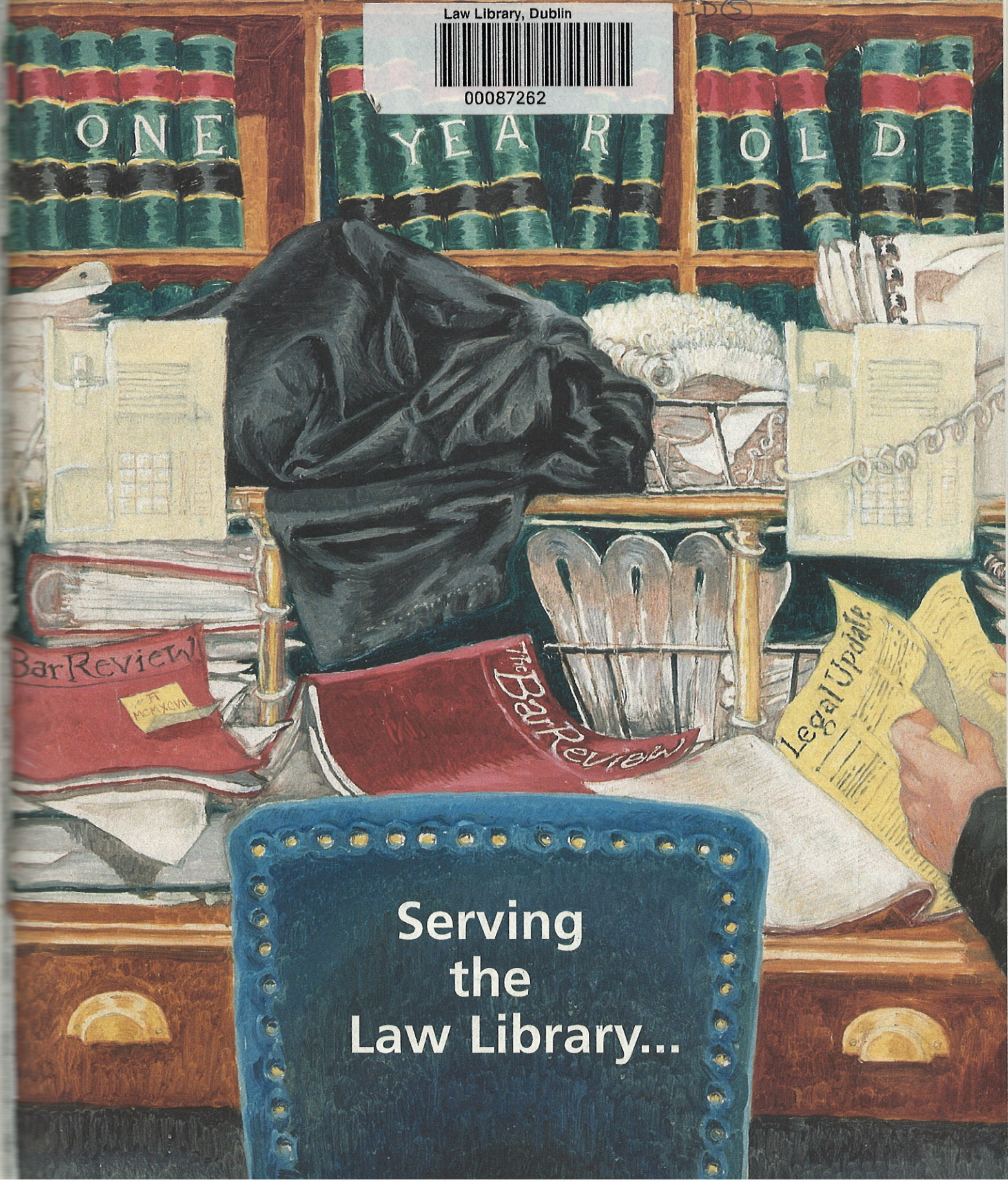
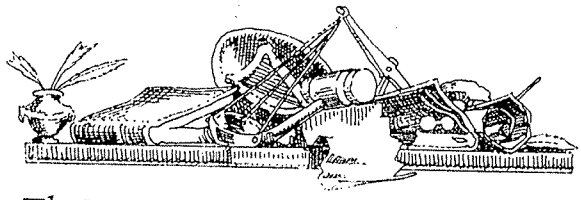
The Bar Review

Journal of the Bar of Ireland. Volume 2. Issue 8. June 1997





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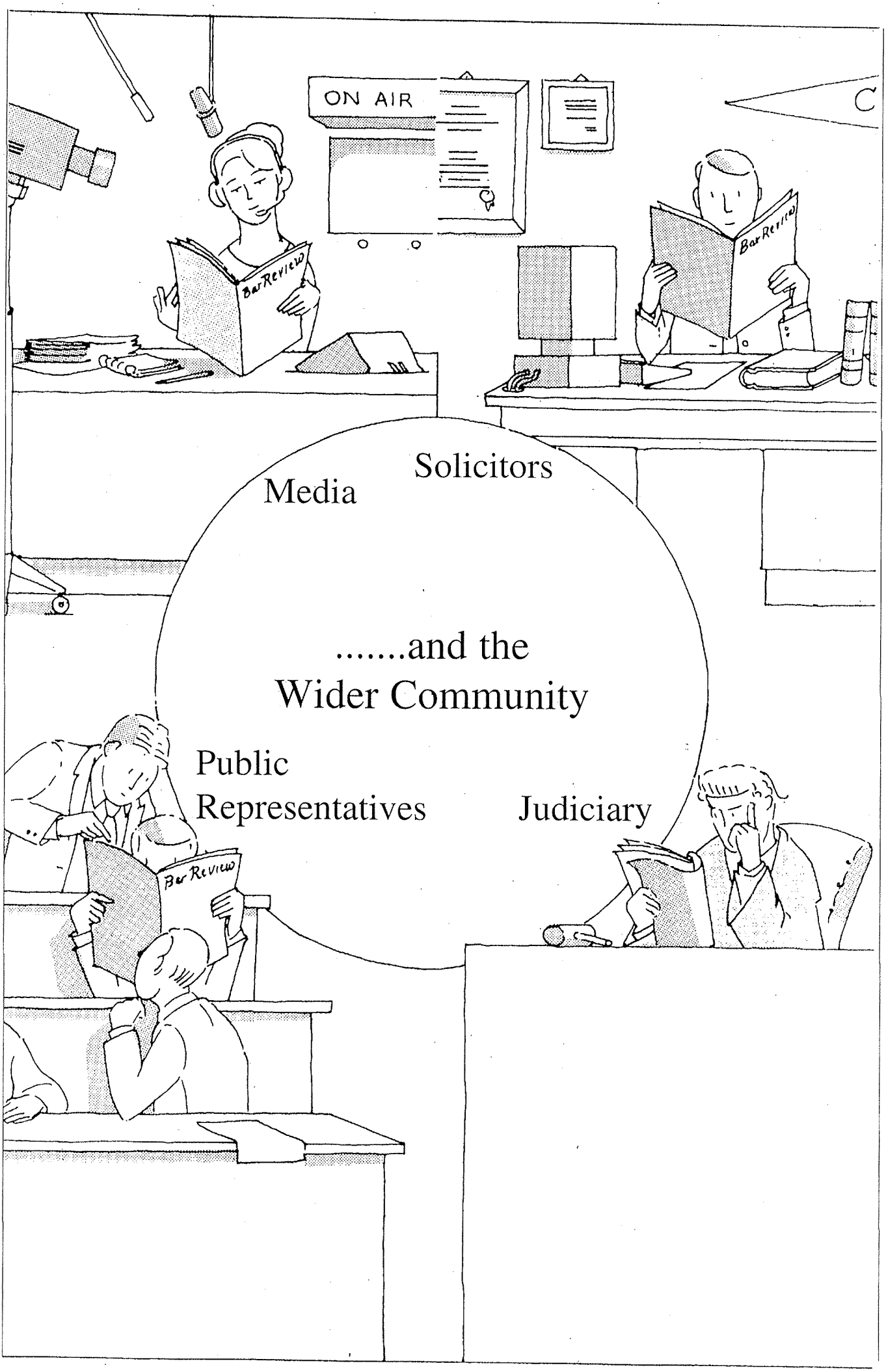
ON AIR
Bar Review
Bar Review
Solicitors
Media
.....and the
Wider Community
Public
Representatives
Judiciary
Bar Review

Serving the Law Library and the Wider Community

The Bar Review has been successfully steered through its first year of publication.

Launched last June, it is designed to serve the professional needs of members for the most current and up to date legal information, as well as facilitating the sharing of news, views and general information among the practising Bar. This formal sharing of news and views will gain in significance as the numbers practising at the Bar continue to increase and as the Law Library extends to a multi-site facility with the opening of the Distillery Site development later this year.

Through the Legal Update, the Review meets the Bar's needs as an information based service profession for the most current and up to date information on legislative and judicial developments, nationally and within the European Union. It also, through the accompanying articles, which have been consistently topical and informed, provides a valuable opportunity for the critical analysis of such legal developments by members. The Editorial policy has been to ensure that the Review, in addition to providing an opportunity for more senior and experienced members to contribute to such debates, also provides younger and less experienced members of the Bar with a legitimate platform on which to demonstrate their particular expertise.

