Defendant had leased a vehicle from the Second Named Defendant. The First Named Defendant was obliged under the terms of the lease to insure the vehicle. He did not insure the vehicle and was involved in a road traffic accident with the Plaintiff.

The question to be determined in this case as it was in others, was whether the finance company was liable or whether it was deemed to be a situation of non-insurance.

The Supreme Court held that the finance company were liable in that they had given consent to the First Named Defendant to drive the vehicle and that the failure to have the truck insured did not vitiate the consent that had been given.

In particular, it appears that they made a policy decision that it would cause great hardship to the general public if leasing companies could let out vehicles on the road as owners and yet be in a position to say that the driving of the vehicle was not with their consent, because no insurance had been obtained. They considered it to be against the policy of Section 118 of the Road Traffic Act 1961.



Therefore, practitioners are now required to have further regard in their preliminary investigations as to whether the driver of the vehicle is the true owner and whether the vehicle is subject to a leasing agreement.

If the vehicle is subject to a leasing agreement, and the vehicle is uninsured, then it may be that the leasing company will be liable. It will depend on the terms of the leasing agreement, providing that insurance should be obtained but one would presume that most standard leasing agreements would involve such provision.

It should also be noted that this decision is at variance with the earlier decision of the High Court, *Fairbrother -v- The Motor Insurer's Bureau of Ireland and others* [1995] Irish Reports at page 581. In similar circumstances, Judge Barron held that the vehicle was not being driven with the consent of the Finance Company.

Foreign vehicles or Irish registered vehicles abroad

In respect of damage done by visiting motorists, the MIBI deals with claims in these types of cases in the same circumstances.

They also deal with accidents caused by Irish registered vehicles abroad.

This has all come about because of the EU directives in relation to insurance against civil liability in respect of the use of motor vehicles.

The current regulations applicable are the Mechanically Propelled Vehicles (International Circulation) Orders 1992.

Under Article 8 of the Orders, a Green Card system operates. It provides an international motor insurance card, which is deemed to be a Certificate of Insurance within the meaning of Part 6 of the 1961 Act and is deemed to be issued to the insured named thereon.

The MIBI is deemed to be the vehicle's insurer. This system is operated by the MIBI and corresponding bodies in the EU and elsewhere.

The Green Card is issued by the Vehicle's insurance company and covers drivers on visits to other countries in the scheme. •

The Scope of Article 30

BRIAN KENNEDY, Barrister

Introduction

Article 30 of the Treaty of Rome prohibits no fiscal restrictions on the import of goods which hinder trade between member states. The prohibition has been interpreted widely to encompass matters as diverse as the German Beer Purity Law[1] and English legislation preventing the importation of pornography.[2] While Article 30 clearly applies to measures restricting the free movement of goods which are taken by member states, the extent of its application to private individuals is less straightforward. The recent judgment of the European Court of Justice ("the ECJ") in *Commission -v- France*[3], however, threw some light on the issue. This article considers the scope of Article 30 in the light of the judgment.

Application of Article 30 to Individuals

Article 30 provides that:- "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States."

To date, the ECJ has never directly considered whether Article 30 applies to measures taken by individuals.

However, provisions analogous to Article 30 have been found by the ECJ to apply to the acts of private parties. In *Walrave -v- Union Cycliste Internationale*[4], the Court of Justice held that Article 48, which covers the free movement of workers, and Article 59 which provides for the free provision of services, were applicable not only to public authorities but also to "rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services". Accordingly, the rules of a sporting organisation were subject to EC law.

Similarly, in *Defrenne -v- SABENA* (No. 2)[5], the ECJ held that Article 119, which requires member states to ensure that men and women obtain equal pay for equal work, applies to collective and individual contracts of employment as well as to public acts.

However, there appears to be a key distinction between these Articles and Article 30. If the ECJ had not applied Articles 48 and 59 to the acts of private parties, the Articles in question would have been deprived of much of their force since most employment and provision of services occurs within the private sector. In contrast, most measures prohibited under Article 30 emanate from the actions of member state governments.

In addition, restrictions on inter-state trade caused by private parties may be caught by the competition rules of the Treaty (Articles 85 and 86). Indeed, if the prohibition of Article 30 were to be construed to apply to all measures adopted by private parties restricting inter-state trade, then Article 30 would have an even broader reach than both Articles 85 and 86, and would render them entirely superfluous. It would be far-fetched to hold that a private person with no dominant position acting alone would breach Article 30 if he chose not to purchase imported goods. It would also be very difficult for private parties to derogate from the free movement of goods as the derogations allowed for in Article 36, such as public policy, morality and security, relate mainly to member states' policies.

