The Bar Review

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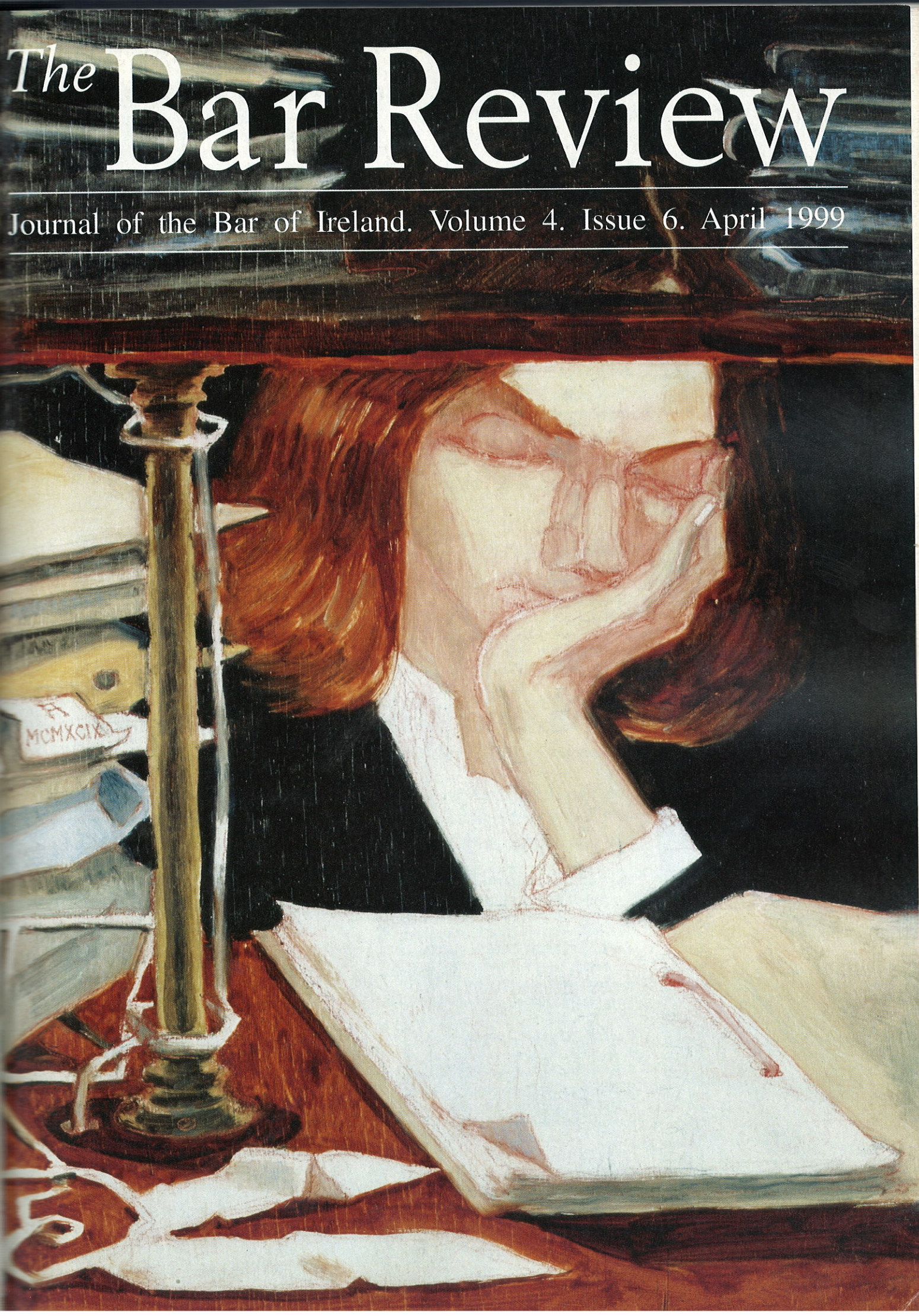

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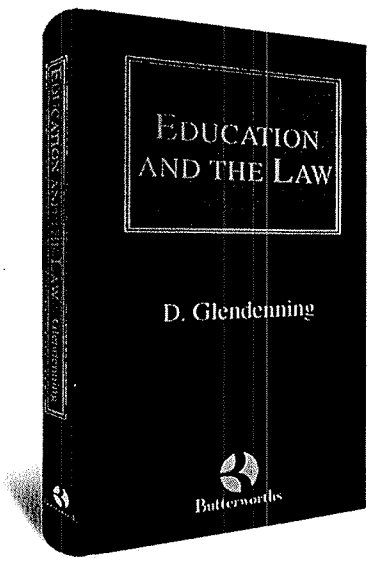

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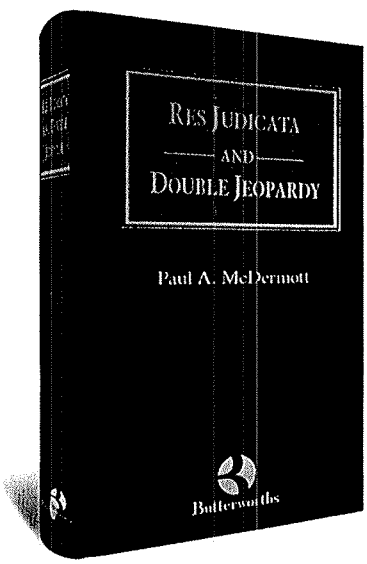

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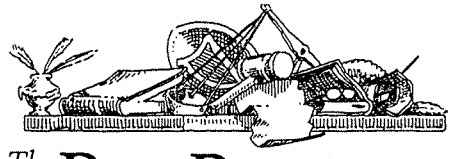

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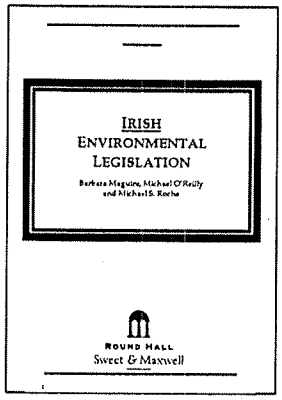

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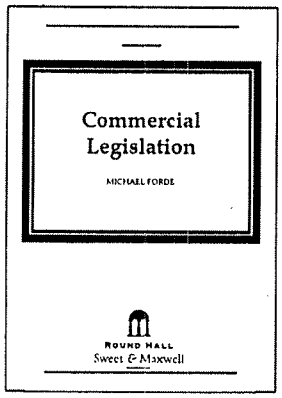

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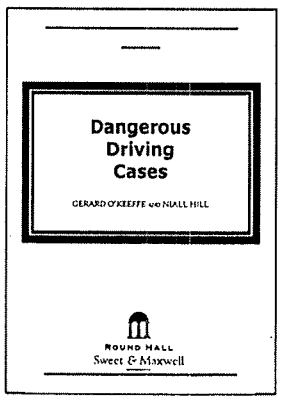

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Victims of Crime

A legitimate argument can be made that the interests and needs of the victims of crime are not adequately catered for under our criminal justice system at present. The shortcomings of the system in so far as it relates to victims are set out comprehensively in the many publications of Victim Support, the report of the Working Party on the Legal and Judicial Process for Victims of Sexual and Other Crimes of Violence against Women and Children and, most recently, in the report of the Conference "Working Together – An Integrated Approach to the Victims of Crime" held in Dublin on the 10th and 11th December, 1997.

The Victim Support group, which was founded in 1985, has done excellent work for victims generally. In the first instance their remit is to help and assist the victims of crime. Secondly, they see it as their function to assist the families of victims. Invaluable help is also given to victims by the Rape Crisis Centres and Women's Aid.

In 1996, the Bar Council was instrumental in establishing the Court Users Group. This body was established in order to reduce the problems encountered by lay people going to court. The Group includes representatives of the Judiciary at all levels, Victim Support, the Department of Justice, the Chief State Solicitor's office, the Gardaí, the Attorney-General, and the office of the Director of Public Prosecutions. The Group was particularly fortunate that Chief Justice Hamilton himself decided to participate in the workings of the Group.

One of key complaints of victims and their representative organisations is the lack of information made available to them regarding the court process in general or the case in which they are involved in particular. Other areas identified where improvements could be made include the right of victims to be accompanied to court, seating arrangements in court for the family of victims, the treatment of victims at identification parades and the provision of an information desk at the Four Courts.

As a result of the actions of the Court User's Group an information desk, which is staffed on a permanent basis in the Four Courts, has now been established. Also, arrangements may now be made to assign appropriate space to members of the family of the deceased in murder cases; similar arrangements have been made to notify a victim in the event of an appeal of a conviction, the date and time of such an appeal. Formal structures have also put in place to inform victims regarding the progress of criminal proceedings.

In addition, the existence of Victim Support has been given wide publicity among members of the Judiciary, and frequently judges have referred victims to that organisation.

However, the mere existence of such arrangements is not enough. What must be done now is to ensure that the facilities and information are actually available at all levels and in every provincial centre. While Victim Support has a strong presence in Dublin, Cork, Sligo and a number of other areas, as yet victim support groups have not yet been established in every provincial centre.

As discussed in an article in this issue of the Review, the present review of the Scheme for Compensation for Personal Injuries Criminally Inflicted provides a valuable opportunity for reform of this scheme in a manner to better address the needs of victims in this area.

In another article in this issue, regarding the Crime Forum Report, it is pointed out that much valuable preparatory consideration of the pertinent issues regarding crime has already been undertaken and that now is the time for a comprehensive package of measures to combat crime generally, which will of course reduce the number of victims requiring assistance and support in the first instance.

Review of the Scheme of Compensation for Personal Injuries Criminally Inflicted

JAMES NUGENT, SC

Many Barristers will attest that the persons who are least well served by our criminal justice system are the victims of crime. The shortcomings of this system have already been highlighted by the many publications of Victim Support, the report of the Working Party on the Legal and Judicial Process for Victims of Sexual and Other Crimes of Violence against Women and Children and, most recently, by the report of the Conference "Working Together – An Integrated Approach to the Victims of Crime" held in Dublin on the 10th and 11th December, 1997.

Suffice it to say that a system, which treats a victim as just one of many witnesses in a case, requires that victim to attend Court without the benefit of legal representation (even in an advisory capacity) unless he or she can afford it, and does not even provide a designated seat for the victim in court (who can end up seated beside the assailant's family), must be capable of improvement.

The civil side of the judicial system is rarely open to a victim of violent crime, as the assailants are rarely a mark for damages. In recognition of that fact, the Government established a Scheme of Compensation for Personal Injuries Criminally Inflicted ("the Scheme") in 1974, whereby a person who suffered a significant injury in a crime of violence could be compensated out of the public purse. The scheme operated reasonably successfully for some years. However, due to inadequate funding, the claims took an inordinate length of time to be processed. Also, when an adjudication had been made there was a further inordinate delay before payment of the award.

In 1986 this scheme was drastically curtailed by excluding payment of compensation for general damages, i.e. damages for pain and suffering, arising from injuries incurred after the 1st April 1986. The reasons given for this curtailment were the considerable economic difficulties which were besetting the country at the time. Following the abolition of general damages awards, and because the work of the Tribunal was devoted to hearing claims which had arisen a number of years earlier, it came to be generally believed by many practitioners that the Criminal Injuries Compensation Tribunal had been abolished. This belief was strengthened by a number of factors, including the fact that the Tribunal does not sit in public and although it is required to submit to the Minister for Justice a full report on the operation of the scheme each year, it has not been the practice to publish this report. As the Tribunal does not advertise its existence, its work does not attract media attention. The result is that victims of crime are unaware that they may well be entitled to some compensation following a crime of violence and, therefore, they do not apply for it.

In the discussion paper "Tackling Crime" issued by the Department of Justice in May 1997, it was stated that *"the scheme of compensation for personal injuries criminally inflicted is under review at present.The outcome of that review is expected in the near future."*

In any review of this scheme it is appropriate that seven specific issues (*inter alia*) be addressed. First, the issue as to whether compensation paid by the State to the Victim of crime should be merely an *ex gratia* payment or a statutory entitlement, will have to be addressed. It seems that in the interests of justice and fairness, the case for a statutory right to compensation is unassailable. If it is in the overall interest of society (and therefore its right) to punish the perpetrator of a crime, then it is surely also, in the overall interest of society (and, therefore, its duty) to restore the victim of the crime to the position in which he or she was before the crime was committed, insofar as that is possible. The only way that society has found of doing this, is by the award of compensation. An obvious and necessary correlation of society's right and duty to punish the perpetrator of a crime is the victim's right to be compensated by society where compensation is not otherwise available to the victim. This right requires to be adequately respected and given protection in a statutory framework.

Secondly, a new scheme must include compensation for general damages for pain and suffering. In 1986 the only justification proferred for prohibiting the Tribunal from awarding general damages was an economic one. Given the present state of the economy, this is no longer a valid argument. A society which can spend millions of pounds on fireworks and a millennium spire can surely afford to pay fair and reasonable compensation to the victims of crime – unless it has its priorities very distorted.

Thirdly, the new scheme should remove the present restriction which states that no compensation will be payable where the offender and the victim were living together as members of the same household at the time the injuries were inflicted. One need only read the results of the National Survey on Violence Against Women which was administered by the ESRI and reported on in the publication "Making the Links", a study commissioned by Women's Aid, to realise the number of victims who are likely to be precluded from seeking compensation by this provision. This provision also excludes claims being made by children who have been physically or sexually abused by one or other of their parents. The inclusion of this provision in the scheme in 1974 stemmed from a mentality prevalent in society at that time, that there was no way of knowing what went on behind the closed doors of houses, and society should not try to find out. We are, however, now aware of what did and does happen in some households, and we

ought not turn a blind eye to it.

Fourthly, while the Tribunal should still hold its hearings in private, its annual report ought to be published. In addition, the Gardai should have an obligation to inform the victims of crime of the existence of the Criminal Injuries Compensation Tribunal, at the time the offence against them is reported. Also, following a conviction, the trial Judge should then be obliged to inform the Victim of the existence of the Criminal Injuries Compensation Tribunal, and should have a discretion as to whether or not to inform the Victim of the existence of the Tribunal following an acquittal. These steps are necessary if recommendation R (85) ii of the Council of Europe on the position of the Victim in the framework of Criminal Law and Procedure, is to be properly implemented. In particular Section A2 of that recommendation provides that:

> "the police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and State compensation."

It does not appear that at present this country is fully complying with this requirement.

Fifthly, compensation should not be awarded, or should be proportionately limited, where the victim has not offered reasonable co-operation to the Gardai in their efforts to apprehend the perpetrator of the crime of which they have been the victim. A similar provision should apply to persons who fail to give reasonable co-operation to the Tribunal in the investigation of their claim.

Sixthly, the Tribunal should not be entitled to award a victim compensation in respect of loss of earnings which is incompatible with information given by the victim to the Revenue Commissioners or the Department of Social Welfare, concerning the victim's earnings prior to commission of the crime which entitles the victim to compensation.

Seventhly, it appears to be inherently unjust to the victim that an award in a case which requires the assistance of legal advice for its preparation and presentation, does not cover the cost of that advice. An appropriate scheme should provide that in cases where the Tribunal certifies that the Applicant needed legal assistance in the preparation and presentation of his claim, legal costs should be awarded. These costs should be on a scale fixed by the Attorney General or the Minister for Justice, after consultation with the Bar Council and the Incorporated Law Society of Ireland. It is not envisaged that these costs would, in any way, equate with the costs of an ordinary Civil Action, as the proceedings before the Tribunal are not of an adversarial nature. The level of costs should also reflect the fact that both branches of the legal profession are making a social contribution in this field, as is the case in the field of Civil Legal Aid.

The present scheme for compensation is clearly inadequate. The review of the scheme which had already commenced in 1997 must now be well underway and hopefully in the near future the victims of crime will receive better treatment from our system of justice than they have received in the past. ●

Review of the Report of the National Crime Forum 1998

IVANA BACIK, Barrister

The National Crime Forum was set up with great fanfare by the Minister for Justice, Equality and Law Reform in February 1998, with the function of inviting comment and suggestions on crime and related issues from the general public and from experts. Professor Bryan McMahon was appointed to chair the body, which was made up of some 33 individuals representing different organisations and areas of expertise.

