The Bar Review

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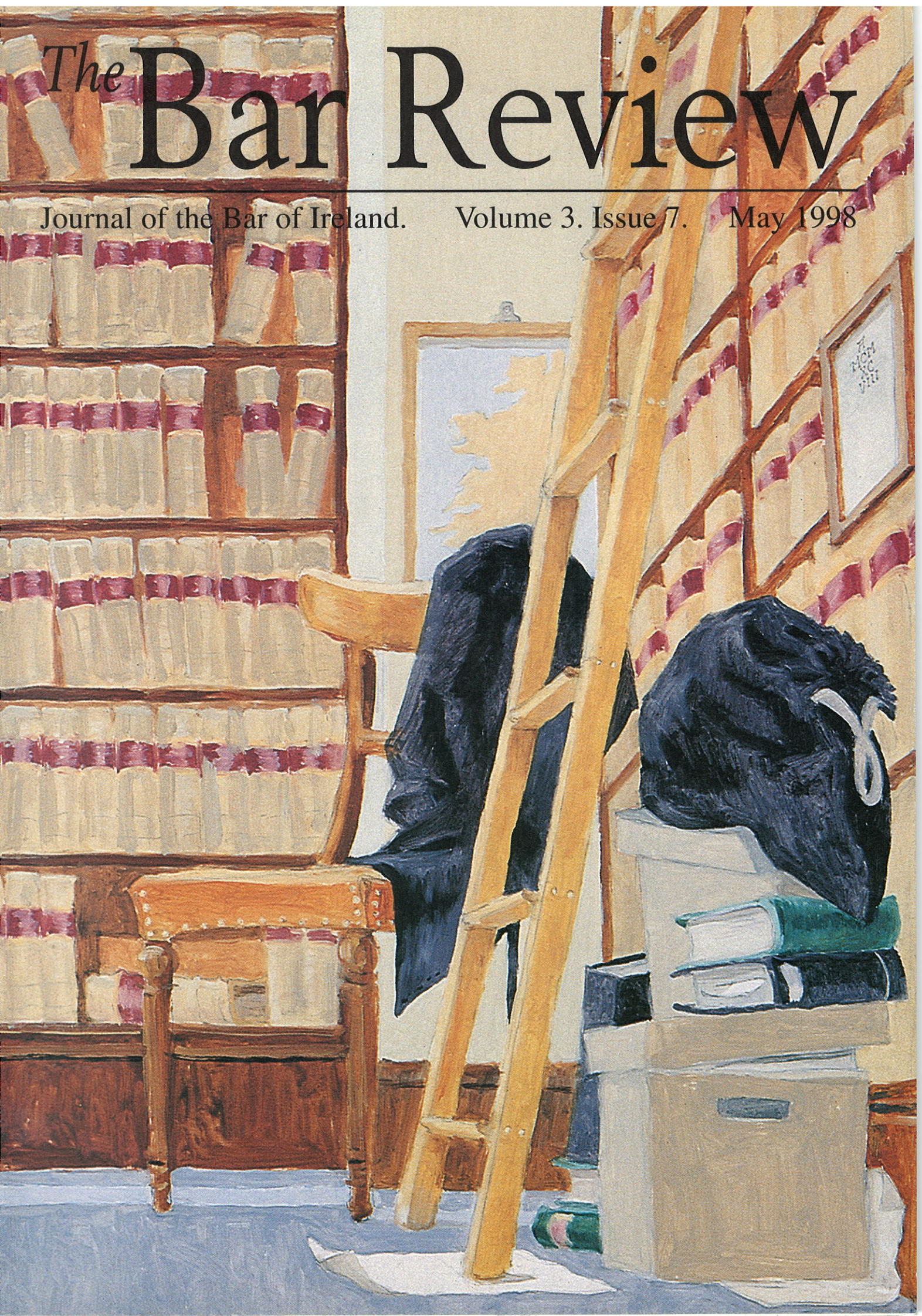

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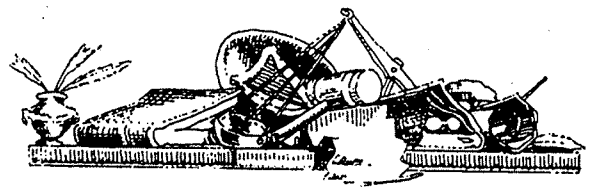

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Euro Price Points

'As a mark of its commitment to European Monetary Union, this office will require all fees marked to be denominated in Euros as and from 1 January 1999. All payments made after this date will also be made in Euros.'

Office of the Attorney General
21 December 1998

Kidding? Of course. But it could happen. As and from next January you may seek to be paid in Euros and you may be forced by some clients to invoice in Euros. Your bank statements will have a Euro column showing the Euro equivalent of all debits and credits. However these will all be 'fictional' transactions as there won't be any Euro notes or coins in circulation until January 2001.

Also rather perversely, after 1 January next year you will be unable to look up the papers for a direct Pound/Sterling rate. You will have to have a Euro rate for the Irish pound and a Euro rate for Sterling. To undertake the conversion in accordance with EU Directives you do the Euro/Punt calculation to three decimal places and then the Euro/Sterling calculation to two decimal places to get your proper conversion.

There are a few other problems. On a very basic level, there is no Euro key on the keyboard. The nearest image is that of the symbols icon. Also most versions of Microsoft Excel will only do the calculations valid to two decimal places. In order to make things slightly clearer, set out below is a Pound/Euro conversion table, which can be carefully stored in a Bar Review folder (conveniently priced at €7.12).

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— John Dowling

●

Succession Act, 1965, Amendment

Please note that S.117(6) of the Succession act, 1965 was amended by S.46 of the Family Law (Divorce) Act, 1996.

Applications must now be made WITHIN SIX MONTHS from the first taking out of representation of the deceased's estate.

●

New ISDN Network

An important element of the new Bar Council development has been the installation of the latest ISDN digital network which will provide for a more versatile communications system between the Law Library buildings.

The entire membership has been transferred to the latest ISDN digital network since January 1998. This requires a change in the first 3 digits of your existing Library telephone number.

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If you have any queries please contact the Bar Council Office.

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– Vacation –

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●

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The Independence of the Bar

Article 26 of the Constitution authorises the Supreme Court to appoint counsel to submit arguments on the constitutional validity of a Bill referred to it by the President. This explicit reference to the position of counsel, in the court system, is a recognition by the Irish people of the independent role of counsel. There is no greater duty cast on any barrister than to uphold the rights of the people under the constitution and that is a role conferred in an Article 26 reference on members of the Bar. It is a trust that is well placed.

The Courts are the arena in which citizens engage in lawful battle with the State. But this must always be a fair battle. The independence of all counsel is a sine qua non of the proper operation of the judicial branch of government and fairness in litigation. However, this would be meaningless unless there are counsel who - particularly in difficult times of strife and political unrest - are willing to take on the entire apparatus of the State to vindicate the rights of a client. In this respect the Bar of Ireland has a distinguished record. From the able defence of the United Irishmen by John Philpott-Curran, the defence of John McGee (proprietor of the Dublin Evening Post) in 1813 by Daniel O'Connell through to the defence of those charged with the most grievous of offences, that of capital murder, the Bar has not been found wanting. The role of counsel in tribunals of inquiry, in the recent past, is a further illustration of the independence of the Bar and its willingness to investigate politicians and others without fear or favour and in the public interest.

It is instructive to look at the first edition of John Kelly's *The Irish Constitution,* a total of 211 pages, and compare it to the most recent edition, which is 1,222 pages long. The explosion in the development of our Constitution, and with it the creation and enlargement of constitutional rights, has occurred, at least in part, through the willingness of counsel to engage in cases that explore the outer regions of constitutional territory. Many of these cases have been taken by counsel without the promise or the reality of payment. All of these have involved counsel defending and vindicating the rights of the citizen and giving practical effect and meaning to the Constitution. It is through pioneering constitutional legislation that the Bar makes one of its greatest contributions to our society.

But in order to maintain a dynamic Constitution an independent Bar is essential. A Bar that is in hock to the large corporations or that is exclusively available to only the wealthy in our society or to the State would soon lose its independence. In this respect, Mr Justice Hugh O'Flaherty in his article *The Independent Bar and the Defence of Human Rights* sums up the case for the Bar and its independence as follows:

> 'The advocate's essential value is his independence. The absence of a permanent commitment to either prosecution or defence, the freedom from the obligations of employment by one particular company, corporation or employer is vital to enable the advocate to develop the independence of spirit and thought.
>
> Our legal system needs the participation of such a group as a key component of the administration of justice. Every free society requires the troublesome presence of the independent advocate. In one sense he is like a part of a discordant symphony. But historically, it has been a common feature of the great advocates that they have been relentless in their testing and criticism of the institutions of the State and have refused to accept the notion of an unchallengeable State power.'

As we come to the end of the 20th century in a country governed by a proliferation of EU directives and regulations, by greater tomes of legislation and pervasive regulatory bodies, the role of an independent counsel - in defence of the rights of the citizen - is probably now more important that it has ever been.

Bail – A Privilege or a Right?

MICHEÁL P. O'HIGGINS, Barrister

"In this country it would be quite contrary to the concept of personal liberty enshrined in the constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that."

These words, spoken by Mr. Justice Walsh in the course of his judgment in the *O'Callaghan* case[1] indicate forcefully the principle that bail should be viewed as a right and not a privilege. Until the passing of the 16th Amendment to the Constitution and the subsequent Bail Act of 1997, there were only two grounds available to a court upon which to base a refusal to grant bail. Both of these grounds came within the broad category of preventing the evasion of justice: one concerned the likelihood of the accused absconding; the second concerned the likelihood of the accused interfering with witnesses or interfering with physical evidence.

The *O'Callaghan* case, which laid down these two grounds for refusing bail, expressly rejected the notion that the likelihood of an accused committing further offences while on bail could constitute a ground for refusing bail. The *O'Callaghan* case was reaffirmed subsequently on a number of occasions, most notably by the Supreme Court in *Ryan v. DPP*[2], the *People (DPP) v. Doherty*[3] and the *People (DPP) v. Brophy*[4]. Now of course the constitutional position has changed with the enactment by the people of the 16th Amendment to the constitution. In their wisdom, the people of Ireland amended Article 40.4.1 to include the following clause:-

> 'Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.'

Subsequently, the Bail Act of 1997 was passed by both Houses of the Oireachtas. While it has not yet been brought into operation by Ministerial Order the day of its introduction is presumably not too far away. Section 2(1) of the Bail Act provides as follows:-

> 'Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.'

Section 2(2) provides:-

> 'In exercising its jurisdiction under subsection (1), a court shall take into account and may, where necessary, receive evidence or submissions concerning-
>
> (a) the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction,
>
> (b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction,
>
> (c) the nature and strength of the evidence in support of the charge,
>
> (d) any conviction of the accused person for an offence committed while he or she was on bail,
>
> (e) any previous convictions of the accused person including any conviction the subject of an appeal (which has neither been determined nor withdrawn) to a Court,
>
> (f) any other offence in respect of which the accused person is charged and is awaiting trial,
>
> and, where it has taken account of one or more of the foregoing, it may also take into account the fact that the accused person is addicted to a controlled drug within the meaning of the Misuse of Drugs Act, 1997.'

The expression 'serious offence' is defined in the Act as 'an offence specified in the Schedule for which a person of full capacity and not previously convicted may be punished by a term of imprisonment for a term of five years or by a more severe penalty.' A Schedule to the Act then specifies a wide range of offences.

These include the common law offences of murder, manslaughter, assault occasioning actual bodily harm, kidnapping, false imprisonment and rape; certain other offences against the person; certain other sexual offences; certain offences relating to explosives and to fire arms; robbery; burglary; certain road traffic offences; forgery offences; any offences under the provisions of the Offences Against the State Act, 1939; certain drug offences; certain public order offences; and any offence of attempting or conspiring to commit any offence mentioned in the Schedule.

Potential Difficulties with the New Act

1. The practical significance of Section 2 will be to broaden considerably the enquiry which a judge will have to make before deciding whether an applicant should be released on bail.

This will presumably lengthen the time bail hearings take. It may or may not have an effect on the number of bail applications filed on a week to week basis. A certain amount of crystal ball gazing will have to be indulged in to determine the likelihood of an applicant committing a scheduled serious offence were he or she to be released on bail. Under subsection 3 of the section, it will not be necessary for a court to be satisfied that the commission of a specific offence by the applicant is apprehended merely that a serious offence is thought likely.

Supporters of the new measure point out, with some justification, that under the existing rules laid down in O'Callaghan, a judge is already required, soothsayer-like, to peer into the future to determine the likelihood of an applicant turning up for his trial. And so, the argument runs, what then is the great objection to extending a judge's predictive tasks to cover such matters as the likelihood of that applicant committing an offence while on bail? Opponents of Section 2 argue that the new measure amounts to nothing short of a poorly disguised form of preventative detention[5], where suspects are locked up and kept locked up on the say so of Gardaí who, quoting previous convictions and their view that an applicant is a drug addict, maintain a bald assertion that he will offend were he to be granted bail.

Opponents of the provision take particular exception to the broad wording of subsection 2 which permits a court to 'receive evidence or submissions' concerning, inter alia, any previous convictions of the applicant, and, in a rather novel departure, any other offences in respect of which the accused person is charged and is awaiting trial. It is not altogether clear to this writer how the latter factor could assist a court in arriving at a conclusion as to whether a refusal to grant bail was reasonably considered necessary to prevent commission of a separate offence by an applicant. One would have thought that unproven charges, in respect of which an applicant enjoys the presumption of innocence, ought not be matters taken into account when enquiring as to an applicant's likelihood of committing offences on bail.

2. Another issue which is likely to raise its head concerns the level of proof which the prosecutor will be obliged to meet when attempting to put before the court matters set out in the second subsection of Section 2 of the new Act. The subsection talks rather vaguely of a court receiving 'evidence or submissions' concerning the various matters. Does this mean that it will be open to the prosecutor to submit that a particular applicant is addicted to drugs rather than requiring a State barrister to adduce evidence in proof of this assertion?

Some of the difficulties touched on above were raised with very considerable foresight by Finlay J. in his decision in *Ryan v. DPP*[6] which was an attempt by the Prosecutor to persuade the Supreme Court to reconsider the O'Callaghan rules. In the course of his Judgment which emphatically reaffirmed the O'Callaghan case, Finlay J. raised a number of complex constitutional issues which would arise were a perceived intention to commit further crime a permissible ground for refusing bail:

> 'An intention to commit a crime, even of the most serious type, is not in our criminal law a crime itself unless it is furthered by overt acts of preparation or converted by an agreement with another into a conspiracy. The courts cannot create offences or crimes, although the Oireachtas may. Are they, however, to be permitted to detain a person because he is suspected of an intention, which even if proved in a full criminal trial, could not lead to his punishment? If such a power did exist in the courts, why should its exercise be confined to cases where the suspect is an applicant for bail? Why should the court's prevention of the apprehended harm cease in the event of the determination without a sentence of imprisonment of the original charge, which charge may in its character and seriousness bear no resemblance at all to the feared offence? How can such an intention be proved and by what standard of proof must it be established? Could there be any grounds on which an accused person suspected of such an intention would be afforded less comprehensive notice of the evidence to be offered against him of the grounds for such suspicion and less opportunity to prepare and be represented to contest such allegations than he is afforded in relation to the presenting of a criminal charge against him?
>
> Would every application for bail, accordingly, in which this ground was advanced as the substantial ground of opposition, take on the nature and necessary requisites of a criminal trial? These queries not only indicate practical problems but more importantly highlight the nature of the jurisdiction which it is sought to evoke without legislation.'

Notwithstanding that the case was decided in the 1980's and notwithstanding that the statutory and constitutional goalposts have been shifted substantially since then, it is worthwhile bearing in mind the concerns raised by Chief Justice Finlay and the instructive observation made by him at the foot of his Judgment:

'The criminalising of mere intention has usually been a badge of an oppressive or unjust legal system. The proper methods of preventing crime are the long-established combination of police surveillance, speedy trial and deterrent sentences.'

3. A third area of difficulty which might present itself concerns the definition within the Act of the expression 'serious offence'. As discussed above, what might be called the third ground of opposition to bail, that is the likelihood of an application committing a serious offence while on bail only comes into play where such an applicant is before the court charged with a scheduled offence for which that applicant 'may be punished by a term of imprisonment for a term of five years' or more.

A potential difficulty arises, however, where an applicant is say charged with assault occasioning actual bodily harm. Such a charge in the District Court carries a maximum of 12 months. In the Circuit Court on indictment, such a charge attracts a maximum penalty of five years imprisonment. If an applicant charged with assault is to have his case

disposed of summarily in the District Court, the question arises; can he argue in a bail application that, as he has opted to have his case tried in a forum which can hand down a maximum sentence of 12 months, the offence with which he has been charged and in respect of which he is now applying for Bail, is not a serious offence within the meaning of the definition set out in the Bail Act of 1997, and is therefore not an offence in respect of which ground number 3 for refusing bail can be potentially triggered. This potential difficulty is compounded by the fact that bail applications are commonly made prior to the stage when the DPP has directed in what court a charge is to be prosecuted.

Issues not dealt with in the Bail Act, 1997

The Act of 1997 does not deal with a number of issues which arise in the context of bail applications. For instance, as already discussed, it is not always clear what level of proof the State is required to meet when putting forward evidence in support of an opposition to bail.

Secondly, it is debatable as to what extent an applicant is entitled to have advance knowledge and notice of the grounds of opposition which the State intends relying upon in a bail application. There does not appear to be any decided case on the question as to whether the State is obliged to provide to an applicant, in advance of a bail application, a written statement taken from a State witness whom it will be alleged has been intimated by, or on behalf of, the applicant and which factor will be relied upon at the bail hearing grounding the State's opposition to bail. These issues crop up from time-to-time in the weekly bail list and do not appear to have been addressed in the Bail Act of 1997.

Two other issues which arise constantly in the context of the weekly bail list concern the admissibility of hearsay evidence and the vexed question of res judicata, that is the rule preventing an applicant re-applying to the High Court for bail in circumstances where that applicant has already had his entitlement to bail adjudicated upon.

Admissibility of Hearsay evidence in Bail Applications:

The Supreme Court in the *McKeon* case[7] has decided that in certain cases hearsay evidence may be admitted in bail applications. However, it is up to the judge in individual cases to decide what weight should attach to such hearsay evidence and, where appropriate, to weigh up and place the hearsay evidence offered in the balance against any direct evidence which may be offered.

This rule of permitting the admission of hearsay evidence has very recently come under attack in a case entitled DPP v. McGinley where the applicant is appealing to the Supreme Court following a decision of Mr. Justice O'Higgins in the High Court to refuse bail. At the time of preparation of this article, the Supreme Court had not yet given its judgment.

Res judicata

Another issue which arises frequently in the bail list and which has only been touched on in the new Act concerns the question of res judicata. The doctrine of res judicata is availed of by the State to prevent applicants reapplying for bail in circumstances where they have already been refused, or in circumstances where bail conditions have already been set. The doctrine is frequently relied upon in the bail list where the State is faced with the spectre of applicants, represented by solicitor and counsel one week, being refused bail after a full hearing and, a week later, themselves applying for bail from prison, in an attempt to revisit the whole issue. In such circumstances, the State quite rightly argue that the matter has already been adjudicated upon and should be struck out. Of course while this is very often the eventual outcome, it is usually not reached until after the tax payer has funded the applicant's journey from prison to the Four Courts with all the costs attendant on such a day out.

While the issue of repetitive and unfounded bail applications is certainly an ongoing problem for the State authorities and the Chief State Solicitors Office in particular, the issue should not be allowed dilute what must remain a protected principle of our criminal justice system, that is the right of access to the courts for all citizens particularly those held in custody against their will without a trial.

In order for an applicant to defeat a plea of res judicata, he must be in a position to show that a sufficient change of circumstances has arisen in his case to warrant a court revisiting the question of bail. There appears to be no reported case on what criteria an applicant must meet before a court will re-open a previously heard bail application. A sample of changes in circumstances which have been put up from time to time, some with greater levels of success than others, include the following:-

- The fact that an applicant will not get a trial for an appreciable length of time;
- The fact that there has been a delay in serving the Book of Evidence;
- The fact that an anticipated trial date has been lost;
- The fact that new and relevant evidence has emerged (although some judges regard this factor as more appropriately a matter relevant to an appeal to the Supreme Court);
- The fact that an applicant has been unable, despite efforts, to raise or find independent sureties to meet bail conditions previously set;
- The fact that an appreciable length of time has elapsed since the previous bail application.

In this last connection, it is worth noting the provisions of Section 3 of the Bail Act, 1997 which deals with an applicant's entitlement to renew his bail application. Section 3 provides as follows:

3. (1) Where an application by a person for bail -
   (a) Has been refused by a Court under Section 2, and
   (b) the trial of the person for the offence concerned has not commenced within four months from the date of such refusal.

   then, the person may renew his or her application for bail to that court on the ground of delay by the prosecutor in proceeding with his or her trial, and the court shall, if satisfied that the interests of justice so require, release the person on bail.

   (2) In determining whether to grant or refuse an application under

Subsection (1) a court may receive evidence or submissions concerning the delay in proceeding with the trial of the person concerned.
(3) Nothing in this section shall affect the operation of Section 24 of the Act of 1967.

It is possible to envisage other circumstances which might arise and which might be relied upon by an applicant as a possible change of circumstance. For instance, a previously relied upon ground of opposition to bail may have been removed or rendered less significant. An example would be where in a previous application bail was refused on the basis of a fear of intimidation of a State witness who lived near to the applicant, and that witness has since moved to a new address or out of the country.

Another possibility, and one which has been put forward from time to time, concerns the situation where an applicant's health deteriorates in custody, or where a close family member of the applicant falls ill and has no one to look after him or her. The approach of the courts in such instances is to look at each case on its own merits and to weigh up the various competing factors so as to achieve a just and reasonable balance.

There is no doubt but that unmeritorious renewal applications do find their way into the bail list only to be defeated at the first hurdle of *res judicata*. It is submitted that the approach which the courts have hitherto adopted to this difficult issue - dealing with each case individually on its own merits - is the correct one, permitting a judge as it does to weigh up the competing interests involved and in appropriate or finely balanced cases, affording the applicant a second hearing.

Practical Difficulties With Bail Applications:

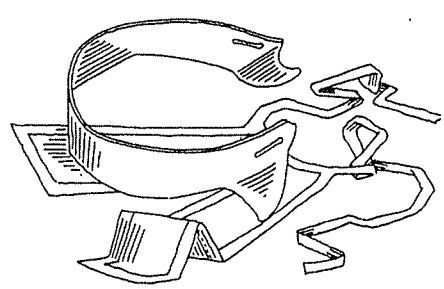
The structure of the bail list and the sheer weight and number of bail applications each week (it is not uncommon for the number of applications on a Monday to exceed seventy) make it very difficult for judges to accord to each case the level of time and attention that they would otherwise like to devote to each application. Consider the case of an applicant charged with murder. His application may be, perhaps, one of seventy or so applications coming before a High Court Judge on a Monday morning. If the prosecution case is at a relatively early stage, the stakes at this bail application are extremely high.

If the judge hearing the list takes the view in the time available to him that there is a risk that the person charged with murder may not turn up for his or her trial, or may interfere with a State witness, or (once the Bail Act has been introduced) is likely to commit a serious offence were he to be released on bail, it is quite possible that the applicant in question will be deprived of his liberty for upwards of twelve months. That is worth repeating.