In *Van de Haar*[6], the ECJ made a number of *obiter* comments which appear to have clarified the issue. The Court was asked to explain the relationship between Articles 30 and 85. It stated that while "Article 85 belongs to the rules on competition which are addressed to undertakings and associations... "Article 30, on the other hand, belongs to the rules which seek to ensure the free movement of goods and, to that end, to eliminate measures taken by Member States which might in any way impede such free movement."

A similar issue arose for consideration in the recent Irish case of *Hinde Livestock Exports Ltd. v. Pandoro*[7]. The defendant company transported livestock by ferry from Rosslare to Cherbourg, the only route for transportation to continental Europe. In June 1997, it decided to reduce considerably its service and to carry only livestock intended for breeding purposes, following protests from animal welfare campaigners and adverse publicity. The plaintiff exporters sought an interlocutory injunction to compel the defendant to continue to provide the export service.

The plaintiffs relied, *inter alia*, on Article 34, which applies to quantitative restrictions on exports and is phrased identically to Article 30, claiming that its application extended to measures taken by private individuals. In the High Court, Costello P., dismissing the claim, held that the plaintiffs had not made out a fair question that Article 34 applied to such a situation. He stated that:-

> "Article 34, it seems to me, refers to national measures. It refers to measures taken by the State or by the State authorities..."

In the Supreme Court, O'Flaherty J.,

delivering the majority judgment, decided the case on other grounds and left the issue open.

Commission -v- France

While Article 30 may thus apply solely to measures taken by member states, the recent judgment of the ECJ in *Commission -v- France* makes it clear that such measures may still relate to the acts of private parties.

The Commission instituted Article 169 proceedings against France, arising out of its continuing failure to take all necessary and proportionate measures to prevent restrictions to the free movement of goods which resulted from protests by French farmers against the importation of agricultural products from other member states. Evidence was given of the interception of lorries and the destruction of their loads, violence against lorry drivers, threats against French supermarkets selling imported agricultural produce and damage to imported products when on display in shops.

The ECJ held that Article 30 does not merely prohibit measures emanating from the State which in themselves restrict trade but also applies where a member state abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State. It noted that a failure by a member state to take adequate measures to prevent obstacles created by private individuals is just as likely to obstruct trade as a positive act.

In so ruling, the ECJ relied on Article 5, which requires member states to take all appropriate measures to ensure fulfilment of their obligations arising out of the Treaty. It accepted that member states enjoy a margin of discretion in determining the measures which are most appropriate to eliminate barriers to the importation of products in a given situation but that the ECJ, taking due account of this discretion, must verify whether the member state had adopted appropriate measures under Article 5.

The ECJ noted that when some incidents of violence and vandalism occurred, the French police were either not present on the spot, despite warnings, or did not intervene, even where they far outnumbered the perpetrators of the disturbances. Only a very small number of the persons who participated in serious breaches of public order were identified and prosecuted.

In the circumstances, the ECJ held that having regard to the frequency and seriousness of the incidents involved, the measures adopted by the French government were manifestly inadequate to ensure free trade in agricultural products, on the basis that it had failed to dissuade the perpetrators of the offences from committing and repeating them. The events had also created a climate of insecurity which had a deterrent effect on trade flows. It noted that France had adduced no concrete evidence proving the existence of a danger to public order which would justify the measures under Article 36.

Accordingly, it held that France had infringed Article 30, in conjunction with Article 5, on the ground that it had failed to adopt all necessary and proportionate measures to prevent the obstruction of the free movement of fruit and vegetables by private individuals. This duty to adopt measures is a new principle of EC law.

The International Trader's Ferry Case

In the application of this new principle, the interpretation of the precise "necessary and proportionate measures" which a member state is obliged to take will be crucial. Interestingly, in advance of the judgment, the English Court of Appeal had been faced with a similar problem in relation to Article 34.

In *R -v- Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.*[8], a company attempted to transport livestock across the English Channel but was prevented by a large number of animal rights protesters. The local police mounted an operation to police the lorries through the port, which involved large expenditure. After a number of months, the local chief constable sought to restrict police services at the port to twice weekly movements, on the basis that the resources utilised at the port were significantly affecting his ability to deliver policing services efficiently and effectively in other areas of the community. The company sought to quash this decision, alleging, inter alia, a breach of Article 34.

