The Bar Review

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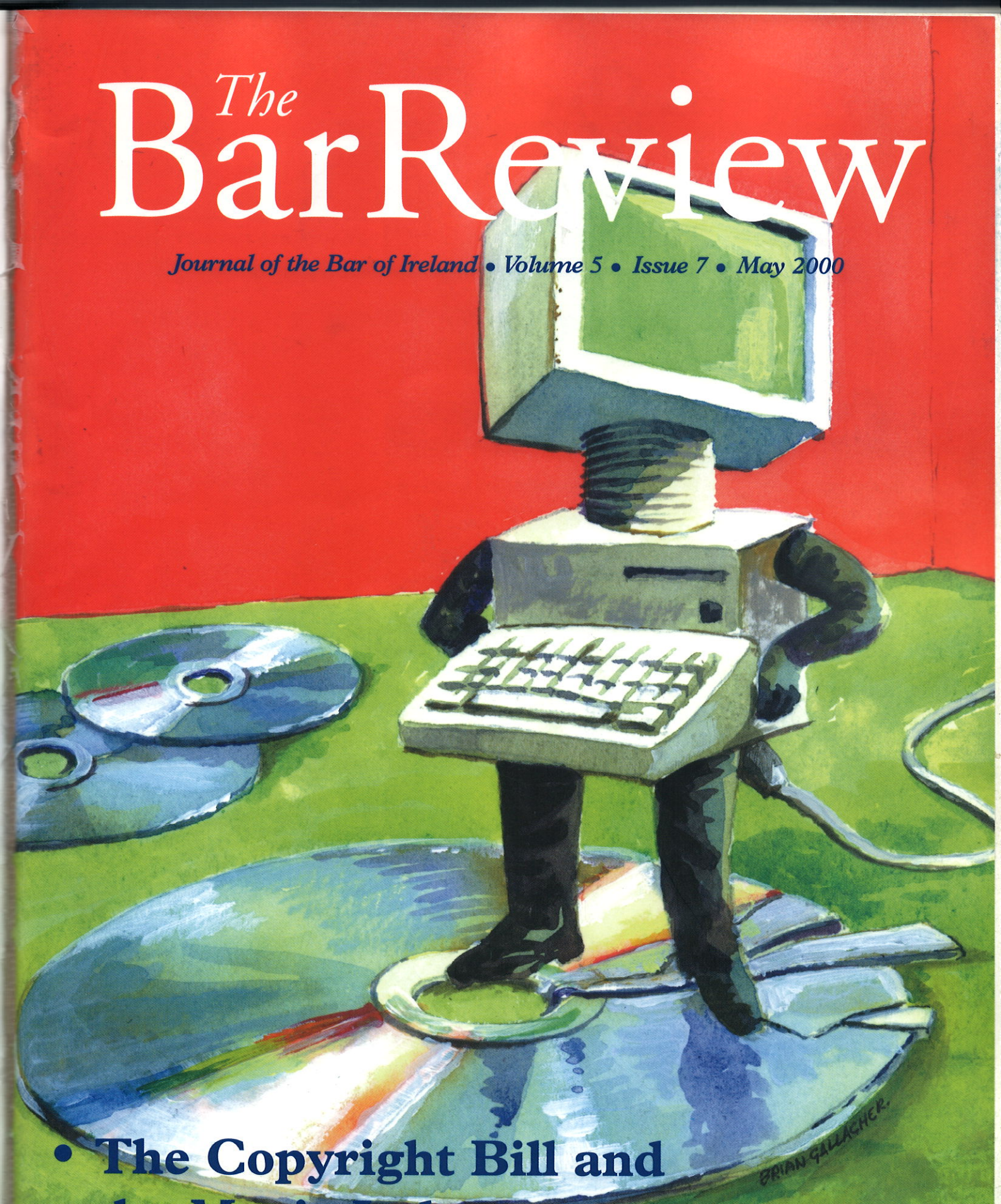
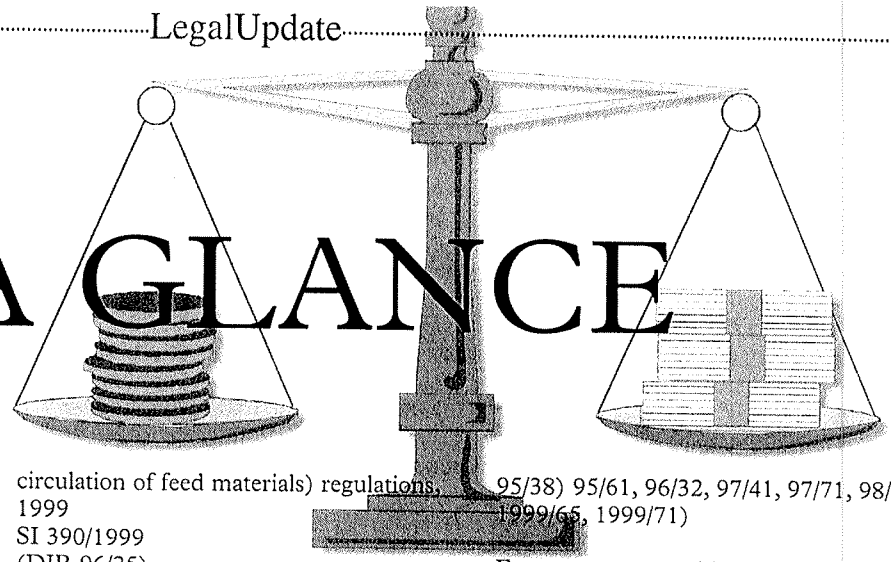


- **The Copyright Bill and the Music Industry**
- **Enforcement of Foreign Judgments**
- **Regulating Artificial Reproductive Technologies**

AT A GLANCE



Court Rules

Circuit court rules (no. 1) (organisation of working time act, 1997), 1999
SI 373/1999

Circuit court rules (no. 2) (data protection act, 1988), 1999
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Circuit court (alteration of circuits) order, 1999
SI 387/1999

European Directives implemented into Irish Law

Information compiled by Damien Grenham, Law Library, Four Courts

European communities (feeding stuffs intended for particular nutritional purposes) (amendment) regulations, 1999
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European communities (conservation of wild birds) (amendment) regulations, 1999
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European communities (guidelines for the assessment of additives in animal nutrition) regulations, 1999
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European communities (seed potatoes) (amendment) regulations 1999
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European communities (putting into circulation of feed materials) regulations, 1999
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European Communities (control of emissions of gaseous and particulate pollutants from non-road mobile machinery) regulations, 1999
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European communities (supplementary supervision of insurance undertakings in an insurance group) regulations
SI 399/1999
(DIR 98/78)

European Communities (pressure equipment) regulations, 1999
SI 400/1999
(DIR 97/23)

Air pollution act, 1987(environmental specifications for petrol and diesel fuels) regulations, 1999
SI 407/1999
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European communities (marketing of ornamental plant propagating material and ornamental plants) (amendment) (no. 2) regulations, 1999
SI 462/1999
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European communities (classification, packaging and labelling of pesticides) (amendment) regulations, 1999
SI 463/1999
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European communities (pesticide residues) (products of plant origin, including fruit and vegetables) (amendment) regulations, 1999
SI 458/1999
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European communities (pesticide residues) (cereals) (amendment) regulations, 1999
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(DIR 86/362, 88/298, 93/57, 94/29, 95/39, 96/33, 97/41, 97/71, 98/82, 99/65, 99/71)

European communities (pesticide residues) (foodstuffs of animal origin) (amendment) regulations, 1999
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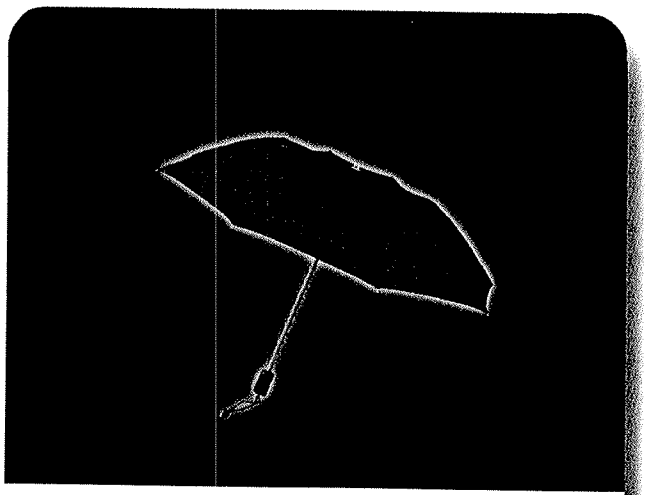
European communities (authorization, placing on the market, use and control of plant protection products) (amendment) (no.4) regulations, 1999
SI 461/1999
(DIR 91/414)

European communities (deposit guarantee schemes) regulations, 1999
468/1999
(DIR 94/19/EC)

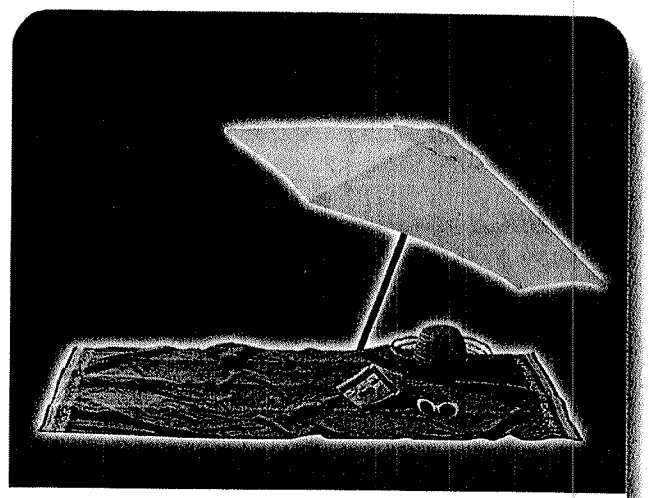
ABBREVATIONS

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

The Update on European Case Law, Bills in Progress and Library Acquisitions has been held over until the June Issue due to pressure of space.



Pension



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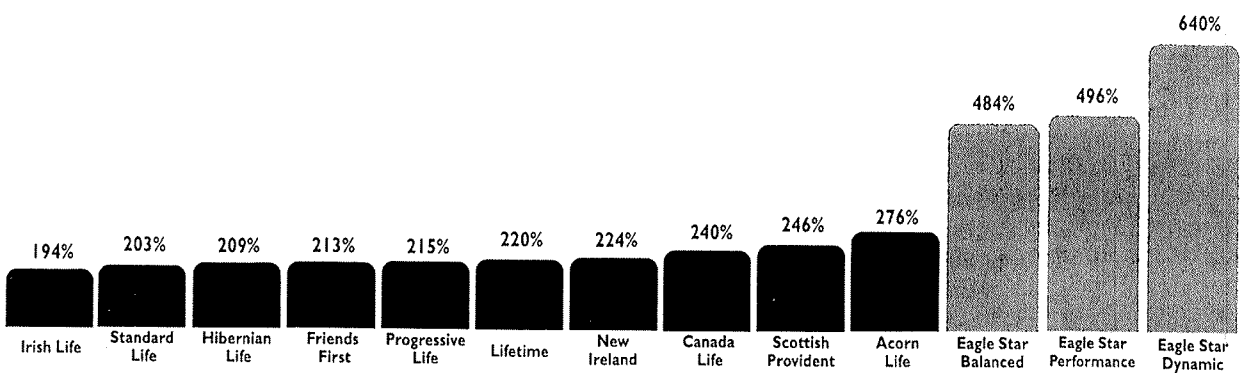

INDIVIDUAL MANAGED PENSION FUNDS TEN YEAR PERFORMANCE %

Source: MoneyMate and individual companies. All figures and copy relate to individual pension managed growth and aggressively managed sectors. Returns based on offer/offer performance from 1/11/89 - 1/11/99 and do not relate to premiums paid into a policy. Unit values may be expected to fall as well as rise. Past performance is not always an indication of future returns which are dependent on future investment conditions.

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SECONDARY VICTIMS NERVOUS SHOCK

Mark Dunne BL *analyses the Irish and UK law on secondary victims and nervous shock, including the recent decision in the Irish case of*
Eithne Curran v Cadbury (Ireland) Limited.

Introduction

The law relating to liability for psychiatric injury caused by the negligence of another - more commonly, if somewhat inaccurately, known as nervous shock,[1] is an area of law still in flux. This is particularly so in cases dealing with secondary victims, that is, those who while not participating in the event, witness it or come on its immediate aftermath. It has recently been described as an area which, "is still evolving and has obviously not reached maturity."[2] This is evidenced by an examination of the case law relating to secondary victims and the most recent decisions in Ireland and the UK. In this paper these decisions will be considered in an attempt to establish what approach the courts are likely to take in the future.

The Irish approach

The issue of nervous shock came before the Superior Courts for the first time in almost a century in *Mullally v Bus Eireann.*[3] There the Plaintiff's husband and sons were involved in a car crash, which was caused by the negligence of the Defendant. The Plaintiff was not near the scene of the accident, but travelled to the hospital where she saw her severely injured family and witnessed terrifying and appalling scenes. In the High Court Denham J. in finding for the Plaintiff stated that, "The question of law from this court is whether the chain of causation from the crash caused by the defendants to the illness of the plaintiff is reasonably foreseeable by the reasonable man."[4] The judge took the view that on the facts there was a causal link or nexus between the defendant's negligence and the plaintiff's illness which was reasonably foreseeable.

> "It would be unjust, and contrary to the fundamental doctrine of negligence, not to find that there is a legal nexus between the actions of the defendants causing the accident, and the resultant aftermath of the accident in the scenes in the hospital ..... There was no other cause of the scenes in the hospital or the injuries to the children and the husband other than the defendants' negligence. The shock of the Plaintiff was foreseeable. The duty of care of the defendants extends to injuries which are reasonably foreseeable. Thus the defendant had a duty of care to the plaintiff. I consider that there is no bar in law, or under the Constitution, to this determination. If it causes commercial concern then that is a matter for another place, where a policy can be established in the law. It appears to me to come under the fundamental principles of the law of negligence to hold the defendants liable for reasonably foreseeable psychiatric illness caused by his negligence."[5]

In coming to her conclusion the learned Judge referred to the case of *McLoughlin v O'Brian*[6] and stated that while the case before her appeared to fall within the parameters set by Lord Wilberforce she was guided by the dicta of Lord Bridge.

In *McLoughlin*, Lord Bridge adopted the straightforward application of the reasonable foreseeability test. While he accepted the importance of factors such as time, space and relationship as bearing on the degree of foreseeability of the Plaintiff's illness he was opposed to the drawing of hard and fast lines of policy.

> "I have no doubt that this is an area of the law of negligence where we should resist the temptation to try yet once more to freeze the law in a rigid posture which would deny justice to some who, in the application of the classic principles of negligence derived from *Donoghue v Stevenson* ... ought to succeed, in the interests of certainty where the very subject matter is uncertain and continuously developing, or in the interests of saving defendants and their insurers from the burden of having sometimes to resist doubtful claims."[7]

Lord Wilberforce on the other hand took a more restrictive and narrow approach. He was of the view that there was a real need for the law to place some limitation on the extent of admissible claims and that this limitation should affect the class of persons whose claims were recognised. Thus only those with a very close relationship to the person injured could sue and then only if there was proximity to the accident both in time and space. Lord Wilberforce was also of the view that a strict test of proximity by sight and hearing should be applied, save for those who came on the scene very soon after the accident or those whom it could be said that one could expect nothing else than that they would come immediately to the scene.

The next case in which the Irish Courts were given an opportunity to examine the issue was *Kelly v Hennessy.*[8] In that the Plaintiff's family were involved in a serious car crash caused by the negligence of the defendant. The Plaintiff had not been present at the crash, but went to the hospital where she saw the aftermath of what had happened. In the High Court the Plaintiff was awarded damages for nervous shock, from which the Defendant appealed to the Supreme Court.

In the Supreme Court Hamilton CJ set out 5 criteria which a Plaintiff must establish in order to succeed in an action for damages in nervous shock :

1. The Plaintiff must establish that he or she actually suffered "nervous shock" - that is suffered from a recognisable psychiatric illness;

2. A Plaintiff must establish that his or her recognisable psychiatric illness was "shock induced";

3. A Plaintiff must prove that the nervous shock was caused by a defendant's act or omission;

4. The nervous shock sustained by a Plaintiff must be by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff;

5. If a plaintiff wishes to recover damages for negligently inflicted nervous shock he must show that the defendant owed him or her a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock - it is not enough to show that there was reasonably foreseeable risk of personal injury generally.

The learned Judge went on to state that in cases where the nervous shock resulted from perception of the aftermath of an event, the relationship between the plaintiff and the person injured had to be close, before the Plaintiff would succeed. He stated that there was no rule of public policy that prevented a Plaintiff who satisfied the criteria from succeeding. He referred with approval to the dicta of Lord Russell in *McLoughlin* where he stated that,

> "In the last analysis any policy consideration seems to be rooted in a fear of floodgates opening - the tacit question "What next?" I am not impressed by that fear - certainly not sufficiently to deprive this plaintiff of just compensation for the reasonably foreseeable damage done to her. I do not consider that such deprivation is justified by trying to answer in advance the question posed "What next?" by a consideration of relationships of the plaintiff to the sufferers or deceased, or other circumstances : to attempt in advance solutions, or even guidelines, in hypothetical cases may well, it seems to me, in this field, do more harm than good."[9]

Denham J in her judgment moved slightly away from the reasonable foreseeability test which she applied in *Mullally* towards a more proximity based test. Referring to this issue she stated that there were several aspects of proximity including proximity of relationship, proximity in a spatial sense and proximity in a temporal sense. She referred to the dicta of Lord Bridge in *McLoughlin* and indeed the more restrictive approach of Lord Wilberforce. However she took the view that "It is not necessary in this case to choose between either the general or the more restricted approach in common law. I have used the cases to isolate factors which are relevant in law and applied these factors to the facts of this case."[10] The learned judge concluded that a person with a close proximate relationship to an injured person, such as the plaintiff, who while not a participant in an accident, hears of it very soon after and who visits the injured person as soon as practicable, and who is exposed to serious injuries of the primary victims in such a way as to cause a psychiatric illness, then becomes a secondary victim to the accident.

The approach taken by the Supreme Court would seem to be a middle ground between the adoption of the reasonable foreseeability test simplicter, (as espoused by Lord Bridge and adopted in *Mullally*) and the more restrictive policy driven approach (as espoused by Lord Wilberforce) and adopted by the Courts in the UK[11]. However if there was any doubt as to the difference of approach between the two jurisdictions before now this has certainly been cleared up by the most recent decision of the House of Lords which retreats even further from the dicta of Lord Bridge and widens the gap between the approaches in both jurisdictions.

The recent UK approach

White v Chief Constable of the South Yorkshire Police[12] concerned a number of Plaintiffs who were police officers on duty at the Hillsborough Football Stadium disaster and suffered post traumatic stress disorder as a result of becoming involved in the aftermath of the disaster - carrying the dead and resuscitating the injured. The House of Lords, reversing the Court of Appeal,[13] held that the police officers were not entitled to recover damages for psychiatric injury suffered as a result of assisting in the aftermath of the disaster, either as employees[14] or as rescuers.[15] Their Lordships held in effect that rescuers and employees, who up until then had been considered to be entitled to recover without having to satisfy the control mechanisms, were now to be treated as secondary victims. Their Lordships also held that there was no general duty of care owed by the employer to his employees, in respect of psychiatric illness and that they, together with rescuers, like other secondary victims had to surmount the policy control mechanisms if they wished to recover. Lord Steyn stated that policy considerations had undoubtedly played a role in shaping the law on recovery for pure psychiatric harm. He quoted with approval from Weir[16] where he stated that

> "There is equally no doubt that the public ... draws a distinction between the neurotic and the cripple, between the man who loses his concentration and the man who loses his leg. It is widely felt that being frightened is less than being struck, that trauma to the mind is less than a lesion to the body. ... The law has reflected this distinction as one would expect, not only by refusing damages for grief altogether, but by granting recovery for other psychical harm only late and grudgingly, and then only in very clear cases. In tort, clear means close - close to the victim, close to the accident, close to the defendant."[17]

The learned Law Lord went on to state that in his view there were at least four distinctive features of claims for psychiatric harm which justified the differential treatment. Firstly there was the complexity of drawing the line between acute grief and psychiatric harm and the greater diagnostic uncertainty in psychiatric cases than in physical injury cases. Secondly there was the unconscious effect of the expansion of the availability of compensation on potential claimants who had witnessed gruesome events, where the litigation was sometimes an

"It is submitted that these policy arguments are similarly unconvincing. The first two factors are also present in cases where mental suffering is a part of a claim for physical injury, yet the courts are able to deal with these factors in that context. As for the arguments that a relaxation of the rules would greatly increase the classes of persons who could recover and impose a disproportionate burden on defendants, it is clear that this is a matter of policy to be determined and controlled by the legislature."

unconscious disincentive to rehabilitation. He noted that while this factor was also present in cases of physical injuries with concomitant mental suffering it would play a larger role in cases of pure psychiatric harm. Thirdly, the abolition or relaxation of the special rules governing the recovery of damages for psychiatric harm would greatly increase the class of persons who could recover damages. Fourthly, the imposition of liability for pure psychiatric harm in a wide range of situations could result in a burden of liability on defendants which may be disproportionate to tortuous conduct involving perhaps momentary lapses of concentration, e.g. in a motor car.

It is submitted that these policy arguments are similarly unconvincing. The first two factors are also present in cases where mental suffering is a part of a claim for physical injury, yet the courts are able to deal with these factors in that context. As for the arguments that a relaxation of the rules would greatly increase the classes of persons who could recover and impose a disproportionate burden on defendants, it is clear that this is a matter of policy to be determined and controlled by the legislature.

Referring to the dicta of Lord Bridge in *McLoughlin* he stated that

> "This decision was given at the peak of the expansion of tort liability in the wake of *Anns v Merton London Borough* [1977] 2 All ER 492. In 1982 in *McLoughlin* ... the House acted on the reassuring picture that the ' ... scarcity of cases which have occurred in the past, and the modest sums recovered, give some indication that fears of the flood litigation may be exaggerated...' This assumption has been falsified by the growth of claims for psychiatric damage in the last ten years. .... In any event, since *McLoughlin's* case the pendulum has swung and the House of Lords have taken greater account of policy considerations both in regard to economic loss and psychiatric injury."[18]

Referring to the earlier decision of the House of Lords in *Alcock v Chief Constable of the South Yorkshire Police*[19] he stated that that case established that a person who suffers reasonably foreseeable psychiatric illness as a result of another person's death or injury cannot recover damages unless he can satisfy three requirement : (i) that he had a close tie of love and affection with the person killed, injured or imperilled; (ii) that he was close to the incident in time and space; (iii) that he directly perceived the incident. The learned judge referred to these considerations as "control mechanisms." The learned judge concluded by stating that "In my view the only sensible general strategy for the courts is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as *Alcock* ...as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament."[20]

Lord Hoffmann in his judgment took a similarly restrictive approach stating,

> "It seems that if the foreseeability test was to be taken literally and applied in the same way as the test for liability for physical injury, it would be hard to know where the limits of liability could be drawn. In all but exceptional cases, the only question would be whether on the medical evidence, the psychiatric condition had been caused by the defendant's negligent conduct. There was a time when it seemed that English law might arrive at this position. It came within a hair's breadth of doing so in *McLoughlin v O'Brian*, one of those cases in which one feels that a slight change in the composition of the Appellate Committee would have set the law on a different course. But the moment passed and when the question next came before your Lordships' House in *Alcock* judicial attitudes had changed. The view which had for some time been in the ascendancy, that the law of torts should, in principle aspire to provide a comprehensive system of corrective justice, giving legal sanction to a moral obligation on the part of anyone who has caused injury to another without justification to offer restitution or compensation, had been abandoned in favour of a cautious pragmatism."[21]

He went on to state that the House decided that liability for psychiatric injury should be restricted by "control mechanisms.. that is to say more or less arbitrary conditions which a plaintiff had to satisfy and which were intended to keep liability within what was regarded as acceptable bounds."[22] Lord Hoffmann gave two policy reasons for refusing the plaintiffs' claim. Firstly, he noted the definitional problem of who would fit into the category of rescuer, although he acknowledged that this was a less important reason. Secondly, he stated that to treat policemen as rescuers in a special category would offend against the notions of distributive justice in that ordinary people would think it wrong that policemen should have the right to compensation for psychiatric injury out of public funds while bereaved relatives were sent away with nothing.

It is submitted that these reasons are unconvincing. The Courts are often confronted with difficult cases where categories have to be defined and limited and have not resiled from the task on the basis that it was difficult. As for the second reason, far from being a convincing argument for limiting the categories, it highlights why the control mechanisms are undesirable, discriminating as they do between victims.

The most recent Irish decision

This issue has most recently come before the Irish Courts in the case of *Eithne Curran v Cadbury (Ireland) Ltd.*[23]

This case was not concerned with harm resulting from perception of the aftermath of an accident but rather with a Plaintiff who suffered psychiatric injury when she was involved in an accident caused by the negligence of her employer.[24] However the judgment is of interest to the present discussion because in it McMahon J[25] reviews and analyses the case law and discusses the likely approach of the Irish Courts in the future.[26]

In his judgment McMahon J commented on the terminology used in nervous shock cases and noted the tendency, especially in English cases, to divide victims into primary victims and secondary victims and stated, "for my own part, I am not convinced that the separation of victims into these categories does anything to assist the development of legal principles that should guide the courts in this complex area of the law." He referred to the Supreme Court decision in *Kelly* and noted that the majority of the Court did not make such a distinction.

He noted that the three main policy arguments put forward for restricting recovery were, floodgate fears, the difficulty of proving that the injury existed and the possibility of fraud, but he was unconvinced by them. He noted that the evidentiary problems of proving the psychiatric illness were exaggerated and no more difficult than the proof required in some types of back injuries which were not detectable by x-ray or scan. Furthermore he noted that the Courts had no hesitation in compensating psychiatric illness when it accompanied physical injury, although the proof requirements for the psychiatric element were equally problematic. As regards the possibility of fraud, the learned judge noted that the possibility was present in all tort claims and was not confined to cases of psychiatric illness and that the rules of evidence, burden of proof and trial process generally was designed to minimise the risk and by and large succeeded.