An adverse bail result and the delay in getting trial dates in the Central Criminal Court can mean an applicant, who apparently enjoys the presumption of innocence, being forced to spend a year in jail without a trial. That such a high tariff could follow from an unsuccessful bail application re-enforces the requirement that the State authorities be required to go through all necessary loops, including compliance with accepted rules of evidence and natural justice, before it is open to a court to refuse bail.

Unfortunately, as judges, registrars, practitioners and applicants will be aware, the pressure of the bail case load often makes it impossible for a court to consider in sufficient detail, all matters arising in relation to each application. It stands to reason where there are over seventy bail applications to be dealt with in under four hours, some of which take longer than others, it is quite impossible from a practical point of view to insist upon the full rigours of the criminal trial being applied to each application.

The position is exacerbated where for instance a lengthy bail application on behalf of an accused charged with murder is vigorously fought out for perhaps two hours, thereby leaving all the other applications to be dealt with in under two hours. To deal with this, such practices as the rule in *McKeon's* case[8] permitting hearsay evidence in certain cases get developed, and other instances in which the rules of criminal evidence become somewhat diluted. As with many issues, the matter is essentially one of balance. The courts are faced with the task of balancing an applicant's entitlement to a full hearing in which the rules of our criminal justice system are complied with, the competing exigencies presented by the bail list and the practical realities involved with a weekly list containing sometimes seventy or so applications for liberty, all of which are scheduled to take place within a four hour period in the confines of one courtroom.



In view of the recent changes in our bail laws and the apparent shift in national thinking on the subject, away from the rights of an accused, it is perhaps more important than ever to remember that a bail application, no less than a criminal trial, constitutes a full justiciable controversy, the result of which may deprive a citizen of his liberty for a very long time.

The courts must continue to insist upon basic adherence to the rules of natural justice and the rules of evidence even in circumstances where the bail case load continues to rise. As one High Court Judge, who frequently takes the bail list, colourfully put it, we would do well to remember that the High Court "is a court of law and not a court of whatever you're having yourself...". ●

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1 [1996] IR.501; [1968] 102 ILTR.45
2 [1989] IR.399
3 Unreported Supreme Court delivered 26th February, 1993
4 Unreported Supreme Court delivered 2nd April, 1993
5 That preventative detention offends against the very fundamental concept of personal liberty enshrined in the Constitution has been highlighted in a number of cases. Consider the decision of Mr. Justice Carney in the case of *People DPP v. Michael Bambrick* [1996] IR 265
6 [1989] IR.399
7 Unreported Supreme Court delivered 12th October, 1995. Hamilton CJ presiding with O'Flaherty and Egan JJ. In the *McKeon* decision, the Supreme Court affirmed the decision of Costello P in the High Court revoking bail
8 Ibid

The Criminal Law (Sexual Offences) Act, 1993

MARY ELLEN RING, Barrister

Prostitution is often said to hold the dubious title of 'the world's oldest profession'. It then begs the question: who was first? The prostitute offering the service or the 'client' seeking the service. The view of the prostitute (usually female) as the temptress is as old as Eve but does little to clarify the public view of prostitution. It is seen perhaps by some as a morally reprehensible 'job' but there appears to be little public consensus as to what should be done with prostitution and prostitutes. The modern approach is more from a public health and order point of view than from a moral outrage approach. Oddly enough the public health approach mirrors the concerns when the first piece of legislation to control prostitution was introduced in 1864 in the form of the Contagious Diseases Act. This piece of legislation, which was finally abolished in the late 1880s, provided for the compulsory medical examination of prostitutes working in garrison towns, thereby protecting soldiers from venereal diseases. Its concern was not for the prostitutes but rather for the 'customers'. The debate today about the control of prostitution has moved on from venereal diseases to AIDS and while we do not have compulsory medical examinations, the concern still centres on the 'customer' and the general public rather than on the prostitutes.

The public ambiguity towards prostitution is reflected in the law. The act of prostitution is not illegal. This of course, is in the case of persons of full age and capacity; where sexual acts occur with children or persons under a disability these acts are prohibited. Thus sexual acts between consenting persons of full age and reason, whether for money or other goods, are not unlawful acts. Prostitution is not defined by statute but the common law definition in *R. v de Munck* [1918] 1KB 635 is still cited with approval:

> '...prostitution is proved if it be shown that a woman offers her body commonly for lewdness for payment in return.'

The criminal law prohibits acts surrounding prostitution in that it is unlawful to solicit or loiter for the purposes of prostitution (Section 7, Criminal Law (Sexual Offences) Act, 1993, hereinafter 'the 1993 Act'); to organise prostitution (Section 9 of the 1993 Act); live off the earnings of prostitution (Section 10 (1) of the 1993 Act); keep a brothel (Section 11 of the 1993 Act) and procure girls/women for the purposes of prostitution (the Criminal Law Amendment Act 1885 as amended by the Criminal Law Amendment Act, 1935).

These provisions reflect the public order (loitering) and public health concerns often expressed by politicians. However a full public debate has not taken place as to how the public wishes to deal with prostitution as we enter the 21st century. Indeed, the most recent legislation as found in the 1993 Act appears to have arisen in a political vacuum and without full consultation. It is not clear why the then Minister for Justice felt the need to include provisions concerning prostitution in an Act mainly concerned with the decriminalisation of homosexual acts. It is noted that the provisions in the Act relating to prostitution arise from recommendations in the *Law Reform Commission Report on Vagrancy and Allied Offences* but since that report was published in 1985 it can hardly be argued that there was a pressing political or public need to include these matters in the 1993 Act.

It is all the more surprising in that for almost ten years preceding the 1993 Act there had been a dramatic decrease in the number of prosecutions for prostitution related offences. This arose out of a perceived weakness in the law arising from the decision in *King v Attorney General* [1981] I.R. 233. In that decision the Supreme Court found the offence of loitering with intent to be contrary to the provisions of the Constitution in that it allowed past behaviour to be introduced in a prosecution for the offence. Following from this a prosecution for being a common prostitute found loitering contrary to the Dublin Police Act, 1842 was dismissed in the District Court and that provision was no longer relied on for the prosecution of prostitutes. The downfall in prosecutions is seen in a comparison in the figures reported in the *Annual Report of An Gárda Síochána on Crime* between the years 1978 and 1989. In the 1978 Report there were 187 convictions for prostitution offences while in 1989 there were no proceedings taken for prostitution or for living off the earnings of prostitutes.

For nearly a decade it would appear there were almost no prosecutions for offences related to prostitution. It would also appear that there was no great public outcry or concern about a resulting decay in the moral fabric of Irish society. Ireland did not become a target for organised prostitution though in later years we have seen non-nationals coming to Ireland and becoming involved in prostitution.

The public complaints that have arisen about prostitution have mainly been centred on the public order side of the problem. Women walking in certain areas of the big cities have been approached or followed in cars by men looking for prostitutes. This has led to problems and, depending on the area, a

greater or lesser response from the garda authorities. There is no doubt that there has been a greater garda presence, for instance, in the Benburb Street vicinity in Dublin, an area allegedly frequented by prostitutes, since the opening of the National Museum at Collins Barracks. The effect of such efforts is usually to move prostitutes onto another area where there are either fewer members of the public or even none at all. This moving on approach does not usually affect the numbers overall but can appease a vociferous local public who tend not to be concerned once the public order problem is dealt with to their satisfaction.

The 1993 Act saw the introduction of a 'gender neutral' approach to the prosecution of prostitution offences. No longer is it assumed that a prostitute is female, and men may be prosecuted for looking for the services of a prostitute or for offering services as a prostitute. However this 'equality' of approach is not felt to be reflected in the prosecutions actually taken by the gardaí. *The 1995 Annual Report of An Gárda Síochána* states that 42 people were convicted under the provisions of the 1993 Act in relation to prostitution offences (of which 16 are classified as including 'other offences'). There is no breakdown given of how many of the convicted persons were male and how many were female. In that regard anecdotal evidence is relied upon and this indicates that the overwhelming majority of prosecutions are taken against women. The 1993 Act provided for the arrest and prosecution of 'kerb-crawlers' but for the most part these arrests are not taking place. This raises the question as to why such prosecutions are not going ahead. Clearly it is easier to locate and detain a person standing at a street corner or strolling along the footpath then it is to follow or chase a car. However if the effect of such a policy is the unequal treatment of offenders, it raises serious question about policing. Further it has happened on more than one occasion that fourteen-year old females have been prosecuted under the 1993 Act. This is clearly a strange decision to take in that sex with girls of fourteen years of age is a criminal offence in itself as they are not in a position to consent to sexual activity. The fact that underage females are left with criminal convictions and the men who are attempting to engage in sexual activity with underage females or males are not being prosecuted, should be a matter of serious concern.

Also the prosecutions that are being taken are predominantly against men/women who are in the open, on the streets, while off-street prostitution in massage parlours or 'brothels' goes largely unchecked. The men and women on the street are the most vulnerable in many ways and their visibility makes them more exposed to arrest and prosecution.

There is a need to debate whether acts associated with prostitution need to continue to be criminalised. There exists public order legislation to deal with excessive congregation of persons in a particular area. There are also laws to deal with underage sex if the will to prosecute is there. Concerns about public health issues particularly relating to the spread of infectious diseases should be dealt with by the public health authorities. If more people are becoming involved in prostitution to feed drug habits and thereby pose a threat to the health of the greater community, a clamp-down on prostitution is not the way to deal with the drug problem. The Eastern Health Board is already involved in two projects working with male and female prostitutes and the focus clearly is on health issues. These projects serve a valuable purpose not only to the people availing of the services but also to the community at large. However the continued criminalisation of prostitution may hamper such projects in that involvement with these projects indicates involvement with prostitution and a resulting fear of criminal prosecution. Assaults on prostitutes are not always reported for fear of bringing one's own activities to the attention of the gardaí. This is not to say that such assaults are not investigated or prosecuted but rather there is a concern among people involved in prostitution that such assaults will be treated differently because of the activities of the victim.

For some the debate should include the question of legalisation of prostitution. Proponents of this argument cite the fact that even with strict controls prostitution will continue and legalisation and regulation would eliminate health, safety and public order problems. Legalisation, it is argued, would also eliminate the 'pimp' who lives off the earnings of the prostitute and would allow the State to recoup what are seen in some quarters as large amounts of money made in the course of the current illegal activities. Further, legalisation allows for the better protection of the prostitutes, or sex workers as they are called in countries which have legalised prostitution. It is interesting to note that in some countries where prostitution has been legalised problems still continue, especially in relation to underage prostitution or prostitution involving non-nationals who cannot legally work due to such factors as their illegal status in the country in the first instance. Also legalisation has not in itself increased public acceptance of 'sex workers' nor has it allowed for a full examination of the paths that bring men and women to such work.

As Irish society prepares to enter the 21st century the time has come to look at many of the laws on our statute books. In particular our criminal laws should be reviewed and perhaps in some instances codified. In the case of public nuisance offences such as prostitution, we should consider what ill is being dealt with in such prosecutions that could not be dealt with under other existing legislation. For almost a decade prior to the 1993 Act, no prosecutions were being taken for prostitution and yet Irish society was not overrun with problems resulting from this gap in the law. If there were only 42 convictions in 1995 for prostitution related offences for the whole of the Republic, decriminalisation would not release a multitude of offenders onto the streets. However decriminalisation might allow for the proper agencies to work openly with persons involved in prostitution with a view to really 'moving them on' - on to other forms of employment and other ways of leading healthy and safe lives. ●

The Employment Equality Act, 1977: Guilty of Invidious Discrimination?

CONOR DIGNAM, Barrister

Where it is satisfied that a person has been dismissed in contravention of s.3(4) of the Employment Equality Act, 1977 ('the 1977 Act') the Labour Court may award one of three forms of relief to the dismissed person[1]. The Court may (i) order the reinstatement by the employer concerned of the dismissed person, (ii) order the re-engagement by the employer concerned of the dismissed person, or (iii) by order direct the employer concerned to pay to the dismissed person such compensation as the Court considers reasonable[2].

The different terms in which the third form of relief is expressed should be noted. Section 26(1)(e) of the 1977 Act provides that either an employer or dismissed person in respect of whom an order under this subsection has been made may appeal to the High Court on a point of law. Section 26(5) of the 1977 Act, however, provides an avenue of appeal to the Circuit Court[3], in providing that 'a person to whom a direction is given in an order under sub-section (1) may, notwithstanding s.17 of the Act of 1946, appeal against the order to the judge of the Circuit Court in whose circuit the person carries on business'.

It appears, therefore, from the express terms of s.26(1) and s.26(5) of the 1977 Act, that for the purposes of the appeals procedure under the 1977 Act that a distinction is drawn between the parties before the Labour Court for the purposes of the appeals procedures open to those parties. All such parties may appeal to the High Court on a point of law but only employers (respondents before the Labour Court) may appeal to the Circuit Court, and, within that category, only employers/respondents who are directed to pay compensation may avail of that latter avenue of appeal. It is submitted that if that is indeed the correct interpretation of s.26(5) of the 1977 Act it may be argued that the Employment Equality Act, 1977 itself may be guilty of unlawful discrimination. In order to assess whether or not this interpretation is correct it is necessary to consider the meaning of the words in s.26(5) of the 1977 Act and, if correct, whether the different treatment provided for therein is a lawful differentiation having regard to the provisions of the Constitution. The fundamental objective of the courts in interpreting statutory provisions is to discover the intention of the legislature. The courts adopt two principal approaches in performing this interpretative role: the literal approach and the schematic or teleological approach.

The literal approach has been endorsed by the courts as being the primary principle of construction. O'Flaherty J in *Cork County Council v Whillock*[4] stated "...it is clear to me that the first rule of construction requires that a literal construction must be applied. If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences".

The authoritative statement of the literal approach is contained in *Inspector of Taxes v Kiernan*[5] in which Henchy J adopted the statement of Lord Esher MR in *Unwin v Hanson*[6]: "If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language".

The statements of O'Flaherty J and Lord Esher MR both contain the qualification that where the statutory provision is one directed to a particular class who may be expected to use the word or expression in either a narrowed or an extended connotation, or as a term of art the provision should be given such meaning[7].

Apart from the above qualification the courts may also decline to give the words their literal or ordinary and natural meaning where the application of the literal approach leads to an 'absurdity'. In such a case the courts may interpret the provision in such a way as to give the words a secondary or modified meaning which they are capable of bearing. In doing so the courts are effectively seeking to give a meaning to the provision which is in accordance with the scheme and purpose of the statute.

Thus, in *Nestor v Murphy*[8] Henchy J declined to adopt the literal approach where he held that the adoption of the interpretation given by the literal approach would lead to a pointless absurdity and that in such circumstances it is necessary "to adopt what has been called a schematic or teleological approach. This means that s.3(1), must be given a construction which does not overstep the limits of the operative range that must be ascribed to it, having regard to the legislative scheme as expressed in the Act of 1976 as a whole."

Despite this centrality of the concept of an 'absurdity' there is no judicial definition of the term. According to Byrne & McCutcheon[9] the schematic or teleological approach may be adopted where the literal meaning gives rise to an interpretation which is repugnant, renders the statute unworkable or meaningless or is grossly unreasonable. It is not sufficient that the literal meaning would lead to an unfair, unreasonable or inequitable result. An absurdity is said to arise where the literal interpretation leads to a conclusion which, it is thought, could not have been intended by the legislature. Lord Reid expressed the view in *Luke v The Inland Revenue Commissioners*[10] that the schematic or teleological approach is justified where "to apply the words literally is to defeat the obvious

intention of the legislation and to produce a wholly unreasonable result." It is apparent from this statement of Lord Reid and Murphy J's conclusions in *Rafferty v Crowley*[11] that the courts may not adopt the schematic or teleological approach simply where they consider that the interpretation which this approach would give would lead to a more desirable or equitable result.

It is also important to emphasise the fundamental point that the schematic or teleological approach may only be availed of where the word or phrase is capable of bearing an alternative meaning.

Several aids to interpretation, in the form of presumptions, are employed by the courts in interpreting statutory provisions. One such presumption is the presumption of constitutionality which will be discussed below. A second presumption which is relevant in this context is the presumption that all words bear a meaning. This presumption was set out by Egan J in *Cork County Council v Whillock*[12] in the following terms: "There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain."

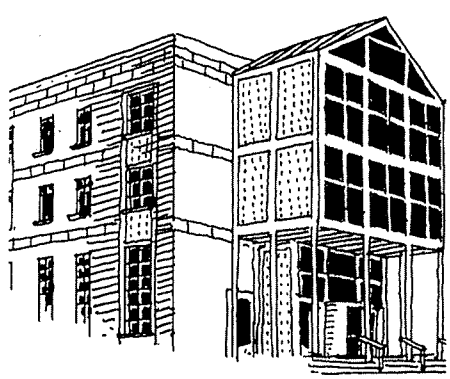
It is submitted that s.26(5) of the 1977 Act falls to be considered using the literal approach rather than the schematic or teleological approach. The interpretation given by the literal approach can not, it is submitted, easily be said to give rise to an 'absurdity', though it is conceded that an appeals procedure which discriminates between the parties to an oral hearing before the Labour Court may be undesirable and even inequitable. The test contained in Lord Reid's statement in *Luke v The Inland Revenue Commissioners* that the schematic or teleologocal approach is justified where "to apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result" is a test which emphasises the primacy of giving the words their ordinary and natural meaning. The words contained in s.26(5) of the 1977 Act do not appear to defeat the obvious intention of the legislation (though this might be because the intention of the legislation in drafting and enacting s.26(5) is less than obvious).

Furthermore it can hardly be said that the terms of s.26(5) of the 1977 Act satisfy the terms of the test formulated by Byrne & McCutcheon[13] that the schematic or teleological approach may be adopted "where the literal meaning gives rise to an interpretation which is repugnant, renders the statute unworkable or meaningless or is grossly unreasonable." It is not sufficient that the result of applying the literal interpretation is undesirable or inequitable. The courts are constrained by their role as interpreters to divining the intention of the Oireachtas rather than acting as legislators.

It is further submitted that the words used in s.26(5) of the 1977 Act are clear and unambiguous and are not capable of bearing a secondary meaning and as such are not capable of being modified by the adoption of the schematic or teleological approach.

In making this submission regard is had to the fact that (i) there was no necessity for the different phraseology employed in s.26(1)(d)(iii) and its mirror in s.26(5) of the 1977 Act and, applying the latter presumption set out above it must be presumed that the Oireachtas intended the different phraseologies to have a meaning, and (ii) that if the Oireachtas intended s.26(5) of the 1977 Act to provide for an appeal to the Circuit Court which would be available to all parties to a dispute before the Labour Court it was open to them to express themselves in the clear and unambiguous language of s.26(1)(e) of the 1977 Act.

While it would be tempting to assume that there was no real intent or reason for the different wording of s.26(1)(d)(iii) and its mirror in s.26(5) of the 1977 Act the presumption that all words bear a meaning as set out above applies to counteract this rather simple potential solution.



It seems therefore that the only interpretation of s.26(5) of the 1977 Act open to the courts is that, unlike in the case of s.26(1)(e) of the 1977 Act, the Oireachtas intended to provide for an appeals procedure which only permits employers who are directed to pay compensation to appeal to the Circuit Court or in other words to create a statutory procedure which draws a distinction between the parties to whom it is addressed.

If this is so it must be considered whether there is any rational and/or reasonable grounds for drawing this distinction between parties whose disputes are decided upon by the Labour Court or whether this distinction amounts to 'invidious discrimination' and is therefore in breach of Article 40.1 of the Constitution.

Article 40.1 provides that "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social functions."

It is submitted that s.26(5) of the 1977 Act prima facie creates an inequality in the manner in which parties to decisions of the Labour Court are held before the law. The question which arises is whether that inequality is saved by the second sentence of Article 40.1 ie. on the grounds of a difference in capacity or of social function.

It is difficult to see how the second sentence is in any way relevant to the distinction drawn in the 1977 Act. Persons before the Labour Court in a dispute under s.3 of the 1977 Act may be defined in a number of ways: as employee/dismissed person and employer, claimant and respondent respectively, or as unsuccessful party and successful party. It is accepted that a difference in social function may arise between employees and employers (though it is not accepted that it will always necessarily be a social function as countenanced by Article 40.1).

However, this is not the distinction with which s.26(e) of the 1977 Act is concerned. The section is concerned, rather, with the latter two distinctions. For the purposes of labels, status or function claimants/respondents, successful party/unsuccessful party are identical in that they are all a party to a Labour Court hearing and are all ultimately the subject of a Labour Court decision. It is in this context that Article 40.1 and

s.26(e) of the 1977 Act must be considered. There is, therefore, no difference in social function between the parties who are treated differently by the 1977 Act. They are treated differently simply because of how the Labour Court, after investigation, decides to deal with those parties.

The distinction is drawn at what appears to be an entirely arbitrary point with no reasonable or objective basis for that distinction. On the one hand we have a category of persons who may be the subject of a Labour Court decision (employees/dismissed persons/claimants) who are entirely deprived of the right of an appeal to the Circuit Court and on the other hand we have a category of persons who may or may not be deprived of such an appeal depending on the form of relief which is ordered against them.

In this latter regard there is no objective basis for distinguishing between an employer/respondent who is ordered to reinstate or to re-engage an employee/claimant (which may cause untold difficulties in the particular workplace) and one who is ordered to pay what may in fact be a modest amount of compensation.

As stated by Kelly[14] the term 'invidious discrimination' relates to "a category which, although not defined, must presumably include arbitrary or casual discriminations not flowing from any spirit of adjustment or balancing-out which the justice of the subject-matter might require."

The inequality contained in s.26(5) of the 1977 Act could perhaps be saved in circumstances where the Labour Court was in a position to order a form of relief which was significantly more onerous on the person against whom it is ordered than the other forms of relief open to the Labour Court and s.26(5) of the 1977 Act provided for an appeal against such order with a view to achieve some balance between the parties but as set out above that is not the case as the law stands.

It is submitted that the inequality contained in the 1977 Act fails the test set down by Henchy J in *Dillane v Ireland*[15] as the distinction drawn is "arbitrary, capricious or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of."

A difficulty which must be encountered in suggesting that s.26(5) of the 1977 Act is repugnant to Article 40.1 is the line of authority[16] which suggests that if all members of a class are treated equally there can be no question of discrimination. Thus, it may be argued that as all persons who are directed to pay compensation by the Labour Court are treated equally there can be no question of unlawful discrimination. However as argued in Kelly[17], the creation of the statutory class must itself be justifiable. Barrington J has expressed this principle thus *Brennan v AG*: "the classification must be for a legitimate purpose, [that] it must be relevant to that purpose, and [that] each class must be treated fairly."[18] However, the weight of the authority is at variance with Barrington J's decision.

Barrington J goes on in *Brennan v AG* to express the view that "It may be that all discrimination between citizens not relevant to a legitimate legislative purpose is invidious." It is difficult to see what legitimate legislative purpose is sought to be achieved by the different treatment provided for by s.26(5) of the 1977 Act. Kelly's assertion that "there is the impression that a distinction was made almost for the sake of making one, by a busybody legislator seems particularly opposite."[19]

There appears to be no rational or objective basis for the distinction contained in s.26(5) and equally there appears to be no legitimate legislative purpose. As such the discrimination contained in s.26(5) of the 1977 Act is, arguably, invidious. However, a person who is precluded from appealing a decision of the Labour Court to the Circuit Court by the terms of s.26(1)(e) of the 1977 Act as interpreted above faces a further difficulty if he seeks to challenge s.26(5) of the 1977 Act.