The Bar Review is widely distributed outside the Bar among key external audiences such as the judiciary, subscribing solicitors and academics, public representatives and members of the media. It serves as an appropriate vehicle which indirectly allows such external bodies to form their own impression of the Bar based on the matters which are considered by the profession itself to be of concern to it.

In addition therefore to serving members professional needs, the Review is also intended to promote among the wider community an awareness and understanding of the Bar as an information based service profession dedicated to providing a first class service to its clients and to playing its role as an informed commentator and contributor to general debates of public importance.

The Bar Council is of course rightly concerned that commercial principles apply to all areas of Council activity and it has laid particular emphasis on the need for the Review to become self-financing. This is only possible through the kind support of our advertisers and the interest of our subscribers, whom, on this occasion, it is timely to thank for the role they play in ensuring the survival of the Review.

Through the support of members who contribute articles and those of our advertisers and subscribers, the Editorial Board looks forward to the challenge of continued production of the Review in service of the Bar's needs for professional information and as a vehicle with which to communicate with its external audiences.

Notice of AGM

The Annual General Meeting of the Bar will be held on Monday 21st July at 4.15 in the Law Library

●

Seamus Sorahan Perpetual Cup Challenge
Staff / Members Soccer Match
Friday, 25th July, 6.30.
Grangegorman.
All Welcome.

●

Congratulations on Exam Success

Congratulations to Paul Maloney and Damian Grenham who have successfully completed their final year exams in the Diploma in Legal Studies course in the College of Commerce, Rathmines.

●

Marketing Directory

Thank you to all members who submitted details for inclusion in the marketing directory. A number of copies of the draft directory are now available at the issue desk for your attention. Members are invited to check their entry under the various subject headings and notify the Secretary of the Liaison Committee, on the forms also available at the issue desk, of any changes required.

●

Winners of Bar Council / Rape Crisis Centre Essay Competition

Congratulations to the following law students who submitted winning entries to the Bar Council / Rape Crisis Centre Essay Competition. The topic of the Essay was "Separate Legal Representation for Rape Victims - A Fair System".

The Bar Review

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June '96 - June '97

First Prize:
Mr. Eoin MacGiolla Ri
Law Faculty,
UCG

Second Prize:
Mr. J Connolly
Glenageary
Co. Dublin

Third Prize:
Ms. Louise Monaghan
Cork.

●

Seanad Nomination

Henry Abbot, SC, has received the Bar Council nomination to the Cultural and Educational Panel of the Seanad.

●

Bar Council Elections

Polling in the Bar Council Elections will commence at 10am on Friday 4th July and conclude at 3pm on Friday 11th July. Polling will take place in the Law Library from 10am to 4.30pm between those dates.

●

AIJA Asia-Pacific Courts Conference

Sydney, Australia, 22 -24 August, 1997
Theme: "Managing Change"
Seminars and Workshops will consider issues including:
The Courts and the community,
Managing the work of the courts,
Information Technology and the Courts
Core Values in a Desirable Judicial System,
The role of the Courts and the Legal Profession for the 21st Century,
Family Law systems,
Exporting Alternative Dispute Resolution and Legal Services,
Juvenile Justice Systems and Pre-trial processes in the criminal jurisdiction

Speakers (awaiting confirmation) include Professor A. Zuckerman of Oxford University, Sir Richard Scott, Vice -Chancellor, UK and Deputy Chief Judge Mahoney, Principal Family Court Judge in New Zealand.
The Chief Justices of Australia and New Zealand will present keynote addresses.

Contact: AIJA Asia-Pacific Courts Conference Secretariat, Fax: + 61 9251 3552

●

Life Offices Lawyer's Association Established

The Life Offices Lawyer's Association (LOLA) has been established as a forum for lawyers working in life assurance offices in Ireland to meet and share information and debate common issues such as the Data Protection Act, Money Laundering, Consumer Credit Act, Family Law Act, Third Life Directive, Disclosure Regulations and EMU.

The first meeting took place last month in the offices of Standard Life with representatives from New Ireland, Irish Life, Scottish Provident, Standard Life and Lifetime Assurance.

Interested parties contact: Maria O'Connell, Legal Manager, Irish Life - 01 475 7411

Soccer Club Trip 1997

Having visited Oporto last year the all-conquering Soccer Club turned its attention to Palermo during the Whit Vacation. This time around there was some material changes. First, all members of the touring party arrived at Dublin Airport (although not Palermo) with valid passports. Secondly, lobster did not feature on the menu this year.

The trip commenced with a relaxed midday rendezvous. This mood was to pervade most of the subsequently undertaken activities.

An early high point of the tour took place when the Irish delegation was received by Palermo's crusading anti-Mafia mayor. His name, in case anyone has forgotten, is Leoluca Orlando. Patrick Hanratty was nominated, by popular acclaim, to present the Mayor with some traditional Irish gifts: whiskey and salmon. He bravely persevered and presented the salmon notwithstanding the significance of "presenting a dead fish to a Sicilian" having been pointed out tohim. The Mayor in return regaled us with stories about the famed co-operation between Palermitan dogs, cats and mice. The ensuing discussion on the difference between normality and normalisation was understood by some people.

The build-up to the match continued with the team training on a nightly basis. Contrary to the practice of other international teams, the squad welcomed the opportunity to mingle with the supporters. This open-door policy was continued right up to kick-off and included allowing many of them to share the team coach on the way to the stadium. In return Derek's Army of loyal fans exuded both support and sympathy. They even went so far as to suppress their mirth. The four o'clock start was put back to an evening kick-off. There was an initial suspicion that the Italians were playing cunning mind games. It was later revealed that RTE had in fact taken up their option on the television rights.

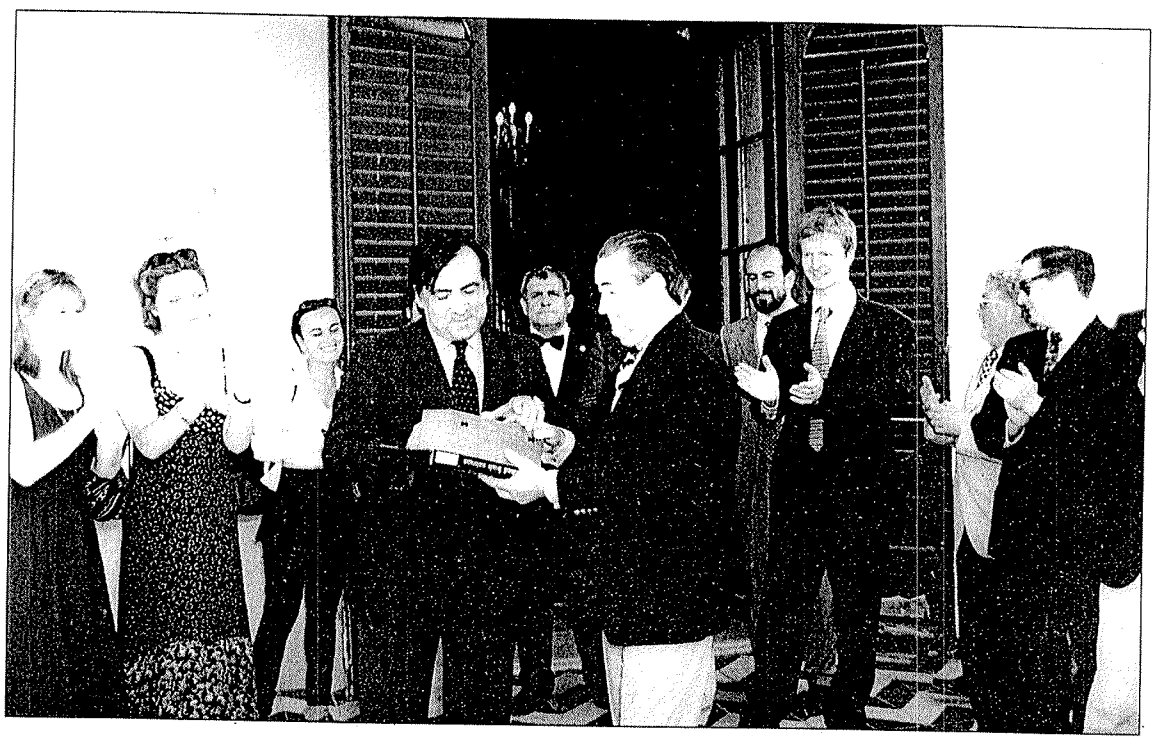
The team, with the steely determination for which they are noted, were unlucky to go in at half-time losing two-one, particularly in view of the fact that Seamus Woulfe opted for the point when the goal was available. Team captain (and Paul O'Higgins' nomination for man-of-the-match) Micheal P. O'Higgins scored the Irish goal with some help from right-back Stephen Byrne. In the second half the team could only watch helplessly as the referee showed his hometown colours and allowed two outrageously offside goals. At two goals down there was some hope of a draw but the writing was on the shirt when the fourth goal was scored. It should be noted that leave has been obtained to certiorari those two second-half decisions.

Sporting success, however, was not all Sicilian. The tennis players, captained by Terence Coughlan, won their challenge match.

The success of the trip would have been more difficult to achieve had it not been for prize-winning Johnny Walsh's magical powers of persuasion which opened many doors that would otherwise have remained closed. Intriguingly, Sicily's GDP is reported to have increased by 6.3% during our stay.