McMahon J reviewed the most recent English case law including *White* and noted that the English Courts viewed secondary victims as being less deserving and consequently, it demanded that those victims, for policy reasons, satisfy the "control mechanisms". In contrast he noted that to recover in the Irish Courts, the claimant had to comply with the five conditions laid down by the Supreme Court in *Kelly.* He also noted that the majority of the Court did not make a distinction between primary and secondary victims. The learned judge also made the point that the Supreme Court had relied heavily on the Australian decision of *Jaensch v Coffey*[27] which was rejected by the English Courts.

After reviewing the law McMahon J stated,

> "Two things become clear from this: the law on this topic is far from settled in either jurisdiction; second, a divergence of approach between the two jurisdictions is becoming increasingly obvious and perhaps inevitable. ..... The House of Lords' decision in *White* is somewhat reminiscent of its earlier decision in *Murphy v Brentwood District Council* [1991] 1 AC 398 where it resiled from its earlier approach in *Anns v Merton London Borough Council* [1978] AC 728 on the general duty of care issue. This withdrawal was never followed by the Irish courts, who in *Ward v McMaster*, and a succession of cases thereafter, kept faith with Anns' approach. From the Supreme Court's reliance on the Australian authorities in *Kelly,* it would seem that the Irish Courts will not be overawed by *White* and may well choose, as it did in *Ward v McMaster*, to go its own road, especially since *White* has its critics."

Conclusion

It is clear that the Irish Courts have taken a far more flexible approach to the question of psychiatric illness than their English counterparts. Although they have not adopted the reasonable foreseeability test simpliciter, they have clearly rejected a policy constraints approach. However the law in this area is far from settled and it is likely that there will be further developments in both jurisdictions. ●

1. See Ken Bredin, "Nervous Shock and the Secondary Victim", [1997] 3 Bar Review 133.
2. Tan Keng Feng, "Liability for Psychiatric Illness - The English Law Commission", [1999] Torts Law Review 165, 177.
3. [1992] ILRM 722.
4. Ibid. p. 730
5. Ibid. p.731
6. [1983] 1 AC. 410
7. Ibid. p. 433
8. [1995] 3 I.R. 253
9. [1983] 1 AC. 410,429
10. [1995] 3 I.R. 253,274
11. See *Alcock v Chief Constable of the South Yorkshire Police* [1991] 1 All. ER. 907, *McFarlane v EE Caledonia Ltd.* [1994] 2 All ER 1, *Page v Smith* [1995] 2 All ER 736.
12. [1999] 1 All ER. 1
13. *Frost v Chief Constable of the South Yorkshire Police* [1997] 1 All. ER 540
14. The Plaintiffs had argued that the Chief Constable owed them a duty of care as their de facto employer to take reasonable care not to expose them to unnecessary risk of injury, whether physical or psychiatric, and was vicariously liable for the negligence of the senior officer who had caused the accident by opening an outer gate.
15. Prior to this rescuers were view as a special category to be treated like primary victims.
16. Casebook on Tort 7th ed. 1992 p.88
17. [1999] 1 All.E.R. 1, 32
18. Ibid. p. 34 -35
19. [1991] 4 All ER 907
20. Ibid. p. 39
21. Ibid. p. 40.
22. Ibid. 41.
23. Unreported Dublin Circuit Court 17th December 1999. McMahon J.
24. In this case the Plaintiff was employed by the defendant as an operative on an assembly line type machine which carried chocolate bars to the Plaintiff's work station for packing. The machine was stopped without notification to the plaintiff, who in line with normal practice turned it back on. When she did so she immediately became aware that there was a fitter inside the machine, repairing it. On hearing the commotion and screaming she was convinced (albeit incorrectly) that she had killed or seriously injured her fellow employee and as a result sufferedm a psychiatric injury. McMahon J in finding for the Plaintiff held that she was an involuntary participant due to the defendant's negligence and that the defendant owed her a general duty of care on proximity and neighbourhood principles, and that there had been a breach of that duty which caused the plaintiff reasonably foreseeable psychiatric harm and that there were no good policy reasons which should deny that duty.
25. McMahon J is co-author of the leading Irish textbook on tort, McMahon & Binchy, *Irish Law of Torts* 3rd ed. 2000, Butterworths.
26. Albeit by way of obiter dicta.
27. (1984) 115 C.L.R. 549

THE SEX OFFENDERS BILL, 2000

Ivana Bacik BL *examines the provisions of the Sex Offenders Bill currently going through the Oireachtas.*

Introduction

In recent years, sex offending has rarely been off the political agenda. A great deal of attention has focused on how to reform the law on sex offences to give greater protection to victims and the general public, without encroaching unduly on the rights of offenders.[1] The Sex Offenders Bill, 2000, has been introduced in the context of this debate around reform. It was presented to the Dáil by the Minister for Justice, Equality and Law Reform on January 10, 2000 and will be going to Committee stage in May of this year.

The Bill provides in Parts 2 to 5 for the post-release monitoring and supervision of those convicted of sexual offences. In Part 6, a significant change in the procedure for the trial of such offences is introduced, namely legal representation for complainants where the defence seeks to adduce evidence of their prior sexual history. Overall, a Bill such as this should attempt to balance the rights of sex offenders with the need to protect the public against such offenders. However, in several respects this balance has not been achieved.

Definition of 'Sexual Offence'

Despite the title of the Bill, it refers for the most part to 'persons convicted of sexual offences' rather than to 'sex offenders'. Section 3 contains a complex definition of what constitutes a 'sexual offence' for the purposes of the Bill. A total of 20 such offences are listed in the Schedule. However, section 3(2) provides that these are not to be considered as 'sexual offences' where the complainant had reached a particular age at the date of the offence (either 15 or 17, depending on the offence), and the defendant was not sentenced to any punishment involving deprivation of liberty.

Section 3(3) provides similarly that certain offences are not be considered as 'sexual offences' where the victim or other party to the offence was over 15, and the person guilty of the offence was less than three years older than the victim or other party. While it makes sense to introduce a qualifying provision in relation to consensual sexual relations with a partner of a similar age, it would have been far more sensible to undertake a codification of the law in this area. The unwieldy definition provisions in the Bill demonstrate how unnecessarily complex the law on sexual offences remains, with a plethora of different types of offence, differentiating between complainants on the basis of their age, gender or relationship to the accused.

The Law Reform Commission recommended an obvious change some years ago, suggesting that a single consolidated offence of 'child sexual abuse' or 'sexual exploitation' be introduced instead.[2] Such a change is long overdue, since prosecutors presently must rely on offences like incest, unlawful carnal knowledge and sexual assault, which are not always flexible enough to cover all the forms of sexual abuse to which children are subjected.[3]

Part 2 - Notification Requirements for Sex Offenders

Part 2 of the Bill provides for certain notification requirements that must be complied with by all those convicted of a 'sexual offence' after the Act comes into force, and by those previously convicted but still awaiting or serving a sentence for such an offence. It also applies to those convicted outside the State of a 'sexual offence'. In its application to those who have already been sentenced, it purports to have a retrospective effect, which may well be open to constitutional challenge.[4]

Under section 9, such persons must notify the Garda of their name and home address, any other address within the State at which they are staying for a particular period, and any change of name or address, within 10 days of such change. They must also inform the Garda of any intention to leave the State for more than 10 continuous days, and their address outside the State during that period, where known.

Section 8 provides that a person is obliged to keep the Garda notified of their movements indefinitely, if they have been sentenced to a term of more than two years' imprisonment, and for a period of up to10 years, if they have been sentenced to a lesser term. Those convicted of a sexual offence but who have not been sentenced to imprisonment must comply with the notice requirements for a period of five years. The time periods are halved where the person is under 18 at the date of sentencing. Failure to comply with the notification requirements for the specified time is a summary offence.

A person subject to an indefinite notification requirement may apply to the court for an order discharging the obligation, on the grounds that the interests of the common good are no longer served by its continuance.[5]

Commentary on Notification Requirements

The arguments for and against a 'register' of sex offenders have been rehearsed both here and in many other jurisdictions.[6] Those who favour a register tend to rely on assertions of its usefulness in providing public protection against repeat offending. These assertions are countered by principled arguments based on the protection of individual

liberties, and by the practical argument that registers have little effect on reducing repeat offending, since reconviction rates for sex offending tend to be relatively low, and since most sex offenders are already known to their victims.

The word 'register' does not appear in the text of the Bill, so the question is whether the introduction of the notification requirements amounts to the creation of a register in all but name. In effect, a register is already in place, as the Garda keep computerised records relating to all indictable criminal convictions, including those for sex offences.[7]

What, then, is the extra benefit provided by introducing the notification requirements? The Department of Justice Discussion Paper suggested that the main advantage of keeping a separate record of sex offenders would be in allowing the Garda more effectively to track their movements following their release from prison.[8] The notification requirements would enable the existing database to be kept up-to-date, but in a way that encroaches unduly on the liberties of ex-offenders, who would have to provide personal information to the gardaí, including information about any holiday taken, for a lengthy or even indefinite period after their release.

Where a register of sex offenders has been introduced in other jurisdictions, much of the debate has centred on whether the public should have access to it. There is no mention of access to the register in the Bill, so apparently there will be no right to see the list of names and addresses maintained by the Garda. The absence of a public access provision is to be welcomed, since the dangers of general disclosure of names are all too obvious. However, an express prohibition on public access to the register would be preferable, in order to safeguard the privacy of the ex-offender.

The introduction of the notification provisions will impose onerous requirements on offenders well after release, but should also generate debate around the treatment of ex-offenders generally. It is a well-established principle of sentencing that sanctions for offending should be proportionate and finite.[9] Thus, persons who have served their time should be regarded as having paid their debt to society and should be encouraged to re-integrate into the community without being labelled forever as 'criminals'. Otherwise their rehabilitation would be impossible.

Yet, in Ireland there is no provision whereby offences can become 'spent'; a conviction remains on the record indefinitely. By contrast, under the English Rehabilitation of Offenders Act 1974, convictions are regarded as 'spent' or lapsed after a period of between five and 10 years has passed, depending on the sentence imposed.[10]

The absence of any Irish provision for 'spent convictions' compounds the disadvantage faced by ex-offenders here on release, since their criminal record is never expunged.[11] In addition, those convicted of sexual offences will now be obliged to comply with notification requirements well after they have served their time, and in some cases for an indefinite period into the future. Where then is the potential for rehabilitation?

Given that the gardaí already maintain a database on all offenders, any benefit to the public afforded by Part 2 of the Bill would be outweighed by its disproportionately onerous effect on the ex-offender.

Part 3 - Sex Offender Orders

The concept of a 'sex offender order' is entirely new. Under section 15, such an order may be sought from the court *ex parte* by a garda not below the rank of Chief Superintendant, where a person has been convicted in this or another jurisdiction of a 'sexual offence'. The court must be satisfied, on a balance of probabilities, that the person has acted on one or more occasions so as to give reasonable grounds for believing that an order is necessary to protect the public from serious harm.

The order may remain in force for as long as the court sees fit, and may prohibit the respondent from doing anything the court considers necessary for the purpose of protecting the public from serious harm. Breach of an order is an offence, subject to a high maximum penalty of five years imprisonment. These provisions give unduly wide discretion to the courts to make extensive encroachment upon the freedom of movement of individuals, on the basis of possibly unconstitutional evidence relating to a garda's view of the possible future behaviour of a person. Indeed, considerable power is given to the gardai, since it will be easier for them to get a section 15 order than to obtain a criminal conviction for assault or harassment, for example. The 'sex offender order' may therefore become a means of getting around the stricter criminal law standard, in relation to activities that should really be dealt with through criminal sanction.

Part 4 - Provision of Information for Employment Purposes

Under section 25 of the Bill, sex offenders must notify any prospective employer of their conviction, if seeking any job that would involve unsupervised access to children as a necessary and regular feature. Non-compliance with Part 2 may again incur a high maximum penalty, of five years imprisonment.

This approach again imposes a notification requirement upon sex offenders that will bind them indefinitely. Moreover, it presupposes that no rehabilitation of such offenders is possible; once convicted of a sexual offence, a person will always be labelled as a 'sex offender' for the purposes of certain job applications.

Part 5 - Post-Release Supervision for Sex Offenders

Only in Part 5 of the Bill is a definition of 'sex offenders' provided, and it is much more restrictive than the definition upon which Parts 2 to 4 is based. 'Sex offenders' are persons convicted after the commencement of the Bill, of an offence for which the court deems the appropriate punishment to be imprisonment. Sections 27 and 28 allow a court in sentencing such an offender to consider whether a period of post-release supervision should be built into their sentence.

The motive behind these provisions may offer potential for rehabilitation, but the cart is being put before the horse, since adequate facilities are still not available for the rehabilitation of sex offenders while in custody. The total number of sex offenders in Irish prisons is close to 400, yet there are only 10 places available on the sex offender treatment programme in Arbour Hill prison, and no such treatment available yet in any other prison in which sex offenders are detained.[12]

Of course, post-release supervision should be an important feature of any penal system, so that offenders are not simply

dumped back into the outside world after release from prison, without any assistance in re-integration into the community. But adequate rehabilitation facilities should be made available throughout the period of detention, as well as after release. Given the lack of resources provided for rehabilitation of sex offenders to date, one might well doubt the likelihood of adequate investment being made in the provision of post-release supervision.

In addition, no mention is made of Temporary Release, which is currently denied to sex offenders as a matter of policy. Early release rules should apply to sex offenders as to all other types of offender, in order to give them a 'light at the end of the tunnel' or an incentive to seek treatment.[13]

Part 6 - Legal Representation for the Complainant

Finally, Part 6 contains an important reform to the procedure under section 3 of the Criminal Law (Rape) Act, 1981, as amended. This section provides that where an accused wishes to adduce evidence about the sexual experience of the complainant with any person, they must apply to the judge in the absence of the jury. The judge may only give leave to adduce such evidence where he or she is satisfied that 'it would be unfair to the accused person to refuse'. Section 33 of the Bill now provides that the complainant may be heard, and may be legally aided and represented, during the hearing of the defence application under section 3.

While legal representation for victims of crime is the norm in inquisitorial systems, such a concept is alien to the adversarial trial process. However, given the very particular concerns about the treatment of complainants in sexual offence trials, legal representation is justified for such complainants within our system. In a recent empirical study focusing on rape law in different jurisdictions, legal representation for complainants was recommended, as it was found to have a highly significant impact upon their overall satisfaction with the trial process, irrespective of the outcome.[14]

In order, then, to provide greater protection to the complainant while safeguarding the constitutional rights of the accused, the Department of Justice suggested that representation might be limited to the 'trial within a trial', since the jury would thus not be influenced by the complainant's lawyer.[15]

The application for leave to adduce sexual history evidence is certainly the most obvious stage within any trial where the complainant should have legal representation. It is submitted that such evidence is frequently introduced in practice to undermine the credibility of the complainant, and to diminish her in the eyes of the jury. A recent Home Office Report concluded that women may even be discouraged from reporting rape because they know that they may be cross-examined about their sexual history at trial.[16] Although the defence can no longer adduce this evidence as of right, Adler found that defence applications had a 75 per cent success rate in England; there is no reason to believe that the success rate is any lower in this jurisdiction.[17]

In short, the introduction of legal representation for complainants to allow them to challenge the introduction of sexual history evidence is to be welcomed. It may help to change the perception that rape victims presently have of the trial process as a 'secondary victimisation'.[18]

Conclusion

A Bill of this sort should attempt to balance the rights of victims, the general public, and offenders. This is a delicate and difficult task, and has not been achieved in the present Bill. While it is innovative in its introduction of limited legal representation for complainants, it imposes onerous post-release obligations on offenders, and gives unduly wide discretion to the courts in the power to grant sex offender orders. It will also interfere with the rehabilitation prospects of those convicted of sexual offences, upon whom the label 'sex offender' may be imposed indefinitely.

The Bill may also be criticised for its omissions. A truly innovative bill could encompass the codification of sexual offences; provision for convictions to be deemed 'spent' after a certain period; provision for increased treatment places and equal access to early release for sex offenders in prison. The notions of rehabilitation and equal treatment for sex offenders are particularly important.

By singling out sex offenders for differential treatment, the danger is that a system of 'criminal apartheid' may be created, whereby they are always isolated from other offenders.[19] It is not in the public interest that sex offenders should become so alienated from society that they may never be rehabilitated. This point should not be forgotten in any debate on reform.

If we are serious about reforming the law on sex offences, therefore, a more considered balancing of rights will be necessary. It is to be hoped that the passage of the Bill through the Oireachtas will be marked by further debate around how this may be done. ●

1 See for example the Report of the Working Party on the Legal and Judicial Process for Victims of Sexual and Other Crimes of Violence against Women and Children. Dublin: NWCI, 1996; Department of Justice, Equality and Law Reform Discussion Paper 'The Law on Sexual Offences'. Dublin: Government Publications, 1998; Bacik, Maunsell and Gogan, The Legal Process and Victims of Rape. Dublin: Rape Crisis Centre, 1998.
2 Law Reform Commission, Report on Child Sexual Abuse, 1990.
3 O'Malley, T., *Sexual Offences: Law, Policy and Punishment* (Dublin: Round Hall Sweet & Maxwell, 1996) at p. 112.
4 Article 15.5 of the Constitution prohibits the enactment of retroactive penal legislation (see also Kelly, *The Irish Constitution* (3rd ed) on the application of this Article).
5 Section 10 of the Bill.
6 See for example Soothill, Francis, Sanderson and Ackerley, 'Sex Offenders: Specialists, Generalists-or Both?' Brit. J. Criminol. (2000) 40 56-67, and Thomas, T., 'Protecting the Public - Some Observations on the Sex Offenders Bill, 2000' 2000 Irish Criminal Law Journal (forthcoming).
7 Dept. of Justice Discussion Paper, op cit, at para. 10.1.2.
8 ibid, at para. 10.7.3.
9 See for example, O'Malley, T., *Sentencing Law and Practice* (Dublin: Round Hall Ltd., 2000), Chapter 5.
10 The Act applies to those sentenced to imprisonment for 30 months or less. Once the 'rehabilitation period' of between five and 10 years has passed, they must be treated in law as persons who have not been charged with any offence.
11 Although the Children Bill, 1996 provides for the expunging of young offenders' criminal records in certain circumstances.
12 At the beginning of April, 2000, there were 2,900 people in custody, 391 of whom were sex offenders, according to figures released by the Irish Prison Service; Irish Times, April 13, 2000.
13 See O'Malley, T., op cit, at p. 278.
14 Bacik, Maunsell and Gogan, op cit.
15 Dept. of Justice Discussion Paper, op cit, at para. 5.6.9.
16 Home Office, Speaking Up for Justice. Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (London: HMSO, 1998).
17 Adler, Z., Rape on Trial (London: Routledge, 1987).
18 Holmstrom and Burgess, *The Victim of Rape: Institutional Reactions* (New York: Wiley & Sons, 1978).
19 Soothill, Francis, Sanderson and Ackerley, op cit, at p. 56.

INTERNATIONAL MUTUAL ASSISTANCE

Patrick O'Reilly BL *explains the framework of laws governing international mutual assistance between judicial authorities in tackling international economic crime and drug trafficking.*

Introduction

The concept of the Global Village first enunciated in the Sixties is now almost a reality. As ever social political and technological change appears to have charged ahead of legal regulation. Criminals who have taken full advantage of the benefits offered by social, political and technological change seem to be in a strong position to avoid such regulation as exists to hinder and sanction their activity. In the absence of a coordinated criminal system, three of the core freedoms of the European Union, (persons, services and capital) have greatly facilitated organized crime both in respect of economic crime and drug trafficking.

"Increased ease of travel and the use of so called tax havens have allowed organized criminals to commit crime on an international scale. Such criminals take advantage of the lack of supervision or security of the assets to be stolen/trafficked in one State and then take advantage of lack of regulation in the Destination State of the proceeds of the crime.

It is not correct however to focus simply on the European Union. Increased ease of cross-frontier flows of capital, both from a technological and a regulatory view point, increased ease of travel and the use of so called tax havens have allowed organized criminals to commit crime on an international scale. Such criminals take advantage of the lack of supervision or security of the assets to be stolen/trafficked in one State and then take advantage of lack of regulation in the Destination State of the proceeds of the crime. There is an increasing level of International Co-Operation in dealing with crime of international dimensions. This co-operation takes place at the investigative level on a police to police/customs to customs basis and on a judicial basis. This Article will examine the framework and development of International Mutual Assistance between Judicial Authorities and the future developments of this form of International Co-Operation.

Sources

The starting point for International Mutual Assistance between Judicial Authorities is the European Convention on Mutual Assistance in Criminal Matters[1]. This is the foundation statute and contains many of the basic principles of Mutual assistance. It should be remembered that this is a fully international Convention and now has signatories as diverse as Georgia, Cyprus, Albania, Peru, The Philippines, as well almost all the world's larger or more powerful nations.

It is a customary rule of International Law that one State will not assist another in the gathering of the other State's tax revenue and indeed Article 2a of the Convention enshrined this principle. It was therefore generally not possible to seek the assistance of another state in gathering evidence in respect of fiscal or tax offences. The Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters[2] purports to allow one state to assist another where the assist sought concerns a fiscal offence.

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime[3] introduced the concepts of restraint and confiscation into the area of International Mutual Assistance enabling one State at the request of another to freeze the proceeds of a crime committed in the requesting state. Once a Confiscation Order is made in the State in which the crime is committed that State can then request the State in which the proceeds exist to recognize the Confiscation Order and make what is known as a Confiscation Co-operation Order.

The last primary source of Mutual Assistance is the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[4]. The Convention is instructive in its detail as to manner in which Requests for assistance should be made. It also provides for a scheme of Assistance between investigative agencies of the various signatories and provides for the sharing of information between such agencies. It is useful in that it points the way for future developments in

Mutual Assistance in that it provides for such matters as (a) The Transfer from one state to another of proceedings for the criminal prosecution of offences (it is thought that ultimately such a Trial might be carried out in the requested State in accordance with the criminal law of the of the requesting state)(b) the establishment of joint investigative teams between Nations (c). The use of the method known as "controlled delivery" of illicit substances at international level i.e. one State would assist another in making a bogus delivery of the illicit substance in order to apprehend the perpetrators.

Mutual Assistance In Practice

All of the above can seem somewhat remote in the absence of any factual example. In light of this Country's geographical position and former regulation of Irish registered non resident companies combined with its perceived "tax friendly" status there are many instances in which bank accounts both personal and corporate have been used simply as a landing pad for funds garnered either by way of evasion of tax in another state or by the commission of an offence, drug related or otherwise. Under the Scheme of Mutual Assistance the investigative authorities of another state can seek to piece the money trail together by having examined under oath before a District Judge the third parties through whose hands the money passed. In these way accountants, bank managers, fund managers, company formation agents and the like can be examined as to the identity of the beneficiary or the remitter of the funds. Arising from several such applications in this jurisdiction foreign prosecutorial authorities have gathered evidence which has been used to convincing effect in the foreign trial particularly from the point of view of confiscation of the proceeds of crime legislation.

The Freezing and Seizing elements of Mutual assistance have been used in to prevent disposal by persons being prosecuted by the foreign authorities from selling real property. These provisions have also been used to prevent persons being investigated by foreign authorities from dealing with bank accounts standing to their credit in this Jurisdiction.

The search and seizure provisions have been used to carry out searches on property in this jurisdiction at the request of foreign investigating authorities.

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The taking of evidence provisions have also been used to take the evidence of a witness unwilling to travel to the State in which the trial for certain social welfare offences was to take place. Interestingly in this case the evidence was taken on video and in the presence of all participating parties .The Judge of the foreign State was also present to assist but not in any sense adjudicate.

The Municipal Legislation

In an earlier Article the writer set out the various statutory provisions which incorporate into Irish Law the adopted provisions of International Mutual Assistance[5]. I will attempt here to expand here on the earlier analysis in so far as further developments have taken place.

The Section 51 Procedure (The Taking of Evidence):

* The Minister receives "Request for Assistance" from a foreign court or prosecuting authority.

* The Minister satisfies himself that either an offence has been committed or reasonable grounds exist for believing that an offence has been committed in the foreign State.

* The Minister nominates a District Judge "to receive such of the evidence to which the request relates as may appear to the Judge to be appropriate for the purpose of giving effect to the letter of request."

* A Hearing takes place in the District Court. The interests of the foreign State are represented by solicitor and Counsel instructed by the Minister for Justice, Law Reform and Equality.

* The evidence is given under oath and a transcript taken. Such documents or items of evidence are annexed to the transcript as an exhibit.

* The transcript is then approved by the Judge and witnesses and the evidence is transferred to the Minister for onward transmission to the foreign State

This latter procedure was examined in some detail by Mrs Justice Catherine McGuiness in the recent Judicial Review case of *Carlos Salinas de Gortari -v - His Honour Judge Smithwick and the Minister for Justice, Law Reform and Equality and ors.* (Unreported Judgment delivered 18/1/2000.)

Briefly the facts were as follows: the Minister received from a French investigating magistrate a request for assistance in respect of enquiries being conducted by the Magistrate into charges of laundering of large sums of money deriving from drug trafficking, partaking in international financial operations relating to drug trafficking and other related offences. The person sought to be questioned (Carlos Salinas de Gortari) is the former President of Mexico and is resident in Ireland. Mr Salinas was unwilling to travel to France but agreed to give evidence in this jurisdiction. In a Section 51 application Mr Salinas answered many questions put to him but refused to answer others on the grounds of his right to silence. In broad outline the questions he refused to answer were (a) questions in relation to his assets (b) his knowledge of bank accounts opened in France by his

brother Enrique Salinas (c) the names of his banks in this jurisdiction and in Mexico.

While Mr Salinas claimed a general right of silence he did not advance any grounds on which the answers would tend to incriminate him. It was ruled by the District Judge hearing the Section 51 application that Mr Salinas was obliged to answer the questions put. Mr Salinas sought by means of Judicial Review to challenge the latter ruling.

Counsel for Mr Salinas argued that he should have the same general right to silence as he would have in this jurisdiction as a police witness at the investigative stage that is to say a general right to silence governed by the Judges Rules. It was also argued that even if there was no general right to silence he should have a general privilege against self-incrimination as regards criminal proceedings in this State or possible criminal proceedings in France.