The Divisional Court held that the decision contravened Article 34 as it was equivalent to a quantitative restriction on exports which could not be justified under Article 36 as the chief constable had made no effort to increase the financial resources available to him and was therefore unable to prove that he had inadequate resources to police the port on a regular basis.

On appeal, however, the Court of Appeal held that the decision could be justified under Article 36. It stated that the chief constable had acted under an obligation to use his available resources to police the area as well as he could and that had he not made such a decision, the burden on the local police force would clearly have exceeded what would reasonably be required. The Court considered that the chief constable had struck a balance which was reasonable and proportionate in considering the company's right to export, the protesters' right to protest peacefully and the right of the residents of the area to protection from crime.

Commission Legislative Proposals

The duty of member states to take measures in relation to the acts of private individuals is also the subject of draft legislation. At the European Council of Amsterdam in June 1997, the Commission was asked to submit proposals on "the means of guaranteeing in an effective manner the free movement of goods". In response, the Commission proposed a regulation which would enable it to intervene in specific situations to restore the free movement of goods.[9]

The regulation would apply to a situation where obstacles to the free movement of goods arose which could cause serious disruption to the proper operation of the internal market, including where action was taken by private individuals and the member state failed to take necessary and proportionate measures available to it to safeguard free movement. The obstacles would have to be of such a nature as to cause serious loss to the individuals affected and to require immediate action to prevent this loss from increasing.

In such a situation, the Commission would be entitled to request the member state, by means of a mandatory decision, to take the measures necessary to remove these obstacles. If the member state did not comply with the decision within a set deadline, the Commission could take the member state to the ECJ under Article 169. The binding nature of the decision would facilitate actions by private individuals who had suffered injury before national courts to seek an injunction to remove the obstacle to free movement and/or to seek damages for injury suffered.

Conclusion

While it appears unlikely that the ECJ will apply Article 30 to measures taken by private parties, as was argued by the plaintiffs in *Hinde Livestock Exports Ltd. -v- Pandoro*, the judgment in *Commission -v- France* suggests that the application of Article 30 in conjunction with Article 5 has the result that a member state may be liable under Article 30 where they fail to take necessary and appropriate measures to prevent the free movement of goods from being obstructed by actions of private individuals. The proposed regulation will improve the Commission's ability to act quickly to prevent infringements by member states.

In the light of this new principle, it has been suggested[10] that privately run campaigns to promote the purchase of national goods, such as the Buy Irish campaign, may be contrary to Article 30, on the basis that such discriminatory advertising creates a barrier to trade. It is unclear whether the ECJ would support so broad an application of the principle or whether it will confine it to situations where illegality has occurred, such as the protests and acts of vandalism and violence in *Commission -v- France*. The precise nature of the actions of private individuals which member states are obliged to prevent and the measures which they are obliged to take to ensure this prevention both remain to be clarified. ●

1 Case 178/84 *Commission v. Germany* [1987] ECR 1227
2 Case 121/85 *Conegate v. Customs and Excise Commissioners* [1986] ECR 1007
3 Case C-265/95 *Commission v. France*, judgment of the Court of Justice of 9 December, 1997
4 Case 36/74 *Walrave v. Union Cycliste Internationale* [1974] ECR 1405
5 Case 43/75 *Defrenne v. SABENA (No. 2)* [1976] ECR 455
6 Cases 177 & 178/82 *Van de Haar* [1984] ECR 1797
7 High Court, Costello P., unreported, 1 August, 1997; Supreme Court, unreported, 18 December, 1997
8 [1997] 2 All ER 65
9 COM(97) 619 final (97/0330 (CNS)). For more detailed analysis of the proposal, see Handoll, "*Free Movement of Goods: State Responsibility for Private Obstacles*", forthcoming
10 See Quigley, "*Buy Irish Campaign may infringe EU law*" (1998) Gazette, Jan-Feb 4.

Official opening of the Distillery Building

Friday, March 20th saw the official opening of the new Distillery Building by An Taoiseach, Bertie Ahern. The main speakers were John MacMenamin, Chairman of the Bar Council, the Chief Justice, Mr Liam Hamilton and the Most Junior Member of the Bar, Philip Sheehan. Amongst the guests were members of the Bar from Scotland, England and France, members of the judiciary, legal practitioners and media.

