The Bar Review

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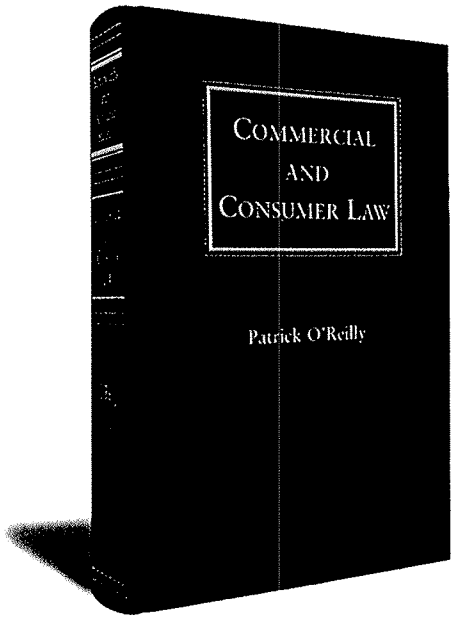

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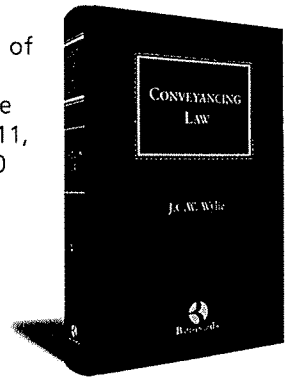

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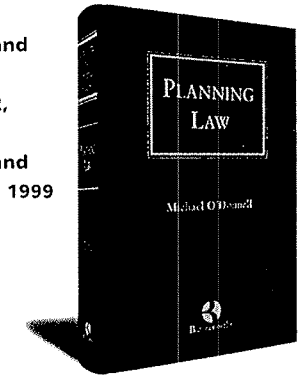

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Law Reform Commission Seminar on Statutory Drafting and Interpretation

A seminar is being held on Statutory Drafting and Interpretation, based on a consultation paper published by the Law Reform Commission. This will be held on Tuesday, 18th April in the Italian Room, Department of the Taoiseach, Government Buildings, Upper Merrion Street, Dublin 2 at 5.30pm.

The seminar is part of the consultative process to assist the Commission in the preparation of its final report and recommendations for reform on this important subject.

If you are interested in attending, please contact Denis McKenna at 6377600 before Tuesday 11th April.

Calcutta Run 2000

The Calcutta run is taking place on Sunday 21st May. Proceeds raised from the run go towards helping homeless children at home and abroad. Over 500 runners, mainly made up of barristers and solicitors, took part last year and the organisers are hoping to top that be encouraging those who ran to participate again and bring a friend. A barbecue and music will follow the run in the Law Society grounds.
For more information, contact Alan Roberts at (01) 4692000 or email at run@algoodbody.ie

Professional Practices Ruling

A barrister shall not cause or permit his name to be put on proceedings for professional negligence without first satisfying himself from the contents of an expert witness's report that at least a stateable case can be made to justify the issue of the proceedings.
(Professional Practices Committee, 16th February 2000)

C.L.A.S.P.

Concerned Lawyers Association for the Alleviation of Social Problems (CLASP) raised over £115,000 in 1999/2000, which marks an increase of over £4,000 on the previous year. The committee of CLASP would like to thank all the members of the legal profession who supported our 10th Anniversary Party in the Distillery Building last July as well as the traditional Christmas Party in the King's Inns. Thanks to your generosity, CLASP was able to make donations to the Salvation Army, Crosscare, St Audoen's National School, The Simon Community, The Summer Project of the Oliver Bond Street Flats, St Vincents Trust, The Jesuit Centre for Faith and Justice, Focus Ireland and the Merchants Quay Project. On their behalf and our own, we thank you for your continued support.
(Dermot Manning BL, Treasurer, CLASP)

Lectures on Legal Information and Legal Publishing

The first of a series of lectures on legal information and legal publishing will be held at the Law Society's Blackhall Place headquarters on Thursday 13 April 2000 at 7.30pm. Dr. David Ibbetson, Fellow in law at Magdalen College, Oxford, will speak on *Legal printing and legal doctrine,* while UCD's Professor Niaall Osborough will disscuss *The history of Irish legal publishing: a challenge unmet.* The lectures are the first in the Hugh M Fitzpatrick Lectures in Legal Bibliography series. A wine reception will follow the event. For further information and invitations, contact Libary and Information Consultant, Hugh M Fitzpatrick, on
Tel: 01 269 2202, Fax: 01 284 3186 or write to Adleaide Road, Glasthule, Co. Dublin.

Recent events in Chechnya, and the end of the Pinochet affair are just two of the many recent reminders that the establishment of a permanent International Criminal Court is a significant milestone in the development of international criminal law. The new court will provide a much needed forum for the prosecution and trial of war crimes, crimes against humanity and gross violations of human rights at the international level. At the same time, it will boost and provide support for the prosecution and trial of these offences at the domestic level.

Importantly, the office of the Court's prosecutor has been accorded powers to secure priority for the International Criminal Court's investigations and procedures in appropriate cases. These powers as well as the ability of the court's officers to take action on Irish soil in limited circumstances of extreme emergency and, more generally, the powers of the court to try Irish citizens for offences committed within Ireland mean that a constitutional referendum on the ratification of the Statute of the International Criminal Court will almost certainly be necessary in Ireland.

It follows that recent calls by Amnesty International and others for Ireland to rectify the Statute by September of this year are probably incapable of being met. Nonetheless, Ireland was an active and positive participant in the negotiations leading to the adoption of the Statute by the overwhelming majority of the international community and it would be fitting if it took a lead also in initiating steps for the holding of an early referendum on the question of ratification.

The establishment of the International Criminal Court, once the required number of ratifications have been deposited, will be much more than an additional procedural element in the process of closing the net on perpetrators of gross violations of human rights. The statute of the court constitutes in itself a substantial measure of codification of the general principles of international criminal law. Building on existing human rights treaty provisions and on comparative decided cases, the statute reaffirms the principle applied by the House of Lords in its first decision on the Pinochet case: sovereign leaders and other state officials cannot cloak themselves with state authority to justify immunity from prosecution for gross violations of human rights including crimes committed against their own citizens. The statute also has important implications for the non-effectiveness of measures adopted at the domestic level to bar such prosecutions as for example the devices of granting individual or general amnesties, the defence of obedience to orders and special statutes of limitations.

It should be borne in mind however, that the existence of this new machinery, while it may send a powerful message of intention must be accompanied by the political will to bring the perpetrators of these crimes to justice. If the court's indictments were to fall the way of some notorious indictments of the International Criminal Tribunal for the Former Yugoslavia, the new court could be quickly undermined. Therefore, UN peacekeeping forces and domestic police forces alike should be given full encouragement in the exercise of their duties in giving effect to indictments issued by the new court. Again, the Irish government may be well placed to contribute to the integrity of this process.

At the time of writing, it is also encouraging that the ratification of the UN Torture Convention is presently being debated in the Oireachtas. In this connection too, the Pinochet case has demonstrated the significance of becoming party to this and other international human rights treaties. In an extradition context, no less than in the case of formal indictments, the Irish courts should have the necessary powers to respond and to intervene in order to give effect to Ireland's commitment to the prosecution of torture and other crimes against humanity.●

RE EU SANCTIONS AGAINST AUSTRIA LEGAL?

Eugene Regan BL assesses the basis, if any, in European law for the sanctions imposed on Austria by the EU arising out of the recent inclusion of the Freedom Party in the Austrian government.

Portuguese Presidency Statement on Austria

On 31 January 2000 a "statement from the Portuguese Presidency of the European Union on behalf of XIV Member States" declared that:-

"...in case it is formed in Austria a government integrating the FPO, Governments of XIV Member States will not promote or accept any bilateral official contacts at political level with an Austrian Government integrating the FPO; There will be no support in favour of Austrian candidates seeking positions in international organisations; and Austrian ambassadors in EU capitals will only be received at a technical level."

The decision to impose a form of sanctions or boycott against Austria was adopted at the level of the Heads of State and Government and was designed as a pre-emptive joint action to prevent the formation of a Government in Austria, which would include the FPO or Freedom Party. The decision announced by the Portuguese Presidency in its Statement raises a number of serious political and legal issues. It is the legal issues only which form the subject matter of this paper.

Statement by the Austrian Ministry for Foreign Affairs

The Austrian Government's reaction to the Portuguese Presidency Statement was to express regret pointing out that "This step, taken without previous dialogue with the Austrian Government, is against the spirit of solidarity and co-operation between EU Member States." The Ministry spokesperson added that

> " Austria is a stable democracy where human rights are guaranteed by the constitution and protected by an independent judiciary...Any new government programme will be based on the EU's common values of freedom, democracy, respect for human rights and fundamental freedoms as well as the rule of law"

and suggested that " any future government should be judged by its programme and actions."[1] The response of the Austrian Government was measured and in a spirit of co-operation invited the 14 Member States to engage in "an open and objective dialogue." Such an open and objective dialogue is consistent with the normal way of doing business in the European Union as prescribed by the Treaties. The European Court of Justice has ruled, that

> "the Commission and Member States must respect the principle underlying Article 5[2] of the Treaty, which imposes a duty of genuine cooperation on the Member States and Community institutions; accordingly, they must work together in good faith with a view to overcoming difficulties."[3]

This is not the approach adopted by the 14 Member States who have maintained the sanctions imposed on Austria notwithstanding the formation and pleadings of the new Austrian Government.

The Amsterdam Treaty

Article 6(1) of the Treaty of the European Union provides that:

> "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states" and Article 6(2) that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and fundamental freedoms signed in Rome on 4 November 1950 and as they result on the constitutional traditions common to the Member States, as general principles of community law."

Article 7 provides for the determination of the "existence of a serious and persistent breach by a Member State" of the article 6 principles and for sanctions to be imposed on that Member State.

The Treaty of Amsterdam has thus defined the principles upon which the European Union is based and the Union has assumed an obligation to ensure that such principles are respected by Member States. By virtue of Article 7 of the Treaty of the European Union, the Union now has competence to impose sanctions against Member States who do not respect the fundamental principles of democracy and the rule of law as enunciated in Article 6 of the TEU. However, such sanctions can only be imposed by a unanimous decision of the Council, excluding abstentions, in the composition of the Heads of State and Government on a proposal of one third of Member States or of the European Commission and with the assent of the Parliament. No such procedures were followed in adopting the decision to impose sanctions on Austria.

The Status of the Presidency Statement

In examining the status of the Statement of the Portuguese Presidency one must look at the institutional structure of the Union and the role and responsibilities of the Presidency of the Council within that structure.

Article 3 of the Treaty of the European Union provides that

> "The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the Acquis Communautaire".

Article 4 provides that " The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof."

While formerly the European Council did not act in a lawmaking capacity the Maastricht and Amsterdam Treaties provided for specific Council Decisions to be adopted at the level of the Heads of State and Government. Any measure to impose sanctions on a Member State for breach of the principles referred to in Article 6 of the TEU is one of those Decisions, which the Treaties require to be taken at that level. Furthermore, as a matter of fact the Decision imposing sanctions against Austria was taken at the level of Heads of State and Government as the Portuguese Presidency canvassed, procured and announced the Decision imposing sanctions.

Furthermore, it would appear that the decision taken is binding on Member States and cannot be changed except at the level of the European Council. The Taoiseach in responding to questions in the Dail on 15 February 2000, stated inter alia that "the sanction is in place, it is an indicator. If this government follows the policy it has set down, perhaps matters will change, but that can only be done at European Council level."[4]

Article 5 of the TEU as amended by the Amsterdam Treaty provides

> "The European Parliament, the Council, the Commission, the Court and the court of auditors *shall exercise their powers under the conditions and for the purposes provided for,* on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by other provisions of this Treaty." [Emphasis added].

It is the responsibility of the Presidency of the Council, under the treaty provisions set out above, to secure agreement at the level of the Heads of State and Government, on whether or not a Member State has infringed the principles set out in Article 6 of the TEU and accordingly the Portuguese Presidency took that responsibility and secured agreement as reflected in its Statement in the name of the Presidency of the EU imposing sanctions on Austria. The decision, if considered a decision of the Council, was not taken, however, in accordance with the procedures prescribed by article 7 of the TEU for the imposition of sanctions in such circumstances.

The 'decision of the 14 Member States' is most likely legally binding on Member States but the intention would appear to be that it is legally binding as a matter of international law rather than of Community or Union law. The Statement reflects a decision adopted at an intergovernmental level. This Decision is somewhat akin to the decision of the European Council at Edinburgh on 12 December 1992 in which Member States adopted measures, legally binding in international law, to facilitate a second referendum on the Maastricht Treaty in Denmark, without making any formal changes to that Treaty.

The decision imposing sanctions on Austria raises some interesting legal issues which include: (i) whether the decision imposing sanctions on Austria, in the name of 14 Member States, was in law a decision of the Council and/or (ii) whether the Portuguese Presidency and the 14 Member States were entitled to adopt a measure, outside the framework of the Union's institutions, imposing sanctions on Austria.

Some direction on these issues is provided by the seminal case of *Commission v Council* (1971), otherwise known as the *ERTA* case[5]. In this case, the Member States acting through the Council adopted a resolution on 20 March 1970, the object of which was to co-ordinate their approach to the negotiations for a European Road Transport Agreement (ERTA). The Commission challenged this resolution before the European Court of Justice under Article 230[6]. The European Court held, inter alia, that "...the Council's proceedings dealt with a matter falling within the power of the community, and that the Member States could not therefore act outside the framework of the common institutions;[7] The proceedings of the Council were held not to be " ...simply the expression or the recognition of a voluntary co-ordination, but were designed to lay down a course of action binding on both the institutions and the Member States."[8] Further it was held that the " the proceedings ..had definite legal effects both in relations between the Community and the Member States and on the relationship between the institutions."[9]

In European Parliament-v-Council and Commission[10], concerning a decision to grant humanitarian aid to a third country, the European Court of Justice ruled inter alia:- " the Court has consistently held that an action for annulment is available in the case of all measures adopted by the Institutions, whatever their nature or form, which are intended to have legal effects;" and that "consequently it is not enough that an Act should be described as "a decision of the Member States" for it to be excluded from review under Article 173 of the Treaty". The Court added that

> "it should be pointed out that the Community does not have exclusive competence in the field of humanitarian aid, and that consequently the Member States are not precluded from exercising their competence in that regard collectively in the Council or outside it."[11]

Further in *European Parliament-v-Council of the European Union*[12] the Court held inter alia that " The Community's competence in (the field of development aid) is not exclusive. The Member States are accordingly, entitled to enter into commitments themselves vis a vis non-member States, either collectively or individually, or even jointly with the Community"

In Opinion 1/94[13] the European Court found that "the Community and its Member States are jointly competent to conclude TRIPS" (Trade Related Investment Measures) within the context of the World Trade Organisation. This and subsequent case law suggests that at least in external policy competence is non-exclusive but rather shared and complementary.

From this examination of the case law of the European Court of Justice and the facts of the present case it is apparent that:

(i) The fact that the decision taken to impose sanctions on Austria while described as a decision of 14 Member States does not necessarily mean that such decision is not in law a decision of the Council;

(ii) The decision of the Heads of State and Government was taken within the context of the single institutional framework provided by Article 3 of the TEU as the decision was canvassed, procured and announced by, and in the name of, the Presidency of the EU and to this extent it could constitute a decision of the Council;

(iii) The decision "of the 14 Member States" dealt with a matter falling within the new competence of the Union provided by Article 7 and accordingly the Member States were, it could be argued, precluded from acting outside the provisions of Article 7 of the Treaty of the EuropeanUnion.

(iv) The nature of the new competence provided by Article 7 of the TEU may, however, be deemed to be a shared or complementary competence between the Union and Member States, rather than an exclusive competence, which may permit the Member States to adopt the decision imposing sanctions on Austria, notwithstanding the said provisions. However, even in such cases, "the powers retained by the Member States must be exercised in a manner consistent withCommunity law"[14]

As there has been no definitive determination on the issue of competence in internal Union matters it is possible to argue that the decision imposing sanctions was in law a decision of the Council on the grounds inter alia that the Member States were precluded from acting outside the Treaty Framework provided by Article 7 of the TEU. If a decision of the Council, the latter clearly failed to comply with the provisions of the Treaty in exercising the competence provided by Article 7 of the TEU.

In *Roquette Freres - v - Council*[15] the Court ruled that it is an essential procedural requirement for the European Parliament to be consulted about a legislative proposal where the Treaty so requires. Where sanctions are imposed by the Council, pursuant to Article 7 of the Treaty, the Council can only take that decision on the basis of a proposal by $^1/_3$ of the Member States or by the Commission and after obtaining the assent of the European Parliament. The Head of State and Government in taking its decision imposing sanctions on Austria may have acted on a proposal by 1/3 of the Member States, although this is not evident, but most certainly did not act on the basis of a proposal from the Commission and likewise it did not obtain the assent of the European Parliament. Accordingly, it would appear that the decision, if a decision of the Council, constitutes an infringement of an essential procedural requirement as defined by the European Court of Justice.

Article 253[16] of the EC Treaty provides that Acts adopted by the Council "shall state the reasons on which they are based." The European Court has considered that failure to give an adequate statement of reasons in legislation is sufficient to declare that legislation void. In *Germany v Commission*[17] the Court stated inter alia:

> "In imposing upon the Commission the obligation to state reasons for its decisions, Article [253]is not taking mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights, to the Court exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty."

No statement of reasons has been issued by the Portuguese Presidency seeking to explain the motivation for the decision to impose sanctions on Austria.

In *Fedesa and others*[18] the European Court stated that

> "a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate, the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case."

The circumstances of this case are a concern on the part of Member States that a new Government in Austria with FPO participation may breach fundamental principles of EU law. Article 7 of the TEU sets out a procedures for dealing with this situation yet such procedures were disregarded in this instance. The decision, if a decision of the Council constitutes an evasion of a procedure specifically prescribed by the Treaty for dealing with circumstances in which a Member State has allegedly infringed one of the fundamental principles upon which the Union is based.

The Portuguese Presidency designation of the decision as a decision of the 14 Member States rather than of the Council could be considered a mere stratagem designed to evade the very procedures which would have allowed Austria to have received a fair hearing prior to the imposition of sanctions and the European Parliament to exercise some democratic control.

It must be acknowledged that the decision imposing sanctions, however, ill conceived, was taken as a form of emergency measure. In the circumstances there may be some justification for the Member States not to have followed the procedures set out in Article 7 of the TEU. However, no such emergency situation exists following the formation of the new Austrian Government. Accordingly, it may be appropriate at this late stage to have recourse to the procedure set out in Article 7 of the TEU to determine whether the sanctions introduced should be maintained.

It should be noted that actions provided for in Article 7 of the Treaty only come into play where there is "a serious and persistent breach by a Member State of the said principles". In this case if there was a breach by Austria of any of the principles set out in Article 6 such breach has not been identified, nor has Austria been given the opportunity to desist from any such breach. In the circumstances therefore, one could not say that there has been a persistent breach by Austria of any of the principles referred to in Article 6 of the Treaties.

Is the Decision subject to Judicial Review by the ECJ?

The Court of Justice does not have jurisdiction to review a Council decision imposing sanctions on a Member States pursuant to Article 7 of the TEU. The Amsterdam Treaty, by virtue of Article 46, extended the remit of the Court of Justice to the fundamental rights provisions of Article 6(2) of the TEU

but not to either the democracy/rule of law principles of Article 6(1) nor to the sanctions procedure of Article 7.

Accordingly, even if the decision of the 14 Member States imposing sanctions on Austria was considered to be a Council Decision such decision is not reviewable by the European Court. However, where such decision have effects within the Community, involving for example a suspension of voting rights in the Council, the Court may intervene.[19] Such institutional implications may not arise in this case. The European Commission has stated that "at this stage the working of the European Institutions is not effected."[20] However, it is by no means certain that this will remain the case given the inherent difficulty in distinguishing bi-lateral relations between Member States and the normal business of the European Union.

The European Community is a Community " based on the rule of law".[21] While "the Court of Justice's competence as regards Article 6(1) is excluded. It is competent, however, to enforce general principles of law that form part of the so-called 'acquis communautaire jurisprudentiel', notwithstanding the fact that such principles are also set forth in treaty provisions that are not open for review."[22]

This would appear to accord with the view of the European Commission who commenting on the imposition of sanctions by the 14 Member States on Austria pronounced that

> "it will continue to fulfil its duty as guardian of the provisions and values set down in the Treaties, which provide that the Union is founded on the principles of liberty, democracy, respect of human rights and fundamental freedoms and the rule of law, as set out notably in Article 6 and 7 of the Treaty on European Union.".

Accordingly, the Commission sees its role of Guardian of the Treaties as extending to the fundamental principles enunciated at Article 6(1) of the TEU.

While the decision imposing sanctions on Austria, viewed as a Council decision is not reviewable by the Court pursuant to Article 230 of the EC Treaty, the decision of individual Member States, is subject to review by the Court on the grounds the Member States in taking the said decision did not respect fundamental principles of EU/ EC law and thereby failed to fulfil their obligations under the Treaties.

Such review could be initiated by Austria pursuant to Article 227 of the EC Treaty, which provides that "A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice."

Member States rarely invoke the Article 227 procedure to initiate legal proceedings against another Member State and tend to rely on the Commission, as Guardian of the Treaty, to commence Article 226[23] infringement proceedings against a Member State, which it considers, has failed to fulfil its obligations under the Treaty. The most notable case in which a Member State pursued its action before the European Court of Justice for failure to fulfil its obligations under the Treaty is *France v United Kingdom* (1979).[24]

The Article 227 procedure provides that a Member State who intends to initiate a Article 227 action should first address its complaint to the European Commission and should allow a three-month period for the Commission to issue a reasoned opinion prior to referring the matter to the European Court.

The function of the Commission to act as guardian of the Treaties is a competence granted to it by virtue of Article 211[25] of the EC Treaty. The Commission has complete discretion whether or not to act on any complaint from a Member State or any other complainant.[26] However, should the Commission not consider a Member State is in breach of the Treaty and fails to act, the complainant Member State is at liberty to pursue its action against the other Member State in question directly in the European Court.

In the present case the Commission has stated

> "it will continue to fulfil its duty as guardian of the provisions and values set down in the Treaties, which provide that the Union is founded on the principles of liberty, democracy, respect of human rights and fundamental freedoms and the rule of law, as set out notably in Article 6 and 7 of the Treaty on European Union."[27] Accordingly, any complaint made by the Austrian Government that the decision of the '14 Member States' infringes the principles referred to in Article 6 of the TEU would fall to be considered by the European Commission as guardian of the Treaties.

The fundamental question is whether the 14 Member States have, by their decision and the manner in which it was adopted, infringed the fundamental principles upon which the Union is founded, and thereby acted in breach of EC law.

(i) Principle of Democracy

The Union is founded on, inter alia, the principle of democracy. The Irish Courts define

> "a democracy (as a) form of government in which the sovereign power resides in the people as a whole and is exercised by the people either directly or through their elected representatives[28]" and "a democratic state is one where government by the people prevails[29]".

In *McKenna - v - An Taoiseach* (No 2) Denham J held that

> "Ireland is a democratic state. The citizen is entitled under the Constitution to a democratic process. The citizen is entitled to a democracy free from governmental intercession with the process, no matter how well intentioned"[30]

Further under EC law it has been held that "the democratic principle ...constitutes one of the cornerstones of the Community edifice."[31]

One has no reason to believe that Austria is any less a democracy than Ireland or any other Member State of the European Union as that term is defined by the Irish Courts and generally understood. Any undue interference with the democratic process is illegal under Irish Constitutional Law. By virtue of the general principles of law recognised by the European Court of Justice, one might suggest that any undue interference with the democratic process in any Member State, such as Austria, is also illegal as a matter of European Community law.

Nevertheless the Portuguese Presidency acting on behalf of 14 Member States took a decision to impose sanctions on the Austrian Government designed to prevent the participation of the FPO or Freedom Party in government in Austria. In short

the sanctions threatened in the Portuguese Presidency Statement had the clear and express intention of frustrating the democratic process in Austria. Furthermore, the maintenance of the said sanctions is known to restrict the proper functioning and effectiveness of the new democratically elected Austrian Government to the detriment of its citizens. Accordingly, the Austrian government have, it may be suggested, a legitimate claim that the 14 Member States have acted in breach of the fundamental principle of democracy contrary to EC law.

(ii) The principle of a right to a fair hearing

One of the principles enshrined in the European Convention of Human Rights and common to all Member States is that of a right to a fair hearing. The European Court of Justice held in Trans *Ocean Marine Paint - v - Commission*[32] that it is a general principle of community law that

> "a person affected by a decision taken by a public authority must be given the opportunity to make his point of view known. This rule requires that an undertaking be clearly informed, in good time, of the essence of conditions to which the Commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission."

The right to a fair hearing is considered a fundamental right by the European Court of Justice[33]. The right to be heard applies in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person[34].

In the present case, the Portuguese Presidency and the 14 Member States imposed sanctions on Austria (a) without specifying the charge made against the Austrian Government and/or people; and (b) without providing the Austrian Government with an opportunity of responding to the charge, however defined, prior to the imposition of sanctions. The imposition of such sanctions would appear to constitute an infringement of the right to a fair hearing of the Austrian Government and its citizens in breach of European law.

(iii) Equality of Treatment and non-discrimination

In *Royal Scholten-Honig - v - IBAP*[35] the European Court ruled that "the general principle of equality.....is one of the fundamental principles of Community law. That principle requires that similar situations shall not be treated differently unless the differentiation is objectively justified". Accordingly, the principle of equality and non-discrimination is one of those principles common to the Member States of the Community and constitutes one of the principles upon which the Community is founded.

In the light of the diverse nature of the political parties which have participated in the democratic process and in the governments formed in the different member states of the European Union without interference, to intercede in the formation of the government in Austria in the year 2000, would prime facie appear to be discriminatory against Austria and the Austrian people. Since no specific charges or accusations have been made against Austria any argument based on 'objective justification' for the interference in the democratic process in Austrian would appear to be unsustainable.

Conclusion

The provisions of the Amsterdam Treaty granting the Union competence to sanction Member States who do not respect fundamental principles of law is to be welcomed as a means of strengthening democracy and the rule of law in Europe. However, the failure to respect the procedures established by the Treaties for the imposition of such sanctions, which provides for the right of the accused to be heard and democratic control by the European Parliament, reflects very badly on a Community based on the rule of law and the principle of democracy.

In failing to have recourse to the procedures prescribed by the Treaty of the European Union in imposing sanctions on Austria the Decision of the Heads of State and Government, as announced by the Portuguese Presidency on 31 January 2000, is fatally flawed. Furthermore, such decision is most likely illegal for failing to respect the fundamental principles of democracy, right to a fair hearing and of equality of treatment.