Lastly, it was argued on behalf of Mr Salinas that there was no specific provision for compelling a witness to answer questions contained in Part VII of the Criminal Justice Act, 1994.

McGuinness J. rejected the first two submissions and accepted the last. In rejecting the first two submissions her Lordship made some useful observation as follows. The Section 51 procedure is neither a Trial nor the administration of justice. The Applicant was not an accused person in either jurisdiction. It was found that the Section 51 procedure should not be compared with the taking of depositions in the District Court prior to the sending forward of an accused for Trial or Indictment. It was held that the Section 51 procedure was purely and simple a creation of statute and must be considered as such. The rights of a person being questioned in the Section 51 procedure were equated to those of a witness not those of an accused.

As regards the power to compel a witness to answer questions McGuinness J. accepted that the Oireachtas intended that a witness in the Section 51 procedure be fully compellable both to attend and to answer questions. However she refused to interpret the Act and the Second Schedule thereto in such a way as to import a power to the District Judge to compel a witness to answer questions. In this way and in the absence of amending legislation a District Judge cannot impose a penal sanction for failure to answer a question put to a witness in the Section 51 procedure.

The Future Of International Mutual Assistance

While many of the above measures may seem progressive to the lawyers in Common Law Countries, the scheme of International Mutual Assistance is rapidly expanding.

The Council of Europe Convention on Corruption[6] which purports to harmonise the law of signatory States in respect inter alia of active and passive bribery of foreign and domestic public officials has provisions enabling international mutual assistance to facilitate the investigation and prosecution of such offences.

The Council of Europe Convention on the transfer of Proceedings in Criminal Matters[7] allows one State to prosecute a person in respect of an offence committed in another. This may only be done provided the conduct in question is an offence under the law of the requested State. A further development being considered is the hearing in one state of criminal proceedings governed by the law of the requesting state.

The Schengen Group of countries (all EU member States with the exception of Ireland, UK and Denmark) have agreed to implement a broader range of mutual assistance than that envisaged by the aforementioned Conventions allowing for a greater flow of information between customs authorities on an informal basis, the provision of information on Aliens from Third Countries, the transfer of sentenced persons, hot pursuit of offenders and so on.

There are more fundamental legislative proposals such as the harmonization at European level of the criminal law targeting organized transfrontier crime, the creation of central departments responsible for mutual assistance in each member State (something we already have in Ireland). There is further mooted the possibility of conducting an inquiry in a requested member State in conformity with the provisions in force in the member State requiring assistance.

Conclusion

With the growing internationalization of crime and indeed with the exponential growth of computer fraud it is often that various parts of the crime are assembled in different countries. While the offence may have been committed in Ireland the mechanism for committing the offence or evidence of the proceeds of the crime may exist abroad.

It is with these facts that the realization comes that International Mutual assistance in the investigation and prosecution of offences is an area which will grow to tackle the practical problems facing investigating and prosecuting authorities. ●

1 Council of Europe, done at Geneva 1959 and effectively incorporated into Irish Law by Part VII of the Criminal Justice Act, 1994 commenced by S.I. 333 of 1996.

2 Council of Europe, done at Strasbourg 1978 and incorporated into Irish Law by virtue of Section 15 of the Criminal Justice (Miscellaneous Provisions) Act, 1997.It should be noted that the Additional Protocol contains some additional matters of mutual assistance which in accordance with the Protocol Ireland reserved the right not to accept

3 Done at Strasbourg 1990 and incorporated to a great extent into Irish Law by virtue of Part VII of the Criminal Justice Act 1994

4 Adopted by the Conference on the 19th of December 1988 and signed by Ireland

5 The Bar Review Vol 3 issue 4.

6 Adopted November 1998

7 Done at Strasbourg 1972

PPROPRIATING THE ASSETS OF FAILED COMPANIES: TRACING IN EQUITY INTO A DIMINISHED FUND

Micheal McGrath BL analyses the recent High Court decision *In The Matter of Money Markets International Stockbrokers Ltd. (In Liquidation).* which considered the equitable concept of tracing.

Introduction

The law on how the loss should be borne as between the beneficiaries of a fund from which a person in a fiduciary capacity wrongfully takes money has been helpfully clarified by Laffoy J.'s judgment in *In The Matter of Money Markets International Stockbrokers Ltd. (In Liquidation).*[1] The question is in essence one of tracing the money invested in the fund into the diminished value of the fund, although in practice it arises as one of how the amount left in the fund should be appropriated amongst the investors.

Money Markets International Stockbrokers (MMI) was suspended by the Stock Exchange on 19th February 1999. The liquidator found that over £2.7 million was owed to clients but the amount available to satisfy this debt was under £1.5 million. On 18th February the applicant had lodged a sum of money to the client account of MMI in order to pay for shares purchased on his behalf by MMI. The applicant sought an order directing the liquidator to complete the transaction to buy shares with the amount that he had lodged, or, in the alternative, to return to him the money that he had lodged.

Background

Accounts of the law to be applied to this issue generally start with *Clayton's Case,* 1816.[2] This established the principle of 'first in, first out', which is best explained by an example. X contributes £10,000 to a fund containing no other money and the next day Y contributes £10,000 to that fund. If the following day the trustee of the fund wrongfully takes £10,000 from the fund the loss would be borne entirely by X. Such a result would benefit the applicant in *Money Markets* as the loss would be borne by persons who had lodged money in the client account before he had done. This result of the rule in *Clayton's Case* has been described by Goff and Jones in as 'capricious and arbitrary'.[3] In a passage quoted in Laffoy J.'s judgment the Chief Justice Keane writing extrajudicially described it as 'rough justice' and doubted whether:

> "the Court would now continue to apply *Clayton's case* (which has always been regarded as based on rather crude if convenient assumptions) to the case of competing claims of beneficiaries to money in a bank account."[4]

The dislike of the rule in *Clayton's Case* is not confined to academic commentaries on the law. In *Re Registered Securities Ltd.*[5] the New Zealand Court of Appeal stated 'The automatic application of the rule in *Clayton's Case* as between beneficiaries will not withstand scrutiny.'[6] It held that because the rule is a fiction based on presumed intent it cannot be allowed to work an injustice. Secondly, because it is based on presumed intent it must give way 'to an express contrary conclusion or to circumstances which point to a contrary conclusion'[7]

Woolf L.J.'s (as he then was) judgment in *Barlow Clowes International (in liquidation) v. Vaughan*[8] was a significant influence on Laffoy J.'s judgment. Woolf L.J. stated that the following *obiter dictum* of Judge Learned Hand accurately described the application of the rule to the case before him:

> "To adopt the fiction [of first in, first out] . . . is to apportion a common misfortune through a test which has no relation whatever to the justice of the case."[9]

However, as Woolf L.J. noted, Hand J. applied the rule as he considered himself bound by precedent. The interaction between a judicial dislike of the rule on the one hand and a reluctance to explicitly overrule it on the other hand is characteristic of much of the case law in this area.

In *Barlow Clowes* the funds in two investment plans had been misapplied and when the company went into litigation there was a shortfall in the plans to which around 11,000 investors had contributed. The Court of Appeal discussed three ways of apportioning the loss between the investors:

1. The rule in *Clayton's Case*. This was considered impractical given the complexity of the accounts, and unfair by both Woolf and Leggatt L.JJ.
2. The 'rolling charge' or 'North American'[10] solution. A withdrawal from the account is considered to be a withdrawal in the proportion of the interests in the acount at the moment prior to the withdrawal. Although Woolf L.J. stated that this 'would produce the most just result'[11] given the complexity of the accounts in the present case all the parties accepted that the costs involved would be disproportionate even to the significant amount of money involved.
3. The *pari passu ex post facto* solution (as Woolf L.J. called it). All the available assets of the fund are divided between the beneficiaries proportionate to the amount that they have invested, disregarding the date of the each investment and the date of each unauthorised withdrawal. Woolf L.J. stated that this solution has 'the virtue of relative simplicity and therefore relative economy and also the virtue in this case of being more just than [the Rule in Clayton's Case].'[12]

Having decided that the latter solution was the better in principle of the two in issue Woolf L.J. discussed the authorities to ascertain whether there was binding precedent preventing him from applying that solution. Along with the other two judges (Dillon and Leggatt L.JJ.) he held that whereas there is a presumption in favour of applying the rule in *Clayton's Case* that presumption is rebuttable where its application would be impractical or unjust - in the case in hand it would not be applied because it would be contrary to the express or implied or presumed intention of the investors.

The other case that Laffoy J. relied upon in formulating the applicable legal principle was the Irish case of *Shanahan Stamp Auctions Ltd. v. Farrelly.*[13] In that case about £1.5 million pounds investors' money first of all had been placed in an investment fund for the purchase of stamps and secondly had been converted into goods (stamps). The value of the company's assets when it went into liquidation was under £500,000. One of issues was whether the rule in *Clayton's Case* should apply to a particular class of investors. Budd J. stated:

> "It may be that the rule in *Clayton's Case* does not apply beyond tracing in a bank account and the principle may have no application to property acquired by means of a mixed fund. But I prefer to deal with the situation, for safety's sake, as if the principle can properly be applied to the case of property acquired with such a mixed fund."[14]

Budd J. found that whereas it would be possible to apply the rule to deposits in the bank account it was not possible to know whose money had been withdrawn to purchase particular lots of stamps. As it was practically impossible to apply the rule he ordered a pro rata distribution.

The Judgment

From her discussion of *Shanahan, Barlow Clowes* and the passage from Keane C.J.'s book set out above Laffoy J. stated that:

> "The conclusion I draw from the authorities are that . . . in the case of a current account such as the account in issue here where trust funds sourced from various beneficiaries are mixed or pooled in the account it is settled law that as a general proposition the rule in Clayton's Case is applicable in determining to whom the balance of the account belongs.

"It would be a mistake to consider *Money Markets*, or indeed *Barlow Clowes*, as heralding a new approach to the law of tracing in equity. Although discussion of the rule in *Clayton's Case* has become a regular feature of the case law and academic commentary on this question there has been a strong tradition of the courts actually deciding cases, as courts of equity should, in the light of the justice of the case as between the parties. This is what Laffoy J. did on the facts of *Money Markets*."

> However, the application of the rule may be displaced in the particular circumstances of a case, for instance, if it is to be shown or to be inferred that it does not accord with the intention or presumed intention of the beneficiaries of the trust fund."[15]

Laffoy J. stressed that she was not required to reach a conclusion as to how the balance was to be divided out between all the parties who had a claim to the funds in the account; she confined herself to considering the position between the applicant on the one hand and all other parties on the other hand. She held that even if Clayton's Case does not apply, on the facts the applicant had a better claim than the other investors. After holding that the liquidator did not have the power to complete the purchase of the

shares she therefore ordered that he repay the applicant the full amount transferred to the company.

Analysis

It would be a mistake to consider *Money Markets*, or indeed *Barlow Clowes*, as heralding a new approach to the law of tracing in equity. Although discussion of the rule in *Clayton's Case* has become a regular feature of the case law and academic commentary on this question there has been a strong tradition of the courts actually deciding cases, as courts of equity should, in the light of the justice of the case as between the parties. This is what Laffoy J. did on the facts of *Money Markets*.

Laffoy J. stated that the courts should apply a presumption that the rule in Clayton's Case applies, but that this can be displaced by the intention or presumed intention of the parties. If a presumption of some other intention displaces a presumption of the application of a particular rule this in effect says no more than that the courts should apply the intention or the presumed intention of the parties. That this has been done by courts of equity for years is evident from the following (non-exhaustive) list of what can be termed with respect to Laffoy J.'s formula of words as 'exceptions to the rule in Clayton's Case':[16]

a) The account is not a current account.[17]

b) The account was broken, i.e. one account was closed and a new account opened.[18]

c) Two accounts were kept.[19]

d) Negotiations between the parties showed that they intended that a particular transaction was to be treated separately from any other course of dealings between the parties.[20]

e) The account contains entries made in anticipation of payment[21]

f) The account contains a blend of the trustee's money and trust money.[22]

g) Fraudulent withdrawals are made from the account.[23]

h) *ultra vires* transactions are made on the account.[24]

i) A balance remains in a charitable fund the purpose of which has been fulfilled.[25]

j) It is impossible to attribute the benefit of a particular contract to a particular client.[26]

k) Short term transfers were made from one account to another in order to earn a higher rate of interest rather than as an investment of a particular investor's money.[27]

Conclusion

The decision in *Money Markets* can be fully reconciled with the historical nature and purpose of equity: of doing what is right to bring about the fairest possible result between the parties. It is to be hoped that the Irish courts will continue to uphold the equitable tradition of adjudication and never be in the position in which Hand J. found himself in *Schmidt* of feeling obliged to apply a rule that he considered unjust.●

1 High Court, unreported 28th July 1999.
2 *Clayton's Case: Devaynes v. Noble* (1816) 1 Mer. 572, [1814-23] All ER 1, 35 ER 781
3 Lord Goff of Chieveley and Gareth Jones *The Law of Restitution* (5th ed.) (London: Sweet and Maxwell, 1998) 108
4 Keane *Equity and the Law of Trusts in Ireland* (Dublin: Butterworths, 1998) 286
5 [1991] 1 N.Z.L.R. 545
6 ibid. 553
7 ibid. 553
8 [1992] 4 All ER 22
9 *Re Walter J. Schmidt & Co. ex p. Feuerbach* 298 F. 314 (1923). This passage was also approved in Registered Securities.
10 So called because it is favoured by the courts in the United States and Canada, e.g., Re Ontario Securities *Commission and Greymac Credit Corp.* (1986) 55 OR (2d) 673.
11 [1992] 4 All ER 22, 35
12 ibid. 36
13 [1962] I.R. 386
14 [1962] I.R. 386, 442. In *Re Diplock* [1948] Ch. 465 the Court of Appeal stated that there is no justification for extending [the rule in Clayton's Case] beyond the case of a banking account. (at page 555)
15 Page 13 of the judgment
16 Some of these cases concerned the situation where there was a running account between only two parties and the issue was how payments should be appropriated, rather than the situation discussed in this article where funds are to be appropriated between different beneficiaries of a blended fund. These two situations have been treated similarly by the courts and there is no reason why principles set down in the one situation would not apply to the other.
17 *The Mecca* [1897] A.C. 286
18 *Re Sherry* (1885) 25 Ch. D. 692
19 *Bradford old Bank v. Sutcliffe* [1918] 2 K.B. 838
20 *City Discount Co. Ltd. v. McLean* (1874) L.R. 9 C.P. 692. See also *Henniker v. Wigg* (1843) 4 Q.B. 792
21 *Galula v. Pintus* (1911) 104 L.T. 574. The Plaintiff entered the amount of bills discounted in the account without waiting until they were paid.
22 Re *Hallett's Estate* (1880) 13 Ch. D. 696. There is a presumption that the trustee is honest and withdraws his own money first.
23 *Lacey v. Hill, Leney v. Hill* (1876) 4 Ch. D. 537 (affirmed on other grounds sub. nom. *Read v. Bailey* (1877) 3 App. Cas. 94)
24 *Blackburn Building Society v. Cunliffe, Brooks and Co.* (1884) 9 App. Cas. 857
25 *Re British Red Cross Balkan Fund* [1914] 2 Ch. 419. In Ireland that situation is now governed by Section 47 of the Charities Act, 1961, which allows such a fund to be applied cy-prËs.
26 *Re Eastern Capital Future Ltd. (in liq.)* [1989] B.C.L.C. 371
27 *Norton Warburg Investment Management Ltd. v. Gibbons* unrep. English H.C. 31st July 1981

AJOR ARBITRATION CONFERENCE FOR DUBLIN

The Chartered Institute of Arbitrators is holding its annual conference in Dublin in September of this year. The Bar Review talks to the ***Dr. Nael Bunni,*** *the first non-British resident to hold the office of President of the Institute, about the work of the Institute, the aims of this year's conference and the Ireland's emergence in the world of international arbitration.*

The Chartered Institute of Arbitrators (CIArb) has a simply stated object: "to promote and facilitate the determination of disputes by arbitration". Founded in 1915, it now has over 10,000 members in some 84 countries, drawn from a wide range of disciplines including law, construction, shipping and insurance. Over a third of the membership is drawn from outside the UK. The Institute has had an Irish branch for nearly 20 years.

This year the Institute will be holding its Annual Conference in Dublin Castle, from 28th to 30th September.

The Institute has long played an important role in the promotion of arbitration internationally. Its activites include the maintenance of a register of arbitrators and a panel of arbitrators, appointment and nomination of arbitrators and education and training programmes for potential and practising arbitrators.

The President chairs the Council of the Institute which governs the affairs of the Institute.

This year's Annual Conference will be opened by the Hon. Mr. Justice Ronan Keane, Chief Justice of Ireland. The conference will include three workshops - on the themes of Education and Training, Adjudication and International Matters in addition to a simulated arbitration scenario which will showcase the latest techniques in arbitration internationally.

It is particularly appropriate that the annual conference be held in Dublin this year given the strides that Ireland has made in recent years in the area of international arbitration. The Arbitration (Commercial International) Act, 1998 enacted the UNCITRAL Model Law on International Commercial Arbitration into Irish law. The Model Law is the accepted benchmark for contemporary international arbitration practice. The Bar opened its Dublin International Arbitration Centre in 1998 to co-incide with the passing of the Act. This is a purpose-built arbitration facility which provides a state-of-the-art environment for the conduct of arbitrations. In addition, a Diploma Course in International Arbitration has been available in UCD for the past number of years.

Dr. Bunni is a leading international figure in construction arbitration and is well-placed to comment on international trends. He sees the adoption of the Model Law as being particularly significant in the bid to attract more international arbitrations to Ireland. "The Model Law is the standard international law on arbitration. It was published by the United Nations Commission on International Trade Law in 1985 and has already been accepted by over 30 jurisdictions around the world. It gives party autonomy central place in the arbitral process and minimises the risk of court interference in the arbitral process. It leaves arbitrating to the arbitrators". He believes the adoption of the Model Law has improved Ireland's arbitration profile internationally. He is aware of a number of international arbitrations being referred to Ireland since the 1998 Act came into force.

'The Model Law is the standard international law on arbitration. It was published by the United Nations Commission on International trade Law in 1985 and has already been accepted by over 30 jurisdictions around the world. It gives party autonomy central place in the arbitral process and minimises the risk of court interference in the arbitral process. It leaves arbitrating to the arbitrators."

In addition to the passing of the 1998 Act, the opening of the Bar's Dublin International Arbitration Centre in Church Street has greatly advanced our arbitration infrastructure by providing a purpose-built international arbitration facility. If anything, the Centre could be expanded, says Dr. Bunni. "We can never have too many facilities for arbitration". Dr Bunni believes that education and training of Irish lawyers and arbitrators in international arbitration is also vital. The Diploma course in International Arbitration in UCD is helping to meet this need. "The next phase of work is really promotional. Ireland needs to sell its strengths as an arbitration venue to the international business, legal and arbitration communities"

The international arbitration market has traditionally been concentrated in the cities of London, Paris, Geneva, Stockholm. New York and Hong Kong. Recent years have seen new jurisdictions emerge as arbitration forces, with international arbitration centres now operating in Vancouver, Singapore, Malaysia and Cairo. He believes that Ireland rates well amongst the emerging arbitration jurisdcitions. "Ireland has high quality lawyers and judges, a good communications infrastructure and purpose-built arbitration facilities. It is an accessible, neutral jurisdiction. People also tend to enjoy their visits here."

The Conference in September will be casting an eye into the future to attempt to predict new trends in arbitration. One area that Dr. Bunni sees as being of particular importance is the area of electronic commerce and online disputes, although there is of course a distinction to be made between disputes arising from online transactions (which may be arbitrated online or "off-line") and the conduct of an arbitration online (which may involve the arbitration of any type of dispute). He thinks it likely that online arbitration services may develop which would involve submissions to arbitration, pleadings and hearings all being conducted over the Internet by electronic means. "The whole focus of arbitration is to provide cost-effective and time-effective resolution of commercial disputes. If these objectives can be met by exploiting technology to produce a more efficient arbitration service, than online arbitration developments are to be encouraged." There is likely to be a distinction in the type of arbitration service provided in consumer and small business disputes where the amounts involved are limited to say £5,000, and more complex disputes involving larger amounts, with online arbitration perhaps being more suited to the former type of dispute.

The Institute's conference will also focus on domestic arbitration, where the Irish and English general legal principles are quite similar, although their arbitration laws have moved apart somewhat since the enactment of the Arbitration Act 1996 in England. The workshops and simulated arbitration will be designed to involve participation from attendees at the Conference; he hopes it will be a "stimulating and learning" experience for all present. There will also of course be a social side. Many of the attendees will be coming from abroad and there is a full programme of social events. The Conference is being sponsored by the Irish Bar, Bank of Ireland and Irish Distillers, amongst others.

Booking forms from the Conference are available through the Bar Council's Arbitration Committee. Please contact Mary O'Reilly at 817 5014 for further details. ●

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KING'S INNS NEWS

"REBEL HEART" on location at King's Inns.

The dining hall became the interior of the GPO as we know it from photographs taken in 1915. The famed clock ("see you under the clock in the GPO") is the focal point with the serving counters on either side dealing in particular with separation allowances (World War 1 had begun and the allowances were, of course, paid to the wives and families of serving officers and soldiers who had gone abroad). The photograph shows, left to right, the hero of the four hour TV epic, Ernie Coyne (played by James D'Arcy), Camilla McAleese, Under-Treasurer King's Inns, John Strickland, Director of the series for BBC and David Curran, film liaison assistant at King's Inns.

King's Inns Team Success at International Moot Competition

The King's Inns team of Jennifer O'Connell, Lorna Lynch, Tom Fitzpatrick, Paul Christopher and Fionuala Croker (all from final degree) performed particularly well at this year's Willem C. Vis International Arbitration Moot Competition in Vienna, reaching the quarter-finals (from an entry of some 80 teams from 29 countries) and picking up two individual speaking awards (for Jennifer O'Connell and Lorna Lynch).

The competition, which is in its seventh year, is designed to develop international arbitration skills in young lawyers from around the world. The team were accompanied to the competition by Ercus Stewart SC, lecturer in arbitration at the King's Inns, and Cian Ferriter from the Bar Council's Arbitration Committee.

New Director of Education

We extend a warm welcome to Marcella Higgins who took up the position of Director of Education at King's Inns on 8 May.

Marcella joins us from Portobello College where she had been Registrar for the last seven years. During that period she was also involved in the education of LL.B students. She holds a BA, a H. Dip.Ed. and a Masters Degree in Education from University College, Dublin. We hope that she has a fruitful and rewarding time at King's Inns.

DATES FOR BENCHINGS

* **Friday 23 June -**
  The Hon. Mr Justice Roderick Murphy
* **Friday 7 July -**
  Mr Paul Callan, SC
* **Friday 14 July -**
  Mr Liam McKechnie, SC
* **Friday 21 July -**
  Mr James Salafia, SC

THE HABITATS DIRECTIVE AND THE WILDLIFE AMENDMENT BILL 1999

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

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

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

Appeals Based on Science

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

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

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

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

Preparing an Appeal

The Technical Annexes.

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

COMPETITION LAW ALIGNMENT REFORM

by Imelda Maher
(Round Hall, Sweet and maxwell, 1999)

REVIEWED BY EUGENE REGAN B.L.

Competition policy is where law, economics and, some would say, politics meet. In an era of privatization, de-regulation and liberalization, fostered by the European Community's programme for the completion of the EU's internal market, competition policy is seen as a key instrument in promoting an efficient and competitive economy - a proposition which is now more readily accepted in Ireland in the light of our most recent economic success.

Imelda Maher's *Competition Law* goes back to first principals in explaining the origins and fundamental philosophy of EC and Irish competition policy and sets out in a detailed and structured way the evolution of competition policy in Ireland as enunciated by the Competition Authority and the Courts. It is a comprehensive and erudite work on the interface between EU and Irish competition law, it outlines the new direction of both EU and Irish Competition Policy and makes specific proposals for the alignment and reform of both, thus justifying the sub-title of her book.

The Competition Act, 1991 was introduced in response to the completion of the EC's internal market. The Act was designed to create a change in the climate in which Irish business operates and, together with other policy measures in such areas as de-regulation, State Aids and Public Procurement, to enable Irish firms to compete effectively in the EC's internal market.

The introduction of the Competition Act, 1991 did contribute to greater awareness of the importance of Competition policy in Ireland but it was the Competition Amendment Act, 1996, in transforming the Competition Authority into an enforcement agency with extensive and far reaching powers to investigate and initiate civil or criminal prosecutions, which brought home to the business community that they could ignore competition law at their peril.

The author points out that the Irish Competition Act, 1991 was modeled, both substantively and procedurally, on EC Competition Rules highlighting in this respect as in so many others the importance of the European Union in establishing best practices in the manner in which we regulate our economy. The Act introduced a general prohibition system against anti-competitive practices, which unlike the EC rules, contained no special rules for any sector. The book highlights the continuing difficulty of the overlapping jurisdiction of EC and National Rules. There is a shared competence in terms of substantive law in that the Member States can have their own competition rules and there is shared procedural competence in that national courts and authorities can apply the EC Competition Rules. National Competition Law Rules can be applied to a situation even where Article 81 and 82 could apply provided they do not prejudice the full and uniform application of EU Law. It is suggested that the Irish position is out of step with the growing number of other Member

States who have aligned their Competition Rules with those of the EC. It points out that the Competition Authority is not a Tribunal for the purposes of Article 234 of the EC Treaty and could not refer a question on the interpretation of EC Law to the ECJ.

The book deals comprehensively with the EC Competition Rules and their operation in Ireland highlighting the fact that prior to 1991 few Irish competition cases arose before the EC Courts or the Irish Courts. The book rightly points out that the Commission is primarily dependent on complaints for finding out where there are breaches of the Competition Rules and that few complaints emanated from Irish companies and are unlikely to do so in the future with the emphasis on de-centralisation of enforcement to national authorities. The work deals comprehensively with the enforcement of Article 81 and 82 by the EC Authorities in Ireland.

Chapter 4 deals with the application of Irish competition law in respect of restrictive practices and abuse of market dominance. The concepts involved in Section 4 and Section 5 proceedings are clearly explained and referenced in the Competition Authority decisions and Irish Court rulings.