Another sporting and social success can be added to the Soccer Club's record of "away" games to date.

- Dara Hayes, Barrister.



Patrick Hanratty, SC, presenting gifts of whiskey and salmon to Mr. Leoluca Orlando, the Mayor of Palermo, during the Bar Soccer Club trip to Sicily.

Separate Legal Representation For Rape Victims. A Fair System

Eoin Mac Giolla Ri, Student, Law Faculty, University College Galway.

Winning Entry in Bar Council / Rape Crisis Centre Essay Competition

A Solution?

It is not often that a writer comes to a piece to find that they have been given a solution to discuss rather than a problem. The suggestion has been made that separate legal representation for the victims of rape could be the solution to many of the problems encountered by victims in our criminal justice system. The question being posed here is whether such representation is possible under our laws; how such a system might work; would separate legal representation solve rape victims' problems and, would such a system be fair to both defendant and complainer.

Moving Beyond Sympathy

No one should doubt that rape victims are entitled to our sympathy and any assistance that we can give them, particularly as they go through the ordeal of the criminal process. However, the granting of separate legal representation. be it fair or unfair, is a move beyond sympathy and beyond the bounds of the current conception of our criminal justice system. Given the importance of the trial to the life of the victim, the importance of the victim to the trial and the serious wrong done to the victim, in the absence of strong reasons not to, the victim should be recognised to some extent as a separate legal party.[1] There is, however a strong body of opinion which would say that a victim is simply not a party to any criminal trial, rape included, and that not alone is there no such right to representation but furthermore such representation is completely at odds with the nature and aims of our system.

The Emergence of State Prosecution

In Ireland we are firmly rooted in the Socratic notion of the State as guardian of the Law. A crime against an individual is a crime against us all and the State, acting on behalf of all, brings the offender to justice. This is a fundamental principle of our law and without it there would be simply no legal or moral justification for the Gardai, Prisons or Courts as we now know them. However, the adoption of this principle took place more through convenience than through jurisprudence. We can see very plainly from legal history that earlier legal regimes on both these islands were victim-driven. The victim initiated and pursued the prosecution of an offender and upon conviction the punishment could in many cases be chosen by the aggrieved party There was an unquestioned right of a victim to take a case[2] and to be heard in court. In the Irish Brehon system money, in reparation, was often payable to the victim.[3]

Subsequently, in England there developed a distinction between legal wrongs. While most wrongs retained the possibility of recourse against the wrong-doer in the law of torts, there also developed a criminal law. The criminal law did not at first preclude private prosecutions but over time centralisation, the development of police forces and public prosecution offices rendered private criminal actions close to impossible and all but obsolete. Where the difference lies between a criminal wrong and a tort is not clear, though the more serious and public a wrong. the more likely it is to be a crime. What is clear, however, is that successive English kings created more and more criminal offences as the revenue from fines (paid to the crown and not the victim) proved a very lucrative source of income.[4] These snippets of legal history show that public prosecution of criminal offences has not always been a fundamental principle of our system but developed through changing circumstances and sometimes for questionable (non-legal) reasons. It would seem, then, that there is no absolute reason not to consider separate legal representation for victims. as they would only be reclaiming a right that was once their's without question

Place of the Victim Today

It could be argued that far from displacing the victim from the criminal justice system, the events of history have put the victim into a very favourable position. Instead of having to pursue, catch, prosecute and convict a felon on their own and at their own expense, the state does it for them. The cost of this service is that the victim must surrender their role in the prosecution to the State. It could also be said that the criminal justice system in its entirety is dedicated to the needs and demands of victims.[5] In reply to this it must be said that the State gives no choice in the matter of assuming the role of prosecutor, victims who would prefer more involvement are not given the option. Furthermore, the fact that a system is intended to cater for the needs of a particular class of person is no guarantee that their interests will actually be served. This unfortunately would appear to be the case with regard to the rape victims in Ireland.

This is borne out in the contradiction between these two objections mentioned above to representing the victim. On one hand an opponent expects to be able to say that there is simply no role for the victim in the criminal justice system apart from that of a witness. if they are so required. Yet they will also say that the entire system is working on the victim's behalf. It is in the middle of this contradiction that victims and especially vic-

tims of rape find themselves. An entire system works around them yet they are told that they have no part in it.[6] Issues that deeply effect their lives are decided and the victim is said to have surrendered their right to have a say in those issues to the State.

Is There a Need?

Thus far we have seen that even though it can be said that the concept of separate legal representation runs counter to some of the principles of our criminal justice system. it was formerly a part of our legal system. Its re-introduction would eliminate the contradictions in attitudes that have dealt with above. It would however not be necessary to make this radical change if our current system looked after the needs of rape victims sufficiently well.

Unfortunately, it cannot be denied that there are problems with the treatment of victims under the current system of trying rape cases.[7] From initial reporting and questioning by the Gardai, through the taking of evidence, delays, the haze of the various stages of the trial to cross examination and unexpected aquitals, there is an acceptance that the system feels no duty to protect or represent victims of rape.[8] The introduction of separate legal representation would not solve all the hardships faced by rape victims. It might, however lead to a renewed empowerment of the victim through which certain key problems could be resolved. For example: assistance during questioning by police; detailed information on the progress of their case through the system and protection and representation at trial.

If it is at all possible to generalise about the effects of crime on its victims it would be true to say that the emotional and psychological damage caused by rape is greater than that caused by any other crime. On this basis the separate legal representation of the victims of rape can be justified independently of any other crime.

Moreover, any additional trauma caused by the legal system is especially unwelcome. In the light of this we can say with confidence that there is a need for an improvement in the situation and if legal representation has worked elsewhere it may be needed here.

Where has it been done before?[9]

A number of countries have developed limited rights of representation for victims of crime. The emergence of victim support groups in many countries, starting in the United States, has lead to increased recognition of the need for the involvement of victims in the criminal process in a capacity other than that of witness. France, for example, recognises the right of a victim of crime to recover damages as a *partie civile*[10] to a criminal case.

Canada and the United Slates operate similar systems[11] which allow for the representation for victims in the presentation of evidence concerning reparation due to them from a convicted person.

A more comprehensive effort has been made in Denmark to use legal representatives to alleviate some of the harshness of their process. It is a modest system in its aims and it makes no attempt to involve the victim in the process beyond the role already occupied by her.[12] It seeks, in general only to offer legal protection and guidance in the issues that concern the victim already

The Danish System[13]

The system in Denmark[14] operates entirely at the expense of the state. It is worth noting that it is not offered to victims of any crime other than rape. An attempt was made during the parliamentary debate on the matter to broaden its scope to include victims of other offences but it was felt that cost and administrative limitations dictated that this could not be done. The seriousness of the trauma suffered by rape victims, the exceptionally confrontational nature of rape trials and in particular the emotional vulnerability of rape victims were thought to justify the exceptional provision of administrative and financial resources.

On the reporting by a victim to the police of a rape or other serious sexual offence, a list of lawyers is presented to the victim from which a lawyer may be chosen. A complainer may chose to call her own lawyer or indeed chose not to be represented. The police may not without the victim's clear permission interview her in the absence of her chosen lawyer. The lawyer accompanies her to any medical examination that may be required by the circumstances of the case. As the case progresses the complainant is kept informed of developments by her lawyer including any decision by the prosecuting authorities to lower or drop charges against the accessed. The victims lawyer is also entitled to view all police documents on the case but is bound not to reveal such information as he may find there to his client.

At the trial the lawyer may question the complainer about any issues which may be relevant to establishing the full facts of the case. The complainers legal representative may not at any time concern himself with the guilt or innocence of the accused nor with what should be considered an appropriate sentence. If the defence requests permission to question the victim regarding her sexual past her counsel may present reasons as to why such evidence should not be heard. Where a guilty verdict is reached counsel may also present an application for reparations to be paid to the victim similar to the systems operated in the countries mentioned above. During and after the trial the complainers lawyer has a duty to inform the complainer of any counselling that is available to her.

Could the Danish model work here?

The Law Reform Commission considered the issue of separate legal representation in its discussion paper[15] and its report on rape.[16] The discussion document revealed that some commissioners felt that the introduction of a system similar to the Danish system might be unconstitutional. Some members felt that '*dual representation hostile to the accused*'[17] would tilt the balance of the proceedings against the accused so as to render the constitutional concept of "in due course of law" radically altered from its 1937 meaning. In fact it could be said that the concept "in due course of law" has probably changed many times even since

1987. It is also questionable whether a barrister prohibited from broaching issues of guilt or sentence could be described as hostile. It would of course have to be adapted to the solicitor/barrister system we operate here. The role of the two representatives being as easy to distinguish in this instance as any other.