The decision to impose sanctions on Austria could be deemed to infringe the fundamental principles of law upon which the European Union is founded the very principles which the decision was designed to protect. In the circumstances, it is incumbent on the European Commission to act, in its capacity as guardian of the Treaties.●

1. Statement of Austrian Ministry of Foreign Affairs 1 February 2000.
2. Article 10 Post -Amsterdam Treaty.
3. Case C-52/84 *Commission v Belgium* [1986] ECR 89.
4. Dail Report 15 February 2000 Col. 538
5. Case C-22/70 [1971] ECR 263.
6. Article 173 Pre- Amsterdam Treaty.
7. Ibid 4 paragraph 22.
8. Ibid 4 paragraph 53.
9. Ibid 4 Paragraph 55.
10. Cases C-181 and 248/91[1993] ECR 1-3685.
11. Ibid 10 paragraphs 11-14.
12. Case C-316/91 [1994] ECR 1-1625.
13. Opinion pursuant to Article 228(6) of the EC Treaty [1994] ECR 5267.
14. Case C-124/95 The Queen v HM Treasury and Bank of England ex Centro-Com Srl [1997] ECR 1- 81 para 24-8.
15. Case C - 138/79 (1980) ECR 3333
16. Article 190 Pre-Amsterdam Treaty.
17. Case C-24/62 [1963] ECR 63.
18. Case C - 331/88 (1990) ECR 1-4023 and 4065
19. Amaryllis Verhoeven "How democratic need European Union Membe be? Some thoughts after Amsterdam" [1998] 23 E.L.Rev. June.
20. European Commission Statement of 1 February 2000.
21. Case C-294/83 Les Verts [1986] ECR 1339.
22. Ibid 15 page 225.
23. Article 169 Pre- Amsterdam Treaty.
24. Case C-141/78 [1979] ECR 2923.
25. Article 155 Pre-Amsterdam Treaty.
26. Case 416/85 *Commission v United Kingdom* [1988] ECR 3127.
27. Ibid
28. Pringle J, obiter, in *de Burca - v - Attorney General* [1976] IR 38
29. udd J., *O'Donovan - v - Attorney General* [1961] IR 114
30. [1995] 2 IR 53
31. Case C-58/94 *The Netherlands v Council* [1996] ECR 1-2168.
32. Case 17/74 (1974) ECR 1063 para 16.
33. Case 85/87 Dow *Benelux - v - Commission* [1989] ECR 3137.
34. Case C-135/1992 *Fiskano - v - Commission* [1994] ECR 1-2885
35. Case 103,145/77 (1978) ECR 2037

RIMINAL CONTEMPT OF COURT: THE *EAMONN KELLY* CASE CONSIDERED

Pauline Walley BL *analyses the law on criminal contempt of court in this jurisdiction in light of the recent Supreme Court decision in* Kelly v. O'Neill and Brady.

Introduction

Criminal contempt is an issue which has received both judicial and media prominence in the last few months. The issue arose in a limited way in the *Nevin*[1] trial, and in the Midleton case involving District Judge Patwell and a Legal Aid Board solicitor[2] which received much news coverage in February of this year. However, the most important consideration of the issue in recent months has been by the Supreme Court in the *Eamonn Kelly case,*[3] and the judgements of Denham J. and Keane J. (as he then was) merit analysis. The purpose of this article is to consider the case briefly and to see if the case and its obiter dicta pose any discernible shift in the law of contempt.

Background

The rules embodied in the law of contempt are intended to uphold and ensure the effective administration of justice. Lord Simon in *AG v. Times Newspapers* said:-

> "these rules are the means by which the law vindicates the public interest in the due administration of justice".[4]

The law of contempt is of ancient origin[5] and is in origin a creature of the common law, [6]resting entirely on judicial discretion by way of a summary procedure.[7],[8] Traditionally, contempt is classified either as criminal or civil. Borrie & Lowe[9] break this down further into two classifications; contempt by interference with the administration of justice, for example disrupting a court process, publication of contempt material or other acts which risk prejudicing or interfering with the course of justice, or civil contempt by way of disobedience where court orders are disobeyed or undertakings given to a court are breached. In so far as contempt constitutes a crime, it is a sui generis offence and has its own rules which are discussed below.

Criminal contempt of court may take a number of forms. Generally speaking, most of the authorities including Miller,[10] and Borrie & Lowe as well as the Law Reform Commission Report classify criminal contempt as follows:-

(a) Contempt in the face of the court: *in facie curiae;*
(b) Scandalising the court:
(c) Other interference with the administration of justice.
(d) Breach of the sub judice rule

(a) Contempt in the face of the court

Contempt in the face of the court relates to conduct within the courtroom itself such as assault on witnesses[11] or jurors or the judge himself, insults,[12] disruptive behaviour, the taking of photographs or the making of tapes[13] or some other action which interferes with the physical operation of the court process. In *Morris v. Crown Court,*[14] a group of Welsh students protested during proceedings in the High Court in London to indicate their support for the preservation of the Welsh language. Salmon L.J. said

> "Every member of the public has an inalienable right that our courts shall be left free to administer justice without obstruction or interference from whatever quarter it may come..... The archaic description of these proceedings as 'contempt of court' is in my view unfortunate and misleading. It suggests that they are designed to buttress the dignity of the judges and to protect them from insult. Nothing could be further from the truth. No such protection is needed. The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented."

His brother Lord Denning MR stated

> "Here was a deliberate interference with the course of justice in a case which was no concern of theirs. It was necessary for the judge to show - and to show all students everywhere - that this kind of thing cannot be tolerated..... If they strike at the course of justice in this land.... they strike at the roots of society itself and they bring down that which protects them".

The non-attendance in court of a witness has been held in some cases to constitute contempt in facie curiae. Costello J. held in the case *In Re Kelly v. Deighan*[15] that attempting to induce a witness not to attend court constituted contempt in the face of the court. Other issues which have arisen under this heading include contempt by lawyers in the overzealous defence of their client's interests. This has included threats of violence or provocative language, or acts of defiance such as the burning of a document in disobedience of an order of the court.[16] Finally, the refusal of a witness to be sworn in or to answer questions may in certain circumstances amount to a contempt. However, it is necessary to show that the question posed was relevant for, as O'Dalaigh C.J. noted in *Keegan v. de Burca,* "it is in my opinion correct to say that it is no offence to answer an irrelevant question". This issue has arisen particularly in the case of journalists refusing to disclose their journalistic sources on the grounds of privilege.[17]

(b) Scandalising the Court

Scandalising the court by contrast deals with matters which are said or done which are calculated to endanger public confidence in the court itself, and in the administration of justice within that court,[18] so as to hold judges " to the odium of the people as actors playing a sinister part in a caricature of justice."[19] It may relate to wild or baseless allegations of malpractice or allegations of corruption against a judge.[20] O' Higgins CJ said that

> " It is not committed by mere criticism of judges as judges, or by the expression of disagreement - even emphatic disagreement - with what has been decided by a court.....Such contempt occurs where wild and baseless allegations of corruption are made against a court so as to hold the judges'.. to the odium of the people.... "

It would also include scurrilous abuse[21] and improper allegations of corruption or bias.[22]

(c) Interference, other than Publication, with the Administration of Justice

This catch-all category really encompasses acts, other than publication, which interfere with the course of justice. These have included cases where witnesses were threatened either before[23] or after giving evidence[24], interference with judges[25] or jurors,[26] officers of the court[27] or parties to an action.[28]

Sometimes a case may straddle more than one of the sub headings mentioned. In the Patwell case, it appears from newspaper reports that the case may have involved more than one of the headings cited.

(d) Breach of the Sub Judice Rule

The breach of the sub judice rule is essentially any act done or writing published which is calculated to obstruct or interfere with the due course of justice or the lawful process of the courts before or during a trial. In *AG (NSW) v John Fairfax & Sons Ltd,* it was stated that:

> "Contempt will be established if a publication has a tendency to interfere with the due administration of justice in the particular proceedings. This tendency has to be determined objectively by reference to the nature of the publication; and it is not relevant for this purpose to determine what the actual effect of the publication upon the proceedings has been, or what it probably will be. If the publication is of a character which might have an effect upon the proceedings, it will have the necessary tendency unless the probability of interference is so remote or theoretical that the de minimis principle should be applied."

The *Eamonn Kelly* case[29]

The most recent consideration of this issue was by the Supreme Court last December in the Eamonn Kelly case. The accused had been convicted of a drugs offence in the Circuit Criminal Court, but was awaiting sentence. After conviction but prior to sentence, the *Irish Times* published an article on the accused which included details not only of other convictions, but also referred to other crimes which sources believed he had been involved in. The trial judge Judge Cyril Kelly, found as a fact that he was not corruptible in relation to the sentence, but found the newspaper guilty of contempt as there was a risk of prejudice to the accused's right to a fair trial including sentence. It appears he may have been concerned about other parties in the sentencing process such as probation officers or character witnesses. The Supreme Court agreed.

Keane J. stated in his judgement[30] that criminal contempt has been regarded by the law as necessitating punishment because if it were to go unpunished the consequences for public confidence in the administration of justice would be profound.

So what principles regarding the sub judice rule can be discerned from the decision and the earlier common law authorities?

Publication Need not be Actually Prejudicial

It has long been established that to maintain an action for contempt, it is not necessary to show that publication is actually prejudicial to a trial[31] If a trial is in fact prejudiced, the accused can appeal to have his conviction quashed but it is sufficient in contempt proceedings if the publication has a tendency or is calculated to prejudice the case. As Cotton L.J. said in *Hunt v. Clarke*[32]

> "It is not necessary that a judge or jury will be prejudiced, but if it is calculated to prejudice the proper Trial of a cause, that is a contempt and would be met with the necessary punishment in order to restrain such conduct".

Risk of prejudice

The phrases "calculated to prejudice" or "tending to prejudice" are intended to refer to a publication which, when objectively viewed, can reasonably be said to present a risk of prejudice. The essential test is a risk of prejudice and not any actual prejudice itself. This is supported by many authorities, most notably the House of Lord's decision in the *Sunday Times* case[33] and is also referred to by Keane J. in the *Kelly* decision where he said :-

> "In a specific case it will be the parties to the litigation who will be immediately affected - in this case the Applicant whose right to a fair Trial it is claimed was compromised - but the law is founded not merely on the immediate interest

of those parties but upon the wider public interest of the administration of justice".

The Right of the Accused to a Fair Trial

In a criminal trial, the accused has a right under Article 38 of Bunreacht na hEireann to a trial in due course of law. This fundamental right also exists at common law. He is entitled to rely on a system of justice which ensures that a jury determines his guilt or innocence solely on the basis of the evidence put before the jury, and no other extraneous matters. As Lord Hardwicke L.C. said I*n Re Read and Huggonson,*

> " nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented, nor is there anything of a more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard."[34]

This view was restated by Denham J. in the *Kelly* case when she stated that "the jury should reach its verdict by reference only to evidence admitted at the trial and not by reference to facts alleged or otherwise contained in statements or opinions aired by the media outside the trial."[35]

Justice must be seen to be done: Public Interest

It is also manifestly clear that justice must not only be done, but also must be seen to be done. As Lord Diplock said in the *Sunday Times* case :-

> "Whether in the result the publication will have had any influence upon jurors or witnesses is not known when the proceedings for committal for contempt are heard. This mischief against which the summary remedy for contempt of court is directed is not merely that justice will not be done, but it will not be manifestly seen to be done, contempt of court is punishable because it undermines the confidence not only of the parties to the particular litigation but also if the public as potential suitors in the administration of justice by the established courts of law".[36]

This view is similar to that of Denham J. in the *Kelly* judgement where she stated that

> "within the concept of the administration of justice is the peoples' right to an independent justice system where justice is not only done but seen to be done."[37]

The case law emphasises that the law of contempt is a deterrent, being essentially concerned with the prevention of prejudice, rather than merely applying sanctions to comments which have actually prejudiced a case. As O'Higgins C. J. said in the *Walsh* case

> "The primary purpose of such action is not to punish those whose criminal conduct has endangered the administration. It is to discourage and prevent the repetition or continuance of conduct, which if became habitual, would be destructive of all justice."[38]

So viewed, it is perfectly logical to hold that publications may amount to a contempt on the basis of possible prejudice, and yet at the same time to hold that when a conviction has sought to be quashed, that a trial has not in fact been prejudiced. It may also help to explain why contempt actions may still be successful in cases where the publication is alleged to be calculated to prejudice the accused, even though he has already been acquitted. The authorities and *Kelly* confirm that the administration of justice is a matter not just of individual rights. Obviously, an accused has a right to a fair trial, but this right is not simply a right vested in those who happen to be accused of particular crimes. As Keane J. pointed out in the *Kelly* case :-

> "It is in the interest of the community as a whole that the right should be protected and vindicated by the State and his organs.
>
> "The law adopts this approach because to do so otherwise would be to put at risk the public confidence in the administration of justice which is the very purpose of the contempt of Court doctrine to preserve."

Doctrine should not be invoked lightly

However, that is not the end of the matter. The doctrine of contempt should not be lightly invoked because as Keane J. pointed out in the *Kelly* decision:-

> "The contempt of court jurisdiction should not be likely invoked by the courts: the freedom of expression guaranteed by the constitution should not be curtailed save to the extent necessitated in protecting the administration of justice".

It is also clear that since the summary nature of the remedy is at odds with one of the fundamental principles of constitutional and natural justice, namely "nemo iudex in sua causa" that such remedy should be used both sparingly and judiciously.

"The determination of what is an actionable contempt has been influenced in part by the nature of the contempt procedure itself. It is summary in nature: there is no indictment, and courts have been of the view, in the absence of statutory authority, that trial otherwise than by jury of a criminal offence is such an anomaly that it can be justified only by the special circumstances flowing from the nature of the contempt itself."

Must be risk of real prejudice

In addition, it is also clear from the common law authorities that there must be a real risk of prejudice, and not just a remote or trivial possibility of prejudice. Accordingly to Lord Reid in the *Sunday Times* case, the test of what constitutes a contempt at common law is that expressed by Lord Parker *CJ in R v. Duffy, Ex-Parte Nash,* namely that there must be a real risk of prejudice as opposed to a remote possibility. In Lord Reid's

view, this test is no more than an application of the ordinary "de minimis" principle, and that there can be no contempt if the possibility of influence is remote.[39] On the other hand, if there is some but only a small likelihood, that may influence the courts not to impose any punishment. If there is a serious risk, some action may be necessary. However, this view seems to leave open a category of what might be called "technical contempts", namely publications which create a small, rather than a remote risk, of prejudice and where punishment may not be appropriate. This is dealt with both by Borrie & Lowe and also the Law Reform Commission Report, and both advise that the media are expected to refrain from creating such risks. However, the concept is less than helpful and the test can be difficult to operate. Does this become the length of the judge's foot?

What is an actionable contempt?

This is a difficult issue. The determination of what is an actionable contempt has been influenced in part by the nature of the contempt procedure itself. It is summary in nature: there is no indictment, and courts have been of the view, in the absence of statutory authority, that trial otherwise than by jury of a criminal offence is such an anomaly that it can be justified only by the special circumstances flowing from the nature of the contempt itself. The courts have long referred to this aspect of its arbitrary power and as Jessel MR said in *Re Clements & Costa Rico Republic v. Erlanger* :-

> "It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched and exercised... with the greatest reluctance and the greatest anxiety on the part of Judges to seek whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject".

The stricture that the jurisdiction should not be lightly invoked by the courts is also affirmed by Keane J. and Denham J. in the *Kelly* judgment. It is against this background that there is a discernible approach in many of the cases of the judiciary not to over use the contempt power which has led to this notion of a technical contempt. Borrie & Lowe say that this notion is apt to cause confusion, and if properly referring to a publication which having been judged a contempt, is nevertheless thought for a variety of reasons not to warrant punishment. However, it seems clear that a technical contempt is a contempt and the issue of any technical inadvertence relates to a question of punishment or penalty, rather than the question of whether a contempt has occurred at all.

Mens Rea

Mens rea is another factor which must be considered in this area. Generally speaking, mens rea is a necessary ingredient in most criminal offences. The traditionally authorities seemed to suggest that mens rea was not an ingredient in the offence of contempt as it was absolute in its nature and did not require any establishment of mens rea. The common law authorities, although couched in language of "calculated to interfere" or with "a tendency to interfere" with the administration of justice, seem to confirm that the intention to publish the offending piece is sufficient in itself, and that there need not be an intention to actually interfere with the administration of justice. However, it would be unwise to assume that this is necessarily the correct position in Irish law; an uncertainty highlighted by Keane J. in the *Kelly* decision when he said :-

> "While undoubtedly the generally accepted view of the law has hitherto been that the offence is absolute in its nature and does not require the establishment of mens rea, one certainly could not exclude the possibility that, in the absence of any modern Irish authority, the courts in this country might have come to the conclusion that mens rea was a necessary ingredient of the offence".

Furthermore, at the end of the judgement of Denham J. in the *Kelly* case, she specifically refers to mens rea as an issue which may be important in the necessary reconciliation of conflicting interests by the trial judge.[40]

Factors to be taken into account by Court

A number of actors must be taken into account in any matter which is before a jury in determining whether a contempt is actually been committed.

Firstly, it is generally accepted that proceedings at first instance before a jury are particularly vulnerable to improper or inappropriate comment or publication because a jury has no legal training or knowledge. A jury cannot easily be expected to ignore material which attacks the character of the accused or which asserts his guilt. As Lord Ellenborough said in *R v. Fisher*[41]:-

> "If anything is more important than another in the administration of justice, it is that jury men should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before ex-parte statements of the evidence against the accused, which the latter had no opportunity to disprove or controvert".

Timing is a particularly important factor and obviously the time when the publication occurred, and the holding of the trial will often be an important factor in deciding whether a particular publication amounted to a contempt. As most of the authorities point out, time can dull the memory of judges, jurors and witnesses, and the authorities recognise that people often retain little of what they see or hear. However, material published at the beginning of a trial or during the course of the trial would be regarded as particularly sensitive.

The robustness of juries is a matter which has received much commentary from all of the authorities, and is expressly referred to by both Denham J. and Keane J. in the *Kelly* decision. As Lord Donaldson MR said in *AG v. Newsgroup Newspapers*[42] :-

> "Whilst I have never been a great believer in the efficacy of a conscious effort to put something out of ones mind, an acceptance of the fact that it is likely to remain there, but a determination not to take into account is more effective, and whilst I fully accept that Judges may have an exaggerated belief to the extent to which juries are prepared to be guided by them in such mental gymnastics, the fact is that for one reason or another a Trial by its very nature seems to cause all concerned to become progressively more inward looking, studying the evidence given and submissions made to the exclusion of other sources of enlightenment. This is a well known phenomenon".

In the words of Denham J. in *Kelly* :-

> "Jurors are robust. The test for a court in such a situation is whether there is a real risk that an accused would not receive a fair trial".[43]

It is clear from the authorities that publications which are calculated to excite feelings of hostility towards the accused are matters of contempt.[44] The reason such publications offend the contempt rule is because they tend to induce the jury and/or a court to be biased. Such hostile feelings can most easily be induced by commenting unfavourably upon the character of the accused. Juries, according to Borrie & Lowe, are particularly vulnerable to such comments because it is common for a lay person to adjudge a person's guilt for his personal character, and in criminal cases evidence as to the character of the accused is not usually admissible before the verdict is given.

Other types of publication or material which would offend include revealing the past criminal record of the accused, publishing a confession allegedly made by an accused, making comments as to the merits of the conviction and including photographs of the accused, when identification is an issue in the trial.

Freedom of Expression

Although all of the above reflects both the common law and the constitutional position in relation to the rights of the accused and the right of society to ensure that the accused receives a fair trial, there is one other constitutional issue which does require consideration. Freedom of expression is a right which is guaranteed under the Constitution, although it is not an absolute right and must be seen in the context of other rights which may conflict with these rights. As Denham J. said :-

> "Freedom of expression is not an absolute right under the Constitution, however, it is a fundamental right of great importance in a democratic society. In striking a balance between that right of the freedom of expression and the administration of justice, if there is a real risk of an unfair trial the balance should tip in favour of the administration of justice and the determination of a contempt of court. Also, if there is doubt, the balance should swing behind the protection of the administration of justice. However, if the matter of the perception of the administration of justice is the issue, the situation is fraught with complexity".

The collision between the freedom of expression rights and the issue of contempt was also considered in the English decision of *Times Newspapers* which published material concerning the drug thalidomide during the course of litigation, and was subsequently "gagged" by the House of Lords which held that this amounted to a "prejudgement" of the issues. The case subsequently went to the Strasburg Court and the *Sunday Times* claimed that the finding of contempt amounted to a breach of Article 10 (2) of the European Convention on Human Rights. The European Court of Human Rights agreed with this view, and held that the finding of contempt amounted to an infringement of the Convention. It was stated :-

> "Having regard to all the circumstances of the case and on the basis of the approach described in paragraph 65 above, the Court concludes that the interference complained of did not correspond to a social means sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention. The Court therefore finds the reasons for the restraint imposed on the Applicants not to be sufficient under Article 10 (2). That restraint proves not to be proportionate to the legitimate aim pursued : it was not necessary in a democratic society for maintaining the authority of the judiciary".

It must be remembered whilst Ireland has ratified the European Convention on Human Rights it is not yet part of domestic law. Reference has been made to a presumed conformity between Irish law on contempt and the European Convention in the decision of the *State (DPP) v. Walsh* [45] However, Denham J. did not say whether she endorsed that view and specifically said :-

> "However, not necessarily going so far as to endorse that statement, there it is no doubt that when considering the balance which is required to be struck between the protection of the due administration of justice and freedom of expression, the jurisprudence of the European Court of Human Rights may prove helpful guidelines".

A similar view on the provision of the Convention and the law of defamation was taken by the Supreme Court in the *De Rossa* libel case, where the Supreme Court held that juries should not be given guidelines or instructions from a trial judge as to how to measure jury awards.[46] Independent Newspapers had claimed that the failure to give such guidelines breached Article 10 of the Convention and the freedom of expression provision, but the Supreme Court declined to accept that view.

But if there is a balancing of these rights and a doubt as to how to achieve that balance, the right to a fair trial is paramount.[47]

Possible Defences

The authorities seem to suggest only two possible defences; both fraught with some doubt. The Law Reform Commission cite Borrie & Lowe's view that public interest may qualify in that there may be certain situations where there is a greater public interest in publication which would outweigh the public interest in the due administration of justice. The example given refers to information published by the police in an effort to secure arrest, in particular if that person was deemed dangerous to the public. The Commission also refers to the Australian decision of *Ex p. Bread Manufacturers Ltd*[48] which upheld publication on the ground of discussion of public affairs. There appears to be no authority in this jurisdiction on either point. In addition, as mentioned earlier, the issue of mens rea is unclear and the lack of it may or may not be successful in the future as a defence. Traditionally however, it seems to assist only in the calculation of punishment and not in the assessment of liability.

Punishment

The question as to whether material amounts to a contempt is entirely a matter for judicial discretion, taking into account all of the factors mentioned above, and taking into account all the circumstances of the particular case. The question of punishment whether by way of imprisonment and or penalty is also entirely a matter of judicial discretion. In the *Kelly* case, the punishment imposed by Judge Kelly was a £5,000 fine and this was upheld by the Supreme Court.

Conclusion

The significance of the *Kelly* case is two fold. Firstly, it examines and approves a number of common law authorities on the sub judice issue. However, its real significance lies not in its restatement of existing principles, but rather in its emphasis that it is not just the right of an accused person to a fair trial which is at stake. This has been mentioned in previous authorities but perhaps not with such emphasis. The court must also be concerned in evaluating the risk of prejudice to ensure that justice is being seen to be done, and to preserve and protect public confidence in the administration of justice. This concern extends not only to the moment of conviction, but also to the moment of final disposal by the judicial process.[49] It may take the Irish media some time to appreciate this.●

1. *DPP v. Catherine Nevin* March 2000
2. See coverage in eg. *The Irish Times* at www.irish-times.ie
3. *Eamonn Kelly v. Paul O'Neill and Conor* Brady Supreme Court Unrep 2 December 1999
4. *AG v. Times Newspapers* [1974] AC 273
5. Miller: *Contempt of Court* (2nd Ed 1989 Clarendon Press) p1
6. However, the Irish Law Reform Commision in its Report on Contempt of Court (1994) noted that the Constitution had clearly had an impact on the law of contempt and due regard had to be taken of fundamental rights such as fair procedures, personal liberty and freedom of expression.
7. Although the determination of contempt as a matter of law is for a judge alone summarily, if there are "live and real issues of fact" to be determined, it appears the accused has a prima facie right to have these determined by a jury. See Henchy J. in the *Walsh* case, followed by Kinlen J. in *De Rossa v. Independent Newspapers* [1998] ILRM 293
8. Gavan Duffy P. referred to the exercise of this summary jurisdiction as being justified by " the urgent and imperative need of a prophylactic order from the High Court of Justice". See *AG v. Connolly* [1974] IR 213 at 218
9. Borrie & Lowe: The Law of Contempt 3rd Ed Butterworths 1996
10. Miller
11. *Mitchell v. Smyth* [1894] 2 IR 351: Threat to police witness; see also Re Johnson 20 QBD 68(1887) Threat by one solicitor to opposing solicitor.
12. *Ex parte Tanner,* Judgements of the Superior Courts (Ireland) JSCI (1889)
13. There are no express statutory provisions regarding the taking of photographs, taping, or video recordings of court proceedings. The Law Reform Commission in their Consultation Paper in 1991, took the view that the matter appeared to be one governed by the inherent jurisdiction of the court. It noted that in the Canadian decision of *R. v. Basker* [1980] 4 WWR 202, the Court of Appeal held that it was perfectly proper for a trial judge to have queried counsel as to whether he had used a tape recorder without first obtaining the judge's permission.
14. [1970] 1 All E R 1079
15. [1984] ILRM 424
16. *Linwood v. Andrews and Moore* 58 LT 612 (1888)
17. See *In Re O'Kelly* 108 ILTR 97; the issue was more recently considered by Judge James Carroll in the Circuit Court in a case involving journalist Barry O'Kelly where details of the terms of a settled civil action were allegedly leaked to the media in breach of a confidentiality agreement. The journalist refused to reveal his source on the grounds of privilege. The issue was ultimately decided by Judge Carroll without the need to hold the journalist in contempt but it was argued before the Circuit Court that the decision of the European Court of Justice in Goodwin had altered the position in relation to the revelation of journalistic sources.
18. See *The State (DPP) v. Walsh* 412 which concerned "scandalising" the conduct of the Special Criminal Court.
19. Gavan Duffy P. in *Attorney General v. Connolly* [1947] IR 213 at 220
20. See O'Higgins CJ in *The State (DPP) v. Walsh* [1981] 412 at 421
21. See *AG v. O'Ryan and Boyd* [1946] IR 70 where a county councillor wrote a letter to a local judge after he had sentenced some farmers for their activities in an agrarian riot. The letter was abusive and was subsequently read out by the councillor at the next county council meeting. See also *R v Gray* [1900] 2 QB 36
22. See *AG v O Ryan* and *Boyd; AG v. Connolly;* both op. cit. ; also *Re Hibernia National Review Ltd* [1976] IR 388
23. See *In Re Kelly and Deighan* where an attempt to persuade a witness not to attend court was held to be contempt; op. cit.
24. See *Moore v. Clerk of Assize Bristol* [1972] 1 All ER 58
25. *Atheson v. Morgan* 60 ILT & Sol 937
26. *R. v Martin 5 Cox 356; In re MM and HM* [1933] IR 299
27. *Price v. Hutchinson* LR 9 Eq 534 (1870)
28. See Borrie & Lowe p 442-449; also Re Hooley *Ruckers Case* 79 LT 306 (1898)
29. *Eamonn Kelly v. Paul O'Neill and Conor Brady* Unrep. Supreme Court 2 December 1999
30. *Eamon Kelly* case op. cit.
31. See Borrie & Lowe p 74
32. (1889) 58 LJ QB 490 at 492
33. [1974] AC 273 at 309
34. In *Re Read and Huggonson* (1742) 2 Atk. 469
35. See *Kelly* op. cit. p 17
36. op. cit.at fn 8, p 309
37. *Kelly* op. cit. at p 16
38. op cit at page 428
39. op. cit. at p 299
40. op. cit. at p 21
41. *R. v Fisher* (1811) 2 Camp.
42. *AG v. News Group Newspapers* [1987] QB 1 at 16
43. *Kelly* op. cit at p 19
44. Pigott C.B. in R. v. Dougherty (1848) 5 Cox CC 345. In the recent murder trial of *DPP v Laurence Callaghan* (Central Criminal Court 21.01.00) Carney J. criticised a headline in the Irish Mirror which characterised the accused, who had pleaded guilty to manslaughter but not guilty to murder, as a "brute," while the trial was still ongoing.
45. [1981] IR 412 at 440
46. *De Rossa v. Independent Newspapers Supreme* Court Unrep. July 1999
47 See Denham J. in Kelly at p 19
48. *Ex p. Bread Manufacturers Ltd* 37 SR (NSW) 242 at 248 (1937)
49. Please see the paper delivered by Mr. Justice Carney at the seminar "Recent Developments in Defamation and Contempt of Court: A Practical Update" 22 January 2000

ROPERTY IN THE DEAD BODY

Crionna Creagh BL *gives an overview of the law dealing with property in the dead body and offers some proposals for modernising that law in the light of the recent organ removal controversy.*

General introduction

The increase and proliferation of human tissue use in medicine and science has triggered concerns about the use and possible abuse of the human body and its parts. The recent discovery by parents that organs of their dead children had been retained at autopsy/post-mortem without consent and the subsequent revelation that organs have also been retained and used for other purposes subsequent to autopsy, has raised issues with moral, ethical and possibly religious implications.