The Forum held a number of public hearings between February and March 1998, and received 250 written submissions from a range of individuals and groups. The hearings were generally well-reported in the media, and great interest was expressed by commentators in the likely outcome of the Forum's deliberations.

However, the Report of the Forum, published in December 1998 has, by contrast, generated very little publicity, comment or criticism thus far. This is a pity, since it is a document worth reading, which expresses an enlightened, thoughtful and reasoned approach to the issue of crime in Ireland. It is in many ways an impressive achievement, since it represents an attempt at fusing a wide spectrum of opinion on a range of crime-related issues into one coherent report.

Unfortunately, the remit of the Forum was very limited; it was not directed to develop recommendations or strategies as to how reform of the criminal justice system could be effected, but simply to present to the Minister a set of views on the system. Thus, while the Report is impressive in its scope, it ultimately falls short of making any recommendations, even where it is clear that the members of the Forum had concluded that a particular strategy would be most effective.

That restriction is an inevitable shortcoming of the Report, but nonetheless there are a number of themes which appear to have dominated the Forum's deliberations, of which two in particular are of great importance in any attempt to develop Irish criminal justice policy.

First, the Report clearly accepts the connection between socio-economic conditions and crime.[1] This view is summed up in Chapter 1 of the Report, as follows: 'the link between socio-economic deprivation, exclusion and marginalisation, on the one hand, and crime on the other is sufficiently well documented to make it clear that tackling those factors would be the biggest single step towards effective crime prevention.'[2]

According to Brewer et al, this link between socio-economic deprivation and crime has by now become 'something of a truism',[3] and indeed criminological research has shown social deprivation to be a 'criminogenic situation',[4] in the sense that persons whose law-abiding choices are restricted by social and economic conditions are more likely to offend than those who are in positions of social and economic advantage.

However, despite the growing consensus on this point, it is vital that the link between deprivation and crime is emphasised in any report of this nature, since, by implication, the recognition of this link will lead to the adoption of a multi-agency approach to dealing with crime. Such an approach is indeed favoured in the Report, which accepts that in order to tackle crime, a concerted effort must be made to reduce deprivation involving education, health and social welfare agencies as well as those concerned with criminal justice.

In a later chapter dealing specifically with inter-agency co-ordination, reference is made to the relative success in this context of initiatives such as the Local Development Partnerships, which have been effective in harnessing the efforts of statutory, community and voluntary bodies in combating disadvantage, and the local Drugs Task Forces, which again represent an integrated approach to the drug problem in a number of areas in Dublin and Cork.

The absence of basic data on crime was the second constantly recurring theme in the submissions to the Forum, as is clear from the concluding chapter: 'One point was made repeatedly at almost every session of the Forum. There is a dearth of relevant, up-to-date information on which to base judgements and decisions in the criminal justice area in Ireland.'[5]

In this jurisdiction, we lack basic data about so many crucial features of our criminal justice system; about sentencing decisions: the detailed breakdown of annual crime figures: attrition rates for different offences; the causes of crime; the effectiveness of alternatives to imprisonment; prison conditions; recidivism rates and what happens to offenders upon release from prison. As the Forum notes, this absence of basic data has precluded the development of research interpreting and analysing crime, and has become a major obstacle in developing any coherent strategy around crime.

While the causal role of socio-economic deprivation and the absence of crime data are themes which recur throughout the Report, each chapter also deals with specific crime-related issues. The choice of topics covered is somewhat unexpected (why is a whole chapter devoted to 'zero tolerance', when, for example, there is no chapter devoted to 'crimes against children'?) but presumably the choice was dictated by the submissions which the Forum received.

That aside, there can be no dispute as to the need to include certain topics in the Report, such as the position of victims of crime, which is considered in Chapter 3. Two points raised in this

chapter deserve special mention. First, it is stated that the single most important need for victims is for access to information about the criminal justice process. Secondly, critical mention is made of the fact that the Criminal Injuries Compensation Scheme no longer provides victims with compensation for pain and suffering. If the Forum had not been precluded from doing so, they could have recommended change in relation to these issues.

In their consideration of the link between drugs and crime, the views of the Forum come across less clearly. The Report comments that submissions were made both for and against the decriminalisation of some or all drugs. It concludes, however, that the Forum did not have the opportunity to undertake the necessary in-depth study which would have enabled them to reach an informed judgement on this question. Although the inconclusive nature of this finding is disappointing, it is encouraging that the Forum would favour further discussion of decriminalisation 'in a calm and dispassionate manner'.[6]

The chapter on young people and crime highlights the fact that the teenage years are the peak period for offending, and comments that young offenders are therefore the crucial group in any strategy for the prevention of crime. However, very little has been done to tackle youth crime specifically; the Whitaker Committee's remarks on youth crime are quoted, and it is commented that these remarks could still be said to apply today, 14 years after their publication: 'The majority of young people coming before the courts have a very limited stake in conventional society... It is clearly not by any reform of the criminal justice system, but rather by more wide ranging economic and social policies, that the problem of juvenile crime can be tackled.'[7]

The Report also makes reference to the justice versus welfare models for dealing with young offenders, but comes to no conclusion on which is preferable, although it does clearly favour greater use of restorative justice principles in dealing with young offenders. It is regrettable that the removal of young offenders from the ambit of the criminal justice system altogether was not considered; this imaginative approach, which has been adopted in a number of other EU jurisdictions, places young people involved in offending under the care of local authorities, or health and education agencies, rather than criminalising them. The Irish approach has been different, as O'Sullivan writes, our history of juvenile justice has been focused on incarcerating working class youths in industrial and reformatory schools, and that ideology of detention persists to this day.[8]

Domestic violence and sexual crime are dealt with together in Chapter 6, and the main concern identified in relation to both types of crime is their level of under-reporting. It is conceded that victims may perceive that any attempts to invoke the legal process will be 'traumatic, long drawn-out and ultimately fruitless'.[9] This view of victim's perceptions of the legal system, at least in relation to rape, was confirmed by a study carried out in 1998, the results of which were published subsequent to the conclusion of the National Crime Forum process.[10]

Chapter 7 deals with white-collar crime, but interestingly, and perhaps surprisingly, the Forum reports that it received few submissions on this issue, despite the estimation by the Whitaker Report that it costs eight or ten times the total cost of other crimes. The Forum speculates about possible reasons for the 'cloak of silence' which exists over this type of crime, and concludes by suggesting that we are still unduly selective in our view of what constitutes 'crime'.

The chapter on policing reports a shift towards a more community-oriented approach, but it is warned that the concept of 'community policing' has different meanings for different people, and the Forum appears reluctant to advocate any real power-sharing between police and the community, although it is suggested that some limited community empowerment might be possible, such as a say in local policing methods. The Report is critical about the lack of police accountability, commenting that the present procedures are simply not adequate to ensure accountability.[11]

Some interesting comments are made in relation to criminal law generally in Chapter 9, which also deals with the courts. In this section, the Forum rejects the notion of mandatory sentencing, but appears to favour the introduction of sentencing guidelines, as recommended by the Law Reform Commission.[12] The Forum also considers codification of the criminal law, but does not deal with this topic in any depth.[13]

The chapter on sentencing is perhaps the most thought-provoking and constructively critical of those in the Report. It is stated that imprisonment should only be seen as a punishment of last resort, and that there should be greater use of community sanctions, and more imaginative alternatives to imprisonment provided. This is the same approach adopted by the Whitaker Report and more recently by the Law Reform Commission.[14]

However, more consideration could have been given to models of sentencing other than the traditional retributive or 'just deserts' model favoured by a majority of the Law Reform Commission. O'Donnell, for example, writes of the failure of our present narrow focus on retribution and prison, and the need to look at new ways of sentencing, involving greater use of restorative justice principles and of rehabilitative measures.[15]

Rehabilitative measures are given greater consideration in the following chapter, which deals with the prison system. The urgent need for rehabilitative facilities to be introduced into our prisons is noted, and the need for an individual plan of management for each offender is identified. It is commented that the probation and welfare service presently lacks sufficient resources to enable them to manage prisoners in this way, and the particular problems of access to psychiatric care and treatment for drug addiction for prisoners are noted.[16]

A whole chapter is devoted to the topic of 'zero tolerance', which the Report describes dismissively as a 'vague and ill-defined concept'. However, in this context they review the 'broken windows' thesis first expressed by Wilson and Kelling in 1982, that is, that a series of small disorders can ultimately lead to the commission of crime.[17] The Forum reviews how this theory has been seen to work in reducing crime on the New York subway system, but expresses doubt as to whether it would translate into an effective method of crime control in an Irish context.

The final chapter of the Report is entitled 'Informing the Policy Process'. A cynical commentator might wonder if this topic was left to last in order to emphasise the potential role of the Report in informing policy. In any case, the absence of basic data on crime is emphasised once again in this chapter,

and the establishment both of an official crime database and of a body to analyse and interpret this data is seen as urgently necessary.

The Report asserts that a National Crime Council should be set up at once, and that the independence of such a body would need to be guaranteed. It is to be hoped that if the proposed Council is established, it will be given sufficient resources to enable it to commission research on crime.

It is to be hoped, further, that the enlightened views expressed in the Report as to the need for a multi-agency approach to crime will be given effect in our criminal justice policy. However, this Report joins a series of other reports making similarly enlightened suggestions: NESC in 1984, The Whitaker Report in 1985, the LRC Report on Sentencing 1996, and most recently the Department of Justice's own discussion paper, 'Tackling Crime', which was published in 1997 and which also advocates a multi-agency approach to crime.[18]

It is all too easy for successive governments to ignore the content of these well-meaning reports in the absence of public pressure to take on board the changes they recommend. We should now ask the question; how many more reports must be produced before some action is taken to introduce an enlightened and progressive criminal justice policy which acknowledges the role which socio-economic conditions play in causing crime? ●

1 The Report states that most submissions accepted this, and refers to a particular submission based upon a study of data relating to the Dublin District Courts, published as Bacik, I., Kelly, A., O'Connell, M. and Sinclair, H., 'Crime and poverty in Dublin: an analysis of the association between community deprivation, District Court appearance and sentence severity' in Bacik, I. and O'Connell, M. (eds), *Crime and Poverty in Ireland*. Dublin: Round Hall/Sweet & Maxwell, 1998.

2 Report of the National Crime Forum 1998, p. 37.

3 Brewer, J., Lockhart, B. and Rodgers, P., *Crime in Ireland 1945-95*. Oxford: Clarendon Press, 1997, at p. 218.

4 Gibbons, D., 'Observations on the study of crime causation', (1971) *American Journal of Sociology*, 94: 465-99.

5 *Ibid*, p. 177.

6 *Ibid*, p. 78. For further discussion of decriminalisation in an Irish context, see: Charleton, P., 'Drugs and crime – making the connection: a discussion paper' (1995) 5 *Irish Criminal Law Journal* 220, and Murphy, T., 'Drugs, drug prohibition and crime: a response to Peter Charleton' (1996) ICLJ 1.

7 The Whitaker Report (Report of the Committee of Inquiry into the Penal System). Dublin: Stationery Office, 1985.

8 O'Sullivan, E, 'Juvenile justice and the regulation of the poor: "restored to virtue, to society and to God"', in Bacik, I. and O'Connell, M. (eds), op. cit., pp. 68-91.

9 *Ibid*, p. 104.

10 Bacik, I., Maunsell, C. and Gogan, S., *The Legal Process and Victims of Rape*. Dublin: Rape Crisis Centre, 1998.

11 For a critical review of police accountability and a model of community policing, see Connolly, J., 'From colonial policing to community policing' (1998) 8 ICLJ 165.

12 Law Reform Commission Consultation Paper on Sentencing, 1993; Repor t on Sentencing (LRC 53-1996). Dublin: Stationery Office, 1996.

13 For an argument in favour of codification, see Charleton, P., *Criminal Law: Cases and Materials*. Dublin: Butterworths, 1992, at pp. 1-2.

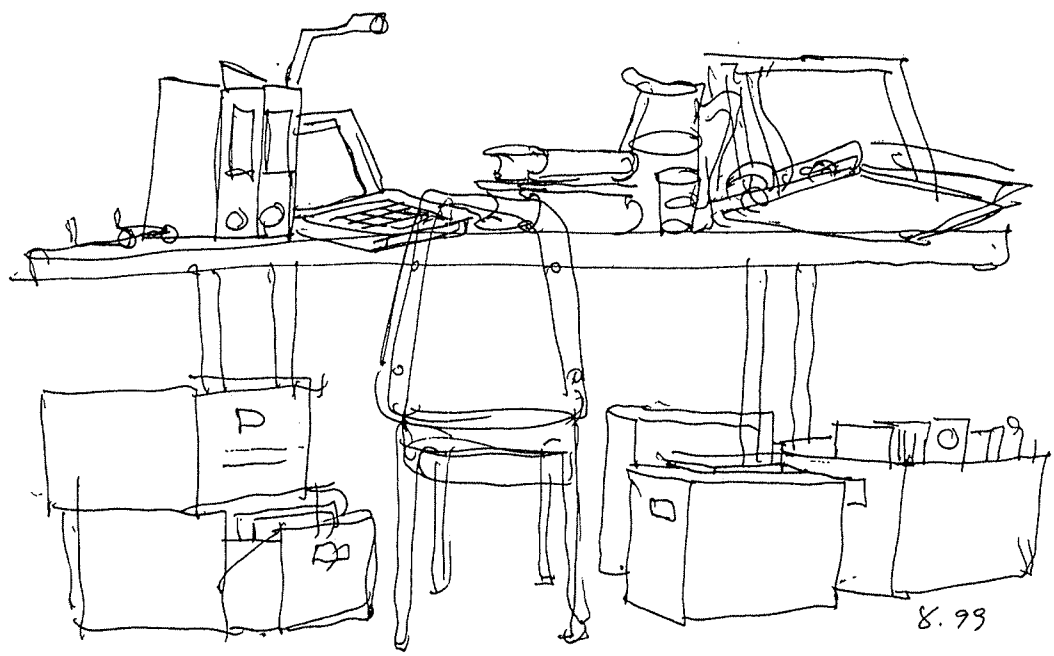
14 Consultation Paper and Report on Sentencing, op. cit.

15 O'Donnell, I., 'Challenging the punitive obsession' (1998) ICLJ 51.

16 For a recent study of Mountjoy prisoners which highlights these and other issues, see O'Mahony, P., *Mountjoy Prisoners: a sociological and criminological profile*. Dublin: Dept of Justice, 1997.

17 Wilson, J. Q. and Kelling, G., 'Broken Windows', *The Atlantic Monthly*, March 1982, pp. 29 – 38.

18 Department of Justice, *Tackling Crime: Discussion Paper*. Dublin: Stationery Office, 1997, see especially chapter 18.



The Impact of European Law on the Enforceability of Bank Security Documents

JOHN BRESLIN, Barrister

When considering the enforceability of security granted by a borrower or guarantor in favour of a bank, no longer is it enough merely to consider the possible effects of Irish statute and case law. The growing importance which the law of the European Union plays in this regard cannot be underestimated. A brief consideration of the following four recent cases demonstrates this. In each case, principles derived from EU Directives, or from EU Treaties themselves, were used in attempts to set aside consensual security granted to credit institutions. The attempts to show that the relevant security was vitiated were unsuccessful on the particular facts of the cases. But this is not a reason for those advising credit institutions to become complacent, nor for those advising borrowers to despair. Clearly, EU law will have, in general, a significant potential effect in determining the enforceability of bank security documents.

Bayerische Hypotheken und Weschelbank v Dietzinger

The European Court (Fifth Chamber) in *Bayerische Hypotheken und Weschelbank v Dietzinger*[1] considered the effect of the 'Doorstep Sales' Directive.[2] This Directive provides, broadly speaking, that a consumer has the right to a 'cooling off' period where goods or services are sold to him on an unsolicited basis away from the business premises of the trader. For the purposes of the regulations a consumer is an individual who is 'acting for purposes which can be regarded as outside his trade or profession'.[3] The Directive was implemented in Ireland by the European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989.[4]

The defendant had guaranteed the debts of his father's building firm which were owed to the plaintiff bank. Thanks to the zeal of the bank manager, the guarantee was signed away from the business premises of the bank but the defendant was not afforded the required 'cooling off' period. The key question before the court was whether the German equivalent of the Doorstep Sales Regulations applied so as to render the guarantee unenforceable.