The constitution may even provide a legal basis for legislation permitting separate legal representation for the victims of rape. At Art. 40.3.2. it states that "the state shall....in the case of injustice done, vindicate the life, person, good name and property rights of every citizen." Permitting legal representation in the pursuit of such vindication would seem a reasonable right for the Oireachtas to grant. Equally, it should also be considered that the Criminal Justice (Amendment) Act. 1994 permits a court to grant compensation for harm caused to the victim of a crime at sentencing in a criminal trial involving violence. Under the current law the victim is not entitled to be represented by counsel in the presentation of evidence relating to her claim. The constitutionality of granting a right without permitting the legal means to achieve it is questionable. It was a similar lacuna in the former Danish regime that lead to their first steps toward their current comprehensive system.[18]

The Case in Favour

The Danish model of legal representation for rape victims promised improvements in the treatment of victims as they move through the various stages of the criminal justice system and was found on the whole to have delivered on its promise.[19] In Ireland the provision of a lawyer at the point of initial contact with the system would be an improvement. The Garda Siochana have no formal procedures in place for the questioning of rape victims. If studies in other countries are to be believed. police do not always provide sympathetic treatment at this stage.[20] At the time of initial contact the victim will be, almost by definition, in a traumatised state. The presence of a lawyer could protect the victim in at least three ways. First, by shielding her from over zealous or disbelieving questioning. Secondly, ensure that the victim is in a fit condition to give a statement, and thirdly, ensure that if the complainer is indeed in a fit state to give evidence that all relevant issues are covered by the Gardai for use in the case of a contested trial.

A major advantage of the Danish system is that personal legal advice can keep the victim informed. Jennifer Guinness of Victim Support in a speech in U.C.G. in November '96 said that of all the needs of victims, information about what is happening to them is the most important Clearly if issues such as the possibility of charges being reduced or dropped, hostile cross-examination by defence counsel., the possibility of an aquital, the presence of the accused in court are explained in detail to a complainer before a trial the trauma of their eventual occurrence could be greatly reduced. A big advantage for the complainer is that there is continuous contact with one person and not with a host of agencies and although a lawyer is not a professional counsellor they will meet a complainer regularly and can.,according to their judgement, refer the complainer to get any help they require

Of course the most important input of a lawyer would have to be at the trial itself Already we have too very important procedures open to a Victim post-conviction, i.e. the Victim Impact Statement and the provision of compensation from the offender The statue of these provisions has been questioned by some commentators. nonetheless, their primary role could be said to be to offer the Victim formal recognition and redress for the wrong done to *her*,[21] as opposed to the State or the common good. It would appear anomalous to grant these very valuable rights and yet deny a lawyer to represent the victims voice, particularly as cross-examination by the defence is permitted in the giving of victim impact evidence. At this stage of the trial the victims interest in the case is at least as strong as that of the prosecution but their aims may be quite diverse.

It was submitted in the Law Reform Commission's consultation paper that there were other areas within the trial itself in which the interests of the prosecution and the complainer may also diverge. In examining the victim, generally the main witness for the State, the prosecution counsel's interest will lie in the conviction of the defendant and not in the welfare of the victim. This is to be expected, if not demanded, as under the current system the prosecution represents the state and no-one else Conflicts of interest are not hard to imagine. A complainer may wish to protect an non-relevant secret; a request to discuss the complainers previous sexual history, could be entirely harmless to the prosecutions case and yet may be deeply traumatic to the victim. It may be that separate legal representation for the victims of rape may be the only way to resolve these conflicts of interest should they arise.

The case against

Crucial to the case in favour of separate legal representation for the victims of rape is a mistrust of our current system. The current system is capable of looking after the victims interests without interference from lawyers The Gardai, generally a female Garda, interview the victims of rape in the same way that they interview the victims of any other crime. If there is a difference in treatment it is that they are treated with more compassion and given more time than other complainers. It could never be pleasant to recount the details of a rape and very little could be achieved by having a lawyer present.

It could even be argued that going for the option of a legal presence is only increasing and not decreasing any confrontation that is alleged to exist between the Gardai and rape victims. If such problems do exist the American method of re-training their forces to adopt a more sympathetic attitude to those complaining of rape would tackle the causes of such problems rattler than the symptoms. Similarly, the correct training of personnel would be more beneficial to the humane and efficient gathering of statements and information than the supervision of these events by a non-Garda, non-medic lawyer.

That information is crucial to lessening the trauma of a victim's passage through the system is undeniable. Again, the question must be asked whether a

state appointed personal legal representative is the most appropriate person to furnish this information. In the debates in the Danish parliament concerning this scheme much was made of the issue that there would be one person, the lawyer, responsible for informing the complainant at every stage of the justice process. This one-to-one contact or interface with the system was recognised as particularly important. Again it could be argued that legal representation is unnecessary in Ireland. It is standard procedure for the Garda who first interviews a complainant to stay in continuous communication with the victim. All news of developments is to be passed on by the officer, it is this officer who compiles the Victim Impact Statement and presents it to the court. In this way the complainant has continuous individual attention and information during the process.

While the trial of a rape case is almost by definition a traumatic occasion for a victim, it should not however be accepted as it has been above, that the source of the stress is counsel for the prosecution. While the interests of the prosecution and the victim do not directly coincide, the protection of the welfare of the State's witnesses is still the duty of the prosecution. It would be more correct to assume that the trauma arises through the examination by the defence.

Justice demands that the evidence of a complainer be rigorously examined by the defence counsel. The emphasis in the Danish system on avoiding any reference to, or interference with, the defence as well as the constitutional right to a trial 'in due course of law' would preclude the complainer's lawyer from interfering with this examination. In the extreme event of an absence of protection by the prosecution during unfair treatment by the defence, the law already provides that the presiding judge shall intervene to protect the witness (complainer).[22] In light of this there would appear to be no real role left for separate complainer's counsel except perhaps that of presenting the request for compensation to the court. The preparation of this brief by the victim's own solicitor is not precluded and presentation of such an application by counsel for the prosecution could hardly be said to do the victim an injustice.

Where does the balance lie?

There are, as we have seen, strong cases to be made on both sides of this issue. It boils down to what we consider the best method of guaranteeing humane treatment for rape victims. The case for separate legal representation for the victims of rape is based on the idea that a lawyer is the correct person to protect the rights of vulnerable people within a system as unforgiving as the criminal justice system. The view to the contrary is that the agents of the state currently engaged in that role are willing to protect, and capable of representing, the interests of the rape victim. Some, like the Law Reform Commission, have gone even further and suggested that the introduction of lawyers for victims would only serve to complicate rather than facilitate the resolution of problems facing complainers. This view has probably been reinforced in the minds of many by the expensive and lengthy Tribunal of Inquiry into the Beef Industry.

Unfortunately, it would appear that while the police prosecution services and judiciary have historically assumed protective roles, there is a need for rape victims' to be legally represented to ensure that at the very least that these organs of state fulfil their duties towards victims.[23] Evidence from other jurisdictions[24] and the public perception of the situation here is that rape victims do not in fact receive due consideration, information or protection at the moment.

Other jurisdictions have tried to resolve similar problems through the adoption of voluntary codes of conduct. The English attempted to restore the confidence of victims in their system through the adoption of a Victims Charter[25] of rights. While this document does outline clearly what a victim should be entitled to, which is something that we in Ireland have yet to define. It has been largely unsuccessful[26] as it lacked the strength of legal enforceability, particularly where the securing funding from government was concerned.

The value of lawyers

When a member of the public finds themselves in a situation where they believe that the state or anyone else is treating them unfairly and that they believe that they have rights that are not being vindicated by those organs entrusted with that duty, they will generally turn to a lawyer. The victims of rape, as has been said earlier, are involved in a process in which they find themselves surrounded by lawyers, police officers, judges, officers of the courts, all of whom are said to be directly or indirectly acting on their behalf yet no one person or agency represents their rights or interest. Their vulnerable situation and the duty the state owes them as victims of a crime committed in the state demands that these rights be represented fully.

When the value of lawyers is questioned as it was by the Law Reform Commission we need to ask what is the role of lawyers in our legal system. Instinctively we can say that their value lies in their ability to protect a clients interests and to fully explore the clients rights. We can see this value clearly when we examine the rights given to an offender and contrast them with the position of a victim. Would we consider it is acceptable for a defendant to be denied access to a chamber when making statements to the police? Certainly not, as such evidence could be used against him in court and we must protect defendants from unwittingly incriminating themselves. Yet, a victim who is not entitled to a similar presence may in a state of shock unwittingly make an inaccurate statement which, if presented in evidence, may result in the acquital of a guilty party.[27]

The protection of a client's rights may be seen as the most fundamental role of a lawyer. The similar but distinct obligation to explore in full their client's entitlements may be an even greater help to the victims of rape. In Ireland there are almost no legal precedents in relation to victims rights, such concessions as have been made to victims have come by way of statute due to public pressure on the Oireachtas. This contrasts sharply with the development of rights in almost all other areas of law in this jurisdiction. In

recent Irish legal history many rights have been secured through constitutional and quasi-constitutional litigation. The supreme court has granted unenumerated rights in the areas of planning, education, civil liberties and especially 'due process rights'. These improvements were won through the dynamic of our constitutional law fuelled by the demands of individuals who were recognised by the courts as having a legitimate complaint and represented by a lawyer. Victims have found this avenue blocked off to them not for want of a legitimate complaint but by a lack of recognition and the lack of representation.