Following a tour of the building, the Taoiseach commented on the need for projects of this type which incorporate older structures in modern developments and revitalise the local community. The new complex provides rooms for over 175 barristers and includes a state of the art legal research centre which is open on a 24 hour basis. In addition there is general seating and library space for barristers, to help alleviate overcrowding in the library in the Four Courts.

It also includes Ireland's first international Arbitration Centre with simultaneous translation services and electronic communications to facilitate international arbitrations.

Chief Justice, Mr Justice Liam Hamilton and An Taoiseach, Mr Bertie Ahern, TD

An Taoiseach Mr Bertie Ahern, TD and Michael Durack, SC, Bar Council Treasurer

An Taoiseach meeting the library staff

Seamus McKenna, SC & Mr Justice Dermot Sheridan

Speeches at the Opening

John MacMenamin, SC, Chairman of the Bar Council, An Taoiseach, Mr Bertie Ahern, TD & Philip Sheehan, Most Junior Member of the Bar

Overview of the Building

Eoin Fannon, Patricia Moran & Michael Dowell

Will the Mac become the next Betamax?

GREG KENNEDY, Information Technology Executive

Where it all started

Apple Computers, founded by Steve Jobs and Steve Wozniak in the mid-seventies, released the first real 'Personal Computer', the Apple I. It received a warm reception by the 'tinkering' community i.e. engineers, electronics buffs, accountants looking for ways to ease or automate their work. The public in general still thought a PC was a police constable and were no more interested in computers than I am in the minutes of the meetings of the Peanut Growers Association of America.

However, it wasn't until the release of the Apple Macintosh several years later that Apple began working its way onto the desktops of general business users. The Macintosh (Mac) sported a previously unheard of concept called a Graphical User Interface (GUI) with heavy emphasis on ease of use. It was the only PC at its time to use the now familiar mouse, icons, sound and quality graphics which we expect in a PC today. And this was, and still is, its forte.

Specifically because of its graphics capabilities the Mac became popular with graphic artists and publishers. Its ease of use was its main factor in being chosen by many schools as their computer of choice.

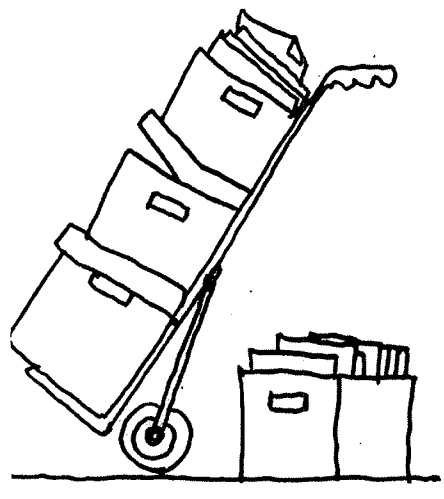
Then came IBM

The rest of the fledgling computer industry wasn't lying idle while Apple were toasting their success. In 1982 IBM released its IBM PC computer which, although only using a text based interface, took the computer and business community by storm. That text based interface was called the "Disk Operating System" or DOS and was developed by a little known company at the time, called Microsoft.

Despite its lack of finesse the PC had one thing the Mac didn't; expandability. The Mac came as a complete package with everything built in. If you needed to add functionality to it you had to buy a new machine with that capability. Not so with the IBM PC.

The PC came as a basic machine and you added parts as you needed the functions in exactly the same way we do today. If you wanted sound, you added a sound card. If you wanted more disk space, you added another disk drive.

Because of this arrangement the PC was much cheaper than the Mac. For cost conscious business this was the key factor. Despite the difficult interface to master on the PC, the cost saving on hardware far out-weighed the cost of sending their employees on an extra couple of days training.



So what's the difference besides money?

The early computer industry was stuck with the problem of incompatibility. The PC didn't run Mac programs and vice versa. This was down to the different microchips used to build them. The PC used chips by the Intel Corporation, the Mac used chips by Motorola and they just didn't speak the same language. The other problem was application support. There was no point in buying a computer unless you had a program to run on it. Because more people could afford a PC, the applications that came out at the time were targeted towards the PC market. Many companies couldn't go to the expense of re-writing their applications to run on the Mac. Another key difference between the Mac and the PC was that Apple didn't allow anyone else to make the parts inside their machine for them. IBM and its PC could take parts from many different companies so long as they were PC compatible. Again, economies of scale came into affect and drove the prices of PC components down.