It was accepted that the defendant, in signing the guarantee, was not acting in the course of a trade or profession. However, could he claim protection under the regulations even though the trader was not supplying a service (i.e. the loan) to him, and even though the loan was advanced by the bank to a business concern?

The reasoning of the court is perhaps not as comprehensive as one might hope for on either of these counts. However, the court did appear to hold that the guarantor of a loan which was subject to the Doorstep Sales Regulations could claim the protection afforded by the regulations because the contract of guarantee was intimately connected with the underlying loan. Accordingly, the defendant had, *prima facie*, a right of renunciation in respect of the contract of guarantee. (The court did not go on to consider whether unlawful denial of this right by the bank would invalidate its right to call for repayment of its loan to the principal debtor.)

The court, however, held that the Directive only covered a guarantee of obligations undertaken by a consumer in a 'doorstep sale' context. In other words, for a contract of guarantee to be open to attack under the Directive, two conditions must be satisfied: first, that the underlying transaction be a 'doorstep sale', and secondly, that the guarantee itself also be a 'doorstep sale' transaction.

The court also held that even though the defendant, in signing the guarantee, was acting as a consumer, he was not a consumer for the purposes of the regulations because the underlying loan was to a business, and was not 'consumer' in nature. The defendant was, as it were, 'infected' by the business purpose of the principal debt.

The *Dietzinger* decision has important ramifications for bank guarantees. Doubts have existed as to whether a person who grants a guarantee to a credit institution can claim protection under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 ('the Unfair Contract Terms Regulations'). The Unfair Contract Terms Regulations provide that standard form terms in a contract between the supplier of goods or services, on the one hand, and a consumer,[5] on the other, will be unenforceable if they are unfair, within the meaning of the regulations. For the purpose of the Unfair Contract Terms Regulations a term is unfair if 'contrary to the requirement of good faith' it 'causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all the circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.'

The point has caused some uncertainty because, as is mentioned above, the guarantor of a loan receives no service from the lending institution.[6] However, it is implicit in the court's reasoning in *Dietzinger* that the guarantee is so intimately connected with the principal debt that the surety is *prima facie* protected by the Unfair Contract Terms Regulations. This was, indeed, considered to be the better view even before the *Dietzinger* decision. However, as noted, the guarantor claiming such protection must show that not only was he acting as a consumer in signing the contract of guarantee, but also the principal debt must itself be a 'consumer' transaction. If the guarantor clears these hurdles, then it would appear that much of the 'boilerplate' language in standard form bank guarantees is open to attack.[7]

Citibank International plc v Kessler

In *Citibank International plc v Kessler*[8] a German national – Mr. Kessler – working in England – and who wished to return

to Germany – found his plans hampered by the fact that he could not sell the house he had purchased in England, and, furthermore, the bank to which the house was mortgaged would not give its consent to the mortgagor letting the premises to third parties (the house having become unsaleable due to structural defects and an unresolved boundary dispute). Such consent was required by the term of the mortgage: indeed, it is a standard term in mortgages in the United Kingdom and in this jurisdiction also.

Mr. Kessler argued that Article 48 of the EC Treaty – which guaranteed freedom of movement for workers within the European Community – prevailed over the mortgage. He also argued that a term should be implied into the mortgage that the mortgagee would not unreasonably withhold its consent to a letting.

Chadwick LJ, in the Court of Appeal, rejected both arguments. As regards the implication of a term, he noted that the circumstances giving rise to the need to imply a term arose after the date of the mortgage agreement. A term could not be implied on this basis: a term could only be implied to cater for circumstances prevailing as at the date of the contract.

As regards the Article 48 argument, Chadwick LJ noted that the EU law authorities – *Walgrave and Koch v Association Union Cycliste Intnerationale*[9] and *Union Royale Belge des Societes de Footbal Association v Bosman*[10] concerned rules which were aimed at regulating in a collective manner employment and the provision of services. As such these authorities were of no assistance to Mr. Kessler: the clause in the mortgage deed was not aimed at the issue of employment; and it was not part of a collective arrangement.

As a practical matter, Chadwick LJ took the view that acceptance of Mr. Kessler's arguments could mean that lenders would be less willing to lend to those whose occupation was such that they might move between member states to seek employment, be they UK nationals, or nationals from some other Member State. This is because provisions in the mortgage documentation aimed at protecting the lender's security would be unenforceable. This would make credit institutions less willing to lend, and increase the costs of borrowing. Far from promoting freedom of movement, this would impede freedom of workers, who would find it more difficult to obtain funds to purchase residential property in the Member State where they were working.

Oakdale (Richmond) Limited v National Westminster Bank plc

In *Oakdale (Richmond) Limited v National Westminster Bank plc*[11] Chadwick J (as he then was) held that a requirement in a debenture that the chargor pay all book debts into a designated account with the chargee bank, and not to charge, assign, factor or discount those debts to any third party[12] did not breach either Articles 85 or 86 of the EC Treaty. As is well known, these articles prohibit agreements or practices which restrict or distort competition in trade in the EU, and the abuse of a dominant position having an effect on intra-community trade.

Chadwick J held that the prohibition on borrowing and charging assets without the prior written consent of the bank was not anti-competitive because the company was always free to pay off the bank with money borrowed elsewhere, provided that the full amount of the indebtedness was paid off. The requirement that the company pay all book debts into a blocked account with the bank was no more than was necessary for the bank to protect its security over that class of assets. The company, furthermore, failed to demonstrate that the bank enjoyed, still less abused, a dominant position.

The test was whether the restrictions in the debenture were necessary to render the transaction properly operable. In order for a fixed charge over book debts to be effective the bank must, under English law, ensure that it has effective control over the proceeds of the book debts.[13]

Chadwick J's decision was affirmed by the Court of Appeal.[14] There, the court also noted that due to a quirk of the operation of the rule in *Clayton's Case*,[15] the creation of a second charge over the book debts of which the bank had notice would effectively erode the bank's security: the only practical way in which the bank could protect its security would be to 'rule off' the company's account with it, and credit new borrowings to a new account. This would cause disruption to the company's dealings with the bank, and result in additional costs.

Bagnasco v Banca Popolare di Novara

In *Bagnasco v Banca Popolare di Novara*[16] the European Court of Justice (Sixth Chamber) held that standard bank conditions which enable a bank to vary its interest rates by notice in accordance with movements in money-market rates are not anti-competitive. (It is also worthy of note that such conditions are expressly permitted under the Unfair Contract Terms Regulations.)[17] The court further held that such a provision did not amount to the abuse of a dominant position by the bank. Furthermore, the requirement imposed by the bank, as a commercial precondition, that the borrower provide a guarantee (by which the guarantor agreed to waive many of his rights under the Italian commercial code)[18] for an overdraft, was additionally held not to be anti-competitive, nor an abuse of a dominant position. The decision can be seen as a strong one in favour of the bank, as the terms of the bank's guarantees were common to many other banks in the Italian market. ●

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1 [1998] All Evaluation Report (EC) 332; [1998] 2 CMLR 499.
2 OJ L 372/31.
3 See, e.g., *Ministere Public v Di Pinto* [1991] ECR 1198.
4 SI No 224 of 1989. See Forde *Commercial Law* (Dublin: Butterworths, 1997) (second edition) page 536.
5 For the purposes of the Unfair Contract Terms Regulations a consumer means a natural person who is acting for purposes which are outside his business. 'Business' is defined as including a trade or profession.
6 See Breslin *Banking Law in the Republic of Ireland* (Dublin: Gill & Macmillan, 1998) page 614 *et seq*: Paget's *Law of Banking* (ed Hapgood) (11th edition) (London: Butterworths. 1996) page 632.
7 See, further, Breslin *op cit.*
8. *The Times*, 24th March 1999.
9 [1974] ECR 1405.
10 [1995] ECR 1-4921.
11 [1997] BCLC 63.
12 Thereby constituting a fixed charge over book debts: see *Re Keenan Brothers Limited* [1985] IR 401.
13 In Ireland the position is slightly different. It is enough if the contract merely stipulates for such control, it being irrelevant if such control is, as a matter of fact, actually exercised: *In re Wogan's Drogheda Limited* [1993] IR 157.
14 Unreported, 6th August 1996, Hobhouse and Millett LJJ.
15 (1816) 1 Mer 572.
16 C-215/96; C-216/96: unreported, 21st January 1999.
17 Schedule 3, paragraph 2 (b).
18 This is also a feature of most standard form guarantees drafted by Irish credit institutions.

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 4. Issue 6. April 1999

A directory of legislation, articles and written judgments received in the Law Library from 26th February 1999 to 18th March 1999.
Judgment Information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

McEvoy v. Prison Officers Association
Supreme Court: **O'Flaherty J.**, Lynch J., **Barron J.**
18/12/1998

Fair procedures; natural and constitutional justice; plaintiff had been removed as president of the defendant association by a vote of no confidence; plaintiff had been awarded damages against defendant; whether there was an obligation on the defendant to comply with the rules of natural and constitutional justice; whether the defendant was obliged to comply with fair procedures.
Held: Matters of internal management of a private body are not subject to judicial review provided there is no *mala fides*; appeal allowed.

Library Acquisition
Department of the Marine and Natural Resources Minerals Development Acts, 1940-1995.
Report by the Minister for the Marine and Natural Resources for the six months ended 31 December 1998 in accordance with Section 77 of the Minerals Development Act, 1940 and Section 8 of the Minerals Development Act, 1979.
Dublin Stationery Office 1999
N87.C5

Statutory Instrument
National Safety Council (Establishment) Order, 1987 (Amendment) Order, 1999.
SI 11/1999

Agency

Library Acquisition
Buttimore, Jonathan
Holiday law in Ireland
Dublin Blackhall 1999.
N286.T6.C5

Aliens

Statutory Instruments
Aliens (Amendment) (No 2) Order, 1999
SI 24/1999

Aliens (Visas) Order, 1999
SI 25/1999

Children

Eastern Health Board v. Judge McDonnell
High Court: **McCracken J.**
05/03/1999

Judicial review; jurisdiction; statutory interpretation; application for leave for judicial review; respondent imposed conditions in respect of the care of child; whether the respondent acted *intra vires*; the jurisdiction of the applicant over minors; whether the respondent can impose conditions with regard to the child which restrict the power of the applicant after a child care order was made; ss.24 and 47, Child Care Act, 1991
Held: Relief refused; s. 47 is intended to give overall control of the child to the District Court; court's statutory obligation to have regard to the welfare of the child cannot be delegated to the applicant; District Court should only interfere in circumstances which could reasonably be considered to adversely affect the welfare of the child.

Articles
Child Abduction - an Irish perspective
Wood, Tabitha
1999 1 IJFL 15

Implementation of the Hague convention on intercountry adoption: the Law Reform Commission report
Pillay, Roisin
1999 1 IJFL 19

Protecting children under the child care act 1991 - getting the balance right
Buckley, O'Sullivan, Skehill
1999 1 IJFL 10

Statutory Instrument
Health and Children (Delegation of Ministerial Functions) Order, 1999
SI 18/1999

Civil Liberties

Articles
The Belfast agreement and the future incorporation of the European convention of human rights in the Republic of Ireland
Hogan, Gerard
4(4) 1999 BR 205

The Northern Ireland Act: Issues of Equality and Human Rights
Dickson, Brice
4(4) BR 212

Statutory Instrument
Freedom of Information Act, 1997 (Section 6(4)(b)) Regulations, 1999
SI 46/1999

Freedom of Information Act, 1997 (Section 28(6)) Regulations, 1999
SI 47/1999

Commercial Law

Article
An agent's windfall for the sale of goods – the measure of recovery
O'Callaghan, Patrick
1999 CLP45

Company Law

Robinson v. Forrest
High Court: **Laffoy J.**
11/02/1999

Winding up; restrictions on directors of insolvent companies; application pursuant to s.152, Companies Act, 1990 for relief in respect of restrictions imposed; the manner in which a liquidator must prove that he has complied with his obligation under the section; whether it was just and equitable to grant relief; whether the deterrent effect of the order would be undermined.
Held: Relief granted; on the facts it was just and equitable to grant the relief; on an application under s.152 the liquidator should personally swear an affidavit that he has notified all of the creditors and contributories of the company who are known to him of the receipt by him of the application and of the return date of the application.

Dunleckney Limited, In re
High Court: **Carroll J.**
18/02/1999

Company; director; application to restrict a director pursuant to s. 150 Companies Act, 1990; application to prevent former director acting as director or secretary for 5 years; whether Part VII Companies Act, 1990 applied to company deemed not struck off; whether actions which took place prior to the coming into force of 1990 Act should be taken into account in deciding whether former director acted honestly and responsibly; whether any other reasons why it would be just and equitable that former director should be subject to the restrictions imposed by s. 150 of the 1990 Act.
Held: Part VII applied to the company; only conduct of directors since coming into force of Part VII of 1990 Act to be taken into account; declaration under s.150 made as the former director had failed to fulfil a statutory obligation.

Article
Disregarding the separate legal personality of a subsidiary company where the "justice of the case" requires
Bolster, Fergus A
1999 ILTR 22

Time for a rethink on small business?
Igoe, Pat
1999 (January/February) GILSI 22

Statutory Instrument
Companies (Forms) (Amendment) Order, 1999.
SI 14/1999

Constitutional Law

Articles
Constitutional background to, and aspects of, the Good Friday agreement – a Republic of Ireland perspective
O'Donnell, Donal
4(4) 1999 BR 174

The Belfast agreement and the future incorporation of the European convention of human rights in the Republic of Ireland
Hogan, Gerard
4(4) 1999 BR 205

Contract

Vibac S.P.A. v. A.C. Tape and Packaging Limited
High Court: **O' Sullivan J.**
09/02/1999

Terms and conditions; discount; commission; faulty goods; over-pricing; damages; dispute as to discount; dispute as to commission; whether discount contingent upon payment in advance or payment within 10 days; whether commission was payable on all goods or specific goods only.
Held: Discount was 5% on payment in advance, with a concession of 5% discount on delivery for a period; commission payable on specific goods only; damages awarded for faulty goods and overpricing.

Bula Ltd. v. Tara Mines Ltd.
Supreme Court: Hamilton C.J., Barrington J., **Keane J.**
15/01/1999

Mining lease; allegation of breach of clause of the lease; construction of clause; subsequent proposed mining take-over; allegations of misrepresentation; restrictive covenant; proposal contained restrictive covenants in respect of consent of bank in financing the take-over; whether the first named defendant and the Minister was in breach of the lease of minerals owned by the State; whether the first named defendant wrongfully sought the take-over of the plaintiff company in breach of the restrictive covenant; whether the plaintiff entitled to damages for misrepresentation.
Held: Appeal dismissed; plaintiff's contention of the construction of the clause was unsustainable; no obligation on the first named defendant to enter into any form of joint development; allegation of misrepresentation not established; no action for damages for misrepresentation in the absence of contract.

Criminal Law

Zoe Developments Ltd. v. D.P.P.
High Court: **Geoghegan J.**
03/03/1999

Judicial review; adverse pre-trial media publicity; press release by second respondent referred to previous convictions of applicant; press release stated three persons killed on sites managed by the applicant; affidavit in High Court civil proceedings referred to previous convictions; affidavit did not refer to pendency of criminal prosecution; application to stop criminal prosecution; application for order restraining second respondent from publishing or circulating material calculated to prejudice the jury; whether pending trial should be stopped: whether serious risk of unfair trial: whether there would be prejudice to a fair trial; whether there was prosecutorial misconduct sufficient to warrant prohibition of trial; whether trial should be prohibited if deliberate attempt to abuse process; whether there was a deliberate attempt to abuse process: whether the second named respondent, a quasi-prosecuting body, breached duty of care by referring to previous convictions in press release.
Held: Relief refused; trial postponed to achieve a fair trial; breach of duty of care but not a deliberate breach; no deliberate intention to influence the outcome of a pending trial; prohibition of trial would be appropriate if second respondent deliberately attempted to abuse process; no deliberate attempt to abuse process.