The guarantee of equality before the law contained in Article 40.1 guarantees equality before the law to all citizens "as human persons". The traditional approach of the courts to this guarantee has been to use this phrase to limit the range of the guarantee of equality to "what the courts seem to view as essential rather than contingent features of a citizen's existence."[20]

Kenny J stated in *Macauley v Ministers for Posts and Telegraphs*[21] "..the guarantee in the Constitution of equality before the law relates to the position of the citizen as a human person.."

Walsh J went further in *Quinn's Supermarket v Attorney General*[22] when he stated that "..this guarantee refers to human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow." Walsh J's words were echoed in *Murtagh Properties v Cleary*[23] where it was stated that the guarantee "relates to their essential attributes as persons, those features which make them human beings. It has, in my opinion, nothing to do with their trading activities or with the conditions on which they are employed."

On this narrow interpretation of the terms of Article 40.1 it is arguable that the guarantee of equality would not apply to persons adversely affected by s.26(5) of the 1977 Act as the inequality contained in s.26(5) of the 1977 Act affects persons as parties to a Labour Court hearing rather than as a human person per se. In other words s.26(5) of the 1977 Act relates to the contingent rather than the essential features of a citizen's existence. However this may be an overly-restrictive view of the essence of the 'human person'.

Conflict over rights and entitlements (in this case rights and entitlements arising from statute), it may be argued, is an intrinsic part of the human condition in society. This argument may be augmented by the suggestion that as the claims coming before the Labour Court are themselves disputes in relation to a constitutionally-recognised right i.e. of equality and in some cases of extreme sexual harassment, of bodily integrity, it is artificial to say that such disputes are not central to an individual as a human person.[24]

It should be noted that the 'human personality' doctrine has never been applied in cases touching on the administration of justice[25]. Henchy J in *The State Keegan v Stardust Victims Compensation Tribunal*[26] stated that he "would accept that Article 40.1 of the Constitution requires that people who appear before the Courts in essentially the same circumstances should be dealt with in essentially the same manner." In *The People (DPP) v O'Shea*[27] Henchy J, dissenting, opined that a law which had the effect that acquittals in the Central Criminal Court were appealable by the prosecution and acquittals in the Circuit Court non-appealable, would breach Article 40.1.[28] Both of these decisions are peculiarly relevant to the discussion in hand.

It is noted by Kelly[29] that there is some evidence of an inclination by the courts to move away from the restrictive 'human personality' doctrine. Inter alia the case of *Howard v Commissioners of Public Works in Ireland*[30] in which Denham J expressed the view "that the concept of equality encompassed more than what she described as the personal right of citizens to be treated equally before the law: that it included the principle that, in the execution of their power the organs of government shall act with due regard to the concept of equality", provides evidence of this tendency.

The presumption of constitutionality requires that "an Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution: and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt."[31]

The Court continued in *East Donegal Livestock* "It must be added, of course, that interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas. In seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning."

As argued above, the words employed in s.26(5) of the 1977 Act are clear and unambiguous and as a result a secondary or modified construction cannot be given to the words as to do so "would be to usurp the functions of the Oireachtas." If the analysis given above is correct it is not possible to construe s.26(5) of the 1977 Act in accordance with the provisions of the Constitution.

If it were so possible the Courts would, if the above argument in relation to inequality is correct, be obliged to construe s.26(5) of the 1977 Act as providing for an appeal to the Circuit Court for all parties before the Labour Court (or at least to draw the distinction in a manner which is not arbitrary).

The Employment Equality Act, 1977, created and continues to create a transformation in society in providing an effective means of redress against discrimination in the workplace. It would be ironic if the very Act responsible for combating unlawful discrimination was itself responsible for unlawful discrimination, albeit on different grounds. ●

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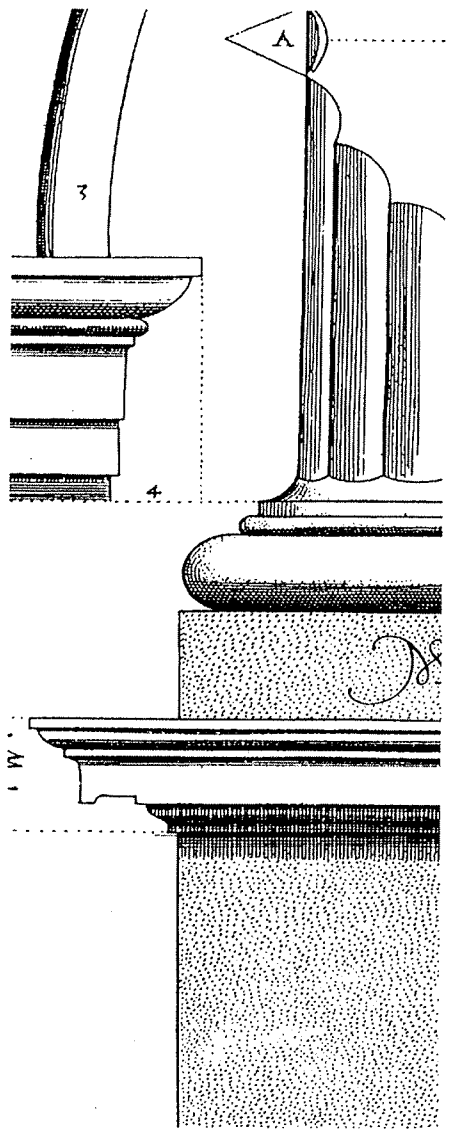
1. Section 27(1) of the 1977 Act: "A dispute as to whether or not there has been a contravention of section 3(4) in relation to the dismissal of a person may be referred to the Court by that person."

   Section 27(2): "Where a dispute is referred under this section to the Court, section 26 shall apply to the dispute as if it were a complaint under that section."

   Section 26(1)(d): "If after such investigation the Court is satisfied that the complaint is well founded, the Court may – (i) order the re-instatement by the employer concerned of the dismissed person in the position which he held immediately before his dismissal..... (ii) order the re-engagement by the employer concerned of the dismissed person either in the position which he held immediately before his dismissal or in different position which would be reasonably suitable..." (iii) by order direct the employer concerned to pay to the dismissed person such comppensation as the Court considers reasonable in the circumstances.
2. Section 26(1)(d) of the 1977 Act
3. It is not stated whether such appeal is a de novo hearing. The fact that the appeal to the High Court is expressed to be an appeal on a point of law may be relevant in identifying the appeal to the Circuit Court under s.26(5) of the 1977 as a de novo hearing.
4. 1 IR 231 at 237
5. IR 117
6. 2 QB 115
7. *Inspector of Taxes v Kiernan* [1981] IR 117
8. IR 326
9. Byrne & McCutcheon, *The Irish Legal System*, 3rd Edition, page 494
10. AC 557 as adopted by Murphy J in *Rafferty v Crowley* [1984] ILRM 350
11. ILRM 350
12. 1 IR 231
13. Byrne & McCutcheon, T*he Irish Legal System*, 3rd Edition
14. As quoted by Beytagh in *The Irish Jurist* XVIII 56
15. ILRM 167
16. *O'Brien v Manufacturing Engineering Co.* [1973] IR 567; *The State (Hartley) v Governor of Mountjoy Prison* Supreme Court, 21st December, 1967; *The State (Kenny) v O hUadhaigh* [1979] IR 1; *The People (DPP) v Quilligan* (No. 3), Supreme Court, 14th July 1992
17. Kelly, *The Irish Constitution*, 3rd Edition
18. *Brennan v Attorney General* [1983] ILRM 449
19. Kelly, *The Irish Constitution*, 3rd Edition, at page 740, in relation to *The State (Hunt) v O'Donovan* [1975] IR 39
20. Ibid, at page 719
21. IR 345
22. IR 1
23. IR 330
24. For further discussion see Kelly, *The Irish Constitution*, 3rd Edition at page 722
25. Ibid, page 723
26. IR 642
27. IR 384
28. See also Henchy J in *The People (DPP) v Quilligan* (No. 2) [1989] IR 46
29. Kelly, *The Irish Constitution*, 3rd Edition, at page 723
30. ILRM 665
31. *East Donegal Livestock Mart Ltd. v Attorney General* [1970] IR 317



Access to EC Information and the Principle of Transparency

DAVID CONLAN SMYTH, Barrister

In the citizen's guide to the Amsterdam Treaty issued by the European Commission entitled *A New Treaty for Europe* (2nd edition), M. Jacques Santer, President of the European Commission declares that 'This Treaty is for you. It lays the foundations for the Europe we want to build in the 21st century. It sets out the rules of the game Governments will have to observe and it establishes rights for all the citizens. This is why the Heads of State or Government of the EU wanted the Treaty to be transparent and easy to understand. They also wanted to produce a Treaty responding to the European people's real concerns.'

Having learnt the lessons of the disastrous campaign to have the Maastricht Treaty ratified, the Amsterdam Treaty is being publicised to a large extent on the basis that it is very citizen-friendly and that it brings the citizen to the forefront of Union and Community concerns.

If the new Treaty is ratified it shall, inter alia, introduce certain very limited amendments to the current institutional structure in an attempt to continue the reforms brought about by the Maastricht Treaty in 1992. These reforms have been welcomed in general but criticised by many as not going far enough and there is no doubt but that major changes will be required prior to enlargement of the European Union to the east.

One of the selling points in the very limited campaign leading up to the referendum in Ireland on May 22nd has been that EC Institutions shall be brought much closer to the citizens they are supposed to serve.

A right of access to documents held by EC Institutions has been accorded Treaty status for the first time. Citizens shall be entitled to correspond with EC institutions in their own language and the EC Institutions shall from now on make legislation more transparent. This article proposes to briefly examine the background to the principles of access to documents and transparency.

Right of Access and the Amsterdam Treaty

The Amsterdam Treaty inserts Article 191a into the EC Treaty to provide (at the new Article 255 of the consolidated version of the EC Treaty) that 'any citizen of the Union and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3'. Paragraphs 2 and 3 of the new Article 255 EC state that the Council shall, within two years of the entry into force of the Amsterdam Treaty, lay down the general principles and exceptions on grounds of public or private interest governing this right of access and that each of the political institutions shall provide for this right of access in their own Rules of Procedure. This clause represents a quantum leap from the situation obtaining in the 1970s and 1980s where it was practically impossible to obtain access to documents held by Community Institutions.

Principle of Access prior to the Amsterdam Treaty

Notwithstanding the newly accorded Treaty status, recognition of the principle of access to public documents was already developing at Community level anyway probably as a result of both Dutch and Scandinavian political pressure and due to the determination of the Court of Justice to improve transparency. In the 1970s and 1980s access to information regarding Council meetings was almost impossible. Council meetings were held in secret and there was until a few years ago no legal mechanism to find out the attendance, the minutes or even the way a Member State voted. Apart from the press releases issued by departing Ministers after Council meetings the only record of the meetings was the text of the legislative acts adopted by the Council which were subsequently published in the Official Journal.

With the advent of the 1990s came a new climate of openness. A Declaration of the Member States attached to the Maastricht Treaty (Declaration No. 17) emphasised the importance of transparency and called upon the Commission to submit a report to the Council by 1993 to improve public access to information. The three political institutions of the EC responded in 1993 by adopting the Inter-Institutional Declaration on Democracy, Transparency and Subsidiarity which is said to be modelled on the American equivalent. In December 1993 the Council and Commission jointly adopted a Code of Conduct governing public access to Council and Commission documents.

The principle in the Code that the public was to have the widest possible access to documents held by the Commission and Council was implemented by early 1994 by both Institutions (the Council amended its Rules of Procedure through Decision 93/731/EC and the Commission adopted Decision 94/90/EC incorporating the Code).

Exceptions to the Principle of Access

The Code of Conduct distinguishes between two categories of exception to the principle of access. It provides firstly that the institutions must refuse access to documents where such access could undermine the protection of public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations), the protection of the individual and of privacy, the protection of commercial and industrial secrecy, the protection of the Community's financial interests and the protection of confiden-

tiality as requested by natural and legal persons that supplied the information to the institution concerned. The Code provides secondly that the institutions may refuse access to protect the institution's interest in the confidentiality of its proceedings.

No Blanket Refusals

The rules in the Code were reviewed by the Court of First Instance in the well known case of *Carvel and Guardian Newspapers -v- Council*[1] (T-194/94, Judgment of the 19th of October, 1995) where the Council had refused disclosure of documents including attendances, minutes and voting records of the Ministers for Justice on the basis that this could not be disclosed as it referred to Council deliberations.

The Court of First Instance stated that it was clear from the text and the aim of the Council Decision which implemented the Code of Conduct that the Council must when exercising its discretion in this respect genuinely balance the interests of citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations.

The Court ruled that in this case the Council had not exercised its discretion having regard to these considerations but had merely issued a blanket refusal. The first case taken against the Commission for a refusal to grant access to documents was *WWF (UK) -v- Commission*[2] (T-105/95, Judgement of the Court of First Instance of the 5th of March, 1997). The case involved a request for access to documents concerning the interpretative centre at Mullaghmore, County Clare.

The Court noted that in relation to the second category of exceptions in the Code to the principle of access to documents, the Commission enjoyed a margin of discretion which enabled it to refuse access to documents relating to its own deliberations. The Court adopted the *Carvel* reasoning stating that it was necessary for the Commission when exercising its discretion to balance the interest of the citizen in obtaining access to documents with the Commission's interest in protecting the confidentiality of its deliberations.

The Court then proceeded to address the argument submitted by the Commission that the documents could be connected with the prosecution of Ireland by the Commission in infringement proceedings under Article 169 EC and therefore access could be denied on the grounds of the public interest exception in the first category in the Code. The Court noted that a blanket refusal to disclose will not be justifiable. Only those documents which relate to infringement proceedings are privileged. However a comprehensive statement of the reasons refusing access must be given to the Applicant.

This does not mean however that the Applicant should be able to ascertain the content of each document from the reasons refusing access! The Decision in the *WWF* case was not properly reasoned and was accordingly annulled as being in breach of Article 190 EC.

A Full Statement of Reasons must be given

The EC Court of First Instance has had an opportunity to examine this area twice in recent months. On the 6th of February, 1998 the Court delivered its judgment in the case of *Interporc Imund Export GmbH -v- Commission* (T-124/96) where the Applicant sought to challenge the Decision refusing disclosure of documents concerning alleged fraud in relation to the importation of beef from Argentina by the Applicant.

The Commission refused access on the basis that disclosure could inter alia undermine the public interest (court proceedings). The Court referred to its decision in *WWF (UK)* and repeated its assertion that Decision 94/90 confers a right of access on citizens to documents held by the Commission. The Court noted that the Decision permits any person to seek access to any unpublished Commission document and they are not obliged to give any reason for their request. It was then noted that the exception to the right of access relied on in this case by the Commission was in the first category in the Code.

The Court stated that the mandatory phraseology in the first category means that the Commission must consider in relation to each document whether its disclosure is in fact likely to undermine one of the interests referred to in the first category. If this is the case the Commission is then obliged to refuse access. Any decision refusing access must contain a full statement of reasons as to why access is being denied to each category of documents subject to the refusal, in such a manner as to satisfy the person concerned that the Commission did in fact consider the matter properly and comprehensively.

The Decision must also permit the Applicant to assess whether the grounds for such refusal are justified. In the Interporc case the refusal contained no explanation but merely referred to the fact that disclosure was being refused to ensure the protection of the public interest (court proceedings). As this statement of reasons was inadequate the Court ordered the annulment of the Decision in question.

The Right to a Fair Trial -v- The Right of Access

On the 19th of March, 1998 a similarly constituted Chamber of the Court delivered its judgment in the case of *Van der Wal -v- Commission* (T-83/96) where the Applicant sought the annulment of a Commission Decision refusing him access to letters sent by the Commission to three courts in France and Germany pursuant to the EC scheme which permits national courts to request the expert assistance of the Commission in EC competition cases pending before them.

National courts may ask for information regarding either procedure or substantive law. There is no obligation on the part of national courts to so request and it does not interfere with their right to refer such cases to the Court of Justice under Article 177 EC. The Applicant had no involvement in any of the three cases but rather sought the information to assist his firm which works in the area of competition law. The refusal was based on the ground that such disclosure would be detrimental to 'the protection of the public interest' (court proceedings).

The Decision refusing access furthermore explained that the information sent to the three courts formed an integral part of the courts' files and that disclosure was a matter for those courts and it was not for the Commission to breach the relationship of trust existing between the courts and the Commission.

The Applicant alleged (and was supported by the Dutch and Swedish Governments) that the Commission Decision should be annulled as it breached the Commission's own Code of Conduct and that it breached Treaty rules. The argument submitted by the Applicant was essentially that disclosure would not undermine the relationship between the courts and the Commission

nor would it affect the public interest and even if this were the case the right of public access must supersede any such concerns.

The Dutch Government argued that the Commission's interpretation of the exceptions in the Code of Conduct was too broad and that it excluded a whole category of documents without in fact considering in this case whether the exception was merited. The Commission compared itself to an expert witness who is merely persuasive and whose testimony may only be disclosed by the national court.

The Court of First Instance firstly referred to the principle in *WWF UK -v- Commission* where it had stated that the exceptions to the right of public access must be strictly construed. The Court stated that the text of the Decision containing the Code of Conduct requires the Commission to examine on a case by case basis whether disclosure is likely to undermine one of the facets of public interest protected by the first category of exceptions. The Court then addressed the issue as to whether in these cases the Commission is entitled and if so to what extent to refuse disclosure of documents sent to national courts in the context of the scheme providing for such co-operation in competition cases.

The Court referred to Article 6 of the European Convention on Human Rights which guarantees that for the right to a fair trial to be respected a case must be heard by an 'independent and impartial tribunal'. The Court continued its long line of human rights jurisprudence in this case by emphasising the fact that fundamental human rights constitute an integral part of Community law and that the Community judicature shall ensure observance of such rights.

The Court then repeated its assertion that the sources for such rights are the constitutional traditions common to the Member States as well as international human rights treaties to which the Member States are party. The Court again states in this case that its principal inspiration in this regard is the European Convention on Human Rights. The Court then declared that:

> 'The right of every person to a fair hearing by an independent tribunal means, inter alia, that both national and Community Courts must be free to apply their own rules of procedure concerning the powers of the judge, the conduct of the proceedings in general and the confidentiality of the documents on the file in particular. The exception, according to the court, to the right of public access in order to protect the public interest when such documents are connected with court proceedings is designed to ensure this fundamental right to a fair trial. Therefore ,the exception is not restricted merely to protecting the interests of the parties but also encompasses the procedural autonomy of national and Community courts'.

The scope of this exception to the right of public access also permits the Commission to rely on the exception even where it is not a party to the proceedings. The Court then drew a distinction between documents drawn up for a particular court case and those which exist independently. The exception based on public interest in relation to court proceedings can only apply to the first category of documents because the decision to grant access is for the national court alone.

Treaty Status for the Right of Access

It is of importance that in none of the judgments has the Court recognised the right of access or principle of transparency as being inherent in the scheme of the Treaty or as a general principle of Community law. Rather the Court has on each occasion treated the subject as at most a right conferred by Community legislation.

It has been suggested that the Amsterdam Treaty is merely conferring Treaty status to a right which has already been established by the legislation adopted by the Commission and the Council and which is protected in the caselaw of the Community Court.

The writer suggests on the other hand that the elevation of the right of access to documents held by EC Institutions to a Treaty-based right constitutes a fundamental change in the nature of this right. Essentially it means that in each and every case consideration will have to be made of the various interests in balancing the right of access of the public with the principle of secrecy and it seems that non-disclosure will be the exception to the rule in the future.

Better Quality Legislation and Codification

The right of access to information held by Community Institutions is bolstered by a Declaration attached to the Amsterdam Treaty by the Member States governing transparency. The Declaration emphasises that drafting of legislation must be of a standard to enable national authorities to properly implement it and to permit greater understanding on the part of the public and by business circles.

The Declaration also calls upon the political institutions of the European Community to establish guidelines in this respect by common accord and for an accelerated codification of legislative texts. This should serve to encourage the programme of simplification and codification which has been underway in inter alia the area of customs and agriculture for the last few years.

In a further attempt to bring the Union/Community closer to the people the new Article 21 EC will enable persons to write to the Institutions and get a response in their own language (so long as it is an official language of the Community).

A simpler more transparent future?

It is to be hoped that the Amsterdam Treaty introduces an era of simplification and clarification. The Treaty in itself simplifies the layout of the European Community Treaty (despite lawyers' grumbles that the numbering sequence will have to be completely relearnt!). The European Union Treaty is also made considerably clearer by the new Treaty. The institutions from now on will be required to adopt a user-friendly approach and to reason any decision which limits public access. It appears that the will exists to ensure that the Union/Community is more transparent to the peoples of Europe. If this is the only lesson learnt from the Maastricht train nearly being derailed five years ago that is a good thing. ●

1 Carven and Guardian Court Reports T-194/94 1995, European Court Reports II - 2765

2 World Wildlife Fund, case T-105/95 1997, European Court Reports II - 313

Legal Update

The Bar Review
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A directory of legislation, articles and written judgments received from 21st March 1998 to 30th April 1998.
Judgment information compiled by the researchers in the Judges Library, Four Courts, Dublin 7.
Edited by Desmond Mulhere, Law Library, Four Courts, Dublin 7.