And so we come to the analogy of the VHS standard versus Betamax. In a similar situation VHS video recorders were much cheaper despite the fact that Betamax was technically better. So market forces ruled in favour of VHS.

This was the unfortunate quagmire that Apple found themselves in for the second half of the nineteen-eighties and early part of the nineties. They had a technically brilliant product but were pricing themselves out of the market.

The Macintosh had devoted fans due to the fact that Apple billed the Mac as 'your' machine and indeed many of the advancements in the Mac were as a result of user requests. Mac users had a sense of involvement with their beloved machine as opposed to the box of arcane black magic in which lived the dark forces of evil, which was the PC's persona (and still is).

Apple continued to sell Macs but nowhere near the scale of PCs. It easily held its own in the markets that had taken it to their hearts initially but found it difficult to break into the business market where the PC was quickly gaining ground with applications like Lotus 1-2-3 or WordPerfect. It is ironic that, at the time, most of the features seen in the PC had been a standard in the Mac three or four years earlier. This situation continues today.

Then Came Microsoft

The release of Microsoft Windows Graphical User Interface (GUI) for the PC came close to sealing the fate of Apple. With the advent of Windows the Mac no longer held the ease of use badge on its own. With the new graphical PC environment came truly excellent packages that just weren't available on the Mac. Microsoft's Word and Excel packages effectively sealed off the business market from Apple (and quite a few other companies in the PC software market as well)

While Microsoft were steamrolling the whole industry with their products. an old piece of technology with a new face reared its head. The Internet, initially developed by the US Military in the 70's, got a face lift in 1992 with the development of a GUI called the World Wide Web. This catapulted the Internet to its current status as the new global communications medium. Along with the Internet came a concept called the Network Computer.

The Internet works on the principle of a low powered computer getting all its information from a central server. The idea of building a computer specifically for accessing the Internet rather than a general purpose PC attracted quite a lot of attention, mostly by accountants. The Network Computer was touted as a low cost machine with little hard disk space and very little memory, the central computer was the machine that would do all the work.

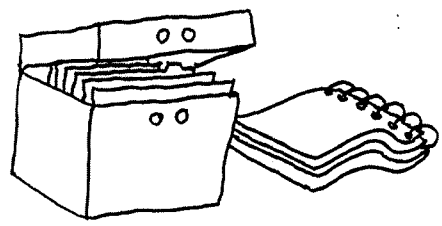
This idea looked like it might actually take off until Microsoft decided that it wouldn't sit well with their power hungry Office suite.

Microsoft again?

Strangely, the threat of the network computer may be Apples saving grace. Microsoft is fighting to keep the PC as the dominant desktop machine. Because of this they are trying to garner support from the other desktop manufacturers, in this case Apple, to keep the NC out of the picture.

Despite the fact that Microsoft stopped any new application development of its products on the Mac several years ago, in August 1997 Microsoft announced it would start developing for the Mac again with the release of its Office 98 productivity suite and Internet Explorer. Microsoft even invested a much needed $150m in Apple.

Since its heyday in the early eighties there have been some significant changes in Apple's Macintosh. The chip used to build the machine has been changed to the PowerPC chipset and the Mac was re-badged as the PowerMac. A change which made the machine nearly two or three times faster than the PC, thus making it even more attractive to the graphics community, speed being the life-blood of any graphics application.



Apple's GUI called MacOS has been licensed to other companies in the hope that it will be successful on the PC and draw people back to its true home, the Mac.

The issue of running PC applications on the Macintosh has been solved to a certain extent. Given that the PowerMac is so fast there are applications which can emulate the functions of a PC. Thus, we have products like 'VirtualPC' which allow the running of PC applications on the PowerMac. Again, there are compatibility issues. Many of the mainstream applications work in this environment, but when you stray from these products subtle problems start to appear.

Another, if more expensive, solution is the 'PC Compatibility Card'. This is essentially a PC on an extra circuit board added to the PowerMac. Given that the PC Compatibility Card is almost as expensive as a new PC I can't think of a reason not to buy a PC in the first place.

Who will win?