D.P.P. v. Heaphy
High Court: **McGuinness J.**
09/02/1999

Case stated; validity of the issue of a search warrant; alleged drug offences; indictable offences; whether the evidence given to the court was sufficient to prove on a *prima facie* basis the valid issue of the search warrant; whether Peace Commissioner is obliged to give evidence on oath.
Held: Information sworn by the garda was sufficiently factual to enable the Peace Commissioner to be satisfied of the grounds for issuing the warrant; not necessary for the Peace Commissioner to give evidence of his state of mind.

M. v. B.
High Court: **O'Higgins J.**
11/12/1998

Statutory interpretation; proceeds of crime proceedings; power to grant order for payment of legal fees under the Proceeds of Crime Act, 1996; whether the ad hoc legal aid scheme or an order under the 1996 Act was more appropriate.
Held: Relief refused; it was not "essential" to make the order because of the existence of an ad hoc legal aid scheme.

D.P.P. v. Judge Ballagh
High Court: **Quirke J.**
08/02/1999

Judicial review; *certiorari*; validity of summonses; road traffic offences; charges dismissed; defect in form of summonses; respondent denied applicant an opportunity to adduce evidence on the circumstances which gave rise to the charge and the multiple applications for the issue of summonses; whether the respondent had jurisdiction to hear the trial of the alleged offences; whether the respondent entitled to dismiss the charges.
Held: Relief granted; the respondent had jurisdiction to hear the charges but was in error in dismissing the charge.

Articles
Last call for the sound of silence?
English, Richard
1999 (January/February) GILSI 14

Mandated victim participation: a criminal law response to the problem of domestic violence
Davis, Fergal
1999 ILTR 39

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Archbold, John Frederick
Archbold criminal pleading, evidence and practice 1999
1999 ed / by P.J. Richardson
London S & M 1999
M500

Damages

Todd v. Cincelli
High Court: **Kelly J.**
05/03/1999

Tort; assessment of damages; house adjoining plaintiff's house had been demolished; parties had reached agreement in relation to a number of heads of damage; whether damages should be awarded for diminution in value of the plaintiff's premises; whether aggravated damages should be awarded; whether punitive damages should be awarded.
Held: Compensatory and aggravated damages awarded; punitive damages not awarded.

Gaffey v. Hurley
Supreme Court: **Denham J**, Lynch J.; Barron J.
26/01/1999

Assessment of damages; whether the trial judge attached appropriate significance and weight to the evidence relating to the vocational assessment of the appellant; whether the award in respect of pain and suffering by the appellant from the date of the accident to the date of the trial was irreconcilable with the same award in respect of future pain and suffering.
Held: Appeal dismissed.

Education

Statutory Instrument
Education Act, 1998 (Commencement) Order, 1999
SI 29/1999

Employment

Kenny v. Minister for Trade and Employment
High Court: **O'Sullivan J.**
19/02/1999

Judicial review; employment outside the State; award for wrongful dismissal; employer was in liquidation and unable to pay award for wrongful dismissal to applicant; whether respondent was obliged to pay applicant's award; judicial review of respondent's decision not to pay award; interpretation of "a person to whom the Act applies" in s.6(3)(b), The Protection of Employees (Employers' Insolvency) Act, 1984; interpretation of "employment which is insurable" in s.3 of 1984 Act; whether applicant temporarily employed outside the State; Social Welfare (Consolidation) Act, 1981; Social Welfare (Contributions) (Amendment) Regulations, 1961.
Held: Relief refused.

An Bord Altranais v. Ní Cheallaigh
High Court: **Kelly J.** (*ex tempore*)
17/12/1997

Midwife; fitness to practice; order restraining applicant from practicing as a midwife; application to discharge order; application to vary order to allow applicant to act as midwife to notice parties; whether there were grounds which justified the Court in discharging the order; whether there had been unreasonable delay in proceeding with enquiries; whether order breached rights of mothers who wished to contract with applicant; s.44, Nurses Act, 1985.
Held: None of the grounds advanced justified the Court in discharging the order; defendant ordered to furnish notice parties with copies of complaints grounding original order; order would be varied on the basis of each notice party making a fully informed choice

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SI 35/1999

Employment Regulation Order (Handkerchief And Household Piece Goods Joint Labour Committee), 1999
SI 36/1999

Parental Leave (Maximum Compensation) Regulations, 1999
SI 34/1999

Environmental Law

Statutory Instruments
Oil pollution of the Sea (Civil Liability and Compensation) (Annual Returns and Contributions) Regulations, 1999
SI 16/1999

Protection of Groundwater Regulations, 1999
SI 41/1999

European Law

Articles
An outline of the rights of establishment under the Europe agreements
Barrington, Eileen
4(4) 1999 Bar review 214

European challenges to Ireland's tax regime
Quigley, Conor
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Statutory Instrument
European Communities (Introduction of Organisms Harmful to Plants or Plant Products) (Prohibition) (Temporary Provisions) Regulations, 1999
SI 38/1999

Evidence

Articles
Excelling as an expert witness
Conroy, Caroline
1998 ILTR(Expert Witnesses Directory) 2

Expert evidence: the new rules explained
Groarke, Patrick J
1999 (January/February) GILSI 16

Expert evidence – a few personal observations and the implications of recent statutory developments
Barr, Mr Justice Robert
4(4) 1999 BR 185

The disclosure and exchange of experts' reports in personal injuries litigation
Brady, Rory
4(4) 1999 BR 181

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Ritchie, Andrew
Medical evidence in whiplash cases
London Sweet & Maxwell 1999
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Extradition

Burke v. Conroy
High Court: **McCracken J.**
05/03/1999

Extradition; delay; charge of indecent assault; application for order for release; plaintiff suffering from ill health; whether unjust to order delivery due to lapse of time and other exceptional circumstances; criteria to be applied when making order; s.50(ii)(bbb), Extradition Act, 1965.
Held: Relief granted; it would be oppressive and invidious to order delivery; duration of delay considerable in conjunction with ill health and other circumstances; the ill health of the plaintiff on the facts was an exceptional circumstance.

Family

B. v. An Bord Uchtala,
M. v. St. Louise's Adoption Society
High Court: **McGuinness J.**
21/12/1998

Adoption; guardianship of infants; application for adoption order; prospective adoptive parents sought order dispensing with the consent of the natural mother to the adoption; application for sole custody until making of adoption order; natural mother sought an order returning the child to her custody; whether the natural mother had agreed to place her child for adoption; whether adoption was in the best interests of the child; s. 3, Adoption Act, 1974; s. 11, Guardianship of Infants, Act, 1964.
Held: Order dispensing with consent of mother granted; adoption order granted; sole custody granted to prospective adoptive parents for 6 months; no order made in the proceedings under the Guardianship of Infants Act.

McG. v. W.
High Court: **McGuinness J.**
14/01/1999

Nullity; recognition of foreign divorce; petitioner previously married to notice party; divorce obtained in England; petitioner subsequently married respondent; petitioner claimed a declaration that marriage to respondent was null and void by reason of his prior subsisting marriage to respondent; divorce granted prior to enactment of Domicile and Recognition of Foreign Divorces Act, 1986; jurisdiction of English Court based on notice party's residence for more than one year in England; whether English divorce entitled to recognition in this State; whether common law rules relating to recognition of foreign divorces should be developed in line with statutory developments in relation to jurisdiction in matrimonial matters; whether s.5 of 1986 Act prevents a court from developing common law rules relating to recognition; s.5, Domicile and Recognition of Foreign Divorces Act, 1986; s.29(1), Family Law Act, 1995; s.39, Family Law (Divorce) Act, 1996.
Held: English divorce entitled to recognition; marriage between petitioner and respondent valid and subsisting.

Daly v. Judge McGuinness
High Court: **Macken J.**
11/02/1999

Judicial review; declaration; fair procedures; proceedings to discharge interim barring order; whether applicant was entitled to have a lay litigant present during the course of the hearing; whether the respondent had a discretion to rule that lay litigant should not be allowed to remain in the court; whether in the interest of the administration of justice the prohibition was to be overridden.
Held: Relief refused; these proceedings were held in the context of specific prohibitory legislation; the applicant was not prejudiced.

Articles
Mandated victim participation: a criminal law response to the problem of domestic violence
Davis, Fergal
1999 ILTR 39

Tax implications of divorce
Walpole, Hilary
1999 IJFL 2

Fisheries

Daly v. Minister for the Marine
High Court: **O' Sullivan J.**
25/02/1999

Judicial review; legitimate expectation; EU Common Fisheries Policy; respondent operated a "replacement policy" requiring new entrants to the fishing fleet to demonstrate a ton for ton withdrawal from the register as a requirement to obtain a licence; as a result of that policy the tonnage assigned to a licensed vessel was a valuable commodity; applicant wished to sell tonnage of ship; consent of respondent was necessary for sale; letter from respondent to applicant offering licence subject to the condition that tonnage would be used for aquaculture purposes only, licence issued but did not state condition; applicant believed licence allowed demersal fishing; letter from respondent confirming view of applicant; letter issued in error; respondent refused to allow applicant to sell tonnage for replacement purposes; whether the applicant had a legitimate expectation that respondent would allow sale of tonnage for replacement purposes; whether the expectation was reasonable; whether it would be unjust and unfair to allow the respondent to go back on letter.
Held: Reliefs refused.

Statutory Instruments
Celtic Sea (Prohibition on Herring Fishing) Order, 1999
SI 43/1999

Cod (Restriction on Fishing) Order, 1999
SI 13/1999

European Communities (Common Fisheries Policy) (Market Intervention) and (Common Agricultural Policy) (Forestry Measures) Regulations, 1999
SI 39/1999

Health

Statutory Instruments
Health Insurance Act, 1994 (Risk Equalisation) (Revocation) Regulations, 1999
SI 32/1999

Health Insurance Act, 1994 (Commencement) Order, 1999
SI 28/1999

Health and Children (Delegation of Ministerial Functions) Order, 1999
SI 18/1999

Human Rights

Articles
The Belfast agreement and the future incorporation of the European convention of human rights in the Republic of Ireland
Hogan, Gerard
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The Northern Ireland Act: Issues of equality and Human Rights
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Information Technology

Articles
Litigation and the year 2000
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Ferriter, Cian
4(4) 1999 BR 217

Injunctions

Article
The continuing development of the mareva injunction in Ireland
Courtney, Thomas B
1999 CLP 39

Insurance

Allianz France Iardt v. Minister for Agriculture and Food
High Court: **Morris P.**
19/02/1999

Insurance; marine; placing brokers; risk; preliminary issue; whether the first named fourth party acted as placing broker of the defendant's marine assurance policy; whether placing brokers for French share.
Held: The first named fourth party acted as placing broker.

International Law

Article
Implementation of the Hague convention on intercountry adoption: the Law Reform Commission report
Pillay, Roisin
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Judicial Review

D.P.P. v. Judge Kelliher
High Court: **Morris P.**
28/01/1999

Certiorari; charge of rape; preliminary examination; respondent discharged notice party in respect of charge; whether respondent acted in excess of jurisdiction; whether respondent failed to carry out his functions in accordance with Criminal Procedure Act, 1967.
Held: Relief refused; although opinion of the respondent that there was not a sufficient case to put the accused on trial for the offence with which he was charged was wrong, this did not constitute a ground for interfering with the opinion.

Land

Dunn v. Crawford
High Court: **Laffoy J.**
11/02/1999

Charges on lands; terms of deed of transfer; terms of repayment of the balance of the sum varied by subsequent agreement; interpretation of the terms of the deed of transfer as varied by the subsequent agreement; declaration sought that the principal and interest due on the charges were well charged on the lands; whether the defendants were entitled to look behind the terms of the recitals; whether the recital acted as an estoppel against the defendants.
Held: Relief granted; defendants were estopped from denying the state of their indebtedness; defendants were not enti-

tled to look behind the recitals of the agreement as to the respective debts of the plaintiff.

Legal Profession

Article
What can we do for you?
O'Sullivan, Claire
1999 (January/February) GILSI 24

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Hogan, Daire
R.R. Cherry (1859-1916) Lord Chief Justice of Ireland, 1914-1916
Paper delivered at the annual general meeting of The Irish Legal History Society on Friday 10th October 1997 at the premises of the Public Record Office of Northern Ireland, Balmoral Avenue, Belfast.
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Article
Designing a courts system for the 21st century
Murphy, Ken
1999 (January/February) GILSI 6

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Licensing

D.P.P. v. Tivoli Cinema Ltd.
Supreme Court: O'Flaherty J., Murphy J., **Barron J.**
07/12/1998

Licensing; case stated; statutory interpretation; use of theatre for late night concerts; prosecutions dismissed; whether defendant was in breach of the terms of the licence; what amounts to a performance; whether intoxicating liquor sold within the permitted time; whether seat includes a place of standing; whether the patrons had previously engaged or paid for a seat; s.7, The Excise Act, 1835.
Held: Appeal allowed.

Negligence

Cremins v. Minister for Defence
High Court: **O'Donavan J.**
17/02/1999

Personal injury; army deafness; Green Book; plaintiff claimed to be suffering from noise- induced hearing loss and tinnitus; whether plaintiff's claim was statute-barred; whether the Green Book formula for assessing hearing loss is incomplete; Statue of Limitations Act, 1957; Statute of Limitations (Amendment) Act, 1991.
Held: Damages awarded based on International Standard 0199; Green Book does not allow for further deterioration of hearing caused by a combination of noise-induced hearing loss and age-related hearing loss.

Lennon v. Midland Health Board
High Court: **Smith J.**
15/12/1998

Personal injury; plaintiff suffered back injury as a result of repetitive nature of her work in a laundry; plaintiff claimed that injury was caused by negligence of defendants; whether training received by plaintiff was adequate in the circumstances; whether injury was attributable to any negligence on the part of defendants.
Held: Claim dismissed.

Armstrong v. Dwan & Sons Ltd.
High Court: **Morris P.**
08/02/1999

Personal injury; liability; causation; assessment of damages; assessment of injuries; accident at work; plaintiff was injured when stepping on crash bars of a truck which he was dismounting; allegation of fault in crash bar; allegation that the second named defendant was negligent in repairing the crash bar; whether obligation on first named defendant to inspect the truck after repair; the manner in which future losses should be calculated.
Held: First named defendant had not been negligent; Second named defendant had been negligent; claim for future losses should be included in general damages.

Planning

Cablelink Ltd. v. An Bord Pleanala
High Court: **Carroll J.**
23/02/1999

Judicial review; application for leave to apply for judicial review; decision of an Bord Pleanala; permission granted for erection of a television reflector; no licence to operate the deflector; whether the respondent failed to take into account policies and objectives of the government; whether absence of a licence constituted matters relating to the proper planning and development of the area.
Held: Relief refused; enforcement of licensing system was not a planning matter but a matter for central government.

Practice & Procedure

D.P.P. v. Hyde
High Court: **McCracken J.**
05/02/1999

Case stated; validity of three summonses; alleged infringement of EEC regulations; whether summonses were fundamentally defective; whether a charge in a summons which was unclear was a breach of the District Court Rules: whether a summons brought in respect of a charge which had been repealed was fundamentally defective; European Communities (Road Transport) (Recording equipment) Regulations 1986.
Held: The first summons was valid and could be proceeded with; the second summons was defective as it did not provide the accused with a sufficiently clear description of the offence with which he was charged; this was a defect which came within the District Court Rules and accordingly was a matter for the District Court judge; the third summons was fundamentally defective as it related to an alleged offence which did not exist at the time the charges were brought and accordingly could not be proceeded with.