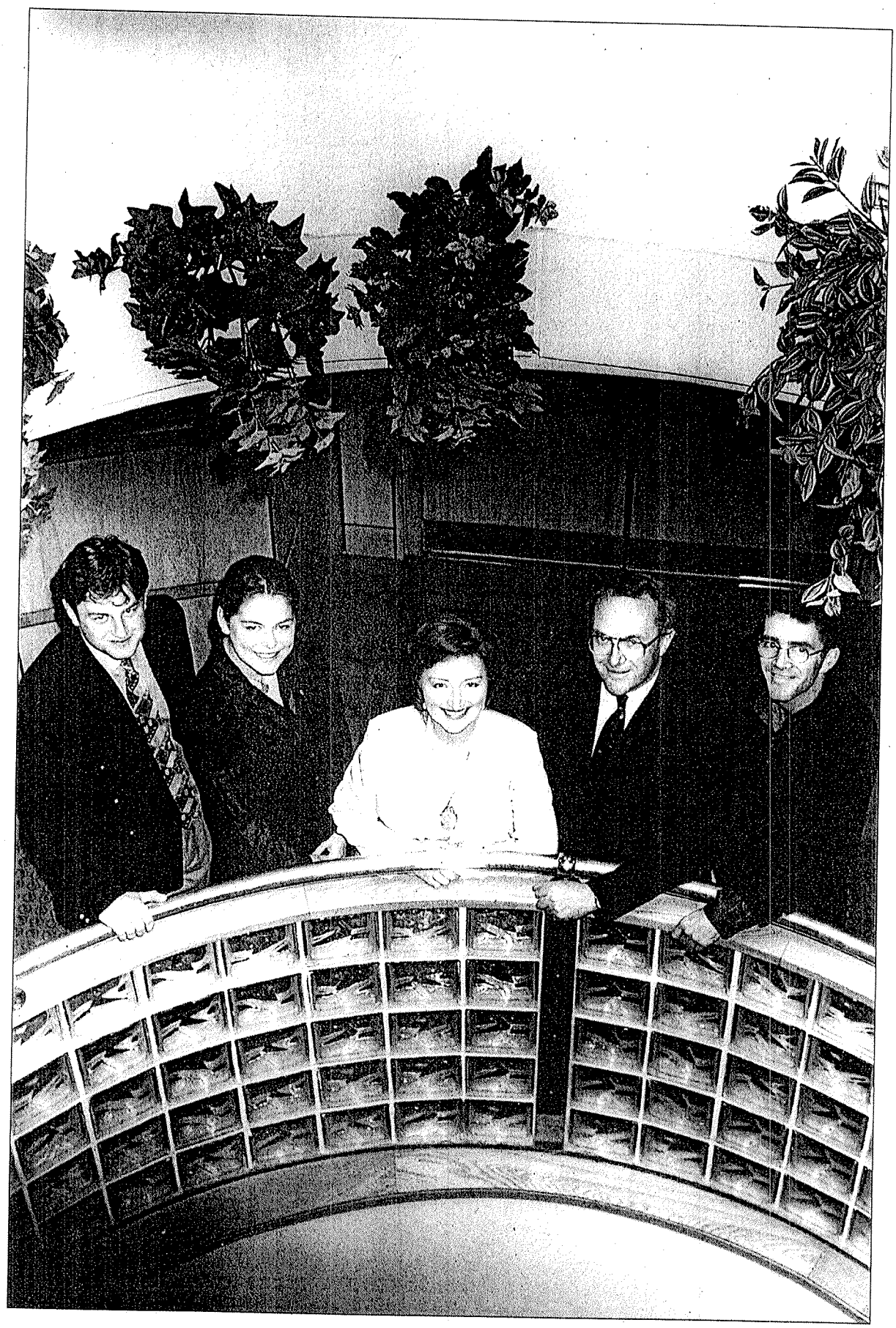
Is seperate legal representation for rape victims taking thigs too far?

Talk of supreme court action in pursuit of the aims of victims is far removed from the real needs of individual rape victims. If basic issues like sympathetic treatment. information and a fair hearing could be adequately dealt with most people would be happy. The campaign for victims rights will not be won on the day that a prosecuting counsel meets a complainer half an hour before a hearing to explain what will happen in court to her. Nor will victims rights be secure when a Garda phones a victim to tell her that charges are being dropped so that she knows about it before she buys her morning paper. The position of the victim of rape will only be properly recognised when every member of every agency dealing with victims recognises that she is entitled legally, as well as morally, to sympathy, information and the protection of her physical emotional and legal well being. Then we will be safely able to say that we do indeed have a fair system.

Conclusion

A lack of information about our entire justice system hampers us when we try to draw conclusions about any aspect of it. While evidence points to the truth of it, it is difficult to say whether or not we are failing to look after our victims needs without doing a thorough empirical study of the system. Some figures we do have though are that last year 4,000 people called the rape crisis centres of Ireland yet only about 200 rapes were reported to the Gardai. The total number of sexual offences reported to the Gardai still amounts to less than 1000. The problems of non-reporting and the treatment of rape victims are clearly linked. If the public perceive that they will suffer as a result of reporting a rape and taking it to court. much of the battle against rape and rapists will have been lost before it has begun. A tangible improvement in the position of the rape victim is required. We can try a Victims Charter as proposed by Fianna Fail[28] in this election or try changing attitudes and re-training personnel. The success of these attempts is contingent on their acceptance in the system and on the resources provided for them by government. By choosing legal representation as our tool we could be embarking on a journey that would bring us to a stage where rape victims rights leave the realm of funding issues and attitudes to become legally enforceable rights. ●

1. Christie. N. British Journal of Criminology. 1977 p.1.
2. English Legal History. Baker. London. 1971.pp92-93
3. A Guide to Early Irish Law. Kelly. Dublin 1991.
4. Baker. supra. p575
5. In the absence of victims there would be no need for a criminal justice system.
6. For the ultimate slight in this regard see. Cheryl Hanna. Harvard Law Review. Vol.190 at p1849
7. This statement is made on the basis of research in our neighbouring jurisdiction, public perception and the continued low level of the reporting of rape in Ireland.
8. Carol Smart records that systematic abuse and mysoginistic utterances by members of the professions and the bench are excused as "idiosyncrasies" or "faux pas". British Journal of Criminology, No.28. p116.
9. It was noted that the competition requested case law relating to the U.S. Canada and Australia. From my research I have not been able to ascertain that these countries have a system of separate legal representation as imagined by the title. The U.S. does allow representation but only for the presentation of applications for court ordered compensation. The director of research at the Australian Institute of Criminology in an e-mail indicated that he had no knowledge of any such system in any Australian State or territory.
10. A Source Book on French Law. Kahn Freund. O. O.U.P. 1979
11. Waller. Irvine, Maguire and Pointing. Victims of Crime A New Deal.
12. It does not seek to include higher sentences and conviction rates as "Victims Rights" as tougher schemes might.
    See Justice For Some. George Fletcher. Mass. 1995
13. The treatment of the Danish system is taken largely from Rape and Legal Process by Jennifer Temkin. London. 1987.
14. Chapter 66a of the Danish Procedural Code. 1982.
15. Law Reform Commission. Consultation Paper-Rape (1987)
16. Law Reform Commission. Report on Rape and Allied Offence (1988)
17. Consultation Paper at p 17.
18. Temkin supra at p 166
19. ibid. p176
20. The Brith Crime Survey. Islington Crime Survey. Popular Justice. Harvard Law Rev. Vol. 109 No.2. to name but a few.
21. Christie. N. supra at p5.
22. John Jackson. Current Legal Problems. U.C.L. 1996
23. It would appear that the Danish system has been successful in this regard. Temkin at p176
24. For example the Islington Crime Survey showed that 84.2% of those reporting attempted rape were "Highly Dissatisfied" with the Police. Only 8% of victims of sexual offences reported the matter to the police: 44.8% of those not reporting said that it (reporting) would not do any good.
25. Home Office Public Relations Branch JO10368 RP 2/93
26. See Helen Fenwick. Crim. Law Review. 1994. P 843
27. While a guilty verdict should not always be considered to be in the interest of the victim the example does highlight the inequity involved.
28. see Fianna Fail Position Paper on Justice. pp 13-14



Pictured at the prize-giving ceremony for the Rape Crisis Centre/Bar Council essay competition were(L to R): Eoin Mac Giolla Ri, (1st prize), Louise Monaghan (3rd prize), Olive Braiden, Director, Rape Crisis Centre, James Nugent, SC, Chairman, Bar Council and John Connelly (2nd prize).

The Implications of the Distillery Site Development for the Bar

Cian Ferriter, Special Projects Manager

The imminent opening of the new Bar Council premises in Church Street has generated a deal of excitement amongst the profession. From next October almost 300 members will have their own rooms outside the Law Library, between the present Church Street building and the Distillery Site. The Law Library's information network of legal databases and electronic mail will encompass these three sites as well as the Four Courts Library. The dial-in system will allow members at home or outside Dublin to access the network also. A second library will open in the Distillery next January, along with the Arbitration Centre and consultation and seminar rooms. These developments will inevitably cause all practising barristers to re-examine the organisation of their practise. The main questions that are posed include: Where is it best to work from? Will those without a room be "left behind?" How important is it really to get up to speed on this "computer business?" What are the cost implications of these developments? What will happen to the Law Library as it currently stands?

An attempt to answer these questions is given below.