Administrative

O'Dwyer v. Minister for the Environment
High Court: **Geoghegan J.**
27/03/1998

Judicial review; taxi licences; hackney licences; uses for which taxi licence necessary; transfer of hackney licences; regulations defining uses for which taxi licence necessary; regulations amended to include carriage initiated by radio communication while vehicle in a public place; whether amendment irrational; regulations failing to allow sale or transfer of hackney licences; whether failure irrational; Art. 3(2)(f) Road Traffic (Public Service Vehicles) Regulations, 1963; Art. 2 Road Traffic (Public Service Vehicles)(Amendment) Regulations, 1983; Art. 18 Road Traffic (Public Service Vehicles)(Amendment) Regulations, 1995
Held: Amendment requiring taxi licence for carriage initiated by radio communication while vehicle in public place not irrational; failure to provide for sale or transfer of hackney licences not irrational; judicial review refused

Statutory Instruments

Borrowing Powers of Certain Bodies Act, 1996 (Commencement) Order, 1996
S.I.232/1996

Houses of the Oireachtas (Members) Pensions (Amendment) Scheme, 1998
SI 75/1998

Members of the Oireachtas and Ministerial and Parliamentary Offices (Allowances and Salaries) Order, 1998
SI 74/1998

Adoption

Statutory Instrument

Adoption Rules, 1996
S.I.223/1996

Agriculture

Statutory Instruments

European communities (Trade in Bovine Breeding Animals, their Semen, Ova and Embryos) (Amendment) Regulations, 1996
S.I.233/1996
(DIR 77/504, 91/174, 94/28, 87/328, 88/407, 90/120, 89/556, 93/52, 93/60)

European Communities (Pesticide Residues)(Foodstuffs of Animal Origin) (Amendment) Regulations, 1998
SI 70/1998
(DIR 97/71)

European Communities (Pesticide Residues) (Products of Plant Origin, including Fruit and Vegetables) (Amendment) Regulations, 1998
SI 71/1998
(DIR 97/71)

European Communities (Pesticide Residues)(Cereals)(Amendment) Regulations, 1998
SI 72/1998
(DIR 97/71)

European Communities (Importation of Bovine Animals and Products obtained from Bovine Animals from the United Kingdom) (Amendment) Regulations, 1996
S.I.210/1996

European Communities (Official Control of Foodstuffs) Regulations, 1998
SI 85/1998
(Dir 89/397, 93/99)

Aliens

Article

Deportation of Refugees Anisimova and the safe first country principle
3(4) 1998 BR 172
Egan, Nuala

Animals

Statutory Instrument

European Communities (Aquaculture Animals and Fish) (Placing on the Market and Control of Certain Diseases) Regulations, 1996
S.I.253/1996
(DIR 91/67, 93/54, 93/53)

European Communities (Zootechnical and Genealogical Conditions Applicable to Imports from Third Countries) Regulations, 1998
SI 26/1998
(DIR 94/28))

Wildlife (Wild Birds) (Open Seasons) (Amendment) Order, 1996
S.I.219/1996

Wildlife (Wild Mammals) (Open Seasons) (Amendment) Order, 1996
S.I.220/1996

Arbitration

Sheahan v. FBD Insurance Plc.
High Court: **Kelly J.**
25/03/1998

Arbitration awards; interim and final awards; error of law; set aside; dispute

as to liability in respect of insurance claim; whether error of law on face of interim award; whether as a result of error arbitrator incorrectly calculated consequential loss in respect of plaintiff; jurisdiction of court to set aside award; distinction between question of law which is material to an arbitration and specific question of law which is referred to arbitrator for a decision; ss.36, 41 Arbitration Act, 1954
Held: No error of law of face of award

Article

Arbitration clauses and the void or terminated contract
Simons, Garrett
3(5) 1998 BR 247

Bankruptcy

Article

The adjudication of a debtor in bankruptcy
Glanville, Stephen
1998(1) P & P 8

Commercial

Article

Banks as fiduciaries
Breslin, John
1998 CLP 47

Taking security over cash deposits the House of Lords confirms the conceptual possibility of charge-backs.
Hutchinson, Brian
1998 CLP 3

Performance bonds, surety bonds and demand guarantees distinguished
White, R J
1998 CLP 35

Library Acquisition

Consumer Credit Law
Bird, Timothy
Dublin Round Hall Sweet & Maxwell 1998
N305.4.C5

Company

Crindle Investments v. Wymes
Supreme Court: Hamilton C.J., Barrington J., **Keane J.**
05/03/1998

Duties of directors; pursuance by directors of personal litigation; defendants were directors of Bula Holdings and Bula Ltd. pursuing litigation on behalf of companies and also personal claims; possible conflict in pursuance of both sets of claims; whether defendants obliged to withdraw personal claims; whether fiduciary duty owed to plaintiffs as shareholders; whether defendants in breach of fiduciary duty to shareholders; whether defendants' actions in breach of constitutional rights of plaintiffs; whether defendants' actions in breach of duty of care owed to plaintiffs; whether plaintiffs entitled to bring a derivative action in respect of damage caused to company
Held: Directors did not owe a fiduciary duty directly to individual shareholders; plaintiff shareholders could not bring a derivative action in respect of damage caused to the company; defendants did not owe duty of care to plaintiffs; defendants did not infringe constitutional rights of plaintiffs; defendants not obliged to withdraw personal claims; appeal dismissed

Cavan Crystal Glass Limited, In re
High Court: Kelly J.
27/03/1998

Examiner; petition for appointment of examiner; criteria; whether petition properly presented; whether petition could be amended; whether effect of amendment of petition retrospective; whether examiner should be appointed; ss. 2, 3(6), 3(7) Companies (Amendment) Act, 1990; O. 15 r. 2, O. 28 r. 1, O. 28 r. 2 Rules of the Superior Courts
Held: Petition to appoint examiner not properly presented; court has power to allow amendment of petition; amendment of petition has retrospective effect; examiner would not be appointed where no identifiable possibility of survival of company shown; petition refused

Eurochick Limited, In re
High Court: **McCracken J.**
23/03/1998

Winding-up; voluntary liquidation; whether court should halt voluntary liquidation; conversion into court-supervised liquidation; basis on which court should replace voluntary liquidator; whether wrongdoing on part of company requiring investigation; whether position of creditors would be improved under court-supervised liquidation
Held: Court-supervised liquidation refused

Articles

Set-off on insolvency
O'Callaghan, Patrick
1998 CLP 20

The company examinership - looking for a life-line after In re Springline (in liquidation)
Marray, Eamon
3(4) 1998 BR 166

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Proposed Merger or Take-Over Prohibition (Amendment) Order, 1996
S.I.214/1996

Competition

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Fair procedures and the granting of category licences by the Competition Authority
Barrington, Eileen
3(4) 1998 BR 200

The Competition (Amendment) Act, 1996 extending the criminal law
Charleton, Peter
Bolger, Marguerite
3(5)1998 BR 214

Conflict of Laws

Intermetal Group Ltd. v. Worslade Trading Ltd.
Supreme Court: **Murphy J.,** Lynch J., Barron J.
06/03/1998

Forum non conveniens; non- EU state; tort of inducing breach of contract; injunctive relief sought; whether Ireland appropriate forum for determining disputes between parties; whether justice requires stay to be granted; test to be applied in determining appropriate forum; consideration of jurisdiction with which proceedings most closely connected; principles for granting injunctive relief; whether tort of inducing breach of contract known to foreign jurisdiction; whether Brussels Convention applicable

to doctrine of forum non conveniens
Held: Appeal dismissed; stay refused; Ireland appropriate forum;

Minister for Agriculture, Food and Forestry v. Alte Leipziger Versciherung Aktiengesellschaft
High Court: **Laffoy J.**
06/03/1998

Contract of insurance; exclusive jurisdiction clause; whether general conditions of insurance policies were incorporated into the contract; whether a defendant can invoke an exclusive jurisdiction clause in an insurance agreement whose existence is disputed; whether the jurisdiction clause was included in the insurance agreement; whether the jurisdiction clause complied with the requirements of the Brussels Convention; whether a jurisdiction clause must be limited to the risks specified in the Brussels Convention; whether there was consensus on the jurisdiction clause; Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988; arts. 8, 12, 17 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.
Held: Agreement on jurisdiction was contrary to Art.12 of the Brussels Convention

Constitutional

O'Cleirigh v. Minister for Agriculture Food and Forestry
Supreme Court: Hamilton C.J., Barrington J., Keane J., Murphy J., **Lynch J.***
(*Decision of the Court delivered by Lynch J.)
27/03/1998

Legislation; validity; constitutional challenge; legislation providing for dissolution of Irish Land Commission; determination by Minister of compensation to be paid to commissioner on dissolution; whether determination an exercise of judicial power; whether Minister judge in his own cause; whether commissioner has standing to challenge legislation not yet in operation; s. 9(1) Irish Land Commission (Dissolution) Act, 1992
Held: Commissioner has standing to challenge legislation by virtue of a real and present interest in the question of its validity; determination of compensation not an exercise of judicial power; declaration of invalidity refused

Campaign to Separate Church and State Ltd. v. Minister for Education
Supreme Court: Hamilton C.J., O'Flaherty J., Denham J., **Barrington J., Keane J.**
25/03/1998

Constitutional rights; breach; endowment of religion; state aid to religious schools; whether payment by state of salaries of chaplains appointed by religious denominations to community schools is in breach of constitutional guarantee not to endow any religion; whether such endowment sanctioned expressly or impliedly by Constitution; interpretation of "endow"; Art. 44.2.2 of the Constitution
Held: Payment by State of chaplains' salaries does not constitute an endowment of religion

Article

The Minister's alter ego the Carltona principle
O'Farrell, Carol
3(5) 1998 BR 251

Contract

Carroll v. Carroll
High Court: **Shanley J.**
05/03/1998

Deed of conveyance; undue influence; improvident transaction; conveyance of public house and residential accommodation to son; applicants seek to have transaction set aside on grounds of undue influence and improvidence; whether there was a presumption of undue influence; whether this presumption was rebutted by evidence of the free exercise of the father's will; whether there was independent legal advice; whether the plaintiffs were guilty of laches
Held: Transaction should be set aside on the grounds of undue influence and improvidence

Fitzpatrick v. Criminal Assets Bureau
High Court: **Shanley J.**
27/02/1998

Seizure of assets; competing ownership claims; third respondent convicted of fraudulent trading and forgery; claim that car was purchased on behalf of a company; whether he acted with the actual or ostensible authority of the company; whether there was a resulting trust; when property in the car passed; consideration of who provided the purchase monies; ss. 130, 140 Finance Act 1992; ss. 17,18,62 Sale of Goods Act, 1893
Held: Car was held by the company on resulting trust for the third respondent; claim dismissed

Article

Arbitration clauses and the void or teminated contract
Simons, Garrett
3(5) 1998 BR 247

Criminal

D.P.P. v. Brennan
Supreme Court: Hamilton C.J., Keane J., **Lynch J.**
16/03/1998

Right to trial by jury; assault on a peace officer acting in the course of his duty; accused charged with common assault rather than assault on a peace office in the course of his duty; effect of charge to deprive accused of ability to opt for trial by jury; whether accused had right to trial by jury where facts would support charge of assault on a peace officer in the course of duty; s.19(1) Criminal Justice (Public Order) Act, 1994; s.52 Courts (Supplemental Provisions) Act, 1961
Held: The choice of offence to be laid against an accused is a matter for the DPP; no right to trial by jury exists where the offence is a minor offence fit to be tried summarily

Mullins v. Judge Hartnett
High Court: **O'Higgins J.**
01/04/1998

Assault contrary to common law; abolition of offence; retrospectively; statutory interpretation; applicant charged with assault contrary to common law; alleged offence occurred prior to coming into force of Non-Fatal Offences Against the Person Act, 1997; s. 8(1) abolished common law offence of assault; applicant sought order restraining the Director of Public Prosecutions from continuing prosecution; whether pre-1997 offence of assault statutory or hybrid offence;

whether Act had retrospective effect; whether legislature intended to discontinue pending prosecutions for assault contrary to common law; applicable principles of statutory interpretation; s. 8(1) Non-Fatal Offences Against the Person Act, 1997; s. 2(1) Interpretation Act, 1937
Held: Abolition of common law offence of assault intended to have prospective effect only; relief refused

D.P.P. v. Special Criminal Court
High Court: **Carney J.**
13/03/1998

Disclosure; organised crime; identity of informants; confidential information; identity of informants who may be seriously endangered by disclosure; whether the case should be dealt with by ordinary courts; who should be involved in the process of determining what should be disclosed; whether disclosure could be made to the legal advisors of the accused subject to an undertaking not to reveal the contents to the accused
Held: Established relationship between defence lawyers and their client can not be altered; ruling of the Special Criminal Court quashed

Articles

Detention without charge and the Criminal Justice (Drug Trafficking) Act 1996 shifting the focus of the Irish criminal process from trial court to Garda station
Keane, David
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International mutual assistance in criminal matters
Part VII of the Criminal Justice Act 1994
O'Reilly, Patrick
3(4) 1998 BR 189

Striking a blow for reform? a note on the Non-Fatal Offences Against the Person Act 1997 and its effect on the law of assault
Bacik, Ivana
1997 ICLJ 48

The Competition (Amendment) Act, 1996 extending the criminal law
3(5)1998 BR 214
Charleton, Peter
Bolger, Marguerite

The Statute of Limitations in Sexual Abuse Cases
Nugent, James
3(5)1998 BR 222

The right to silence Rock v Ireland and Others
Ring, Mary Ellen
3(5) BR 225

The Criminal Justice (Drug Trafficking) Act 1996 decline and fall of the right to silence?
Ryan, Andrea
1997 ICLJ 22

'Queering' the criminal law some thoughts on the aftermath of homosexual decriminalisation
Ryan, Fergus W
1997 ICLJ 38

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Criminal Justice Act, 1994 (Section 46 (1)) Order, 1998
SI 65/1998

Criminal Justice Act, 1994 (Section 47 (1)) Order, 1998
SI 65/1998

Criminal Justice Act, 1994 (Section 47 (1)) Order, 1998
SI 66/1998

Criminal Justice (Legal Aid)(Amendment) Regulations, 1998
SI 79/1998

Damages

Eurostock Meat Marketing Ltd. v. Ministry of Agriculture, Food and Forestry
High Court: **McCracken J.**
13/03/1998

Loss of profit; export ban; liability not in issue; claim for loss of profits as a result of the ban imposed by the defendant on the export of ox heads from the State to Northern Ireland; consideration of how to obtain an accurate view of loss of profits in light of the distortion of the market
Held: Damages awarded for loss of profits from contracts and sales, and delay of production

Education

Statutory Instrument

Vocational Education Committees (Filling of Casual Vacancies) Regulations, 1996
S.I.205/1996

Employment

O'Rourke v Cauldwell
High Court: **O'Higgins J.**
20/03/1998

Contract of employment; termination; notice; breach of terms; damages claimed for early termination of contract; whether there was a binding contract between the defendant recruitment agency and the plaintiff; whether the recruitment agency was misled into the contract by the second-named defendant (employer); whether there was an implied term that contract of employment could be terminated on one weeks notice
Held: Contract was between plaintiff and the defendant; insufficient evidence to imply a term into the written contract regarding termination; recruitment agent responsible for the contract and for the breach of the contract

Sheehan v. Commissioner of An Gárda Síochána
High Court: **Morris P.**
19/03/1998

Judicial review; natural justice; constitutional justice; order of certiorari sought quashing decision to replace the plaintiff as the Area Administrator of a community policing scheme; whether he was appointed in a temporary or a permanent capacity; whether the rights of the plaintiff were respected; whether the plaintiff was suitable for permanent employment
Held: The rights of the plaintiff were respected; relief refused

McEvoy v. Prison Officers Association
High Court: **McCracken J.**
18/03/1998

Fair procedure; natural justice; constitutional justice; plaintiff removed as President of the defendant by means of a vote of no confidence; seeks declaratory

relief and damages; whether fair procedures were complied with in removing him; whether natural justice applied; whether natural and constitutional justice were complied with
Held: Natural and constitutional justice were not complied with; damages awarded

Article

Industrial relations, the right to picket and restrictions of right
to injunction C & T Crampton Ltd v Building & Allied Trades Union, Denis Farrell, Derek Doyle, Kenneth O'Connor, Patrick McCallion and Neville Farrelly
Purcell, Pat
3(5) BR 239

Statutory Instrument

Employment Regulation Order (Hotels Joint Labour Committee),1996
S.I.208/1996

Health Service Employers Agency (Establishment) Order, 1996
S.I.213/1996

Equity & Trusts

Articles

Banks as fiduciaries
Breslin, John
1998 CLP 47

Trusts and income tax - taxation of trustees
Bohan Brian
9(1997) ITR 465

European Communities

McNamara v. An Bord Pleanála
Supreme Court: Hamilton C.J., Barrington J., **Keane J.**, Murphy J., Lynch J.
25/03/1998

Reference to ECJ; judicial review; planning decision; refusal by High Court to order reference to ECJ; whether High Court in the position of a final court of appeal; whether High Court obliged to order reference; whether reference could be ordered after final judgment had been given; whether case pending after final judgment had been given; whether question of European law arose which could form subject of reference; whether procedural rules governing review of planning decisions treat European law rights less favourably than domestic law rights; whether procedural rules governing review of planning decisions impose excessive difficulties on the exercise of European law rights; whether applicant entitled to rely on ground of challenge raised later than two months after impugned decision; Art. 177 Treaty of Rome; ss. 82(3A) & 82(3B)(b) Local Government (Planning and Development) Act, 1963
Held: Case no longer pending and reference could not be ordered after final judgment had been given; procedural rules governing review of planning decisions did not treat European law rights less favourably than domestic law rights and did not impose excessive difficulties on the exercise of European law rights

Article

Eurowatch The Amsterdam Treaty a glance at the main substantive provisions
Liston, Julie
3(5) 1998 BR 243

European social policy after Amsterdam
O'Mara, Ciaran A
1998 CLP 42

Taking a punt on the Euro
O'Connell, Maria
1998 (March) GILSI 28

Taxation and the Euro
Brennan, Philip
9(1997) ITR 551

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3(4) 1998 BR 198
McGarry, Paul

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MacEochaidh, Colm
3(4) 1998 BR 193

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Evidence

Eastern Health Board v. Fitness to Practice Committee of the Medical Council
High Court: **Barr J.**
03/04/1998

Evidence; in camera proceedings; subsequent use of information given at in camera proceedings; proceedings relating to alleged sexual abuse of children; subsequent investigation by Fitness to Practice Committee into alleged misconduct of doctor making diagnoses of child sexual abuse; whether information introduced in or derived from in camera proceedings can be produced in subsequent proceedings before Fitness to Practice Committee; whether court has a discretion to impose terms concerning disclosure of such proceedings; whether subsequent proceedings must themselves be held in camera if using such information
Held: There is no absolute embargo on disclosure of evidence given at in camera hearings; it is a contempt of court to make such disclosure without prior judicial authority; the court has a discretion to permit such disclosure, subject to such terms as it may think proper; disclosure will be ordered on terms that the subsequent proceedings of the Fitness to Practice Committee will be held in camera

Eastern Health Board v. Mooney
High Court: **Carney J.**
20/03/1998

Hearsay evidence; compellable witnesses; whether hearsay evidence is admissible under Child Care Act; whether foster parents are compellable witnesses; Child Care Act, 1991
Held: Hearsay evidence is admissible, depending on the circumstances; foster parents are compellable witnesses

O'Sullivan v. Judge Hamill
High Court: **O'Higgins J.**
25/02/1998

Evidence; admissibility; live television link; capacity to give evidence; application to prevent evidence being given by means of live television link; charge of having sexual intercourse with a person who was mentally impaired; whether there must be a prior finding that the person had a mental handicap; whether Court has jurisdiction to allow a televi-

sion link to be used; ss. 12, 13, 16, 19, 27 Criminal Evidence Act, 1992
Held: Court has jurisdiction to allow television link to be used without the necessity of a prior finding that the person had a 'mental handicap'

Extradition

Kwok Ming Wan v. Conroy
Supreme Court: **Hamilton C.J.**, Keane J., **Barron J.**
31/03/1998

Extradition; delay; whether delay such as to cause oppression to applicant if extradited; whether marriage, founding of family, establishment of business and purchase of home constituted exceptional circumstances making extradition of applicant oppressive; s. 50(2)(bbb) Extradition Act, 1965
Held: Release of applicant ordered

Family

(A.)S. v. (P.)S.
Supreme Court: **Denham J.**, Keane J., Barron J.
26/03/1998

Custody; child abduction; wrongful removal and detention of children by mother outside their country of habitual residence; application by father for return of children; whether father acquiesced in children's removal; evidence of sexual abuse of children by father; whether grave risk that return of children would expose them to psychological harm of a serious nature; whether return of children could be ordered subject to undertakings; whether undertakings adequate to secure safety of children; Child Abduction and Enforcement of Custody Orders Act, 1991
Held: Return of children to England ordered subject to undertakings from father; children to remain in custody of mother pending determination of custody by the English courts

(M).D. v. (A.T).D.
High Court: **O'Sullivan J.**
06/03/1998

Child abduction; consent; grave risk of harm; whether child should be returned to the custody of the father; whether consent to the removal was conditional upon a reconciliation; whether Court had discretion under the Convention; Child Abduction and Enforcement of Custody Orders Act, 1991
Held: Returning order made

(I.)K. v. (J.)K.
High Court: **Morris P.**
25/02/1998

Child abduction; consent; acquiescence; grave risk; order sought returning the infants; whether the plaintiff consented to the removal of the children; whether there was acquiescence; whether there was delay; whether the infants would be exposed to risks if returned; art. 13 Child Abduction and Enforcement of Custody Orders Act, 1991
Held: Order granted

(D.)K. v. (T.)H.
High Court: **O'Higgins J.**
25/02/1998

Nullity; Validity of marriage; grounds for nullity; Petitioner victim of child sexual abuse; drug taking by Petitioner; death of Petitioner's father; remarriage of Petitioner's mother; conflict between Petitioner and stepfather; whether Petitioner, by reason of circumstances, able to enter into and sustain a normal marital relationship; whether Respondent able to enter into and sustain a normal marital relationship; whether Petitioner and Respondent able to enter into and sustain a normal marital relationship with each other
Held: Cumulative effect of circumstances such that Petitioner unable to enter into and sustain a normal marital relationship; nullity granted

(J.W.)H. v. (G.)W.
High Court: **O'Higgins J.**
25/02/1998

Nullity; validity of marriage; grounds for nullity; whether Petitioner acted under influence of parents; immaturity of Petitioner; whether Petitioner able to enter into and sustain a normal marital relationship; whether Respondent able to enter into and sustain a normal marital relationship; whether Petitioner and Respondent able to enter into and sustain a normal marital relationship with each other
Held: Nullity refused

(P.)M. v. (T.)R.
High Court: **Lavan J.**
18/02/1998

Marriage validity; consent; capacity: decree of nullity sought; whether there was full, free and informed consent: whether the parties lacked capacity to enter into and sustain a normal marital relationship; whether failure of one spouse to declare age vitiated consent of other spouse
Held: Decree of nullity refused; burden of proving absence of consent not discharged

(G.)N. v. (K.)K.
High Court: **Budd J.**
30/01/1998

Parentage; putative father deceased; declaration of parentage sought; defendant unwilling to provide blood sample for DNA profiling; whether legislation has retrospective effect; whether plaintiff has locus standi; whether there was delay; whether there was corroboration of plaintiff's evidence; ss. 38, 39, 42 Status of Children's Act, 1987
Held: Plaintiff entitled to declarations sought

(P.)M. v. (V.)M.
High Court: **Kinlen J.**
03/11/1997.