Chapter 5 deals with Irish Merger and Competition law and the difficulties faced by practitioners in deciding whether a proposed merger falls within the Competition Act of 1991 (as amended) as well as the Mergers, Takeovers and Monopolies Control Acts, 1978 - 1996. Chapter 6 outlines EC Control of Mergers rules and highlights the Irish contribution to the establishment of EC Merger control where Peter Sutherland, as Commissioner for Competition Policy, succeeded in having a Merger Control Regulation introduced as part of the 1992 programme for the completion of the single market.

Chapter 7 points to the change in policy both at EC and Irish level in respect of vertical restraint agreements. Such changes it is suggested demonstrate the acceptance of the view that vertical restraints are not likely to be anti-competitive unless combined with market power or part of an extensive network of agreements, which lead to market foreclosure.

The book, while focusing on the core elements of EC and Irish competition law also deals comprehensively, in chapters 8,9 and 10 respectively, with the issue of pricing, property rights and the common law principal of restraint of trade all of which remain relevant to defining the scope of competition law.

Imelda Maher points out that until the introduction of the Competition Act, the EC Competition Rules had singularly failed to impact on Irish business. She maintains that this calls into question their effectiveness and lends support to the view that the EC could successfully move towards a two tier systems of Competition Regulation where National Law would support the development of a competitive climate that could then be built on at a higher level by the Commission as the primary competition body in the EC.

The author states that the parallel jurisdiction of the national and EC rules, compounded by the lack of clear demarcation of jurisdiction (other than in relation to Mergers) and the inability of the Competition Authority to apply the EC Rules, highlight the complex interaction of the two systems. She points to the fact that the Commission has sought to address this problem in its 1999 White Paper where it suggests a radical change in the implementation of EC Competition Rules suggesting that it abandon its exclusive power to apply Article 81(3) through the enactment of the regulation rendering all of Article 81 directly applicable. In effect, it proposes a decentralised control system with article 81 and 82 being directly effective allowing the Commission to focus on those cases with a community interest.

Article 84 of the Treaty states that National Authorities can apply Article 81 and 82 pending the adoption of measures indicating the powers of the Commission under Article 83. EC law confers powers on National Competition Authorities to apply the EC rules but this power can only be exercised if National Law has also conferred the necessary power and procedures on them to apply Article 81(1) and 82. Several states have done so, but Ireland has not thus far even though the Commission published a notice designed to encourage co-operation between it and national authorities. The main stumbling block for the conferral of such powers on the authority is that it is an administrative body and the ability to impose fines is essentially reserved to the Courts under the constitution. If all national authorities had power to enforce the EC Rules then it would be easier for the Commission to refer complaints back to the domestic forum leaving it to focus on cases with a community interest.

This book is a valuable contribution to the existing body of literature on Competition Law in Ireland. The structure and schema followed is conducive to a full understanding of both the substantive law and procedures which must be followed by the business community in order to comply with EC and Irish Competition law. In providing an up to date work Imelda Maher has been in a position to take account of the latest decisions of the Competition Authority, Judgments of the Irish Courts and pronouncements of the European Commission in the form of the 1999 White Paper.

If not providing solutions to the issue of demarcation between Irish and EC Competition policy, the author has nevertheless clearly defined the issues to be resolved and given some pointers to the future direction of competition policy both at national and EC level.

For legal practitioners involved in competition matters this work is essential reading.●

"This book is a valuable contribution to the existing body of literature on Competition Law in Ireland. The structure and schema followed is conducive to a full understanding of both the substantive law and procedures which must be followed by the business community in order to comply with EC and Irish Competition law."

"HUMAN WRONGS HUMAN RIGHTS"

by Jane Winter
(Jointly published by The Northern Ireland Human Rights Commission and British Irish Rights Watch, 2nd ed., 1999)

Reviewed by Paul Anthony McDermott BL

The need for this timely publication is clearly identified by High Commissioner Mary Robinson in her Foreword to the book:

> "Since the adoption of the Universal Declaration of Human Rights in 1948, the UN's human rights mechanisms have expanded to touch almost every aspect of human rights. Those mechanisms can often seem bewildering to those who are not familiar with them. People whose human rights have been violated need all the help they can get in order to use this machinery to focus international attention on their problems."

The UN has a whole array of mechanisms for helping people to redress their wrongs that lawyers may be unfamiliar with and the purpose of this book is to fill that gap. The practical usefulness of the book cannot be over-estimated. For example there is a fascinating section on how to effectively lobby a UN Committee. This contains detailed advice on everything from who to lobby to the best time of day to target a Committee member in the corridors of the UN.

The book commences with an overview of the UN human rights machinery and comprehensively describes the complex web of Councils, Commissions, Committees, Special Rapporteurs and Working Groups (the differences between which are fully explained in a helpful glossary). It then proceeds to explain how one can make a submission to these groups and more importantly how to make a submission that will be noticed. The book also describes how to make an individual complaint under the First Protocol of the International Convention on Civil and Political Rights and how to utilise the 'Resolution 1503' procedure for complaints about "situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights." In addition it outlines how to bring very urgent cases to the attention of the UN. The book concludes with a fact-file on each UN human rights body complete with its remit, members, address, contact numbers and most importantly of all its annual closing date for submissions.

Unlike some human rights publications Human Wrongs Human Rights remains firmly rooted in day to day practicalities. A good example of this is the following advice which appears towards the start of the book:

> "When it comes to human rights, there is nothing you can tell anyone at the UN that they have not heard before and no situation you can describe of which there has not been a worse example somewhere else in the world. It particularly pays for people in Ireland and the UK to be sensitive to that fact ...It does not help to describe a beating-up in a police station, however brutal, as 'torture'. Much better to call it 'ill-treatment' and let the UN decide that you have understated your case."

Whilst this might seem like obvious advice it is extraordinary how rarely it is given in texts and how many times it is ignored in practice.

One useful innovation in the book is a website map for the homepage of the UN High Commission for Human Rights. As someone whose previous experience of UN webpages has been akin to that of a child dropped in the centre of Hampton Court Maze, I found this section particularly illuminating.

The book is well written and clearly presented. Its stated aim is to enable human rights groups around the world make much more effective use of the UN mechanisms for protecting human rights. In this reviewer's opinion it more than succeeds. A copy of this publication should find a place on the shelf of every NGO and human rights lawyer.●

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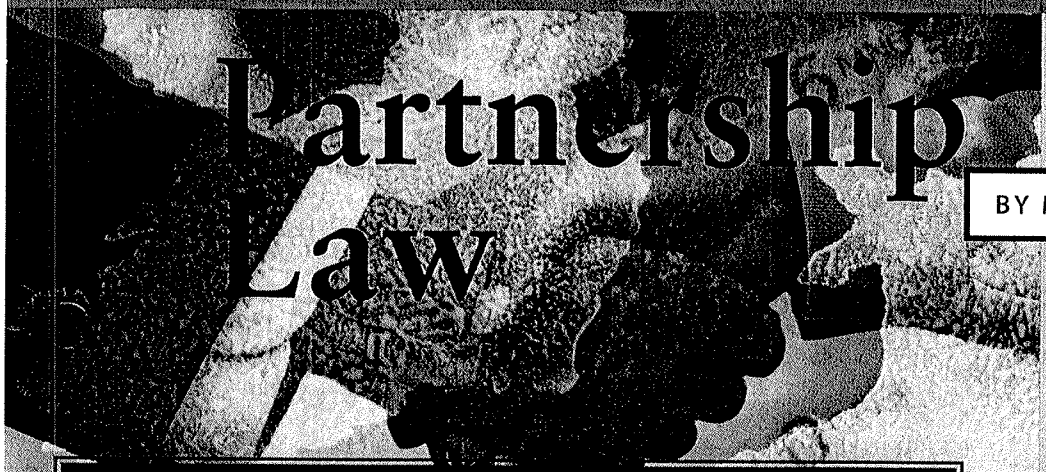

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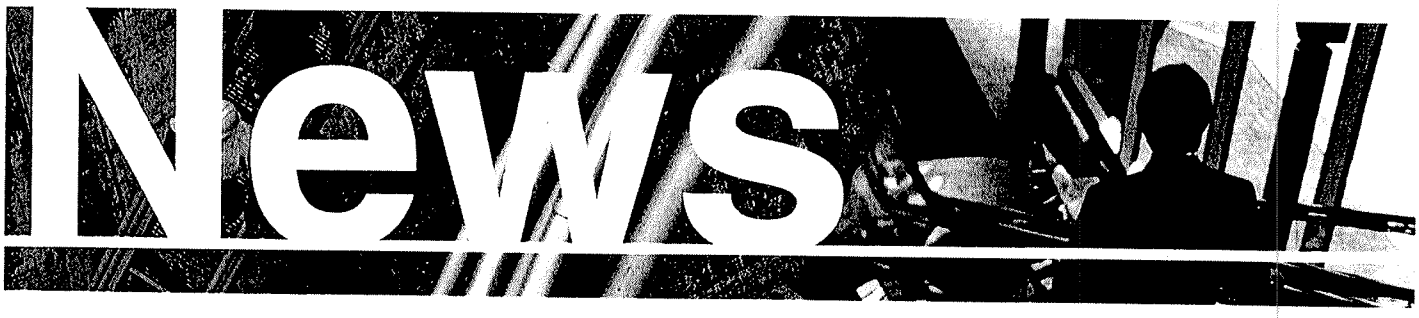

Irish Maritime Law Seminar

The Irish Maritime Law Association is hosting a seminar entitled 'Promoting Ireland as a centre for Maritime Arbitration and Commerce and recent developments in Irish Maritime Law'. Issues to be covered include Ireland as a Location for Maritime Arbitration, the London Experience of Maritime Arbitration, Practical Aspects of Maritime Arbitration in Ireland, investigation of marine casualties and recent legislation on oil pollution.

Speakers include Brian McGovern SC, Colm O'hOisin BL and Ciaran Lewis BL from the Law Library.

The day long seminar is being held on Wednesday 17th May in Jurys Hotel in Ballsbridge. Admission is £125 for non-members and £100 for members, which includes lunch.

Details are available from: Paul Gill, Honorary Treasurer of the Irish Maritime Law Association at tel 667 0022, fax 667 0042

Sentencing

The Professional Practices Committee wishes to clarify Rule 9.20 of the Bar Code of Conduct which states;

'Prosecuting Counsel should not attempt by advocacy to influence the Court in relation to sentence.'

The Professional Practices Committee wishes to confirm that this Rule applies to the Court of Trial rather then the Court of Criminal Appeal. A prosecuting barrister may on appeal by the DPP to that Court on the instructions of the DPP make submission's on the undue leniency of sentence by a trial judge in the Circuit or Central Criminal Court.

Professional Practices Committee
27th March 2000

Unique sitting at the Limerick Circuit Court

Usually it is only the retirement of judges and other jurists which are marked in legal journals. However, the recent retirement of Captain Frank Sheridan from his post as harbour master of Galway is worthy of legal note because he was uniquely summoned by his honour Judge Kevin O'Higgins (before his elevation to the High Court) to sit with him on the circuit court bench at Limerick for the hearing of an appeal brought by a sea pilot against the removal of his licence by the pilotage authority of the Shannon estuary.

The unique statutory provision which required a circuit court judge to sit with an assessor of nautical and pilotage experience was to be found in the Pilotage Act, 1913. This provision has since been repealed by the Harbours Act in 1966, a development which will be welcomed by common law lawyers wary of the court forming a judgment based on opinion not opened to the court and untested by cross-examination. This civilians lawyer's tradition however, still continues in the High Court where the admiralty judge may appoint assessors but in that court the power to make appointments is discretionary and last appears to have been exercised in 1967 in the case of the s.s. *Irish Elm* 101 I.L.T.R. 182.

The grounds upon which the Shannon estuary pilotage authority had removed the pilots license were that the pilot had been keeping his standby watch for incoming ships by keeping in touch with the pilot station in Kilrush by mobile phone from his house in Cork. It is said to be the mark of a fair judgment if both parties leave the courts dis[illegible]s. However, in this case the pilot was well pleased with the judgment as his licence was restored and he was able to resume his livelihood. He was also allowed to continue to use his mobile phone, but henceforth only for the purpose of keeping in touch with his family from the pilot station in Kilrush! Accordingly, the pilotage authority was also well pleased as the seaward approaches to the Shannon have since been fully manned and the pilotage service to incoming ships assured.

It may well be, therefore, that this particular admiralty practice has something to commend it. In any event, Captain Sheridan can look back with satisfaction at his contribution to the administration of justice and the tribute Mr Justice O'Higgins paid to him at the conclusion of the case.

John Wilde Crosbie BL

THE COPYRIGHT AND RELATED RIGHTS BILL, 1999

The Government recently unveiled its Electronic Commerce Bill amid much fanfare. However, a piece of legislation which is arguably of equal importance to the shape of Ireland's Information Society has been crawling through the Oireachtas for the past year with very little public debate or focus on its provisions. That piece of legislation is the Copyright and Related Rights Bill, 1999.

With 355 sections stretching to almost 200 pages, the Bill is one of the longest ever to come before the Oireachtas. It attempts to modernise Irish copyright law in the light of developments in the digital era. The Bill also seeks to implement the terms of a number of important European Directives, dealing inter *alia* with copyright in databases, computer programs, satellite broadcasting and cable re-transmission and lending and rental rights.

The Bill radically re-structures Irish copyright law. The distinction in the Copyright Act, 1963 between rights enjoying full copyright protection and neighbouring rights has been abolished and replaced by the concept of "works" protected by copyright. The categories of protected work are much wider, extending as they do to sound recordings, films, and television and cable broadcasts. Copyright is statutorily acknowledged as a "property right" for the first time, which will raise interesting questions about the application of jurisprudence on property rights under the Constitution to the field of copyright. The Bill introduces an entirely new set of protections for performers independent from copyright protection. It also introduces limited recognition of the moral rights of authors and performers. The scheme of defences to copyright infringement remains largely intact, if tightened somewhat in favour of copyright owners. The Bill also introduces more extensive provisions for copyright licensing, as well as aligning our law on copyright protection for database compilers with the more stringent European law in that area

The Bill's somewhat rushed conception (introduced in part as a response to the institution of proceedings by the European Commission against Ireland for our failure to implement the Rental and Lending Rights Directive) is to be contrasted with its lengthy gestation period; the Bill has been in progress through the Oireachtas for almost 12 months. The progress of the Bill through the Oireachtas highlights the shortcomings of our legislative system when dealing with technical or complex legislation. The Bill entered Select Committee stage in January of this year. There was intensive lobbying of the Committee by the various vested interests and a number of amendments were passed at Committee stage in response to that lobbying. However, the debate on the Bill at Select Committee was guillotined before Easter with a large number of amendments left undebated. The Bill will now enter Report stage where it is unlikely that much time will be available for further debate. Copyright involves a delicate balancing of competing artistic, commercial and social interests and as such it is regrettable that the deliberations of the Select Committee, and the presentations to the Committee by affected interest groups, did not have the benefit of a wider critical public exposure.

It is not possible to analyse the Bill in any detail in the short space available here. In general, the Bill is a laudable attempt to legislate for contemporary developments in the copyright field. The concern at European level has been to co-ordinate the provisions of the draft E-Commerce Directive and the draft Directive on Copyright Harmonisation, given that the legislation in both areas will lay the legal bedrock for the "Information Society" . Some concern has been expressed that the provisions of the E-Commerce Bill and Copyright Bill may not have been as clearly co-ordinated as the provisions in their European counterparts. For example, it remains to be seen how the Copyright Bill's provision (in Section 39(4)) imposing liability on "facilities providers" for copyright infringement where their facilities are used to infringe copyright will interact with the protection from liability given to "service providers" under the E-Commerce Bill. It also remains to be seen whether the Bill's provisions dealing with copyright infringement on the Internet will cover the types of copyright misuse made possible by new developments in technology.

As highlighted in the article on the application of the Bill to the music industry in the present issue of this journal, it seems regrettable that the Bill, as a result of an amendment at Committee Stage, now contains a provision in section 37(4) (relating to the right of record companies to equitable remuneration for making available recorded music to the public) which is directly incompatible with Article 14 of the 1996 WIPO Performances and Phonograms Treaty.

It would also have been useful to have a wider debate on the provision of *droit de suite* rights for artists.

It is to be hoped that some of these issues will be aired before the Bill is finally passed and that the public will have its say on how the Copyright Bill will allocate rights and power in this digital age.●

OPYRIGHT RELATED RIGHTS BILL, 1999 AND THE MUSIC INDUSTRY

Colm O'Dwyer BL *argues that the terms of the Copyright and Related Rights Bill dealing with recorded music are, as presently framed, contrary to Ireland's obligations under the WIPO Performances and Phonograms Treaty and are likely to cause huge problems with copyright enforcement in the digital age. He proposes an alternative legislative solution to the problems raised.*

Introduction

When one considers that protection of copyright is the most fundamental issue underpinning the artistic and cultural activities for which Ireland has forged an international reputation, as well as the new information based industries such as computer software development, it is surprising that deliberations of the Select Committee on Enterprise and Small Business in relation to the Copyright Bill have not received significant coverage in the mainstream or even specialist media.

Copyright reform is necessarily a technical matter and many of the issues that have arisen in relation to the Bill are highly technical. However much of the Bill's provisions have significant implications and these provisions deserve wider debate, particularly by the media who will be directly affected by its provisions.

This article deals specifically with only one amendment which has been made to the Bill at Select Committee stage, Amendment 21 to Section 37 of the Bill, which relates to the nature of the copyright protection provided to the producers of phonograms i.e. record companies. However, in common with many of the other provisions of the Bill, this Section is likely to affect a very broad spectrum of interests and will, no doubt, be the cause of extensive litigation if enacted in the form that has been accepted by the Select Committee.

The nature of the copyright protection provided to the producers of phonograms

The Copyright Bill, in Sections 17 and 37, proposed to introduce an absolute or exclusive right for record companies in relation to the making available to the public of the sound recordings in which they have a copyright.

Section 17 (2) (b) provided that copyright subsists in sound recordings, films, broadcasts or cable programmes while Section 37 (1) provided that the owners of copyrights in these works had the exclusive right to undertake or authorise others to copy the work, make available to the public the work or make an adaptation of the work.

In effect, these provisions, when read in conjunction with Section 39, which defines the phrase 'making available' to include the 'playing of a copy of the work in public', the 'broadcasting of a copy of the work', and the 'making available to the public of copies of the work by wire or wireless means in such a way that members of the public may access the work from a place and a time chosen by them', would mean that record companies would not only have the power to authorise or prohibit the use of sound recordings in night-clubs and bars but also that they could control the making available of recorded music via digital media such as the Internet.

This exclusive right is considered to be particularly important by the recording industry internationally because new digital technologies such as Music Player (MP3), Real Audio and Windows Media Audio are likely to create a fundamental change in the record business whereby the content, music, will be delivered to the consumer via wire or wireless digital networks instead of on a physical carrier such as a compact disc or magnetic tape.

In relation to the playing of records in bars, discos and hotels, the representatives of the recording industry have long argued that these operations rely on recorded music to attract the customers from whom they receive their revenue and that they should pay back to the owners of copyright in the recordings some small share of that revenue.

Furthermore, they argue that the record business is risk based and that, while there are some spectacular successes, there are many failures, and, in order for the record companies to recoup the heavy investment that they make in new and unproven talent, they must be able to generate revenue both from the sale of their recordings and from fees charged for the public performance, broadcasting or diffusion of their recordings.

"Section 17 (4) of Copyright Act, 1963, which embodies the current law on this area, provides that causing a record to be heard in public, or to be broadcast, 'without the payment of equitable remuneration to the owner of the copyright subsisting in the recording' are acts restricted by copyright. This, in practice, creates a non-exclusive or secondary copyright in that the record company cannot prevent a person broadcasting or causing the record to be heard in public but is merely entitled to remuneration."

If they are to be able to collect these fees, an exclusive right in relation to public performance is necessary to ensure that they are entitled not to provide a licence where someone refuses to pay.

The representatives of the owners of bars and discos argue that these venues should not have to pay record companies for using recorded music at all because they already have to pay for the record itself and have to pay composers/songwriters a performance royalty through the Irish Music Rights Organisation (IMRO). They also claim that they have an important role in promoting music and fear that if the record industry had an exclusive right in relation to public performance, it would be used to prevent bars or discos that were unwilling to pay the public performance tariff demanded for playing records.

Section 17 (4) of Copyright Act, 1963, which embodies the current law on this area, provides that causing a record to be heard in public, or to be broadcast, 'without the payment of equitable remuneration to the owner of the copyright subsisting in the recording' are acts restricted by copyright. This, in practice, creates a non-exclusive or secondary copyright in that the record company cannot prevent a person broadcasting or causing the record to be heard in public but is merely entitled to remuneration. The question of when this remuneration has to be paid was considered by the Supreme Court in the case of *Phonographic Performance (Ireland) Limited v Controller of Industrial and Commercial Property, John Ryan, White Sands Hotel Limited and Hotel Imperial Dundalk Limited* [1996] 1 ILRM 1. It was held in that case that the payment of the equitable remuneration provided for in Section 17 (4) is not a condition precedent and that the wording and sense of other several sections of the 1963 Act suggests that the legislature had envisaged that the payment of equitable remuneration would only apply to a person that had already caused the record to be broadcast or heard in public i.e. after and not before the event.

This situation is problematical for the recording industry because it means that it is not an infringement of the copyright in a recording to broadcast or play that recording in public and a licence from the owner of the copyright in a recording is not actually required to do these acts. It therefore follows that Phonographic Performance Ireland (PPI), the company which administers the performance right on behalf of the Irish record industry, does not operate a licensing scheme, as had been assumed prior to the *White Sands* case, and does not have the power to permit or forbid broadcasters or disco owners from playing recordings. The obligation to pay equitable remuneration, however, is a statutory obligation and the copyright owners or their representatives are entitled to sue for the debt pursuant to statute. If there is a dispute in relation to the amount of the equitable remuneration, which is often the case, the dispute may be referred to the Controller of Patents, Designs and Trade Marks by either party pursuant to Section 31 (3) of the 1963 Act. Unfortunately, the Controller has never made a determination in any of the numerous disputes that have come before his office and the owners of copyright have sometimes remained unpaid for many years while the owners of some of the largest discos in the State await a decision on the amount of remuneration they should pay.

Amendment 21

Section 17 (4) of the 1963 Act was actually an amendment to the 1963 Bill which had originally proposed to introduce an exclusive right both for composers and record companies. History has repeated itself in the year 2000, with an amendment to the 1999 Bill being accepted at Committee Stage which takes away the exclusive right in relation to public performance and the 'making available' of sound recordings.

Amendment 21 adds a new subsection (4) to Section 37 of the Bill which reads:

"(4) Where a sound recording is -

a) Played in public,
b) Included in a broadcast, or
c) Made available to the public by wire or wireless mean in such a way that members of the public may access the sound recording from a place and at a time individually chosen by them, including the making available of sound recordings through the Internet,

the right conferred on the owner of the copyright in that sound recording conferred by subsection (1) (b) shall be deemed to be satisfied by the payment of equitable remuneration".

The implications of Amendment 21

The objective of this amendment is clearly to reduce the exclusive 'making available' right proposed for record companies to a mere right to equitable remuneration. However, the amendment goes much further than the current Copyright Act. As well as replicating the current position in relation to the payment of equitable remuneration by broadcasters and discos, which was probably the intention, the amendment also takes away the right of copyright owners to prevent their recordings being 'made available' to the public by wire or wireless means where these recordings can be accessed or downloaded at a time chosen by the user.

This part of the amendment would appear to be directly contrary to Article 14 of the WIPO Performances and Phonograms Treaty (Geneva,1996) which provides that 'producers of phonograms shall enjoy the exclusive right of authorising the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public from a place and at a time individually

chosen by them'. It is of considerable significance because it would seem to permit someone, without the permission of the copyright owners, to set up a world wide web site or a digital network server offering to the public digital audio files consisting of copies of popular recordings in MP3 or other formats which users could download to digital storage devices/players via the Internet as long as that person intends to pay equitable remuneration at some stage in the future. As I have already said, the record industry is of the view that this digital distribution of sound will within the next ten years become the primary method of exploitation of recordings rather then the traditional physical distribution of records, tapes and discs.

By reason of technological change, the protection of the copyright in the sound recording is also more seriously undermined by the retention of a non-exclusive right than it had been in the past. Digital Audio Broadcasting (DAB), which is the broadcast over radio waves of a digital rather than analogue signal, has been introduced in UK and in many other countries on a trial basis. The sound quality and clarity of the DAB signal is comparable to that of a compact disc and far better than an FM signal. Digital broadcasting technology also potentially affords broadcasters the opportunity to offer far more stations to a given section of the radio spectrum. The combination of greater choice and a higher quality digital signal is likely to encourage far more home recording from the radio. A digital signal can be stored on a digital storage device without any loss of sound quality and, if, for example, the number one song is played on a record chart show, a person will soon be able to record the song and have a recording that is as good as a compact disc. This digital recording can then be disseminated as a file to any number of other users without any degeneration in the quality and this may have serious implications for on-line record sales. It is argued that some control over what recordings are played on what sort of programmes may therefore be required in the future to prevent radio stations dedicating certain channels to the playing of, for example, the top ten albums in order of chart position all day, every day which would be an obvious incentive to record them rather than buy them.

Again, there is a strong counter-argument to this proposition which is that broadcasters such as RTE, which use recorded music as the substance of most of their programming, should not have to seek a licence to play certain or any records from PPI and that PPI should not have the power, even theoretically, to prevent broadcasters, and in particular the State broadcaster, from playing whatever music they wish to play. This issue was of considerable concern in the UK in the 1980s when Phonographic Performance Limited (PPL) imposed a needle-time restriction on radio stations in relation to some recordings.

It is difficult to see how a workable balance between the rights of record companies, broadcasters, and disco and bar owners, which also complies with our international obligations under various treaties, can be reached. However, an attempt will again have to be made by the Legislature as Section 37 of the Bill as it now stands is clearly contrary to the WIPO Treaty and interferes with the property rights of the copyright owner to such an extent that it is probably unconstitutional.