Rooms, Seating and Place of Work

The genesis of the premises expansion that started with the present Church Street building and now the Distillery development lay in the simple reality that the Four Courts library had become too small for the numbers in the profession. This is reflected in the fact that the most contentious issue amongst members in recent years has been that of seat allocation in the library. Members have had to wait up to 5 years to be assigned a seat in the library. Even with an assigned seat, there are parts of the library where concentrated work is practically impossible - particularly on the ground floor. Other areas where unassigned seats are bunched have hosted Calcutta-style crowding. There are some 550 seats in the library of which some 500 are assigned. From October over half of those with assigned seats will have rooms elsewhere while those without seats will also be without rooms. It would seem that a reassessment of seating policy will be appropriate during the next legal year. In addition from next January there will be 100 unassigned seats in the legal research centre in the Distillery for use by those members who would prefer a quieter, more comfortable ambience to work in. Each of these desks will be wired for electronic services so that laptops can be plugged in to work on Word processing, send e-mail or research a legal database.

Members working outside the library will have a vastly improved service through the dial-in system. It is envisaged that members will be able to search the library catalogue, order books, research databases and send and retrieve e-mail through this system.

Altered role for Four Courts Library?

The opening of a second library (in the Distillery) raises questions about the role of the Four Courts library. The new library will be a Legal Research Centre with a different emphasis from the present set-up in the Four Courts library. Books will be on open-plan shelving with a self-service approach ie the member can select and issue a book themselves. There will be a quiet reading room and a separate electronic research room with access to a wide range of legal databases. Care is being taken to ensure that the present library service will not be "run down" to respect the reality that the Four Courts library will still be the primary location of library services. However over the next number of years subject to member approval it is likely that the Four Courts might shift emphasis from that of a research library to a more court-going service.

The Importance of Computer Literacy

The suite of electronic services for members (including legal databases, e-mail, word processing and the electronic legal diary) which constitutes the "Virtual Law Library" will have implications for the organisation of library services and members practices given that the first port of call when researching a case will be the computer at home, in a member's room or in one of the two libraries, rather than the Issue Desk. In addition materials will be retrievable outside of normal working hours. It will thus become vital for each member to have a computer or at least access to a computer and for each member to have the skills to use the various electronic services. To this end, library staff have developed a series of computer training courses for members starting from this term.

New Facilities for the Bar

The Distillery will contain 20 consultation rooms and 4 purpose-built arbitration rooms in its "Arbitration Centre".

The Arbitration Centre will attract more "alternative dispute resolution" business for the Bar. The extra consultation rooms will provide much needed private space for the dignified conduct of consultations and settlement meetings. The facilities available in the Distillery from January will include seminar and conference rooms, video-conferencing equipment, audio-visual screens, all of which will allow more sophisticated continuing professional education courses to be run as well as allowing the Bar host external events.

Collegiality

Unlike the position up to say 15 years ago, there is probably no individual barrister who knows everyone in the law library. Those who have taken rooms outside the library have had to make a special effort to keep in contact with what is happening around the library. The opening of the Distillery will magnify this trend. It may well be that the Distillery becomes the hub of interaction given the large numbers who will operate from there.

It is important to emphasise that all members will have access to the same set of services on completion of the Distillery. The electronic services will be available to all members in both libraries regardless of whether they have rooms or not. The library in the Distillery is not just for members who have rooms there. The improvements in services and facilities brought on by the Distillery will enure to the benefit of the Bar as a whole.

Costs

One of the most important questions raised by the Distillery project is that of cost. The financing structure of the project is such that there should be no need to increase members fees to meet any of the on-going costs of the centre. A re-evaluation of expenditure on member services by the Bar Council has led to the proposal that any new services should be supplied on a cost-recovery basis so that there will be charges to users for new services such as access to databases.

2001, A Date Odyssey

Greg Kennedy, Information Technology Executive

There are three certainties when you wake up on January 1st in the year 2000:

1) You will have a serious hangover,
2) you'll write at least one cheque with 1999 as the year and,
3) the date will be 1st January 1980 on your computer.

This might sound silly but its true. There is a global problem with all computers which is known as the 'Year 2000 Problem' or Y2K.

So what is Y2K?

The problem will occur when the clocks in computers tick over from 23:59 on 31st December 1999 to 00:00 1st January 2000. At this time, unless preventative measures are taken, computers around the world will start crashing around our ears.

Why will this happen?

Most computers and computer programs only store the last two digits of a year i.e. the 1997 is stored as 97 in the computer. If you don't believe me take a look in your wallet. Check the expiry date on your credit card or cheque card. Look at the insurance certificate on your car. All these and many more things are written and stored in two digit format.

With two digit formats, when the year 1999 which is stored as 99 changes to 2000 we will have a year of 00. All computers consider a year of 00 as being 1900.

Consider what happens if your credit card expires in 2001? As far as the computer is concerned your card expired in 1901. Even now these cards are being rejected by the swipe machines we see in shops. In fact many shops in the states actually have signs in their windows saying they can't accept credit cards with expiry dates after 1999.

The two big questions then are, how did this happen and how will it affect the ordinary user?

How did this happen?

When computers were first used commercially in the late 1960s and early '70s storage space was very expensive. We are now used to buying multi-gigabyte hard disks for a few hundred pounds, in those days even a one megabyte disk cost thousands of pounds.

Therefore, this high cost space needed to be rationed out very carefully. Having an extra two digits stored just to hold a century, that could be assumed anyway, wasn't encouraged by organisations who did not wish to pay millions of dollars for their computers only to have their space eaten up by the number nineteen.

So computer programmers wrote their programs to work with the last two digits of the year.

Why would they sabotage their own programs?

To be fair to the programmers they didn't. In 1970 they could not have expected a program they wrote then to still be in operation in 1999. It's different for lawyers who work with legislation that is tens, even hundreds of years old, but people in the computer industry don't expect anything they create to be around in five years, never mind thirty.

That is what happened however. Big companies wrote their programs in the 1960s and '70s and added on to them over the years until they reached the point where the programs reached millions of lines of computer code thus making them so big they couldn't afford to re-write them.

What is being done to fix the problem?

Companies are looking at the problem at the moment but they are now going to pay the price for their space saving dictates in the early years. A recent Gartner Group survey estimated the price of examining and changing the two-hundred and twenty billion lines of computer code on mainframe computers alone to be $400 billion; and that's the lower end of the estimate.

The net result is companies having to turn almost all their technical staff over to this one problem on a full-time basis for the next three years. In fact there is a third less computing staff on the planet than are needed and this deficiency is expected to grow to two thirds by the year 2000.

How will it affect you?

There are two ways it can affect you. On a software level i.e. does your software store date information in four digit format? And on a hardware level i.e. does your PC know what to do when the year rolls over to 2000?

The hardware problem is again a result of saving space. It was decided when the original IBM PC was developed to store the date in a piece of hardware called the Real Time Clock. The 'Century digits', nineteen, was stored in non-changeable memory and the remaining two year digits are usually calculated from the number of seconds passed since 1st January, 1980, the third result on our fictitious new years day above. The problem is a lot of programs read the real time clock to get the current date. So, when the year digits roll over from 99 to 00 you will have a date of 1900.

Immediately, all your invoices become 100 years overdue and programs such as schedulers, e-mail and electronic file-o-faxes delete appointments, tasks and

messages that are over a certain number of months old.

There is a fix though. Several of the larger PC manufacturers (Dell, Compaq, IBM) have posted small programs on their Internet sites which update the code for the Real Time Clock. The code usually is a simple command saying, IF YEAR >= 80 THEN CENTURY = 19; IF YEAR <80 THEN CENTURY = 20. This should solve your problem. If you don't have a PC from a manufacturer with a solution there is a site (http://www.year2000.com/)which is dedicated to the Y2K problem and describes a procedure for testing your machine for the problem. Year2000.com also provide a free program which will fix the problem.

For the software side the important thing is that your software, whether it's a word-processor, spread-sheet or accounts package, stores its dates in four digit format.

Most of the popular software i.e. Microsoft Office, Corel WordPerfect and Lotus SmartSuite are Y2K compliant. Again, the best place to check is the companies homepages on the Internet (see addresses listed below). As far as accounts packages go Microsoft Money is compliant. Raven Computing confirmed their Breeze product has stored dates in four digit format for quite some time.

What will the end result be?

With the one-third shortage of technical people on the planet only the bigger companies can afford to pay the high wages now being offered to solve this problem. This will mean that not all computer systems will be ready for December 31st 1999. It won't be until after the year 2000 that these people will be freed to work on the smaller systems and it is expected that Y2K will still be causing problems until 2005.

With all this doom and destruction predicted the only thing we can do is laugh at ourselves for getting into this mess. Year2000.com have a joke section with one statement that explains everything. "Old software doesn't die it just waits until the year 2000". This may turn out to be a very expensive joke.

Company	Address
Dell	http://www.dell.com
Microsoft	http://www.microsoft.com
Compaq	http://www.compaq.com
Hewlett Packard	http://www.hp.com
IBM	http://www.ibm.com
Year 2000	http://www.year2000.com
Corel Corporation	http://www.corel.com
Lotus Corporation	http://www.lotus.com

News from the 'CCBE'

Harry Whelehan SC has replaced Eoghan Fitzsimons SC as the nominated delegate of the Bar Council to the CCBE (Conseil des Barraux de la Communaute Europeene or Council of the Bars and Law Societies of the E.C.). He outlines some key information concerning the Council and its operation and reports on some of the matters under consideration.

Background

The C.C.B.E. is the liaison body between the Bars and Law Societies of the Member States of the European Community. It represents all such Bars before the institutions of the European Community. Its meetings are also attended by delegations with observer status from Cyprus, Hungary, Poland, The Slovak Republic, The Czech Republic, Slovenia, Switzerland and Turkey.