It has also raised legal issues in relation to property in the body. The law concerning property in the body is archaic and complicated. For the purposes of this article I will confine myself to the dead body[1].

> "It is generally accepted that in English law the corpse of a human being is not the subject of property, even though the person who is under the duty to dispose of it has a right to possession for that purpose. If the no property rule applies also to parts, removed from corpses, then many medical specimens are to a greater or lesser extent beyond legal control"[2]

The traditional view arose in the context of body snatching in the seventeenth and eighteenth centuries. These issues have not generated much interest since then. In general the courts do not like dealing with the concepts of property in the body viewing it as unsavoury to consider a dead body as an inanimate object, irreverent in the religious sense and lacking in the respect due to the dead. The law of property has a long history; the foundation of English property law in the modern sense was laid in the feudal times. That system has had to grow and develop to keep pace with new phenomena, most noticeably a move away from the traditional property emphasis of a right to exclude others, to significant developments in personal property which today embrace such things as intellectual property rights, confidential information and image to name but a few.

The Irish courts have yet to address legal issues relating to property in the body. On the rare occasions the English courts have been faced with questions relating to property in the body remarkable resourcefulness on the part of the judiciary has meant that the court only turned to the property analysis as a last resort[3]. This has resulted in remarkable underdevelopment of this area of the law. However technological developments and the unimaginable development of medical science combined with the bold assertion of rights by the public are forcing questions relating to uses, possession and control over human tissue into the courts. Ireland, in the absence of a Human Tissue Act and Organs Transplant Act, will have to turn to the common law for the answers to these questions. The dearth of regulation in Ireland is in marked contrast with the level of activity in respect of human tissue, Ireland has one of the healthiest organ transplantation programmes in Europe operating since the 1960's. Artificial insemination centres and egg (ova) clinics, sperm banking, blood donation and invitro-fertilization programmes all have well established roots in the medical care sphere in this country[4].

This article proposes to examine the dead body and what rights accrue in respect of it, to whom those rights accrue, followed by a look at avenues of redress a person wronged by any action in respect of the dead body may have in law.

The "No Property" Rule

The origin of the rule that there is no property in the body is both old and frail. The very first mention of the no property rule dates to a case in 1614[5]. That case involved a conviction for stealing several burial sheets. It was held that the property in the sheets rested in those who owned the sheets before they were used to dress the corpse and not in the corpse. This case was later mistakenly understood to be authority for the proposition that a corpse itself was not capable of being property.

The next case, known as the *Dr. Handyside's* case, arose almost a century later and involved an action for trover or conversion[6] against a doctor who took away and kept conjoined twins that had not survived at birth. The case remained unreported for a lengthy period but when eventually it was recorded it stated that it was held that no action would lie, as no person had property in corpses. It has since been shown that the case was settled while the jury were out and that judicial comments attributed to the case must therefore be *obiter.*[7]

In the subsequent case of *Williams v Williams*[8], a person by his will had directed that his body after his death should be delivered to a friend for cremation. His family buried the body

in disregard of the request and the plaintiff friend by fraud managed to disinter the body and have it cremated. She then tried to recover the costs of the cremation as the deceased had provided in his will. It was held that since there was no property in a dead body, the deceased could not by his will dispose of his own body. The request of the deceased could be honoured but could not be imposed as a legal obligation upon his executors since the testator lacked any property rights in his body. It is unlikely however that the testator was trying to dispose of his body as a piece of property but rather expressing a wish.

The plaintiff being a mere friend was unsuccessful in any claim to possession, as it was a right that belonged to executors, which they had exercised:

> "executors or administrators or other persons charged by law with the duty of interring the body have a right to custody and possession until it is properly buried"[9].

The *Williams* case appears to have been a case on possession, which renders *obiter* any judicial comments in the case on whether there is such thing as property in the body. From these cases it can be seen the foundation for the no property rule is visibly shaky being based on a misunderstanding of the finding in a case and *obiter* comments. Yet it stands in spite of the common law claim of adaptability.

In the eighteenth and nineteenth centuries the cases that arose were mainly in relation to disturbance of the body for reburial under different rites. Regardless of the laudable motives convictions were brought for the common law misdemeanour of trespass upon the burial ground and removal of the corpse.

Later legislative intervention[10] addressed matters that arose in relation to bodies being exhumed for sale to medical schools, by enabling them to be supplied legally for the purpose of examination by dissection and teaching, studying or researching[11].

Although criminal sanction protects removal of corpses from graves as effectively as a civil right to sue for theft, it leaves exposed any redress for unlawful interference with a corpse, for example removing body parts at autopsy for scientific research. If corpses became the subject of property, liability could be imposed for interferences with an unburied corpse or parts of corpses and the law of criminal damage would apply.

In addition to executors and administrators the other persons charged with the obligation to dispose of a body decently are the parents of a deceased infant child, a householder on whose premises the body lies and similarly a hospital where remains lie. The hospital must be regarded as lawfully in possession of the body until at the very least the executors or relatives know about the death. Those concerned must then have an intention to possess the body and communicate that intention to the hospital authorities[12].

The definitive position in relation to the rights and duties in respect of the next of kin is unclear as was stated in the recent case of *Dobson v North Tyneside Health Authority*[13], where Peter Gibson LJ stated

> "But I am not aware there is any authority that there is such a duty [interring the body] on the next of kin as such. If there is no duty, there is no legal right to possession of the corpse. However even if that is wrong and the next of kin do have some right of possession of the body, there is no authority stating that right is otherwise than for the interment or other proper disposition of the body."

It is accepted once the next of kin takes up the right to possession, the right is not an unlimited one. However once one refers to possession, the ability to enforce possession necessarily introduces the concept of property.

It could be said however that the best right to possession of a corpse is not necessarily dependent on there being no property in the body. Were the legal system to recognise property in the corpse, so that the law of theft and possessory actions applied, yet frame the rule in such a way that property vests in the executor[14] who would have discretion to say what was to be done with the corpse within a prescribed legal framework, then burial, cremation and medical science could be permissible whereas the sale of the body or body parts or use as raw material such as human leather for example, would be forbidden. This would afford the executor greater armoury in the protection of the corpse.

Another possible solution would be to accept the "no property" rule yet recognise a power to give binding directions as to what is to be done with the corpse by the person with the best right to possession.

Parts of the Body

The traditional view in relation to property in the body becomes more difficult to defend in relation to things severed from the body. It has been suggested that

> " just as things severed from realty become personalty, so things severed from the bodies become the subject of property"[15] .

Human tissue taken with or without consent once separated from the body can raise the complicated spectre of ownership and financial returns that a person or relative may feel are due to them, from developments made using that tissue, for example the use by a pharmaceutical company of brain tissue by manufacturing it into human growth hormone or the development of a valuable cell line from blood samples.[16] The property approach is desirable in a climate where the uses for bodily tissue and potential for further development in biotechnology outstrips what was imaginable when the rule evolved. Modern medical science will continue to develop sophisticated ways of converting formerly useless body parts and substances into modern therapeutic agents and just as in the past the law had to deal with the anatomical age, the issues of today are biotechnological, genetic and transplantational.

The one recognised exception to the no property rule is when a corpse is so changed by the labour of a worker (such as an embalmer) that it becomes the subject of property. In other words, the corpse has acquired some attributes differentiating it from a mere corpse awaiting burial. It may have acquired some pecuniary value such to become the property of the worker. The case of *Doodeward v Spence*[17], laid down the general proposition in these cases - where a person by the lawful exercise of skill or work, so dealt with the corpse in his lawful possession that it acquired some attributes differentiating it from a mere corpse awaiting burial, then the person acquires a right to possession of the corpse or part thereof - at least as against anyone else who is entitled to have the object delivered up to him, for the purpose of burial. In *Doodeward* as the body had not unlawfully come into the doctors possession and because some although not, much work and skill had been bestowed by him upon it and it had acquired an actual pecuniary value it could no longer be regarded as a mere corpse awaiting burial.

Doubts on this reasoning have been expressed by Matthews, a leading author in this area, who says the common law would not normally recognise a proprietary claim arising out of unauthorised work on the goods of another but he may not be correct as the two headed corpse was not a good before the work was carried out. This principle is used to justify the holdings of Egyptian mummies, Maori heads[18] and the like that are contained in the worlds museum collections. In the absence in this jurisdiction of a Human Tissue Act as in England[19], this principle could potentially leave organs awaiting transplantation in a vulnerable position and at risk of becoming the property of the worker. In practice a court would be probably find that no skill or labour had been exercised on the organs and no change in character had therefore occurred..

The Court in *Doodeward* went so far as to say:

> " there can be no property in a human body, dead or alive. I go further and say that if a limb or any portion of a body is removed that no person has a right of property in that portion of the body so removed".

"Could it be argued that removal can be justified on the ground of advancement of the public good? Certain powers given to the coroner in relation to removal of parts from a dead body are essentially an interference with the rights of private individuals and illustrate that these rights can sometimes be subordinate to the demands of justice and public good."

Applying this principle to that of a victim who suffers a loss of a limb as a result of an accident, would mean that the victim would be without a better right to recover the limb for reimplantation surgery from any other person who found or carried off the limb.

Can the common law ever justify the removal of tissue from the dead?

Could it be argued that removal can be justified on the ground of advancement of the public good? Certain powers given to the coroner in relation to removal of parts from a dead body are essentially an interference with the rights of private individuals and illustrate that these rights can sometimes be subordinate to the demands of justice and public good.

Some authors seem to think that it is desirable that removal of tissue in the interests of common good should be recognised as a justification for its removal[20]. Others suggest that this approach is unnecessary as it will give room for argument at every turn and advocate a property analysis as preferable:

> "If the person in lawful possession of the body (or otherwise in possession entitled to object) consents to the removal then, subject to limitations on conduct imposed by general law in the interests of public order or decency (no different in principle from forbidding cruelty to animals), the removal is lawful. If that person refuses, it is unlawful." [21]
>
> This analysis is attractive. It in effect is no different to the position that exists in relation to donation of tissue from patients with brain stem death, where it is by the consent of the relatives in consideration of the wishes of the dead as they best know or estimate them.

To continue the analogy with organ donation from the dead donor, it can be seen that the requirement of consent has not diminished peoples altruism, as there is no shortage of the availability of organs for transplantation. It is therefore most probable that parents approached in a sympathetic way to consent to tissue from their dead child being retrieved, even in this most pitiful moment will either consent, taking some comfort in the ultimate benefit the death of their child may yield to the benefit of others or simply refuse. Either way those wishes must be respected and obeyed.

The Polkinghorne Report in Britain in 1989, which reviewed practices in relation to the research and uses of foetuses and foetal material, recommended a consent type approach in preference to the alternative property route which parents might have in respect of the foetus.

Another justification raised under the heading of the common good has been the doctrine of necessity. If a doctor faced with the alternative of removing transplant material without consent or standing by while a potential recipient died, chooses to remove the tissue or organ without consent, this doctrine would hold such removal lawful. It is submitted that any general use of the doctrine of necessity would be incorrect, as the doctrine is strictly limited in application to an emergency situation, where for competence reasons the patient cannot consent and in those circumstances the doctor may proceed to remove the tissue or organ without consent.

Criminal Liability

If the removal of human material does not obstruct either the coroner or the police in their enquires or the course of public justice then any possible criminal liability would be at common law. Historically a range of old common law offences have been used to deal with improper handling of corpses. Treating human bodies in a degrading way, or a way that offends notions of public decency can attract common law offences. Some unsavoury examples include, using a pair of freeze dried foetuses as earrings attached to a sculpted head as a display[22] and the mutilation by a priest of a corpse awaiting burial for sexual gratification. These were uses which resulted in convictions. Although in the main these types of convictions resulted from acts done for improper motives, in other cases the fact that the defendant was well motivated was regarded as irrelevant. This may have significance in relation to the activities of doctors or pathologists at post-mortem because it is at odds with the attitude taken in the area of treatment, where motive is critical. For example it is generally accepted that the crime of battery has no place in modern medical law as usually the actions of the doctor would not qualify as a deliberate hostile act, but rather acts of medicine committed in good faith. In light therefore of the courts reluctance to prosecute a doctor in the bona fide practice of medicine, it is hard to imagine a court would be willing to find the retention of material at post-mortem an improper handling.

In England, the Human Tissue Act 1961 governs conditions to be met if removal of human tissue is to be lawful, one such criterion being that removal must be by a registered medical practitioner. In 1973[23] a case arose where two eyes were

removed from a corpse by a person other than a registered medical practitioner for use in another hospital. The person who removed the eyes made false representations as to his qualifications and it transpired he was not a registered medical practitioner. As no sanction was provided for in the Act the old crime of disobedience of a statute was used to convict the offender.

The "no property" rule is said to be so generally accepted that any attempt to use a prosecution for theft in respect of human tissue is not considered a practical possibility. Yet an inconsistency can be exposed by the rare cases where urine[24] or blood[25] needed for prosecutions have been taken from police stations and has led to convictions for theft indicating that body waste and tissue may indeed be treated as property.

Crime of Preventing Disposal of Corpse

It is well established that it is a common law crime to prevent the disposal of a corpse for example by detaining it for a claim upon a debt or selling it when retained to bury it.

In light of the current controversy concerning the unauthorised retention of human material at post-mortem, could such conduct amount to the offence of preventing the disposal of the body?

If what was available for burial was recognisable as the body of the deceased it is unlikely that retention of internal parts would prevent burial.

> "Doctors often retain parts of bodies after post-mortem examinations-indeed, where sufficient material is retained after an official post-mortem examination, coroners sometimes permit the disposal of the corpse before inquiries into the death are completed."[26]

In such circumstances it has never been suggested that retention of parts by the coroner prevents the disposal of the body. The unauthorised retention of human tissue or organs would be unlikely therefore, to amount to the common law crime of preventing disposal of the body.

Tortious Liability For Unlawful Removal Of Tissue And Unlawful Post-Mortem

(1) Unlawful Removal Of Tissue

Opinions differ on the question of liability in tort for the unauthorised removal of tissue from a corpse at the suit of the person lawfully entitled to possession. Skegg says:

> "there are no established torts which would normally be applicable-although on general principles the unauthorised removal might well be actionable, on the ground that it constituted an interference with the right to possession of the person under a duty to dispose of the body"[27].

He thinks liability could be imposed for an intentional interference with the right to possession for the purpose of burial on the principle of *ubi jus ibi remedium.*

In reality, it is most probable that a potential plaintiff may never know of the possible cause of action as the body returned after the post-mortem would appear intact. But, if a potential plaintiff discovers facts about an unlawful interference with the corpse it is likely these claims will develop in the territory of negligence.

It has been suggested[28] that the right to possession for the duty to bury cannot be stretched to include a duty to bury with no parts missing since if it did it would place very onerous and unworkable obligations at serious traffic accidents and major disasters to gather each and every part for burial. If the duty to bury does not extend to that extent, then neither can the right to possession extend to those limits. This approach is more likely to find favour with the Courts and would mean an aggrieved next of kin would not be able to establish tortious liability for the unauthorised retention of materials at post - mortem on the ground that it interfered with their right to possession for burial. The fact that possession is only for the purpose of burial is therefore limiting.

Another recent case seems to suggest that preservation of body parts for purely investigative or administrative purposes will not turn them into property so as to make them recoverable. In the case of *Dobson v North Tyneside Health Authority*[29], brain tissue was retained at post mortem on behalf of the coroner because it was felt it bore upon the cause of death. The plaintiff mother of the deceased needed the pathology specimens to establish medical negligence in the treatment and care of her dead daughter. The primary claim in this case was in conversion, " but since the next of kin have not shown and cannot show that they had actual possession or an immediate right to possession at the time the brain was disposed of" that claim failed[30]. The claim on all other grounds failed also, in bailment because the bailment was not by the next of kin but by the neuropathologist, and in wrongful interference because nothing done by the defendant was wrongful.

As no duty of care was found to exist between the hospital and the plaintiff by reason of the hospital simply storing the materials for the pathologist, the claim in negligence also failed. It was decided that the retention of tissue at post mortem did not transform the tissue into an item to which the plaintiff relative had a right of possession.[31] Once the pathologist finalised his determination of the cause of death, there was no continuing obligation to retain the materials.[32]

Finally ashes of a deceased person deposited by the next of kin in the cemetery, can be the subject of bailment as the cemetery does not acquire any ownership interest in the dead bodies buried there, but is charged with responsibility of their care[33].

(2) Unlawful post-mortem

Actions for an unlawful post mortem examination can be dealt with by the tort of trespass, unlawful interference or negligence depending on the facts of the case and the degree of knowledge of the person performing the act. Trespass can be used where the person having the right to possession of unburied human remains is actually in possession or is to be regarded as such. The advantage of being able to use trespass or wrongful interference is that it is not necessary to show damage of a property right, it is sufficient merely to show a violation of the right, in which case the law will presume damage. Exemplary damages are likely to be awarded to distinguish wilful from innocent wrongdoing. In the *Edmonds* case the plaintiff claimed he suffered mental anguish and suffering. The court reasoned if mental suffering can properly be considered in other type of actions such as defamation, malicious prosecution, then it should be allowable in a case of misconduct when it is a natural and certain consequence of the defendants action.[34] However the court clearly distinguished the case of an intentional tort from a case of negligence, where damages for wounded feelings in a case involving wilful misconduct are awarded in part to

punish the defendant. The court cited with approval the case of Larson in which the Supreme Court of Minnesota found;

> "The right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin. This right is one, which the law recognises and will protect, for any infraction of it, such as unlawful mutilation of the remains; an action for damages will lie. In such an action a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proved".

Although this is an American case it is suggested the reasoning is applicable to the common law here.

Unauthorised removal of tissue at post - mortem grounding action for nervous shock?

Most likely the initial focus of attention of the aggrieved parents will be on highlighting the wrong or bringing about a change in practice. However, down the road the possibility of nervous shock claims may materialise.

Generally the doctor who removes human material from a corpse without consent does not usually owe a duty of care to the person aggrieved by unauthorised removal, hence the tort of negligence rarely applies.

Because the development of medical law in Ireland and to a lesser extent England, lags behind other jurisdictions such as Canada, New Zealand and Australia it is instructive to look at their treatment of those issues. In the Canadian case of *Mason v Westside Cemeteries*[35] ashes of the plaintiff's parents which were bailed in the cemetery for safekeeping, were lost. The court examined various authorities on nervous shock and said there were no judicial authorities dealing with damages for mental distress in the case of bailment. The question in the present case was whether the relationship between the cemetery and the plaintiff was such that the cemetery must have contemplated that the loss of the plaintiffs' parents ashes would cause mental distress. The court found that it was obvious, the cemetery would have been aware of the upset that would be caused by the loss of the remains. That being so, the court could find no reason to deny recovery for damages.

> "If damages are recoverable for upset over the loss of a dog[36] or for the disappointment of a ruined holiday[37], surely the distress caused by the loss of the remains of someone's deceased parents is likewise compensable"

The judgment outlined the courts usual refusal to award damages for emotional upset unless it has manifested itself in some physical recognisable psychiatric illness similar to the Irish position. Usually grief alone is not recoverable. Molly J went on however;

> "it is difficult to rationalise awarding damages for physical scratches and bruises of a minor nature but refusing damages for deep emotional distress which falls short of a psychiatric condition. Trivial physical injury attracts trivial damages. It would seem logic to deal with trivial emotional injury on the same basis, rather than denying the claim altogether. Judges and juries are routinely required to fix monetary damages based on pain and suffering even though it is well known that the degree of pain is a subjective thing incapable of concrete measurement. It is recognised that emotional pain is just as real as physical pain and may, indeed, be more debilitating.....surely emotional distress is a more foreseeable result from a negligent act than a psychiatric illness".

This was said in the full recognition of the undesirability of lawsuits based on minor upsets and frights, however Molly J felt such minor or frivolous claims could be dealt with by limiting recovery based on foreseeability and by imposing cost sanctions in cases of a trivial nature. Generally damages allowed for mental distress have been relatively low. The parent upset by the discovery of retention of tissue on post-mortem is in a similar position to the plaintiff in *Mason,* in that they have lost some peace of mind.

The US courts adopt a different and some would say confusing approach to claims for mental distress. The concept of mental distress applies to a variety of mental states falling short of a recognised psychiatric illness. On this side of the Atlantic as the law presently stands, mere mental distress does not qualify for compensation. There have been suggestions that an exception should be created for recoverability in relation to mental distress caused by misconduct relating to the dead body[38], although these have been rejected on the basis of the difficulty in separating the natural grief resulting from the death of a loved one from the additional grief suffered as a result of the mishandling of the body. It was also rejected because it would be unfair that a more lenient rule would apply to an interference with a corpse than if the plaintiff's living relative was injured.

Any claim in negligence therefore must be analogised with the existing cases on recovery for psychiatric injury.[39] The Supreme Court in the case of *Kelly v Hennessy*[40] has established the criteria to succeed in an action for damages for nervous shock. The requirements of foreseeability and proximity are perhaps the two of concern for these purposes. A key requirement is that the psychiatric illness is shock induced. Parents of children whose organs have been retained at autopsy seem to have obtained the news in a two stage way. Initially there was a suspicion, which was followed by an inquiry to obtain the information relating to the specific case. This type of information gathering does not fit with the sudden impact, shock inducing news.

A duty of care will not arise unless the risk of psychiatric injury (unassociated with physical injury) was reasonably foreseeable. The question has been raised as to whether the courts should prescribe some limits on reasonable foreseeability on policy grounds[41]. It may be therefore that a court might look unfavourably on any attempt to stretch foreseeability. A key question is whether the doctors acting in the 1970s and 1980's were careless as to the result of their conduct on a foreseeable group of people. Was nervous shock a sufficiently foreseeable consequence of the defendants negligent act/omission, such as to bring the plaintiff in the scope of those to whom the defendant owed a duty of care?

Another feature of these claims although not addressed by Hamilton CJ, are propinquity between the accident and plaintiffs discovery. It is uncertain whether discovery has to be

by physically seeing or hearing the accident or immediate aftermath. Failure in respect of the latter requirement, it is suggested, would most likely prevent invisible mishandling such as retention of tissue at post-mortem as giving rise to a claim in negligence for psychiatric illness.

Conclusion

The law of today is tied to a 300 year-old precedent of questionable authority. Property rights in the body are not formally recognised yet gifting, stealing, bailing and patenting of the body all exist. The legal issues in relation to property in the dead body are even more pronounced in respect of things severed from the body. The fact that the Bill in progress in relation to invitro-fertilization refers to the power to determine the property issues in respect of the reproductive material shows an acceptance by the policy makers that a property analysis of the body and its parts is appropriate and arguably strengthens the case for a property analysis of the dead body and its parts.

The buried corpse is protected but a lacuna in the law exists in relation to protection afforded to corpses or parts of corpses prior to burial or disposal. This inadequacy could be overcome by the courts taking the view that until such time as disposal, the corpse is the subject of property protected by theft and the tort of trespass to goods, conversion and detinue.

If the law were to accept that only when corpses or the remains of corpses are buried or dispersed they are not the subject of property, it could afford legal protection not only to corpses awaiting burial but also to the ashes of a cremated body or a human body that has been disinterred.

Limited proprietary rights in respect of dead tissue ought to be recognised, balanced against the desirability of research designed to benefit society.

A possible solution in defining the property right is "at death the deceased body ought to be regarded as vesting in the executor prior to the disposition for its own protection, thereby attracting at least the same protection as the deceased's personalty, in which the executor enjoys an unquestioned proprietary interest."[42]

There is a public interest in seeing bodies properly and hygienically disposed of and in protecting the deceased body until it is disposed of. A proprietary analysis to this end is neither distasteful nor disrespectful and would ensure a body delivered to a pathologist, undertaker or coroner would be bailed with the executor retaining the rights as bailor.

The ignorance on matters relating to human tissue and its use has changed as a result of the recent "organs" controversy. Attention has been focused on the need for a statutory framework to regulate this area and on the need for rigorous standards aimed at preserving respect for the dead and protecting the property rights of those with the best right to possession of the dead body.