Child abduction; foreign custody dispute; service of documents; order sought returning child; whether it is essential that all the documents be served on the mother before the commencement of proceedings; whether these proceedings were really subsidiary to original proceedings before a foreign court; whether the strict requirements of the Convention were complied with; arts. 9, 12, 13 Child Abduction and Enforcement of Custody Orders Act, 1991
Held: Application refused; proceedings not in accordance with the Convention

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Degrees of Separation
Shatter, Alan Joseph
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Hake (Restriction on Fishing) (no 2) Order, 1998
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Northern and Western Herring (Restriction on Fishing) Order,1996
S.I.209/1996

Monkfish (Restriction on Fishing) (no 2) Order, 1998
SI 61/1998

Gárda Síochána

Donovan v. Minister for Justice
High Court: **Geoghegan J.**
02/04/1998

Gárda Síochána; malicious injury; compensation; judicial review; natural justice; discretionary nature of judicial review; member of Gárda Síochána injured while searching for suspects; Minister refused leave to apply to court on ground that injury not maliciously inflicted; failure by Minister to hear representations as to whether injury was maliciously inflicted; whether Minister in breach of natural justice; whether Minister entitled to consider whether injury maliciously inflicted; whether certiorari should in discretion of court be refused; whether injury maliciously inflicted
Held: Minister entitled to consider whether there is a stateable case that injury maliciously inflicted; Minister in breach of natural justice by failing to hear representations whether injury maliciously inflicted; certiorari nevertheless refused since no stateable case that injury maliciously inflicted

Statutory Instrument

Gárda Síochána (Associations) (Amendment) Regulations, 1998
SI 63/1998

Gárda Síochána (Associations) (Amendment) Regulations, 1996
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Intellectual Property

McDermott Laboratories Ltd. v. Controller of Patents Designs and Trademarks
Supreme Court: Hamilton C.J., O'Flaherty J., **Keane J.**
19/03/1998

Patent; licence; application to controller for licence under patent; patent had expired on date application was made; legislation subsequently coming into force extended term of patent; whether patent in force at date of application; whether application to be dealt with on basis of preexisting legislation or subsequent legislation; whether extension of time to appeal to High Court should be granted; s. 42 & s.75(6) Patents Act, 1964; First Schedule, par. 3(1)(a) Patents Act, 1992
Held: Patent not in force at date of application for licence; application to be dealt with under preexisting legislation

Universal City Studios Inc. v. Mulligan
High Court: **Laffoy J.**
25/03/1998

Copyright; ownership; infringement; injunction; video tape; whether plaintiffs owners of copyright of video films; evidence of infringement consisting of seizure of counterfeit video tapes by Gárda Síochána; whether such evidence admissible; whether search warrant valid; whether such evidence establishes infringement; whether plaintiffs entitled to perpetual injunction; damages for breach of undertaking; s.22 Copyright Act, 1963
Held: Injunction granted; plaintiffs owners of copyright

Land Law

Articles

The practitioner, a conveyance and the duty of care
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Landlord and Tenant

Redfont Ltd. v. Custom House Dock Management Ltd.
High Court: **Shanley J.**
31/03/1998

Easements; parking restrictions introduced by property management company to the detriment of the plaintiff's business; express right of way granted under the head lease and the sublease; lease provides for right of property management company to make regulations; whether the right of way included the right to park; whether the right to park was an ancillary right; consideration of the nature and the user of the land
Held: No right to make rules with the effect of extinguishing rights expressly granted to the plaintiffs under the sublease; unlawful and impermissible interference with the plaintiff's right of way and the ancillary rights, including the right to park; injunctive relief granted

Kenny Homes & Co Ltd. v. Leonard
High Court: **Costello P.**
11/12/1997

Tenancy; licence; jurisdiction; hiring and leasing agreement; injunction sought restraining the defendants from trespassing; whether court has jurisdiction to grant an injunction when an application for a new tenancy is pending before another court; whether the agreement created a tenancy or a licence; whether the premises was a tenement; consideration of the intention of the parties and the transactions as a whole; whether possession was exclusive; whether the defendants were guilty of trespass; ss. 5, 20, 28 Landlord and Tenant (Amendment) Act, 1980
Held: No contract of tenancy; premises not a tenement; relief granted

Legal Aid

Statutory Instrument
Criminal Justice (Legal Aid)(Amendment) Regulations, 1998
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The rights of man in Ireland and the role of lawyers in 1798
The King's Inns 1798 Commemorative Lecture by Dr Martin Mansergh, Special Adviser to the Taoiseach,
Mansergh, Martin
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Local Government

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SI 81/1998

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Nursing Homes (Subvention) (Amendment) Regulations, 1996
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The Health Act, 1970 (Section 76) (Adelaide and Meath hospital, Dublin, incorporating the National Children's Hospital) Order, 1996
S.I.228/1996

Negligence

Doran v. Delaney
Supreme Court: Barrington J., **Keane J., Barron J.**
09/03/1998

Professional negligence; breach of contract; conveyancing; inaccurate reply to requisitions; vendors solicitor failed to inform solicitors for the purchasers of a boundary dispute which caused land to be landlocked; whether solicitor for the vendors liable for breach of duty; consideration of duty of care owed by a solicitor to third parties; whether a solicitor could be liable to third party by reason of transmitting in good faith information furnished by his client; whether third party relied on the information
Held: Breach of duty of care by vendors solicitors

Bates v. Minister for Justice
Supreme Court: **Murphy J.,** Lynch J., Barron J.
04/03/1998

Assault; damages; duty of care; prisoner assaulted in cell by other prisoners; whether respondents negligent in failing to take reasonable care for safety of appellant; whether failure to supervise area where assault took place
Held: Respondents not found negligent

Gardiner v. Minister for Defence
High Court: **Johnson J.**
13/03/1998

Personal injuries; negligence; hearing loss; damages claimed in respect of personal injuries suffered; negligence, breach of duty and breach of statutory duty alleged; whether the plaintiff did suffer from a noise induced hearing loss; whether the negligence of the defendants induced the condition; what the standard for measuring the level of hearing impairment should be
Held: Plaintiff suffered impairment of his hearing as a result of the negligence of the defendant; damages awarded

The Governor and Company of the Bank of Ireland v. Lennon
High Court: **Lavan J.**
17/02/1998

Duty of care; contract creating security; whether the bank owed a duty of care to the defendant; whether there was a

material misrepresentation of fact by the bank; whether the duty of care arose from an implied term of the contract between the banker and the customer
Held: Defendant failed to establish a tortious duty of care

Heatley v. Wicklow Urban District Council
High Court: **O'Donovan J.**
03/02/1998

Negligence; loss of earnings; contributory negligence; ESB pole which had been removed causing a hazard for pedestrians; whether there was contributory negligence; whether the plaintiff was permanently incapacitated from heavy labouring work; whether the losses should have been contained; assessment of damages for loss of earnings
Held: Injuries attributable to the negligence of the ESB; damages awarded for loss of earnings, pain, suffering and general interference with enjoyment of life

Lynch v. O'Connor
High Court: **Kinlen J.**
28/06/1997

Negligence; spina bifida; minor; claim for damages against doctors who attended child after birth; whether there was negligence
Held: Claim dismissed

Pensions

Article
Self-administered pension funds
Morton, Owen
9(1997) ITR 476

Planning

McBride v. Galway Corporation
Supreme Court: Hamilton C.J., **Keane J., Murphy J.**
24/03/1998

Judicial review; certiorari; compliance with EU law; Environmental Impact Statement; order sought to quash decision of respondents inviting tenders for the construction of sewage treatment plant on island; whether date of application to carry out development made before foreshore regulations implementing EU directive came into effect; whether application defective in not having an environmental impact statement prepared; whether respondents complied with EU Environmental Directive; S.I. 25/1990; S.I. 349/1989; Foreshore Act, 1933
Held: Relief refused; compliance with directives

Donegal County Council v. Ballantine
High Court: **McCracken J.**
20/03/1998

Unauthorised use; quarrying; expiry of planning permission; liberty to apply; order sought prohibiting development or unauthorised use which consists of quarrying and blasting; whether the Court has jurisdiction to make an Order on foot of a Notice of Motion dated 1985; whether the legislation provides for prohibitions on future developments or uses; s.27 Local Government (Planning and Development) Act, 1976; s.19 Local Government (Planning and Development) Act, 1992
Held: Order refused

Lancefort Ltd v. An Bord Pleanala
High Court: **McGuinness J.**
12/03/1998

Judicial review; locus standi; constitutionality; environmental impact statement; site inspection reports; whether the applicant had locus standi to bring judicial review proceedings against the planning decision; whether a body corporate has locus standi to challenge the constitutionality of legislation; whether the applicant has sufficient interest in the proceedings to challenge the validity of the legislation; whether the respondent must be shown to have considered the requirement for an environmental impact assessment; whether the site inspector is required to include an account of his inspection in his report to the Bord; s. 82 Local Government (Planning and Development) Act 1963; ss. 23 and 14(8) Local Government (Planning and Development) Act 1976; s. 19(3) Local Government (Planning and Development) Act 1992; art. 56(2) Local Government (Planning and Development) Regulations 1994
Held: Applicant had locus standi to maintain judicial review proceedings generally; grounds of challenge fail; no locus standi to challenge the constitutionality of the legislation

Article
Judicial review of planning decisions subsection (3B) Part 2
Macken, James
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Practice & Procedure

Bula Limited v. Tara Mines Limited
Supreme Court: Barrington J., **Keane J.**, Barron J.
26/03/1998

Security for costs; respondents successful at trial; appellants appealed to Supreme Court; whether respondents entitled to security for costs of appeal; whether appellants if unsuccessful on appeal would be able to discharge costs of respondents; whether arguable grounds of appeal established; whether special circumstances required security for costs to be furnished; whether appellants' conduct of case at first instance a special circumstance; s. 390 Companies Act, 1963; O. 58 r. 17 Rules of the Superior Courts
Held: Application for security for costs of appeal granted

National Irish Bank Limited v. Radio Telefis Eireann
Supreme Court: Hamilton C.J., O'Flaherty J., Barrington J., **Keane J., Lynch J.**
20/03/1998

Disclosure; confidential information; publication; scheme for evasion of tax; injunction sought to restrain publication of confidential information; claim that publication is justified on the grounds of public interest; consideration of the "iniquity" defence; whether the public interest in the maintenance of confidentiality is outweighed by the counter veiling public interest in exposing such conduct; consideration of the extent of the disclosure which is legitimate
Held: Appeal dismissed; warning not to publish the names of innocent investors and to cooperate with regulatory authorities

Dunne v. Fox
High Court: **Laffoy J.**
03/04/1998

Third party discovery; costs; review of taxation; whether plaintiff should have been ordered to pay third party costs of

discovery; basis for taxation of costs of third party discovery; whether costs reasonably incurred in making discovery; whether onus is on non-party to establish reasonableness of costs incurred; whether allowances by Taxing Master properly made; O.31 r.19 & O.99 Rules of the Superior Courts
Held: Amounts charged by non-party were reasonable and allowances properly incurred

Heffernan v. O'Herlihy
High Court: **Kinlen J.**
03/04/1998

Statute of limitations; professional negligence; concealment; injury resulting from alleged medical malpractice; failure by solicitor to issue proceedings within limitation period; whether solicitor fraudulently concealed this failure from plaintiff; whether plaintiff's action against solicitor commenced within limitation period; whether limitation period should be extended because of fraudulent concealment by solicitor; s. 71(1) Statute of Limitations Act, 1957
Held: Solicitor fraudulently concealed failure to issue proceedings; plaintiff's action against solicitor not statute barred

Quinlivan v Conroy
High Court: **Kinlen J**
03/04/1998

Discovery; extradition; official documents; extradition to UK sought for conspiracy to murder, conspiracy to cause explosions, escaping unlawful custody and malicious wounding; allegation of a risk of unfair trial due to media coverage in Britain; application for a number of official reports; whether documents requested are in the possession, power or custody of the respondent; O. 31, r. 12 Rules of the Superior Courts
Held: Order makes no reference to "procurement"; respondents have not been in possession, power or custody of the documents; application dismissed

Gallagher v. Minister for Defence
High Court: **O'Higgins J.**
25/03/1998

Statute of Limitations; meaning of "date of knowledge"; noise related hearing problem; time when Plaintiff knew he had been injured for purpose of establishing the "date of knowledge"; whether he knew significance of the injury; whether he knew injury was attributable to negligence; ss. 2(1), 2(2), 3(1) Statute of Limitations (Amendment) Act, 1991
Held: Defence based on the Statute of Limitations failed

Fagan v. Burgess
High Court: **O'Higgins J.**
25/03/1998

Strike out; perjury; testimony alleged to constitute perjury; whether civil action lies at suit of injured party; whether testimony privileged; whether proceedings should be struck out as disclosing no cause of action; O. 19 r. 28, Rules of the Superior Courts
Held: Absolute privilege attaches to testimony of witnesses; proceedings struck out

Murphy v. Times Newspapers Limited
High Court: **Morris P.**
23/03/1998

Discovery; libel action; whether matters sought to be discovered relevant; motion for further and better discovery; criteria to be applied; whether further and better discovery should be ordered due to lapse of time since initial discovery
Held: Discovery sought relevant to defence of justification and credit and character of Plaintiff; further and better discovery refused

Cornhill v. Minister for Agriculture and Food
High Court: **O'Sullivan J.**
13/03/1998

Amendment of pleadings; criteria governing amendment; whether amendment necessary to ensure real issues in controversy before court; whether injury would be caused to Defendant if amendments allowed; whether amendments should be refused due to delay of Plaintiffs standard of evidence required to ground application for amendment; O. 28, Rules of the Superior Courts
Held: Amendments allowed

National Irish Bank v. Radio Telefis Eireann
High Court: **Shanley J.**
06/03/1998

Discovery; injunction; breach of confidence; public interest; order sought preventing the use of confidential information about the business of the plaintiff; how to balance the public interest in preserving confidences, the public interest in protecting the freedom of expression and the public interest in favour of disclosure of serious wrongdoings; whether the plaintiff has established that there is a serious issue to be tried; whether damages are an adequate remedy; s.18 (1) Broadcasting Act 1990; Art. 40.6(i) of the Constitution
Held: Public interest in the disclosure of the information prevails; publication of the confidential information allowed; reliefs refused

D.P.P. (Coleman) v. McNeill
High Court: **O'Donovan J.**
27/02/1998

Service of proceedings; excessive delay; prejudice; road traffic offence; delay of twelve and a half months between the alleged offences and the hearing; insufficient efforts made to serve the summons; whether service of an earlier summons which was not proceeded with was relevant; whether the defendant discharged the onus of proving prejudice; ss. 49(2), 49(6), 109(1) Road Traffic Act 1961; s.10 Road Traffic Act 1994; Road Traffic Act 1995; Road Traffic Act 1968; Road Traffic (Amendment) Act 1984
Held: Excessive delay caused prejudice to the defendant; appeal dismissed

Murphy v. Ballyclough Co-operative Creamery Ltd.
High Court: **Morris P.**
27/02/1998

Statement of claim; amendment; estoppel; order sought amending the statement of claim to include the first and second-named defendants; whether the plaintiff is estopped from proceeding with this claim; whether the defendants suffered prejudice by reason of relying on an assurance from the solicitors for the plaintiff; whether the accident could still be satisfactorily investigated by the defendant
Held: Plaintiff's claim against the first and second-named defendants struck out

Articles

Rules of the superior courts order 15, Parts I and II - parties
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1998 (1) P & P 2

The statute of limitations in sexual abuse cases
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Records & Statistics

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Registration of Births and Deaths (Ireland) Act, 1863 (Section18) (Kerry) (no.2) Order, 1996
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Statistics (Census of Industrial Commodities Production) Order, 1998
SI 45/1998

Statistics (Structure and Distribution of Earnings) Order, 1996
S.I.218/1996

Road Traffic

D.P.P. v. Fennelly
High Court: **O'Higgins J.**
06/03/1998

Conflict of evidence; road traffic offence; variance between evidence and summons; whether District Judge was correct in exercising judicial discretion in dismissing the charges; Order 88 Rules of the District Court
Held: Resolution of conflict of evidence solely and uniquely the preserve of a trial judge

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Carriage of passengers and their luggage by sea the Athens convention 1974 - how will it affect passenger claims in Ireland?
O' hOisin, Colm
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Galway Pilotage (Amendment) Order, 1996
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SI 90/1998

Social Welfare

Statutory Instrument

Social Welfare (Consolidated Payments Provisions) (Amendment) (no 13) (Treatment Benefit) Regulations, 1997
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Social Welfare (Code of Practice on the Recovery of Overpayments) Regulations, 1996
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Succession

Roberts v. Kenny
High Court: **Geoghegan J.**
10/03/1998

Construction of Will; uncertain terms; tax avoidance; whether the defendant was entitled to an absolute estate or life estate only in the Estate of the deceased; whether the plaintiffs were entitled to a remainder interest in the Estate; whether the terms of the Will exempted the defendant from provisions of the Settled Land Acts and the Trustee Acts; Whether the defendant was accountable for breaches of trust; Settled Land Acts; Trustee Acts; Succession Act 1965
Held: Will conferred a life estate on the defendant

Taxation

Articles

Capital acquisitions tax - the tax free threshold
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Capital gains - the transfer of business reliefs
Twomey, Kieran
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Value-Added Tax (Special Scheme for Means of Transport: Documentation) Regulations, 1996
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(DIR 94/28))

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S.I.243/1996
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European Communities (Trade in Bovine Breeding Animals, their Semen, Ova and Embryos)
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European Communities (Pesticide Residues) (Products of Plant Origin, including Fruit and Vegetables) (Amendment) Regulations, 1998
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European Communities (Pesticide Residues)(Cereals)(Amendment) Regulations, 1998
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European Communities (Materials and Articles intended to come into contact with Foodstuffs) (Amendment) Regulations, 1996
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European Communities (Official Control of Foodstuffs) Regulations, 1998
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Consumer Credit Law
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The rights of man in Ireland and the role of lawyers in 1798
The King's Inns 1798 Commemorative lecture by Dr Martin Mansergh, Special Adviser to the Taoiseach
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Information compiled by Sharon Byrne, Law Library, Four Courts, Dublin 7.

Adoption (No.2) Bill, 1996
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Committee - Dáil

Child Trafficking & Pornography Bill, 1997
Committee - Dáil

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Committee - Dáil **[PMB]**

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1st stage - Dáil

Court Services (No.2) Bill, 1997
Report - Seanad

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

Eighteenth Amendment of the Constitution Bill, 1997
Report - Dáil **[PMB]**

Employment Equality Bill, 1997
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Employment Rights Protection Bill, 1997
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Family Law Bill, 1998
2nd Stage - Seanad

Gas (Amendment) Bill, 1998
2nd stage Dáil

Geneva Conventions (Amendment) Bill, 1997
Committee - Dáil

Housing (Traveller Accommodation) Bill, 1998
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International War Crimes Tribunals Bill, 1997
1st stage - Dáil

Jurisdiction of Courts and Enforcement of Judgments Bill, 1998
Committee - Seanad

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1st stage - Dáil

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

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2nd stage - Dáil **[PMB]**

Oil Pollution of the Sea (Civil Liability and Compensation)(Amendment) Bill, 1998
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Plant Varieties (Proprietary Rights)(Amendment) Bill, 1997
Committee - Dáil

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

Roads (Amendment) Bill, 1997
Committee - Dáil

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

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

Sexual Offenders Registration Bill, 1998
2nd Stage - Dáil

Shannon River Council Bill, 1998
2nd stage - Seanad

Tribunals of Inquiry (Evidence) (Amendment) Bill, 1998
1st stage - Dáil

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Committee - Dáil

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

1/1998 - Referendum Act, 1998
26/02/1998

2/1998 - Central Bank Act, 1998
signed 18/03/1998
To be commenced by S.I.

3/1998 - Finance Act, 1998

4/1998 - Electoral (Amendment) Act, 1998
signed 31/03/1998
commenced on signing

5/1998 - Oireachtas (Allowances to Members) and Ministerial, Parliamentary, Judicial and Court Offices (Amendment) Act, 1998
signed 01/04/98
s24-28 commenced 19/06/1996
rest commenced on signing

6/1998 - Social Welfare Act, 1998
signed 01/04/1998
ss 4 &5 to be commenced by S.I.
rest commenced on signing

7/1998 - Minister for Arts, Heritage, Gaeltacht and the Islands (Powers and Functions) Act, 1997

8/1998 - Court Services (No.2) Act, 1998

Abbreviations

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

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

Our Man in Strasbourg

The Bar Review talks to John Hedigan S.C. about his recent election to the European Court of Human Rights

Within a very short time, John Hedigan will be leaving his practice on the Dublin Circuit and moving to Strasbourg to sit as Judge in respect of Ireland on the European Court of Human Rights.

Hedigan was elected to the position at the European Court from a list of three persons, whose names were submitted by the Government to the Parliamentary Assembly of the Council of Europe. The Legal Affairs Committee of the Assembly conducted interviews in Paris in January of this year with full hearings. This was a lengthy and time consuming process and taken very seriously by the Assembly, which had fought hard to get this interview mechanism set up despite strong opposition. This is only one of the recent changes to the court system in Strasbourg to which Hedigan has been elected.

Under the terms of Protocol 11 to the European Convention on Human Rights, the European Commission, Court of Human Rights and the structures around them are being replaced by a new permanent court system. This had become necessary as the success of the Court has been such that there is a backlog of cases stretching up to five years and this has placed it in the invidious position whereby it threatens to contravene Article 6 of its own Convention which holds that everyone has the right to a hearing within a reasonable time.

The judges of the new Court are also taking up full-time positions. Up to now, the Court sat for one week in every month. They have to reside in or near Strasbourg and are elected for terms of six years, with the exception of this first group. By means of a lottery, it was determined that half of the judges-elect will sit for a three year term and the rest for six years. In this manner, half the Court will be elected every three years, ensuring continuity of experience and that the Parliamentary Assembly isn't overwhelmed by having to initiate the lengthy interview process for the entire Court. Judges can be elected for a further term if the Government nominates them again and if the Parliamentary Assembly chooses to re-elect them. This lottery process has just been completed and, as a result, Hedigan will serve a six year term.

Criteria for Admissibility

There are also arrangements in place to allow unrestricted access to the Court for all applicants. Previously, individuals might not get a hearing unless they were referred by the Commission or the State concerned. Individuals or states may make their case directly to the Court through a committee of three judges who will decide whether or not a case is admissible, within the criteria set out:- i.e.

1. Domestic remedies must have been exhausted;
2. (a) the application must be within a period of six months from the date on which the final decision was taken;
   (b) must not be anonymous;
   (c) must not be a matter already examined by the Court or submitted to another procedure of international investigation or settlement, or one which contains no new relevant information;
   (d) must not be incompatible with the provisions of the Convention, manifestly ill-founded or an abuse of the right of application.

If it is patently inadmissible then the three judges will rule it out. If accepted, the case is heard by a chamber of seven. According to Hedigan "large numbers will be rejected on the basis that they are not admissible. The Commission, currently using the same criteria that the new Court will use to decide admissibility, are rejecting ninety percent of the complaints that are made to it". In fact, only a small proportion of the entire number of letters and complaints that the Commission receives ever appear before it for a decision on admissibility. There are numerous such applications sent in which are entirely misconceived.

The work of the old Commission and Court has been combined and will be carried out by this newly elected Court. It will supervise the investigation of the case which includes requesting the governments involved to make submissions. The chamber holding an enquiry will include a judge from the country concerned and the same applies if it ultimately goes to the Grand Chamber which is a chamber of seventeen. The judge of the state brought to the Court has to be involved so that their expertise in the domestic legal system will be available. A chamber of seven may also relinquish jurisdiction to the Grand Chamber when there is a question of interpretation or a decision which might in some way affect the existing jurisprudence.

The Court will apply the jurisprudence of the Convention of Human Rights but allow for different systems, philosophies and approaches. This is referred to as the margin of appreciation. Hedigan explains "while we all are united in one way under the Convention, we are still forty different countries with forty different legal systems and forty different social systems. This is the big challenge for the future. Whilst at the same time respecting the margin of appreciation and the different systems and cultures that exist, we can not allow the watering down of rights already established".

The volume of work processed by the Court has increased dramatically over the last decade. In 1975 three hundred and thirty five applications were regis-

tered with the Commission. In 1997 almost four thousand applications were registered. These are many reasons for this remarkable increase; among these, many eastern European countries have recently taken up membership of the Council of Europe, thereby augmenting the number of cases, and more significantly, the Court itself has built up an excellent reputation.

There is an emphasis on a friendly settlement system wherein if a complaint is admissible the Court makes itself available to the parties to try and negotiate a 'friendly settlement' with respect for human rights. A friendly settlement would have to be one which took account of the rights of the individual and respect of the Convention - the buying off of a complainant for example would not be acceptable to the Strasbourg authorities.

Continued breaches of their obligations under the Convention and failure to comply with the Court's ruling, could lead to the ultimate sanction, that of expulsion of the country from the Council of Europe. However, this is an extreme measure as, once outside the Council, there is no recourse against violations at all.

Further, the expulsion of a country would be a major political event. Generally speaking, however, countries have complied with the decisions of the Court. Hedigan observes that "Ireland, like other members, has had a number of very bitter pills to swallow, but they have done so and honoured the decision of the Court. The same thing has held true throughout the Council of Europe members. There is a moral sanction for not complying with the Court's decisions, even if the ultimate sanction is never used. It has managed to prove a highly effective body for the protection of human rights".

Growth in Membership

With membership of the Council of Europe increasing, many fear that the standard of protection will change or established rights will be watered down. Hedigan would argue that point. "They joined and they joined what was in place, a very powerful structure for the defence of human rights". He cites the fact that prior to the earlier part of this century, a large number of the very radical political movements in the world originated in Eastern Europe - the Russian Revolution may not have turned out well but the ferment of intellectual experimentation and thinking in Russia at the beginning of the century was monumental. In Czechoslovakia, both then and in more recent times, the theatrical and artistic movements pressed for very radical progress in human rights, so there is a tradition there. "We have all got a great deal to learn from each other. I would be very optimistic, bearing in mind that they joined, no-one forced them into this. I would hope that the future is very bright. It's certainly going to be an immensely interesting time to be there.