Although the tale of Apple and their Macintosh has been a troubled one there seems to be a new period of positive growth coming for Apple. I for one would have liked to see the Mac win out over the PC. It is an excellent tool to work with and had it won I think people would have more readily accepted computers as easy to use tools rather than the mistrusted error prone machinery they are seen as today. Perhaps Apples new found friendship with its old rival Microsoft may bring new found expansion. ●

Other sources

Apple Computers
http://www.apple.com
Microsoft Corporation
http://www.microsoft.com
Sun Microsystems (Network Computer)
http://www.sun.com
Byte Magazine (25 years in publication including blow by blow battle of the Mac)
http://www.byte.com

CONSUMER CREDIT LAW

by Timothy C. Bird,
Roundhall, Sweet & Maxwell, £98.00

As with many of the legislative measures in the area of commercial law, the Consumer Credit Act, 1995 ("the 1995 Act"), which came into effect on the 13th May, 1996, resulted from legislative initiatives at E.U. level, in this case, E.U. Directive 87/102 as amended by E.U. Directive 90/88 which deals with the approximation of the laws, regulations and administrative provisions of Member States relating to consumer credit. The scope of the 1995 Act is not however confined to the stated objects of these E.U. Directives. The Oireachtas has used the occasion of compliance with its obligation under these Directives to introduce extensive reforms to what may be broadly described as consumer legislation. The 1995 Act repeals the Moneylenders Acts 1900 to 1989, the Hire Purchase Acts 1946 to 1980, and amends certain provisions of the Pawnbrokers Act 1964, the Consumer Protection Act, 1978, the Sale of Goods and Supply of Services Act, 1980 and the Central Bank Act, 1989. The 1995 Act therefore represents an important consolidating and reforming legislative measure in the area of Irish consumer law.

The intimate relationship between the consumer and commercial activity is reflected in the extensive regulatory reach of the 1995 Act which deals with a diverse range of matters including consumer credit agreements, consumer hire purchase agreements, sale agreements, money lending agreements, credit and mortgage intermediaries, charges by credit institutions, housing loans, pawn brokering and data protection as it relates to consumer transactions. It is particularly apt that such an important reforming measure should receive the detailed consideration of an expert from the Office of the Director of Consumer Affairs. *Consumer Credit Law* by Mr Timothy Bird is the first publication dealing with the legislative objectives and changes introduced by the 1995 Act. The author has produced in this publication, which runs to 682 pages, a detailed, lucid and authoritative analysis of the 1995 Act. The publication benefits from a collaborative approach in which the author liaised with academics, officials from the Department of Enterprise, Trade and Employment, private legal practitioners and officials from the Central Bank and the Office of Consumer Affairs.

The author's ease with his subject is reflected in the intelligible format of the text and lucid writing style all of which serve to command and retain the interest of the reader who would otherwise be intimidated by the sheer volume and technical content of the provisions of the 1995 Act. While the author deals with each section of the 156 sections of the 1995 Act, the publication is much more than an annotated commentary of the 1995 Act. The author's objective is not to give a conceptual analysis of the 1995 Act but to explain and inform the reader of the principles and rules underpinning the 1995 Act. In this connection, the introduction to the publication contains a very helpful and brief summary of the later chapters. This is a very useful aid and encouragement to the reader who might otherwise be discouraged by this weighty publication.

The author helpfully prefaces his detailed consideration of the 1995 Act by explaining that the principal purpose of the Act is to provide the consumer with a sufficient level of information so that he is fully aware of the contractual commitments and obligations which he undertakes in entering into any of the agreements to which the 1995 Act applies. It is helpful for the reader to keep this basic objective of the 1995 Act in mind when reading the author's analysis of the more technical provisions of the 1995 Act such as those dealing with annual percentage charges (APRs). The 'consumer information' objective of the 1995 Act is essentially achieved through the twin obligations of disclosure and transparency. These twin obligations are emphasized and re-emphasized by the author in his treatment of the various agreements which are regulated by the 1995 Act.

While it is not possible in the context of a book review to give detailed consideration to many of the reforms introduced by the 1995 Act, it is perhaps worth noting the enhanced role given to the Director of Consumer Affairs ("the Director") under the Act. The Director is vested with a new regulatory function which casts him in a 'watchdog' role. In particular, the Director is obliged under the 1995 Act to keep under general review the terms and conditions of services provided to customers of credit institutions. It is interesting to note that the Director is already availing of this new power to investigate the recent acknowledged unauthorized bank charges levied on customers' accounts by certain branches of National Irish Bank. Further to this newly acquired power, the Director is also empowered to require persons to furnish him, or his authorized officers, with information or records, relevant to an investigation, and to require such individuals as he may deem necessary to attend before him for the purpose of facilitating any such investigation. As the author notes, this latter power to summon witnesses is an important addition to the functions of the Director who had no such power under the Consumer Information Act, 1978 or other relevant legislation. In addition to the Director's more potent investigatory role, the Director may also publish codes of practice in respect of credit agreements, and where necessary, direct financial institutions or lenders to withdraw or modify advertising in relation to offers of financial accommodation. In addition to the author's comprehensive treatment of the provisions of the 1995 Act, the author has also included within the publication two appendices which respectively contain a very useful commentary on the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, and the Schedules to the 1995 Act.