Tobin and Twomey Services Ltd. v. Kerry Foods Ltd.
High Court: **Kelly J.**
3/12/1998

Judicial review; taxation of costs; High Court application for an Order pursuant to s.39, Arbitration Act 1954 and a Mareva Injunction; relief refused; defendants awarded their costs when taxed and ascertained; costs awarded on party and party basis; challenge to certain items allowed by Taxing Master; whether luxury payments are recoverable on a party and party taxation; whether holding of three consultations in preparation of Affidavits for hearing was in the nature of a 'luxury'; whether Master erred in allowing costs of previous hearing at which motion was adjourned; whether Master erred in level of fee allowed for taking of judgment; whether Master erred as to the amount allowed for the solicitor's instruction fee; whether accountants were entitled to fees in respect of preparation of affidavits; whether amount in respect of attendance of witness in court should have been allowed where that witness was not to give evidence *viva voce*; s.27(3), Court and Court Officers Act, 1995; O.99, r.10(2), Rules of the Superior Courts.
Held: Costs of previous hearing disallowed; fee for taking of judgment reduced; costs of attendance of witness in court disallowed; fee in respect of preparation and attendance at hearing reduced.

Rhatigan v. Gill
High Court: **O'Sullivan J.**
16/12/1998

Lodgment; nominal lodgment; defendant not in possession of sufficient information to allow him to lodge a realistic amount; unsuccessful negotiations; application to increase lodgment; whether defendant should be allowed to increase lodgment.
Held: Having regard to all of the circumstances, it would not be just to allow the defendant to make an increased lodgment and, accordingly, the application was refused.

Controller of Patents, Designs and Trademarks v. Ireland
High Court: **Carroll J.**
18/02/1999

Discovery; privilege; motion for further and better discovery; motion requiring defendants to specify classification of privilege; interpretation of an order of the High Court refusing to grant specific discovery and granting general discovery; whether documents generated in advance of the institution of proceedings were privileged; ss. 4 and 5, Intellectual Property (Miscellaneous Provisions) Act, 1998.
Held: Documents in respect of which an order of specific discovery had been refused could not be discovered under a general order of discovery; documents were covered by legal professional privilege as they were documents seeking or obtaining legal advice.

Societe Lacoste S.A. v. Keeley Group Limited
High Court: **O' Sullivan J.**
03/11/1998

Jurisdiction; enforcement of foreign judgment; appeal from orders of the Master of the High Court; Art. 34, Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; Convention was not adopted into domestic law when proceedings were instigated nor at the time of first instance judgment but was adopted before appeal judgment; Master enforcing appeal judgment; whether Master had jurisdiction to make order enforcing a foreign judgment; whether date for determination of jurisdiction was date of appeal decision; whether Master's order should recite that the country of judgment is a contracting State; Jurisdiction of Courts and Enforcement of Judgments Act, 1993.
Held: Master had jurisdiction to make order.

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Disclosure of reports and information in personal injuries litigation: the 1998 rules
Pierse, Robert
1999 ILTR 42

The continuing development of the Mareva injunction in Ireland
Courtney, Thomas B
1999 CLP 39

The disclosure and exchange of experts' reports in personal injuries litigation
Brady, Rory
4(4) 1999 BR 181

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SI 27/1999

Road Traffic

Statutory Instrument
Road Traffic Act, 1961 (Section 103) (Offences) Regulations, 199
SI 12/1999

Social Welfare

Statutory Instruments
Social Welfare (Temporary Provisions) Regulations, 1998
SI 466/1998

Social Welfare Act, 1998 (Section 22) (Commencement) Order, 1998
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Social Welfare Act, 1998 (Section 16) (Commencement) Order, 1998
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Quigley, Conor
1999 (January/February) GILSI 4

Tax implications of divorce
Walpole, Hilary
1999 IJFL 2

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Irish stamp duty law
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Dublin Butterworths 1998
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Tort

Boyle v. Marathon Petroleum Ltd.
Supreme Court: **O'Flaherty J.**, Denham J., Murphy J.
12/01/1999

Tort; employment; breach of statutory duty; accident at work; appellant injured

while working in very cramped conditions on an intermediate floor on an offshore platform; whether installation manager was in breach of statutory duty to ensure that workplace was safe; whether conclusion of the trial judge that the intermediate floor was as safe as reasonably practicable was supported by the evidence; s. 10(5), The Safety, Health and Welfare (Offshore Installations) Act, 1987.
Held: Appeal dismissed.

Guinness Ireland Group v. Kilkenny Brewing Company Ltd.
High Court: **Laffoy J.**
10/02/1999

Passing off; injunction; whether the plaintiffs had acquired an exclusive reputation in the use of the name "Kilkenny" in conjunction with "beer"; whether it was necessary for the plaintiff to establish defendant had an intention to deceive, create confusion or cause the wrong impression; whether the plaintiffs had an established goodwill at the time the defendant was incorporated; whether the public would get the impression of an association between the businesses carried on by the parties.
Held: Injunction granted restraining defendant from using name and directing defendant to change name.

Article
The disclosure and exchange of experts' reports in personal injuries litigation
Brady, Rory
4(4) 1999 BR 181

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London Sweet & Maxwell 1999
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Transport

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SI 21/1999

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SI 19/1999

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SI 20/1999

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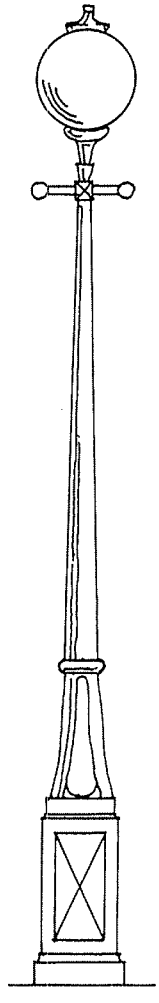

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C-18/95 F.C Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland
Judgment delivered: 26/1/99
Freedom of movement for workers; combined assessment covering income tax & social security contributions; non-applicability to workers who transfer their residence from one member state to another of a social contributions ceiling applicable to workers who have not exercised their right to freedom of movement; possible offsetting by income tax advantages; possible incompatibility with community law; consequences.
Court of Justice of the European Communities

C-390/95P Antillean Rice Mills NV v Council of the European Union
Judgment delivered: 11/2/1999
Competence of the Council to impose restrictions on the import of agricultural products originating in the overseas countries & territories.
Court of Justice of the European Communities

C-127 & 229/96 & 74/97 Francisco Hernandez vidal v Prudencia Gomez Perez
Judgment delivered: 10/12/1998
Safeguarding of employees' rights in the event of transfers of undertakings.
Court of Justice of the European Communities

C-173 & 247/96 Francisca Sanchez Hidalgo & Ors v Associacion de Servicios Aser
Judgment delivered: 10/12/1998
Safeguarding of employees' rights in

the event of transfers of undertakings.
Court of Justice of the European Comunities

C-215 & 216/96 Carlo Bagnasco & Ors v Banca Polpolare di Novara sco. coop
Judgment delivered: 21/1/199
Competition Art. 85 & 86; standard bank conditions for current-account credit facilities and for the provision of general guarantees.
Court of Justice of the European Communities

C-343/96 Dilexport Srl v Amministrazione delle finanze dello stato
Judgment delivered: 9/2/1999
Internal taxes contrary to art. 95 of the treaty; recovery of sums paid but not due; national rules of procedure.
Court of Justice of the European Communities

C-348/96 Donatella Calfe (Art. 177) Judgment delivered: 19/1/1999
Public policy; tourist from another member state; conviction for drug use; exclusion for life from a member states' territory.
Court of Justice of the European Communities

C-374/96 Florian Voderbruggen v Hauptzollamt Bielefed
Judgment delivered: 16/12/1998
Court of Justice of the European Communities

C-77/97 Osterreichische Unilever GmbH v Smithkline Beecham Markenartikel GmbH
Judgment delivered: 28/1/1999
Interpretation of art. 30 & dir. 76/768; comestic products; national legislation imposing advertising restrictions.
Court of Justice of the European Communities

C-103/97 Josef Kollensperger GmbH & Co KG v Gemeindeverband Bezirkskankenhaus Schwaz
Judgment delivered: 4/2/1999
National court or tribunal within the meaning of Art.177; procedures for the award of public supply contracts and public works contracts; body responsible for review procedures.
Court of Justice of the European Communities

C-150/97 Commission of the European Communities v Portugeuse Republic
Judgment delivered: 21/1/1999
Failure by a member state to fulfil its obligations; Dir.85/337.
Court of Justice of the European Communities

C-181/97AJ van der Kooy v Staatssecretaris van Financien
Judgment delivered: 28/1/1999
Part four of the EC Treaty; art. 227; Art.7(1)(a) 6th Dir. 77/388; goods in free circulation in overseas countries and territories.
Court of Justice of the European Communities

C-207/97 Commission of the European Communities v Kingdom of Belguim
Judgment delivered: 21/1/1999
Failure of a member state to fulfil its obligations; council Dir.76/464; water pollution; failure to transpose.
Court of Justice of the European Communities

C-237/97 AFS Intercultural Programs Finland
Judgment delivered: 11/2/1999
Dir.90/314 on package holidays and package tours; scope; organisation of student exchanges.
Court of Justice of the European Communities

C-303/97 Verbraucherschutzverein v Setkellerei GC Kessler GmbH & Co.
Judgment delivered: 28/1/1999
Brand name; sparkling wine; art. 13(2)b of Reg 2333/92; description of product; consumer protection; risk of confusion.
Court of Justice of the European Communities

C-354/97 Commission of the European Communities v French Republic
Judgment delivered: 9/2/1999
Failure of a member state to fulfil its obligations; Dir. 93/74, 94/28, 94/39, 95/9 & 95/10.
Court of the Justice of the European Communities

C-149/98P Anne-Marie Toller v Commission of the European Communities
Order of the Court delivered: 19/11/98
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European Communities (Motor Vehicles Type Approval) Regulations
SI 49/1999
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European Communities (Minimum Measures for the Control of Certain Diseases Affecting Bivalve Mollusca) Regulations, 1999
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(DIR 95/70)

Environmental Protection Agency act, 1992 (Ambient Air Quality Assessment And Management) Regulations, 1999
SI 33/1999
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Local Government (Water Pollution) (Amendment) Regulations, 1999
SI 42/1999
DIR 80/68

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Activity Centres (Young Persons' Water Safety) Bill, 1998
2nd stage – Dail [p.m.b.]

Architectural Heritage (National Inventory) & Historic Monuments (Miscellaneous Provisions) Bill, 1998
Report - Seanad

Bretton Woods Agreements (Amendment) Bill, 1998
Committee - Dail

Companies (Amendment) Bill, 1999
2nd stage- Dail [p.m.b.]

Censorship of Publications (Amendment) Bill, 1998
2nd stage - Dail [p.m.b.]

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

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

Criminal Justice (United Nations Convention Against Torture) Bill, 1998
Report- Seanad

Criminal Law (Rape)(Sexual Experience of Complainant) Bill, 1998
2ND stage - Dail [p.m.b.]

Control of Wildlife Hunting & Shooting (Non-Residents Firearm Certificates) Bill, 1998
2nd stage - Dail [p.m.b]

Eighteenth Amendment of the Constitution Bill, 1997
2nd stage - Dail [p.m.b.]

Electricity Regulation Bill, 1998
2nd stage - Dail

Employment Rights Protection Bill, 1997
2nd stage - Dail [p.m.b.]

Energy Conservation Bill, 1998
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Enforcement of Court Orders Bill, 1998
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Equal Status Bill, 1998
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Human Rights Bill, 1998
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1st stage - Dail

National Disability Authority Bill, 1999
Committee - Seanad

Postal and Telecommunications Services (Amendment) Bill, 1998
Committee - Dail

Prevention of Corruption (Amendment) Bill, 1999
1st stage - Dail

Prohibition of Ticket Touts Bill, 1998
2nd stage - Dail [p.m.b.]

Protection of Children (Hague Convention) Bill, 1998
1st stage - Dail

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

Qualifications (Education & Training) Bill, 1999
Committee - Seanad

Radio & Television (Amendment) Bill, 1999
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1st stage - Dail [p.m.b.]

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2nd stage - Seanad

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Telecommunications (Infrastructure) Bill, 1999
1st stage - Seanad

The British - Irish Agreement Bill, 1999
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Trade Union Recognition Bill, 1999
1st stage - Seanad

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Abbreviations

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

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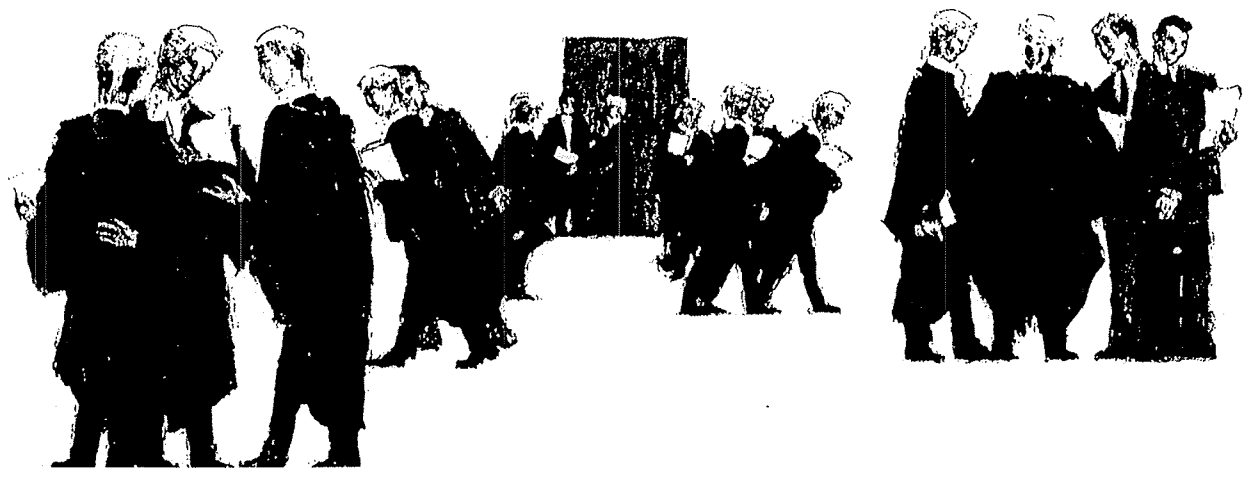


KING'S INNS NEWS

Examinations

King's Inns Students are busy preparing for the summer examinations which begin on Monday, 10 May and continue for a fortnight. We take this opportunity of wishing them the very best of luck.

●

MBNA Card

This issue of the Bar Review carries an advertisement for the King's Inns MBNA card. We are pleased to hear from MBNA that, so far, the take-up has been very favourable. The comments on the card from retailers have also been favourable. Definitely one to have in the wallet.

●

Cumann Cuimhneachain an Onoraigh Cearbhall O Dalaigh

Ocaid Ghaeilge - Leacht agus Beile in Ostai an Ri an Chead Mhairt de gach Tearma Beilti.

Tearma na Trionoide Meitheamh, 1999 in Ostai an Ri, Sraid Henrietta.

5.00pm: "Nil Gra Da Mheid Nach dTagann Fuath Da Reir" - gneithe de Dhli an Teaghlaigh le Micheal Mairtin O Se, Abhcoide, sa Seomra Coiteann.

6.30pm: Beile sa Phriomh-halla Proinne Mas suim leat freastal ar leacht agus beile, glaoigh ar Dhaithi Mac Carthaigh, Abhcoide ag 01 8175251.

●

– Camilla McAleese
Under-Treasurer, King's Inns

Existing Duties on Employers to Consult with Trade Unions

OISÍN QUINN, Barrister

Introduction

The Irish system of industrial relations, like that in Great Britain has traditionally been voluntary in nature, where the collective bargaining process between employers and trade unions has been left to the parties without the intervention of the State. Not only has collective bargaining been a voluntary process but most collective agreements are not considered legally binding.[1] State intervention has been limited to relatively minimal regulation by providing for the licensing of Trade Unions and the creation of Dispute Resolution Machinery such as the Labour Court and the Labour Relations Commission and the Rights Commissioner Service.[2] In keeping with the voluntary tradition, the recommendations and decisions of our industrial relations dispute resolution machinery are not legally enforceable.

The position is different on the Continent[3] where collective bargaining is legally regulated, collective agreements tend to be legally binding and special Labour Courts whose decisions are legally enforceable have generally been created.