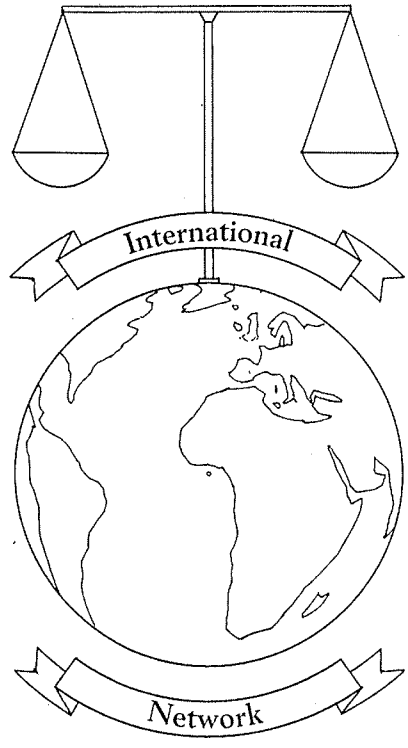
The objects for which the CCBE was established are:

"A. To act as a joint body on behalf of the Bars and Law Societies of the States of the EEA in all matters involving the application of European Community Treaties, Community Law, the EEA Agreement and the Agreement of the 2nd May, 1992 with adjusting protocol made the 17th March, 1993 between the EFTA States ("The EFTA Agreement") implementing same to the legal profession.

B. To co-ordinate the views, policies and activities of the Bars and Law Societies in the EEA in their common dealings with European Community, EEA and EFTA Institutions.

C. To constitute the forum within which the representatives of the Bars and Law Societies of the EEA may consult and work together.

D. To further the achievements of the objectives of the European Community treaties, EEA Agreement and EFTA Agreement in their application to the legal profession.



E. To act as the joint body of the Bars and Law Societies of the EEA in supervising the inter-state practice of the legal profession throughout the EEA.

F. To represent the Bars and Law Societies of the EEA in their dealings with other organisations in the legal profession and with other authorities and third parties.

G. To study and promote the study of all questions affecting the profession of lawyer and to develop solutions designed to coordinate and harmonise the practice of that profession."

The CCBE is the officially recognised organisation of the European Union (EU) and the European Economic Area (EEA) for the legal profession. It maintains a permanent delegation to the European Court of Justice and the Court of First Instance of the European Union, the European Jurisdictions of Human Rights and to the EFTA Court. It also maintains a Council for Advice and Arbitration to settle disputes between lawyers or between Bars and Law Societies throughout the community.

A Common Code of Conduct was adopted unanimously in Strasburg in 1988 and a copy of that is well worth reading and copying and may be obtained from the Bar Council Office or the Issue Desk.

Operation

Each profession appoints a nominated delegate to represent it at meetings of the Council, which take place in various European Capitals four or five times in each year. The Council concerns itself with the very many issues which are of common concern to the legal professions across Europe, such as: professional matters in the context of European legislation and regulation concerning the free movement of people and the freedom to supply and obtain services; issues raised in relation to matters of professional discipline; ethical problems which arise in relation to multi-discipline practices; the right of lawyers established in one European country to practice in another jurisdiction in accordance with the concept of the free

movement of people and the community requirements that there should be free movement of people to supply and receive services within the EU.

The full minutes of each of the meetings of the CCBE are available to the Bar Council and the Bar Council's delegate reports to the Bar Council on each meeting attended as its representative.

Current issues of major importance and interest

1. The "Establishment" Directive - according to Article 52 of the Treaty of Rome nationals of one Member State have a right to "take up and pursue activities as self employed persons" in another Member State under the same conditions that applied to nationals of that whole State. Article 59 of the Treaty envisages a similar right in relation to the rendering without discrimination of services within the Community. These two articles are of direct and unconditional applicability since the 1st January, 1970. The European Court of Justice has left open the possibility of adopting directives towards the implementation of these freedoms to the extent that such directives favour the implementation of the rights of free establishment and freely rendering services. Directive 77/249 of the 22nd March, 1977 (the "Services" Directive) was a first step allowing professionals, and, notably, lawyers to provide legal advice and render occasional legal services under home title in a Member State other than that in which he is qualified. However, this directive did not afford lawyers the right to practice on a continued basis in the host State, ie, did not grant a right of "establishment".

   The European Court of Justice in the *Gebhard* case (November, 1995) specified the distinction between the freedom to provide services and the freedom of establishment. At present a great deal of work is being done with a view to ensuring that such directive as might evolve and come into force will be as effective as possible to:

   a. On the one hand provide the right of establishment, that is to say the right of practitioners from one jurisdiction within the community to practice before the Courts of another country within the community while;

   b. At the same time protecting the consumer by ensuring that those practising in any jurisdiction will have the necessary competence and knowledge of the law, understanding of the procedures and sense of responsibility to the institutions of the host country and be subject to professional disciplinary measures in operation in the host country.

   In parallel, with these deliberations which are very far advanced and are being pressed enthusiastically by the presidency of the EU, here in Ireland discussions are ongoing between the professions and the Department of Justice with a view to ensuring that suitable regulations to implement the Directive will be in place when it comes into force and that a system of registration or verification will be established to ensure that practitioners from other jurisdictions will be both authenticated and competent before they will be permitted to offer their services.

   My own view of the negotiations both in relation to the establishment directive itself and the preparation of regulations for its implementation in this country are positive and, on balance, I believe that the implementation of the directive throughout the community is likely to open up greater possibilities for Irish practitioners who might wish to practice abroad rather than create a threat to practitioners in Ireland from lawyers visiting from abroad and intending to practice in this country.

2. Eastern European Countries
   The CCBE has identified a need to establish contact with Eastern European lawyers with a view to reinforcing the importance of an independent legal profession in a constitutional type democracy. Questions are being considered as to how the CCBE could help and a newsletter has been produced by the CCBE for circulation in the Eastern Block. From time to time speakers from the CCBE may also go and address various groups of lawyers in these countries.

3. The question of the establishment of "multi-discipline practices" is very topical as in a number of countries, for example accountancy firms are subsuming legal practices and offering both legal and accountancy services, the concern among the CCBE is that difficult ethical problems that can arise as a result of such entities being created. The CCBE feels that there should be a set of common rules for all professions as to how they may regulate themselves and inter-relate. However, difficulties arise in that certain professions have or claim a special position, for example lawyers have a special responsibility in relation to the administration of justice while other professions might have special responsibilities in relation to the Revenue authorities in a country.

   In Holland, Arthur Anderson/Price Waterhouse were successfully sued by the Dutch Bar because of the manner in which they set up a multi-discipline practice and the Dutch High Court has ruled against that particular practice and the manner in which it is constituted. However, the case is likely to be appealed to the Supreme Court in Holland and may ultimately end up before the European Court of Justice. At the last meeting it appeared that similar cases are arising in Belgium and in France and possibly in Spain and in Greece.

   A working group was formed to look at the rules of the CCBE and to consider the stand that should be taken by the CCBE and what principles could be formulated as a guideline to the Bar Councils and Law Societies in Member States with a view to enabling them to take the necessary steps and if necessary, proceedings to protect the integrity of the profession in any case where the supervisory and disciplinary role of the professions might be undermined, or the adherence by members

of the professions to the code of Conduct of the professions could not be guaranteed. This group is to monitor the proceedings in Holland and elsewhere and the matter will be kept under review.

4. Money Laundering
The Council has been made aware of the Irish measure giving effect to the Money Laundering Directive of 91/308/EEC which was brought into force in Ireland by the Criminal Justice Act, 1993. The sort of problems which arise from the implementation of this directive concern the preservation of the right to privilege for information between a lawyer and client and the apparent conflict between that obligation and the obligation under the legislation based on Solicitors to inform the authorities of any "suspicion" which they might have relating to client's affairs if they felt there was any question of money laundering concerning to the proceeds of crime, terrorism or drugs. The Council was concerned about recent raids on Solicitors offices in Dublin and the detention of a Solicitor under this legislation. It was concerned that a position should be established whereby the position of the lawyer vis-a-vis his professional obligations in such matters would be clarified. The problem was recognised as a difficult one and again a working group was set up with a view to seeing if guidelines can be formulated for the assistance of lawyers who might find themselves having to consider their position under such legislation. The sub-committee is to report in September of this year.
Reports from the CCBE on matters such as the above will necessarily be selective having regard to the very large volume of material produced by the CCBE itself and each of the delegations, the permanent committees which comprise committees on competition, company law, permanent delegation to the Court of Justice, permanent delegation of human rights, deontology, finance, and a committee on Eastern Europe, in addition to the various "ad hoc" committees two of which are mentioned above.

Those members with views on any particular developments at CCBE level are welcome to convey those views to me as the Bar Council's delegation to the Conference. ●

O'Neill v. The Minister for Agriculture and Food & Others[1] - the implications for administrative law.