"In 1995 I attended a conference in Budapest and remember meeting a judge from Bulgaria which had recently joined the Council of Europe. Her sole function was sitting on a Court that was trying to adjudicate compensation for people whose properties had been expropriated by the Communists and alternatively to compensate people who had been given property by the Communists that somebody else was now demanding back. You can imagine what a knotty problem that was and she had been doing that since 1989 when the revolution had cracked open the Soviet bloc".

Work like this will be going on all over Europe as they try to bring their judicial systems into line with the requirements of the Convention and there will be many problems involved, which will have to be resolved without diluting the rights that have been put in place. There will simply have to be a degree of recognition given to the difficulties that each of these countries may have at the time, with the aim being that they are all marching step by step forward towards the particular standard that everybody hopes and expects will come about. It is a very interesting and exciting challenge.

Hedigan notes that "Ireland has had relatively few cases that have actually gone to a hearing in the Court. Interestingly, the very first case ever heard before the Court was *Lawless -v- Ireland* in 1961. Insofar as Ireland's track record with Strasbourg goes, we are a greatly respected country".

A World-Wide Judiciary?

At present there is no effective international criminal institution, although there are draft statutes before the UN assembly, to establish a court to deal with international crimes such as genocide, crimes against humanity, drugs trafficking, etc. Hedigan doesn't see the extension of the European Court of Human Rights as the answer. "The Council of Europe will have enough difficulty sorting out its huge increase in numbers without adding to them any further".

With regard to jurisdiction, the governments of the member states have resolved to co-operate with the Court in every way in relation to cases that come before it, in line with their obligations under the Convention. There are quite likely to be circumstances or cases where one or other party is not co-operating with the Court, or where the government of a country is saying one thing is the factual situation and the applicant is saying the other.

The Court is going to have to ascertain the facts in such a case. In order to do so, the new Court will have investigative powers as well as being a judicial body. It will supervise the investigation of complaints and organise fact-finding missions where necessary. As a result it is a very powerful institution and will not be solely reliant on either side's statement of the facts.

Except for Ireland, every state in the Council of Europe will shortly have incorporated the convention into their domestic law. As a result, many of the complaints people have may be dealt with by their national courts.

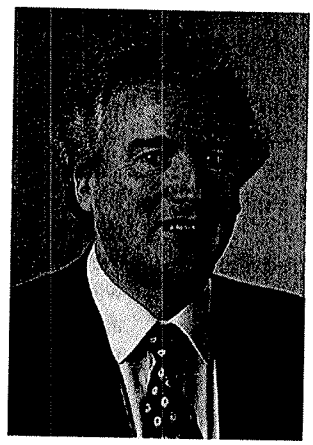
Eventually, it is hoped that people will have their rights secured at national level and appeal to Strasbourg will exist solely to ensure consistency of jurisprudence.

The new Court that is inaugurated on November 1st next will inherit approximately 7,000 cases. Its jurisdiction will stretch three quarter way round the globe from Ireland to the Pacific Coast of the Russian Federation including a population of almost a thousand million people. Such a huge jurisdiction at such a challenging time will ensure a heavy caseload for all judges involved.

Any number of circumstances give rise to human rights problems. While all cases carry the full weight of responsibility in ensuring that justice prevails, those directly impacting on human rights surely require the most from the legal system and its servants. John Hedigan will certainly have his work cut out for him. •

New Director for the Bar Council

Jerry Carroll, the new Director of the Bar Council took up duty on 1st May 1998. A former civil servant, he has spent most of his career in the Department of Finance although he has had tours of duty in the Department of Industry and Commerce and the Revenue Commissioners.



Jerry Carroll

Before joining the Council, Jerry was responsible for the Department of Finance's role in relation to the promotion and regulation of projects being established in the International Financial Services Centre within the Custom House Docks area. In this regard, he worked very closely with the key players in the Financial Services Industry.

Jerry's general work background has been in the area of management with a particular focus on organisation development, staff development and training. He was Head of the Civil Service Training Centre for a number of years. While working in the Centre, Jerry was centrally involved in the development and promotion of the Strategic Management Initiative and in the preparation of the subsequent implementation plan 'Delivering Better Government'.

Jerry points out that the Civil Service currently employs 28,000 staff spread across 32 Departments and Offices. "Given the range of activity being undertaken by the Civil Service, the service fully accepted the need for a strategic approach to the development of policy and the delivery of service generally." He adds that during his Civil Service career he never saw himself as a bureaucrat but as someone there to provide a quality service to the public.

It is a maxim he intends to apply to his new position - the provision of premium service to the members of the Bar. The other issues on his agenda are the development and encouragement of Bar Council staff to provide such a quality service by giving them challenging and satisfying roles, and by facilitating access to learning new skills.

Overall, Jerry emphasises that the service provider must be both efficient and effective. "It is a case of doing the right things as well as doing things right" he says. He also looks forward to working with the Bar on future strategies and projects.

When asked why he had left the Civil Service to join the Bar Council, he replied that it was the challenge of working with a prestigious body like the Bar Council and its 1200 barristers which has interested him most. Getting to know the individual barristers, their business and their concerns will be a priority, together with developing a unified team approach amongst the staff of the Bar Council to ensure that the services and new technology are used to the best advantage by the members of the Law Library.

As regards his first impressions on coming to the Law Library, he has been very impressed by the friendly and helpful manner of both members and staff. He is also impressed by the professionalism of all concerned and the desire for growth and development as exemplified by the state of the art premises and the developments on the information technology front.

On a personal level, Jerry is married with four children. He is a graduate of UCD in Economics and Philosophy. An eminent member of the Law Library, recently described him as an Irish speaking, hockey playing, Christian Brothers' boy - a rather interesting mixture. We wish him the best of luck in his new post as Director of the Bar Council, and the full support of all members of the Bar and staff. ●

Drugs: The Judicial Response

PETER CHARLETON, SC and PAUL ANTHONY MCDERMOTT, Barrister

Introduction[1]

The tension in relation to a judicial response to crimes committed by drug addicts is increasingly that between moving towards treatment options or towards an even more rigorous imposition of penalties. Public opinion in Ireland about the evils of drug misuse has probably never been as strong as it is at the present time.[2]

Coupled with strident political calls to incarcerate drug traffickers are pleas for more resources to allow dependants to leave their habits behind them. Courts have traditionally looked into the background of offenders and paid particular attention to circumstances which mitigate a crime. Votes are available, however, for politicians who decry high crime rates and pretend that there is a panacea that can be applied to eradicate criminality. There is a wave of political thought moving from the United States that propounds that by declaring war on drugs and being merciless with offenders, patterns of behaviour which generate crime can be eradicated. This political movement is based upon political self interest.

It attempts to tie the hands of the judiciary in their dealing with drug offences so that sentences become ever larger and incarceration becomes the only available option. Courts in Ireland, in Canada and Australia have consistently expressed the view that drug traffickers must find out that they operate within a legal environment which is hostile to their trade.[3] At the same time there is a growing realisation that warehousing offenders in institutions which merely maintain their habits, or in some cases reinforces them, does little against what should be an ultimate aim of attempting to turn offenders away from the disastrous pattern of addiction to drugs. In *The People (DPP) -v- MacEntee*[4], for example, the Court of Criminal Appeal accepted the fact that the defendant:

> Was a person who, while he traded in misery, was a victim of the system himself in that he was a heroin addict and that his activities were at least in part directed towards feeding his habit.

Irish courts have struggled, as have courts everywhere in the western world, with the concept of drug addiction as mitigation. Differences have been drawn between the cold blooded non-user of drugs and those who commit various crimes in order to finance their needs.[5] There is a sense, however, of the courts being overwhelmed with pleas of addiction as a mitigating factor.[6] The following statement of principle, enunciated in Australia by King CJ, appears increasingly dominant:

> There is a limit, and a very strict limit, to the extent to which leniency can be extended to an offender by reason of his own addiction..however sympathetic one feels to a person who has allowed himself to get into that predicament, the duty to the community, to protect the community against the spread of the drug evil, must predominate...This court cannot allow a situation to develop in which the contracting of an expensive habit of drug addiction becomes a licence to commit crime.[7]

There is a feeling, in reading the law reports, of courts everywhere responding to the criminogenic effects of drugs from the point of view of the public, where the personal circumstances of the offender play a secondary role.[8] Ireland has recently seen a twenty percent drop in the overall crime rate. In England and Wales the most recent statistics indicate a nine percent drop.[9] The cause for the drop in Ireland would be the subject of much speculation but as little informed debate as possible. A huge rise in economic prosperity leading to general building works which spread that prosperity into deprived areas may be one factor. Another factor may be Ireland's unique laws on the seizure of criminal assets. Another possible factor is the break-up of the gang which made the passage of this law easier. More on this later.

The purpose of this article is therefore to examine the opposing trends of the courts being used as deterrent weapons in the fight against crime and the belief that addiction, or dependency, is itself the engine that drives the crime trend.

Criminogenic Effect

Crime

Studies from the United States have indicated that in comparison to non drug using offenders, severe drug users tend to commit fifteen times as many robberies, twenty times as many burglaries and ten times as many thefts.[10] Active drug use accelerates crime by a factor of between four and six, with a crime content that is at least as violent, or more so, than that of non-drug using counterparts. These studies were of heroin users, but such research as has been done on crack-crime statistics indicate a similarly high or even higher criminogenic effect than heroin related crime and a definite increase in violence.[11] Two leading American experts write:

> Empirical studies of the association between drug use and crime provide an appreciation of the enormous impact drug abuse has on crime. Indeed, the extensive research on the relationship between drug abuse and crime provides convincing evidence

that a relatively few severe substance abusers are responsible for an extraordinary proportion of crime... Drug-dependent offenders generally lead lifestyles manifested by hedonistic, self-destructive, and antisocial behaviours; they also have problems related to poor interpersonal skills, a lack of job skills, dependency on others, and frequent conflict with criminal justice authorities... Offenders involved in the regular use of hard drugs or polydrug abuse are typically at high risk for recidivating after release from the criminal justice system... Although a large proportion of the nation's offenders lead lifestyles associated with problems of drug abuse, only a small percentage receive treatment while in the criminal justice system.

In Ireland the prosecution rate for drug offences, such as possession of controlled drugs or possession for the purpose of supply, has increased ten fold since 1973 to date. The latest research by the Gárda Síochána has indicated that of approximately nineteen thousand indictable crimes (in our system essentially an indication that these are more serious) perpetrated between September of 1995 and August of 1996, twelve thousand were committed by drug addicts.

One addict was alleged to be responsible for one hundred and forty seven detected crimes with the corresponding highest non-drug using offender achieving only thirty three.[12] Experience indicates that the vast preponderance of this problem is due to heroin users or to people who are predominantly heroin users, but who may, in desperation, reach for a wide range of other drugs in substitution.

In the 1970's Dublin began to experience a heroin problem. Only the most foresighted warned against the consequences of ignoring it. They were ignored. In 1979 an explosion of street level crime was the consequence of the problem becoming an epidemic.[13] Criminal activity in Dublin runs at a level approximately three times greater than for the rest of the country.[14] The result of this is that now one can reasonably estimate that between two thirds and four fifths of all street level crime is generated by drug addiction.[15] The statistics show the results. In 1978, seven hundred and three robberies were recorded. This was an increase from five hundred and fifty in 1975. By 1983 the figure had shot to two thousand, one hundred and seventy eight and has only fallen, by about a fifth, in the last twelve months.

There were thirteen thousand burglaries committed in Dublin in 1975 and they are now running at around thirty thousand. Between 1973 and 1991 indictable crime increased by fifty six reported acts. Stealing, as an overall category of crime, has doubled over eighteen years. From 1973 over a period of eighteen years robbery has increased in levels of commission by more than four times and burglary by almost six times. There is a direct relationship between these increases and drug abuse. With the arrival of heroin in Dublin and its growth into an epidemic the sudden

upward spiral in crime statistics indicates a parallel beyond argument.[16]

Poverty

Apart from a connection between drugs and crime there is also a connection in Irish society, and in Dublin in particular, between drugs and poverty. For the first time setting has come centre stage in a consideration of the drug problem and Irish drug policy is moving away from regarding drugs as being an independent force for evil operating, more or less, in a social vacuum.[17] In the first report of the Ministerial Task Force on measures to reduce the demand for drugs[18] the authors noted that submissions from local groups consistently:

> Underlined the same underlying causes of problem drug use as had already been identified by the group, i.e. social disadvantage/exclusion, characterised in high levels of unemployment, poor housing conditions, low educational attainment, lack of recreational facilities, etc.[19]

In Dublin, studies between 1971 and 1996, indicate that serious drug problems are not randomly distributed in geographic or socio-economic terms, but cluster in neighbourhoods characterised by poverty and general disadvantage. The complex package of personal difficulties including educational disadvantage and unemployment cannot reasonably be attributed to drug abuse alone.[20] In previous generations those excluded may have turned to alcohol. Experience indicates that this was probably so. It is a judgment value to say that cannabis abuse is one step up from this. Again, experience tends to indicate that this may be combined with alcohol abuse.

When one comes to heroin and cocaine and crack-cocaine one is, however, dealing with substances which have a capacity to enslave people beyond any other known power.[21] In 1997 the Garda Research Unit carried out a survey of drug abusers in the Dublin area.[22] The profile which emerged of the people who come most frequently before the courts on drug charges tends to support the Task Force conclusions. The first offence for the majority, sixty five percent, was a stealing offence of some kind. Ninety one percent of hard drug abusers had left school before they were sixteen years old.

A typical drug user was male, addicted to heroin, aged between fifteen and twenty five, unemployed, single, living with his parents and had a criminal record. A substantial number of participants in the study had not sought any form of treatment in respect of their problem. One half of the respondents admitted to either having sold drugs, acted as couriers or lookouts, or assisted as tasters to check the purity of street drugs. All of these are activities in support of trafficking. Most said that they were involved to support their own drug habit. The Gardaí estimate that a typical drug user in Ireland uses half a gram of heroin five days a week and will spend around ten thousand pounds on drugs during the course of a year.

No one knows the extent to which this pattern will continue. It may change radically. A recent survey in the United Kingdom entitled *Young People On Drugs* in 1998, produced by the School's Health Education Unit, shows that nearly a third of fourteen and fifteen year olds in rural regions have had some experience of trying drugs. The actual figure for rural regions is twenty five percent in comparison to twenty one percent for affluent regions and approximately just under eighteen percent for city dwellers. As with so many things in relation to drugs one wonders where these trends may lead us[23].

Legalisation

The Argument For

Judges can respond to various kinds of crime by a type of tacit legalisation. If, for example, after a hard fought trial in relation to a prostitution offence, brothel keeping or living off the earnings of prostitutes, an accused is convicted and then not imprisoned, but merely fined the equivalent of about one hour's earnings, legalisation has effectively taken place by judicial response.[24] The issue of legalisation should therefore be openly discussed especially within the context of sentencing responses which depend upon judicial discretion as to the view of the crime and the culpability of the offender. In Ireland it has recently been argued that we have been engaged in a war against drugs that has failed. The author of a recent polemic writes:

> I am arguing that it is wrong. I regard prohibition as ineffectual, irresponsible, and illegitimate. It is ineffectual because it is falling far short of its objectives; it is irresponsible because it is contributing directly and indirectly to the creation of greater social problems than those which it is directed against; and it is illegitimate because it employs incarceration and other criminal sanctions in an improper and excessive manner.[25]

Tom Murphy, a lecturer in criminal and constitutional law in University College Cork, seems to believe that the heavy consumption of drugs arises from the criminal sanction imposed on it by society. No authority is cited for this view. He states that heavy consumption "is by no means an inevitable consequence of initial use". He claims it is due to the social 'setting' and the individual 'set' that will dictate whether initial drug use will lead eventually to addiction. He claims that heroin and cocaine are not dangerous per se, but can be consumed as 'lifestyle choices'. It is argued that destructive drug abuse is found only where there is prohibition. Explicitly, in the text, he states:

> Further, Wilson is referring to a type or style of 'heavy consumption' found only under a prohibitionist regime, where regular users' lives are necessarily governed by their habit 'temperance, fidelity, duty, and sympathy' are under far greater threat when the law of the State criminalises otherwise voluntary activity.[26]

The Argument Against

One is disturbed to find an absence of any studies which lend credence to this view. One tends to wonder how much in touch with the reality of drug abuse or indeed with commonsense its author is. Just look at his argument. Heroin is unlawful and therefore the price of heroin is high. People will choose, of their own free will, either to consume a lot of heroin or very little. It is up to them, and not a factor of their own personality and the relationship of physical interdependence which can grow up with use of this drug.

If drugs were legal, then heroin might be bought cheaply. This would induce people who use heroin to use it in a way so as not to become dependent. Because heroin is illegal it is expensive. Therefore people have to commit crimes to gain the money to fund their habit.

The argument is nonsense because if one chooses to commit crimes of violence to fund a drug habit, one therefore chooses the abuse of the drug over the normal dictates of conscience not to abuse other people in society. Yet that abuse by drug users continues to an extreme level.

No one we have come across in Circuit Court 24 in Dublin, with a dependency on these substances has been happy about it. We believe that that would be so whether or not they were being prosecuted for drug pushing or robbery or whether they were simply engaged legally in destroying their own lives and those of family members. Their unhappiness seems to us to stem from drug abuse. At the level of reportage the memoir of Christine F.[27] and the memoir left by the cocaine addict M. Ageyev entitled *Novel with Cocaine*[28] indicates the extraordinary depths to which the abusers of dependency inducing drugs are driven to uphold what Murphy would have us believe is a 'lifestyle choice'. He quotes Krivanek as apparently disabusing us of the notion that cannabis can act as a gateway to the use of cocaine and heroin:

> ...What the general public and some professionals often overlook is the fact that involvement with one drug does not necessarily mean progression to the next one. Virtually all marijuana users had earlier tried alcohol or cigarettes, usually both; but only a percentage of alcohol and cigarette users [about forty five percent] go on to use marijuana. A tiny fraction of [marijuana users], some three percent, then go on to try heroin.[29]

The Scale of the Problem

Figures which have been produced at the trial of three gang members so far sentenced, in relation to what has become known as the Greenmount Gang, indicate how enormous is the abuse of cannabis resin within Irish society.[30] Over a period from April, 1994 to October, 1996 the Greenmount gang imported approximately 41,000 kilos of elicit goods. Attempting, as best one can, to take away the weight of the armaments imported and the small quantity of cocaine included in the shipments, and the weight of the packing itself, one comes to a minimum figure of around 15,000 kilos of cannabis resin imported by this gang alone per annum.

If one in thirty three, or thereabouts, of cannabis users go on to the abuse of cocaine and heroin it is perhaps a fair indication of why we continue to have a problem of the dimensions which we do in this country. Figures gathered over the last ten years from unsmoked hand-rolled cigarettes containing cannabis resin indicate that approximately .1 of a gram is the amount which a marijuana smoker will normally use.

These figures indicate an annual consumption from the Greenmount Gang alone of well over one hundred million cigarettes. Irish society already has tremendous problems with alcohol abuse. Marijuana abuse on a long term basis leads to an amotivational lifestyle syndrome which causes particular damage to the abuser and to his family. It is very difficult to argue against the use of any drug where it is of therapeutic benefit. One still awaits evidence of an increase in human happiness where such drugs are available.

The Imprisonment Binge

The latest available figures (1995) indicate that, per one hundred thousand of the population, Ireland has fifty five people in prison. This compares favourably with England and Wales (1997) at one hundred and twenty and remarkably favourably with the United States at six hundred and fifteen. The rate for Northern Ireland is one hundred and six per one hundred thousand (1995). Only Russia and Beylarus have higher figures than the United States. Canada, sharing the North American continent, has only one hundred and nineteen persons per one hundred thousand of the population in imprisonment (1994).[31]

There is no room for complacency in Ireland. One major new prison is due to come on stream by the millennium. The pattern has been for such prison space as we have to remain full. Judges must not allow themselves to be pressurised into engaging in what would amount to merely a war of attrition against persons convicted of crime. Crime has become a political vote catcher.

With that phenomenon has come a responsibility among the judiciary in discussing it and in promoting responses designed to combat it. Most people convicted of a criminal offence in most Western countries do not go to prison. The exception is the United States where seventy percent of all offenders convicted of a felony in State courts, amounting to around nine hundred thousand in 1992, are sentenced to some form of imprisonment.

These include four fifths of those convicted of violent crimes, two thirds of those convicted of property felonies, three quarters of those found guilty of drug trafficking and sixty two percent of those convicted of drug possession.[32] No figures are available for Ireland, but in England and Wales the 1995 figures disclose that of approximately three hundred thousand people sentenced for indictable offences about one fifth were sent to prison; about one third were fined; and about twenty eight percent were made serve some form of non-custodial sentence.[33] Both the Council of Europe, the Canadian and the United Kingdom approaches to sentencing are in favour of the use of imprisonment only where the offence is so serious that it merits custody or where it is necessary, by reason of the violent or sexual nature of the offence, to protect the public.[34] As a matter of practice this has been the Irish approach to sentening and the one recommended by the Whittaker Report after anxious consideration and wide consultation.

Lenient Judges?

There is a close alliance between media and political interests. Surveys are propounded apparently with a view to showing that the general public regards judicial sentencing as far too lenient. These are often predicated, however, on the basis of crude and loaded questions.[35] Where in-depth surveys are used, and questions are open-ended, the results differ. The more knowledgeable people are in relation to the exact circumstances of the offence and the background of the offender and the possibility of reform, the more likely they are to agree with the sentence passed by the court. In 1991 a sentencing exercise was carried out in Delaware using a representative sample of four hundred and thirty two persons within the community. They were given twenty three hypothetical cases ranging from theft, to rape, to armed robbery.

On an initial view seventeen out of twenty three would have been incarcerated by the group with probation given to the remaining six. After considering information on prison overcrowding and

five alternative sentences (intensive probation, restitution, community service, house arrest and boot camp) they met in small groups to discuss the sentence. Only five out of twenty three offenders were then sent to prison, the other eighteen being given alternative sentencing options. Those sent to prison were four violent offenders and a drug dealer with prior convictions.[36]

Other Options

Options available in this country, as alternatives to imprisonment, include a community service order involving people engaging in public works on behalf of the community (which usually benefits them as well as bringing them into contact with at least the fact of other people's lack of privilege) and worthwhile supervision from a probation officer. In addition, probation is an option, though a softer one.

During the time when Mr. Justice Moriarty was the main sentencing judge in the Circuit Court intensive probation modules were developed which involved close supervision and the requirement to attend work and educational courses. Statistics from England and Wales indicate that three quarters of community service orders are carried out successfully without a further conviction during the time of the order. Recidivism rates are certainly no worse than in the case of imprisonment and some are better.[37] Fining and restitution orders, based more on ability to pay and willingness to admit fault, than on the civil standard of compensation, are also options.

A Wave of the Future?

In the United States the prison population has increased about four fold since 1980 but, despite this incarceration binge, there has been no resultant diminution in crime figures. In 1980 the USA had around 0.4 million prisoners, now it is around 1.7 million with a further 3.5 million on some form of probation. The fact that crime has only dropped by 5% in the last five years has led to a re-think of incarceration in some states. Offenders who have committed less serious drug offences or property offences motivated by a drug addiction are given the option early on in their appearances before the courts to attend before a Drug Court.