The Irish legal framework in this area has been influenced by our membership of the European Union. The Treaties establishing the European Union contain the aims of establishing an internal market and improving the living and working conditions of workers.[4] It is fundamental to the legal framework of most Continental European jurisdictions that Employers must consult with employees' representatives and, accordingly, provisions to that effect have been reflected in European Directives and been imported into a number of pieces of Irish legislation implementing those Directives here.

There has also been a domestic impetus for changes in this area. The role that social partnership has played in our current economic boom is well recognised and appreciated. The dispute involving Ryanair in 1998 ignited a debate about whether or not Trade Unions should be granted a legal right to recognition.[5] A High-level group of social partners was established under Partnership 2000 and their discussions on trade union recognition have led to the proposals which involve legislation allowing the Labour Court to intervene in certain disputes and to impose (after various procedures) legally binding decisions on the parties.[6] While this will mark a major departure from the voluntary tradition, changes to that tradition have already been gradually occurring over recent years.

The Constitution and Fair Procedures

Article 40.6.1(iii) provides for the right of citizens to form associations and unions. The Courts have always been quick to point out that this right also involves of necessity the right not to join Trade Unions.[7] However, the Courts have also emphatically stated that the constitutional right to join a Trade Union does not oblige employers to recognise such unions. In *EI Company Limited – v- Kennedy*[8] Mr. Justice Walsh stated that "an employer is not obliged to meet anybody as the representative of his worker nor indeed is he obliged to meet the worker himself for the purpose of discussing any demand which the worker may make." In the case of *Abbot and Whelan – v- ATGWU and Ors*[9] Mr Justice McWilliam in the High Court stated that "employers must frequently have refused to negotiate with employees or the Unions and this may have led to industrial action but, outside the terms of the contract of employment, employers are not bound to take part in any, or any particular form of, negotiations."

Accordingly, there is no constitutional right to recognition for a trade union for the purposes of negotiation.

However, in the context of fair procedures, the Courts have recognised that, in particular circumstances, employees should be entitled to be represented by Trade Union Officials at disciplinary hearings. In *Maher – v- AIB* ELR(1998)204, Smithwick P. held that the Plaintiff should have been given the opportunity to be represented by her union before the employer decided to suspend her without pay. In *Maher v- Irish Permanent (No.1)* ELR (1998) 77 at p.88, Ms Justice Laffoy held that the Plaintiff was entitled to be legally represented at a hearing into alleged sexual harassment. The principles of natural justice are imported into each employee's contract of employment.[10]

To date, however, the requirement that an employee or his representative be informed of the reasons behind any decision which affects him has only been applied to decisions where the employee's employment has been in jeopardy. In the case of *Boucher and Ors – v- Irish Productivity Centre*[11] the EAT held that the procedure for selecting employees for redundancy was unfair because the criteria for selection had not been put to each of the claimants as part of the selection process. In the case of *Gearon -v- Dunnes Stores* the EAT held that the dismissal of the employee was unfair when the employee was deprived of the opportunity of having her trade union representative make representations on her behalf.

Accordingly, in circumstances where an employees employment is in jeopardy it is hard to envisage circumstances in which the rules of natural and constitutional justice would not entitle that employee to be represented by a trade union representative (assuming of course that such representation was forthcoming).

Contractual Agreements

Notwithstanding the absence of a constitutional right to have one's Union recognised or a general statutory right to recognition, there is nothing to prevent employees obtaining a specific contractual right that their Trade Union will be recognised. However, such express contractual provisions are rare. It is however open to employees to argue that their contract contains an implied term that their Union will be recognised. Such an implied term could be established by virtue of the conduct of the parties and a course of dealing. In the case of *National Union of Tailors and Garment Workers -v- Charles Ingram and Company Limited*[12] the UK EAT held that:

> "whereas in the present case there is neither a written agreement that the Union should be recognised nor an express agreement which is not in writing, it is sufficient if the established facts are clear and unequivocal and give rise to the clear inference that the employers have recognised the Union. This will normally involve conduct over a period of time and the longer that state of facts have existed the easier it is to reach conclusion that the employers have recognised the Union.[13] It should be stated that a contractual right to have the union recognised would be a right of the employee incorporated into his/her contract of employment.

In the event that such a right could be established by an employee, then the corresponding obligation on the employer to recognise the employee's Trade Union would be transferred to a new employer pursuant to the transfer of Undertakings Regulations, 1980.[14] It should also be noted that Regulation 4 of the Transfer of Undertakings Regulations, 1980 provides that the Transferee should continue to observe the terms and conditions agreed in any collective agreement following the transfer of a business.

Statutory Provisions placing duties on Employers to consult with Trade Unions

1. The Transnational Information and Consultation of Employees Act, 1996.

This Act commenced on the 22nd of September, 1996[15] and it introduces into Irish law Council Directive 94/45 EC concerning the Establishment of European Works Councils or Procedures in Community Scale Businesses for the Purpose of Informing and Consulting with Employees.

The Act applies to community scale undertakings which are defined in Section 3 of the Act as any undertaking with at least 1,000 employees within the Member States and at least 150 employees in each of at least 2 Member States. According to the European Trade Union Institute as many as 1,152 undertakings could be affected by the Directive and approximately 200 of these have operations in Ireland. The Directive was adopted under the new social policy procedures introduced after the Maastricht Treaty and was adopted by all of the Member States except the United Kingdom who were not initially covered by this Directive.[16]

The Act provides that undertakings which negotiated agreements which cover their entire work force and which provide for transnational information and consultation with employees shall be exempt, provided those agreements were negotiated before the 22nd of September 1996.

Since the 22nd of September 1996 a written request by at least 100 employees, or their representatives, from at least two Member States means that the community scale undertaking must establish a special negotiating body to negotiate an agreement and structure to provide for community wide information and consultation with employees. If the Central Management of the Company refuses to commence negotiations within 6 months of this request then a European Works Council is automatically established pursuant to Section 13(1) of the Act. Alternatively, if the parties are unable to reach an agreement after the expiration of a period of 3 years from the date of the request then a European Works Council shall be established in accordance with Section 13 (1) as set out in the Second Schedule of the Act. In practice therefore the subsidiary requirements, as they are called, for a European Works Council contained in the Second Schedule to the Act should form the minimum basis for any agreements on consultation and information with employees. The relevant law for dealing with these agreements to set up the European Works Council is the law of the Member State where the community scale company has its Central Management (or if its Central Management is outside the Member States) the Member State where the Central Management has its representative agent.

According to paragraph 5 of the Second Schedule each European Works Council ("EWC") shall have the right to meet with the Central Management once a year and to be informed and consulted on the basis of a report drawn up by the Central Management on the progress of the business of the community scale undertaking or community scale group of undertakings and its prospects and local management shall be informed accordingly.

Paragraph 5(2) provides that this annual meeting shall relate in particular to "the structure, economic and financial situation and probable trends in employment, investments, and substantial changes concerning the organisation, introduction of new working methods or production process, transfer of production, mergers, cutbacks or closures of undertakings, establishments or important parts thereof, and collective redundancies."

Each European Works Council should have at least 3 but not more than 30 members and it can elect select committees from amongst its members comprising of not more than 3 members. The election of employee's representatives to the European Works Council is covered by the First Schedule of the Act. It provides that any employee who is employed in the State on the day or days of the election are entitled to vote. However, to run for a position on the EWC an employee has to have been employed in the State for a continuous period of not less than one year on the nomination day. Where the number of candidates exceeds the number of positions available the election would be decided according to the principles of proportional representation. Paragraph 6 provides that the cost of the nomination and election procedure shall be borne by the Central Management of the Company.

The negotiations for the formation of the European Works Council are to be conducted between Central Management and the companies Special Negotiating Body (SNB). The setting up of an SNB is triggered by a written request from at 100 employees or their representatives from at least two of the countries co-

ered by the Directive. Once the process has been initiated a company must establish an SNB composed of employee representatives from the undertaking's operations in all of the Member States. The SNB and Central Management have 3 years in which to negotiate the agreement over the establishment of an information and consultation procedure. As indicated in default of that agreement the European Works Council, as provided for in the Second Schedule of the Act, shall be formed.

During the negotiation period, which can last up to 3 years, Central Management and the SNB must address a range of specific issues including:

(a) The composition of the EWC,
(b) The number of members;
(c) The allocation of seats;
(d) The terms of office;
(e) The EWC's functions;
(f) The procedure for information and consultation;
(g) The venue, frequency and duration of meetings;
(h) The financial and material resources to allocated;
(i) The duration of the agreement; and
(j) The procedure for its renegotiating.

Obviously, this Act introduces dramatic new provisions in relation to community scale companies and by September 1999 many European Works Council should be established.

There is a difference between the procedure for election to the SNB and an EWC. Only employees can be elected to the EWC whereas Trade Union Officials who are not employees can be elected to the SNB. Furthermore, the definition of a Trade Union Official is restricted to officials of a Trade Union which is "already recognised" for collective bargaining purposes.

Many companies entered into agreements voluntarily with the Employees Representatives prior to the 22nd of September 1996 to avoid the Act applying. Based on an analysis of the agreements reached two basic models for the structure of the information on consultation arrangement have emerged. They have been described as the "German" and "French" models. The former is a structure made up of employee representatives only, which meets bilaterally with management whereas the latter is a joint committee of management and employee representatives. Seventy five percent of the agreements analysed followed the French models.

It should be noted however that this Act and the procedure to be established pursuant to it do not provide for negotiation in relation to terms and conditions of employment or pay. The Act provides for the right to consultation and information but does not give a right to recognition or negotiation.

2. The Protection of Employment Act, 1977 and The Protection of Employment Order, 1996

Council Directive 75/129 EEC required Ireland to introduce legislation providing for the consultation of employees' representatives in the event of collective redundancies. That Directive was implemented by means of the Protection of Employment Act, 1977, which came into operation on the 10th of May 1977. The original Directive was amended by Council Directive 92/56/EEC and that Directive was implemented by means of the Protection of Employment Order, 1996.[17] Both of those Directives have now been repealed and replaced by Council Directive 98/59/EC of the 20th July 1998. That Directive came into force on the 1st of September 1998 and it effectively amounts to a consolidation of the two previous Directives.

Pursuant to the Protection of Employment Order, 1996 "collective redundancies" means dismissals affected by an employer for one or more reasons not related to the individual concerned where in any period of 30 consecutive days the number of such dismissals is:

(a) At least 5 in an establishment normally employing more than 20 and less than 50 employees;
(b) At least 10 in an establishment normally employing at least 50 but less than a 100 employees;
(c) At least 10% of the number of employees in an establishment normally employing at least 100 but less than 300 employees; and
(d) At least 30 in an establishment normally employing 300 or more employees.[18]

Section 9(1) as amended provided as follows:

> "where an employer proposes to create collective redundancies, he shall, with a view to reaching an agreement initiate consultations with employees representatives."

Section 9(2) as amended provides that the consultations under Section 9 are to include consultations about 'the possibility of avoiding the proposed redundancies, reducing the number of employees affected by them or otherwise mitigating their circumstances by recourse to accompanying social measures aimed, inter alia, at aid for re-deploying or retraining employees made redundant".

Section 10 of the Act requires "the employer to supply the employees representatives with all relevant information relating to the proposed redundancies."

The employer must notify the Minister at least 30 days before the first dismissal is to take effect and copy that notification to the employees representatives.

In the original Act "employees' representatives" was defined as officials of a Trade Union "with which it has been the practice of the employer to conduct collective bargaining negotiations." That definition has now being changed by the 1996 Order which defines employee's representatives as "a Trade Union or Staff Association or a person or persons chosen by the employees likely to be affected by the proposed redundancies to represent them." This is an important change and it means that an employer can no longer argue that there are no employees representatives because it has not been that employer's practice to conduct collective bargaining negotiations. This change is in keeping with the decision of the European Court of Justice in the case of the *Commission -v- The United Kingdom of Great Britain and Northern Ireland.*[19] In that case the UK was condemned by the ECJ for not providing a mechanism for the designation of Workers Representatives in a company where the employer refused to recognise such representatives.

The new consolidated Directive 98/59/EC which came into force on the 1st of September 1998 recites at paragraph 12 that Member States "should ensure that workers representatives and/or workers have at their disposal administrative and/or judicial procedures in order to ensure that the obligations laid down in this directive are fulfilled." In the *Commission -v- UK* decision the ECJ held that the provision in the United Kingdom's national legislation provid-

ing for a protective award of compensation to any employee who is not consulted or provided with information did not amount to a proper implementation of the Directive because the protective award could be set off against any other sum awarded to the employee as a result of the termination of his employment. The ECJ stated that "an employer will not be penalised even moderately or lightly by the sanction except and only to the extent to which the amount of the 'protective' award which he has been ordered to make exceeds the sums which he is otherwise required to pay to the person concerned."[20] Accordingly, the ECJ held that the United Kingdom had failed in its obligations to properly implement the Directive by failing to provide for the proper sanctions.[21]

Both the 1977 Act and the 1996 Order however appear to be deficient in that there is no provision made to ensure that Workers Representatives or workers can ensure that the obligations are fulfilled. Section 11 of the Act makes it an offence for an employer to initiate consultations or to provide the information. However, it is only a summary offence and the maximum fine is IR£500.

Finally, it should be remembered that the duty contained in the 1977 Act and the 1996 Order is to consult with a view to reaching an agreement. There is no obligation to actually reach an agreement.

3 The Transfer of Undertakings Regulations, 1980

The transfer of Undertakings Regulations, 1980 were introduced by S.I. No. 306 of 1980 and came into operation on the 3rd of November, 1980. The Regulations were introduced to give effect to Council Directive No. 77/187/EEC of the 14th of February, 1977. That Directive has since been amended by Council Directive 98/50/EC of the 29th of June, 1998. The amending Directive does not have to be implemented until the 17th of July, 2001 at the latest.

Article 6 of the First Directive requires both the Transferor and the Transferee to inform the representatives of their respective employees for the following:

(a) The reasons for the transfer;
(b) The legal economic and social implications of the transfer for the employees; and
(c) The measures envisaged in relation to the employees.

This information must be given in good time before the transfer is carried out. Furthermore, Article 6.2 of the First Directive requires both the Transferor and the Transferee to consult with the employees representatives, again in good time if either of them envisage measures in relation to the employees. This Article was given effect in Regulation 7 of the Irish Regulations.

Article 2 of the Directives defines "representatives of the employees" as "the representatives of the employees provided for by the laws of practices of the Member States with the exception of members of administrative, governing or supervisory bodies of companies who represent employees on such bodies in certain Member States." These obligations are mandatory. If there are no representatives of the employees then the information described above must be given to the employees directly although in that instance there is no obligation then to consult.

Details of any measures envisaged in relation to employees must be discussed with representatives of the employees with a view to obtaining their agreement to these measures. The new Directive also requires the Transferor and the Transferee to inform the Workers Representatives of the date or proposed date of the transfer.

The Irish Courts have not had to interpret these provisions as yet. However, the original 1981 UK Regulations only obliged employers to consult with the recognised Trade Unions. The European Commission instituted proceedings against the United Kingdom in the case of *The Commission -v- United Kingdom of Great Britain, Northern Ireland.* The ECJ held that the UK provisions were defective in purporting to allow an employer to ignore the representatives of employees where the employer did not recognise the Trade Union. Furthermore, the Court stated that there should be "a mechanism for the designation of employee representatives, in an undertaking where the employer refuses to recognise employee representatives."

As with the 1977 Act and 1996 Protection Order in respect of collective redundancies there is no mechanism provided to allow employees representatives to enforce their rights under the transfer of Undertakings Regulations, 1980. A provision to remedy this deficiency is contained in the Employment Rights Protection Bill, 1997 introduced by Deputy Broughan in December 1997 but no action has been taken by the current Government in that regard. Currently, the Irish Regulations simply make it an offence to breach the regulations and fines are limited to IR£500.