It is hoped that the current controversy will yield a satisfactory long-term solution to this most sensitive of issues.●

1. The issues in relation to property in the living body require an examination of the law of consent.
2. Skegg, *Human Corpses, Mediacl Specimens and the Law of Property* 1975 4 Anglo American Law Review 412, at 412
3. Other avenues included public law, criminal law, public health law
4. At present there is a Bill in progress in relation to Regulation of Assisted Human Reproduction (Regulation of Assisted Human Reproduction Bill, 1999). Section 11 of the Bill makes provision for the Minister to make regulations to determine the ownership of human reproductive material and regulate the use, storage and disposal of human reproductive material
5. *Haynes Case* 12 Co Rep 113; 77 E.R 1389 cited as authority for the no property rule in 2 East P.C. 652
6. An action for trover is a trespass action founded on property in the thing
7. A similar case in Australia, *Doodeward v Spence,* is authority for the no property rule in that jurisdiction: [1908]6 CLR 406
8. [1882] 20 Ch D 659
9. *Clerk & Lindsell on Torts* (17th Edition), 653
10. Anatomy Act 1832 in UK incorporated into Irish law by SI 256 of 1949
11. The bodies of persons convicted of murder were allowed to be used for dissection.
12. Health Act 1970, section 77
13. [1997] 1 WLR 579
14. or who ever else is under a duty to dispose of it
15. Skegg , 1975 4 *Anglo American Law Review* 412 at 418
16. *Moore v Regents of the University of California* (1990) 793 P 2d 479
17. [1908] 6 CLR 406
18. Proceedings were instituted in 1989 by the Maori Council supported by the New Zealand government to halt the sale of a preserved head at a London auction. The matter was settled prior to trial.
19. Human Tissue Act 1961 (England)
20. Nuffield Council on Bioethics Report "Human Tissue: Ethical and Legal issues" (1995) p.64
21. Matthews, *The Man of Property,* 1995 3 Mediacl Law Review 251 at 259
22. *R v Gibson* [1991] 1 All ER 439
23. *R v Lennox* - Wright [1973] Crim LR 529
24. *R v Welsh* [1974]RTR 478
25. *R v Rothery* [1976] RTR 550
26. Skegg; *Cadaveric Transplant Material* (1974) 14 Medicine, Science, Law 53
27. Skegg; as above
28. Ian Mc Coll Kenndy (1976)16 Medicine, Science Law 49
29. [1997] 1 WLR 579
30. conversion is dependent on the existence of some proprietary right
31. There was nothing in the pleadings or evidence before the court to suggest that the brain after the post mortem acquired properties akin to those that have undergone stuffing, embalming or other processes which would have endowed it with some value for exhibition purposes.
32. *Dobson v North Tyneside AHA* [1996] 4 All ER 474
33. *Mason v Westside Cemeteries* [1996] 135 DLR 4th 361
34. Relying on the Canadian authority of *Philipps v Montreal General Hospital* [1908] 33 Que S C 483 in which *Larson v Chase* 14 LRA 85 was cited
35. as above
36. *Newell v Canadian Pacific Airlines Ltd* [1976] 74 DLR 3d 574 , defendan airline agreed to transport the plaintiff's two pet dogs knowing the plaintiffs emotional attachment to them, from Toronto to Mexico City. Due to negligence of the defendant one dog arrived dead and the other in a comatose state. The court found the contract was such that the parties must have contemplated that a breach might entail mental distress.
37. *Jarvis v Swan Tours Ltd* [1973] QB 233
38. US Restatement (second) of Torts 1977 para 868
39. *Mullaly v Bus Eireann* [1992] ILRM approved in Kelly v Hennessy [199(1 ILRM 321
40. [1996] 1 ILRM 321
41. Mc Mahon and Binchy Annual Review of Irish Law 1995, 521
42. *Interest in Goods,* Palmer and Mc Kendrick (Second edition, p37)

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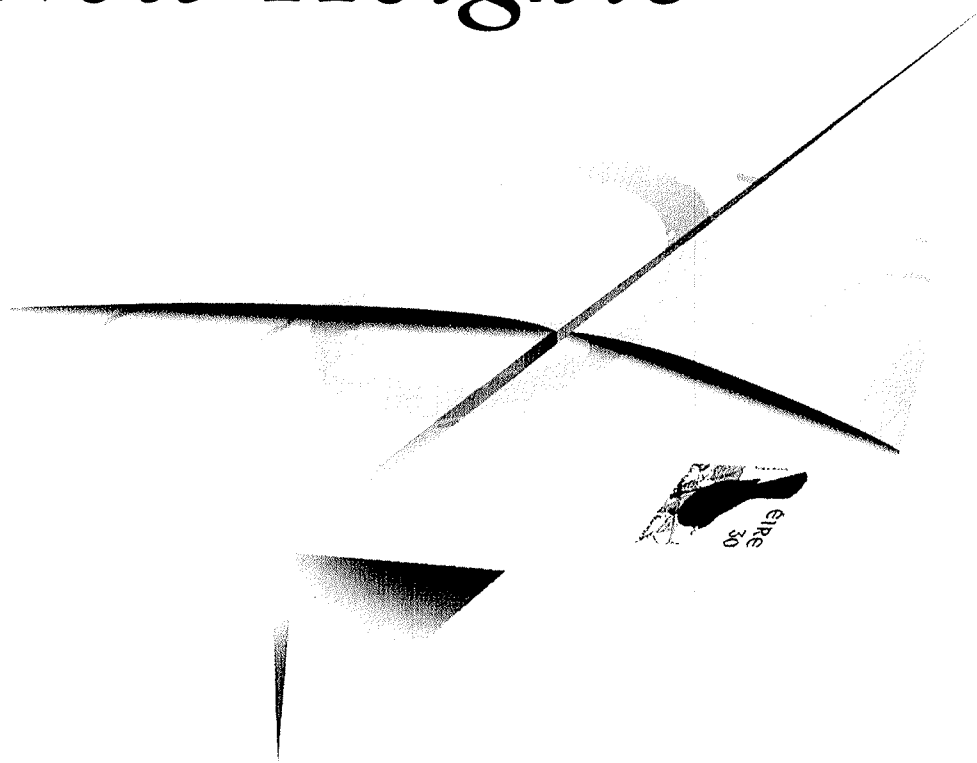

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Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 5, Issue 6

A directory of legislation, articles and written judgments received in the Law Library from the 10th February 2000 to the 14th March 2000.

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

Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

Statutory Instrument

Appointment of Special Advisers Order, 1999
SI 344/1999

Adoption

Article

The changing face of adoption
Darling, Vivienne
1999 (4) IJFL 2

Agency

Library Acquisition

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

Aliens

Library Acquisition

Hughes, Jane
Detention of asylum seekers in Europe: analysis and perspectives
The Hague Martinus Nijhoff Publishers 1998
C206.E95

Arbitration

Article

Arbitration (International Commercial) Act 1998
Byrne, Raymond
1999 ILTR 262

Library Acquisitions

Crowter, Harold
Introduction to arbitration
London LLP 1998
N398

Huleatt-James, Mark
International commercial arbitration a handbook
2nd ed
London LLP 1999
C1250

O'Reilly, Michael
Costs in arbitration proceedings
2nd ed
London LLP 1997
N398

Redfern, Alan
Law and practice of international commercial arbitration
3rd ed
London Sweet and Maxwell 1999
C1250

Children

Article

From legislation to practice: some observations on the 1991 child care act in relation to the promotion and protection of children
McElwee, C Niall
1999 (4) IJFL 7

Civil Liberties

Minister for Agriculture and Food v. Information Commissioner
High Court: **O'Donovan J.**
17/12/1999

Freedom of information; statutory interpretation; appeal pursuant to s.42(1) Freedom of Information Act, 1997; employee of Department for Agriculture and Food made a request to the Department pursuant to s.7 Freedom of Information Act, 1997 for sight of his personnel files; employee refused access to files created prior to a certain date in reliance upon s.6(6)(c) of the 1997 Act; respondent reviewed decision pursuant to s.34 of the 1997 Act and granted employee full access to certain records and partial access to other records; appellant seeking order discharging decision of the respondent to give access and declaratory reliefs; whether the respondent unnecessarily and wrongly embarked upon a consideration of the contents of the records; whether the error was one of consequence; whether the respondent was entitled to take into account sections of the Act which had not been relied upon by the appellant in reaching its decision; whether there were grounds upon which the respondent was entitled to conclude that the appellant had not ruled out the possibility of future use of the records in respect of which access was sought; whether s.6(6)(c) must be construed as meaning that, if there is evidence to suggest that future use of a record to which access is sought appears to be contemplated, then the subsection cannot be used to justify a refusal to grant access.
Held: Contents of records are irrelevant to s.34 review; the respondent was not entitled to take into account sections of

the Act which were not relied on by the appellant when arriving at his decision; respondent was limited to considering s.(6)(c); there was adequate evidence to support the respondent's findings that the provisions of s.6(6)(c) of the Act did not apply; appeal dismissed and decision of the respondent varied to allow access to all records sought.

Commercial Law

Articles

Breach of confidence: the nebulous umbrella
Forde, Robert
1999 IBL 158

ESOP fables share and share alike
Fitzgerald, Kyran
1999 (November) GLSI 18

Madame Tussaud's "whole business" comes of age
Downey, Conor
1999 IBL 148

Recent developments in financial regulation
Goldberg, David
1999 CLP 99

Taking security over the assets of public enterprises
Downey, Conor
1999 IBL 176

The EC merger regulation - a review of recent developments
Cahill, Dermot
1999 CLP 272

The ISDA master agreement - managing legal risk: jurisdictions and counter-parties
Foy, Agnes
1999 CLP104

Woolf on fraud
Foy, Agnes
1999 IBL 126

Library Acquisitions

Hill, Jonathan
The law relating to international commercial disputes
2nd ed
London LLP 1998
C1200

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

Statutory Instrument

Investor Compensation Act, 1998 (Section 18(4)) (Prescription of Individuals) (Amendment) Regulations, 1999
SI 345/1999

Company Law

Article

Share buy-backs in Singapore
Chandran, Ravi
1999 CLP 111

Library Acquisition

Stedman, Graham
Shareholders' agreements
3rd ed
London Sweet & Maxwell 1999
N263

Competition

Wheelbin Services Limited v. Kildare County Council
High Court: **O` Caoimh J.**
21/12/1999

Competition; abuse of a dominant position; injunction; plaintiff denied access to landfill site by defendant; whether there is a fair issue to be tried that the defendant constitutes an undertaking for the purposes of the Competition Act, 1991; whether there is a fair issue to be tried that the defendant is in a dominant position; whether there is a fair issue to be tried that the defendant is guilty of an abuse of a dominant position contrary to s.5 Competition Act, 1991; whether damages are an adequate remedy; whether the balance of convenience favours the plaintiff.
Held: There is a fair issue to be tried; damages are an adequate remedy for the plaintiff; balance of convenience lies in favour of the defendant; relief refused.

Constitutional Law

Pringle v. Ireland
High Court: **O'Donovan J.**
13/07/1999

Bar to proceedings; preliminary issue; plaintiff convicted of capital murder and sentenced to death; sentence commuted to 40 years' penal servitude; plaintiff spent fourteen years and ten months in prison; plaintiff applied to Court of Criminal Appeal pursuant to s. 2, Criminal Procedure Act, 1993; Court of Criminal Appeal held plaintiff had established a newly discovered fact that rendered his conviction unsafe and unsatisfactory, quashed the conviction and directed a new trial; Director of Public Prosecutions entered a nolle prosequi; plaintiff applied to Court of Criminal Appeal pursuant to s. 9, Criminal Procedure Act, 1993 for a certificate that there had been a miscarriage of justice in his case; Court of Criminal Appeal refused to grant the certificate but certified that its decision involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court on the question whether the Court of Criminal Appeal had been correct to refuse the certificate sought; Supreme Court answered that question in the affirmative but referred the matter back to the Court of Criminal Appeal to allow plaintiff to renew his application; plaintiff instituted present proceedings seeking damages for negligence, breach of duty and failure to vindicate his constitutional rights; whether plaintiff's application under s. 9 Criminal Procedure Act, 1993 debarred him from maintaining the present proceedings.
Held: It is a prerequisite for the exercise of the option provided for in s. 9(2), Criminal Procedure Act, 1993 that the applicant has obtained a certificate from the Court of Criminal Appeal that there has been a miscarriage of justice; as plaintiff has not obtained such a certificate and could not maintain an action under s. 9(2) he is therefore not debarred from maintaining the present proceedings.

Eastern Health Board v. E.A.
High Court: **McGuinness J.**
02/09/1999

Protection of identity; in camera proceedings; High Court made an order prohibiting publication of any information in relation to proceedings concerning the welfare of "Baby A" and "Baby B"; order subsequently made permitting The Irish Times to publish name of counselling agency involved in the proceedings; application seeking order permitting naming of both the general practitioner and barrister involved in the case; whether in the public interest to allow such publication; whether contrary to the interests of the children to allow such publication.
Held: Overriding need is to protect identity of the infants and their mothers; application refused.

Contract

Articles

Exempting or limiting liability in sale agreements

Clarke, Blanaid
1999 CLP 267

Relevant contracts tax (RCT)
Feerick, Ivor
12 (1999) ITR 636

Copyright, Patents & Designs

Article

Intellectual property (miscellaneous provisions) act 1998
Byrne, Raymond
1999 ILTR 297

Library Acquisition

Bainbridge, David Ian
Software copyright law
4th ed
London Butterworths 1999
N112.7

Criminal Law

O'C. v. Governor of Curragh Prison
High Court: **Geoghegan J.**
12/01/200

Criminal; habeas corpus; common law assault; offence of assault at common law had been abolished by s. 28 Non-Fatal Offences Against the Person Act, 1997; applicant convicted of indecent assault; whether "assault and battery" includes indecent assault; whether indecent assault was abolished by s.28; Art. 40 of the Constitution.
Held: Application refused; s.28 does not apply to the offence of indecent assault or sexual assault.

Conlon v. His Honour Judge Kelly
High Court: **Mc Guinness J.**
14/12/1999

Criminal; judicial review; certiorari; prohibition; applicant had been tried on a number of counts of fraudulent conversion; retrial ordered after jury failed to agree on the verdict; further charges brought against applicant; orders made by respondent consolidating indictments; applicant seeking certiorari quashing the orders of the respondent and an order prohibiting the second named respondent from prosecuting the applicant with the additional counts added; whether the respondent had jurisdiction to consolidate the two indictments; whether the applicant should be denied relief because he failed to apply for a separate trial on the different counts pursuant to s.6(3), Criminal Justice (Administration) Act, 1924 .
Held: The respondent had ample jurisdiction to make the orders which he did; the appropriate remedy lies in the provisions of s.6(3); reliefs refused.

D.P.P. v. Nulty
High Court: **Carroll J.**
02/06/1999

Criminal; practice and procedure; defective charge sheet; case stated; jurisdiction of court in relation to defective charge sheet; District Court held that charge was invalid and refused to amend defect on the grounds that the application to amend should have been made earlier in the proceedings; whether the District Court Judge was correct in law in holding that the charge as framed was an invalid charge; whether the District Court Judge was correct in law in refusing to amend the invalid charge on the grounds that the application should have been made earlier; O. 38, District Court Rules, 1997.
Held: The charge as framed was an invalid charge; the District Court Judge was not correct in law in refusing to amend the invalid charge.

D.P.P. v. McCormack
High Court: **McGuinness J.**
08/07/1999

Criminal; practice and procedure; drink driving; arrest; case stated; accused gave valid breath specimen and was taken into custody; evidence established that the accused was not informed at the time of his arrest of the fact that he was being arrested, nor under what provision he was being arrested; whether the district judge was correct in dismissing the charge where the accused had not been informed under what provision he was being arrested; whether the district judge was correct in dismissing the charge where the accused had not been informed that he was being arrested.
Held: The District Judge was correct in dismissing the charge against the accused, since the accused was not validly arrested, as he was not informed that he was being arrested.

Corbett v. D.P.P.
High Court: **McGuinness J.**
07/12/1999

Criminal; judicial review; prohibition; applicant charged with assault contrary to s.42 Offences Against the Person Act, 1861, as amended by s.10 Criminal Justice (Public Order) Act , 1994; prosecution sought an adjournment; common law offence of assault had been abolished by s.28 Non Fatal Offences against the Person Act, 1997; Act contained no saver as to prosecutions pending; Interpretation (Amendment) Act, 1997 enacted saving provisions; applicant seeking order of prohibition preventing the respondent from taking any further steps in the prosecution of the applicant; whether the State is bound by its concession in Kavanagh v D.P.P that there was a lacuna in the 1997 Act in regard to the abolition of common law assault; whether the prosecution of the applicant could be saved by the Interpretation Act 1997; whether the provisions of the Interpretation Act, 1997 and in particular s.1(4) are repugnant to the Constitution; whether the prosecution of the applicant would offend the constitutional principle of equality of treatment before the law; whether the conduct of the respondent constituted an interference in the applicant's constitutional right of access to the courts.
Held: Orders refused.

McKenna v. Presiding Judge of the Dublin Circuit Criminal Court
High Court: **Kelly J.**
14/01/2000

Criminal; judicial review; prohibition; delay; delay of fourteen months between date complaint made and date of first arrest; delay of four years and four months between date of applicant's first arrest and second arrest; applicant seeking an order of prohibition to restrain the further prosecution of the charges against him; whether delay was inordinate; whether the applicant has been prejudiced by the delay and his right to a fair trial impaired.
Held: The cumulative delay was inordinate and inexcusable; delay has not given rise to a real risk of an unfair trial; application dismissed.

D.P.P. v. Hollman
High Court: **O'Higgins J.**
29/07/99

Criminal Assets Bureau; confiscation of the proceeds of crime; application for order pursuant to s. 3 Proceeds of Crime Act, 1996; belief that property constitutes proceeds of crime; whether belief of former Chief Superintendent is evidence under Act; whether respondent shown that property is not proceeds of crime; whether Act applies to proceeds of crime even if crime committed outside the State.
Held: Order granted.

Articles

Asset forfeiture in the United States
Jaipaul, Sonia C
1999 ICLJ 191

British legislative developments on the confiscation of criminal assets
Cole, Detective Sergeant Chris
1999 ICLJ 176

"Collaring" the white collar criminal
Gallagher, Eugene
1999 CLP 263

Seizure of criminal assets: an overview
McCutcheon, J Paul
1999 ICLJ 127

Targeting the financial wealth of criminals in Ireland: the law and practice
Murphy, Fachtna
1999 ICLJ133

The enforcement of money laundering legislation
Walsh, Eamonn J
1999 ICLJ 204

Tracing the proceeds of crime: legal and constitutional implications
Murphy, Shane
1999 ICLJ160

Woolf on fraud
Foy, Agnes
1999 IBL 126

Library Acquisitions

Cross & Tapper,
Cross and Tapper on evidence
9th ed / by Colin Tapper
London Butterworths 1999
M600

Department of Justice, Equality and Law Reform
Victims charter and guide to the criminal justice system
Dublin Department of Justice, Equality and Law Reform [1999]
M593.C5

McCutcheon, J Paul
Confiscation of criminal assets law and procedure
Dublin Round Hall Sweet & Maxwell 1999
M580.2.C5

Smith & Hogan
Smith and Hogan criminal law
9th ed / by Sir John Cyril Smith
London Butterworths 1999
M500

Damages

Daly v. Murphy
Supreme Court: Keane J., Murphy J., **Barron J.**
29/10/99

Personal injuries; evidence; skipper of fishing vessel injured his back during collision with another vessel; plaintiff attended general practitioner but did not call him at trial of action; no medical opinion provided as to extent of pain which might be anticipated; no documentary evidence provided indicating nature of the plaintiff's earnings; liability admitted; damages awarded in High Court; trial judge found that plaintiff's evidence was grossly exaggerated; no corroborating evidence called by either party; defendant appealed on basis that award was excessive; whether, upon trial judge regarding witness's evidence as exaggerated, before any of that evidence can be accepted, there must be corroborating evidence from which it can reasonably be inferred where the line of exaggeration occurs; whether there was any evidence upon which award for personal injuries or pain and suffering other than shock could be made; whether there was any evidence upon which trial judge could make findings as to extent of plaintiff's pre-accident condition, whether prolapsed disc was caused by collision, whether plaintiff would suffer more pain and discomfort than if collision had not occurred or as to period during which plaintiff was unfit for his pre-accident work; whether there was sufficient evidence to indicate plaintiff's earnings. Held: Appeal allowed; case remitted to High Court for retrial on all issues.

Defamation

De Rossa v. Independent Newspapers plc
Supreme Court: **Hamilton C.J., Denham J.***, Barrington J., Murphy J., Lynch J. (*dissenting)
30/07/1999

Libel; damages; plaintiff awarded £300,000 in damages by the High Court; whether damages excessive; whether larger awards ought to be subjected to more searching scrutiny by an appellate court than has been customary; whether award in this case was so high as to amount to a restriction or penalty on the freedom of expression of the defendant; defendant accepted that trial judge had instructed the jury in accordance with present practice; whether jury ought to be given more specific guidance as to what counsel and the trial judge consider to be appropriate levels of damages, and by way of comparison with awards made in personal injury and previous libel cases; Articles 40.3.1_, 40.3.2_ and 40.6.1_ of the Constitution; article 10, European Convention on Human Rights. Held: The suggestion of figures would constitute an unjustifiable invasion of the province of the jury; there should not be any reference by way of comparison to awards in personal injury or other defamation cases; no special scrutiny of large awards is permissible; the award did not go beyond what a reasonable jury applying the law to all the relevant considerations could reasonably have awarded and was not disproportionate; the substantive law fulfils the obligations imposed by the Constitution and the Convention; appeal dismissed.

Education

Statutory Instrument

Vocational Education (Grants for Annual Schemes of Committees) Regulations, 1998
SI 228/1999

Employment

Articles

Accentuate the positive
Redmond Dr, Mary
1999 (November) GLSI 16

And justice for all?
Twomey, Adrian F
1999 (November) GLSI 22

Sexual harassment
Twomey, Adrian F
5(2) 1999 BR 64 [part 1]

Library Acquisition

Blanpain, Roger
European labour law
6th ed
The Hague Kluwer law International 1999
originally published as the "International encyclopaedia for labour law and industrial relations"
W131.5

Irish Centre for European Law
The free movement of workers within the European Union
Dublin Irish Centre for European Law 1999
W130

Statutory Instrument

Safety Health and Welfare at Work (Fishing Vessels) Regulations, 1999
SI 325/1999
(DIR 93/103)

Environmental Law

Library Acquisition

Larsson, Marie-Louise
The law of environmental damage: liability and reparation
The Hague Kluwer law 1999
C243

Equity & Trusts

Library Acquisition

Thomas, Geraint
Powers
London Sweet & Maxwell 1998
N54.6

European Communities

Articles

The Brussels convention
Buttimore, Jonathan
1999 IBL 122

The EC merger regulation - a review of recent developments
Cahill, Dermot
1999 CLP 272

Library Acquisitions

Blanpain, Roger
European labour law
6th ed
The Hague Kluwer law International 1999
originally published as the "International encyclopaedia for labour law and industrial relations"
W131.5

Gearty, Conor A
European civil liberties and European convention on human rights a comparative study
The Hague Martinus Nijhoff 1997
C200

Irish Centre for European Law
The free movement of workers within the European Union
Dublin Irish Centre for European Law 1999
W130

Kapteyn, Paul Joan George
Introduction to the law of the European Communities from Maastricht to Amsterdam
3rd ed / by L.W. Gormley
The Hague Kluwer law international 1998
W71

Statutory Instruments

European Communities (Ban on the supply to Indonesia of equipment which might be used for internal repression and terrorism) Regulations, 1999
SI 357/1999

European Communities (Licensing of Drivers) Regulations, 1999
SI 351/1999

European Communities (Motor Vehicles Type Approval) (No.3) Regulations, 1999
SI 358/1999

Evidence

Library Acquisition

Cross & Tapper,
Cross and Tapper on evidence
9th ed / by Colin Tapper
London Butterworths 1999
M600

Family Law

Article

From legislation to practice: some observations on the 1991 Child Care act in relation to the promotion and protection of children
McElwee, C Niall
1999 (4) IJFL 7

Garda Síochana

Hynes v. Commissioner Garda Síochana
Supreme Court: **O'Flaherty J., Keane J.**, Barron J.
(ex tempore)
13/01/99

Garda Síochana; plaintiff charged with breaches of discipline; plaintiff dismissed; appealed on grounds that disciplinary tribunal had erred in law and penalty imposed was excessive; appeal board affirmed decision of tribunal save in respect of one charge; whether fact that one charge should not have come before tribunal vitiated the whole proceedings. Held: Appeal dismissed; tribunal had distinct charges before it.

Stanley v. Garda Síochana Complaints Board
High Court: **Laffoy J.**
19/10/1999

Judicial review; certiorari; ultra vires; fair procedures; reasonableness; duty to give reasons; applicant seeks certiorari of decision by respondent declaring that the applicant's complaint is a vexatious claim within the meaning of section 4(3)(a)(vi) of the Garda Síochana Complaints Act, 1986; whether applicant has established that the respondent's decision was fundamentally at variance with reason and common sense; whether the Court is entitled to infer that the respondent did not turn his mind to the question of whether an offence might have been committed or the alternative inference that the respondent formed the opinion that an offence might have been committed; whether the respondent's failure to give reasons was a breach of the applicant's right to fair procedures; s.7, Garda Síochana Complaints Act, 1986. Held: Relief refused.

Human Rights

Article

The European court of human rights and the abolition of corporal punishment in Ireland
Arthur, Ray
1999 (4) IJFL 11

Library Acquisitions

Gearty, Conor A
European civil liberties and European convention on human rights a comparative study
The Hague Martinus Nijhoff 1997
C200

Van Dijk, P
Theory and practice of the European convention on human rights
3rd ed
The Hague Kluwer Law International 1998
C200

Information Technology

Articles

Data protection & privacy on the internet
Murray, Karen
5(2) 1999 BR 69

Electronic filing
Hussey, Frank
12(1999) ITR 643

Information technology the emerging legal environment
McAleese, Don
1999 IBL 182

Taxing online
Keegan, Brian
12 (1999) ITR 648

Unscrambling the "outsourcing" egg
Canniffe, Carrie Jane
5(2) 1999 BR 85

Library Acquisition

Bainbridge, David Ian
Software copyright law
4th ed
London Butterworths 1999
N112.7

Venables, Delia
Researching the legal web a guide to legal resources on the internet
2nd ed
London Butterworths 1999
L157

Injunctions

Fanning v. University College Cork
High Court: **Carroll J.** (ex tempore)
07/07/1999

Mediation process; injunction; plaintiff and defendant are joint defendants in legal proceedings, in which a notice of discontinuance has been served upon the plaintiff; plaintiff and defendant as joint defendants made a joint defence agreement; defendant has sought to resolve the matter through a mediation process; whether there is a fair issue to be tried; whether the balance of convenience favours the defendant in seeking to resolve the dispute.
Held: Application refused.

T.D. v. The Minister For Education
High Court: **Kelly J.**
25/02/2000

Injunctions; children; separation of powers; provision by State of special residential care for children; provision of these facilities deferred; application for series of injunctions directing respondent to take all steps necessary to ensure the completion of the proposed developments within the specified time scale; whether injunctions sought would be sufficiently specific; whether applicants have locus standi to obtain the relief sought; whether to grant the injunctions would be to trespass on the role of the Executive in the determination of policy; whether the continual deferments were the result of matters outside the control of the State or its agencies.
Held: Injunctions granted.

International Law

Article

Enforcing foreign tax laws
MacLeod, James S
12 (1999) ITR 592

Library Acquisitions

Hill, Jonathan
The law relating to international commercial disputes
2nd ed
London LLP 1998
C1200

Huleatt-James, Mark
International commercial arbitration a handbook
2nd ed
London LLP 1999
C1250

Redfern, Alan
Law and practice of international commercial arbitration
3rd ed
London Sweet and Maxwell 1999
C1250

Statutory Instrument

European Communities (Ban on the supply to Indonesia of equipment which might be used for internal repression and terrorism) Regulations, 1999
SI 357/1999

Legal Profession

Articles

Growing role for lawyers as scandals unfold
Fitzgerald, Kyran
1999 IBL 161

Summary trials and judicial criticism - an educational response
Carey, Gearoid
1999 ILTR 278

The art of giving
Behan, Maria
1999 (November) GLSI 24

The Denham commission reports: a critical analysis
Martin, Frank
1999 (4) IJFL 18

Library Acquisition

Law Society of Ireland Disciplinary Tribunal
Solicitors (disciplinary tribunal) rules, 1997
Dublin Law Society of Ireland 1997

Law Society of Ireland Disciplinary Tribunal
Solicitors (disciplinary tribunal) rules, 1998
Dublin Law Society of Ireland 1998

Rider, Barry A K
Law at the centre: the Institute of Advanced Legal Studies at fifty / edited by Barry Rider
The Hague Kluwer Law International 1999
L401

Statutory Instrument

Courts Service Act, 1998 (Establishment Day) Order, 1999
SI 349/1999

Negligence

Gayson v. Allied Irish Banks Plc.
High Court: **Geoghegan J.**
28/01/2000

Negligence; negligent advice; plaintiff suing defendant for damages for alleged negligent advice given to him by an employee of the defendant not to avail of the tax amnesty of 1988; whether defendant had assumed responsibility for giving of such advice; whether the defendant was vicariously responsible for giving of such advice; whether the defendant relied on the advice; whether there was an actionable duty of care owed by the employee if acting as agent of the defendant.
Held: Action dismissed.

Everitt v. Thorsman Ireland Limited
High Court: **Kearns J.**
23/06/1999

Personal injury; negligence; employer's liability; supplier's liability; health and safety; damages; injury in the workplace due to latent defect in plant; whether first named defendant is liable where a tool supplied by the second named defendant contains a latent defect which results in an injury to the employee; whether first named defendant was on notice of latent defect; whether first named defendant took reasonable steps to provide safe plant under its common law duty; whether the first named defendant is in breach of regulation 19 of the Safety, Health and Welfare at Work (General Application) Regulations, 1993 (S.I. 44 of 1993); whether the claim against the second defendant was statute barred; whether plaintiff had actual or constructive knowledge that the second named defendant was the supplier of the defective plant from the time of the accident; whether the first named defendant is entitled to indemnities from the second named defendant to the extent of 100%.
Held: First named defendant was in breach of his statutory duty; damages awarded; second named defendant was liable to indemnify first named defendant to the extent of 100%.

Hogan v. Electricity Supply Board
High Court: **O'Higgins J.**
17/12/1999

Personal injury; contributory negligence; plaintiff suffered severe electric shock as transformer had been re-energised during lunch break; whether the defendant was negligent in failing to have task specific, easily understood instructions; whether the defendant was negligent in not

supervising the plaintiff in tightening the bolts; whether the defendant was negligent in not following the "declaring off" procedure; whether the defendant was negligent in not following the "roping-off" procedure; whether the defendant was negligent in turning on the transformer at lunch; whether the defendant was in breach of statutory duty; section 52(1) Safety Health and Welfare at Work (General Application) Regulations, 1993.
Held: Defendant was negligent in not following the "declaring off" procedure; plaintiff bears 85% of liability; damages awarded.