The range of offences and the type of offender chosen is problematic. Commercial or medium grade pushers have no place in such a programme. Addicts driven to crime by disadvantage and dependency are their target. Instead of pleading guilty or not guilty, the offender is given the option of a potential non-custodial disposal if they co-operate with probation, a drug treatment programme and remain free from other offences. Families are involved in the process. Court appearances are frequent with a judge positively congratulating the subject as, during the progress of their appearances, urine analysis shows them to remain drug free. A relapse into taking the non-prescribed drugs leading to the commission of offences, operates as an automatic exclusion from the programme. Exclusion means that the case then progresses in the ordinary adversarial way with the consequence of a custodial sentence waiting at its culmination.

Intensive probation, drug courts, community service and probation all require funds. Far less funds, however, than imprisonment. In Ireland the staff to prisoner ratio is extremely high and, including administration, tends almost towards a one to one basis.[38] In Russia and Beylarus imprisonment traditionally has made money for the authorities as prisoners have been used as a source of labour. In the United States the costs of imprisonment are estimated at forty billion dollars a year[39], but staff to prison ratios are far less than in Western Europe.[40]

Drugs have been central to the enormous growth in the United States prison population. During the period 1985-1995 the number of sentenced prisoners in State prisons more than doubled. The increase attributable to offences against drug laws was four hundred and seventy eight percent. The level of crime continued to creep upwards. Vivien Stern writes:

> This has led to mandatory minimum sentence for drug offenders, however minor the offence. When federally prosecuted, a sentence of at least five years is required for possession of more than five grams of crack cocaine with intent to distribute. One year in prison without parole is the sentence for anyone convicted of selling drugs within one thousand feet of a school. In Michigan the mandatory sentence for possession of less than a pound and a half of cocaine with intent to distribute, even for a non-violent first offender, is life without parole... In 1993 it was reported to the U.S. Congress that judges of every federal circuit had adopted Resolutions against the mandatory minimum sentences for drug offenders... Recent developments in the United States penal policy suggests that the trend is not going to be reversed in the near future. The 'three strikes and you're out' policy means that anyone convicted of three serious or violent felonies will be sentenced to life imprisonment on the third. The expression comes from baseball. The law was first introduced in Washington State in 1993. In 1994 it became federal law and to date there are such laws in twenty four States.[41]

The Criminal Justice Bill, 1997, currently making its way through the Oireachtas, provides that where a person is found guilty of controlled drugs with the market value of ten thousand pounds or more with intent to supply these, he should be sentenced to a minimum period of ten years imprisonment. Judicial discretion is, however, retained by allowing for a sentence less than this period where the mandatory minimum would be unjust in all the circumstances,[42] including an early indication of an intention to plead guilty and material assistance in the investigation by the accused. One wonders at a provision such as this. It makes a great deal of noise, but essentially changes nothing by allowing the court to 'have regard to any matters it considers appropriate' to reduce the sentence below the mandatory minimum.

Valuations are notoriously flexible and have led in England to a nation-wide table of values.[43] Furthermore, politicians should be made to wake up to the fact that a person in possession of millions of pounds worth of drugs may be a pathetic donkey figure two or three steps removed from the criminal godfathers. An analysis based on realism is central to the judgment of McGuinness J. in *Gilligan -v- Ireland and the Attorney General*[44] in relation to the facts. Of course, the fact that the law upheld there, of which more later, seems to be a good idea, does not by any means mean that it is constitutional. There is at least a judicial wariness of copying the

mistakes made by other countries. We must be wary in Europe of copying the mistakes of other countries.

Is It Always A Sentencing Matter?

Good Intentions

The sentencing scheme of the 1977 Misuse of Drugs Act was completely different to that of any other criminal statute. People often wondered why probation and medical reports were necessary in respect of drug offenders. They were not called for in legislation dealing with any other criminal wrong. These reports were ordered automatically, and by statutory compulsion up to the implementation of the Misuse of Drugs Act, 1984. The reports then became an option for the trial judge. All of the medical reports given in practice between 1977 and 1984 were in short form, apparently prepared by a prison doctor, and simply stated that the prisoner did not suffer from a psychiatric illness and that apart from an addiction problem, he would otherwise enjoy good health.

The probation reports went into considerable detail on the prisoner's background and suggested alternatives to incarceration. The true statutory basis for these reports, however, was that the medical report should have been a consideration of what treatment was appropriate for the individual convict's drug dependency. The probation report was designed to consider vocational and educational needs whereby rehabilitation might commence. On receipt of these reports the Legislature clearly contemplated that some form of treatment was to be considered as an alternative to simple incarceration. It is inherent in the scheme of the Act that there was abroad at this time a philosophy that drug dependency could be cured by appropriate treatment and that a prison setting for drug offenders was not necessarily the correct answer.

An order under section 28 of the Act could involve the court releasing the offender subject to conditions, including attending at a treatment centre or remaining under the supervision of institutions or bodies which, the Act contemplated somewhat optimistically, might be available to persons in a home setting to assist in their cure and rehabilitation. Within section 28 was the possibility as well of sentencing a person to a custodial treatment centre for up to a maximum of one year. These sections remain in force, but over the period of the twenty one years that the 1977 Act has remained in force only two persons have been sentenced to custodial treatment by an Irish court.

By statutory instrument no. 30 of 1980 the Central Mental Hospital in Dundrum was designated the custodial treatment centre. In 1989 a judicial review forced Dundrum to declare that it was able to receive convicts for custodial treatment.[45] The lady applicant had been convicted of drug pushing by reason of drug dependency, was suffering from the AIDS Virus and therefore only had two years to live. Having spent a year in the Central Mental Hospital she then died. In 1990 Roe J. sentenced one other offender to

Dundrum. There now follows a slightly edited version of section 28 which makes the policy of providing treatment as an option in addition to simple imprisonment apparent:

> 28(1)(a) Where a person is convicted of an offence under section 3 of this Act ... or an offence under section 15 or 16 of this Act, or of attempting to commit any such offence [Amd. s.14] [if, having regard to the circumstances of the case, the court considers it appropriate so to do, the court may] remand the person for such period as it considers necessary for the purposes of this section (being a period not exceeding eight days in the case of a remand in custody), and request a health board [Amd. s.14] [probation and welfare] officer or other body or person, considered by the court to be appropriate, to -
> (i) cause to be furnished to the court a medical report ... with such recommendations (if any) as to medical treatment ... appropriate to the needs [Amd. s.14] [arising because of his being dependent on drugs] of the convicted person, and
> (ii) furnish to the court a report in writing as to the vocational and educational circumstances and social background of the convicted person together with such recommendations (if any) as to care ...
> (2) Having considered the reports furnished pursuant to subsection (1) of this section, the court shall, if in its opinion the welfare of the convicted person warrants its so doing, instead of imposing a penalty under section 27 of this Act, but subject to subsection (8) of this section either -
> (a) permit the person concerned to enter into a recognisance containing such of the following conditions as the court considers appropriate having regard to the circumstances of the case and the welfare of the person, ... (involving)
> (i) supervision of a health board ...
> [(ia) to receive visits and permit visits by ... the supervision of a body, an officer of that body ...
> (ii) medical treatment or other treatment recommended in the report,
> (iii) ... to attend or remain in a hospital clinic or other place specified ... for a period so specified,
> (iv) ... attend a specified course of education, instruction, or training, ...
> (b) order that the person be detained in custody in a designated custodial treatment centre for a period not exceeding the maximum period of imprisonment which the court may impose in respect of the offence to which the conviction relates, or one year, whichever is the shorter.

Therapy Outside Prison

The idea of a therapeutic community as a means of rehabilitation and as an alternative to simple imprisonment is, at least within the criminal justice system in Europe and America, an entirely twentieth century one. The Boys' Republic set up by Homer Lane in 1907 seems to have been the first of these. This was a juvenile offenders institution where close supervision was replaced by an emphasis on individual responsibility, accomplishing tasks, with free choice and self expression developing the capabilities of the residents. In 1910, small group therapy as part of psychiatry was developed and promoted by the psychiatrist J.L. Moreno.

The model for many narcotics programmes, Alcoholics Anonymous, was started in 1935 by two alcoholics who started a three year process of self-recovery. In the same year the first of the narcotics farms was set up at Lexington, Kentucky, with another introduced at Fort Worth in Texas in 1938. In 1940 therapeutic community methods were introduced into institutional psychiatry and in 1958 the Californian Therapeutic Community, which led the way in the treatment of substance abusers, was begun. Its founder, Charles Dedrick, was an AA graduate who had discovered and developed techniques of therapy in discussion groups with both alcoholics and heroin addicts[46].

The Lexington and Fort Worth models experienced poor results with many voluntary patients failing to remain, high relapse rates (due perhaps in large part to an absence of transition programmes in moving from a custodial setting into freedom). The model for our Act seems to have been the Narcotic Addict Rehabilitation Act enacted by the Congress of the United States in 1966. This made Court treatment orders a specific alternative to incarceration. Screening was required in order to determine if the treatment could be of benefit. Similarly, under our 1977 Act, when a judge was minded to sentence an offender to custodial treatment a further report was required, this time from sending the offender for a short time to the institution which would then report back on his or her suitability.

The statutory emphasis seems to have been on commitment to the programme and a lack of disruption. In the United States Professor Robert Martinson published a famous/infamous (depending on your point of view) paper in *Public Interest* entitled: *What Works? Questions and Answers About Prison Reform.* The conclusion of the author, on review of the literature of the hundreds of custodial treatment attempts in the United States was that, with few and isolated exceptions, nothing worked. For ten years this led to the down-grading and undermining of custodial treatment efforts.

It seems to have been the pressure of numbers of addicts coming into the prison system, uncontrolled recidivism and a basic belief that simply warehousing persons and ignoring the difficult challenge of rehabilitation was short-sighted, that has led to a resurgence of attempts to re-think treatment as a sentencing strategy in the United States.[47] In Ireland the Ministerial Task Force has made recommendations which include the development of state-run treatment facilities in institutions such as hospitals; the provision of additional state funding to voluntary agencies; and the involvement of local communities in the provision of treatment services. While the Task Force, optimistically, puts forward the view that a large proportion of drug misusing offenders would be likely to avail of treatment, if it was offered, this clashes directly with the finding of the Task Force that approximately half of drug takers in Mountjoy Prison are believed to have no desire to receive treatment for their addiction.

Does It Work?

The authors of this article cannot claim either the expertise or knowledge of the relevant literature which would enable anything other than tentative discussion material to be advanced. Within the expert literature there is a groping towards the identification of criteria which distinguishes a successful therapeutic community from one which can only show poor results. There is a call for a more solid theoretical grounding than is now available to explain successes and

failures and guidance as to the application of therapeutic communities in differing contexts, including voluntary admission and judicial incarceration.[48]

Most treatment programmes tend to follow certain broad outlines. There is an initial programme of induction which assesses the genuineness of the addict's desire to participate in rehabilitation. If a sufficient commitment is shown the addict is admitted to the residential programmes. There is no uniformity as to the length of time that is needed for an optimum result. It seems to vary between six and fifteen months.

Within that time group therapy, unexpurgated confrontation with the addict and his behaviour, rewards and deficits based upon clear cut rules, and a transition with more individual responsibility coupled with screening programmes and an absolute prohibition on the consumption of narcotics, seem to be characteristic.

Family and support groups are closely involved. A final phase avoids sudden re-admission to the community in favour of a transition which seeks out residence (changing address can be very important) and work opportunities and which tries to put into place skills of coping learned within the community. If one is again, tentatively, to seek out factors which tend towards the success of a therapeutic community, one might offer the following. Indispensable to success is a desire for change in the addict. A realisation of the destructive nature of substance abuse, the harm done to others and an acknowledgement of the reality of current and past wrongs seems to clean the slate and prepare for a way forward. A rule of life based solely upon the truth seems central.

Many addicts appear to have moved away from reality based perceptions and into beliefs based upon their internally created self-justification. In the treatment modes, the role of former addicts seems to be a feature of the more successful community. Perhaps they bring a convert zeal while at the same time providing a concrete role model, the benefit of genuine experiences and what Carl Jung regarded as central to any form of psychotherapy: what you are is far more important than what you teach. Real leadership within the community provides the basis for the resolution of quarrels and a reference point for decision making.

The limited historical survey has shown that it has been extraordinary individuals, overcoming extraordinary problems, and who may have repented of past wrongs, who have founded and directed movements that have been of enormous benefit in alleviating one of the great curses of the modern world:

> If charismatic leaders are an integral part of the TC structure, the replication of effective TC's would be extremely difficult to achieve, since charisma is unique and idiosyncratic. If, however, particular TC structures generate charismatic leaders as an unavoidable feature of the TC experience, the objective would shift to copying those structures with charismatic leaders... these are significant issues, yet discussions that explicitly address them are scarce. The lack of theoretical grounding also leads to sharply divergent perceptions...[49]
> The studies in the United States indicate that the longer a person stays within a therapeutic community the higher becomes their chances of avoiding re-offending.[50] The Coolmine Therapeutic Community claim a success rate of around forty five percent of those who have completed their induction programme and up to seventy percent of those who have completed the full two year programme.[51] In this context, success is measured by freedom from drug abuse for life.

Treatment Within Prison

The movement of offenders who have been incarcerated into a prison-based treatment regime is, in this country, entirely a matter for the Executive. The pursuit of stringent rehabilitative measures and apparent success in following that course could, however, be a strong influencing factor for a sentencing review or could be a condition imposed on sentence upon which a review is predicated. In the United States a five year study of the 'Stay'n Out' Prison Therapeutic Community indicated that these can be effective in reducing recidivism rates for persons who stayed within a prison programme for the full nine to twelve months and were then released on parole. A figure of almost eighty percent for males and ninety two percent for females was achieved for no parole violations.52 Again, attempting to grapple with factors which seem to influence success the authors of this study offer the following conclusions as to what can make for a successful in prison treatment programme:

> Among the most important conditions are:
> (i)An isolated treatment unit, (ii) motivated participants, (iii) a committed and competent staff, (iv) adequate treatment duration, (v) an array of treatment options, (vi) co-operative and supportive relationships with correctional staff and administration, and (vii) continuity of care that extends into the community. The guidelines above for successful correctional treatment, however, are merely suggestive because few studies have linked the nature of the treatment that clients receive to treatment outcomes...[53]
> In the United States the National Development and Research Institutes have evolved a set of guiding principles as to how to rehabilitate drug abusing offenders within a custodial setting.[54] In Ireland progress in this area was held back by what seems to have been a determination to ignore the problem of drug abuse within prisons. Our approach is now to confront this problem. Approximately seventy percent of inmates in Mountjoy Prison, at any given time, have a history of drug abuse.[55] Most prisoners enter the system with a developed habit. The number of those who commence taking drugs in prison is believed to be quite small.

A large amount of drugs are therefore smuggled into Mountjoy Prison to feed the habits of its inmates. Responses include increased screening of visits and the use of surveillance equipment and dogs. The 1997 Ministerial Task Force Report on Drugs rightly stated that a prerequisite to any successful treatment programme is for drug abusers to move into a drug free environment.[56].

There is a move towards dealing with this problem. Current treatment arrangements in Mountjoy for prisoners who misuse drugs include:

(a) A fourteen day detoxification programme, offered on all committals to prison.
(b) An eight week intensive therapy programme which can deal with

twelve offenders at a time, and which is a follow on to the detoxification.

(c) A new drug free unit opened in Mountjoy in 1996 which can accommodate ninety six prisoners, at any one time. Proposals not yet introduced include a graduation system for prisoners who come off drugs, who might thereby go to a more open form of imprisonment with the potential for earlier release as long as they stay drug free. Regrettably, there are no structures in place to ensure that drug treatment services inside and outside the prison are properly co-ordinated. A prisoner, on release, is no longer the responsibility of prison authorities, as regards his welfare.

There must be a formal mechanism to ensure that persons who are released from extremely short term programmes, have the follow up which is shown by all the studies to be necessary. Drug abusers can drift in and out of the criminal justice system and treatment programmes without being forced into a situation where monitoring, with effective sanctions for failure, and treatment backups continue.[57]

A Way Forward

If there is a consensus in relation to the idea of reform of addicts within a prison setting it seems to emerge from the realisation that temporary warehousing of serious offenders with a drug problem leads inevitably to re-offending on release. The availability of a therapeutic community within a prison that has a motivation-based, as opposed to a control-based system of reform, of willingness to confront one's own wrong, true leadership and adequate time to complete a worthwhile programme (six months seems to be a minimum) do offer a realistic possibility of reform.

Experienced practitioners have cautioned, however, that rapidly expanding an existing programme can lead to undermining the quality of treatment. Throwing money at this problem and demanding that large numbers of offenders be admitted to treatment programmes is a recipe for failure. Too much is expected and it cannot be delivered. Moving slowly forward with modest and realistic proposals and attempting to copy the best of the experiences of the models which have worked in other countries, particularly the United States is the way forward. Judges can perhaps respond by considering, in appropriate cases, the foreshortening of deservedly lengthy sentences based upon genuine rehabilitation.

The key without which nothing works is the willingness of the offender to admit that they have a problem, to confront themselves and their behaviour and above all to desire to change for the benefit of themselves and their families. One cannot speak of substance abuse as a disease. A disease will respond to antibiotics no matter what the state of mind of the patient. A substance abuse arises from the entire nature of the person, their involvement with others and their relationship to society as well as the nature of the substance being abused. • *(continued in next issue)*

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1. A version of this paper was delivered by the first author to a recent conference held in Dublin Castle and involved judges from ten European countries, however, the views expressed are entirely and completely those of the author and were not in any way adopted or approved of by the conference or any element of it.
2. Definitions are taken from the Health Research Board. See O'Higgins and O'Brien - *Treated Drug Misuse in the Greater Dublin Area*, HRB, 1995.
3. *R -v- Brisson* 47 CCC (3d) 474; *The People (DPP) -v- Gannon* CCA, Unreported, 15 December, 1997; *The People (DPP) -v- Finlay* CCA, Unreported, 24 November, 1997; *Choon Sien Tee*, A Crim R 181 at 183 (1994).
4. CCA, Unreported, 10 November, 1997.
5. *R -v- Smith* 34 CCC (3d) 97 at 124. See also Fortson - *Misuse of Drugs and Drug Trafficking Offences* (3rd Edition, 1996) 8-21; and Rinaldi - *Drug Offences in Australia* (1986), Vol 1, p 20, who concludes that the main relevance of addiction in the sentencing process is in understanding the offender's prior convictions.
6. *R -v- Lawrence*, *The Times Law Report*, 1 December, 1988; Drug Addiction as Mitigation 147 Scolag 189; *R -v- Gould* (1983) 5 Cr App R (S) 72.
7. *Watson* (1981) 3 A Crim R 254 at 255.
8. See in general *Bellissimo* (1996) 84 A Crim R 465 at 469; *Mangelsdorf* (1995) 83 A Crim R 272. In *R -v- Gervais* 75 CCC (3d) the Court of Appeal of Quebec noted that a drug trafficker may disguise himself as a legitimate business operator and so abuse the fact that he has no previous convictions.
9. See the *Guardian*, April 8th, 1998.
10. Chaiken and Chaiken - *Crime Rates and the Active Offender* in J.Q. Wilson - *Crime and Public Policy* pages 11-29, cited in Inciardi.
11. The relevant papers are cited in Inciardi at page 211.
12. The authors are grateful to Morris P. for drawing these statistics to our attention. The source is Keogh - *Illicit Drug Use and Related Criminal Activity In The Dublin Metropolitan Area* - (Garda Research Unit, 1977).
13. See O'Mahony - *Crime and Punishment in Ireland* (Dublin 1993) 70 and Yates and Flynn - *Smack; The Criminal Drugs Racket in Ireland* (Dublin 1985) Chapter 1.
14. O'Mahony - *Crime and Punishment in Ireland* (Dublin) (1993) 70.
15. Mr. Justice Moriarity, Personal Communications. See the report of the Lord Mayor's Commission on Crime, Chaired by the Judge (December, 1994) 28.
16. Superintendent John McGroarty - Paper Presented to the Forensic Science Symposium on Drugs and Crime, 14 June, 1986, cited in P Charleton - *Criminal Law Cases and Materials* (Dublin 1992) 225.
17. Butler - *The War on Drugs: Reports from the Irish Front, The Economic and Social Review*, Volume 28 No. 2, April, 1997 165.
18. Department of the Taoiseach, 1996
19. Page 33.
20. Butler op cit 162 wherein the relevant papers are cited.
21. McGroarty op cit.
22. *Illicit Drug Use and Related Criminal Activity in the Dublin Metropolitan Area* 1997.
23. For an interesting review with an interview, see *The Guardian*, March 11, 1998.
24. Obviously such response would need to be consistent throughout the judiciary to operate as a kind of tacit legalisation.
25. Tom Murphy - *Re-Thinking the War on Drugs in Ireland* (Cork 1996) 33.
26. Murphy op cit. 42.
27. London, 1980 published as *H: The Autobiography of a Child Prostitute and Heroin Addict.*
28. London 1985, first published in Paris in *Numbers* in the 1930's.
29. The relevant sources are noted in Murphy - *Drugs, Drug Prohibition and*

Crime: A Response to Peter Charleton - 6 (1996) Irish Criminal Law Journal 1 at 8. The article leading to this response is *Drugs and Crime - Making the Connection: A Discussion Paper* - 5 (1995) *Irish Criminal Law Journal* 220.

30. We are grateful to Detective Inspector Tom O'Loughlin for giving us access to these figures which have not been fully or accurately reported in the media.
31. Figures are taken from Vivien Stern - A *Sin Against the Future: Imprisonment in the World* (London, 1998) 31-32.
32. Maguire and Pastore - *Source Book of Criminal Justice: Statistics* (1995) 166 quoted in Stearn op cit. 319.
33. Nacro - *Criminal Justice Digest*, 90, October, 1996 page 7 quoted in Stern op cit 319.
34. The relevant sources are quoted in Stern op cit 310. See also *R -v- Brown* 119 CCC(3d) 147 at 161 (1997) where the Newfoundland Court of Appeal observed that, 'deterrence does not always have to be equated with incarceration, and those who struggle with addiction are unlikely to be deterred by imprisonment however long the sentence'.
35. See in general Stern op cit, chapter 14.
36. See Stern op cit 315-317.
37. The relevant studies are quoted in Stern op cit 320.
38. Source of this statistic is the media, and it therefore should be treated with enormous care.
39. Stern op cit 22 and 287. Interestingly drug courts in Texas and Oregon receive funding for treatment programmes from assets seized by the State from criminals.
40. Stern op cit, chapter 3.
41. Stern op cit 61-63.
42. In Canada a seven year sentence was recently introduced for importing narcotics. On appeal the Canadian Supreme Court held the legislation to be unconstitutional as it constituted a cruel and unusual punishment; *R -v- Smith* 34 CCC (3d) 97. A different view had previously been taken by the British Columbia Court of Appeal; *R -v- Smith* 8 DLR.(4th) 565.
43. Fortson at 232; *Afzal - The Times*, June 25th 1991; Bucknell - *Misuse of Drugs* (1996) para 9.007. In Ireland attempts to appeal alleged over-valuation of drugs by the police have not proved successful; see e.g. *The People (DPP) -v- Gannon*, CCA, Unreported, 15 December, 1997.
44. Unreported, High Court, 26 June, 1997.
45. *ER -v- Ireland and the Attorney General.*
46. Pan Scarpitti Inciardi and Lockwood Inciardi 30-35.
47. *From Reform to Recovery* - Wexler and Lipton Inciardi Drug Treatment and Criminal Justice, 1993 209-215.
48. Pan Scarpitti Inciardi and Lockwood op cit 39.
49. Pan Scarpitti Inciardi and Lockwood op cit 40.
50. Wexler and Lipton - *From Reform to Recovery*, Inciardi op cit. 213.
51. Jim Comberton, Personal Communication. The figures have not been subject to an independent academic review; Shane Butler, Personal Communication
52. The figures are stated in Wexler and Lipton op cit 213.
53. Wexler and Lipton op cit Citing Hubbard, Marsden, Racal et al - *Drug Abuse Treatment - A National Study of Effectiveness* (Carolina, 1989).
54. These are set out in Wexler and Lipton op cit 217-224.
55. In a recent study of Mountjoy prisoners O'Mahony found that within a selective sample sixty six percent of six hundred and fifty inmates were heroin users: O'Mahony - *Mountjoy Prisoners; A Sociological and Criminological Profile* (Department of Justice, 1997).
56. Second Report of the Ministerial Task Force on *Measures to Reduce the Demand for Drugs* (May, 1997) 63.
57. As to the usefulness of this, which is difficult to assess, see *Illicit Drug Use and Related Criminal Activity in the Dublin Metropolitan Area*, 1997, page 29.