It is customary for the reviewer of a new publication to make some suggestions in relation to improvements

which may be made to future editions of the publication. In this connection, I make two suggestions. A loose leaf format of this very worthy publication should be considered for future editions so that new developments in this ever burgeoning area of law may be incorporated at minimal cost to the consumer. The table of cases in the publication which is very helpfully segregated into Irish and English authorities does not entirely compliment the author's comprehensive treatment of his subject. By way of an example, the author's treatment of the contractual condition of merchantability while impressive does not refer to the important authorities of *Lutton v Saville Tractors Limited* (1986) N.I. 327, *Berstein v Pamson Motors (Golders Green) Limited* (1987) 2AllER 220, *Rogers v Parish (Scarborough) Limited* (1987) 2AllER 232 and *Shine v General Guarantee Corp* (1988) 1 AllER 911. These suggestions apart, *Consumer Credit Law* is a standard-setting publication which will prove indispensable to all those who express an interest or claim an expertise in consumer credit law.

— Eamon Marray, Barrister.

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IRISH LAND LAW *(3rd Edition)*
by J.C.W. Wylie, Butterworths, £85.00

When I was very young, there was no modern Irish Land Law textbook. Then there was Wylie's *Irish Land Law*. After that first edition in 1975 there was a supplement (1975-80) and they were both replaced by a second edition in 1986. There were, however, no rival works with which to compare Wylie's. Now we have Andrew Lyall's *Land Law in Ireland* and Paul Coughlan's *Property Law* as well. Would we break our by now well established habit of checking to see if the answer to our problem was to be found in Wylie? One reason for using Lyall or Coughlan was simple - these works were more recently published. With the publication of the third edition of Wylie's *Land Law* there is no excuse for postponing a reassessment of this book.

In fact, neither Lyall nor Coughlan replace Wylie's comprehensive treatment of Land Law in the Republic of Ireland and Northern Ireland. Professor Wylie resisted the temptation to re-write so that the work appears familiar to it's accustomed users. He has instead revised or extended the existing paragraphs. It is not only in areas where there have been legislative changes (for example, the Powers of Attorney Act, 1996) that the text has to be read again. A curious person might like to look at paragraph 4.081 in the second edition and then turn to the new one. An even more curious person would also read page 202 of Lyall's book.

This third edition, however, is not without fault. The cover remains attached to the text of my copy of the previous edition, but I am sorry to say that text and cover of the new one have already separated. The work is in danger of becoming an unmanageable size and certainly needs to be better bound. From the point of view of a lawyer in the Republic of Ireland, one obvious way of slimming down the volume would be to remove the references to the law in Northern Ireland, but that would be selfish. There is no alternative work devoted to Land Law north of the Border. Not only that but on occasion it is helpful to compare the law in the two jurisdictions. This pastime looks like becoming a frustrating one. It is obvious that the Land Law Working Group in northern Ireland has found a more receptive audience for it's reports than our own Law Reform Commission. In addition to the Wills and Administration Proceedings (NI) Order 1994, there is now the Property (NI) Order 1997. You can find out about them in the third edition but you will not find out about two recent changes in this jurisdiction. First of all, no reference is made to section 46 of the Family Law (Divorce) Act, 1996 which reduces the time limit for making an application under section 117 of the Succession Act, 1965 to six months from the taking out of representation to a deceased's estate. Secondly, section 6 of the Family Law (Miscellaneous provisions) Act, 1997 is not mentioned whereby section 72A is added to the Succession Act, 1965 to resolve doubts about the effect of a disclaimer on an intestacy and establish that the disclaimed estate does not then pass to the State as ultimate intestate successor but to the appropriate next-of-kin.

Faults and all, this is still an essential tome for every lawyer's library.