It is also unfortunate that the change from the introduction of exclusive rights for composers/songwriters, performers and record companies and in relation to their creative works - the recording being considered to be a creative work of the record company that produced it - as was proposed in the original Bill to a system of equitable remuneration which only applies to record companies and performers has knock on affects on many other sections of the Bill the whole scheme of which was based on all of the different owners of copyright mentioned in Section 17 having exclusive rights. There is no follow on in the Bill for the introduction of non exclusive rights, no structure for the payment of equitable remuneration. In fact, many of the later Sections of the Bill deal solely with the registration and control of licensing bodies but if PPI is not a licensing body, then it follows that it does not have register with the Controller and disputes which arise in relation to the payment of equitable remuneration do not fall within the jurisdiction of the Controller who, pursuant to Section 344 of the Bill, will determine 'disputes arising under this Act between licensing bodies and persons requiring licenses'. In fact, on a strict interpretation of the relevant sections of the Bill, the only control that the Controller, or any Copyright Tribunal which may be established to carry out the functions of the Controller, has over the owners of copyright in a sound recording is in relation to the payment of equitable remuneration to the performer for the exploitation of a recording of a performance pursuant to Section 198 of the Bill.

"This part of the amendment would appear to be directly contrary to Article 14 of the WIPO Performances and Phonograms Treaty (Geneva,1996) which provides that 'producers of phonograms shall enjoy the exclusive right of authorising the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public from a place and at a time individually chosen by them'."

Statutory licences - a possible solution ?

One possible solution to most of these difficulties would be the introduction of a statutory licensing system whereby the record companies will be required to permit public performance and/or broadcasting of recordings on terms set by legislation. This system would mean that the record companies do have some sort of exclusive right but that broadcasters, discos and bars do not have to fear that they will be prevented from playing records by PPI (by the introduction of an Irish needle-time restriction) If the Minister were to be given the power under a revamped Section 37 to draw up regulations for a licensing scheme under which people could apply to use recordings for standard public performance or broadcasting purposes on terms which are transparent in relation to price and other conditions, the copyright owner would then have to grant a licence if the use is covered by the scheme. The remuneration payable for different types of licence could be set by, or subject to approval of, the Office of the Controller or by a Copyright Tribunal or by some other independent body, and appeal by either side in relation to which tariff applies permitted to the same body. A statutory licensing scheme

would probably also require that the tariff or fee for unrestricted access to the entire repertoire of recorded material to which PPI has licensing rights be paid in advance. Payment would then confer the right to use that repertoire immediately without the delay and inconvenience which ad-hoc negotiations might involve. The statutory system guarantees that this right is available to all users regardless of their size or commercial strength and achieves for the licensee a measure of administrative security. For the licensing body and owners of copyright that it represents it ensures that they will receive a fair remuneration for the use of their works.

"One possible solution to most of these difficulties would be introduction of a statutory licensing system whereby the record companies will be required to permit public performance and/or broadcasting of recordings on terms set by legislation."

A statutory licensing scheme in operation

A statutory licensing system for broadcasters is already in place in the UK pursuant to Part IX of the Broadcasting Act, 1990. The introduction of this system disarmed PPL of injunctive rights which it had threatened to use during the 1980s in relation to the enforcement of needle-time restrictions. Since 1991, the broadcaster must simply give notice to the UK Copyright Tribunal of their intention to use copyright material and of the date on which they propose to begin to do so (Section 135B(3) (a)) and then apply to the Tribunal to have the terms of payment set (section 135 (3) (b)). They can then start to play any records they wish on air and, while a determination by the Tribunal is pending, they can decide what royalty they wish to pay to PPL (Section 135 C (1)) - but they have to repay any shortfall that fallen on the determination. Once the tariff is set by the Tribunal, it remains in place until one side or the other seeks a review. The tariff itself is assessed on the basis of the net broadcasting revenue of the radio station which is made up of sponsorship and advertising revenues earned from music shows. The Tribunal has the power to consider any other question that may arise as to the operation of the licence after it has made its determination.

After some initial teething problems, this system has been successful in the UK. The Tribunal is reasonably speedy in its determinations, which is vital, and both users and copyright owners appear to be satisfied with the hearing they receive. There is no apparent reason why a similar structure would not be effective in Ireland.

Performers' rights: a further complication

The Copyright Bill proposed in Part III to introduce new copyrights for performers in their performances, even where they are performing a song which they did not write. This change was necessitated by the EU Council Directive No. 92/100/EEC of 19 November 1992 on Rental and Neighbouring Rights which became law in each member state on the 1st of July, 1994.

Performers, who could be singers or musicians, were originally provided with an exclusive right in relation to the making available to the public of recordings of their performances in Section 195 of the Bill but an amendment which is almost identical to Amendment 21, Amendment 132, has been proposed by the Minister of State in relation to their rights. All of the same difficulties that apply to Amendment 21 apply to this amendment including another direct clash with the WIPO Performances and Phonograms Treaty.

The added complication is that performers do not have a royalty collecting society similar to IMRO or PPI. It is likely that PPI will collect their equitable remuneration for them as that company already will have a separate responsibility under Section 198 to pay to performers an 'equitable' cut of the equitable remuneration that they receive for the exploitation of their members' sound recordings. It would therefore be convenient for PPI to collect one larger tariff which will cover both performers and record companies but the performers will receive both their own equitable remuneration and a share of the equitable remuneration collected on behalf of record companies.

At the time of writing, Amendment 132 had not yet been reached by the Select Committee. However, if they do not accept the amendment for the reasons outlined, Amendment 21 will appear to have been both ill-conceived.

Conclusion

Amendment 21 to Section 37 of the Copyright Bill is unsatisfactory in that it does not properly balance the rights of the owner of the copyright in a sound recording with the rights of people whose businesses are based on making recorded music available to the public by playing it on the radio or in a disco.

The re-introduction of a non-exclusive system of rights management involving the payment of equitable remuneration also damages the entire scheme of the Bill which was clearly based on the premise that the owners of different copyrights in a musical work and sound recording would all have the same exclusive right to allow or prohibit someone else dealing with their property.

Furthermore, Section 37 (4) (c), which was introduced by Amendment 21, is contrary to our obligations under the WIPO Performances and Phonograms Treaty (Geneva, 1996) and is open to constitutional challenge on the grounds that it interferes with the rights of private property within the meaning of Articles 40.3.2 and 40.1 of the Constitution.

I think that the Section 37 of the Copyright Bill will have to be changed, and suggest that the introduction of statutory licensing in relation to the public performance and broadcasting performance may be the appropriate change to make. The right to prevent a person making copies of recordings available in digital format in such a way that members of the public can download the work at a time chosen by them (including the making available of copies of the work via the Internet) must remain an exclusive right as digital distribution is likely to become commercially significant over the next few years and may in the longer term become the primary method of exploitation of recordings.●

NFORCEMENT OF FOREIGN JUDGMENTS IN NON-CONVENTION CASES

Jonathan Newman, BL, *UCD Law Faculty, examines the anarchic common law rules governing the enforcements of foreign judgments in non - European Convention cases and thier recent reform by the Canadian judiciary*

Introduction

When it is sought to enforce a foreign judgment in Ireland in a situation where the European Judgment Conventions[1] are inapplicable it is necessary to rely on the State's common law rules on enforcement.[2] The Conventions do not apply to a judgment originating from a non-Convention state (most significantly the United States) or given in proceedings excluded from the Conventions' scope.[3] Judgments obtained in insolvency proceedings or by regulatory authorities are, for example, excluded.

The common law rules on the enforcement in Ireland of foreign judgments are, however, extremely restrictive. The result is that, if a foreign judgment cannot benefit from the European Conventions, it - and therefore also the contractual or other civil obligation to which it gives effect - is often unenforceable in Ireland as a practical matter. This situation, characterised as "anarchic and unfair",[4] is created by clear, long-established common law rules which are shared by many common law jurisdictions.

"The common law rules on the enforcement in Ireland of foreign judgments are, however, extremely restrictive. The result is that, if a foreign judgment cannot benefit from the European Conventions, it - and therefore also the contractual or other civil obligation to which it gives effect - is often unenforceable in Ireland as a practical matter. This situation, characterised as "anarchic and unfair", is created by clear, long-established common law rules which are shared by many common law jurisdictions."

The unsatisfactoriness of this position is heightened by the fact that the United States is Ireland's third largest market and the primary market for the State's high technology goods and services. The experience of the operation of the European Conventions would indicate that Ireland's civil and commercial interests are better served by enhancing the level of confidence that can be placed in dealings as between Irish residents and US and other foreign residents, and not by undermining that confidence by facilitating the evasion by Irish residents of the enforcement of obligations arising out of those dealings.

The common law rules have long seemed immutable. The Canadian courts, however, have recently recast one of the primary features of the common law rules in an effort to improve the level of enforcement in Canada of foreign judgments. This article outlines the existing Irish rules and the Canadian developments, and examines whether the Irish courts might follow suit if invited to do so in an appropriate case.

Practice & Procedure

A legal process for the recognition and enforcement of foreign judgments in Ireland is necessary because measures of execution will not issue against a person or assets in Ireland in respect of a non-Irish judgment. An Irish judgment must be obtained on foot of the foreign judgment and it is this process which is labelled recognition and enforcement of the foreign judgment (but will hereafter, for convenience, simply be called "enforcement"). The usual practice is to issue, where the matter falls within the jurisdiction of the High Court, a summary summons seeking an Irish judgment in terms of the foreign judgment and pleading the foreign judgment and the necessary prerequisites to enforcement outlined below. When enforcement of a foreign judgment is not possible in Ireland, the plaintiff may re-litigate the matter *de novo* in Ireland.[5] That course of action may face insurmountable practical or legal obstacles, such as excessive cost or expiry of the limitation period.

Enforcement Prerequisites

To be enforceable in Ireland, the foreign judgment in question must be (a) for a definite sum of money, (b) final and conclusive and (c) given by a court of competent jurisdiction.[6]

The primary effect of the first prerequisite is to rule out enforcement of non-monetary judgments or orders (for instance, injunctions or orders for specific performance). The second prerequisite only excludes those foreign judgments which may be retrospectively altered by the foreign court, otherwise than on appeal, without hearing new evidence.[7] The third prerequisite constitutes the single greatest hurdle to enforcement in Ireland and is the focus of this piece. However, before considering it in detail it is convenient to first summarise the defences to enforcement.

Defences to Enforcement

Four defences to enforcement of a foreign judgment are clearly established. Firstly, an Irish court may decline enforcement if there was fraud on the foreign court (such as deliberate deception of it by the plaintiff).[8] Secondly, enforcement will be denied where it would violate Irish public policy. The requirements of Irish public policy have not been exhaustively defined. Foreign judgments in revenue matters or which are penal in nature will not be enforced;[9] likewise, it appears, judgments giving effect to contracts in unreasonable restraint of trade or tainted by undue influence.[10]

Thirdly, judgments given in breach of "natural justice" or "substantial justice" (the terms appear to be interchangeable) are unenforceable.[11] Finally, the foreign judgment will not be enforced if it is irreconcilable with an earlier Irish judgment, or an earlier foreign judgment which is entitled to recognition and enforcement in the State.[12]

Competent Jurisdiction Prerequisite

As stated above, the third prerequisite for the enforcement of a foreign judgment is that the foreign court was of competent jurisdiction. This means that the foreign court must have had jurisdiction to hear the proceedings and give judgment in accordance with *Irish* rules of private international law. The fact that the court had jurisdiction under its own national rules is irrelevant.

In the current state of Irish law, a foreign court is only competent if (1) the defendant was present in the country in question at the time of the institution of the foreign proceedings; or (2) the defendant submitted to the jurisdiction of the foreign court.[13]

In respect of a natural person, it is the defendant's presence in the foreign country at the moment of service that appears to be required.[14] A company will be viewed as present in a foreign country when it or a representative (for instance, a subsidiary) has a place of business there from which the company's business is conducted.[15] Submission to a foreign jurisdiction arises out of a defendant's ostensible consent to the foreign court hearing the proceedings. Submission commonly arises out of a prior contractual agreement as to the forum before which any dispute shall be brought. A defendant's participation in the foreign proceedings may also amount to submission except where the defendant appears only in order to contest the jurisdiction of the foreign court.[16]

Rationale of Competence Criteria

The leading case in Ireland on the competent jurisdiction criteria remains *Rainford v. Newell-Roberts.*[17] The parties had been partners in a medical practice in England. A dispute arose as to the defendant's personal liability for sums paid by the partnership. By the time the plaintiffs instituted proceedings in England the defendant had moved to Ireland. The English court resolved to take jurisdiction pursuant to Order 11 of the English Rules and leave was accordingly granted to serve the proceedings in Ireland. Judgment was given in default of the defendant's appearance.

Order 11 of the English Rules of the Supreme Court and its Irish counterpart, Order 11 of the Rules of the Superior Courts, determine the jurisdiction of the English and Irish courts respectively in respect of foreign-resident defendants. They no longer apply in cases within the ambit of the European Judgments Conventions.[18] The English and Irish Order 11 have long been very in similar terms.

In enforcement proceedings before the High Court, Davitt P held that the English judgment could not be enforced in Ireland as the English court was not of competent jurisdiction: the defendant had not been present in England when served with the proceedings and no question of submission arose.

Davitt P opined that his initial view was that comity between the Irish and English Courts would require enforcement of the judgment because of the Courts' similar jurisdictional rules. However, he noted, the established English law on competence clearly indicated that, in the reverse situation, an English court would not view an Irish court as competent simply because it had taken jurisdiction on foot of the Irish Order 11. In any event, after reviewing the authorities he was "satisfied that the principle of comity [was] not the applicable one."[19] Instead, Davitt P "with considerable diffidence" adopted the "obligation theory" explanation of the competence criteria as set out in Cheshire's text.[20]

"The result in *Rainford* was that the plaintiffs, in the absence of enforcement of the judgment given in the place with which this dispute was exclusively connected, had to throw away their costs and relitigate de novo in a venue that, in terms of costs, convenience and governing law, was entirely inappropriate. While this outcome accorded with the authorities, it is hard to envisage a case more starkly illustrating the gross shortcomings of the Irish competence criteria."

The obligation theory holds that foreign judgments are only enforceable where they create a valid obligation on the defendant to obey them. Cheshire goes on, in his version of the theory, to note that at common law an Irish court could properly take jurisdiction only where the defendant was present in Ireland or submitted to hearing of the proceedings in Ireland. Only in those circumstances was the defendant obliged to obey the judgment of the Irish court. The corollary was that a defendant who did not stand in the same position *vis à vis* a foreign court was not perceived by the common law as under an obligation to obey the judgment of that court. The statutory expansion of the courts' jurisdiction by the predecessor of Order 11 in 1852 is, rather oddly, of no significance in this version of the obligation theory.[21]

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Limitations of Competence Criteria

Davitt P. was of course fully conscious that this approach was logically unsatisfactory. He noted the statement of Scrutton J in declining to enforce in England a judgment of an Indian court which had taken jurisdiction on foot of an Indian rule similar to England's Order 11:

> "It is difficult to explain the position and practice of the English courts. Under our Order 11 we constantly serve out of the jurisdiction [and] give judgment against absent foreigners.... But, when we are asked to enforce the judgment of a foreign Court against an Englishman served in the same way, we decline to do so...."[22]

It is submitted that the obligation theory, as detailed by Cheshire, is little reflected in the case-law.[23] In any event, the theory is merely explanatory. What is of importance is that, as Davitt P held, it is now settled that the competence criteria are not, in modern times at least, determined on a reciprocal or comity basis and therefore have no built-in flexibility.

While the competence criteria as set out in *Rainford* appear to have never been approved or applied by the Supreme Court, they undoubtedly represent the law in Ireland and have subsequently been applied by the High Court without demur.[24]

Competence Criteria Settled in UK

Recent English case-law has applied the competence criteria in the same terms as those set out by Davitt P.[25] Only once in modern times have the English courts considered departing from the established criteria. In re *Trepca Mines,*[26] where it was sought to enforce a Yugoslav commercial judgment, the Court of Appeal was invited to hold that a foreign court was competent if it had taken jurisdiction on foot of a jurisdictional rule which, *mutatis mutandis,* the English courts themselves utilised. This approach had previously been adopted by the Court of Appeal in relation to the recognition of foreign divorces.[27] The Court in re *Trepca* noted the long-standing nature of the established competence criteria and "felt unable to take that step".[28] It was also noted that (unlike Ireland) the established criteria are reflected in UK legislation.[29] The House of Lords has not considered the competence criteria in modern times.

Judicial Reform of Canadian Common Law

The common law rules on enforcement of foreign judgments as outlined above had long since been "unthinkingly adopted by the courts of [Canada], even in relation to judgments given in sister-provinces." [30]

The starting point of judicial reform of the competence criteria in Canada was *Morguard v. De Savoye,*[31] which concerned the enforcement in British Columbia of a loan arrears judgment given by an Alberta court. The defendant had moved to British Columbia prior to the proceedings and never appeared in them. Nonetheless, the Supreme Court of Canada held that the judgment should be enforced in British Columbia. The Supreme Court's unanimous judgment, delivered by La Forest J, can be broken down into a number of themes.

Origin and Merits of the Common Law Rules

In the Canadian Supreme Court's view, the common law enforcement rules developed in an era when power was co-extensive with territory and presence of persons in that territory. Accordingly, there was enforcement under the common law rules once the state where the judgment was given had power over the litigants arising out of their presence there, or alternatively, their submission.

The common law enforcement rules may have seemed suited to nineteenth century England, the Court opined, given an English resident's difficulty in defending foreign proceedings in the then state of travel and communications. There was also then an exaggerated concern about the quality of justice meted out abroad.

However, the common law now seemed "anarchic and unfair" in allowing a person to avoid obligations by moving residence:

> "Why should a plaintiff be compelled to begin an action in the province where the defendant now resides, whatever the inconvenience and costs this may bring, and whatever degree of connection the relevant transaction may have with another province?"[32]

Comity Requires Facilitating World Economy

La Forest J opined that the common law rules were formerly thought to be in conformity with the requirements of comity, "the informing principle of private international law".[33] Comity had been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. However, comity had to adjust to a changing world economic order and be shaped by international convenience. The rules of private international law were grounded in the need, now imperative, to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner. The United States and EU had, notably, adopted more generous rules for the enforcement of foreign judgments to the general advantage of litigants.

Intra-Canadian Aspects

The fact that Canada constituted a single economy heightened the need for re-appraisal of the common law rules. The federal structure of the courts also meant that there were no concerns as to differences in the quality of justice rendered in provinces.

Protection of Defendants

The Court accepted that it would not be fair to defendants to view the courts of any jurisdiction as competent, without regard to the dearth of connection between that place and the facts underlying the dispute. Enforcement should only be accorded when the court giving judgment had taken jurisdiction appropriately.

Real and Substantial Connection Criterion

This begged the question of what bases of jurisdiction were "appropriate". The Court had no doubts as to the appropriateness of a court taking jurisdiction when the existing competency criteria were fulfilled.[34]

A new competence criterion based on reciprocity - whereby a province would enforce a judgment if the court of judgment had taken jurisdiction on foot of a jurisdictional rule comparable to one used by the enforcing province - was not desirable. The Court appears to have taken this view because several of the Canadian provincial courts apply wide rules of jurisdiction similar to Ireland's Order 11. A provincial court could therefore take jurisdiction when it had very little factual connection with a dispute and yet, under the reciprocal approach, its judgment would have to be enforced elsewhere.

"Instead the Court adapted an approach previously only adopted in cases concerning the recognition of foreign divorces. It held that a foreign court was one of competent jurisdiction when there was a real and substantial connection between the place of hearing and the action. There undoubtedly being such a connection in this case, enforcement was permissible."

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Application of New Canadian Criterion

La Forest J noted that the Canadian courts already had experience in determining whether an action had a real and substantial connection with a state. Canadian case-law stipulated that the existence of such a connection was relevant in determining whether a particular province should take jurisdiction in inter-state torts. Furthermore, under the doctrine of *forum non conveniens* the courts, in determining whether to stay domestic proceedings due to a lack of connection with the dispute, took into account similar considerations.

Extension of Substantial Connection Criterion To International Cases

Numerous Canadian provincial cases have now held that *Morguard* is applicable on the international, as well as the intra-federal, plane.[36] Leave to appeal to the Supreme Court of Canada in several such cases has been refused.[37]

The British Columbia Court of Appeal considered the international applicability of *Morguard in Moses v. Shore Boat Builders*.[38] The defendant, a British Columbian firm, was contracted by the plaintiff, an Alaskan fisherman, to build in British Columbia a vessel for use by the plaintiff in Alaska. Moses sued for breach of contract in Alaska in respect of defects which emerged when the vessel was put into service. The defendant did not enter an appearance in the Alaskan proceedings, even though it had a strong defence in contract. Instead the defendant chose to rely on the unenforcability (in the then state of the law) of any judgment obtained in Alaska. If the plaintiff sued *de novo* in British Columbia, then the defendant would raise its defence. Moses obtained judgment in default of appearance in 1987. Enforcement was not sought until after the *Morguard* decision.

The Court of Appeal held that the judgment was enforceable. Having reviewed *Morguard*, it concluded that much of its reasoning transferred without difficulty to the international plane. The Alaskan court was competent due to the action having a real and substantial connection with Alaska (as indeed it also had with British Columbia). Relevant factors in assessing whether there was a real and substantial connection included the place of residence of the parties; where the cause of action arose (usually the place of damage); whether the defendant conducted business or had other dealings in the foreign country in question; and whether it was within the reasonable expectation of the defendant that it might be sued there.

Two other cases provide useful illustrations of the new competence criterion's application in fields of current difficulty. In *Braintech v Kostiuk*[39] the defendant, a British Columbia resident, had allegedly posted a message on an internet bulletin board which was defamatory of the plaintiff, a firm with its headquarters in British Columbia. For some time the firm had had a research facility in Texas and the plaintiff sued there for defamation. The Texas courts exert a notoriously wide jurisdiction and judgment was given there in default of the defendant's appearance. The British Columbia Court of Appeal found that the Texas court lacked competence under the real and substantial connection criterion. The court noted that, *inter alia*, the plaintiff's connection with Texas was transient; the defendant had never had any dealings in Texas; and that the only evidence of a third party having actually read the message was from a Canadian resident.

The Court of Appeal furthermore endorsed US authorities to the effect that "a passive Web site that does little more than make information available [in a place] to those who are interested in it is not grounds for the exercise of personal jurisdiction [by the courts of that place]."[40] Some more active form of dealings with persons in the state taking jurisdiction was required:

> "[i]t would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be hauled before the courts of each of those countries where access to this bulletin could be obtained."[41]

In *United States of America v. Ivey*[42] the US Environmental Protection Agency obtained judgment in Michigan against

Ivey, an Ontario resident, for the expense of cleaning up an environmental hazard created there by a Michigan firm controlled by Ivey. The EPA had capacity to sue under US legislation which also made Ivey personally and strictly liable for the expense. The Ontario Court enforced the judgment on the basis that the Michigan Court had a real and substantial connection with the dispute, in particular noting that Ivey had actively been operating the Michigan firm for several years. It is noteworthy that litigation by European environmental protection agencies in corresponding situations would not benefit from the European Judgments Conventions.[43]

A Gloss On The New Criterion?

There has been some Canadian judicial suggestion that the new competency criterion should be subject to additional safeguards on the international plane. In *Arrowmaster v. Unique Forming* it was stated *obiter* that *Morguard* was not an absolute rule: "there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process." [44]

In *ATL Industries v. HAN*[45] an Ontario Court considered this caveat in deciding to give effect to a decision given by a Korean court. The Ontario Court noted that the Korean legal system was based on the German legal code, involved impartial adjudication on the evidence and like matters and accordingly did not diverge "radically" from the Ontario process. The fact that pre-trial discovery was not available (but rather mid-trial discovery as part of an extended trial process) did not alter this.

New Competence Criterion in an Irish Context

While well settled in Ireland, the common law competency criteria do not appear to bear the imprimatur of any Supreme Court decision. The Supreme Court has recently demonstrated its willingness to reshape long standing rules of private international law.[46] In principle the Court is free to assess the suitability of the established competency criteria in an appropriate case. What considerations would arise in transferring the Canadian approach to Ireland?

Intrinsic Reasoning

It is submitted that two factors emerge from the Canadian case-law as driving reform: fairness to individual litigants and comity. The first consideration is obviously just as present a concern in the Irish context. In relation to the second, while *Morguard's* perception that the common law rules were seen as reflecting the comity of the era of their development seems inaccurate - both the Irish and English case-law take the view that comity was never the basis of the rules[47] - comity can hardly be said to be irrelevant in guiding the courts today.[48] The Canadian Supreme Court's view was that comity required the bringing of order to the international movement of people, goods and services. In the context of Ireland's open economy there is a strong element of enlightened self-interest in fulfilling this need because orderly and fair Irish enforcement rules encourage dealing with parties linked to Ireland by enhancing certainty and confidence in commercial arrangements.

Any Gloss Necessary?

As noted, the Ontario courts have suggested a gloss on *Morguard* that would deny enforcement to judgments handed down in legal systems radically different from the Canadian systems.

It is hard to see what basis there can be for such a gloss other than a concern to avoid the enforcement of decisions reached in an unjust manner. It is submitted that this gloss is therefore otiose because an established defence to enforcement (both in Irish and Canadian law) is a breach of natural justice or "substantial justice" in the foreign proceedings.[49] It is clear from case-law both in relation to this defence and the same issue when it arises elsewhere in private international law, that even radical differences between the domestic and foreign legal systems are not in themselves a ground for determining that the foreign system renders substantial injustice. [50]

Practicality

While the Canadian real and substantial connection criterion is certainly not a "bright line" test, the Irish courts already consider a very similar issue when determining whether Irish proceeding should be stayed on the ground of *forum non conveniens.* In applications for stays on this ground the Supreme Court has stipulated that the primary issue is whether Ireland is the "appropriate forum" for the trial of the action having regard to, inter alia, convenience, expense, availability of witnesses, governing law and the parties' place of residence or business.[51] These are exactly the same considerations as arise under the new Canadian competency criterion. Furthermore, in cases concerning whether the Irish courts should take jurisdiction in cross-border tort cases, the Supreme Court has stipulated that jurisdiction be taken where a significant element of the tort has occurred in Ireland and "the case clearly calls for the hearing of the proceedings and for the application of Irish law".[52] It is clear in the context of that judgment that this assessment involves very similar considerations to those relevant to the *Morguard* test.