Training for Electronic Services

ADEL MURPHY, Training Co-Ordinator

Learning to use a computer can no longer be relegated to the vague list of 'things I must do when I get time'. Computers are becoming considerably cheaper while the volume of legal information in electronic format is constantly growing. All of the major English Law Reports are on CD-ROM. European legislation, caselaw and treaties are accessible electronically while a host of legal digests and references are also available. This is before we even look to the Internet.

Vast quantities of legal information are available on the Internet and are growing daily. Recent decisions of the superior courts of America, Australia and England are but a few of the very valuable sources of information available. The Irish Statutes and Statutory Instruments are currently being put on CD-ROM and should be available in December of this year.

During the 1970's and early 1980's computers were to be found in selective large corporations and institutions such as universities. They were generally very difficult to operate and were mainly used by physicists or mathematicians. IBM introduced their personal computer in 1981 and promoted the idea that a computer was not just the preserve of mathematicians and number crunchers.

The Apple Macintosh was introduced in 1984 and became noted for its ease of use. However computers were still at an embryonic stage in Ireland and virtually unknown to professionals other than computer scientists and large business organisations.

Select libraries introduced a service whereby information could be accessed remotely, for example, an American database could be accessed in Ireland via the telephone lines. Generally this meant the cost of accessing such material was prohibitive and only one or two staff members in a library were specifically trained to use such databases.

The commands had to be learnt and there was absolutely no room for browsing. Essentially not a lot of common legal materials would have been available and where material was available, accessing such information was a lengthy and difficult process.

CD-ROM

As computers seeped into everyday life publishers started to look at the possibility of compiling large quantities of information on disc and using the computer to access such. Thus the CD-ROM was born. The development of the CD-ROM heralded a paradigm shift from the concept of a specialised information desk to the idea that lawyers and other professionals could do their own electronic research.

In the last three years electronic legal publishers have started to use graphical user interfaces. In essence this means that anybody, without exception can learn how to use a computer for electronic legal research. They are no longer the preserve of computer scientists, hackers or NASA code breakers.

A CD-ROM is essentially a compilation of vast quantities of information on a disc. Such compilations are known as databases. There are two types of databases, full text and bibliographic. A full text database contains the full text of the relevant legislation or judgment. A bibliographic database contains references to legislation or judgments. A bibliographic database is less user friendly than a full text database because having found the exact article or legislation you are looking for, you have to find the actual text. However, they can still be extremely useful sources of information.

There are two important reasons for training. Firstly you have to know what each database contains, i.e. the type of material and the period it covers. Secondly you need to know how each database works. Training is available in the form of a general introduction to computers and on legal databases.

Details of the training on offer, including introductory and intermediate courses in Word, the Internet and email are available in the Law Library.

The Law Library also offers courses on how to use the following databases - Jill, OPAC, the Electronic Law Reports, Celex, the All England Law Reports and the LJI. Jill is the law library listing of superior court judgments since 1983. It has recently been upgraded to cater for full text judgments. Judgments will be full text since 1997 onwards.

OPAC stands for Online Public Access Catalogue and is a listing of all the Law Library's Books, Irish Journal Articles since 1991, Statutory Instruments since 1987, Statutes since 1987 and European Court of Human Rights judgments. The Electronic Law Reports and Celex run on the same software which means they can be searched simultaneously. They are full text judgments so the entire Law Reports from 1856 on are contained on CD-ROM. Celex is the database of the European Communities and is full text.

Again it is a full text database so once you have found the relevant legislation you can access that piece of legislation. Training is also available on how to use the All England Law Reports which are full text. The legal journals index is a bibliographic database which contains information on financial information, the English current law digest and contains an index to English and Irish journal articles and cases reported in English newspapers. The above databases are available on the Law Library network. Having a computer at your disposal and not being able to access the information is like having a Jaguar outside your front door but not knowing the clutch from the accelerator. Computers and databases have become a lot more user friendly in the last five years so there has never been a better time to learn how to use computers. Remember that the usefulness of electronic materials is directly proportional to the skills of the user. ●

1798 Ecumenical Service

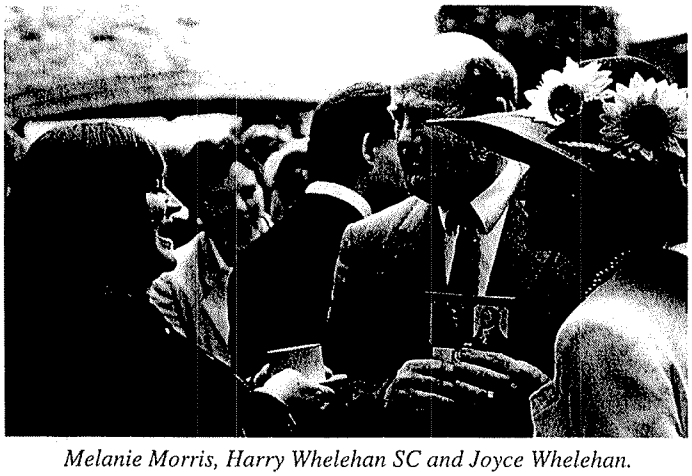
The Bar Council held an ecumenical service in St Michans Church on Sunday 17th May to commemorate members of the Irish Bar who took part in the 1798 rebellion. An Taoiseach, Bertie Ahern, TD, the Lord Mayor of Dublin, John Stafford and Her Excellency, Ambassador Jean Kennedy Smith attended the service along with members of the Bar, judiciary and local parishioners. Mr Justice Frederick Morris, President of the High Court and Mrs Justice Catherine McGuinness gave the readings while the Chairman of the Northern Ireland Bar, Mr Brian Fee, QC and the Chairman of the Irish Bar, Mr John MacMenamin, SC led the reading of the intercessionary prayers, followed by Emily Egan BL and Rory Brady SC representing the Bar Council. A booklet entitled *1798 & the Irish Bar* was launched at the reception following the service. This was commissioned by the Bar Council and gives a concise history of the widespread involvement of barristers on both sides of the insurrection.

Mrs Justice Catherine McGuinness, Her Excellency, Ambassador Jean Kennedy Smith and the Lord Mayor, Mr John Stafford.

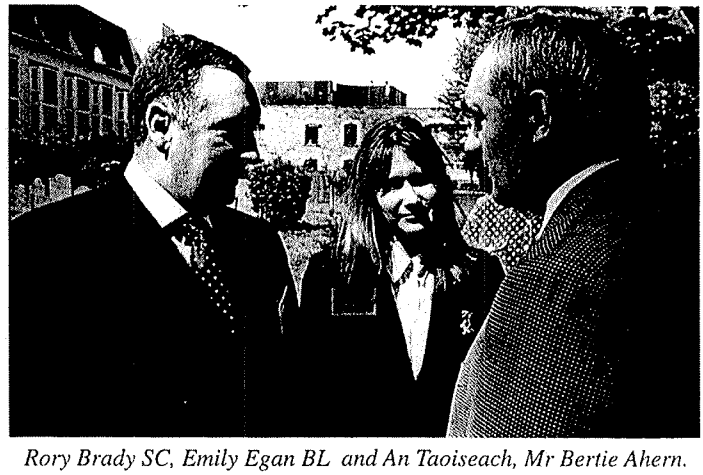
Canon David Pierpoint and Father Micheál Mac Gréil.

Dr Martin Mansergh and John MacMenamin SC, Chairman of the Bar Council.

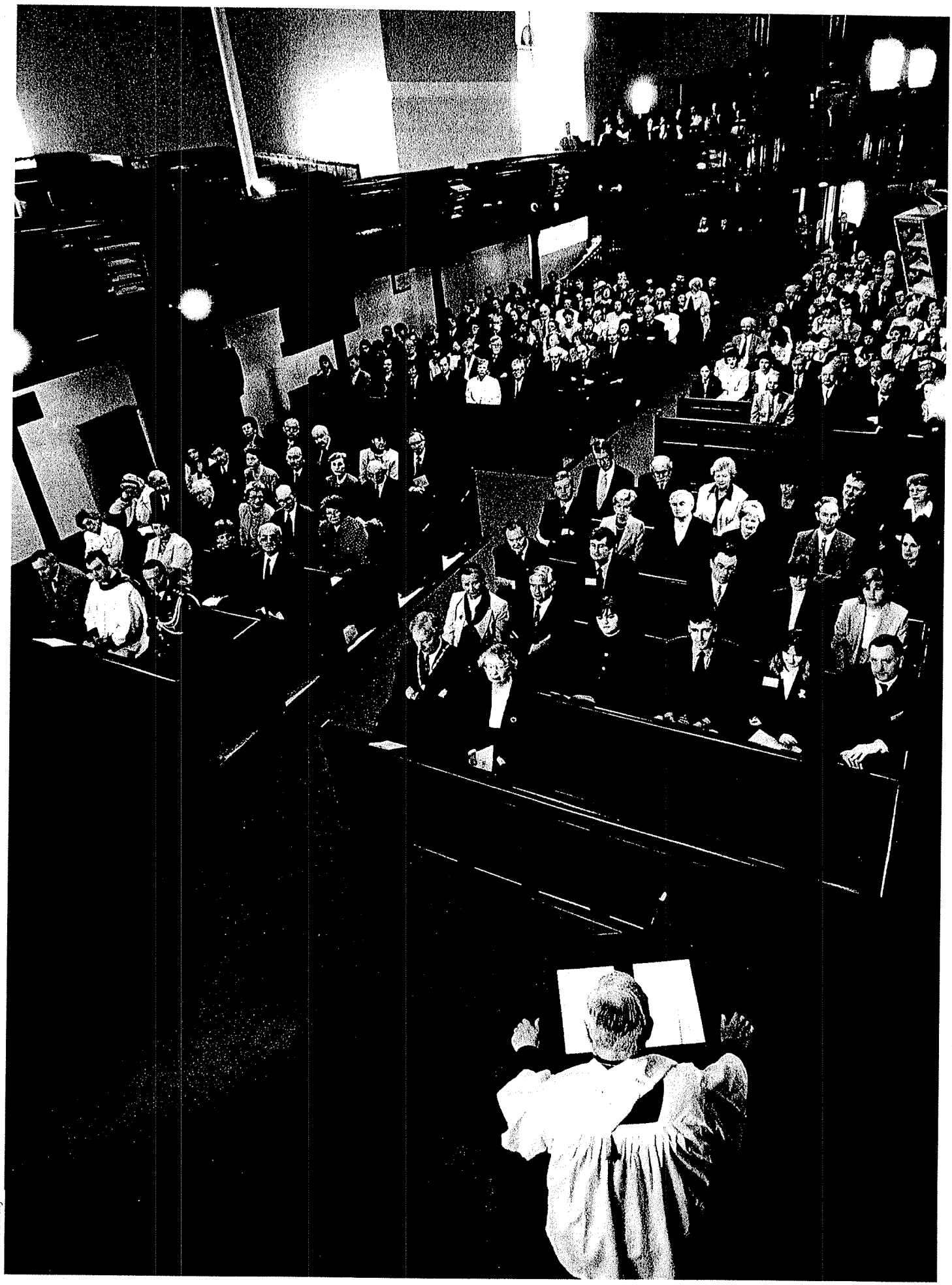
An Taoiseach, Mr Bertie Ahern, the Lord Mayor, Mr John Stafford and Canon David Pierpoint.



Melanie Morris, Harry Whelehan SC and Joyce Whelehan.



Rory Brady SC, Emily Egan BL and An Taoiseach, Mr Bertie Ahern.



Paul McCarthy

Rex -v- Casement

An important new acquisition

The 1916 trial for treason of Sir Roger Casement in the court of the Lord Chief Justice of England remains one of the great classics of British and Irish legal history. The best popular treatment of the trial is probably that of Montgomery Hyde in the Penguin famous trials series, currently available in a new edition. The major source for Hyde's work were the Gavan Duffy papers held in the National Library which, prior to this important new acquisition by the King's Inns, was without question, the best available record of the trial.

But now a second record of the trial has come to light in Ireland, which surpasses this. It is in the form of a full set of original trial papers, bound in a thesis style volume and containing a complete verbatim record of the whole trial and appeal. The record is transcribed from the short-hand notes, taken throughout the hearings, by the firm of Chever & Co. Their work was of an incredibly high standard and they managed to catch almost every word and breath of the trial, even the cries of the chief usher, the selection of the jury and the pronouncements of the King's coroner. The volume appears to have been compiled from the trial papers of Travers Humphries, one of the juniors to F.E. Smith, KC, in the prosecution of Casement. His name is pencilled on each set of brief papers that go to make up the volume.Their historical importance is clear. It shows for example that Sergeant Sullivan's performance through out the trial was far better than many of the Casement biographers credit him with. His final speech to the jury is in fact quite stunning and the interruptions from the bench and the prosecutions, just before Sullivan's nightmare collapse, do not appear in this record to be fair or justified.

The volume also contains a full exhibit list along with some of the exhibits themselves in the form that they would have been presented to the jury, including the list of codes found on Casement to be used for ordering additional guns and ammunition from Germany. It also includes his railway ticket from Berlin to the port of Wihelmshaven from where he sailed for Ireland. There is a rare photograph of members of the Irish Brigade in their smart new uniforms as designed by Casement. Another photograph depicts a poignant eve of the Rising image of a lonely RIC man guarding the beach at Banna Strand where Casement landed.

Quite apart from their historical importance the new acquisition has an obvious attraction to students and practitioners of the art of advocacy. For one of the finest advocates in the history of the law was leading the prosecution and here, word for word, is F.E. Smith's brilliant opening statement to the jury.

There is page after page of controlled cross examination by the best barristers in the business and for those who falter in the art of examination in chief, pages of the best advocacy of this type ever to be gathered together. Also noted are the closing speeches of both F.E. Smith and Sullivan which must count as model examples of this art. Even though many years have passed since the trial, the grace of Sullivan's junior, Artemous Jones, in taking up the closing speech of Sullivan after his dramatic collapse, catches your breath.

The volume was donated to the library by John Boland, a non-practising barrister of the Kings Inns who was encouraged to donate it by our under-Treasurer Camilla McAleese. He obtained the volume from his father who was Clerk of the Lists in the Queen's Bench Division of the Royal Courts of Justice and an inveterate collector of books, who came upon the volume in one of the second hand bookshops that used to abound in the alleys and streets around the Royal Courts.

It is an important acquisition. And it is most appropriate that it should be held by the King's Inns for it may yet prove to be the linchpin for a collection of Casement material. All credit to John Boland who deserves our thanks for this generous gift to the library's collection.

— John McGuiggan, Barrister

THE BULKIES; THE POLICE & CRIME IN BELFAST 1800 - 1865
by Brian Griffin, Irish Academic Press in association with the Irish Legal History Society, £27.50.

Brian Griffin's book is the latest in a series of publications by the Irish Legal History Society. The society was established some years ago and has a wide membership on both sides of the border. In keeping with the society's other publications, the book has a number of illustrations and is presented in hardback.

Although the book is essentially the study of a local police force, the chapters on crime in Belfast and the relations between the force and the public offer an interesting insight into the social conditions of the time.

Despite the introduction of the Irish constabulary throughout the entire country in 1836, Belfast, along with Dublin and Derry continued to have a local police force. The Belfast force became know as the 'Bulkies'. Both the origin and meaning of the nickname remain unclear although it certainly seems to have been a term of abuse.

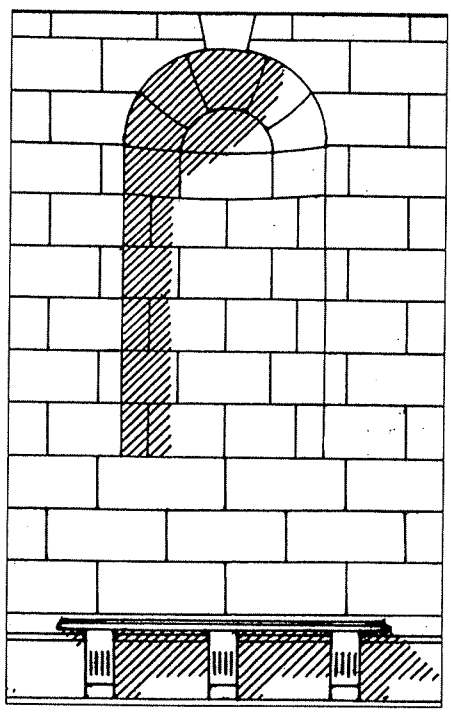
While Belfast, as Mr Griffin reminds us, was often referred to at the time as 'the Athens of the North' the author has succeeded in revealing the seamy underside of the city with its large number of pickpockets, prostitutes, juvenile offenders and its sectarian divisions.

Juvenile crime appears to have been a particularly serious problem. Some of the child criminals were of an astonishingly young age; in June of 1826 John Cullen, aged six years old, was sentenced to one year in prison with hard labour for stealing six silk shawls. Mr Griffin quotes a reporter at Belfast police office in January 1848 to the effect that 'some of the lads who appeared at the bar were, even in their youthfulness, the most perfect specimens of depraved humanity that any locality could exhibit. The sinister eye, the repulsive features, the brutal head and stubborn demeanour, were evidence sufficient to condemn them, of any offence against society, in any Court in Britain'.

It was not unknown for children aged from twelve to fourteen years to be sentenced to seven years transportation for theft, especially if they were repeat offenders.

Those familiar with the city will be interested to learn the nefarious history of well known areas such as North Queen Street, Smithfield and Millfield. Round Entry, close to Millfield, was described by the Reverend W.M. O'Hanlon in 1853 as 'a place celebrated for its iniquity... This entry harbours the most loathsome corruptions; and in these bawdy houses, under the cover of darkness, deeds of villainy are perpetrated which never come to light in our police court. Unwary youth are entrapped and drawn into these places as flies into a spider's web - inebriated, robbed and then turned out guilty, ruined, stricken, with a sting in the conscience and a stain upon their character, which is seldom, if ever removed'.

The chapters dealing with 'the policeman's lot' (duties, working conditions and remuneration) are perhaps of more interest to the specialist historian than the general reader. However Mr Griffin does provide light relief amongst the statistics particularly in relation to the disciplinary offences committed by members of the force.



Hostility to the Bulkies appears to have been widespread among the poorer elements of the city regardless of religious persuasion. Attacks upon members of the local force were common and indeed the crime calendar for Belfast in October 1858 was described as consisting of 'nothing but beating constables'. In 1864 resident Magistrate Orme stated that 'constables were beaten night after night, and day after day'. It would seem that old traditions die hard in this city.

Allegations of partisanship, sectarianism and membership of the Orange Order appear to have been continually levelled against members of the force. Certainly in the latter part of its history the force appears to have been almost exclusively Protestant (by 1865 only five of the 160 officers and men were Catholics).

Mr Griffin appears to accept that sectarian bias did operate in relation to the recruitment of the force but queries whether it is fair to say that the force itself operated in a sectarian manner. Following serious sectarian rioting in Belfast resulting in a number of fatalities and a Royal Commission of Inquiry, the Belfast Police Force was abolished in 1865.

The Irish Legal History Society should be congratulated upon the publication of yet another enlightening and enjoyable work of interest to the general reader as well as students of legal and social history.

Other publications in this series include Colm Kenny's *Kings Inns and the Kingdom of Ireland: the Irish Inn of the Court, 1541-1800* and Niall Osborough's *Law and the Emergence of Modern Dublin: a Litigation Topography for a Capital City*, to name but two. The Society's work is well deserving of the support of the profession, and the modest annual subscription includes a copy of the publication for that year.

Paul Burns, Barrister

TAX ACTS COMMENTARY CONSOLIDATION 1997 (A COMPREHENSIVE COMPANION TO BUTTERWORTHS TAX ACTS)
by Dr Frank Brennan and Seamus Howley.
Butterworths, £85.00

Income Tax was first introduced in 1799 by William Pitt as a temporary tax to provide finance for the Napoleonic wars. In 1802, after the Peace of Amiens, it was repealed but was reintroduced in 1842 by Robert Peel, once again as a temporary tax for a maximum period of three years. It has been with us ever since.

The Taxes Consolidation Act 1997 is the first attempt in this jurisdiction to tame the monster that was created with the Income Tax Act 1967 and has been fed annually by highly complex doses in the form of annual Finance Acts together with Corporation Tax and Capital Gains Tax Acts. The entire body of legislation relating to Income Tax, Corporation Tax and Capital Gains Tax has been brought together in a single volume. Amending provisions have been incorporated within the appropriate sections, many sections have been rewritten for greater clarity and redundant ones have been removed. To coincide with this major development, Butterworths commissioned two leading tax practitioners, Dr Frank Brennan and Mr Seamus Howley, to prepare a commentary on the Taxes Consolidation Act 1997.

In a section-by-section approach, each section is parsed in plain English and comprehensively annotated.

The book has several attractive features for the tax practitioner, not least of which is a comprehensive index thoughtfully compiled, greatly facilitating the accessibility of the book. Additionally, a separate index of words and phrases is included, which is invaluable for lawyers. Revenue statements of practice and tax briefings are also carefully chronicled in the annotation of the relevant section.

Case law is liberally sprinkled in the annotations and Dr Brennan and Mr Howley are generous in including references to unreported Circuit Court cases that they have knowledge of. For example, in the very detailed commentary on 811 of the Taxes Consolidation Act 1997, the reader is informed of the decision of Judge O'Connor in the Circuit Court in Thurles in October 1990 in *JOK and JKW v. Inspector of Taxes*.

The commentary on this section (the old 86 Finance Bill 1989 relating to transactions to avoid liability to tax) illustrates the meticulous nature of the commentary on individual sections by the authors. In the course of a lucid deconstruction of the dense language of the section, the authors provide a commentary on 245 of the Canadian Income Tax Act upon which the legislation was based, together with extracts from a special release by the Canadian Department of National Revenue and details of their advance rulings. There are also citations from USA and Australian cases, as well as a detailed discussion of *McGrath v. McDermott* [1988] 3 ITR 683, which was a springboard for this enactment.

Where computations can be helpful illustrations of principles, the authors readily employ them. For example, in their commentary on 404 of the Act they neatly illustrate with four worked examples the effect of ring-fencing on the use of capital allowances for certain leased machinery or plant.

The typeface is bold and attractive, the syntax concise and terse, and the format user-friendly.

It is difficult to think of a criticism of this book, save that its indispensability and inevitable annual revision for Finance Act changes may, due to paper usage and consequent damage to afforested territories, increase the size of the ozone hole. I thoroughly recommend this commentary for every person seriously interested in taxation.

Patrick Hunt, Barrister

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