Pending legislation to provide for judicial procedures to allow workers and the representatives to ensure that the obligations laid down in the Directives are complied with it may be open to either employees or a representative Trade Union to apply for injunctive relief. In the case of *Maybury -v- Pump Services Limited and Endea Limited*[23] the Plaintiff made an *ex-parte* application to the High Court seeking injunctive relief on the grounds that both Defendants had failed to comply with Regulation 7 (which provides for the duty to provide information). The High Court made an Interim Order restraining the First Named Defendant from selling or completing the sale of the assets and goodwill of the business to the Second Named Defendant until further Order. The case was settled at the interlocutory stage without any further Order.[24] In *Highland Shipping Agencies -v- Weir Agencies & Ors*[25] mandatory injunctions directing the Defendants to comply with their obligations to inform and consult pursuant to the 1980 Regulations were sought and refused. However, at the time of the hearing the transfer had already taken place.

It should be noted that Article 7(a) of the new Directive provides that Member States "shall introduce into their national legal system such measures as are necessary to enable all employees and representatives of employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities."

4 Health and Safety Legislation

(i) The Safety Health and Welfare at Work Act, 1989.

Section 13(3) of the 1989 Act allows employees to select and appoint a safety representative to represent them in consultations with their employer. The Safety Representative is entitled to receive information from the employer "as is necessary to ensure...the safety and health of employees at the place of work." Section 13 obliges employers to

consult with their employees for the purpose of making and maintaining of arrangements which will enable the employer and the employees to co-operate effectively in promoting and developing measures to ensure their safety health and welfare at work and in ascertaining the effectiveness of such measures. An employer must also "as far as is reasonably practicable" take account of any representations made by the employee. The Safety Representative has various rights to make representations and to investigate accidents and to receive information from Health Inspectors. It is an offence for the employer to breach these provisions and the offence is punishable on summary conviction by a fine not exceeding IR£1,000 or on indictment by a fine without limit.

Regulation 11 of the General Application Regulations 1993[26] provides that the employers have a duty to provide information to their employees or Safety Representative (or both) on matters of safety and health to ensure that such information includes necessary information concerning the safety and health risks and protective and preventive measures and activities in respect of both the place of work generally or each type of work station (or both) the designation of employees in relation to emergency procedures and the measures to be taken concerning safety and health pursuant to the Regulations.

Regulation 12 places the employer under a duty to consult his employees or Safety Representatives on matters of safety and health and to ensure that that consultation takes place in advance and in good time on measures to be taken in the work place that affect safety, health and welfare of the employees.

(ii) The European Communities (Protection of Workers) (Exposure to Asbestos) Regulations 1989[27]

Regulation 9 of these Regulations requires each employer to carry out an assessment of the risk of exposure to asbestos of their workers if the worker is being permitted to carry out an activity which would expose or would be liable to expose that worker to dust arising from either asbestos or materials containing asbestos.

Regulation 9 (6) requires the employer in preparing that assessment to consult with the workers concerned or, where appropriate, with the workers representative in respect of the assessment. That requirement to consult is mandatory.

(iii) The Safety, Health and Welfare at Work (Carcinogens) Regulations, 1993

Regulation 11 of these Regulations places a mandatory duty on each employer to ensure that they consult with their employees or their Safety Representatives (or both) in relation to the requirements of these Regulations.

(iv) Miscellaneous Statutory Provisions

The Pensions Act, 1990 regulates Occupational Pension Schemes and provides for the establishment of the Pensions Board which supervises such schemes and their operation.

Section 54 of the Act obliges the Trustees of a pension scheme to furnish information to a number of persons including "an authorised Trade Union representing the members concerned."

There are also a number of legislative provisions which reduce the statutory obligations of employers who recognise Trade Unions and have agreements with those Trade Unions. These pieces of legislation however do not impose any duty on the employer to deal with Trade Unions.

For example, pursuant to the Terms of Employment (Information) Act, 1994 an employer can simply refer an employee to a collective agreement as the source of the written terms of their employment. Otherwise, the employer must furnish each employee with the statement in writing containing particulars of various terms and conditions of the employees employment.

Section 14(1) of the Unfair Dismissals Act, 1977 obliges employers to give employees, not later than 28 days after the contract of employment has been entered into, a notice in writing setting out the procedure which the employer will observe before and for the purpose of dismissing the employee. Section 14(3) provides that this procedure must be agreed with the employee or with the registered Trade Union pursuant to the Trade Union Act, 1941.

Section 4 (5) of the Organisation of Working Time Act, 1997 allows employers to enter into collective agreements with Trade Unions holding a negotiation licence under the Trade Union Act, 1941 which can exempt an employer from the provisions of Sections 11, 12 or 13 which deal with daily rest periods, rest intervals at work, and weekly rest periods respectively. However, in the event that any collective agreement does exempt an employer from complying with those provisions Section 6 of the Act provides that the collective agreement should allow for equivalent rest period or breaks as the case may be. Accordingly, an employer can achieve more flexibility by entering into a collective agreement exempting him/her from certain provisions of the 1997 Act.

Conclusion

There is no doubt that legislation providing for the proper provision of information and consultation with trade unions can play an important role in ensuring fairness at work. The current legal framework and proposals for change appear to be moving Ireland towards a unique form of regulated voluntarism where the vast majority of employers and trade unions will continue to negotiate on a voluntary basis but against a legal framework which supports consulting with and recognising trade unions. ●

1 According to Lord Wedderburn, *The Worker and the Law*, 3rd Edition at page 319 the question of whether or not collective agreements were legally enforceable became a national obsession in Great Britain in the 1960s. The matter had been studied by Otto Kahn-Freund who conducted research on the matter in the '40s and '50s. He concluded that collective agreements in Britain were by and large not normally legally binding because the parties did not intend them to be. The issue came before the Courts in England in the case of *Ford Motor Company Limited -v- Amalgamation Union of Engineering Workers* [1969] 2 QB 303. In that case Mr. Justice Lane decided that the collective agreements in question were not intended to be legally enforceable contracts. It should be noted that in countries such as Sweden, Germany, Italy and France collective agreements are legally enforceable. However, there is nothing instrinic in the nature of collective agreements that prevents them from being held to enforceable. In *Goulding Chemicals -v- Bolger* [1977] IR 211 at page 237 Kenny J. indicated that the test was whether or not the parties by the collective agreement had intended to create legal relations and intended to enter into a binding legal contract.

2 See The Trade Union Act, 1941 and the Industrial Relations Acts, 1946 to 1990.

3 French law and Belgian law contain the concept of ìthe most representative unionî and unions which qualify for that designation are entitled to important priv-

ileges in collective bargaining. In Belgium there is permanent bargaining machinery established by national legislation for individual industries. Many European countries have disclosure rules which require the employer to disclose information during negotiation process. In this regard, see *Collective Bargaining in industrialised market economies: a reappraisal*, Windmuller and Ors, ILO, 1987.

4 Point 7 of the *Community Charter of the Fundamental Social Rights of Workers, 1989* provides that "the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community."

5 Tommy Broughan, T.D., introduced the *Trade Union Recognition Bill, 1998* proposing such a right from the opposition benches in February, 1998. There was also a proposal on the right to recognition in the *Report of the Commission of Inquiry on Industrial Relations*, 28th July 1981. In that report the Commission recommended that where a period of three years has expired since the commencement of an enterprise and whereas a significant number of workers wished to have recognition conceded to a Union which was not party to the original agreement, the matter should be referred to the proposed Labour Relations Board, see page 114 of the Report. At para 879 on page 289 of the Report the Commission recommended that "in the event of an employer failing to give effect to a determination of the Labour Relations Court in favour of recognition, the Court should be empowered to determine conditions of employment to which the employer would be legally bound."

6 Section 10 of Deputy Broughan's *Trade Union Recognition Bill, 1998* contained somewhat similar provisions in that if a recommendation of the Labour Court was not followed the Labour Court was to be given a power to make a binding Employment Regulation Order which could determine pay and conditions of employment. It is interesting to note that at the time the *Trade Union Recognition Bill, 1998* was introduced in the Dail, Deputy Tom Kitt Minister for State of the Department of Enterprise Trade and Employment made a speech very strongly opposing the approach contained in the *Trade Union Recognition Bill*. In his contribution to the Dail on the 17th of February 1998 Deputy Kitt stated that "by assigning a quasi judicial role to the Labour Court in one area of industrial relations, the Bill undermines the effectiveness of the Court in assisting settlement of other types of disputes." He went on to state that "an assumption that an employer will concede recognition for collective bargaining purposes rather than face the threat of statutory minimum pay and conditions appears to underlie this bill; that faced with the threat of having pay and conditions in his enterprise settled by Labour Court Order the employer will opt for union recognition, in other words talk now or pay later. It is highly debatable that employers would behave like that; the more likely route is one of litigation. The proposal is not a convincing strategy to bring about trade union recognition. There will be damage to investment in jobs, especially foreign direct investment."

7 *Meskell v CIE* [1973] IR 121

8 [1968] IR 69

9 [1982] 1JISLL56

10 See *Mooney -v- An Post* unreported Supreme Court, 20th of March 1997 and *Gallagher -v- Revenue Commissioners*, Supreme Court, [1995]1IRLM241

11 [1994]ELR205

12 [1977]IRLR147 In National Union of Tailors and Garment Workers ñv-Charles Ingram and Company Limited the NUTGW claimed that the Company should have consulted them in relation to redundancies which were proposed. They argued that there was an implied agreement that the Union would be recognised.

13 However, it should be noted that a course of dealing which establishes that the employer has dealt with the Union in relation to redundancies or in relation to the transfer of the business does not necessarily imply that the Employer has recognised the Union in relation to bargaining in respect of the terms and conditions of employment of the workers. In that regard, see the decision of the Court of Appeal in the case of *National Union of Gold, Silver and Allied Trades -v- Albury Brothers Limited* [1978]IRLR507 where the Court of Appeal held that even though the Employer had engaged in discussions concerning wages with the Trade Union this was not sufficient to establish that the Employer had recognised the Union. Furthermore, the facts that the Employer was a member of a trade association which had negotiated with the Trade Union was also not sufficient.

14 Regulation 3 of the European Communities (the Safeguarding of Employees Rights on Transfer of Undertakings) Regulations, 1980 provides that "the rights and obligations of the Transferor arising from a contract of employment or from an employment relationship existing on the date of transfer shall, by reason of such transfer be transferred to the Transferee."

15 Pursuant to Statutory Instrument No. 276, 1996, the Transnational Information and Consultation of Employees Act. 1996 (Commencement) Order, 1996.

16 The Directive was extended to the UK in December 1997 and the UK Government has indicated that it will give effect to the Directive by December 1999.

17 This Order was introduced by S.I.No. 370 of 1996.

18 Regulation 5 replaced Section 6 of the 1977 Act with a new Section 6.

19 ECR [1994] Volume 1 2479.

20 At page 2494.

21 In December 1997 Deputy Tommy Broughan introduced the Employment Rights Protection Bill 1997 which aimed to provide for a procedure whereby employees could make complaints to a Rights Commissioner that an Employer had been in breach of the provisions relating to collective redundancies and the transfer of undertakings. However, there are no proposals by the current Government to introduce such legislation.

22 [1994] IRLR392.

23 Unreported High Court per Blaney J. 2nd of May 1990.

24 See Gary Byrne's excellent book on *The Transfer of Undertakings*, Blackhall Publishing, (1999) at pages 272 to 273.

25 Unreported High Court per Flood J.. 2nd of February 1996

26 These Regulations came into operation on the 22nd of February 1993 and were intended to implement Council Directive 89/391 EEC on the Introduction of Measures to encourage improvements in the Health and Safety of Workers of the work place and various other related Council Directives. The General Application Regulations were introduced by S.I. No. 44 of 1993.

27 These Regulations were introduced by S.I. No. 34 of 1980 as amended by the European Communities (Protection of Workers) (Exposure to Asbestos) Amendment Regulations, 1993 introduced by S.I. No. 276 of 1993 which came into operation on the 1st of October 1993.

28 Per Section 54 (2)(d).

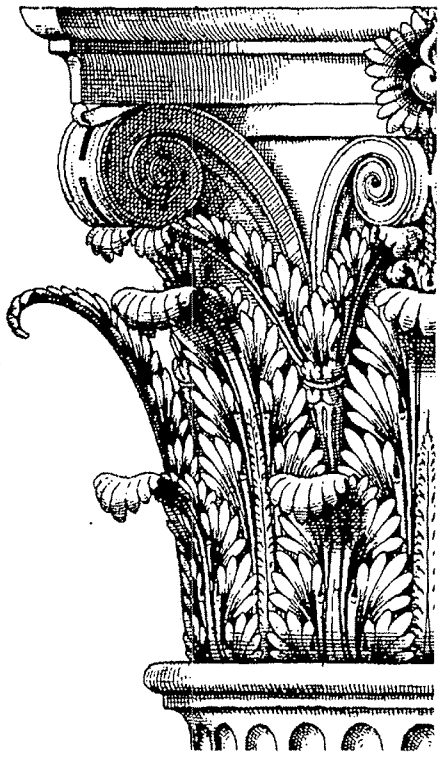
Electronic Anonymity

KAREN MURRAY, Barrister

The ability to remain anonymous may seem an unlikely candidate for inclusion in the canon of fundamental rights, but it is becoming apparent, that it is an essential element in the right to privacy. At present remaining anonymous is something which most of us take for granted. If you go to a bookshop and browse through the Irish history or politics section, nobody will note what books you pick up and which ones you put down. So long as you pay cash nobody, but you, need know that you bought a particular work and even if the cashier recognises your face there is no reason to tell him or her your name unless you want to. But if you pay with a credit card, the picture changes. The bookshop will now have a record that you bought a particular work. At the same time the credit card company will have a record that you made a purchase in that bookshop, which it will store along with all the other records of your purchases. Taken in isolation this information may appear trivial, but if the bookshop database and the credit card database are combined, then a fuller profile of your habits can be developed. If these databases are combined with others, such as airline records, telephone records, magazine subscriptions and the database built up as a result of your use of a Supermarket loyalty card, then a very clear picture of how you spend your money and your time may begin to emerge. This process has given rise to serious concerns, as was noted by Hoffman LJ in the House of Lords:

> "one of the less welcome consequences of the information technology revolution has been the ease with which it has become possible to invade the privacy of the individual...No longer is it necessary to open letters, pry into files or conduct elaborate inquiries to discover the intimate details of a person's business or financial affairs, his health, family, leisure interests or dealings with central or local government. Vast amounts of information about everyone are stored on computers, capable of instant transmission anywhere in the world and accessible at the touch of a keyboard. The right to keep oneself to oneself, to tell other people that certain things are none of their business, is under technological threat."[1]

Concerns such as these have been around for a long time, George Orwell expressed his fear of the 'Big Brother' state in his novel, *1984*. One result of these fears is the enactment of data protection legislation at a European and national level, but it is becoming apparent that the real threat to privacy is not from monolithic central databases but rather from the myriad of information technology systems with which we must interact during our daily lives. The Irish courts recognised a right to privacy in *Kennedy -v- Ireland*,[2] although this was not expressed to be an unconditional right. However, it is arguable that Irish law has always considered the right to anonymity to be important. The most prominent example of this is Article 16.1.4 of the Constitution which provides that "...voting shall be by secret ballot".



Anonymity On-line

One area in which the anonymity of individuals is under particular threat is the Internet. The European Working Party on Data Protection has published a recommendation on Anonymity on the Internet[3] which expresses concerns that:

> "Everywhere we go on the Internet, we leave a digital trace. As more and more aspects of our daily activities are conducted on-line, more and more of what we do, our choices, our preferences, will be recorded. But the risks to our personal privacy lie not only in the existence of large amounts of personal data on the Internet, but also in the development of software capable of searching the network and drawing together all the available data about a named person".