Lack of Reciprocity of Enforcement

In *Rainford* Davitt P stated that, while he leaned towards enforcing the judgment in that case, a countervailing factor was that the English courts would not reciprocally enforce an Irish judgment given in parallel circumstances. Is a lack of reciprocity in enforcement a reason for refusing to alter the common law enforcement rules?

This argument was not considered by the Canadian Supreme Court in Canada. The answer must surely be that the aim of the Irish courts in applying Ireland's rules of private

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international law is to render justice as between the litigants in a particular case, and therefore the question of how foreign courts treat Irish judgments is not a relevant consideration.

Any concern as to lack of reciprocity by other countries were Ireland to liberalise its enforcement rules would of course be overcome were there to be a global convention on jurisdiction and judgments. Ireland is actively engaged in the Hague Conference attempts to conclude such a convention this year. If the Convention is concluded, and is a success in terms of the number of accessions and ratifications - which is far from a foregone conclusion given the failure of earlier Hague initiatives[53] - a common international structure will be created in respect of jurisdiction and enforcement. There is no reason why a potential Hague Convention should prevent judicial reconsideration of our common law enforcement rules. In common with other judgments conventions, the tenor of the Convention is to facilitate enforcement of a judgment originating from a court which appropriately took jurisdiction over the dispute given the court's connection to it. This is of course the same rationale which underlies *Morguard* and so there would be no fundamental divergence in approaches. The best - especially when its coming to pass is doubtful - should not be the enemy of the good.

Conclusion

Recent Canadian case-law demonstrates that, while the common law rules on enforcement are settled, they are not unalterable. The Supreme Court of Canada has set out compelling arguments for reform and a workable new approach. It is submitted that in an appropriate case the Irish Superior Courts may well be convinced to follow the Canadian approach. ●

1. Being the Brussels and Lugano Conventions, which are given force of law in the State by the *Jurisdiction and Courts and Enforcement of Judgments Acts, 1988-93*. The *Jurisdiction of Courts and Enforcement of Judgments Act, 1998* has not been commenced at the time of writing. The contracting states to the Conventions are the EU member states and Iceland, Norway and Switzerland. Poland's accession to the Lugano Convention is imminent.
2. Foreign orders in respect of which *recognition*, rather than enforcement, is typically sought (such as divorce decrees or declarations of rights in land) are not addressed here. Such judgments are classified by the common law as judgments *in rem* and different common law rules are applicable.
3. See Articles 1 and 25 of the Conventions.
4. *Morguard v. De Savoy*e (1990) 76 DLR (4th) 256, *per* La Forest J at 273.
5. *SA La Chemo Serotherapie v. Dolan* [1961] IR 281.
6. *McDonnell v. McDonnell* [1921] IR 148; *Rainford v. Newell-Roberts* [1962] IR 95.
7. *McC v. McC* [1994] 1 IR 293.
8. See *Petronelli v. Collins*, unrep., HC, Costello P, 19 July 1996; *LB v. HB* [1980] ILRM 257; and *Jet v. Patel* [1990] 1 QB 335.
9. *Bank of Ireland v. Meeneghan* [1995] 1 ILRM 96 (refusal to enforce an English confiscation order in respect of the proceeds of crime).
10. *Fraser v. Buckle* [1994] 1 IR 1; *Israel v. Hadjipateras* [1983] 3 All ER 129.
11. *Dyer v. Dulan*, unrep., HC, Keane J, 10 June 1993; *Adams v. Cape* [1990] Ch 433.
12. *ED & F v. Yani* (No 2) [1991] 1 Ll R 429; *Showlag v. Manseur* [1995] 1 AC 431.
13. *Rainford v. Newell-Roberts* [1962] IR 95 (discussed *infra*). The suggestion in the older cases that residence (without presence) in the foreign country may also suffice now seems very doubtful: see generally *Adams v. Cape* [1990] Ch 433 and Morguard v. *De Savoye* (1990) 76 DLR (4th) 256.
14. See *Adams* and *Morguard*, supra.
15. *Adams, supra.*
16. See *Alltex v. Lawler* [1965] IR 264 and also *Kutchera v Buckingham* [1988] IR 66.
17. [1962] IR 95.
18. *Rainford* of course pre-dates the Conventions.
19. At 104.
20. *Ibid,* referring to Private International Law, 3rd ed., 1947. Cheshire's comments are largely reproduced in the current North, *Cheshire and North's Private International Law,* 13th ed., 1999.
21. *Common Law Procedure Act 1852.*
22. At 104, quoting *Phillips v. Batho* (1913) 3 KB 25, at 29.
23. While many nineteenth century cases do indeed refer to the judgment of a foreign competent court as creating an obligation, that case-law displays no clarity on the issue of exactly when such competence arose: see, for instance, *Schibsby v. Westenholz* (1870) LR 6 QB 155.
24. See, for instance, *Dyer, supra.*
25. See, for instance, *Adams, supra.*
26. [1960] 1 WLR 1273,
27. *Travers v. Holley* [1953] 3 WLR 24.
28. At 1281, *per* Hodson LJ.
29. UK *Foreign Judgments (Reciprocal Enforcement) Act 1933.*
30. *Morguard v. De Savoye* (1990) 76 DLR (4th) 256, *per* La Forest J at 268.
31. *Supra.*
32. At 273-4.
33. At 268.
34. This is somewhat surprising as the defendant's mere fleeting presence could hardly be said to be a fair basis of jurisdiction: see the discussion in North, *Cheshire and North's Private International Law,* 13th ed., 1999, at p.409.
35. See *Indyka v. Indyka* [1969] 1 AC 33.
36. Application of *Morguard* at the international level was initially rejected: see *Evans Dodd v. Gambin* (1994) 17 OR (3d) 803 concerning the enforcement of an English judgment.
37. See, for example, *Moses v. Shore* Boat and *USA v. Ivey,* discussed *infra.*
38. (1993) 106 DLR (4th) 654 (leave to appeal to Supreme Court of Canada refused at 109 DLR (4th) vii).
39. (1999) 171 DLR 4th 46.
40. At 61, quoting *Zippo v. Zippo* (1997) 952 FSupp 1119, at 1123-4.
41. *Ibid.*
42. (1995) 130 DLR 4th 674 (leave to appeal to Supreme Court of Canada refused at 145 DLR (4th) vii).
43. See Article 1 and *LTU v. Eurocontrol* [1976] ECR 1541.
44. (1993) 17 OR (3d) 407, *per* MacPherson J.
45. (1995) 53 ACWS (3d) 353.
46. In *W v. W* [1993] 2 IR 476 the Supreme Court altered the common law rule in relation to the recognition of foreign divorces, a rule which had stood untouched for at least a century.
47. See, for example, *Rainford and Indyka, supra.*
48. Comity is regularly considered: see most recently *CM v Delegacion Provincial,* unrep., HC, McGuinness J, 24 March
49. See *Dyer, supra,* and the authorities cited therein; also see *Clancy v. Minister for Social Welfare,* unrep., HC, Budd J, 18 Feb 1994.
50. See, for instance, *Connolly v. RTZ* [1998] AC 854(in relation to the doctrine of *forum non conveniences).* See also *SNIA v. Lee* [1987] AC 871 (injunction sought against the prosecution of qforeign proceedings).
51. *Intermetal v. Worsted* [1998] 2 IR 1.
52. *Grehan v. Medical* Inc [1986] ILRM 627, at 638.
53. The 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments was not widely adopted.

EGULATING ARTIFICIAL REPRODUCTIVE TECHNOLOGIES

Maria J. Colbert BL *explores some of the legal issues raised by assisted reproduction technologies, examines the development of legislative responses in the United Kingdom and in Germany, and looks at what the Irish legislature can learn from them, particularly in light of the introduction of the Regulation of Assisted Human Reproduction Bill, 1999.*

Introduction

"There's no rule so wise but what it's a pity for somebody or other"[1]

When, in July, 1978, Louise Brown, the first "test-tube" baby was born, the media and general public marvelled at the medical achievement of gynaecologist Patrick Steptoe and physiologist Robert Edwards.[2] However, it soon seemed that the public had been too soon made glad by the apparent miracle of the technique of in-vitro fertilisation and the resultant birth. It became clear that myriad legal and ethical complications were attendant on the new technique of assisted reproduction. This article explores some of the legal issues raised by assisted reproduction technologies, examines the development of legislative responses in the United Kingdom and in Germany, and looks at what the Irish legislature can learn from them, particularly in light of the introduction of the Irish Regulation of Assisted Human Reproduction Bill, 1999.

Human Infertility and IVF

The scale and complexity of human infertility, which has both physical and psychological aspects, cannot be overemphasised. Those who are infertile express their feelings of "great despair", the pressures of social expectations, the early indignity and pain of invasive medical examinations, and later, the slow realisation of their infertility and the consequent feelings of incompleteness and inadequacy. Although no firm statistics regarding infertility are available, one source puts the figure at 15% of couples world-wide, another at one in six couples.[3] It is estimated that infertility can be attributed to male factors in 35%, to female factors in 35%, and to joint factors in 10% of cases, while 20% of cases have no known cause.[4] The diversity of statistics is an indicator of the lack of any reliable knowledge of the extent of human infertility.

Many techniques of assisted reproduction have been developed to circumvent infertility, including the older techniques of artificial insemination, surrogacy, and far more recently, various forms of *in vitro* fertilisation. It was not until the development of *in vitro* procedures that medically assisted reproductive technologies (ART) came to the attention of the public and legislatures world-wide.[5]

The term *"in vitro fertilisation"*, abbreviated to IVF, refers to the fertilisation of an ovum and a sperm outside a woman's body, usually in a flat, shallow, petri dish and not, in fact, in a test tube. The process of fertilisation takes place not instantaneously, but over a twenty-four hour period. "Embryo transfer" is used to denote the transfer of some of the embryos, following fertilisation, to a woman's uterus, with the intention that implantation (popularly termed "conception") will take place, and that a pregnancy and the birth of a child will ensue.[6]

Usually the treatment will involve giving the woman drugs in order to stimulate her ovaries to produce up to twenty ova, many more than can be used in any single IVF treatment cycle. Because success rates for IVF are comparatively low and the treatment may not result in a successful pregnancy, or the couple under treatment may wish to have other children, ova, sperm or embryos which have been removed or created in the course of a treatment cycle, but not implanted, may be "frozen" or cryopreserved pending further treatment cycles. Embryos are most frequently cryopreserved, because they are more stable and survive the freezing and thawing process better than sperm and far better than ova, although many embryos do not survive the thawing process and there is evidence of damage to those which do. It is still uncertain whether there are detrimental long term effects on children who had been cryopreserved embryos.[7]

IVF first emerged as a response to female infertility, in

particular to those manifestations involving damage to the Fallopian tubes, which are roughly the breadth of a guitar string and correspondingly fragile. Such damage may be caused, for example, by infection after childbirth or after female genital mutilation, by sexually transmitted diseases or complications after surgery, by appendicitis or ectopic pregnancy[8] Since about 1984, IVF has also been used to circumvent male infertility due e.g. to low sperm count.[9] In 1998, the rate of live births per IVF treatment cycle was 14.9%; in other words, eighty-five percent of those who underwent an IVF treatment cycle did not have a child.[10]

"Assisted reproduction, and in particular IVF, has put basic human and cultural values in issue and raised complex legal questions. In order to regulate this area, it is necessary to assess and consider the significance of human procreation, the social implications of childlessness and infertility; the legal and moral status of the human embryo in vitro by contrast with that in utero; who should have access to assisted reproduction; the consequences of ART for concepts of kinship - of paternity, maternity, family; the permissibility of certain applications of ART such as cloning; the implications of techniques such as cloning or use of donated gametes for human individuality; the right to know one's biological heritage; and the right of gamete donors to anonymity"

Legal Implications of In vitro Fertilisation

Assisted reproduction, and in particular IVF, has put basic human and cultural values in issue and raised complex legal questions. In order to regulate this area, it is necessary to assess and consider the significance of human procreation, the social implications of childlessness and infertility; the legal and moral status of the human embryo *in vitro* by contrast with that in utero; who should have access to assisted reproduction; the consequences of ART for concepts of kinship - of paternity, maternity, family; the permissibility of certain applications of ART such as cloning; the implications of techniques such as cloning or use of donated gametes for human individuality; the right to know one's biological heritage; and the right of gamete donors to anonymity.[11]

One major consequence of IVF is the accessibility of the developing early human embryo to medical or scientific examination. In the case of fertilisation *in utero,* rather than *in vitro,* frequently a woman will be unaware that she is pregnant until at least 14 days after fertilisation. Prior to the development of IVF, therefore, there were few opportunities to examine early human embryos. It is this potential to develop embryos outside of the human body, which may or may not subsequently be implanted in a woman's uterus, which gives rise to what have proven to be some of the most intractable legal problems. The development of IVF as a safe and routinely successful procedure has required and continues to require the use of and destruction of many embryos. In other common-law jurisdictions, the fate of cryopreserved embryos has been the subject of legal proceedings and legislation.

Legislative Responses in two Jurisdictions: Great Britain and Germany

Great Britain.

Although medical and legal professional bodies had produced consultation documents and guidelines which addressed some of the ethical and legal issues bound up with IVF, it was not until 1982 that a Committee of Enquiry into Human Fertilisation and Embryology was established by the Government, with philosopher Mary Warnock as its appointed chairperson. The mandate of the "Warnock Committee" was to "consider recent and potential developments in medicine and science related to human fertilisation and embryology; to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments, and to make recommendations". The Committee's report was published in 1984, and was characterised by deep dissent amongst its members regarding the most important of their findings, on the permissibility of research on the human embryo.[12] Conscious from the experience of the intractable discussions in the abortion context that consideration of the question when life or personhood begins would be divisive of it, the Warnock Committee avoided it. Instead, the Committee turned to the question of "how it is right to treat the human embryo".[13] Noting that some legal protections existed for the human embryo in vivo, and that they were not equivalent to the protections afforded to children or adults, the Warnock Report recommended that "the embryo of the human species should be afforded some protection in law" and went on to examine what that protection should be. Without expressly balancing the legal or moral rights of human embryos against the potential benefits from embryo research, the Report states that the protection might be waived in specific circumstances:-

> "Having examined the evidence presented to us about the types of research which might be carried out on human embryos produced in vitro, the majority of us hold that such research should not be totally prohibited ... we are bound to take account of the fact that the advances in the treatment of infertility ... could not have taken place without such research; and that continued research is essential, if advances in treatment and medical knowledge are to continue."[14]

Advocating that embryo research should permitted only under licence, and that unauthorised use of embryos should be criminalised, the Warnock Committee recommended that no

live human embryo derived from IVF should be kept alive nor used as a research subject beyond fourteen days after fertilisation. The limit of fourteen days was arrived at on a utilitarian basis of weighing the balance of benefit over harm, taking into account the fact that the embryo could not feel pain until much later in its development.[15] As to the origin of the embryos used for research, the Committee was evenly split, half saw no appreciable distinction between using "spare" embryos from infertility treatment and bringing embryos into existence solely for research purposes, and half saw this as an unacceptable step.[16]

The Warnock Report advocated statutory regulation of medically assisted reproduction. Immediately following the Report, the Voluntary Licensing Authority for Human IVF and Embryology, a self-regulating body, was set up and continued to operate until, after a lengthy consultation period, the Human Fertilisation and Embryology Act 1990 was passed and the Human Fertilisation and Embryology Authority established. The Act of 1990 governs infertility treatments involving the use of donated genetic material such as sperm, ova, or embryos, the creation of an embryo outside the human body, or the storage of genetic material. Among the functions of the Human Fertilisation and Embryology Authority are licensing of infertility treatment services, of gamete and embryo storage, and of research on embryos; monitoring and inspecting activities so licensed, and keeping under review developments bearing upon embryos and infertility treatment services and other activities governed by the Act of 1990, in order, on request, to advise the Secretary of State for Health thereof.[17]

A licence for research may authorise the in vitro creation, keeping, and usage of embryos.[18] Authority may only be given for research involving human embryos where it is regarded as necessary or desirable for the purpose of promoting advances in the treatment of infertility, increasing knowledge about the causes of congenital disease, or developing more effective techniques of contraception, developing methods for detecting the presence of gene or chromosome abnormalities in embryos before implantation. Other purposes for which research may be authorised may be specified in regulations, but are limited to those with the object of increasing knowledge, or the application of knowledge, about the creation and development of embryos or about disease.[19] Keeping or using an embryo after the appearance of the "primitive streak" - the first sign of organ development, which under the Act of 1990 is taken to have occurred by 14 days after the start of fertilisation - cannot be authorised by licence.[20]

Licences for research are granted for a specific project, and are granted for a maximum of three years. Treatment or storage licences may be granted for a maximum period of five years.[21]
Certain activities are absolutely prohibited by the Act of 1990. These include placing a live embryo other than a human embryo or gametes other than human gametes in a woman[22], placing a human embryo in an animal[23], and cloning[24].
While the Human Fertilisation and Embryology Act essays a system of closely monitored licensed research, it is built on premises which have proven to be problematic. The first of these is that it is permissible to carry out research on human embryos up to the fourteenth day after fertilisation. During the long public debate and consultation period leading up to the enactment of the Act of 1990, it was proposed that a human embryo be referred to as a "pre-embryo" up to the fourteenth day after fertilisation, *inter alia* because before that time it was not ascertainable whether it would develop into a single human embryo, or more than one embryo, or even, in rare cases, a tumour. The Warnock Report accepted the end of the "preembryonic" stage as correlative to the attainment of recognisable human characteristics and concluded that before that stage, balancing the rights of the embryo against the potential benefit from research on that embryo, embryo research could be carried out. These assumptions are by no means uncontroverted. In the American decision, *Davis v. Davis*[25], the parties had, while married, undergone *in vitro* procedures for the purpose of having a child together. The resulting seven embryos were cryogenically preserved. The marriage broke down and Mrs. Davis wished to donate the cryopreserved embryos to other infertile couples. Mr. Davis was opposed to the donation. The Court accepted medical evidence which stated that an embryo was the youngest form of a being, and that there was no need for a subclass of the embryo to be called a preembryo, because there was nothing before the embryo. Having regard to inconsistencies in the use of the expression "pre-embryo", which was not used consistently in publications, the Court concluded that the term was not a medically correct one and that it was used to create a false distinction, one that did not exist. Custody of the embryos was vested in Mrs Davis. While this decision was reversed on appeal, the reasoning of the trial judge regarding the artificiality of the expression is worthy of note. It must not be assumed that the creation of a distinction between an embryo of under 14 days' development and an embryo of later development equates to a decision that it is acceptable to carry out research on the newly-created category of pre-embryo. Traditionally, a distinction had been drawn

"It is a frailty of legislation that it cannot encompass all contingencies. In the case of legislation regulating an area of swift scientific progress, the frailty is all the more pronounced. Since 1990, situations have arisen which have fallen outside the legislative framework established by the Human Fertilisation and Embryology Act. For instance, the (UK) application to humans of the procedure of nucleus substitution used to create the cloned sheep "Dolly", which involved taking the cell nucleus out of a sheep ovum and replacing it with the nucleus of an adult cell of a sheep, would not per se be prohibited by the Act of 1990. While some forms of cloning are prohibited under s. 3(3)(d) of the Act of 1990, the "Dolly" technique was not anticipated by the legislature and the use of the technique on human cells would only be prohibited by the Act of 1990 if it resulted in the creation of an embryo and was not licensed by the HFEA."

between an *in vivo* embryo of up to 14 days and a more developed one because up to fourteen days an *in vivo* embryo would not yet have become implanted in its mother's uterus and until implantation no pregnancy could be considered to exist. In the case of *in vitro* embryos, it is clear from the first couple of days that an embryo is developing. Any decision to permit research on human embryos should be reached without "the bewitchment of our intelligence by means of language"[26]

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The Act of 1990 provides that an embryo which has been created *in vitro* may not be kept in storage unless there is effective consent by each person whose gametes were used to bring about the creation of the embryo. Should the consent of a gamete donor to storage and to any other possible uses of the embryo be withdrawn, the embryo must be disposed of. Embryos can be stored initially for five years, and for up to ten years or longer, in the event that one of the couple to be treated is likely to become prematurely and completely sterile, for example as a result of treatment for cancer.[28] The HFEA Code of practice states that the means of disposal of an embryo which has been allowed to perish must be sensitively devised, having regard to the special status of the human embryo.[29] In August, 1996, on the expiration of the first five year statutory embryo storage term, there were 3000 unclaimed embryos in storage, which, according to the Act of 1990[30] had to be allowed to perish, because the donor couples could not be located. The destruction of the embryos attracted great public and media attention. Although the destruction was in accordance with the statutory principle vesting ownership in the parents, there was considerable public unease at the perception that human embryos had become disposable commodities.[31]

In *R. v Human Fertilisation and Embryology Authority, ex parte Blood*[32], the issues of consent by a donor to the use of gametes for treatment and storage and consent of the Human Fertilisation and Embryology Authority to exportation of gametes abroad arose. Mr. Blood contracted meningitis and fell into a coma. On the instructions of his wife, sperm was removed from him and preserved. He died shortly afterwards. The samples of sperm were entrusted to the Infertility Research Trust for storage. Mrs. Blood wished to use the samples to try to have her husband's child, but the Human Fertilisation and Embryology Authority refused to give the necessary consent to treatment in the United Kingdom on the grounds that to do so would contravene s. 4(a) and Schedule 3 of the Act of 1990 requiring the written consent of a donor to the removal of gametes. The Authority also refused to exercise its discretion to authorise exportation of the sperm for treatment abroad. Mrs. Blood sought judicial review of the Authority's decision. There was uncontroverted evidence that the Bloods had intended to start a family, that they had discussed what would happen if anything should happen to one of them before any children were born and had come to the conclusion that the best course of action would be to extract the gametes of that partner.

The Court of Appeal held that the under Act of 1990 written consent was necessary for the storage of sperm and treatment services could not be regarded as provided for a man and woman together where the man had died. In consequence of absence of written consent, both the treatment of the applicant and the storage of her husband's sperm were prohibited by the Act of 1990 and the Authority had no discretion to authorise treatment in the United Kingdom. However, by virtue of articles 59b and 60c of the EC Treaty, the applicant had a directly enforceable right to receive medical treatment in another member state, and the Authority's refusal to authorise the export of her husband's sperm infringed that right since it made the treatment she sought impossible. The Court went on to hold that such an infringement would be justified only where it was non-discriminatory, in the general interest, suitable for securing the attainment of the object pursued, did not go beyond what was necessary to attain that objective and did not go further than was necessary to prevent the evasion of the application of national legislation. In reaching its decision, the Authority had failed to take into consideration the effect of article 59, or that the storage had arisen "in an unexplored legal situation where humanity dictated that the sperm was taken and preserved first, and the legal argument followed"[33], and the legal position would in the future be clarified, and there would therefore be no further cases in which sperm was preserved without consent. Because it was not clear whether those two factors would have affected the Authority's decision, the applicant's appeal was allowed. Mrs. Blood received treatment abroad, subsequently became pregnant and gave birth to her husband's child. The decision illustrates that "procreative tourism" is likely to give rise to complex legal problems.

Germany

Although interested professional bodies and groups issued guidelines and contributions to the fledgling debate on the regulation of assisted reproduction, not until a Commission was set up by the government in May 1984, whose task it was to examine the legal and ethical consequences of IVF, genetic analysis and genetic therapy, that serious attention was paid to the regulation of assisted reproduction. The Commission, known as the "Benda" Commission after its chairman, a former president of the Federal Constitutional Court, reported in 1985 with recommendations for statutory regulation. The Benda Report observed that the new technologies should be furthered, but that the constitutionally protected freedom of scientific enquiry and research (Article 5 III 1 of the German Constitution) was limited by the constitutional rights of others, in particular to human dignity, bodily integrity, and life (Articles 1 I and 2 II 1) . The Report referred to a decision of the Federal Constitutional Court to the effect that according to established biological-physiological knowledge, life, in the sense of the chronological existence of an individual, existed at least from the fourteenth day after fertilisation onwards.[34] The Benda Report came to the conclusion that the fertilised ovum was worthy of protection and could therefore not be permitted

to be the object of arbitrary manipulation. Balanced against this consideration was the crucial importance which modern genetic research might have for human health. The Benda Commission concluded that human life began to develop at fertilisation, and that therefore every dealing with early human embryos had to conform to the constitutional guarantee of human dignity.[35] The Report recommended legislative intervention to clarify which procedures were permissible and which were not. It was recommended that IVF be permitted, but that the creation of embryos surplus to the requirements of IVF treatment was unacceptable. It was contrary to the constitutional obligations to respect human life and dignity to deliberately create human life without intending it to develop into a human being. By a majority, the Commission decided that it was not acceptable to create human embryos for the purposes of research, and that research on human embryos was only tenable insofar as its object was to gain specified, vital medical knowledge. The constitutionally protected principles of freedom of scientific enquiry and research were limited by the right to life and bodily integrity. A minority decided that were research to be restricted to the first stages of development, it would be possible to reconcile the interests of research and the right to life.[36]

Eventually, after lengthy public and professional discussion, the Embryo Protection Law (ESchG) was enacted in 1990. The ESchG criminalises certain applications of reproductive technology, and carries penalties of fines and imprisonment, but does not address IVF itself, rather its permissibility can be inferred from the prohibition of some of its applications, such as the creation of human-animal hybrids (par. 7 ESchG) and cloning (par. 6 ESchG). Most notably, par. 1 ESchG prohibits the fertilisation of an ovum for any purpose other than bringing about a pregnancy and the fertilisation of more ova than can be transferred to a woman, and par. 2 ESchG prohibits the *in vitro* development of an embryo for any purpose other than to transfer it to a woman. The rationale for these prohibitions is firmly rooted in the constitutionally protected right to dignity, life and bodily integrity, to which the right to scientific enquiry must bow.

In the ten years since its enactment, the restrictive nature of the Embryo Protection Law has been the subject of controversy. There is a strong feeling in the scientific world that the statute is far too restrictive and has hindered much beneficial research. In enacting an absolute prohibition on embryo research, the German legislature abrogated responsibility for overseeing the conduct of ARTs. There is no provision for a system of licensing or inspection of clinics providing reproductive technologies. Arguably, in consequence, ARTs are in fact less closely regulated in Germany than in the U.K.