— Deborah H. Wheeler, Barrister

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BUILDING AND THE LAW
by David Keane,
The Royal Institute of Architects, £35.00

This is the third edition of this book, which was first published in 1993, and a very elegantly designed and laid out book it is too. The elegance of the design is matched by the clarity of David Keane's approach to the subject, or perhaps I should say, the subjects, because he deals in one small volume of some 240 pages, with planning, environmental law, building regulations, safety at work, local government law, the building contract, dispute resolution, responsibility and liability, and warranties and options.

Clearly, it is not the purpose of this book to provide an in-depth treatment of any of those subjects. What it does set out to do is provide a readily accessible guide to each of those subjects in so far as they impinge on those involved in construction, and to provide up to date information on the current Acts, regulations, contracts and legal decisions that have a bearing on construction.

There are ten chapters, each of which has its own list of contents and finishes with a list of legal cases referred to and a checklist giving the Acts or regulation to be consulted for more information on the topic concerned, cross-referenced to the paragraph of the book in which the

topic is discussed. There is also an index at the end of the book.

David Keane is a past-president of the RIAI, an arbitrator, a barrister and the author of *The RIAI Contracts – a Working Guide*, so he is indeed eminently qualified to write this book. His many years of practice as an architect have not passed without the acquisition of a great deal of erudition, as exemplified in this account of the history of planning legislation in Ireland prior to 1st October, 1964:

> "Up till that date there was no effective planning control. Private developments very often had restrictive covenants in leases which would have acted as a form of localised planning control. The Pembroke Estate in Dublin would be a good example of this type of control. A first step in this direction were the Dublin Reconstruction Acts of 1916 and 1924 which gave the City Architect control of rebuilding after the damage caused by the 1916 Rising and the Civil War ... The first such attempt to legislate for planning in Ireland was the Town and Regional Planning Act of 1934 and the Town and Regional Planning (Amendment) Act, 1939"

He has also acquired some trenchant views, which enliven the text without taking away from the lucid exposition of the subject. Consider for example, this passage on the Health and Safety Directive:

> "Then in 1992 came the notorious EU Directive 92/57 – 'Safety on Sites' with its absurd and unverified opening passage that "whereas unsatisfactory architectural and/or organisational options or poor planning of the works at the project preparation stage have played a role in more than half the occupational accidents occurring on construction sites in the Community" and going on to erect an edifice on these unsound foundations, which is not a prudent thing to do. No evidence was ever produced for this piece of nonsense, though it has been established that the alleged factual report *From Drawing Board to Building Site* published by the Commission is a complete fabrication."

I must say that I am very grateful to have been asked to review this book, because it is a joy to read, and I have had occasion over the past week to consult it to good effect. There are many books that deal with the various subjects discussed, in voluminous detail, but none that I know of that provides such as clear, authoritative and up to the minute overview of the construction field in Ireland. I recommend it to anyone working in this area; it will save you hours and lead you straight to the text that you need to consider.

— James Macken, S.C.

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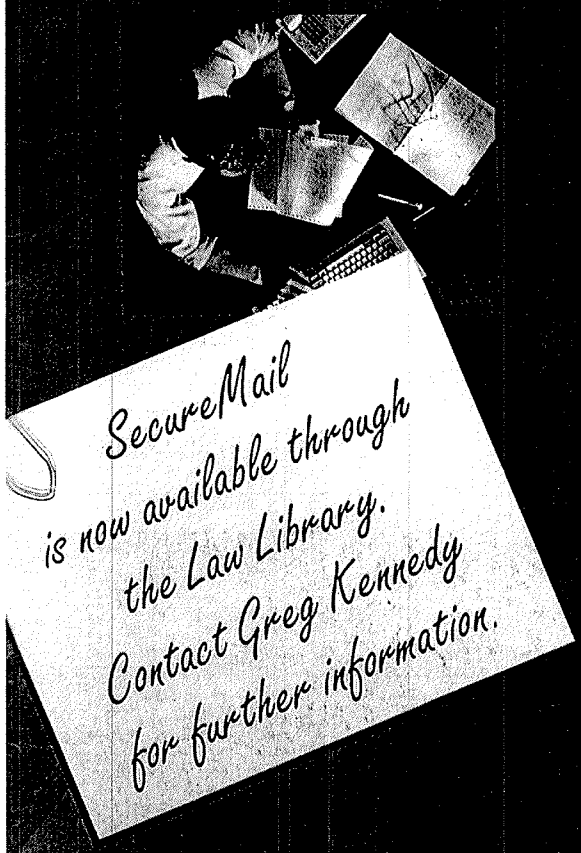

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