Planning

Eircell Limited v. Leitrim County Council
High Court: **O'Donovan J.**
29/10/1999

Judicial review; planning; revocation of planning permission; respondent had granted planning permission to applicant; respondent by resolution decided at a special meeting to revoke said grant of planning permission; respondent served notice to that effect on applicant; before taking decision, respondent had been advised that planning officer had certified that no change in circumstances relating to proper planning and development of the area concerned had occurred since grant of planning permission; reason for decision stated to be a "change of circumstances", as well as "considerable fear, apprehension and opposition" of local community in respect of proposed development; respondent did not inquire into circumstances obtaining at time of grant of planning permission, nor did it investigate the validity or otherwise of grounds upon which revocation decision was based; applicant seeks declaratory relief and orders of certiorari in respect of decision to revoke grant of planning permission and in respect of notice of revocation of grant of planning permission; whether grounds of revocation decision constituted proper planning considerations; whether grounds of revocation decision constituted a "change of circumstances" within meaning of s. 30, Local Government (Planning and Development) Act, 1963, as amended by s. 39, Local Government (Planning and Development) Act, 1976; whether respondent sufficiently informed to take any decision; whether onus on applicant to prove circumstances obtaining at time of grant of planning permission and that circumstances considered by elected representatives of respondent county council in deciding to revoke did not obtain at that time and that no change in circumstances had occurred; whether rules of constitutional justice ought to have been observed by respondent in deciding to revoke planning permission; whether applicant should have exhausted its statutory right of appeal to the Minister before applying for judicial review.
Held: Reliefs granted; onus not on applicant where Court is not concerned with reasonableness of impugned decision but with question of whether respondent had informed itself sufficiently to make any decision at all; respondent must inform itself sufficiently, especially (but not merely) because of the opinion of the planning officer; where a body is making a decision arising from a statutory power and body is obliged to act judicially, then, in absence of procedure laid down by statute from which power derives, body must supplement that lacuna in such fashion as to ensure compliance with constitutional justice; Court has a discretion to refuse relief on ground that applicant has an alternative remedy which was not prosecuted; public at large is entitled to know that planning authority cannot ignore principles of constitutional justice and fair procedures and judicial review facilitates this end; Courts should not be reluctant to intervene in cases which do not simply involve considerations of a purely planning and development nature.

Article

The planning development bill, 1999
Macken, James
5(2) 1999 BR 60

Practice & Procedure

Hughes v. Moy Contractors Limited
High Court: **Morris P.**
25/10/2000

Practice and procedure; delay; delay of five years between the service of summons and delivery of the statement of claim; two witnesses had died; action against the second and third named defendants had already been struck out on grounds of inordinate and inexcusable delay; defendant seeking order dismissing the plaintiff's claim for want of prosecution; whether there was inordinate and inexcusable delay on the part of the plaintiff; whether being deprived of essential witnesses grossly prejudices the defendant; whether since the second named defendant has been discharged out of the action on grounds of delay it is unjust that the action should be permitted to proceed against the defendant; whether the fact that site meetings are fully documented by minutes provides an answer to the defendant's prejudice.
Held: Relief granted; the loss of essential witnesses grossly prejudices the first named defendant.

Moffitt v. Bank of Ireland
Supreme Court: **Keane J., Lynch J.,**
Barron J. (ex tempore)
19/02/99

Practice and procedure; lay litigants; claim of wrongful conversion of proceeds of insurance policy arising from fire to plaintiff's family home by first-named defendant; employee of first-named defendant deposed in grounding affidavit that house was not family home within meaning of Family Home Protection Act, 1976; motion to strike out statement of claim as being vexatious and as disclosing no cause of action against second-named defendant, a solicitor retained by the first-named defendant; motion dismissed by High Court; appeal; whether statement of claim disclosed cause of action against the second-named defendant; whether fact that second-named defendant arranged for swearing of affidavit which subsequently turned out to be false discloses cause of action against him; whether solicitor merely discharging his professional duties to his client; whether, in proceedings taken on foot of judgment mortgage, issue of whether premises constitute a family home arises; O.19, r.28 Rules of the Superior Courts.
Held: Appeal allowed.

McMullen v. Clancy
High Court: **McGuinness J.**
03/11/1999

Practice and procedure; jurisdiction to vary order of court; action in negligence; lay litigant; judgment had been delivered in proceedings; plaintiff's claim had been dismissed; brief to counsel returned in error to plaintiff; appeal to Supreme Court; plaintiff seeking to re-open original proceedings in High Court on basis of letter contained in portion of brief not put into evidence; whether, once judgment has been delivered and final order made, court has jurisdiction to re-open matters and alter or vary its judgment or order; whether court is functus officio.
Held: Court has no jurisdiction to re-open matters decided in judgment and order made and perfected; open to plaintiff to apply to Supreme Court to receive further evidence on hearing of appeal.

Articles

Taxation of fees
Flynn, Master James
5(2) 1999 BR 93

The Brussels convention
Buttimore, Jonathan
1999 IBL 122

The enforcement of money laundering legislation
Walsh, Eamonn J

1999 ICLJ 204

The new discovery rules
Brady, Rory
5(2) 1999 BR 58

Library Acquisition

Glanville, Stephen
The enforcement of judgments
Dublin Round Hall Sweet & Maxwell 1999
N395.2.C5

Statutory Instrument

Jurisdiction of Courts and Enforcement of Judgments Act, 1998 (Commencement) Order, 1999
SI 353/1999

Property

Articles

Ay caramba! buying property in Spain
Berdaguer, Rafael
1999 (November) GLSI 12

Buying a property in Portugal
Cunningham, Bill
12 (1999) ITR 651

Land registration: a new model
O'Cillin, Proinnsias
5(2) 1999 BR 97

Library Acquisition

Law Reform Commission
Report on gazumping
Dublin Law Reform Commission 1999
L160.C5

Wylie, John C W
Conveyancing law
Dublin Butterworth Ireland 1999
contains conveyancing statutes, registry of deeds and land registry statutes
N74.C5.Z14

Records & Statistics

Statutory Instrument

Registry of Deeds (Fees) Order, 1999
SI 346/1999

Refugees

Library Acquisition

Hughes, Jane
Detention of asylum seekers in Europe: analysis and perspectives
The Hague Martinus Nijhoff Publishers 1998
C206.E95

Road Traffic

D.P.P. v. Duffy
High Court: **Quirke J.**
04/06/1999

Drink driving; case stated; Garda's opinion that person has consumed intoxicating liquor prior to requiring breathing specimen; evidence of compliance with s.12(1)(a), Road Traffic Act, 1994; accused alleges that evidence must be given justifying the formation of the opinion; whether stating in evidence that the opinion was formed is sufficient to comply with s.12(1)(a); whether evidence must be led showing the reasonableness and genuineness of the opinion in order to comply with s.12(1)(a).
Held: Where it is stated in evidence that the opinion was formed, the accused has professional legal advice and this evidence is not challenged, nor are the bona fides or reasonableness of the opinion challenged, then the evidence of the garda as to the formation of his opinion is sufficient proof of compliance with the provisions of s.12(1)(a).

Statutory Instruments

European Communities (Licensing of Drivers) Regulations, 1999
SI 351/1999

European Communities (Motor Vehicles Type Approval) (No.3) Regulations, 1999
SI 358/1999

Road Traffic (Licensing of Drivers) Regulations, 1999
SI 352/1999

Road Traffic (Licensing of Drivers) (Amendment) Regulations, 1999
SI 366/1999

Shipping

Library Acquisition

Griggs, Patrick
Limitation of liability for maritime claims
3rd ed
London LLP 1998
N332

Succession

McD v. N.
Supreme Court: Barrington J., Keane J., **Barron J.**
25/11/1999

Succession; moral obligation of parent towards child; ill feeling between parent and child; application to the court for relief under s.117, Succession Act, 1965; whether and to what extent should account be taken of bad feeling between the parent and child in deciding whether a moral obligation still exists between parent and child; what would have satisfied the moral obligation of the parent to the child in the particular circumstances; whether the conduct of the applicant has extinguished his moral claim over the estate of the deceased; whether the applicant had received any benefits in satisfaction of his moral claim against the deceased.
Held: Relief granted; account should be taken of the bad feeling, but a moral obligation did still exist between the applicant and the deceased.

Re Kennedy
High Court: **Kearns J.**
31/01/00

Succession; mutual wills made by husband and wife; both died in car accident; according to autopsy report wife died minutes after husband; application by wife's sister for a grant of administration of wife's estate on basis that wife survived husband; at request of Probate Officer clarification sought as to sequence of deaths; coroner concluded that it was impossible to say whether wife or husband died first; whether presumption that parties died simultaneously rebutted; whether any uncertainty should demand an interpretation that parties died simultaneously; s. 5, Succession Act, 1965.
Held: Presumption under s. 5 applies; "uncertainty" can only be displaced by "certainty".

Taxation

Articles

Electronic filing
Hussey, Frank
12 (1999) ITR 643

Enforcing foreign tax laws
MacLeod, James S
12 (1999) ITR 592

Estate planning case study
Brennan, Frank
12 (1999) ITR 596

EU DTA bombshell
Kelly, Jed
12 (1999) ITR 608

Growing role for lawyers as scandals unfold
Fitzgerald, Kyran

1999 IBL 161

Income tax appeal hearings
Dolan, Eugene
12 (1999) ITR 584

Relevant contracts tax (RCT)
Feerick, Ivor
12 (1999) ITR 636

Taxing online
Keegan, Brian
12 (1999) ITR 648

VAT and cross-border leasing of means of transport
Campbell, Niall
12 (1999) ITR 631

When is a guest house a hotel
Byrne, Dermot
12 (1999) ITR 589

Library Acquisitions

Institute of Taxation in Ireland
Revenue powers conference held at Ardilaun House Hotel, Galway November 1992
Dublin Institute of Taxation [1992]
M335.C5

Smailes, David
Tolley's capital gains tax 1999-2000
Croydon Tolley Publishing 1999
M337.15

Statutory Instrument

Finance Act, 1993 (Section 60) Regulations, 1999
SI 355/1999

Telecommunications

Statutory Instruments

Wireless Telegraphy (Carrigaline UHF Televison Programme Retransmission) Regulations, 1999
SI 347/1999

Wireless Telegraphy (UHF Television Programme Retransmission) Regulations, 1999
SI 348/1999

Torts

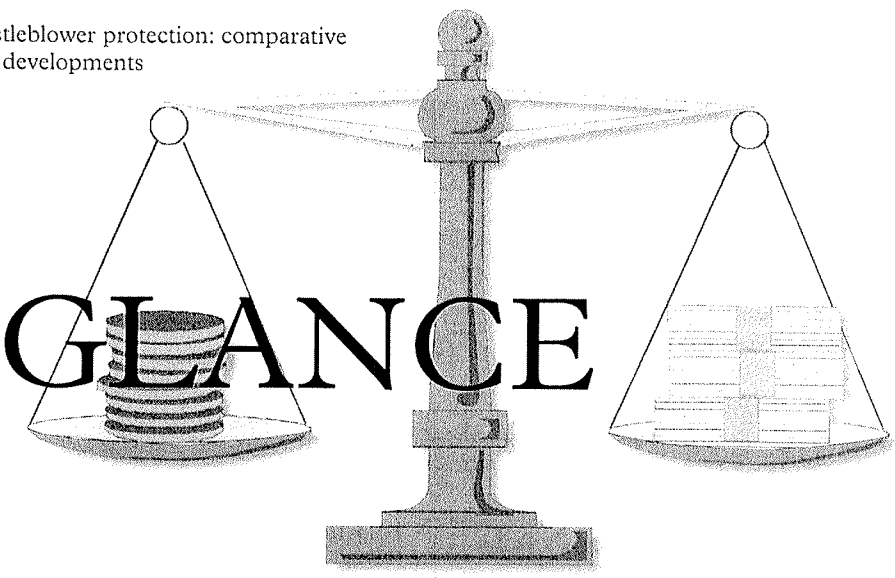
Article

Whistleblower protection: comparative legal developments
Feldman, Estelle
1999 ILTR 264

Tribunals

Irish Times Ltd v. Mr. Justice Flood
High Court: **Morris P.**
28/09/1999

Tribunal of inquiry; taking of evidence on commission; exclusion of public; judicial review; certiorari; sole member of tribunal of inquiry decided to take certain evidence on commission; order of sole member excluded the public from the taking of the evidence; sole member characterised the taking of the evidence as a public sitting of the tribunal; whether sole member correct so to exclude the public, having regard to s. 2, Tribunals of Inquiry Act, 1921.
Held: Section 2 allows for the exclusion of the public where the subject matter of the inquiry is such that the public interest requires it; the ill-health of a witness does not under s.2 justify exclusion of the public; certiorari granted.



AT A GLANCE

European Case Law received in the Law Library up to 13/03/2000

Information compiled by Colm Quinn, Law Library, Four Courts

T-210/95 European Fertilizer Manufacturers' Association (EFMA) and French Republic v Council of European Union and Commission of European Communities

Judgment delivered: 28/10/99
Anti-dumping duties - Elimination of injury - Target price - Profit margin on the costs of production

C-209/97 Commission of the European Communities and the European Parliament v Council of the European Union and the French Republic
Judgment delivered: 18/11/1999
Regulation (EC) No 515/97 - Legal basis - Article 235 of the EC Treaty (now Article 308 EC) or Article 100a of the EC Treaty (now, after amendment, Article 95 EC)

C-81/98 Alcatel Austria AG and Others v Bundesministerium fur Wissenschaft und Verkehr
Judgment delivered: 28/10/99
Public procurement - Procedure for the award of public supply and works contracts - Review procedure

C-200/98 X AB and Y AB v Riksskatteverket
Judgment delivered: 18/11/1999
Freedom of establishment - Payment made by a Swedish company to its subsidiary - Exemption from corporation tax

European Directives implemented into Irish Law up to 14/03/2000

Information compiled by Damien Grenham, Law Library, Four Courts.

European Communities (Protein Feedingstuffs) (Amendment) Regulations, 1999

SI 334/1999
(DIR 95/69, 96/25, 99/20, 82/471)

European Communities (Approval and Registration of Establishments and Intermediaries Operating in the Animal Feed Sector) (Amendment) Regulations, 1999
SI 335/1999
(DIR 99/20, 95/69)

European Communities (Quality of Water Intended for Human Consumption) (Amendment) Regulations, 1999
SI 350/1999
(DIR 80/778)

European Communities (Introduction of Organisms Harmful to Plants or Plant Products) (Prohibition) (Amendment) (No. 3) Regulations, 1999
SI 354/1999
(DIR 84/99)

European Communities (Authorisation, Placing on the Market, use and Control of Plant Protection Products) (Amendment) (No. 3) Regulations, 1999
SI 356/1999
(DIR 73/99 and DIR 80/99)

European Communities (Classification, Packaging, Labelling and Notification of Dangerous Substances) (Amendment) Regulations, 1999
SI 363/1999
(DIR 73/98)

Safety Health and Welfare at Work (Fishing Vessels) Regulations, 1999
SI 325/1999
(DIR 93/103)

Library Acquisitions

Information compiled by Deidre lambe, Law Library, Four Courts

Bainbridge, David Ian
Software copyright law
4th ed
London Butterworths 1999
N112.7

Blanpain, Roger
European labour law
6th ed
The Hague Kluwer law International 1999
originally published as the "International encyclopaedia for labour law and industrial relations"
W131.5

Cross & Tapper,
Cross and Tapper on evidence
9th ed / by Colin tapper
London Butterworths 1999
M600

Crowter, Harold
Introduction to arbitration
London LLP 1998
N398

Department of Justice, Equality and Law Reform
Victims charter and guide to the criminal justice system
Dublin Department of Justice, Equality and Law Reform [1999]
M593.C5

Gearty, Conor A
European civil liberties and European convention on human rights a comparative study
The Hague Martinus Nijhoff 1997
C200

Glanville, Stephen
The enforcement of judgments
Dublin Round Hall Sweet & Maxwell 1999
N395.2.C5

Griggs, Patrick
Limitation of liability for maritime claims
3rd ed
London LLP 1998
N332

Hill, Jonathan
The law relating to international commercial disputes
2nd ed
London LLP 1998
C1200

Hughes, Jane
Detention of asylum seekers in Europe: analysis and perspectives
The Hague Martinus Nijhoff Publishers 1998
C206.E95

Huleatt-James, Mark
International commercial arbitration a handbook
2nd ed
London LLP 1999
C1250

Institute of Taxation in Ireland
Revenue powers conference held at Ardilaun House Hotel, Galway November 1992
Dublin Institute of Taxation [1992]
M335.C5

Irish Centre for European Law
The free movement of workers within the European Union
Dublin Irish Centre for European Law 1999
W130

Kapteyn, Paul Joan George
Introduction to the law of the European Communities from Maastricht to Amsterdam
3rd ed / by L.W. Gormley
The Hague Kluwer law international 1998
W71

Larsson, Marie-Louise
The law of environmental damage: liability and reparation
The Hague Kluwer law 1999
C243

Law Reform Commission
Report on gazumping
Dublin Law Reform Commission 1999
L160.C5

Law Society of Ireland Disciplinary Tribunal
Solicitors (disciplinary tribunal) rules, 1997
Dublin Law Society of Ireland 1997

Law Society of Ireland Disciplinary Tribunal
Solicitors (disciplinary tribunal) rules, 1998
Dublin Law Society of Ireland 1998

McCutcheon, J Paul
Confiscation of criminal assets law and procedure
Dublin Round Hall Sweet & Maxwell 1999
M580.2.C5

O'Reilly, Michael
Costs in arbitration proceedings
2nd ed
London LLP 1997
N398

Redfern, Alan
Law and practice of international commercial arbitration
3rd ed
London Sweet and Maxwell 1999
C1250

Rider, Barry A K
Law at the centre: the Institute of Advanced Legal Studies at fifty / edited by Barry Rider
The Hague Kluwer Law International 1999
L401

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

Smailes, David
Tolley's capital gains tax 1999-2000
Croydon Tolley Publishing 1999
M337.15

Smith & Hogan
Smith and Hogan criminal law
9th ed / by Sir John Cyril Smith
London Butterworths 1999
M500

Stedman, Graham
Shareholders' agreements
3rd ed
London Sweet & Maxwell 1999
N263

Thomas, Geraint
Powers
London Sweet & Maxwell 1998
N54.6

Van Dijk, P
Theory and practice of the European convention on human rights
3rd ed
The Hague Kluwer Law International 1998
C200

Venables, Delia
Researching the legal web a guide to legal resources on the internet
2nd ed
London Butterworths 1999
L157

Wylie, John C W
Conveyancing law
Dublin Butterworth Ireland 1999
contains conveyancing statutes, registry of deeds and land registry statutes
N74.C5.Z14

Bills in progress at 13/03/2000

Information compiled by
Damien Grenham, Law Library, Four Courts

Activity centres (young persons' water safety) bill, 1998
2nd stage - Dail [p.m.b.]

Broadcasting bill, 1999
Committee - Dail

Cement (repeal of enactments) bill, 1999
2nd stage - Dail *(Initiated in Seanad)*

Censorship of publications (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Children bill, 1999
1st stage - Dail

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

Comhairle bill, 1999
Committee- Seanad *(Initiated in Dail)*

Commission to inquire into child abuse bill, 2000
1st stage - Dail

Companies (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**

Companies (amendment) (no.4) bill, 1999
2nd stage - Dail **[p.m.b.]**

Control of wildlife hunting & shooting (non-residents
firearm certificates) bill, 1998
2nd stage - Dail **[p.m.b]**

Copyright & related rights bill, 1999
Committee - Dail *(Initiated in Seanad)*

Criminal justice (united nations convention against torture) bill, 1998
Committee - Dail *(Initiated in Seanad)*

Criminal justice (safety of united nations workers) bill, 1999
2nd stage - Dail *(Initiated in Seanad)*

Criminal law (rape)(sexual experience of complainant) bill, 1998
2nd stage - Dail **[p.m.b.]**

Education (welfare) bill, 1999
Committee - Dail *(Initiated in Seanad)*

Eighteenth amendment of the Constitution bill, 1997
2nd stage - Dail **[p.m.b.]**

Employment rights protection bill, 1997
2nd stage - Dail **[p.m.b.]**

Energy conservation bill, 1998
2nd stage - Dail [p.m.b.]

Equal status bill, 1998
2nd stage - Dail **[p.m.b]**

Equal status bill, 1999
Committee -Seanad *(Initiated in Dail)*

Family law bill, 1998
2nd stage - Seanad

Finance bill, 2000
Committee - Dail

Home purchasers (anti-gazumping) bill, 1999
1st stage - Seanad

Human rights bill, 1998
2nd stage - Dail **[p.m.b.]**

Human rights commission bill, 1999
Committee - Dail

Illegal immigrants (trafficking) bill, 1999
Committee - Dail

Insurance bill, 1999
2nd stage - Dail

International development association (amendment) bill, 1999
1st stage - Dail

Irish nationality and citizenship bill, 1999
2nd stage - Dail *(Initiated in Seanad)*

Landlord and tenant (ground rent abolition) bill, 2000
2nd stage - Dail

Licensed premises (opening hours) bill, 1999
2nd stage - Dail [p.m.b.]

Local Government (planning and development) (amendment) bill, 1999
Committee - Dail

Local Government (planning and development) (amendment) (No.2) bill, 1999
2nd stage - Seanad

Mental health bill, 1999
1st stage - Dail

Merchant shipping (investigation of marine casualties) bill 1999
Committee - Dail

Multilateral investment guarantee agency (amendment) bill, 1999
1st stage - Dail

National beef assurance scheme bill,1999
Committee- Dail (Initiated in Seanad)

National minimum wage bill, 2000
Committee - Dail

Official secrets reform bill, 2000
2nd stage - Dail **[p.m.b.]**

Partnership for peace (consultative plebiscite) bill, 1999
2nd stage - Dail **[p.m.b.]**

Patents (amendment) bill, 1999
1st stage - Dail

Planning and Development bill, 1999
2nd stage - Dail
(Initiated in Seanad)

Prevention of corruption (amendment) bill, 1999
2nd stage - Dail

Prevention of corruption (amendment) bill, 2000
1st stage - Dail

Private security services bill, 1999
2nd stage- Dail **[p.m.b.]**

Proceeds of crime (amendment) bill, 1999
1st stage - Dail

Prohibition of ticket touts bill, 1998
Committee - Dail [p.m.b.]

Protection of children (hague convention) bill, 1998
Committee - Dail

Protection of patients and doctors in training bill, 1999
2nd stage - Dail **[p.m.b.]**

Protection of workers (shops)(no.2) bill, 1997
2nd stage - Seanad

Radiological protection (amendment) bill, 1998
Committee- Dail *(Initiated in Seanad)*

Refugee (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Registration of lobbyists (no.2) bill 1999
2nd stage - Dail [p.m.b.]

Registration of lobbyists bill, 1999
1st stage - Seanad

Regulation of assisted human reproduction bill, 1999
1st stage - Seanad **[p.m.b.]**

Road traffic (Joyriding) bill, 2000
2nd stage - Dail

Road traffic reduction bill, 1998
2nd stage - Dail [p.m.b.]

Safety health and welfare at work (amendment) bill, 1998
2nd stage - Dail [p.m.b.]

Safety of united nations personnel & punishment of offenders bill, 1999
2nd stage - Dail **[p.m.b.]**

Seanad electoral (higher education) bill, 1997
1st stage - Dail [p.m.b.]

Seanad electoral (higher education) bill, 1998
1st stage - Seanad **[p.m.b.]**

Sea pollution (amendment) bill, 1998
Committee - Dail

Sex offenders bill, 2000
1st stage - Dail

Shannon river council bill, 1998
Committee - Seanad

Social welfare bill, 2000
Committee - Dail

Solicitors (amendment) bill, 1998
Committee - Dail **[p.m.b.]** *(Initiated in Seanad)*

Statute of limitations (amendment) bill, 1998
Committee - Seanad **[p.m.b.]** *(Initiated in Dail)*

Statute of limitations (amendment) bill, 1999
2nd stage - Seanad **[p.m.b.]** *(Initiated in Dail)*

Succession bill, 2000
2nd stage - Dail **[p.m.b.]**

Telecommunications (infrastructure) bill, 1999
1st stage - Seanad

Tobacco (health promotion and protection) (amendment) bill, 1999
2nd stage -Dail **[p.m.b.]**

Trade union recognition bill, 1999
1st stage - Seanad

Tribunals of inquiry (evidence)(amendment)(no.2) bill, 1998
2nd stage - Dail **[p.m.b.]**

Twentieth amendment of the Constitution bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty-first amendment of the constitution (no.2) bill, 1999
2nd stage - Dail [p.m.b.]

Twenty- first amendment of the constitution (no.3) bill, 1999
2nd stage - Dail [p.m.b.]

Twenty- first amendment of the constitution (no.4) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.5) bill, 1999
2nd stage - Dail **[p.m.b]**

Udaras na gaeltachta (amendment)(no.3) bill, 1999
Report - Dail

UNESCO national commission bill, 1999
2nd stage - Dail **[p.m.b.]**

Whistleblowers protection bill, 1999
Committee - Dail

Wildlife (amendment) bill, 1999
2nd stage - Dail

ABBREVIATIONS

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

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

THE HABITATS DIRECTIVE AND THE WILDLIFE AMENDMENT BILL 1999

The implementation of the Habitats Directive has presented a formidable challenge across Europe. Member states are facing popular resistance and substantial legislative hurdles. The manner in which this Directive has been implemented in Ireland reflects badly on the State.

Duchas the competent authority responsible for implementing the Directive has managed to upset all actors in the process. The European Commission is preparing a case for the European Court of Justice and we may lose structural funding. Environmental organisations are critical because they feel that not enough sites have been designated. Landowners are concerned about the threat to their livelihood.

The Directive intends that sites designated for protection co-habit with social and economic interests. Serious issues are raised by the manner in which the Directive is being implemented in Ireland. A process which regulates land-use must concern itself with the extent to which the use of land may be restricted while at the same time ensuring proper protection for constitutional rights - property rights, rights to earn a livelihood and rights to procedural justice. The European Communities (Natural Habitats) Regulations 1997 are complex and difficult. The Regulations may be used to impose blanket and arbitrary restrictions of a variety of activities. Judgements on these matters are presently vested in administrators who have little expertise in land-use control. The Appeals procedure is far from satisfactory and lacks transparency.

Appeals Based on Science

We should not underestimate the importance of the scientific basis for the choice of sites. The Habitats Directive is deceptively simple. Scientific definition of the habitat types which require site designation is a major time consuming task and the timetable for the Directive made no allowance for it.

The application of the Directive's criteria for site selection presents the greatest difficulty. The site survey process in Ireland should be subjected to legal scrutiny because of lack of proper scientific data.

There is much confusion on the designation of sites. A new publication The Habitats Directive and The Wildlife Amendment Bill 1999 examines the designation process and explains the issues involved.

Natural Heritage Areas (NHAs) and Special Areas of Conservation (SACs) is there a difference for the landowner?

Preparing an Appeal

The Technical Annexes.

The author Pat Ryan is a member of The Expert Aid Panel to the Independent Appeals Advisory Board.

HE ENFORCEABILITY OF AGREEMENTS TO NEGOTIATE LOCK-OUT AGREEMENTS

Blanaid Clarke Senior Lecturer in Law, University College Dublin analyses
the enforceability of agreements to negotiate and lock-out agreements in circumstances where parties have not yet finalised all the material terms of a contract but have indicated their firm intention to do so.