Comparative observations

In both the United Kingdom and Germany, the debate on the regulation of ARTs, which took place over several years, culminated in the enactment of legislation, eschewing pure self-regulation by medical and scientific professional organisations. At first glance the legislative approaches in the two countries appear to be diametrically opposed, but some consensus is evident, for instance in the prohibitions on cloning and the creation of human-animal hybrids.

One example eloquently illustrates the difference in the approach to the regulation of ARTs taken in Germany and the United Kingdom. In the course of the debate on the permissibility of research on human embryos in Germany and in the United Kingdom, the line of argument was raised that since abortion was permitted until a much later stage of development than that suggested as a limit for research, it was illogical to argue that considerations of respect for the human embryo precluded research. The numbers of embryos used for research would pale into insignificance next to the annual rate of abortion. In Germany, in response it was pointed out that the symbiotic relationship of a foetus and its mother meant that a uniquely personal rights conflict was involved in pregnancy termination, and that no comparable conflict occurred in the case of research with *in vitro* embryos. No individual would be affected by the criminalisation of embryo research, the loss of embryos was to be balanced against freedom of research and enquiry and the rather nebulous advantages which the research promised. The permissibility of abortion did not entail the permissibility of embryo research.[37]

In the United Kingdom, embryo research and abortion were regarded as comparable and the legality of abortion was a strong argument for the legality of embryo research. Lacking a written bill of rights, there was no sustained analysis of the comparability of abortion and embryo research.[38]

Proposed Irish legislation

The Regulation of Assisted Human Reproduction Bill, 1999, proposed a scheme of regulation of the providers of ARTs. Under section 2 of the Bill, anyone providing services allied to or in connection with human assisted reproduction, including the storage of human reproductive material, must be registered. Human assisted reproduction is defined as any process by which "medical or other diagnosis, treatment or research into human reproduction is carried on", and human reproductive material includes human sperm, ova, zygotes or other bodily material capable of being used in human assisted reproduction.[39]

The Bill provides for the establishment by the Minister for Health and Children of a register containing details of the assisted reproduction services provided. Registration, to which conditions specified by the Minister may be attached, is granted by him for a period of two years, with provision for an appeal to the High Court against the refusal of registration.[40] Section 8 of the Bill creates the offences of providing services linked to human assisted reproduction, including the storage of human reproductive material, without being registered; providing false or misleading information for the purposes of obtaining registration; contravening a condition of registration, and contravening regulations made by the Minister under section 11.

By section 9, the Minister must establish an ethics committee for assisted human reproduction with ten members, of which three are to be nominated by the Minister, two registered medical practitioners to be nominated by the Medical Council, one registered nurse to be nominated by an Bord Altranais, two scientists specialising in human reproduction or genetics to be nominated by an tUdaras, and finally two, "reflecting diverse moral views concerning assisted human reproduction held generally in Irish society", to be nominated by the Cathaoirleach of Seanad Eireann. The function of the ethics committee is to consider, evaluate and report to the Minister on the changes in human reproductive technology and their ethical consequences.[41]

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After consultation with the ethics committee, the Medical Council and An Bord Altranais, the Minister must issue regulations for providers of assisted reproduction and associated services, issues which may be so regulated include the ownership, use, storage and disposal of human reproductive material (section 11).

Two further sections of the Bill address contracts for surrogate motherhood, which are to be void, and establish that a donor of sperm or ova is not the parent of a child born of those donated gametes.

Although the establishment of a system of regulation of ARTs is to be welcomed, an examination of legislation and litigation in the U.K. and in Germany demonstrates that the Bill of 1999 leaves many important questions unanswered. Included in the definition of assisted reproduction, providers of which may be registered, is research into human reproduction. There is no elaboration of what the form or objects of this research might be. No mention is made of research involving human embryos, whether it is permitted, and if so until what stage of development. Clinics providing ARTs, having supplied the rudimentary details required, and once registered under the Bill, would be subject to no system of inspection. The Bill does not prohibit cloning or the creation of hybrids, but does prohibit contracts for surrogate motherhood. Manifestly, both ethical and legal issues are raised by ARTs, but the Bill provides only for a committee to consider their ethical consequences, and there is no provision for the nomination of legally qualified members to the committee to assist in the identification of legal problems. By contrast with the Human Fertilisation and Embryology Authority, half of the members of which must be persons not involved in the provision of ARTs, there is no mention in the Bill of a quota of members from outside the medical profession. Current members of the Authority include a solicitor and three law professors.[42] While the Minister is empowered to make regulations addressing them, it is much more desirable that these core issues should be regulated by statute, with the attendant public debate and opportunity for representations from a wide spectrum of interested parties. What must be avoided at all costs is the sort of polemic which has regrettably characterised the abortion debate.

Conclusion

In the light of calls for a more principled approach in countries which have for many years had statutory regulation of ARTs[43], it is time for a dispassionate and reasoned assessment of the legal and ethical issues involved, and for a determined effort to establish what the basic values of contemporary Irish society are and how those values apply to human reproductive technologies. One of the chief sources of basic values must be the Constitution of Ireland. Amongst the personal rights and values recognised and protected by the Constitution are the right to found a family and to "beget children" , and the right to marital privacy, which may, however, be restricted by the State.[44] Constitutional developments in other jurisdictions suggest that legislation penalising some applications of ART could be judicially reviewed on the grounds that such restrictions infringed rights to liberty or to non-discrimination against infertile couples, there being no comparable limitation on the right of fertile couples to have children.[45]

As illustrated by the debates in Germany, the presence of a written constitution with a bill of rights provides a structure by which disparities in rights conflicts may be recognised and new developments systematically assessed. In the United Kingdom, the lack of a system of entrenched human rights and basic values meant that in addressing the regulation of ARTs, confusion arose and abortion legislation was invested with a significance for the issues at hand which it should not have had.

The Regulation of Assisted Reproduction Bill, 1999 is a valiant attempt at legislating for a complex and swiftly developing area. The Bill forms the basis for public and professional debate, out of which it is to be hoped will be forged a lasting consensus on the regulation of assisted reproduction. The law and the legislature must be active rather than reactive in addressing assisted reproductive technologies. In examining the approaches taken by other jurisdictions, it is not necessary to emulate them, but they do enlighten us as to possible solutions and pitfalls. Legislation in this area should be aimed at promoting values which Irish society regards as fundamental.

Finally, the practitioner who considers this to be a rather esoteric branch of the law with which he is unlikely ever to have to do should consider these facts: human infertility is an extensive and rapidly increasing problem, recent research indicates that children born through ARTs are likely to inherit the fertility problems suffered by their parents; IVF and other ARTs are already in use in Ireland; and the use of ARTs has given rise and continues to give rise to litigation inter alia in the U.S.A., Australia, the United Kingdom, New Zealand and Japan.●

1 George Eliot, *Adam Bede.*

2. Dyson, A., *The Ethics of IVF, Cassell,* 1995, p. 1 et seq.

3. See Dyson, op. cit., p. 12; Benson, J. / Robinson-Walsh, D., *Infertility and IVF,* Scarlet Press, 1998, p. 1.

4. McGrail, A., *Infertility: the last secret,* Bloomsbury, 1999, p. 53.

5. Kennedy, I / Grubb, *A, Principles of Medical Law,* O.U.P., 1998, p.547.

6. Dyson, op. cit. , p.xi et seq.

7. Furse, A., *The Infertility Companion,* Thorsons, 1998, p. 86.

8. Downie, S., *Baby Making: The Technology and Ethics,* London, 1988, p. 57 et seq.

9. Dyson, op. cit., p. 75.

10. Human Fertilisation and Embryology Authority, Eighth Annual Report, 1999, p. 13.

11. Dooley, D., *Assisted Reproduction: the pursuit of consensus?* (1999) 5 M.L.J.I. 65.

12. Report of the Committee of Inquiry into Human Fertilisation and Embryology, HMSO, 1984, Cmnd. 9314 (Warnock Report).

13. Warnock Report, para. 11.9.

14. Warnock Report, para. 11.17 et seq.

15. Warnock Report, para 11.22.

16. Warnock Report, para. 11.30.

17. Human Fertilisation and Embryology Act 1990, ss. 7-11; I. Kennedy / A. Grubb, *Principles of Medical Law,* O.U.P., 1998, p. 549 et seq.

18. Act of 1990, s. 11(1) and Schedule 2, paras. 1-3.

19. Human Fertilisation and Embryology Act 1990, Schedule 2, para. 3.

20. Act of 1990, s. 3(3).

21. Act of 1990, Schedule 2, paras. 1(5), 2(3) and 3(9).

22. Act of 1990, s. 3(2).

23. Act of 1990, s. 3(3)(b)

24. Act of 1990, s. 3(3)(d).

25. (1992) 842 SW 2d 588 (Tennessee Supreme Court).

26. Ludwig *Wittgenstein, Philosophische Untersuchungen,* 1953 pt. 1, s. 109.

27. Grubb, A., *Principles of Medical Law,* First Supplement, O.U.P, 1998; Morgan, D. / Hitchings, E. *Regulating Artificial Reproductive Technology and Genetics,* Paper presented at I.S.F.L. Internationational Conference on Biomedicine, the Family and Human Rights, 27-30 August, 1999, St. Anne's College, Oxford.

28. Human Fertilisation and Embryology (Statutory Storage Period for Embryos) Regulations, 1996 (S.I. 1996/375).

29. HFEA Code of Practice, 4th ed., 1998, par. 7.24-7.26.

30. s. 14(1)(c)

31. Furse, A., *The Infertility Companion,* Thorsons, 1998, p. 86.

32. [1997] 2 All E.R. 687.

33. at p. 694.

34. Bundesminister f. Forschung u. Technologie, In-vitró-Fertilisation, Genomanalyse und Gentherapie: Bericht der gemeinsamen Arbeitsgruppe des Bundesministers f. Forschung und Technologie und des Bundesministers d. Justiz, 1985, referred to in this article as the Benda Report, p. 3, para. 1.3; BVerfGE 39, 1, 37.

35. Benda Report, p. 6, para. 2.1.1.2.

36. Benda Report, p. 28 et seq.

37. Gunther, H.-L., Strafrechtlicher Schutz des menschlichen Embryos uber §§218ff. StGB hinaus, in: Gunther, H.-L. / Keller, R. (eds), Fortpflanzungsmedizin und Humangenetik: Strafrechtliche Schranken?, Mohr, 1991, p. 137, 150; Fechner, E., Nachträge zu einer Abhandlung uber Menschenwürder und generative Forschung und Technik in: Gunther / Keller (eds), op. cit. p. 37, 54.

38. Harris, J., *Should we experiment on embryos?* in: Lee, R. / Morgan, D. (eds) Birthrights, Routledge, 1989, p. 85, 88 et seq.

39. Bill of 1999, s. 1. (This Bill is a Private Members Bill and, as much, there is no guarantee that it will be passed by the Oireachtas)

40. Bill of 1999, ss. 3, 4, and 5.

41. s. 10

42. Human Fertilisation and Embrology Authority, Eighth Annual Report, 1999, p. 4.

43. Morgan, D / Lee, R., Regulating Artificial Reproductive Technology: General Report and Reflections: Common Law Jurisdictions, Paper presented at I.S.F.L. Internationational Conference on Biomedicine, the Family and Human Rights, 27-30 August, 1999, St. Anne's College, Oxford.

44. *Murray v. Ireland* [1985] I.R. 532; *Magee v. Attorney General* [1974] I.R. 284

45. Dickens, Bernard M., Biomedicine, *The Family, and Human Rights:* Canada, Paper presented at I.S.F.L. Internationational Conference on Biomedicine, the Family and Human Rights, 27-30 August, 1999, St. Anne's College, Oxford.

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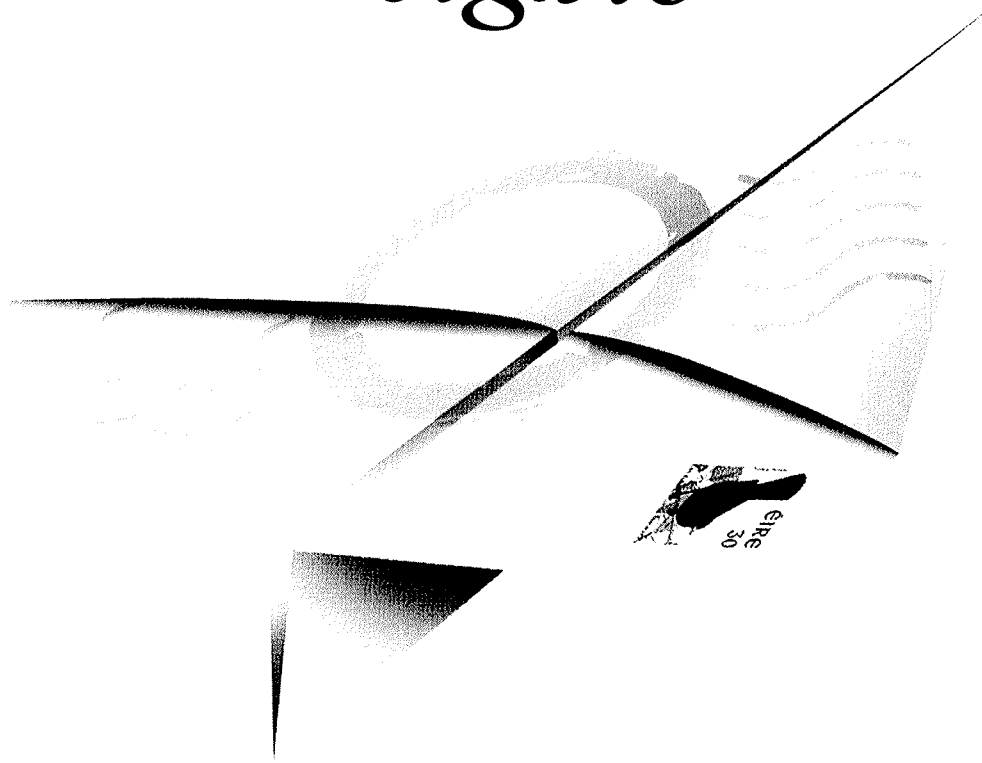

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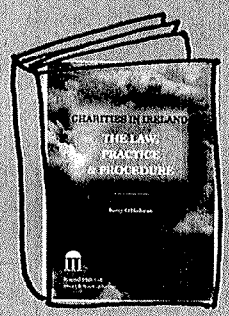

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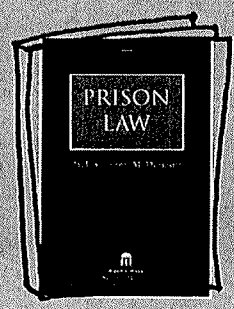

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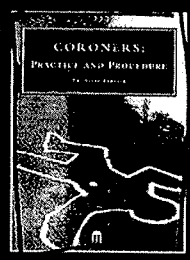

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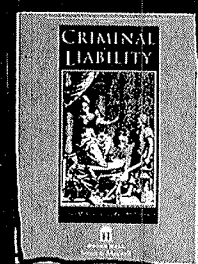
ISBN: 1-85800-058-0
Publication: May 2000



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Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 5, Issue 7

A directory of legislation, articles and written judgments received in the Law Library from the 15th March 2000 to the 12th April 2000.

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

Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

O'Connor v. Minister for the Marine
High Court: **Geoghegan J.**
06/10/1999

Judicial review; certiorari; delay; applicants seeking order quashing aquaculture licence granted by first-named respondent to second-named respondent; application brought outside maximum time period; leave to apply for judicial review had been granted by High Court; whether application brought promptly; whether time should be extended on the basis of possible interference with constitutional rights to livelihood; whether delay issue had been disposed of at the leave stage, or whether it could be dealt with at the full hearing; O.84 r.21, Rules of the Superior Courts, 1986.
Held: Application not brought promptly; no basis for extending time; respondent may raise delay issue at full hearing; application refused.

Statutory Instruments

British-Irish agreement act, 1999 (commencement) order, 1999
SI 377/1999

British-Irish agreement (amendment) act, 1999 (commencement) order, 1999
SI 378/1999

Courts (supplemental provisions) act, 1961 (increase of judicial remuneration) order, 1999
SI 433/1999

Members of the Oireachtas and ministerial and parliamentary offices (allowances and salaries) order, 1999
SI 429/1999

Oireachtas (allowances to members) and ministerial, parliamentary, judicial and court offices (amendment) act, 1998 (allowances and allocations) order, 1999
SI 430/1999

Oireachtas (allowances to members) (telephone and postal facilities) (amendment) regulations, 1999
SI 388/1999

Oireachtas (allowances to members) (travelling facilities and overnight allowance) (amendment) regulations 1999
SI 389/1999

Library Acquisitions

Lewis, Clive
Judicial remedies in public law
2nd ed
London Sweet & Maxwell 2000
N395.1

Killen, Desmond M
Journal of valuation tribunal judgments volume 2: July 1994 - December 1998
Dublin IPA 1999
selected judgments from September 1994 to December 1998 available on CD-ROM at the information desk in LRC
M337.65.C5

Aliens

Article

Protection elsewhere - migration and the refugee
Care, Geoffrey
1999 (4) P & P 74

Arbitration

Library Acquisitions

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

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

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

Yearbook commercial arbitration: volume XXIVa - 1999
Deventer Kluwer Law and Taxation 1999
International Council for Commercial Arbitration
N256

Children

Article

Seen but not heard?
Shannon, Geoffrey
1999 (December) GLSI 18

Commercial Law

Wise Finance Company Ltd v. Hughes
Supreme Court: **Keane J.**, Murphy J., Murray J.
12/11/1999

Money-lending; license to carry on business of money-lending; plaintiff seeking order for possession; High Court held that plaintiff had no license; whether plaintiff fell within exemption from requirement to hold license; s.136, Central Bank Act, 1989; Art. 2(1)(a)(iii), Money-lenders Act, 1900 (s.6(e)) Order, 1993 (S.I. No. 167 of 1993).

Held: High Court had not been referred to the relevant exemption; insufficient evidence to determine whether or not plaintiff fell within that exemption; matter remitted to High Court on undertaking of plaintiff to confine its claim for interest, from date of order appealed from to date of determination of matter in High Court, to interest at the court rate, and to pay all the defendant's costs to date.

A.C.C. Bank plc v. Malocco
High Court: **Laffoy J.**
07/02/2000

Contract; release; joint and several liability; practice and procedure; summary judgment; land; equitable mortgage; limitation periods; plaintiff provided credit line facility to defendant and his wife on foot of a loan agreement; undertaking by defendant's solicitors, with authority of defendant and his wife, to secure execution of mortgage in favour of plaintiff in respect of shop premises; no mortgage of shop ever executed; credit facility withdrawn; house had been mortgaged in favour of plaintiff; house had been in sole name of plaintiff's wife; house sold and High Court ordered that proceeds of sale be placed on joint deposit in names of solicitors for defendant's wife and solicitors for plaintiff; separate proceedings brought by wife to have mortgage over the house set aside, were settled, with the amount on deposit being paid to the defendant's wife, subject to a payment of ú70,000 to the plaintiff; ú70,000 paid from account in joint names of defendant and his wife; summary summons; plaintiff seeking to recover debt from defendant on foot of loan agreement; special summons; plaintiff seeking well-charging order in respect of shop premises; both proceedings heard together; whether settlement with defendant's wife constituted a release or discharge of any liability of the defendant to the plaintiff on foot of the loan agreement; whether equitable mortgage created on foot of the solicitors' undertaking; whether plaintiff's claim statute barred; circumstances in which summary judgment ought to be granted; ss.17(1) and (2) and 35(1)(h), Civil Liability Act, 1961; ss.32(2), 36(1) and 37(1), Statute of Limitations, 1957.
Held: If settlement agreement with one debtor indicates intention that a co-debtor should be discharged, he is discharged, but if it does not then he is not discharged but his liability is reduced; onus on defendant to establish this intention; equitable mortgage created over shop premises; twelve-year limitation period in s.36(1) of the Act of 1957 applies to an action on the covenant or agreement to repay; six-year limitation period in s.37(1) applies to interest; claim not statute barred as regards principal but claim for interest in respect of any period more than six years before proceedings instituted barred; in summary proceedings the court must be satisfied that there is a fair or reasonable probability that the defendant has a real or *bona fide* defence; this probability could not be excluded; summary judgment refused.

Articles

Conference report: public lending right (p.l.r.): the right to culture and a culture of rights
Quinn, Anthony P
1999 3(2) IIPR 16

Securities regulation and the doctrine of caveat vendor in the USA
Goldberg & Abrahamson
1999 CLP 287

Library Acquisition

Cahill, Dermot
Corporate finance law
Dublin Round Hall Ltd 2000
N263

Statutory Instruments

Savings certificates (twelfth issue) rules, 1999
SI 447/1999

Savings certificates (thirteenth issue) rules, 1999
SI 448/1999

Savings certificates (fourteenth issue) rules, 1999
SI 449/1999

Savings certificates (fifteenth issue) rules, 1999
SI 450/1999

Savings certificates (sixteenth issue) rules, 1999
SI 451/1999

Savings certificates (twelfth issue) (amendment) rules, 1999
SI 452/1999

Savings certificates (thirteenth issue) (amendment) rules, 1999
SI 453/1999

Savings certificates (fourteenth issue) (amendment) rules, 1999
SI 454/1999

Savings certificates (fifteenth issue) (amendment) rules, 1999
SI 455/1999

Company Law

Car Replacements Limited, In re
High Court: **Murphy J.**
15/12/1999

Winding-up; remuneration of liquidator; application by liquidator for reliefs constituting 'final order' in respect of certain companies in group; company one of ten companies with surplus assets to distribute; application for final order in the company served on notice party as principal shareholder; hours involved in liquidator's work allocated to various companies by reference to their gross realisations; notice party concerned as to amount of remuneration sought by liquidator from the company; whether method of attributing fees to companies in group resulted in the company funding liquidator's fees in respect of work done on liquidation of other companies in group which was not for the benefit of principal shareholder in the company; whether costs of liquidator's status report must be spread between companies in the group on some basis.
Held: Remuneration of liquidator to be calculated on the basis of hours allocated to companies in group by reference to gross realisations.

Article

Litigation of shareholder disputes under Woolf - can such changes yield advantages for Ireland?
Carey, Gearoid
1999 CLP 300

Library Acquisition

Hollington, Robin
Minority shareholders' rights
3rd ed
London Sweet and Maxwell 1999
N263

Statutory Instrument

Companies (amendment) (no.2) Act, 1999 (commencement) order, 1999
SI 406/1999

Competition

Article

Article 86 of the E.C. treaty - state monopolies and competition
Hughes, Mark
1999 IJEL 18

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Competition Authority
Competition Authority discussion paper no. 8 competition, parallel imports & trademark exhaustion: two wrongs from a trademark right.
[Dublin] Competition Authority 1999
Competition law: Ireland
N266.C5

Competition Authority

Competition Authority discussion paper no. 9 response of the Competition Authority to the Competition and Mergers Review Group's proposals for discussion in relation to competition law.
[Dublin] Competition Authority 1999
N266

Constitutional Law

Grealis v. Director of Public Prosecutions
High Court: **O'Donovan J.**
18/10/1999

Constitutional; criminal; statutory interpretation; judicial review; prohibition; applicant being prosecuted on foot of three summonses; first and second summonses alleged assault contrary to common law; third summons alleged assault occasioning actual bodily harm contrary to s.47, Offences Against the Person Act, 1861; all three summonses dated later than the coming into operation of the Non-Fatal Offences Against the Person Act, 1997, which abolished the offences charged, but all alleged offences occurred before that date; whether assault occasioning actual bodily harm a common law offence; whether s.21, Interpretation Act, 1937 allows the offences to be prosecuted; whether s.1(4), Interpretation (Amendment) Act, 1997 allows the prosecution of the common law offences; whether s.1(4) declaratory and does not create new law; whether s.1(4) invalid having regard to the provisions of the Constitution; whether s.1(4) purports to permit judges of the District Court to determine its constitutionality contrary to Article 34.3.2_ of the Constitution; whether s.1(4) purports to divest the authority of the legislature in favour of the courts contrary to Article 15.2.i and ii of the Constitution; whether s.1(4) purports to permit inequality before the law contrary to Article 40.1 of the Constitution; whether the Interpretation (Amendment) Act, 1997, generally, purports to permit interference in a judicial process in being.
Held: Assault occasioning actual bodily harm is a statutory offence; s.21 does not allow the former common law offences to be prosecuted, but does allow the statutory offence to be prosecuted; s.1 not merely declaratory of the law; on its face s.1 allows the common law offences to be prosecuted; s.1(4) invalid having regard to the provisions of the Constitution.

Consumer Law

Article

The EC directive on certain aspects of consumer sale and associated guarantees: one step forward, two steps back?
White, Fidelma
2000 CLP 3

Statutory Instrument

Consumer credit act, 1995 (section 2) (no. 2) regulations, 1999
SI 392/1999

Contempt

Kelly v. O'Neill
Supreme Court: Hamilton C.J., **Denham J.,** Barrington J., Keane J., Lynch J.
02/12/1999

Criminal contempt of court; consultative case stated from High Court; applicant convicted in Circuit Court of two offences; after conviction, but before sentence, article containing material not admissible in evidence and negative to applicant was published in newspaper of which second named respondent was editor; first named respondent was author of article; applicant seeking attachment of respondents for contempt of court; whether it can be contempt of court to publish such an article after criminal trial has passed from seisin of the jury and where remainder of hearing will take place before judge sitting alone; whether given the constitutional right of freedom of expression of the press, the publication of such an article could ever constitute a contempt of court when published after conviction and before sentence.
Held: Article can be contempt.

Copyright, Patents & Designs

Articles

Recovery under an account of profits and passing off - who gets what when the chips are down?
Clark, Robert
1999 3(2) IIPR 19

Section 24 of the trade marks act 1996 - a new remedy for groundless threats
Lambert, Paul
1999 CLP 293

Survey evidence in passing off and trade mark litigation
Lambert, Paul
1999 3(2) IIPR 10

Statutory Instrument

Patents and trade marks (fees) rules, 1999
SI 403/1999

Patents and trade marks (fees) (no. 2) rules, 1999
SI 434/1999

Costs

Lancefort Ltd v. An Bord Pleanála
Supreme Court: **Hamilton C.J.,** Denham J., Barrington J., Keane J., Lynch J.
02/12/1999

Costs; whether costs of proceedings before the Supreme Court should be awarded in favour of the unsuccessful party; respondent and notice party not seeking costs of the proceedings in the Supreme Court.
Held: Order of the High Court in respect of costs affirmed; no order as to costs in the Supreme Court; no order as to reserved costs; respondent and notice party awarded costs of hearing on application for costs against applicant.