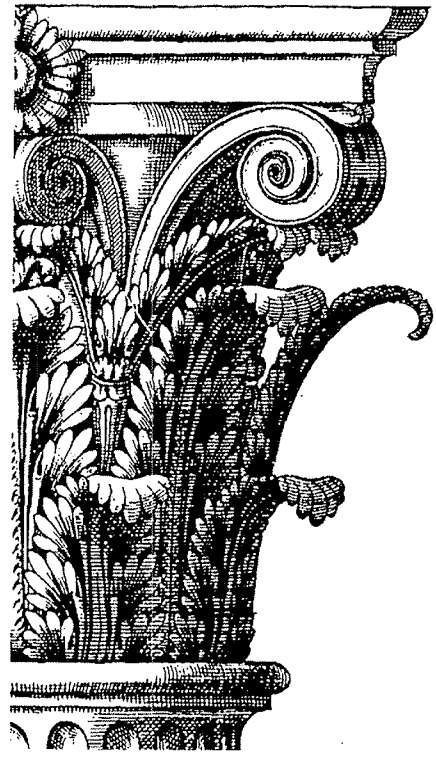
It cites an article in a US newspaper which explained how one could compile a detailed biography of a randomly selected individual using such software and exploiting information from all the discussion groups in which the person participated. The newspaper was able to obtain the person's address and telephone number, place of birth, where he studied, his profession, his current workplace, his interest in amateur theatre, his favourite type of beer, his preferred restaurants and holiday destinations, and his views on such diverse

subjects as Bill Gates and the 'socially repressive' state of Indiana.[4] The US case of *McVeigh v Cohen*[5] illustrates the dangers posed to privacy by the internet. The plaintiff, a sailor on a US nuclear submarine, sent an e-mail to a civilian naval employee asking her for the ages of the children on board his submarine so that he could organise a toy give away. Unfortunately, she did not recognise his email address so she contacted the Service Provider, America On-Line who sent her his user profile. This listed his first name, his home address and his martial status which he had described as 'gay'. This information was forwarded to McVeigh's commanding officer and ultimately lead to his dismissal.[6]

However, the Working Party acknowledges that the question of anonymity on the Internet is at the centre of a dilemma for governments and international organisations. On the one hand the possibility of remaining anonymous is essential if the fundamental rights to privacy and freedom of expression are to be maintained in cyberspace. On the other hand, the ability to participate and communicate on-line without revealing one's identity runs against the grain of initiatives being developed to support other key areas of public policy, such as the fight against illegal and harmful content, financial fraud or copyright infringements. The Working Party examined the need for anonymity in activities such as posting information to news groups, sending e-mail and using digital cash and came to a number of conclusions.

- The ability to choose to remain anonymous is essential if individuals are to preserve the same protection for their privacy on-line as they currently enjoy off-line.
- Anonymity is not appropriate in all circumstances. Determining the circumstances in which the 'anonymity option' is appropriate and those in which it is not requires the careful balancing of fundamental rights, not only to privacy but also to freedom of expression, with other important public policy objectives such as the prevention of crime. Legal restrictions which may be imposed by governments on the right to remain anonymous, or on the technical means of doing so (e.g. availability of encryption products), should always be proportionate and limited to what is necessary to protect a specific public interest in a democratic society.
- Wherever possible the balance that has been struck in relation to earlier technologies should be preserved with regard to services provided over the Internet.
- The sending of e-mail, the passive browsing of world-wide web sites, and the purchase of most goods and services over the Internet should all be possible anonymously.
- Some controls over individuals contributing content to on-line public fora (news-groups etc.) are needed, but a requirement for individuals to identify themselves is in many cases disproportionate and impractical. Other solutions are to be preferred.
- Anonymous means to access the Internet (e.g. public Internet kiosks, pre-paid access cards) and anonymous means of payment are two essential elements for true on-line anonymity.

The Working party further suggests that "the principle that the collection of identifiable personal data should be limited to the minimum necessary must be recognised in the evolving national and international laws dealing with the Internet". The one problem with this approach is that the emerging electronic commerce marketplace relies in large part on advertising for its revenues:



"Onsale and Buy.com are promising to sell goods at wholesale prices and below. Indeed, Onsale has just launched a service called 'atCost' which will offer a broad selection of computer products for the same price that manufacturers charge. Both firms expect to make their profits from selling advertising aimed at customers who visit their websites...Is it too implausible to imagine Dollar.com – a company that sells dollar bills for 90 cents and makes money from advertising?"[7]

Much of this advertising expenditure relies on data processing to be effective. If consumers could remain anonymous this processing would be less effective. which might affect revenues which might in turn hamper the growth of electronic commerce.[8]

Telecommunications

Most attention in this area will focus on the Data Protection Directive,[9] and the now long overdue Irish Data Protection Bill which will implement its provisions. But there is also a European *Directive concerning the processing of personal data and the protection of privacy in the telecommunications sector*[10] which was also supposed to be implemented by October 1998. This confers a variety of rights such as the right to receive non-itemised bills[11] because an itemised bill contains a wealth of information about a person's friends. contacts and habits. Furthermore, the Directive requires Member States to encourage the development of telecommunications service options such as alternative payment facilities which allow anonymous or strictly private access to publicly available telecommunications services. Examples of these are calling cards and facilities for payment by credit card, alternatively. Member States may, for the same purpose, require the deletion of a certain number of digits from the called numbers mentioned in itemised bills.[12] The Directive also limits the type of data which can be stored by a phone company for billing purposes and how it may be processed.[13] 'Caller identification' allows a person who receives a phone call to see the phone number which the call is being made from. Article 8 of the Directive provides that if presentation of caller identification is offered, the calling user must have the ability to

eliminate the presentation of the calling-line identification on a per-call basis. This must be available through simple means and it must be available free of charge. This ability must be available to the calling subscriber on a per-line basis.[14] These provisions also apply with regard to calls to third countries originating in the Community.[15] At the same time, where presentation of calling line identification is offered and where the calling line identification is presented prior to the call being established, the called subscriber must have the ability via a simple means to reject incoming calls where the presentation of the calling line identification has been eliminated by the calling user or subscriber.[16]

Telephone directories are a valuable source of data for marketing companies and businesses. This is particularly true in Europe, if it is to become a single market then it would be advantageous for it to have a single phone directory. However, the creation of such a directory may lead to litigation for example in the US case of *Feist Publications Inc v Rural Telephone Service Co.*[17] The appellants copied the contents of the respondents phone directory in order to create a larger directory covering parts of Kansas which was served by the respondents and other operators. The Directive takes the view that the right to privacy of natural persons and the legitimate interest of legal persons require that subscribers are able to determine the extent to which their personal data are published in a directory. Member States may limit this possibility to subscribers who are natural persons.[18] Personal data contained in printed or electronic directories of subscribers available to the public or obtainable through directory enquiry services should be limited to what is necessary to identify a particular subscriber, unless the subscriber has given his unambiguous consent to the publication of additional personal data. The subscriber is entitled, free of charge, to be omitted from a printed or electronic directory at his or her request. He or she is also entitled to indicate that his or her personal data may not be used for the purpose of direct marketing, to have his or her address omitted in part and not to have a reference revealing his or her sex if this is applicable linguistically.[19]

Conclusion

There is an inherent contradiction at the heart of European policy on data protection. Europe wishes to protect the personal data of its citizens but the EU has, as its fundamental purpose, the development of the internal European Market and databases can be vital to develop this market. The internal European market is very varied with fifteen member states speaking a variety of languages, a picture which will become even more complex as new Members join and extensive databases about the habits of European consumers will make it easier to sell goods throughout Europe, – which was one of the motivations behind the introduction of the *Council Directive on the legal protection of databases.*[20] Also, European Governments themselves have created the Europol database which contains information about criminals in Europe.[21] As more and more EU citizens go on-line, managing this contradiction may become more difficult. ●

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1 R v Brown, [1996] 1 All ER 545 at 555.
2 1987 IR 587.
3 Recommendation 3/97 *Anonymity on the Internet*, Adopted by the Working Party on 3 December 1997
4 The Minneapolis Star Tribune
5 983 F. Supp. 215; 1998 U.S. Dist. LE IS 790; 75 Fair Empl. rac.Cas. (BNA) 1656.
6 See also *Smyth v The Pillsbury Company* 914 F. Supp. 97; 1996 U.S. Dist. LEXIS 776 and *Wesley College v Leslie Pitts, Bettina Ferfuson, and Hudson*, 974 F. Supp. 375; 1997 U.S. Dist. LEXIS 13409; 13 BNA IER CAS 355.
7 The Economist, January 30, 1999
8 See also the Working Party's document on the *Platform for Privacy Preferences (P3P) and the Open Profiling Standard (OPS)*, Opinion 1/98, Adopted on 16 June 1998
9 O.J. L 281, 23rd November 1995.
10 Directive 97/66/EC on the 15th December 1997.
11 Article 7(1)
12 Recital 18
13 Article 6
14 Article 8(1)
15 Article 8(2)
16 Article 8(3)
17 [1991] 20 IPR 129. See Gorman, *The Feist case: reflections on a pathbreaking copyright decision*, Rutgers Computer & Technology Law Journal, Vol. 18, 1992, p733.
18 Recital 21
19 Article 11(1)
20 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases. Official Journal L 077 , 27/03/1996, p0020-0028. Recital 4 to the Directive states that while copyright protection for databases already existed in varying forms in the Member States, such unharmonised intellectual property rights could have the effect of preventing the free movement of goods or services within the Community
21 See Kelleher & Murray, *Information Technology Law in Ireland*, Butterworths, 1997, chapter 23. Murray, *The Europol Act*, ILT [1998] No. 2, Vol. 16.

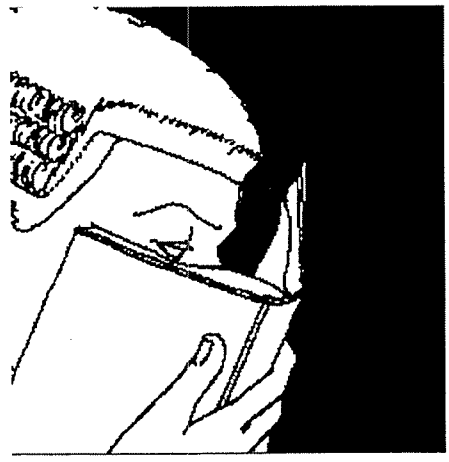
PROPERTY LAW, 2ND EDITION
BY PAUL COUGHLAN
Gill and MacMillan, £40.00

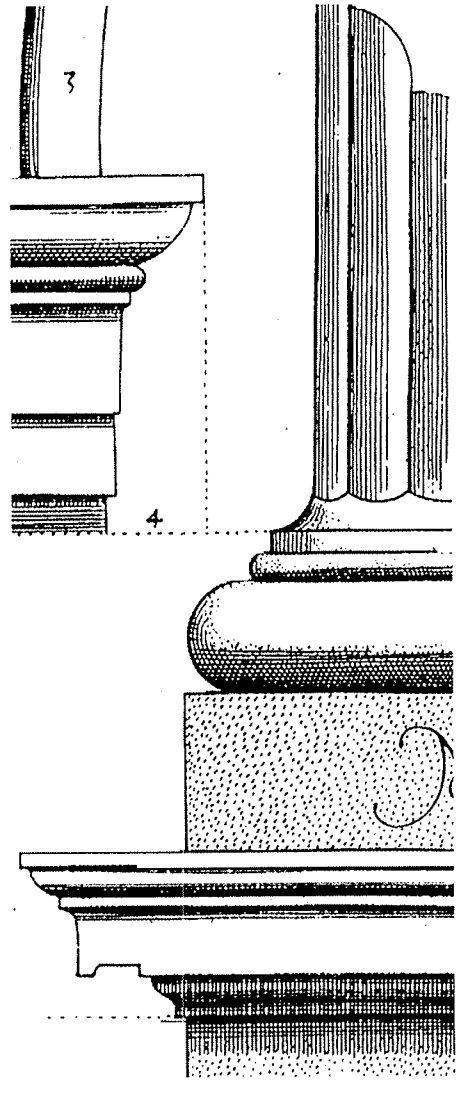
In his preface, dated 1st August, 1998, to the second edition of his book 'Property Law', Mr. Coughlan notes that less than three years had then passed since the first edition was issued. Profession Wylie, publishing the first edition of his 'Irish Land Law' in 1975 had the very considerable advantage of having that edition commissioned by the Law Society and sponsored by the Arthur Cox foundation. He published into a market almost totally starved of such works. Yet it was almost a decade later before the second edition appeared - and a further decade later again before the third edition thereof appeared. It is, of course, appreciated that Professor Wylie's pen was busy in the intervals writing other badly needed legal works.

In the last quarter of this decade, with upwards of 20 judges presiding in the High Court (when not otherwise involved in Tribunals or other Enquiries) and with the Supreme Court sitting in 2 divisions, and at least six parts of the Irish Reports each year rivalling with its younger brothers, particularly the Irish Law Reports Monthly, to select and report what they consider to be the most important of the ever growing flow of written judgments, even in the otherwise sedate area of property law, a decade is now far too long.

While the interval in this particular case was only three years, Mr. Coughlan felt compelled by the changes which had taken place in property law to deal with those changes. It would appear that the choice was of either up-dating the first edition by publishing a Supplement, or alternatively by publishing a second edition. While the publication of any book requires courage and determination, the publication of a second edition after a mere three years shows zeal. It appears to me, supported by the preface to the first edition, that Mr. Coughlan, in lecturing Land Law, wrote the first edition, more to assist the student, or rather, more with the student in mind, than the practitioner. That being so, it would appear to me that the choice between publishing a Supplement to the first edition or writing a second edition flowed from that very choice. The second edition runs to some 462 pages of text, in addition to the various Tables and Indices.

While Mr. Coughlan may have written the book more with the student in mind, there is much assistance also to be found for the practitioner in this second edition. Of particular interest to the practitioner, in my opinion, are the chapters on the Law of Succession and on the Family Home. In the former there is a consideration of the judgment of the Supreme Court in *O'Dwyer v. Keegan* [1997] 2 ILRM at 401, and the distinction between that judgment and in *Re Urquhart* [1974] I.R. at 197.





There is reference to the Supreme Court judgment in *Re Collins* - delivered on the 19th May 1998 - where the Supreme Court endorsed the majority judgment in *Rowe v. Law* [1978] IR 55, thus removing what had become an area of some uncertainty. Indeed in *Curtin v. O'Mahoney* [1991] 2 IR at 562, the Supreme Court had asked the parties whether they wished to have *Rowe v. Law* reconsidered by the Court, and on the parties declining the invitation, the Court reserved for further consideration the question as to whether the majority judgments in *Rowe v. Law* correctly represented the extent of the amendment of the law effected by the enactment of section 90 of the Succession Act, 1965. for a case where the matter would be debated. That lends an added importance to the judgment in *Re Collins*. Mr. Coughlan's commentary on *Re Collins*, is brief, but to the point: I would have preferred if he had expanded on this area, showing where the uncertainties had arisen, and how they had been dealt with by the Supreme Court in *Re Collins*. Brief, likewise, but valuable. are the observations on the provisions for divorced spouses and spouses whose succession rights have been extinguished.

In the chapter on the family home. the discussion is wide ranging. There is consideration of the judgment in *Kavanagh v. Delicato* (Carroll J. 20th December, 1996) on the question of an estoppel against raising the defence of the Act itself, and of the judgments of the Supreme Court in *Bank of Ireland v. Smith* [1995] 2 IR 459 and in *Allied Irish Banks plc v. Finnegan* [1996]1 ILRM at 401. There is a brief, but interesting, discussion of the judgment of Sheridan J. in the Circuit Court in *McCarthy v. McCarthy*. There is a brief. but valuable, discussion of orders affecting the family home, and made under the Judicial Separation and Family Law Reform Act, 1989 and the Family Law Act, 1995.

It appears to me that in his preface to the second edition, Mr Coughlan identifies the areas which led him to conclude that there was a need for a second edition. In the text, however, in dealing with those particular matters, it does appear to me that Mr Coughlan might have expanded more thereon. That is. however, a matter of personal choice.

Mr. Coughlan is to be congratulated for this work.

–George Brady, SC

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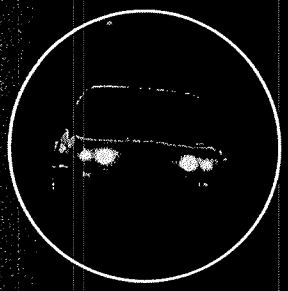

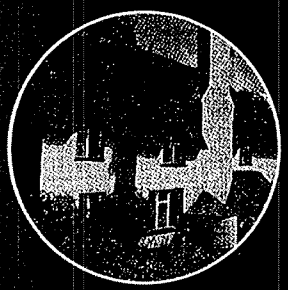

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