Introduction

In the course of negotiations for the conclusion of a contract, the parties may reach a situation where they have not yet finalised all the material terms but it is their firm intention to do so. In this context, both parties may wish to agree to be legally bound. They may decide, therefore, to insert a clause into the agreement agreeing to negotiate the remaining terms in good faith. In addition, they may seek to insert a lock-out clause in order to ensure that no other party will enter the negotiations and frustrate their agreement. The enforceability of clauses of this kind has been the subject of much debate.

Agreements to Negotiate

Enforceability

Earlier indications appeared to suggest that an agreement to negotiate could be deemed to be a binding contractual agreement. In *Hillas & Co Ltd. V Arcos Ltd.*,[1] Lord Wright in the House of Lords stated obiter:

> "If, what is meant is that the parties agree to negotiate in the hope of effecting a valid contract...There is then no bargain except to negotiate, and negotiations may be fruitless and end without a contract ensuing; yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless the jury thinks that the opportunity to negotiate was of some appreciable value to the injured party." [2]

Lord Wright noted, however, that it must always be a matter of construction of the particular contract whether any essential terms are left to be determined by a subsequent contract.

This view was rejected absolutely by the Court of Appeal in *Courtney & Fairbairn Ltd. v Tolaini Brothers (Hotels) Ltd.*[3] which held that the law cannot recognise a contract to negotiate. Lord Denning described Lord Wright's opinion in *Hillas* as ill founded. He stated:

> " If the law does not recognise a contract to enter into a contract (where there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one could tell whether the negotiations would be successful or would fall through: or if successful what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law."[4]

The view that agreements to negotiate lacked sufficient certainty to be enforceable was affirmed by the House of Lords in *Walford v Miles*[5] where Lord Ackner stated:

> "The reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty... How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith'. However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms...It is here that the uncertainty lies. In my judgment,

> while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content."[6]

The decision in *Walford v Miles* was referred to recently in *The Martel Building Limited v Her Majesty The Queen,*[7] before the Federal Court of Canada which held that it was not yet possible to conclude that a tort of failure to negotiate in good faith has emerged.[8]

Early Irish caselaw appeared to suggest that an agreement to negotiate could be considered enforceable. In *Guardians of Kells Union v Smith,*[9] nominal damages were awarded for breach of a contract to enter into a contract. In that case, the plaintiff advertised seeking tenders for the supply of meat. The advertisement stated that a formal contract would be signed on a fixed day. Although the defendant was told that his tender was successful, he decided against entering into a contract and purported to withdraw the contract. The Court stated that although no contract to supply meat existed, the defendant was liable for breaching a contract to enter into this formal contract. However, in *Cadbury Ireland Ltd. v Kerry Co-op Creameries Ltd.*,[10] Barrington J. referred to a particular clause disparagingly as unenforceable because it involved at best "a commitment to enter into honest negotiations".[11]

The situation is somewhat different, however, where an enforceable contract already exists. In *Donwin Productions V EMI Films,*[12] the Court implied a term that the parties would negotiate in good faith because an enforceable contract already existed, although certain other covenants existed which lacked precision. Pain J. said that the *Courtney* decision did not stop him implying such a term "once a firm agreement has been made and a further agreement is in contemplation".

Applicability

It is a basic principle of contract law that where the parties have failed to reach agreement on important issues, an agreement may be held to be unenforceable on grounds of uncertainty.[13] Occasionally, however, the Courts may become involved in gap-filling or in interpreting terms in order to give effect to the intention of the parties. For example, in *Sudbrook Trading Estate Ltd. v Eggleton*[14] tenants were given an option under a lease to buy the premises at a price to be agreed by two valuers, one appointed by the tenants, the other by the landlord. When the tenants attempted to exercise the options, the landlord refused to appoint a valuer and claimed that the options were void for uncertainty as no price had been agreed. The House of Lords determined that the options were legally enforceable as agreements to sell at a reasonable price which price was to be determined by the specified procedure. However, as the procedure specified was merely subsidiary and non-essential to the main purpose of the clause which was to provide for the sale of the property at a fair and reasonable price, the Court could substitute its own machinery to prevent the contract from being unenforceable.

Distinguishing between an agreement to negotiate which is likely to be unenforceable and an agreement to sell at a fair and reasonable price to be ascertained by the parties which is enforceable is not always easy. In *Black Country Housing Association Ltd. v Shand,*[15] the defendants argued that they had agreed with the Council that they would not object to the Council purchasing part of their property under a compulsory purchase order in return for the Council agreeing to convey certain disputed land to them. The trial judge found that the Council had agreed to transfer the land at a price to be agreed and stated that if no agreement was reached within a reasonable time, the parties would not be bound by it. The Court of Appeal determined that it was necessary to decide whether the agreement could properly be regarded as an unenforceable agreement to agree or to negotiate or alternatively as an enforceable agreement to sell at a fair or reasonable price to be ascertained. The test to be applied was stated by Chadwick LJ as follows:

> "What, upon the true construction of the words which they had used and having regard to the circumstances in which they made their agreement, is the true nature or object of their bargain? Was it of the essence of their contract that neither party was to be bound to pay or to accept a price which had not been fixed by future agreement? Or was the true nature of the contract that the property would be transferred at a price which represented a fair and reasonable value having regard to their respective interests; a price which they expected to be able to agree in the future but which, if determined objectively, would be acceptable to each of them?"[16]

The substantial benefit to the Council by the defendants not raising any objections to the compulsory purchase order or the price offered was emphasised by the Court. Chadwick LJ opined that it would have been a matter of astonishment to either side to have been told that the bargain was worthless because either of them might in the future refuse to agree a transfer price for the disputed land. The case was therefore classified as one of the second category of cases and the agreement was held to be binding.

Agreements to Use Reasonable Endeavours

The distinction referred to above is also relevant to a consideration of agreements to use reasonable endeavours. In *Rooney v Byrne,*[17] the plaintiff agreed to purchase a particular house from the defendant subject to getting an advance on the property. O'Byrne J. held that the purchaser was bound to make reasonable efforts to secure the necessary advance. Similarly, in *Queensland Electricity Generating Board V New Hope Collieries Pty. Ltd.*,[18] the Court stated that an agreement to use "reasonable endeavours" was enforceable. The agreement there stipulated "the base price and provisions for variations in prices...shall be agreed by the parties". The Court interpreted this as meaning that "the parties undertook implied primary obligations to make reasonable endeavours to agree on the terms of supply and failing agreement to do everything reasonably necessary to procure the appointment of an arbitrator." This was held to be acceptable.

It may appear difficult at first glance to determine why an agreement to negotiate in good faith has not met with judicial approval when an agreement to use reasonable endeavours has been readily accepted. Such agreements do not appear to have raised any difficulties in terms of policing. In *Walford v Miles,*[19] Lord Ackner attempted to explain the difference between the two agreements on the grounds that the latter, unlike the former, does not lack the necessary certainty. Such an

explanation would not appear to be altogether satisfactory. The principle in *Walford v Miles* was considered and clarified by the Court of Appeal in *Little v Courage.*[20] In that case, an option to renew a lease of a public house was expressed to be conditional upon the tenant and landlord agreeing a business plan and business agreement. One of the arguments put forward by the tenant was that the landlord was under an implied obligation to use its best endeavours to reach agreement with the tenant on the business plan and business agreement. Reliance was then placed on the observation of Lord Ackner in *Walford v Miles* that an agreement to use best endeavours does not suffer from the defect of uncertainty as an agreement to negotiate. Millett LJ, giving the judgment of the Court stated

> "An undertaking to use one's best endeavours to obtain planning permission or an export licence is sufficiently certain and is capable of being enforced: an undertaking to use one's best endeavours to agree, however, is no different from an undertaking to agree, to try to agree, or to negotiate with a view to reaching agreement; all are equally uncertain and incapable of giving rise to an enforceable obligation."[21]

An agreement to use reasonable or best endeavours will thus be treated similarly to an agreement to negotiate where the object which the best endeavours is to be used to achieve is left wholly indefinite.

Reform

A slight change of approach to the issue of an agreement to negotiate may be perceived in the decision of the Irish High Court in *Bula Ltd. & Others v Tara Mines & Others*[22]. Although Murphy J. referred to the decisions in *Courtney and Cadbury Ireland*, he also stated that "consideration must still be given to the observations of Lord Wright in *Hillas & Co Ltd. v Arcos Ltd.*".He stated that "it does offer the bones of an argument which, as I understand it, the plaintiffs seek to couple with the arbitration clause in the present case."

In *Coal Cliff Colleries Pty Ltd. v Sijehama Pty. Ltd.*,[24] the majority of the New South Wales Court of Appeal while accepting that the law will not enforce an agreement to agree, rejected the principle that every promise to negotiate in good faith is unenforceable. Kirby P. indicated his agreement with Lord Wright's speech in *Hillas v Arcos* that, provided there is consideration for the promise, in some circumstance a promise to negotiate in good faith will be enforceable depending on its precise terms. He also agreed that the proper approach to be taken in each case depends upon the construction of the particular contract.

> "In many contracts it will be plain that the promise to negotiate is intended to be a binding legal obligation to which the parties should then be held. The clearest illustration of this class will be cases where an identified third party has been given the power to settle ambiguities and uncertainties...But even in such cases, the court may regard the failure to reach agreement on a particular term as such that the agreement should be classed as illusory or unacceptably uncertain...In that event, the court will not enforce the arrangement. In a small number of cases, by reference to a readily ascertainable external standard, the court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory. Finally, in many cases, the promise to negotiate in good faith will occur in the context of an "arrangement" (to use a neutral term) which by its nature, purpose, context, other provisions or otherwise makes it clear that "the promise is too illusory or too vague and uncertain to be enforceable."[25]

"There has been much criticism in the UK of the *Walford v Miles* decision. Lord Steyn has written suggesting that if the question of the enforceability of an obligation to negotiate in good faith was to arise again, that he hoped the concept of good faith would not be rejected out of hand. While the question did arise again recently in *UK News Ltd v Mirror Group plc and another,* Thomas J. in the Court of Chancery referred to the criticisms but reluctantly stated that he was bound by the earlier decisions to hold that there could not be an enforceable obligation to use best endeavours to negotiate."

This approach would appear to be more consistent with the commercial realities of such agreements. In *Con Kallergis Pty Ltd (T/A Sunlighting Australasia Pty Ltd) v Calshonie Pty Ltd (Formerly Cw Norris Pty Ltd),*[26] an agreement between Norris and Sun Lighting obliged Norris to pay (and Sun Lighting to accept) a price for the variation of a building contract that was to be determined in a particular way - by negotiation between Norris and the builder. It was argued that Norris was obliged by its agreement with Sun Lighting to conduct the negotiations with the builder in good faith (or honestly and reasonably). The Court held that although there may be difficult questions of fact and degree about whether evidence of particular conduct reveals a lack of good faith or lack of honesty or reasonableness, the obligation to act in good faith or reasonably is an obligation that is certain. The Court noted that the contract in *Walford v Miles* was held to be uncertain because either party could break off negotiations at any time and for any reason. In the contract under consideration, however, there was provision for resolution of disputes between the negotiators in the event that one of the parties sought to withdraw from the negotiations.

There has been much criticism in the UK of the *Walford v Miles* decision. Lord Steyn has written suggesting that if the question of the enforceability of an obligation to negotiate in good faith was to arise again, that he hoped the concept of good faith would not be rejected out of hand.[27] While the question

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Quantum Meruit

Although an agreement to negotiate may prove fruitless and pre-contractual negotiations may fail, a party who has produced work during the negotiations may be awarded a quantum meruit. Such an award involves paying a person, literally "as much as he has earned". In *British Steel Corporation v Cleaveland Bridge & Engineering Co. Ltd.*,[29] the defendant entered into negotiations with the plaintiff for the supply by the plaintiff of steel nodes. It was proposed that this contract would be in a standard form used by the defendant. The defendant requested the plaintiff to commence work on the steel nodes immediately 'pending the preparation and issuing to you of the official form of sub-contract'. As a result of the parties failure to agree certain terms, the intended formal contract was not executed. The plaintiff which had produced and delivered to the defendant all but one of the steel nodes, sued for the value of the nodes supplied by way of quantum meruit. In considering the plaintiff's claim, Goff J stated:

> 'Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we now say, in restitution. Consistently with that solution, the party making the request may find himself liable to pay for work which he would not have had to pay for as such if the anticipated contract had come into existence, e.g. preparatory work which will, if the contract is made, be allowed for in the price of the finished work."

"It is important to be aware that even where no benefit accrues to one of the parties to the negotiation as a result of the work performed by the other party, quantum meruit may still be awarded."

The *British Steel Corporation* case was distinguished, however, in *Regalian Properties plc v London Dockland Development Corp.*[30] In the latter case, the English High Court held that while quantum meruit is possible where one party to an expected contract expressly requests the other to perform services or supply goods that would have been performable or suppliable under the expected contract, the situation is different where parties entered into negotiations with the intention of concluding a contract but on express terms that each party was free to withdraw from the negotiations at any time. In such a case Rattee J. determined, it is clear that, pending the conclusion of a binding contract, any costs incurred by one of the parties in preparation for the intended contract are incurred at his own risk in the sense that he will have no recompense for these costs if no contract results. It was noted that the costs for which Regalian sought reimbursement were incurred by it not by way of accelerated performance of the anticipated contract at the request of LDDC but for the purpose of putting itself in a position to obtain and then perform the contract.

It is important to be aware that even where no benefit accrues to one of the parties to the negotiation as a result of the work performed by the other party, quantum meruit may still be awarded. In *Folens & Co. v Minister for Education*,[31] the Department of Education which had entered into negotiations with the plaintiff with a view to the publishing company producing a children's encyclopaedia for the Department, were found liable to the plaintiff for expenses incurred in preparatory work carried out with the Department's approval.

"A lock-out agreement involves an undertaking given to a potential purchaser to the effect that the vendor will not negotiate to sell to a third party for a period of time. Such an agreement is useful in the early stages of negotiating a takeover because it gives the potential purchaser exclusive negotiating rights for a period. This allows the purchaser sufficient time to carry out due diligence and to negotiate without the pressures of a competitive bid situation. Lock-out agreements are legally enforceable, subject to certain requirements."

Lock-out Agremeents

Agreements to negotiate are often accompanied by lock-out agreements. A lock-out agreement involves an undertaking given to a potential purchaser to the effect that the vendor will not negotiate to sell to a third party for a period of time. Such an agreement is useful in the early stages of negotiating a takeover because it gives the potential purchaser exclusive negotiating rights for a period. This allows the purchaser sufficient time to carry out due diligence and to negotiate without the pressures of a

competitive bid situation. Lock-out agreements are legally enforceable, subject to certain requirements.

In *Walford v Miles,*[32] the respondents entered into discussions with the appellants with a view to selling them their beneficial interest in a company. The appellants orally agreed to provide a "letter of comfort" in return for the respondents agreeing to break off negotiations with any third party, and to deal exclusively with them. No time limit was provided for this exclusive opportunity to negotiate. Although the letter of comfort was provided and a draft share-purchase agreement drawn up, the respondents subsequently decided not to proceed with the negotiations and sold their interest to someone else. The appellants sued for breach of contract. The respondents argued that the agreement implied an undertaking to negotiate in good faith which was unenforceable. The trial judge found that the oral agreement was a separate and collateral agreement which the respondents had repudiated. The Court of Appeal deemed the collateral agreement merely an agreement to negotiate and thus unenforceable. This view was confirmed by the House of Lords. On the subject of lock-out agreements, Lord Ackner noted that a lock-out agreement for a limited period was enforceable as it constitutes a negative agreement whereby the promisor agrees not to negotiate for a fixed period with a third party. He emphasised that such an agreement does involve an agreement to lock into negotiations with the promisee. On this basis, Lord Ackner rejected the argument that without a positive obligation on the promisor to negotiate with the promisee, the lock-out agreement would be futile. However, Lord Ackner stated that as the lock-out agreement under consideration was for was an unspecified duration, it necessarily implied a duty to negotiate in good faith. He referred to Bingham L.J. in the Court of Appeal who had suggested that in such a case the obligation would end once the parties acting in good faith were unable to come to mutually agreeable terms. As this would impose a positive duty on the respondents to negotiate in good faith, a duty which, as noted above, he believed was unenforceable, Lord Ackner held that the agreement was unworkable.[33] The enforceability of a lock-out agreement for a finite period was confirmed in *Pitt v PHH Management Ltd..*[34]

It is submitted that the Irish Courts may take a different view to the House of Lords in respect of lock-out agreements for an indefinite period. An Irish court is unlikely to infer an obligation to negotiate in good faith in respect of such an agreement. Implying such a term would destroy the agreement as agreements to negotiate in good faith are unenforceable. In *Karim Aga Khan v Firestone,*[35] Morris J. stated that "it cannot ...be logical to ask the court to imply into a contract a term so as to give it business efficacy when it would have the contrary effect".

This article is based on a chapter of *Takeovers and Mergers Law in Ireland* (Round Hall Sweet & Maxwell, 1999).●

1 [1932] All ER 494.
2 ibid. at 505.
3 [1975] 1 WLR 297.
4 ibid at 301.
55 [1992] 2 WLR 174.
6 ibid at 181-182.
7 1997 Fed. Ct. Trial LEXIS 251.
8 cf. *Canada Steamship Lines v. Canadian Pacific Ltd.* (1979), 7 B.L.R. 1 (Ont. S.C.) and *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.
9 (1917) 52 ILTR 65.
10 [1982] ILRM 77.
11 ibid. at 85.
12 Unreported, *The Times,* 9th March 1984. See also *Dalgety Foods Holland BV v Deb-ITS Ltd.* [1994] FSR 125.
13 *Central Meats v Carney (1944)* 10 Ir. Jur. Rep.34.
14 [1982] 3 All ER 1.
15 Unreported, Court Of Appeal (Civil Division) 22nd May 1998.
16 ibid at 23.
17 [1933] IR 609.
18 [1989] 1 Lloyd's Reports 205.
19 [1992] 2 WLR 174.
20 (1994) 70 P & CR 469.
21 ibid.
22 [1987] IR 95.
23 ibid at 102.
24 (1991) 24 NSWLR 1 .
25 ibid at 26.
26 1997 Vic Lexis 175; Bc9700880.
27 113 LQR 433. See also by Lord Neill QC 108 LQR 406.
28 19 March 1998 Lexis.
29 [1984] 1 All ER 504.
30 [1995] 1 WLR 212.
31 [1984] ILRM 265.
32 [1992] 2 WLR 174.
33 For an excellent analysis of this case see Neill (1992) 109 LQR 405.
34 [1993] 4 All ER 961.
35 [1992] ILRM 31.

TRIBUNALS THE PARAMETERS OF THE JUDICIAL FUNCTION

John Quirke BL *assesses the constitutional implications of the appointment of members of the judiciary to chair non-judicial inquiries, such as Tribunals of Inquiry under the Tribunals of Inquiry Acts.*

Introduction

In recent years there has been a dramatic increase in the numbers of Tribunals of Inquiry. The media-driven publicity of the issues inquired into by these Tribunals has brought the workings of Tribunals of Inquiry into the centre of public attention. The complex nature of these workings (and misrepresentations by the press) have, arguably, caused the function of the Tribunal to be misunderstood by the public in general which in turn is having an effect on the Tribunal itself. Thus, the Tribunal may be gradually turning into something which it was never designed to be.

It is also arguable that any misunderstanding by the public of the role of tribunals is added to by members of the Judiciary being appointed to act as chairmen of Tribunals. This article will examine the role of Judges as chairmen and consider whether the premise that they are the most suitable persons for the job is a viable one.

The Tribunal Of Inquiry and other extra-Judicial Commissions

The Tribunal of Inquiry is a creature of the legislature, inherited from English legislation at the foundation of our state. Its main purpose is to allay public fears by inquiring into matters of urgent public importance.[1] As a consequence it has a legal, social and political effect on our society. The correction and improvement of social policy by enactment is a fundamental consequence of these inquiries.

It is true that familiarity of Judges with legal matters, their legal training and their fact finding role as Judges would appear to make them the most suitable people for the job of chairman but are these the only relevant considerations? Do such appointments in fact create more problems for Tribunals of Inquiry than they solve? The most obvious misconception of Tribunals of Inquiry (not helped by bad reporting) is that these are 'Judicial Inquiries'. While tribunals may be 'judicial' in the sense that they must be conducted in accordance with the principles of natural justice, they are not 'judicial' in the sense of determining the rights and obligations of parties. This subtle but vital distinction is perhaps not fully appreciated by the public and certain sections of the media. Ironically, a major reason given for the appointment of Judges to chair Tribunals is to make them appear more like Courts of law and to give them the import of Judicial authority.

This appearance of a court with which Tribunals are cloaked, distorts the general public's perception and magnifies media interest. The result of this is that the public can become disgruntled with the operation of a Tribunal as they may believe that its purpose is the same as that of a Court of law, with a clear and distinct outcome, a winner and a loser, a right and a wrong. For a society so used to an adversarial system of law it causes confusion to put Judges of that system in charge of an entirely different one, namely, the inquisitorial system. The public sees a Judge and expects all the clarity and finality that a Court case brings; they are misled into believing that this is the purpose of the Tribunals. This misconception may cause Tribunals to become distorted to appease the public or to be dismantled altogether, outcomes which would not be satisfactory.[2]

It is arguable that the entire perception of a Tribunal would be changed if some person other than a Judge was chairman. It is manifest that no imperative exists constitutional or other, which requires a sitting Judge to act as chairman of a Tribunal of Inquiry. Indeed, any element of necessity would be further undermined by the existence of ample and amply qualified alternatives in relation to the chairmanship of inquiries.[3]

The effect on the Judiciary of Judges taking on extra-Judicial activity.

Geoghegan J. stated in *Haughey -v- Moriarty and others.*[4]

> " On the question of appointing a Judge as sole member of the Tribunal, I cannot see that this in any way involves an infringement of the constitutional separation of powers. The Tribunal is not in any sense a Court and there is

nothing in the 1921 act which prevents a person other than a Judge or indeed a person other than a lawyer from being a sole member or chairman of a Tribunal. It may well be a matter of legitimate public debate as to the extent to which it is appropriate that Judges should be chairmen of boards, commissions, Tribunals etc. but that debate would merely arise out of a legitimate concern as to a potential conflict of interest in the future. It could not be suggested that there is anything illegal or unconstitutional about Judges being appointed to any of these positions provided of course that they do not receive any remuneration. Traditionally, it has been thought that a Judge because of his professional training and independence is ideally suited to these positions and particularly of course if the body has to find facts. But in Mr Justice Moriarty becoming sole member of this Tribunal there is in no sense some invasion by the Courts into the realm of the legislature or the executive. I cannot see, therefore, that the argument put forward is sustainable.'

Geoghegan J.'s views no doubt are well founded but did he approach the problem from the wrong direction? Is it the executive and legislature that are invading the preserve of the Judiciary?

The practice of vesting functions which are other than Judicial in nature in Judges has attracted some significant attention and concern in other comparable jurisdictions."

The practice of vesting functions which are other than Judicial in nature in Judges has attracted some significant attention and concern in other comparable jurisdictions.It has been argued in this and other jurisdictions that a Judge sitting on extra Judicial Inquiries is improper and in some instances unconstitutional. The basis of the argument is three-fold

1. A sitting Judge as chairman of a Tribunal of Inquiry is open to the criticism of partiality and bias.

2. A sitting Judge in such a position assumes an unacceptably politicised role and function.

3. The Judicial system as a functioning organ of state may be undermined and debilitated by the alternative use of the Judiciary in such extra Judicial functions.

The US Position

The issue has been debated extensively in the United States. Canon 5 of the Code of Conduct relied upon by the US judiciary[5] states as follows:

> "Valuable services have been rendered in the past to the States and the Nation by Judges appointed by the executive to undertake important extra curial assignments. The appropriateness of conferring these assignments on Judges must be reassessed, however, in the light of the demands on Judicial resources created by today's crowded dockets and the need to protect our Courts from involvement in extra Judicial matters that may prove controversial. The Judge should not be expected or permitted to expect governmental appointments that could interfere with the effectiveness and independence of the Judiciary"

In an article entitled *'Extra Judicial Work for Judges: The Views of Mr Justice Stone*[6] published in 1953, Mason states that in the United States Chief Justice Stone fought strenuously to preserve the Judiciary's integrity and independence. He felt obliged to avoid 'off Court' assignments at all costs which threatened even the slightest involvement in politics. In 1942, shortly after Justice Robert's had been detailed to probe the Pearl Harbour catastrophe, Chief Justice Stone was asked by Franklin D. Roosevelt to head an investigatory commission into the rubber industry.

The President envisioned that the recommendation of such an eminent Judicial figure might restore peace among his feuding aides, placate congress, and the citizens in general.

Stone declined the invitation and in his reply, the learned Judge stated:

> "Apart from the generally recognised consideration that it is highly undesirable for a Judge to engage actively in public or private undertakings other than the performance of it's Judicial office, there are special considerations which must be regarded as controlling here."

He went on to say;

> "A Judge, and especially a Chief Justice, cannot engage in political debate or make public defence of his acts. When his action is Judicial he must always rely on the support of the defined record upon which his action is based and of the opinion in which he and his associates unite as stating the ground of the decision. But when he participates in the action of the executive or legislative departments he is without those supports. He exposes himself to attack and indeed invites it, which, because of his peculiar situation inevitably impairs his value as a Judge and the appropriate influence of his office."[7]

Lewis J. Liman addresses this issue in his article *"The Constitutional Infirmities of the United States Sentencing Commission*[8]:

> "The Judiciary in our tripartite system is limited to deciding cases and controversies, and exercising those non judicative administrative powers that are essential to the running of the Courts."

He argues[9] that the case and controversies requirement and the principle of Judicial independence forbids Judges from making determinations outside the case and controversy context on matters external to the administration of justice or from entering into a formal working relationship with members of other branches of government.

Chief Justice Warren made the following observations when he reflected on his initial refusal to participate in the commission set up to inquire into President Kennedy's death.[11]

> "First, it is not in the spirit of constitutional separation of powers to have a member of the Supreme Court sit on a presidential commission; second, it would distract a justice from the work of the Court, which had a heavy docket; and third, it was impossible to foresee what litigation such a commission might spawn , with resulting disqualification of the justice from sitting in such cases."

U.S. Judges have consistently recognised the boundaries to extra Judicial functions, declining positions which might have compromised their independence. Moreover, the Judiciary persistently have refused to accept remuneration for performing extra Judicial government functions.

The US courts have also examined the issue. In *Mistretta -v-US,*[10] for instance, the U.S. Supreme Court had to consider the constitutionality of the Sentencing Reform Act 1984, and the propriety of article three Judges sitting on a sentencing commission which from time to time would issue binding guidelines in respect of sentencing policy. Although the Supreme Court upheld the constitutionality of the act it did so on a narrow basis. The overriding principle expounded by the Court is as follows:

> "The Ultimate inquiry remains whether a particular extra Judicial assignment undermines the integrity of the Judicial branch."

In relation to the matter of Judges sitting on the Sentencing commission, the Court held that any possibility of bias could be facilitated by the recusal of the Judge in question. However, the Court expressed itself to be troubled and concerned about the politicisation of the office. The Court stated as follows:

> "We are somewhat more troubled by the petitioner's argument that the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial branch. While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from Judiciary involvement in the making of policy.The legitimacy of the Judicial branch ultimately depends on its reputation for impartiality and non partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colours of Judicial action."

The Irish Consitiutional Position

Perhaps the concerns of *Mistretta* apply equally to the situation in this jurisdiction. The recommendations required by chairmen of Tribunals of Inquiry are not matters 'uniquely within the ken of Judges'. Moreover, it is arguable that the chairman is positively required to invest in 'the legislative business of determining what conduct should be criminalised (as does the chairman of the law reform commission) or the executive business of enforcing law' as a consequence of his recommendations on policy.

There is a danger that Chairmen of Tribunals may be seen to engage in policy making by virtue of the fact that they are enjoined to make recommendations in respect of legislative policy in areas not necessarily within their expertise and experience.