Criminal Law

O'Brien v. District Judge O'Halloran
High Court: **Kearns J.**
16/11/1999

Criminal; jurisdiction of District Court; *certiorari;* summons issued in one District Court area was returnable in an adjoining area; respondent purported to adjourn matter; between adjournment and final disposal, the District Court Districts and Areas (Amendment) and Variation of Days (No. 5) Order, 1998 (S.I. No. 376 of 1998) amalgamated the two District Court areas in question and purported retrospectively to validate proceedings initiated but not completed prior to its coming into force; respondent proceeded to convict applicant; whether respondent had jurisdiction to adjourn proceedings; whether District Court Rules could confer jurisdiction; whether a defect in a summons was cured by the applicant's appearance before the court; whether the Order of 1998 cured any defect; s.79, Courts of Justice Act, 1924; ss.21 and 27, Courts of Justice Act, 1953; Courts (Supplemental Provisions) Act, 1961; s.15, Courts Act, 1971; O. 12, r. 5 and O. 13 Rules of the District Court.
Held: Respondent had no jurisdiction to adjourn the matter; the District Court Rules could not confer any jurisdiction; appearance before the court will only cure a defect in a summons where the court venue is one where the court has jurisdiction to amend or otherwise deal with the case; the Order of 1998 relates only to business properly initiated and outstanding prior to its commencement.

The People (Director of Public Prosecutions) v. B.
Court of Criminal Appeal: **O'Flaherty J.,** O'Higgins J., Cyril Kelly J. (ex tempore)
14/12/1998

Appeal against sentence; sexual offences; applicant pleaded guilty to ten sample counts of rape, indecent assault and incest perpetrated upon his three daughters over a period of years; seventy counts in the indictment; applicant had operated a "sexual tariff" by requiring his daughters to submit to him before leaving the house; Central Criminal Court had imposed a sentence of 15 years, the last year to be suspended; whether sentence correct in principle.
Held: Sentence reduced to 11 years, no part to be suspended.

Murray v. Judge McArdle
High Court:**Kelly J.**
05/11/1999

Criminal; judicial review; statutory interpretation; applicant had been convicted of a number of road traffic offences; applicant seeking certiorari quashing those convictions on the ground that no good valid or lawful complaint had been made in respect of the offences within six months of the alleged offences as required by the provisions of s.10, Petty Sessions (Ireland) Act, 1851; complaint made pursuant to s.1(4) of the Courts Act, 1986; whether s.1(7)(a) of the 1986 Act means that not merely must the application for a summons be made within six months of the date of the alleged offence but that the hearing of that complaint must be entered upon by the District Judge within the sixth month period; whether the District Judge is deprived of jurisdiction in circumstances where the time limit imposed in s.10 is not complied with.
Held: Application dismissed.

Articles

Closing remarks
O'Donoghue, John
1999 ICLJ 218

Responding to sexual crime: the need for a new approach
Walsh, Sabine
1999 ILT 310

Library Acquisition

Archbold, John Frederick
Archbold criminal pleading, evidence and practice 2000
2000 ed / by P.J. Richardson
London Sweet & Maxwell 1999
M500

Statutory Instrument

Criminal justice (legal aid) (amendment) regulations, 1999
SI 385/1999

Defamation

McDonnell v. Sunday Business Post Limited
High Court: **O'Sullivan J.**
02/02/00

Defamation; libel; discovery; claim that plaintiff libelled in newspaper article; defence of fair comment; Master had granted discovery against the plaintiff; appeal by plaintiff; whether plea of fair comment requires application for discovery to be supported by affidavit setting out the existence of evidence upon which defendant intends to rely in establishing the facts referred to; whether absence of affidavit disentitles defendant to discovery; whether discovery sought amounts to a 'fishing expedition'; whether discovery so onerous as to be unfair; whether discovery order should relate to documents in existence at or prior to date of publication.
Held: Appeal disallowed; order granted with some exceptions; discovery of documents in existence up to date of publication with proviso that documents coming into existence after publication date also discoverable where drafts were in existence on or before that date.

Defence Forces

Hanley v. Minister for Defence Supreme Court
Hamilton C.J., **Denham J., Keane J.,** Murphy J., **Lynch J.**
07/12/99

Army deafness; assessment of damages; Green Book; defendants appealed from judgment of High Court on grounds that sums awarded to plaintiff excessive and/or contrary to the evidence; High Court judge calculated plaintiff's damages in accordance with formula set out in form of a scale (High Court scale); defendants furnishing alternative scale of damages on appeal (State scale); compensation of present disability under High Court scale and State scale; Civil Liability (Assessment of Hearing Injury) Act, 1998 requiring courts to have regard to Green Book; Green Book furnishing no guidance in relation to aspects of assessment of hearing disability; whether duty on courts to adhere strictly to terms of Green Book; whether courts should have regard to guidance afforded by other standards; whether appropriate for courts in awarding compensation to take present value in actuarial terms of basic unit multiplied by appropriate percentage of hearing loss; whether appropriate for courts to make further actuarial reduction to allow for fact that plaintiff will only suffer from disability for specified period of years; whether High Court scale would lead to excessive awards; whether basic units in State Scale should be adopted in future cases; whether State Scale should be treated as omitting words "(including future ageing)" at head of each of two columns in scale; whether there should be added to basic unit further amount for noise induced hearing loss to the extent that it will be aggravated by age related hearing loss by age 60; whether courts could depart from formula in particular cases to achieve just result.
Held: Basic units in the State Scale should be adopted in future cases, to which should be added, multiplied by appropriate percentage, further amount for noise induced hearing loss to extent that it will be aggravated by age related hearing loss by age 60, discounted for present payment and subject to actuarial reduction to take account of fact that plaintiff will only suffer from disability for specified period of years; award of damages arrived at by High Court in instant case not disturbed, this being in the nature of a test case to determine appropriate method of assessing damages in future cases.

Hassett v. Minister for Defence
Supreme Court: Hamilton C.J., **Denham J., Keane J.,** Murphy J., **Lynch J.**
07/12/99

Army deafness; assessment of damages; plaintiff appealed; damages assessed by High Court in accordance with ordinary principles of law; evidence that plaintiff had not considered his hearing to be abnormal prior to undergoing audiogram; evidence that plaintiff able to perform duties as Company Sergeant without great difficulty; whether level of quantum for pain and suffering to date and into the future reflected severity of plaintiff's injury; whether trial judge misdirected herself in law and in fact in factoring capital cost of hearing aids into quantum for general damages; whether trial judge misdirected herself in law and in fact in holding that plaintiff not at loss of opportunity for promotion because of hearing loss.
Held: Appeal dismissed; damages for pain and suffering to date and into the future not disturbed; not possible to conclude that plaintiff would lose opportunity of promotion due to hearing loss.

Barry v. Minister for Defence
Supreme Court: Hamilton C.J., Denham J., Keane J., Murphy J., **Lynch J.**
07/12/99

Army deafness; assessment of damages; special damages for the future; defendants appealed; trial judge had accepted evidence that plaintiff would suffer difficulty in finding employment in future upon leaving Army; whether credible evidence to support findings of fact by trial judge.

Held: Appeal dismissed; evidence clearly supported findings of trial judge.

Education

Article

21 years on the changing face of CLE
O'Reilly, Sarah
1999 (December) GLSI 21

Employment

Article

Recent developments in employment law - Denny v. Minister for Social Welfare
O'Sullivan, Donal
1999 ILTR 294

Library Acquisition

Higgins, Eddie
Your rights at work
2nd ed
Dublin Institute of Public Administration 1997
N192.C5

Stranks, Jeremy
Health and safety at work in Ireland
Dublin Blackhall Publications 1999
N198.2.C5

Statutory Instrument

Circuit court rules (no. 1) (organisation of working time act, 1997), 1999
SI 373/1999

Entertainment

Library Acquisition

Manchester, Colin
Entertainment licensing law and practice
2nd ed
London Butterworths 1999
N344

Nelson, Vincent
The law of entertainment and broadcasting
2nd ed
London Sweet & Maxwell 2000
N344

Environmental Law

Jackson Way Properties Ltd v. Minister for Environment and Local Government
High Court: **Geoghegan J.**
10/09/1999

Roads; appeal from refusal of leave to seek judicial review; applicant seeking certificate under s.4, Roads (Amendment) Act, 1998; whether certificate that a case involves a point of law of exceptional public importance required for appeal to Supreme Court on non-constitutional grounds, where the case raises a constitutional point; whether certificate should be granted on question of whether or not respondent obliged to consider, when deciding whether or not to approve a motorway scheme, whether or not the scheme complies with the land use objectives of the local authority that has submitted the scheme for approval.
Held: Certificate required; certificate granted.

Articles

Fundamental principles of E.U. environmental law
Whelan, Anthony
1999 IJEL 37

Maintaining environmental standards and the IPPC directive
MacLean, Iain
1999 IJEL 58

Recent developments in environmental impact assessment in Ireland
Fitzsimons, Jarlath
1999 IPELJ 147

Library Acquisition

Kramer, Ludwig
EC environmental law
4th ed
London Sweet & Maxwell 2000
formerly "EC treaty and environmental law"
W125

Statutory Instrument

Litter pollution regulations, 1999
SI 359/1999

Equity & Trusts

Money Markets International Stockbrokers Limited, In re
High Court: **Laffoy J.**
20/07/1999

Equity; restitution; applicant had instructed the company to purchase shares on his behalf; applicant transferred funds in respect of this transaction to the company's account;right of the company to transact business on the Stock Exchange had subsequently been suspended and the company had been wound up; applicant seeking an order directing the official liquidator of the company to complete the contract entered into on the applicant's behalf, or, in the alternative, to repay the sum to the applicant; whether the rule in Clayton's case is applicable in determining to whom the balance on the company's account belongs; whether, if the rule in Clayton's case is not applicable, the applicant should be bound by a *pari passu* distribution; whether the Liquidator has a claim against the monies; s.52(5) Stock Exchange Act, 1995 as amended by s.78, Investor Compensation Act, 1998.
Held: Order granted directing the official liquidator to repay to the applicant the sum transferred to the company; order is to be without prejudice to any claim the liquidator may have against that sum and against the applicant.

Library Acquisition

Snell's equity
30th ed
London Sweet & Maxwell 2000
N200

European Union

Articles

Article 86 of the E.C. treaty - state monopolies and competition
Hughes, Mark
1999 IJEL 18

Bickel - extending the boundaries of European citizenship
Doherty, Barry
1999 IJEL 70

Fundamental principles of E.U. environmental law
Whelan, Anthony
1999 IJEL 37

Maintaining environmental standards and the IPPC directive
MacLean, Iain
1999 IJEL 58

Reeling in the years - the factortame saga
Conlan Smyth, David
1999 (4) P & P 85

The dilemma of Keck - the nature of the ruling and the ramifications of the judgment
Dabbah, Maher M
1999 IJEL 84

The EC directive on certain aspects of consumer sale and associated guarantees: one step forward, two steps back?
White, Fidelma
2000 CLP 3

The soft harmonisation of Irish law - applying European principles in an Irish context
Attew, Mark
1999 IJEL 3

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Cook, C John
E.C. merger control
3rd ed
London Sweet & Maxwell 2000
W110.2

Kaye, Peter
Law of the European judgments convention
Chichester Barry Rose 1999
W73

Kramer, Ludwig
EC environmental law
4th ed
London Sweet & Maxwell 2000
formerly "EC treaty and environmental law"
W125

Office for Official Publications of the European Communities
European Union consolidated treaties
Luxembourg Office for Official Publications of the European Communities 1997
W1

Rudden, Bernard
Basic community laws
7th ed
Oxford University Press 1999
W71

Scherer, Joachim
Telecommunication laws in Europe
4th ed
London Butterworth 1998
N342.E95

Evidence

Carey v. Judge Hussey
High Court: **Kearns J.**
21/12/1999

Form of court order; adjournment; judicial review; prohibition; safety order a necessary proof in prosecution case; prosecution sought to adduce evidence of safety order by means of a photocopy; applicant objected; whether respondent could accept the photocopy; whether respondent could adjourn the matter to allow certified copy to be obtained; s.30, Criminal Evidence Act, 1992; O. 2(2), District Court Rules.
Held: Respondent had jurisdiction to determine manner in which she would deem a copy of a document to be duly authenticated; respondent had discretion to adjourn hearing.

Library Acquisition

Phipson, Sidney Lovell
Phipson on evidence
15th ed by M.N. Howard...[et al]
London Sweet & Maxwell 2000
M600

Family Law

P. v. B. (No. 2)
Supreme Court: Hamilton C.J., **Denham J.,** Barrington J.
26/02/1999

Family; abduction; R., a minor, had previously been the subject of an application and order under the Child Abduction and Enforcement of Custody Orders Act, 1991, which gives force of law in Ireland to the Hague Convention on the Civil Aspects of International Child Abduction; R. was born in Spain; Spanish father (P., respondent); Irish mother (B., appellant); respondent and appellant unmarried, but lived together in Spain with R.; Supreme Court had held that R. had habitual residence in Spain prior to her removal to Ireland by appellant, that respondent had not acquiesced to the removal and that removal had been unlawful; Supreme Court had ordered that R. be returned to Spain, though respondent gave certain undertakings in relation to care of R. pending hearing of case by Spanish Court; order had included liberty to apply to the Court; R. and appellant had returned to Spain; civil proceedings in Spain in relation to custody had granted exclusive custody to appellant, appellant having alleged that respondent had sexually abused R. while exercising his right of access to R.; in August, 1996, Spanish Court had ruled that R. should not leave the national territory of Spain; in October, 1996, appellant had removed R. to Ireland; criminal proceedings in Spain against respondent arising out of appellant's allegation of sexual abuse had collapsed; appellant had initiated a private prosecution there; a criminal process had also commenced in Spain to make appellant answerable for her disobedience in removing R. from jurisdiction; R. had commenced school in Ireland; appellant had an extended family in the locality to which she removed R.; in June, 1998, respondent applied to High Court by way of notice of motion; High Court ordered that R. be returned to Spain upon expiry of a reasonable time to allow advice to be received in relation to preparing R. for the move and addressing any emotional difficulties she might have; appellant's appeal to Supreme Court; whether respondent's delay of 20 months before commencing proceedigs under the Act was fatal to his case; whether R. had settled into her new environment, such as to replace the mandatory obligation on the Court to return the child under the Convention with a discretion so to do.
Held: Appeal allowed; on these facts, Court must look beyond conduct of mother to the needs of the child; the welfare of R. has priority; delay established; respondent could have telephoned appellant's parents in Ireland to discover R.'s whereabouts easily and speedily; delay of approximately one year after Interpol's discovery that appellant had removed R. to appellant's parents' house was not adequately explained by need for respondent's lawyers to prepare documentation; delay must be viewed in overall picture of child's life; delay meant that R. had spent a critical time in Ireland during her development and that prompt return, the essence of the Convention, was impossible to achieve; it was for appellant to prove that child had settled; inferences could be drawn from respondent's delay in determining extent to which R. had settled; expert reports and appellant's testimony suggested that R. had settled into new environment; in spite of appellant's wrongful removal, in special circumstances of case, arising largely because of P's inappropriate delay in commencing proceedings, discretion of Court should be exercised in favour of child remaining in Ireland in its new settled environment.

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Housing

Mongan v. South Dublin County Council
High Court: **Kinlen J.**
17/12/1999

Housing; validity of certain notices; whether the defendant is entitled to serve notice requiring the Plaintiffs who are living in caravans on unserviced and unathorised sites on public land to move their caravans to an authorised halting site; whether the authorised halting site is a suitable halting site for the purpose of s.10(1), Housing (Miscellaneous Provisions) Act, 1992.
Held: The proposed halting site is adequate for the purpose of the Act; action dismissed.

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"A temporary and infrequent phenomenon": the law reform commission report on gazumping
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Noctor, Cathleen
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SI 430/1999

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Local Government

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Urban renewal act, 1998 (section 20) (commencement) order, 2000
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Medical Law

Collins v. Mid-Western Health Board
Supreme Court: Hamilton C.J., Barrington J., **Keane J.**, Lynch J., **Barron J.**
12/11/1999

Medical negligence; failure by G.P. to refer to specialist; hospital admission procedures; while at work deceased suffered a subarachnoid haemorrhage, manifested as a severe, sudden headache; appellant (deceased's wife) telephoned second named defendant, a G.P., requesting him to see deceased urgently; deceased presented with headache but did not say that it had come on suddenly; second named respondent diagnosed an upper respiratory tract infection; plaintiff telephoned second named respondent on two occasions, saying how worried she was about the deceased's poor condition; second named respondent saw deceased on three further occasions and his diagnosis was contradicted by the symptoms; deceased went to see a different doctor, who immediately took the view that the deceased needed a C.T. scan and thereafter wrote to the hospital requesting that the deceased be admitted as a matter of urgency; hospital's senior house officer (S.H.O.) took view that deceased needed further examination by a specialist and sent him home; procedure of first named respondent was to allow patients to be refused admission to the hospital on the opinion of the S.H.O. alone; two days later deceased suffered a second subarachnoid haemorrhage and died five days afterwards; standard of care; whether second named respondent ought to have asked further questions of the deceased in order to elicit the history of the complaint; whether second named respondent ought to have taken telephone calls from plaintiff into account; whether second named respondent in breach of duty of care; whether procedure adopted by first named respondent had an inherent defect that ought to have been obvious to any person giving it due consideration; whether first named respondent in breach of duty of care.

Held: Second named respondent ought to have probed further in relation to the headaches; second named respondent not entitled to ignore communications from appellant; second named respondent fell below the standard of care that could reasonably be expected of him, by not referring deceased to a specialist; practice of the first named respondent in giving absolute authority to refuse admission to a junior doctor, albeit a relatively senior one, had an inherent defect that would be obvious to anyone giving the matter due consideration; both respondents in breach of duty of care; appeal allowed; matter remitted to High Court for determination of whether or not loss flowed from the breaches of duty.

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SI 402/1999

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Planning

Dolan v. Cooke
High Court: **Morris P.**
20/01/00

Planning; exempted development; use; application under s. 27, Local Government (Planning and Development) Act 1976 as inserted by s. 19(4)(g), Local Government (Planning and Development) Act, 1992; applicant farmers objecting to respondent farmer's road-making activities at point adjacent to boundary between farms; whether activities constituted exempted development within meaning of s. 4(1)(a), Local Government (Planning and Development) Act, 1963; whether activities constituted use of lands for purpose of agriculture or forestry within meaning of s.4(1)(a); whether laying of road or path fell within definition of "agriculture" in s. 2(1), Local Government (Planning and Development) Act, 1963; whether fact that work may benefit and enhance lands making them more suitable and convenient for agricultural purposes renders works use of land for purposes of agriculture and forestry within meaning of s.4(1)(a); whether respondent had established entitlement to the benefit of the statutory exemption; whether activities fell within description of works of land reclamation Class 9 set out at Article 9(1)(a), Part 3, Local Government (Planning and Development) Regulations 1994; whether respondent entitled to indemnity based on

1994 Regulations.
Held: Respondent's activities not exempt; order made restraining road-making activities and requiring respondent to restore area to its original condition.

Village Residents Association Ltd. v. An Bárd Pleanála
High Court: **Geoghegan J.**
05/11/1999

Planning; leave to apply for judicial review; substantial grounds; development plan; *locus standi;* respondent granted planning permission to McDonalds for the development of a standard McDonalds restaurant; permission had originally been refused by planning authority on the ground, *inter alia,* that the grant would have amounted to a material contravention of the development plan; applicant company, limited by guarantee, formed after impugned decision; no members of company were official objectors before the respondent, though two promoters did lodge objections which were one day late and therefore rejected; applicant applied for leave to apply for judicial review seeking to quash decision of respondent; whether applicant had *locus standi;* whether applicant had substantial grounds to claim that decision was irrational; whether applicant had substantial grounds for contending that property in question is included in the boundary of a liquor licence; whether applicant had substantial grounds for contending that respondent had failed to give adequate reasons for decision, in particular, why respondent had deviated from development plan; whether applicant had substantial grounds for contending that procedural irregularities were fatal to the entire application; s. 82 (3A) and (3B), Local Government (Planning and Development Act), 1963, as inserted by s. 19 (3), Local Government (Planning and Development) Act, 1992; s. 14 (8), Local Government (Planning and Development) Act, 1976; article 16(4)(d), Local Government (Planning and Development) Regulations, 1994.
Held: Leave granted; applicant did not have *locus standi* to contend that failure to mention on site notice that planning application could be inspected at the offices of the planning authority was fatal to application; this could only be done by somebody who tried to satisfy the Court that he was misled and did not realise that he could inspect the planning application documents in the offices; applicant had *locus standi* under Lancefort v. An B≤rd Pleanßla in respect of other arguments; members of applicant company could not have raised issue of whether or not respondent should give reasons explaining why planning permission in material contravention of the development plan was being granted since that did not become an issue until after respondent's decision; no substantial grounds for contending that decision was irrational; respondent had ample material before it with which to justify decision ultimately taken; no substantial grounds for contending that property in question was included in the boundary of a liquor licence; grant of planning permission does not render something which would otherwise be unlawful, lawful; if either works carried out or user enjoyed pursuant to the planning permission were contrary to the Intoxicating Liquor Acts, then McDonalds could not go ahead with development without taking steps to ensure that the property was no longer licensed property; substantial grounds for contending that whenever respondent invokes its power to grant planning permission in material contravention of the development plan, it must give reasons for the decision.

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SI 465/1999

Practice and Procedure

Truck & Machinery Sales Limited v. General Accident Fire and Life Assurance Corporation Plc.
High Court:**Geoghegan J.**
12/11/1999

Practice and procedure; delay; plaintiff had brought an action for failure to indemnify the plaintiff on foot of a policy in respect of damage by fire to plaintiff's business premises; defendant seeking order dismissing claim for want of prosecution or order requiring the plaintiff to furnish security for costs; whether delay is of a kind that would entitle the defendant to dismiss for want of prosecution; whether delay was inordinate; whether delay was inexcusable; whether all the surrounding circumstances including excuses based on extraneous activities must be taken into account and weighed in the balance in finally considering whether justice requires that the action be struck out; whether it would be just to strike out the action; s.390 Companies Act, 1963.
Held: It would not be just to strike out the action, order refused; order for security for costs to be made if necessary.

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Corish v. Minister for Justice
High Court: O'Neill J. *(ex tempore)*
13/01/2000

Temporary release; *ultra vires;* supply of drugs offences; judicial review; certiorari; applicant refused temporary release by Governor of Castlerea Prison on ground that current policy was not to grant temporary release to offenders serving sentences for the supply of drugs; whether decision invalid having regard to the Temporary Release of Offenders (Castlerea) Rules, 1998 (S.I. No. 157 of 1998); whether art. 4, Rules of 1998 ultra vires the power of the respondent; s.2, Criminal Justice Act, 1960; art. 3, Rules of 1998.
Held: Decision in conformity with the Rules of 1998; art. 4, by purporting to allow the respondent to deny temporary release to prisoners on the basis of a category into which they fall, is *ultra vires.*

Property

Wise Finance Company Ltd v. Farrell
High Court: **Laffoy J.**
15/11/1999

Charge; registered land; claim for possession; discretion of court to make order for possession; whether evidence established that repayment of the principal money secured by the deed of charge had become due; s.62(7), Registration of Title Act, 1964.
Held: Court's discretion to make an order for possession under s.62(7) dependent on plaintiff establishing that he is the registered owner of a charge on the registered land the subject of the proceedings and that repayment of the principal money secured by the charge has become due; application refused.

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Refugees

Dascalu v. Minister for Justice, Equality and Law Reform
High Court: **O'Sullivan J.**
04/11/1999

Refugees; judicial review; procedural justice; applicant had applied for asylum in Ireland; applicant's claim had initially been processed in accordance with a certain procedure; a new procedure had been introduced with the possiblity of an accelerated procedure for manifestly unfounded cases; applicant subsequently informed by the respondent that his application had been refused as mainfestly unfounded; applicant seeking judicial review of the decision of the respondent; whether the respondent was entitled to determine the applicant's claim under the new accelerated procedures; whether fair procedures required the respondent to notify the applicant individually that his application was going to be dealt with under new procedures; whether such notice as the respondent claims to have given was sufficient; whether the applicant is entitled to have his application be determined in accordance with the old procedures.
Held: Order of mandamus refused; respondent was entitled to change the procedure in regard to applications which had already been submitted; applicant was entitled to be told that the procedures under which his application was being considered had been altered; the applicant received insufficient notice; order of *certiorari* granted; applicant not entitled to have his application determined in accordance with the old procedures.

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SI 259/1999

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SI 260/1999

Social welfare (agreement with Switzerland on social security) order, 1999
SI 206/1999

Solicitors

Re Burke
High Court: **Morris P.**
12/10/1999

Restoration to the Roll of Solicitors; applicant's name removed from Roll by order of the High Court, on foot of several episodes of dishonest conduct; application for a limited certificate that would not permit applicant to have control of financial matters; whether injustice to an applicant can be offset by damage to the good name of the profession; whether restoration of applicant to the Roll would adversely affect confidence in the solicitors' profession; whether applicant a fit and proper person to practise as a solicitor; s.10(4), Solicitors' (Amendment) Act, 1960.
Held: Injustice to an applicant not acceptable as a part of any judgment; restoration of applicant to the Roll would not adversely affect confidence in the solicitors' profession; applicant not a fit and proper person to practise as a solicitor; application refused.

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Taxation

MacAonghusa (Inspector of Taxes) v. Ringmahon Company
High Court: **Budd J.**
26/11/1999

Corporation tax; deductible expenses; Schedule D Case I; case stated; respondent redeemed ú6 million of redeemable preference shares and borrowed ú6 million from a bank; Circuit Court had allowed the expenditure as a deduction; whether interest on the loan a deductible expense; whether interest paid wholly and exclusively for the purposes of the trade; s.81, Taxes Consolidation Act, 1997.
Held: Interest was the cost of obtaining finance to keep the trade going; Circuit Court judge entitled to come to the conclusion he reached.

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