Sentiments similar to those of the US judiciary were expressed by Chief Justice O'Kennedy who was one of the principle architects of the free state constitution when he was requested by the then Taoiseach, Eamon deValera to assume the office and functions of the Governor General. O'Kennedy C.J. replied with a strongly worded memorandum on the 1st November 1932.[11]

> "The complication of the Judiciary with both legislature and executive which would result from the proposal in question does not arise out of any constitutional or other necessity and is, therefore, earnestly to be deprecated."

The argument in relation to politicisation and partiality on the part of the Judiciary was recognised in a more contemporary context by the Constitution Review Group. In their report (1996) in relation to the independence of the Judiciary the review group stated as follows:

> "Many Judges hold honorary appointments, often charitable. Judges have often been appointed as chairpersons of Tribunals of Inquiry. Indeed the government tends increasingly to appoint Judges as chairpersons of groups or bodies required to report on policy issues. This may be undesirable as Judges risk becoming, Judicially identified with the policies of the group or body concerned, or may be put in any position of either critic or supporter of the government. It is important for public confidence in the Judiciary and public perception of their independence and impartiality that Judges do not directly or indirectly make public statements on matters of policy. The Review Group recognises, however, that there may be certain areas, for example relating to the administration of justice, where it is proper for Judges to participate in a group or body whose report may have a policy dimension.
>
> The Review Group considers that the prohibition on Judges taking up paid appointments should remain, but in addition, it considers that they should be prohibited from taking any position which is inconsistent with the office of Judge under the constitution."

"There is a danger that Chairmen of Tribunals may be seen to engage in policy making by virtue of the fact that they are enjoined to make recommendations in respect of legislative policy in areas not necessarily within their expertise and experience."

The recommendation assumes added significance when one considers that the US constitution is not as strong as Bunreacht na hEireann in relation to preserving the independence of the Judiciary. There is no provision in the US constitution corresponding to Article 35.3 which provides for the prohibition on a Judge holding 'any other office or position of emolument'. In fact it may be the case that the inclusion of this

article precludes present Irish Judges from taking up any positions which are outside their Judicial remit or are not directly involved in the administration of Justice.

Article 35.3 states:

> "No Judge shall be eligible to be a member of either house of the Oireachtas or to hold any other office or position of emolument."

As Chairman of a Tribunal of Inquiry, a Judge is not acting in his Judicial capacity, he is holding an altogether different position. To say that this position is extra judicial is somewhat misleading. It is not a position which is over and above his position as a Superior Court Judge and for which he receives no remuneration. It is not 'Extra'. The interference in his Judicial activity is absolute and he may be in that position for a period in excess of four years. Were a Judge to perform his judicial functions and then hold another position unrelated to the administration of justice (and for which he would be paid additional remuneration from whatever source) he would almost certainly be considered to be in breach of article 35.4 even if this 'extra' remuneration came from the Judicial coffers. The Judge's function as a Judge is entirely superseded by his function as chairman and he receives a salary. He comes perilously close to appearing to hold another position of emolument. The source of his remuneration is less relevant.

The only difference with the appointment of a judge to a Tribunal is that he does not perform his judicial functions any more, therefore he does not require an additional salary. His only function is as chairman until the conclusion of the Inquiry. He is receiving his salary for holding a position which is extra judicial and this is arguably unconstitutional.

Shortage of Judges.

When the extra judicial activity of a Judge causes a detrimental effect on the operation of the Judiciary itself and that extra judicial activity is within the sphere of either of the other two branches of government, there may be a breach of the separation of powers.

This might occur if a significant percentage of the Judiciary were excluded as a consequence of this extra curial activity. When one considers the very small number of Superior Court Judges in our Jurisdiction it is very detrimental to the Judicial system when: (a) a number of Judges at a time are required to sit as chairmen of protracted Tribunals of Inquiry and (b) having conducted the Inquiry and made recommendations in respect of legislative policy, the judges must recuse themselves from future cases where there may be a perception of bias.

The proliferation of Tribunals of inquiry in recent years also adds to the significance of this argument. Indeed, this argument was adverted to by Chief Justice O'Kennedy at a time when Tribunals of Inquiry were set up with less regularity.

> "Our Courts are, as you know, not overmanned, and all of us have a very large amount of work to do which can only be done adequately by giving to it not merely the hours when we sit in Court but much time and consideration outside the public sittings."

Conclusion

The appropriateness of appointing sitting Judges as chairman of Tribunals of Inquiry must be reassessed in the light of the very significant demands on judicial resources created by contemporary Court systems.

It would appear that even if it is legally within the parameters of a Judge's remit to chair such extra judicial Tribunals they are not the ideal people for the job. The advantages they offer in legal expertise are outweighed by the disadvantages such as the interference and disruption caused to the judiciary itself as courts strain under heavy workloads through shortage of Judges. Their only real advantage over a suitably qualified Senior Counsel is the perception of 'Judicial weight'. This, ironically (a) creates a distorted public perception as it distorts what the true nature of a Tribunal is; a fact finding exercise, not a court case with winners and losers, and (b) leads to an undermining of the independence of the Judiciary.

Lowering the profile of Tribunals by appointing non Judicial Chairpersons would in this writers opinion relieve pressures on the already overworked court system and would remove any concern that there was a breach of the separation of powers.

Finally it would facilitate a better public understanding of the purpose and operation of Tribunals.●

1. The Supreme Court in *Goodman International -v- Hamilton (No.1)* {1992} IR 542 indicated that there was an inherent power in the Oireachtas in pursuit of its legislative functions to set up a Tribunal for the purpose of inquiring into a matter which may lead to legislative enactment.
2. Some terms of reference require the chairman to make recommendations on their findings. This is arguably outside the scope of a chairman's remit.
3. For example, the appointment of Roderick Murphy S.C. (now Mr. Justice Murphy) as Chairman of the inquiry into sex abuse in swimming albeit that this was not a Tribunal of inquiry under the relevant legislation.
4. Unreported, High Court, Geoghegan J. 20th January 1998 at p11.
5. This extract was obtained from an administrative office of the United States Courts.
6. Mason, A.T., *Extra Judicial work for Judges: The views of Mr. Justice Stone.* Vol. 67 Harv. LR 193.
7. The Sentencing Commission which was the subject matter of the *Mistretta* case has come under criticism for similar reasons.
8. Lewis J. Linman., *The Constitutional Infirmities of the United States Sentencing Commission.* Yale Law Journal: Vol. 96; 1363 (1987)
9. At pg. 1378.
10. *Mistretta* -v- U.S.109 S. CT 647 (1989).
11. See Appendix B of McMahon (1982) 17 IR Jur 142.

HE LEASE/LICENCE DISTINCTION

Ruth Cannon BL *analyses the difficulties arising out of the present law on the lease/licence distinction and offers some proposals for reform.*

Introduction

When an individual is in occupation of another person's land with the owner's permission, he can either be categorised as a tenant or a licensee.

Important practical consequences spring from such categorisation. If the occupier is a tenant, he has a proprietary interest in land which will bind third parties to whom the owner transfers the land. In addition a tenant may qualify for important statutory rights under the Landlord and Tenant (Ground Rents) Act, 1978 and the Landlord and Tenant (Amendment) Act, 1980. These include: the right to a new tenancy; the right to a reversionary lease; the right to buy out the owner's fee simple estate in the property. The tenant's rights under the Housing (Private Rented Dwellings) Act, 1992 and regulations made thereunder are also of considerable importance[1].

If the occupier is a licensee, his rights diminish considerably. If he has given consideration in return for the right to occupy, he may be able to get an injunction to prevent the owner throwing him off the land in breach of contract[2]. However because of the doctrine of privity of contract, such a remedy will not lie against third parties to whom the owner sells the land, because they are not bound by the licensee's purely personal rights[3]. In addition, a licensee is excluded from the statutory rights scheme detailed above. He has no statutory right to a new licence, no right to a reversionary licence, and no right to buy out the owner's freehold estate in the land.

This article examines two situations where the law is undecided as to whether an occupier is a licensee or a tenant. The first situation is where there is a written agreement[4] between the owner and the occupier granting the occupier exclusive possession of the owner's land, but describing him as a licensee. Is the occupier a tenant or a licensee?

The second situation is where someone who has originally come into occupation as a tenant for a fixed term (otherwise known as a lessee) overholds after his lease has expired. Does he overhold as a tenant or as a licensee?

The answers to these questions are vitally important because they will determine whether the occupier in question has statutory rights (most importantly, the right to a new tenancy) or not. However they are not easy questions to answer in the light of present conflicting caselaw on the tenant/licensee distinction. United Kingdom and Irish legislation both give a tenant who has been on the land for a certain period of time the right to a new tenancy. The courts of both jurisdictions have had to grapple with the above questions.

In relation to the two situations outlined above, this article compares Irish and United Kingdom caselaw on the tenancy/licence distinction, points out the contradictions and inconsistencies therein, and puts forward proposals for clarification of the law in this jurisdiction.

Situation I: where there is a written agreement which grants an occupier exclusive possession but describes itself as a licence agreement

It follows from the nature of leases and licences that where an agreement for the occupation of land is entered into, the owner of the land will want the occupier to be categorised as a licensee. The occupier on the other hand would no doubt prefer to be categorised as a tenant with all the attendant advantages that this categorisation brings. Which form of occupancy is ultimately decided upon will depend on which of the parties to the agreement has the greatest bargaining power and legal knowledge. In the case of residential tenancies, this party will more often than not be the owner, who will usually be in charge of drawing up the occupation agreement. The occupier, on the other hand, may be unaware of the advantages of a tenancy. Alternatively, in a rising property market such as exists at present, he may lack the bargaining power to obtain such an interest.

Owners of land used their superior bargaining power to ensure that all agreements with occupiers of their land were expressly described as "licences" rather than leases. This was done even where the agreement had all the characteristics of a typical lease, such as a clause giving the occupier the right to exclusive possession[5]. This drafting practice was essentially an attempt by landowners to circumvent legislation which gave statutory rights to tenants. Not unsurprisingly, the courts in both Ireland and the United Kingdom reacted strongly to such behaviour.

In *Irish Shell and B.P. Ltd. v. John Costello*[6], Griffin J. stated that

"Whether a transaction is a licence or a tenancy does not depend on the label which is put on it. It depends on the nature of the transaction itself."

In *Street v. Mountford*[7], Lord Templeman declared that

> "The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

According to Lord Templeman, if an agreement gave someone the right to exclusive possession of land in return for periodic payments, then it created a tenancy irrespective of the intention of the parties.

However subsequent caselaw in Ireland has failed to carry through the (somewhat confused) spirit of Irish Shell whereas United Kingdom courts have taken a different approach.

The Irish Approach

Irish Shell and B.P. Ltd. v. John Costello[8] remains the sole Supreme Court case on the lease/licence distinction. An agreement was

entered into which allowed Mr. Costello to occupy a petrol station owned by Irish Shell in return for periodic payments. The agreement was expressly described as a licence. A few years later a new agreement, again described as a licence, was entered into. Mr Costello argued that this second agreement was in fact a lease and gave him the right to a new tenancy under the 1980 Act.

Griffin J. in the Supreme Court held the second agreement to be a lease despite the fact that it was expressly described as a licence agreement. Griffin J. stated that

> "whether the transaction is a licence or a tenancy does not depend on the label which is put on it. It depends on the nature of the transaction itself."

This quote would appear to mirror the approach of Lord Templeman in *Street v Mountford* insofar as it ignores the intention of the parties and looks for abstract criteria such as exclusive possession and rent in deciding whether a lease or a licence exists.

However, in subsequent dicta Griffin J. also placed importance on the intention of the parties, quoting from Lord Denning in *Shell-Mex v. Manchester Garages*[9] as follows:

> "One must look at the transaction as a whole and at any indications that one finds in the terms of the contract between the two parties to find out whether in fact it is intended to create a relationship of landlord and tenant or that of licensor and licensee"

This is the point at which *Irish Shell* diverges from *Street v. Mountford.* In *Irish Shell,* abstract factors such as exclusive possession and rent did not automatically give rise to a landlord-tenant relationship. While disregarding nametags given to the agreement, the judge had to look at the substantive provisions of the agreement and decide whether they showed an intention to enter into the personal relationship of licensor and licensee or the proprietary relationship of landlord and tenant.

In *Irish Shell* Griffin J. ultimately found the agreement to be a lease. There was exclusive possession and rent and in addition, once the nametag of "licence" was disregarded, the agreement indicated an intention to confer more than just a personal privilege. There were clauses in the agreement more appropriate to a lease than a licence.

Irish Shell is a confusing and inconsistent judgment. On the one hand it ignores the intentions of the parties as expressed by the nametag assigned by them to the agreement, on the other it takes into account their intentions as expressed in the substantive provisions of the agreement. Surely, if the intention of the parties is to be taken into account, it should be the agreement as a whole, and not just certain judicially selected parts of it, which should be considered in determining intention.

If *Irish Shell* was designed to stop landowners avoiding statutory controls on tenancies, it is an obstacle which is very easily overcome by clever drafting, as shown by leases which have come before the courts in subsequent cases..

In the High Court case of *National Maternity Hospital v. McGouran*[10], Morris J. was required to apply Irish Shell to an agreement whereby a hospital allowed an individual to occupy part of the building for the purposes of use as a coffee shop. The agreement was stated to be a licence and it was expressly laid down that there was no exclusive possession; the hospital administrators were entitled to come into the coffee shop whenever they wished. However in practice Mrs. McGouran was the sole keyholder to the coffee shop.

Morris J. took the clause negating exclusive possession at face value. According to this clause, there was no exclusive possesion, therefore under the first principle laid down in *Irish Shell* the agreement could not have been a lease. He did not need to go on to consider the second issue in *Irish Shell.*

Similarly, in *Kenny Homes v. Leonard*[11], which again involved an agreement to occupy a petrol station, the High Court held this agreement to be a licence. Here the agreement had been carefully drafted to avoid any of the pitfalls which had led to the agreement in *Irish Shell* being treated as a lease. In particular there was a clause negating exclusive possession. As in *McGouran* the occupier was the sole keyholder; the owner did not have a key and had in fact never gone on to the site for many years. However the High Court did not care to go into the question of whether the clause negating exclusive possession was ever intended to be enforced in practice.The agreement was held to be a licence.

In conclusion, Irish judges leave the question of whether an agreement creates a lease or a licence to the intention of the parties as ascertained from the written document. Any attempt by the Supreme Court in *Irish Shell* to lay down a set of abstract criteria for leases has not been carried through in practice. In addition, the Irish courts will treat a clause in an agreement that there is no exclusive possession as definitively negating a lease. They will not look behind the clause to see if it is intended to be enforced in practice.

The United Kingdom Approach

The approach of the United Kingdom courts to the lease/licence distinction contrasts sharply with that taken in this jurisdiction.

The United Kingdom courts, taking their cue from the decision in *Street v. Mountford*, hold that exclusive possession coupled with the payment of rent automatically gives rise to a lease. They employ abstract criteria to resolve the lease/licence distinction, ignoring the intention of the parties as expressed in their written agreement. As one writer has stated:

> "Although many areas of leasehold law appear to be giving greater recognition to the contractual nature of leases, in the lease/licence arena many of the cases appear to be moving in the opposite direction, stressing that it is the fact of exclusive possession that is pivotal to the classification of the relationship, not the contractually expressed intention of the parties"[12].

In addition, United Kingdom courts are prepared to look behind clauses in an agreement which say there is no exclusive possession and strike these clauses down as shams if they are not intended to be enforced in practice. The House of Lords case of *Antoniades v.Villiers*[13] can be contrasted with the Irish judgments in *McGouran* and *Kenny Homes.* In *Antoniades* the owner of a flat entered into an agreement with a young couple to let them occupy it in return for periodic payments. There was a clause in the agreement which allowed the landlord to put a third party into the flat with the couple. On the face of it, this clause negated exclusive possession and stopped the agreement being a lease. However the House of Lords said that given the tiny size of the flat, the clause was a sham and was never intended to be enforced. It should therefore be disregarded. The couple had exclusive possession in practice and therefore were lessees[14].

The most recent House of Lords case on the lease-licence distinction, *Bruton v London and Quadrant Housing Trust*[15], reinforces the abstract criteria approach to identification of a lease. Lord Jauncey stated as follows:

> "A lease or tenancy is a contractually binding agreement... by which one person gives the other the right to exclusive

> occupation of land for a fixed or renewable period or periods of time, usually in return for a periodic payment in money....The fact that the parties use language more appropriate to a different kind of agreement, such as a licence, is irrelevant if upon its true construction it has the identifying characteristics of a lease.."[16]

Criticism

There are two approaches to identifying a lease. The first employs abstract criteria. Other proprietary rights, such as easements, are defined by abstract criteria, so why not leases? This approach may be defined as the proprietary approach and is the one which has been adopted by United Kingdom courts.

The alternative approach says that leasehold ownership, although a proprietary right, can only arise if there is a contract between an owner and an occupier which, according to ordinary principles of contract interpretation, creates a lease. Because it places emphasis on the intention of the parties, as determined objectively from the contract, this is known as the contractual approach.

Which approach is correct? The judgment in *Irish Shell* wavered dangerously between the contractual and proprietary approach but failed to come down definitively on either side. Subsequent Irish courts have gone for the contractual approach, staying within the letter but arguably outside the spirit of *Irish Shell.* In Ireland landowners cannot avoid the Landlord and Tenant (Amendment) Act, 1980 by inserting a single word "licence" into their occupancy agreements, but they can do so by inserting five extra words "there is no exclusive possession".

"In Ireland landowners cannot avoid the Landlord and Tenant (Amendment) Act, 1980 by inserting a single word 'licence' into their occupancy agreements, but they can do so by inserting five extra words 'there is no exclusive possession'."

However there may be some justification for the backtracking engaged in by the Irish courts. The fact of the matter is that if a lease can only arise if there is a contract between an owner and an occupier to create it, one must apply ordinary principles of contract interpretation in deciding whether a particular agreement constitutes a contract to create a lease or not. Ordinary principles of contract interpretation state very clearly that the courts are not allowed to imply terms into a contract document which are not there. Neither are they allowed to ignore nametags which are expressly included. Only if one views the legal validity of a lease as stemming from some source other than the contract of the parties can one afford to ignore what they have said in a written agreement.

Other proprietary rights such as easements may be defined abstractly. However a lease originated as a personal right in contract and only acquired proprietary characteristics later. It is submitted that, in this jurisdiction at least, the essence of a lease is still a contract between two parties to hold as landlord and tenant. It follows that in deciding whether such a contract exists we must apply the standard principles of contract interpretation.

In Ireland, the Landlord and Tenant (Ireland) Act, 1860 (commonly known as Deasy's Act) remains the core of our landlord and tenant law. Section 3 of Deasy's Act states as follows:

> "The relation of landlord and tenant shall be deemed to be founded on the express or implied intention of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent."

Fitzgerald J. in *Gordon v. Phelan*[17] stated that

> "Section 3 of the Landlord and Tenant (Ir) Act 1860 shows an intention that something there called the relationship of landlord and tenant should continue to exist, but that from that time it was to continue, not as founded on tenure, but as founded on the contract of the parties."

According to Professor Wylie[18]

> "Founding the relation on the express or implied contract of the parties suggests that it is the intention of the parties, as exhibited by their contract or conduct, which is of paramount importance"

This was recognised by Henchy J. in *Irish Shell v. John Costello (No 2)*[19] where he says " In all cases it is a question of what the parties intended."

Section 3 of Deasy's Act is reinforced by the Landlord and Tenant (Amendment) Act, 1980, Section 5 (1) (a)(iii) which confers statutory rights on a contractual tenant only.

In the United Kingdom, on the other hand, Deasy's Act does not apply, and this may be an explanation for the difference between the two jurisdictions.

The correct approach in Ireland would be to apply ordinary principles of contract interpretation to a document when determining whether it is a lease or a licence. The objective test of contract interpretation laid down in *Smith v. Hughes*[20] applies: how would the reasonable man categorise this agreement? It is submitted that in defining the nature of the agreement the reasonable man would give considerable weight to the nametag assigned to the document by the parties and would only depart from it if there were clearly conflicting clauses in the substantive provisions of the agreement. On this approach, *Irish Shell* would probably be decided the other way.

On the above analysis, the High Court retreat from *Irish Shell* is correct, given the contractual basis of Irish landlord and tenant law. Short of explicitly overruling it, which they have no authority to do, our High Court judges have achieved all that they can in this area.

Policy would require that landlords be prevented from circumventing the statutory protection given to tenants. However policy is a matter for the legislature rather than the judiciary. What is needed in this jurisdiction is an Act amending and updating the Landlord and Tenant (Amendment) Act, 1980, possibly extending its protection to licensees to some extent. It is worth noting that the United Kingdom has enacted legislation to protect non-leasehold occupiers in the Protection from Eviction Act 1977 (as amended by the Protection from Eviction Act 1988)[21].

Alternatively the legislature could repeal Deasy's Act and the reference to the contractual tenancy in the 1980 Act, thus allowing the Irish courts to legitimately follow the United Kingdom position.

The Landlord and Tenant (Amendment) Act, 1980, although an enormously important piece of legislation, had some serious defects. As shown above, one of these was the failure to put safeguards in place to prevent avoidance by landowners. Another omission was its failure to clearly define the question of whether an occupier who was overholding without paying rent qualified as a tenant for the purposes of the legislation.

Situation 2: Where an occupier overholds after the expiry of a fixed term lease without paying rent - can he or she claim a new tenancy under Part II of the Landlord and Tenant (Amendment) Act, 1980?

In order to claim a tenancy you have to be in occupation as a "tenant" at the time you make your application. If someone overholds after the expiry of a fixed term lease, without paying rent, is he a tenant or a mere licensee?

The answer at first appears to be easy. Someone who overholds after the expiry of a fixed term lease without paying any rent, is either a tenant at sufferance or a tenant at will. If his overholding is with the consent of the landlord, he is a tenant at will. If his overholding is without the consent of the landlord, he is a tenant at sufferance. In both cases legal terminology describes him as a tenant. So he should have rights under the 1980 Act.

On closer examination the matter becomes more complicated. For example, a tenant at sufferance is treated as being an adverse possessor under the Statute of Limitations 1957. He clearly does not enjoy the standard landlord and tenant relationship. A tenant at will is not in adverse possession, but nonetheless can be thrown off the land at any time with reasonable notice.

Neither a tenant at will or a tenant at sufferance seem to fall within the landlord-tenant relationship after Deasy's Act unless they are paying rent to the landlord. Section 3 of Deasy's Act makes the payment of rent a necessary factor for the landlord-tenant relationship to arise. In addition, if there is no rent, how can they be contractual tenants under the 1980 Act? Even assuming that an agreement to hold as landlord and tenant can be implied, this agreement will fail at common law for want of consideration.

The dubious position of tenants at will was recognised by Mc Carthy J. in *Irish Shell and B.P. Ltd. v.John Costello (No.2)*[22], where he equated a tenant at will with a mere licensee. Arguably Henchy J. in that case took a similar view.

However the point has yet to be clearly resolved, and in the meantime it is uncertain whether a tenant at will can make an application for a new tenancy or a reversionary lease under the 1980 Act. The reference to "contract of tenancy" in Section 5(1)(a)(iii) of the 1980 Act would seem to rule this out but there is always the risk that this phrase is not clear enough to exclude the tenant at will. Finlay J. in *Baumann v. Elgin Contractors Ltd*[23]. describes a tenancy at will as a "contractual tenancy". Although it is respectfully submitted that this view is mistaken, it may influence future judges.

It is worth noting that under United Kingdom legislation, the tenant at will is excluded from claiming a right to a new tenancy[24].

As the law stands, tenancies at will and at sufferance are dealt with in land law books under the rubric of landlord and tenant law, when in fact they should be contained in the chapters on licences and adverse possession respectively. The expressions "tenancy at will" and "tenancy at sufferance" are no longer appropriate following the re-definition of tenancy in Deasy's Act and should be abolished by statute. In particular, it is important that the Landlord and Tenant (Amendment) Act, 1980 be re-defined to make it clear that a tenant at will or at sufferance cannot make an application under this Act.

Conclusion

Although a valuable piece of legislation, the Landlord and Tenant (Amendment) Act, 1980 contains a number of loopholes, some more serious than others. After twenty years, the time has now come to enact amending legislation to remove these loopholes. It is inappropriate to pass on to the judiciary the burden of filling them in.

In addition it is important that the distinction between a lease and a licence is clearly defined, and perhaps amending legislation could also deal with this point. As the law stands at the moment, our judiciary are bound by Deasy's Act and must treat the intention of the parties as paramount in deciding whether an agreement creates a lease. Such intention must be determined according to standard principles of contract interpretation: what would the reasonable man think was the intention of the parties?

It is submitted that tenancies at will, at sufferance and agreements which are expressly described as licences cannot be said to create a landlord tenant relationship on the law as it now stands. The judicial rejection of nametags in Irish Shell may have to be reconsidered in the light of Section 3 of Deasy's Act.

Landlord and Tenant Law is the most important area of Land Law. It is vital that the principles governing this area of the law be clear, logical and consistent. It is submitted that this is not the case at present and that a legislative reconsideration of this area of the law is long overdue. Until this is achieved, the very worthwhile purposes of the Landlord and Tenant (Amendment) Act, 1980 will to a large extent remain unfulfilled.●

1. For a summary of the 1992 Act and Regulations see (1999) 4 CPLJ. 33, (1997) 2 CPLJ 51 and (1998) 3 CPLJ 4
2. *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd.* [1948] AC 173
3. *Ashburn Anstalt v Arnold* [1989] Ch 1
4. A written agreement to create a landlord-tenant relationship is normally described as a lease
5. Exclusive possession may be defined as the right of the occupier to exclude all persons other than himself from the land, including the owner. There can never be a landlord-tenant relationship without exclusive possession. Exclusive possession is not necessary for a licence, but in Ireland you may have licensees who have exclusive possession. This is extremely unlikely in the United Kingdom because of *Street v Mountford.*
6. [1981] ILRM 66
7. [1985] AC 809
8. [1981] ILRM 66
9. [1971] 1 All ER 841
10. [1994] 1 ILRM 521
11. Unreported, High Court, Costello P., 11 December 1997; affirmed by the Supreme Court; Unreported, Supreme Court, 18 June 1998
12. Bright and Gilbert, "Landlord and Tenant Law: the nature of tenancies" (1st edn., OUP, 1995) at p96
13. [1988] 2 All ER 309
14. Contrast *Antoniades* with the CA decision in *Parkins v Westminster City Council* [1998] 1 EGLR 22 and the QBD decision in *Mehta v Royal Bank of Scotland* [1999] L & TR 340
15. [1999] 3 All ER 481 (HL) discussed at [1999] Conv 492, 517; also [1997] 4 All ER (CA) discussed at (1998) 114 LQR 345
16. [1999] 3 All ER 481 at 485-6
17. (1881) 15 ILTR 70 at 72
18. "Landlord and Tenant Law" (2nd edn., Butterworths, 1999) at Para 2.12
19. [1984] IR 511 AT 517
20. (1871) LR 6 QB 597
21. For recent cases on this legislation, see [1999] Conv 53
22. [1984] IR 511
23. [1973] IR 169
24. Harpum, "*Megarry and Wade's Law of Real Property*" (6th edn., Sweet & Maxwell, 2000) at p1363 fn.34

HE REGULATION OF E-COMMERCE

Adèle Murphy B.L. *analyses the issues raised by attempts to regulate electronic commerce, from a national, european and international perspective.*

Introduction

The Internet has considerably changed the way that business is being conducted and the potentially unlimited access to a worldwide market[1] is being explored by a number of Irish companies. This article explores the legal issues associated with electronic commerce and the main facets of current and proposed European legislation, namely the validity and admissibility of electronic data, the liability of certification-service-providers and the extent to which Internet service providers are to be liable under European law.

The Irish Legislation

In August 1999 a consultation paper was produced by the Department of Public Enterprise to allow for discussion on a number of areas with regard to electronic commerce, including the validity of electronic writing, electronic signatures and electronic contracts. Based mainly upon obligations stemming from Europe it is expected that the Bill will be published shortly with the Department giving Easter as a date for enactment. Given the amount of pre publication consultation this deadline may not be as unattainable as it initially sounds. As it is expected that the principles enshrined in the consultation paper are to remain the same, they are discussed in detail below.

"The Internet has considerably changed the way that business is being conducted and the potentially unlimited access to a worldwide market is being explored by a number of Irish companies. This article explores the issues associated with electronic commerce and the main facets of current and proposed European legislation, namely the validity and admissibility of electronic data, the liability of certification-service-providers and the extent to which Internet service providers are to be liable under European law."

"In Writing"

Traditionally laws have required documents to be in writing for a number of reasons such as ensuring tangible evidence of the existence and nature of the intent of the parties to bind themselves, to ensure a document would be legible by all, that a permanent record existed of the transaction and to allow for the authentication of data by means of a signature. The "in writing" requirement also provided courts and public authorities with a record to facilitate control and subsequent audit for accounting, tax or regulatory purposes [2]

Signatures

Legal documents frequently require signatures to be enforceable. They are generally used to identify a person, provide certainty as to their involvement in the transaction and to associate that person with the content of a document. In certain instances procedures such as stamping or perforation have also been referred to as "signatures" while at the other end of the scale there may be a requirement for witnesses to confirm the signature.

Modern Communication

The advent of electronic communication has resulted in considerable change in the way that business is conducted. A contract can be successfully concluded without two parties or their agents ever meeting and consequently the "in writing" and signature requirements have been somewhat turned on their head. While electronic transactions have been in existence since the 1970's they were formerly based on Electronic Data Interchange (EDI) where private networks were used to connect large corporations with their main clients. In those cases identity and security were not at issue as the networks used were private and the creditworthiness of clients was well established.

When the Internet was initially developed it was mainly used by companies to advertise their services or products and contracts were generally conducted "off-line". Recently more and more companies are moving towards the net to sell their products and conduct contracts online. Unlike EDI, there is generally no pre-existing relationship between the parties on the Internet.

How does a company know that a person in Venezuela is who they say they are and more importantly that their creditworthiness is as trustworthy as they say it is? What if a contract is made online and one of the parties subsequently wants to change a term or deny the existence of the contract- how does the party wishing to enforce it prove that the document he produces in Court was made when he says it was? Furthermore will the Court accept such a document?

The regulation of the Internet and the information society has greatly occupied the international community, particularly the United States[3] and the European Union[4] since its potential for business has been uncovered. If commercial transactions are to be successfully conducted over the Internet and other computer networks a number of new areas have to be addressed. Security, identity and non-repudiability are major issues that do not have the same significance in traditional transactions.

Electronic Signatures

Electronic signatures (also known as digital signatures) provide some solution to the above difficulties. They act as an

> "unambiguous confirmation of the identity of the seller and the authenticity and integrity of electronic documents. Unique to the sender and unique to the message sent, digital signatures are verifiable and non-repudiable. Similarly the exchange of Internet certificates through an automatic "digital handshake between companies provides assurance that parties are who they say they are."[5]

A distinction is generally made between an electronic signature and an advanced electronic signature. The former can simply be a copy of a handwritten signature attached to the relevant document, as long as it uniquely identifies the signatory[6] while the latter is generally based on encryption. Encryption is a mathematical procedure that allows text or data to be secured by making it unintelligible to anyone but the proposed recipient who will be able to decrypt the document by using a "key".[7] A commonly used type of cryptography is Public Key Encryption based upon a "public key" and a "private key". A "public key" is widely known and is used by one party to encrypt messages which can then only be decrypted by the "private key" of the intended recipient.[8] Messages can also be encrypted using the "private key", allowing any number of parties to decrypt the message with the widely available "public key", thereby removing any doubt as to the sender. The slightest change in a signed document will cause the verification process to fail ensuring that a "digitally signed" document acts as a permanent record.

Encryption

If a message is strongly encrypted then it is practically impossible to decrypt data. While this is advantageous for businesses and individuals in terms of security and privacy, law enforcement agencies have been strongly opposed to the usage of sophisticated encryption techniques.[9] It is illegal in the United States to export products that use encryption technology with a key length of more than 40 bits.[10] The Wassenaar Agreement, to which Ireland is a signatory prevents the export of cryptography as a "dual-use" good - one that has both military and civilian application. Business people and civil libertarians alike have been highly critical of any attempts made by governments to limit encryption or control its usage. The latter because of the implications for privacy and the former because it would negatively impinge on business.

A Trusted Third Party

For public key encryption it is necessary to ensure that the parties are who they say they are. A trusted third party (TTP) is an intermediary who has no interest in a transaction and verifies the nature of the parties. Generally they will issue certificates in which case they are known as a certification authority. For the purposes of electronic commerce certificaton involves a computer-based record documenting that a public key belongs to an identified person. They may also maintain databases that can be easily accessible verifying the owners of public keys. Organisations such as banks generally act as trusted third parties and they may also issue digital certificates to customers certifying their identity and also certifying that they have had X amount on deposit over the last twelve months.

International Law

In 1996 UNCITRAL developed a model law on electronic commerce. It provided that information should not be denied legal validity or effect simply because it was in electronic format[11] and that electronic messages should be as acceptable where the law required that they be in writing. It also set out rules for the dispatch and receipt of information[12] An amendment to the model law provided for incorporation by reference[13] recognising that in an electronic environment, extrinsic documents are more frequently relied upon then in paper documents and that while public key certificates are generally short records a certification authority (see above) will want to include relevant contractual terms limiting their liability. Other international organisations such as the OECD[14] have also addressed the issue of electronic commerce and digital signatures.

The European Response

In the last few years a number of EU countries have started to regulate electronic commerce and electronic signatures[15] and it was felt that divergent rules were being established to the detriment of the internal market. In December 1999 a Directive on electronic signatures[16] was passed by the European Parliament to "facilitate the use of electronic signatures and to contribute to their legal recognition".[17]

The Directive has to be implemented into national law before 19 July 2001. Ireland is already well under way with complying with its obligations under the Directive. Europe wide consultation was undertaken prior to the publication of the Directive and the overwhelming ethos of the Directive reflects the minimalist interventionism recommended by businesses and the "net community". The definitions in the Directive are deliberately technology neutral but unfortunately they are also confusing as they do not correspond to the generally accepted terms, i.e. a certification-service-provider is used to describe a certification authority (see above) and signature-creation data is the term used to describe private keys.[18]

Regulation Of Certification-Service-Providers (CSPS)

Certification services can be freely provided in any member state without prior authorisation from a national authority,[19] the rationale being that the market will regulate itself. Voluntary accreditation[20] schemes can be used to enhance the framework for such services and although a prior authorisation

requirement is not permissible Member States are obliged to provide for the supervision of any certification-service-providers (CSPs) established on its territory.[21] Section 16 of the Consultation document deals with the accreditation of CSPs. The National Accreditation Board is expected to administer the voluntary scheme while the National Standards Association of Ireland or the Office of the Director of Consumer Affairs is expected to undertake the supervisory role prescribed.[22]

Liability Of Certification-Service-Providers

A number of situations could arise where a CSP is potentially liable - a certificate could be issued to a person impersonating another person or an algorithm used to produce signatures could be broken. Article 6 of the Directive and 17(3) of the consultation document state that a CSP who provides a qualified certificate shall be liable for "damage caused to any entity or legal or natural person who reasonably relies on that certificate" as regards the accuracy of any information therein or as an assurance that the signatory held the relevant private key corresponding to the public key in the certificate. A CSP who generates keys has a duty to ensure that they are complementary and will be liable unless he proves that he has not acted negligently.[23] Under the directive at a minimum a CSP[24] will be liable for failure to register revocation of a qualified certificate.

CSPs can limit the uses of a qualified certificate and the value to which it can be used provided such limits are recognisable to third parties.[25] Therefore it is unlikely that a CSP who makes it clear on the face of a qualified certificate that such a certificate cannot be used in transactions over £50,000 will be liable to a third party suing for a debt of £70,000.

Annexes are attached to the Directive setting out the requirements for qualified certificates, CSPs and secure signature-creation-devices. While those requirements are not contained in the consultation document[26] they would provide a useful standard for determining whether liability should attach to a CSP.

The Directive And Electronic Signatures

The Electronic Signatures Directive mirrors the distinction as outlined above between electronic signatures and advanced signatures. Electronic signatures are defined as follows and the definition is replicated in Section B the consultation document.

An *electronic signature* means "data in electronic form which are attached or logically associated with other electronic data and which serve as a method of authentication." An *"advanced electronic signature* means an electronic signature which meets the following requirements (a) it is uniquely linked to the signatory (b) it is capable of identifying the signatory (c) it is created using means that the signatory can maintain under his sole control and (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.

Article 5 requires Member States to ensure that advanced electronic signatures which are based on a qualified certificate satisfy the legal requirements of a signature and are admissible in legal proceedings. On the other hand electronic signatures cannot be denied admissibility solely on the basis they are electronic signatures or because they are not advanced electronic signatures. However, unlike advanced electronic signatures, there is no obligation on Member States to provide that electronic signatures have the same force in law as hand written signatures. Notwithstanding the distinction in Article 5, Section 7 of the consultation document provides that electronic signatures and advanced electronic signatures have the same force of law as a manual signature.[27]

Furthermore the consultation document provides a number of exceptions to the above including the law governing wills, affidavits and the transfer of an interest in real property.

Electronic Contracts

An Amended Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market[28] is due to be passed by the European Parliament in the near future. Article 9 of the Proposal requires Member States to ensure that electronic contacts are legally valid and enforceable with certain derogations. Section 9 of the Consultation Document fulfils the requirements under Article 9 while allowing parties to agree otherwise and providing for a number of exceptions such as laws governing wills, affidavits and the transfer of an interest in real property.

Acceptance of a Contract

The Electronic Signatures Directive is quite clear that it does not seek to harmonise the national rules concerning contract law, particularly the formation and performance of contracts.[29] However a more recent proposal[30] sets out regulations for acceptance in certain instances.

Article 11 of the Amended Proposal prescribes that a person is "required to give his consent through technological means, such as clicking on an icon" then the contract is not concluded until the individual has received confirmation of his acceptance from the service provider. Service providers are also obliged to ensure that persons using the service have a chance to correct any accidental errors before the conclusion of the contract. An obligation is placed on both parties to send receipts immediately.[31]

"The Electronic Signatures Directive is quite clear that it does not seek to harmonise the national rules concerning contract law, particularly the formation and performance of contracts. However a more recent proposal sets out regulations for acceptance in certain instances."

Therefore if a person uses the Internet to purchase a CD from a company in England then the following applies. The Website advertises the CD[32] and the consumer clicks on his choice, filling in his relevant credit card details. For the purposes of the Directive this is deemed to be an acceptance but the contract is

not concluded until the service provider in England acknowledges receipt of his acceptance and the recipient is able to access that receipt.

The above rules will not necessarily apply in all electronic contracts. Firstly, parties in a non-consumer contract will be entitled to agree to alternative rules. Secondly, it is doubtful that the above will act as a default in commercial electronic transactions that do not involve click and point technology.

The courts have been reluctant to impose hard and fast rules on when a contract has been formed when non traditional modes of communication have been employed. Wilberforce L in *Brinkibon Ltd. -v- Stahag Stahl GmbH*[33]

> "no universal rule can cover all such cases; they must be resolved by reference to the intention of the parties, by sound business practices and in some cases by a judgment where risks should lie."

Arguments have been made both for and against the postal rule in electronic commerce. Proponents of the Postal Rule in electronic commerce argue that once a message has been sent via email it is no longer in control of the sender, having been sent into the wilds of cyberspace. However it is unlikely that the postal rule would stand up to scrutiny in court as non-delivery of the message will inevitably result in the message being bounced back to the sender, thus remaining within his control. In *Entores Ltd -v- Miles Far East*[34] the court held that where the parties were using a fax to communicate then the postal rule did not apply for the simple reason that the offeree was in the best position to discover a transmission fault. The English courts have gone so far as to hold a telex sent out of ordinary business hours was not received until it had been read by the recipient.[35]

Electronic Delivery

Section 10 of the Consultation Document provides that a document required or permitted to be delivered to a person or body by any law may be delivered in electronic form to that person or body and sets out rules for the receipt of such documents. A document is deemed to be sent when it leaves an information system under the control of the sender and is taken to be received when it enters an information system under the control of the recipient unless the contrary is proved.

It appears that the purpose of this section is to apply to the electronic filing of returns such as tax returns or company accounts. It is arguable, however, that it could also apply to the conclusion of electronic contracts i.e. acceptances being documents that can be delivered in law. The Bill should clarify the application of this section because as it currently stands it could be in conflict with the rules set out in the Proposed Directive (see above - Acceptance of a contract).

Other Relevant Provisions Of The Consultation Document

A notice under the consultation document can be served electronically.[36] The consultation document suggests fines of £80,000 for offences under the Act but it is anticipated that they shall be substantially increased to £500,000[37] and a five year sentence can also be imposed where someone is convicted on indictment

Section 20 allows search warrants to be issued where a member of the Garda Siochana believes that an offence or suspected offence has been committed under the Act. A number of concerns were expressed by industry with regard to mandatory key escrow[38] or key recovery and section 20 reflects that concern. A warrant may only be granted with respect to suspected offences under the Act.[39] UK legislation on the other hand requires certificate-service-providers to retain the means to open encrypted communications.

Liability Of Internet Service Providers

Section 4 of the Draft Directive provides for the liability of service providers. It provides that where a service provider is merely acting as a conduit[40] and has not initiated the transmission or altered the information in any way then while they will be obliged to obey any prohibitory injunction they will not be otherwise liable. Similarly where a service provider temporarily stores the information for the purposes of making the transmission more efficient they shall not be generally liable.[41] However the provider must act expeditiously to remove any information where they are aware that a competent authority has ordered such removal or that the information has been removed from the initial source. Where a service provider acts as a host they shall not be held liable for information they are storing on the condition they do not have "actual knowledge" that the information they are storing is illegal or if upon becoming aware that such information is illegal they act expeditiously to remove or disable access to the information.[42] No general obligation shall be placed on providers to monitor the information which they transmit or store or to seek out facts or circumstances indicating illegal activity.[43]

The recent English case of *Godfrey -v- Demon Internet Limited*[44] looked at the issue of the liability of service providers. Demon was a service provider that allowed authors to publish material to readers. A question arose as to the liability of Demon for the publication of defamatory material. The court held that the transmission of a defamatory posting constituted a publication and was therefore analogous to a book seller who sold a defamatory book. Furthermore it was held Demon Internet had known of the posting's defamatory content. Under the proposed directive it will not be open to the courts to hold a service provider liable for defamation in the same way as a publisher. However the case of Demon would still be decided in the same way due to the principle of actual knowledge set down in the directive.

Conclusion

Although the manner in which electronic commerce is conducted may change it is clear that electronic commerce in one form or another is going to be a permanent fixture. While there has been consensus that electronic commerce should not be stifled by over regulation the lack of clarity as to the status of electronic communications and signatures has resulted in regulation from the EU. It remains to be seen how such measures will be implemented into Irish law and the effect they will have on Irish business. ●

1. It is estimated that the value of online retailing in western Europe in 1999 was worth $3.5 billion and should rise to $9 billion this year. *E-commerce consumer finds a friend in Byrne,* The Irish Times, Monday March 6, 2000
2. See generally *UNCITRAL Model Law on Electronic Commerce,* http://www.uncitral.org/
3. *Intellectual Property and the National Information Infrastructure,* September 1995, http://www.uspto.gov/web/ipnii.pdf
4. The Bangemann Report
5. *Towards a European Framework for Digital Signatures and Encryption,* COM.1997, p.157, para. 36
6. *Strategies for the Implementation of a Public Key Authentication Framework* (PKAF), Standards Australia, 1996, p. 16
7. Michael Chissick and Alistair Kelman, *Electronic Commerce: Law and Practice,* (Sweet and Maxwell, 1999), p.120
8. To crack the code it is estimated that over 72 quadrillion combinations would have to be tried; *Encryption and Competition in the Information Society,* Kirk, (1999) 1 IPQ 37
9. *Electronic Commerce and a New Terrorist Threat,* Intellectual Property and Information Technology Law, (1999) 4 (5); see also Bert Jaap Koons, *The Crypto Controversery - A Key Conflict in the Information Society,* (Kluwer Law International, 1999)
10. A 40-bit key length is not commercially secure. In 1997 an American student cracked a 40-bit algorithm in less than four hours. See generally Dennis Campbell, *Law of International On-Line Business - A Global Perspective,* (Sweet and Maxwell, 1998)
11. Article 5 of UNCITRAL Model Law on Electronic Commerce; http://www.uncitral.org/
12. The dispatch of a message occurs when it *enters* the information system outside the control of the originator. Receipt of a message occurs if the addressee has designated an information system to receive the message when it enters the information system. If the message is sent to a non designated information system then receipt occurs when the addressee retrieves it.
13. Article 5 bis
14. Guidelines for Cryptology Policy (OECD: 1997c) includes a guide for States on the creation of legislation governing the use of digital signatures.
15. In 1998 Germany introduced the Digital Signature Law, France enacted legislation introducing Trusted Third Parties, Italy introduced the Italian Digital Signatures Legislation 1997 and Belgium and Sweden also introduced legislation.
16. Directive 1999/93/EC: OJ L13 19.1.2000, p.12
17. Article 1
18. *Just say 'non' `Proposals for a European Parliament and a Council Directive on a Common Framework for Electronic Signatures (98/0191)* Alistair Kelman, 1998 (3) JILT. http://www.law.warwick.ac.uk/jilt/98-3/kelman.html
19. Article 3
20. "Voluntary accreditation" means any permission, setting out rights and obligations specific to the provision of certification services, to be granted upon request by the certification-service-provider concerned, by the public or private body charged with the elaboration of, and supervision of compliance with, such rights and obligations, where the certification-service-provider is not entitled to exercise the rights stemming from the permission until it has received the decision by the body.
21. Article 3(3)
22. *Fines for e-commerce fraud proposed,* The Irish Times, 3 January, 2000
23. Article 6 and Section 17(3)
24. Article 6(2)
25. Article 6 and Section 17(5)
26. They may be transposed by Statutory Instrument
27. While the Directive confines itself to signatures the Consultation Paper extends legal validity to electronic writing in Section 8. The exceptions set out in Section 7 will also apply to Section 8.
28. COM 99/0427 final
29. Article 1 provides that it "does not cover aspects related to the conclusion and validity of contracts or other legal obligations where there are requirements as regards form prescribed by national or Community law nor does it affect rules and limits".
30. Amended Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market
31. Article 11(a)
32. It is has been generally accepted that the advertisement acts as an invitation to treat. "*Information Technology Law in Ireland*", D. Kelleher & K. Murrray, Butterworths, 1997, p.419. However the Directive provides for cases where the recipient is accepting a service providers "offer", thus indicating that a website advertisement is to be seen as an offer.
33. [1983] 2 A.C. 34
34. [1955] 2 Q.B 527
35. *Schelde Delta Shipping B.V -v- Astarte Shipping Ltd (The Pamela)* [1995] 2 Lloyd's Law Reports
36. Section 4
37. *Fines for e-commerce fraud proposal,* The Irish Times, Monday January 3, 2000
38. Mandatory key escrow requires a certification provider to lodge keys with a third party. Generally this is required for the purposes of law enforcement.
39. Section 20.1
40. Article 12
41. Article 13
42. Article 14
43. Article 15(1)
44. [1999] All ER

KING'S INNS NEWS

Reeling Away

King's Inns seems to be attracting a good share of the films that are being shot in or around Dublin this year. The comedy film, Shiney's Head, was on location for a few days in late March. This is an Irish-Canadian production and stars Dan Aykroyd, Brenda Blethyn and Robbie Coltrane. The screenplay is by an Irish writer, Tony Philpott and it is directed by David Caffrey, the Irish film maker who made Divorcing Jack and the television series Aristocrats. The film is set around bizarre events at a Dublin medical institute where the head is played by Aykroyd and the Coltrane character works as a porter.

The other major film that chose King's Inns for several days shooting is Rebel Heart . This will be broadcast on BBC ONE in the second half of 2000. It is a four-hour television epic that takes place in Ireland from 1916 to 1922 - the tumultuous years that saw both the birth and division of the Irish nation. It is a story about the coming of age of an idealistic young Irishman, Ernie Coyne, who signs up to fight in the rebellion under Michael Collins. Whilst under blistering fire in the doomed insurrection of 1916, Ernie meets Ita Feeney, a young woman whose ability with the rifle and exceptional beauty intimidates the inexperienced Ernie. In the war that follows, Ernie is force to grow up quickly and he and Ita soon find their love and loyalty divided. One of the producers, Malcolm Craddock, said "Once in a lifetime a producer has the opportunity to make a drama that has the power to stop an audience in its tracks. Rebel Heart is such a drama. It is an immensely moving, ambitious and provocative piece".

While the directors, producers and actors on both films were new to King's Inns staff, the crews are all well known to us from other films that have located on Constitution Hill/Henrietta Street. It is most heartening to see the professionalism of the Irish film industry in action .on home turf.

Dining

The next dining term will be from Tuesday 2 May to Monday 15 May 2000. Dates for benchings will be posted in the Law Library in due course.

Spouses' guest night will be on Friday 12 May. Guests are encouraged to be in the Inns at 7.30 pm with dinner beginning at 8.00 pm. Contact Claire Hanley (01) 878 0410 to make a reservation.

This year there will be no student dining during Trinity term. However, there will be dining for members and their guests on a number of evenings. More about these evenings in the next issue.

Irish Times Debate 2000

King's Inns continues to notch up prestigious wins in moots and debates. In March, two of our students, pictured below, Michael Deasy (Degree 1) and Ronan Mullen (Diploma 2) won the team prize in the Irish Times Debate. Part of their prize was a trip to the USA where they took part in a number of debates in a selection of law schools and universities. We extend our heartiest congratulations to the two students and thank them for keeping the flag flying.

Our Work with the Local Community

One year later, we were delighted to welcome back to King's Inns the mobile schoolroom from the Life Education Centre. During three weeks of March, most of the primary schools in the area availed of this interactive programme which enables children from three to 12 years of age to understand the destruction that can be caused by abusing alcohol and drugs. King's Inns staff (Bernadette Maguire and Miriam Riordan) took time out to help with the very little ones who came from the creche located on Henrietta Street.

Also during March we had a visit from the Pfizer Science Bus which is a new innovative project run by the Irish Centre for Talented Youth at DCU. The bus is a full sized coach that has been fitted internally with a laboratory enabling a number of experiments and activities to be carried out on board. The programme is aimed at primary school students between the ages of 9 to 12 years. Judging by the reaction of the children, the Science Bus appears to be a lot of fun.

It is wonderful to see these educational type buses penetrating all areas of Dublin.

SENTENCING LAW AND PRACTICE

By Thomas O'Malley (Roundhall, 2000)

Reviewed by Sean Gillane B.L.

At a time when the Oireachtas has introduced mandatory ten year sentences for certain drug offences and Ireland's prison population has reached an all time high, (with the cement still drying on new prisons in Mountjoy and Castlerea), *Sentencing Law and Practice* represents an important and timely contribution to current thinking on the ways in which punishment is exacted through our criminal justice system.

O'Malley's book can be crudely, and perhaps unfairly, divided into two constituent elements. O'Malley firstly steps behind the issue of sentencing proper in order to anatomise the theoretical justifications underpinning the punishment and sentencing of offenders and in doing so gives a masterfully succinct and accessible account of competing perspectives from the familiar, eg the just deserts theory, deterrence, rehabilitation and retributivism, to the more arcane, eg Kantism and utilitarianism. O'Malley skilfully traces the historical development of these schools of thought while placing them in contemporary and practical context. By recognising, in the words of HLA Hart, that "a judicial bench is not and should not be a professorial chair" O'Malley does not ignore the practical, if at times subconscious, expression of these philosophies by Ireland's judiciary as represented by exhortations such as: "I want to sent out a clear message that this behaviour will not be tolerated" or "Society must be protected from people like you". While members of the judiciary have been criticised for inconsistent sentencing in the formal sense (by which I mean that a particular type of offence is regarded by the critic as preferably coming within a particular narrow sentence range) little is said of different philosophical approaches to sentencing which can, although not necessarily, lead to large divergences in sentences for what appear to be comparable situations. Needless to say, while individual members of the Oireachtas can be bellicose in criticism when a judge has been perceived to go wrong in a particular case, the legislature is silent in terms of indicating how sentencing is to be approached in the large sense. Should the prospect of rehabilitation be relevant and what value is to be placed on it? Is general deterrence more important than particular/individual deterrence? Can the constitutional rights of the individual within the criminal process be subsumed under some notion of the common good? When legitimate but entirely different views are taken of the sentencing process itself and these views remain unarticulated it is perhaps inevitable that criticism on the basis of inconsistency will prevail even though the sentences imposed may be regarded as entirely 'just' within the framework of the different philosophies of the sentencing judges.

The second broad strand in O'Malley's approach is an analysis of the black letter law in relation to sentencing and a consideration of what a sentencing judge is and is not allowed to take into consideration. This approach shows how some of the philosophical difficulties are mirrored by practical ones. Irish law has long recognised the principle of proportionality which requires that the punishment to be imposed be proportionate to the gravity of the offence and the circumstances of the offender thereby combining objective and subjective elements. O'Malley, however, points out that the neatness of expression does not make the principle easy of application. Certainly when an Irish Judge imposes sentence it does not appear that a two step process is involved whereby an appropriate objective sentence is pronounced followed by a slicing off of chunks of time having regard to the subjective circumstances of the offender. It appears that in practical terms the approach is one of "instinctive synthesis" whereby all relevant circumstances are evaluated without any express quantification of the weight to be attached to any given circumstance. This makes an analysis of the operational effect of the principle of proportionality difficult to undertake and like the position in relation to a priori philosophical approaches to sentencing it is impossible to divine the practical effect on sentencing of any given judicial choice.

The question of the status of a guilty plea in the sentencing process is discussed to good effect in Chapter 6 and is of particular relevance having regard to Mr Justice Carney's recent indications in the Central Criminal Court that a timely guilty plea might be expected to be accorded a street value, as it were, of eighteen months. O'Malley also deals with the potential flip side to this well established principle of giving a discount for a guilty plea by discussing the question of whether fighting a case which is subsequently lost (or the manner in which the case is fought) can amount to an aggravating factor. Certainly it appears that there is a grave danger that in encouraging early guilty pleas there will be at least a perception that fighting a case may involve more than losing a plank of mitigation. This must of course colour a practitioners advices and could lead to a cheaper sacrifice of the constitutional right to trial. Perhaps the argument that no discount should ever be given for a guilty plea, to which reference is made in the book, could have been further fleshed out.

Chapter 7 deals with the area of young offenders and provides a comprehensive analysis and history of the peculiar difficulties sentencing judges and practitioners face when dealing with offenders variously categorised as 'young', 'juvenile' or 'child'. Indeed, with the announcement (and consequent media outrage) of a proposed early release date of England's most high profile juvenile offenders, Venables and Thompson the killers of Jamie Bolger, the utility of this particular chapter cannot be denied. O'Malley, in addressing the question of the custodial disposition of young offenders, does in fact refer to the Bolger case and draws interesting parallels with the Sacco case in this jurisdiction. O'Malley has, throughout the book, overcome the dearth of authority in relation to the factors informing everyday sentencing policy by unashamedly culling reports from The Irish Times and The Irish Independent rather than relying solely on official law reports and this further adds to the sense that the book is as much a practical guide as an academic treatise.

Overall the book represents a welcome and very well written addition to the growing, but still undernourished, corpus of jurisprudence in Irish criminal law.

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