Conleth Bradley, Barrister

Introduction

"From early times Ireland has been well endowed with natural advantages for the breeding and rearing of cattle. Good soil and the warm, moisture-bearing South West winds, together with the influence of the Gulf Stream, gave Ireland good grass for the raising of cattle. Indeed, the subject of cattle has permeated Irish life and figures prominently in legend, literature, history and superstition. For example, the central story of the Ulster cycle of traditional Irish tales is the Cattle Raid of Cuailgne, an epic narrative telling of an expedition led by Queen Maeve of Connaught to carry off by force a great bull possessed by one of the Ulster Chieftains. As I studied the cases cited to me on the Competition Law of the European Community in the lee of the Cooley Mountains and under the shadow of Knockarea, with the cairn on its summit raised in honour of Queen Maeve, I was very aware of the influence which cattle breeding and dairying have played in the history of our country." (Per Budd J.,*O'Neill v. The Minister for Agriculture & Others*[2]).

One can now add "administrative law" to Budd J.'s above exposition of the central importance of cattle breeding to Irish life et al. Recently, the Supreme Court, in what can justifiably be claimed as one of the most significant cases of latter years in administrative law overturned the judgment of Budd J. in the High Court in the case of *O'Neill v. The Minister for Agriculture & Others*. In this judicial review application three central issues arose for consideration initially before Budd J. in the High Court and subsequently before the three judges of the Supreme Court[3]:

1. Whether the exclusivity scheme adopted by the Minister for Agriculture and Food for the provision of an artificial insemination field service and stations in which licences were granted on an exclusive basis to nine Artificial Insemination (AI) stations for areas which between them comprised the entire country was *intra vires* the Livestock (Artificial

Insemination) Act 1947 (the 1947 Act) ?

2. If the scheme was intra vires, whether it could only be implemented by regulations made by the Minister in exercise of the power conferred on him by Section 3 of the 1947 Act[4]?

3. If the action of the Minister in adopting the exclusivity scheme was *intra vires* the 1947 Act and was properly carried into effect by administrative decisions rather than in the form of regulations made under the 1947 Act, whether it was in contravention of the obligations of the State under *inter alia* Articles 86 and 90 of the Treaty of Rome ?

As it transpired, and pursuant to the conventions and practice of the Supreme Court, the third issue was not required to be dealt with by the Supreme Court as the Applicant succeeded on domestic grounds. Nevertheless, while the immediate domestic implications of the Supreme Court judgment reverberate in the administrative law world, and form the basis of this article, the decision and analysis by Budd J. of Articles 86 and 90 and their relevant European case law are required reading as the decision of the High Court in this regard was novel.

Factual background

The Applicant, "a veterinary surgeon, farmer and cattle breeder of considerable experience"[5] had been licensed to establish an artificial insemination station from 1986 and had formed a company known as Bova Genetics Limited. By application dated the 6th March, 1990, Bova Genetics limited sought to obtain an AI licence to give a field service to the farming community and to distribute semen directly to DIY licence holders. In a reply dated the 30th November, 1990, the private secretary to the Minister for Agriculture and Food explained the historical context and the practice and procedure involved in the granting of such licences. Essentially, the regime of artificial insemination was based on the division of the State into nine areas in respect of each of which artificial insemination had been licensed on the basis that the licensee was obliged to provide an appropriate artificial insemination service for his area and that the Minister would not grant a licence to any other person practising or seeking to practice artificial insemination in that area. Therefore while the Applicant had been granted a licence from 1986 which allowed him to establish an artificial insemination station, he had not been granted a field service licence or a licence to distribute semen to "Do-it-yourself" AI licence holders. On the 14th October, 1993, the Applicant wrote to the Higher Executive Officer in the Livestock Breeding Division of the Respondent Department seeking the approval of the said Respondent for the training of persons in the artificial breeding of bovines, which application was refused by reply dated the 1st December, 1993.

The *ultra vires* nature of the exclusivity scheme in relation to the Livestock (Artificial Insemination) Act, 1947 The central issue before the High Court and Supreme Court was whether the creation of the exclusive regime of regional monopolies was *ultra vires* the Minister's powers under the 1947 Act or whether it offended Articles 86 and 90(1) of the Treaty of Rome.Section 3 of the 1947 empowers the Minister for Agriculture & Food to make regulations for controlling the practice of artificial insemination of cattle, sheep, goats, swine and horses except under and in accordance with a licence. Section 7 further empowers the Minister to issue such licences and to "attach such conditions as he thinks fit" to a licence. The Livestock (Artificial Insemination) Regulations, 1948 (the 1948 regulations) are confined to the artificial insemination of cows. Thus it was necessary for the Court to assess whether the Minister was entitled under the 1947 Act to fetter his statutory discretion by excluding the possibility of granting a licence which would conflict with the exclusivity scheme in operation. The purported reason for the adoption of the exclusivity scheme were summarised by Budd J., in the High Court, in the following manner:

> "...the objectives of the AI service were to ensure a comprehensive quality service all the year round to all farmers; also veterinary controls in respect of animal welfare, health and good conception rates and the provision of high genetic merit semen in respect of all breeds being available to all breeders with large and small herds. The regional monopoly system had evolved and in 1959 was regarded as a mechanism to ensure that all farmers would have access to an available service. Furthermore, if there was not a geographical division, then it would be difficult to pin responsibility if a problem should arise with regard to disease or inadequacy of service. Moreover, proper record-keeping and control were necessary to ensure quality. Progeny testing was complex, expensive and required record keeping. Evaluations were done in the Department. The organisation by regional monopoly ensured that the licensee was accountable and responsible for ensuring a proper AI service in the entire of its region; to ensure proper training, records and control, conception rates and progeny testing. The record keeping was complex, costly and required continuity of records. It was stressed that unless the licensee had exclusivity in a region, then it would be difficult for the Department to enforce the condition with regard to availability of a proper service throughout the region to both large and small herd owners."[6]

In the Supreme Court while it was acknowledged that the statutory licensing regime in relation to AI was introduced to control disease and improve the general quality of the national herd, there was nothing in the Act to suggest that the Oireachtas intended that a scheme of regional monopolies be established and therefore it was held that in the adoption of such an exclusivity scheme, the Minister had acted *ultra vires* the 1947 Act. Murphy J. was of the view that so far as the question of *ultra*

vires was concerned, one had to look at the legislation with a view to identifying the principles and policies laid down by the Oireachtas for achieving the identified purpose of the legislation, which should reveal both the scope of the Ministeris power and the limitations placed on it.

Delegated legislation

In addition, it was held that the basis of the exclusivity scheme - which was predicated on a series of purely administrative decisions[7] - had by-passed or circumvented the normal safeguards and legislative scrutiny which applied to the making of delegated legislation.[8] Therefore while the Court recognised that a scheme was required for the facilitation and control of artificial insemination, its sole concern was the legality of the current scheme which was *ultra vires* the 1947 Act and which could only have been introduced in the regulatory form made pursuant to the 1947 Act. The Supreme Court[9] opined that the power conferred on a Minister to make law by way of regulation or statutory instrument was to be primarily determined by the interpretation of the statute conferring such a power and that this power to make delegated legislation was limited by the provisions of Article 15.2[10] of the Constitution of 1937. Furthermore, while both Houses of the Oireachtas can scrutinise legislation through the annulment procedure, the ultimate responsibility rests with the Courts to ensure that the exclusive power of Parliament to make law is not eroded by a delegation of power which was neither envisaged or allowed by the Constitution. The test implemented by the Courts in pursuance of this policing role was whether that which was challenged as an unauthorised delegation of parliamentary power was more than a mere giving effect to principles and policies which are contained in the statute itself.[11]

In *O'Neill*, the Supreme Court[12] was of the view that there was a "strong presumption" that the Oireachtas did not intend to delegate to an individual Minister the legislative powers conferred by the Constitution exclusively on the National Parliament:

> "Even in those jurisdictions where the separation of powers is not governed by the requirements of a written constitution, a presumption appears to arise that in delegating legislation, Parliament did not intend to confer radical powers of a legislative nature."[13]

Consequently, the Supreme Court was concerned with the scope of such regulations and it was the manner in which they affected a person's constitutional rights which raised doubts as to how far they were within the contemplation of the Oireachtas. The division of the State into nine identified areas was so radical in qualifying a limited number of persons and disqualifying all other, possibly equally competent persons, that it was inconceivable that the legislature would have contemplated or authorised the creation of such a scheme by the executive.

Conclusion:- Administrative law implications

The merits of the particular facts of this case aside, the Supreme Court availed of the opportunity to reiterate the legal parameters for the operation of the Minister's discretionary powers, which on a broader perspective will apply in principle *mutatis mutandis* to analogous circumstances.

First, as we have seen, the *O'Neill* judgment represents a clear restatement of the principles and legal parameters applicable to the general doctrine of *ultra vires* and to the issue of delegated legislation.

Secondly, the presumption of constitutionality which applied to the 1947 Act carries with it the requirement that the Ministeris powers must be exercised in accordance with the Constitution and the rules of natural justice. This was decided by the seminal decision of the Supreme Court in East Donegal Co-Operative Livestock Mart Limited & Others v. The Attorney General[14] where the Court inter alia held Section 3[15] of the Livestock Marts Act, 1967 constitutional because it presumed that all proceedings, procedures, discretions and adjudicationis which were permitted by the Act were intended by the Oireachtas to be conducted in accordance with the principles of constitutional justice which require that the Minister should consider every case on its merits. Whereas the East Donegal case was concerned with a statutory scheme designed to regulate the carrying on of a trade in a particular premises, O'Neill related to a scheme intended to regulate a particular practice.

Thirdly, in considering applications for licences under the 1947 Act, was the Minister entitled, in the exercise of his discretion, to adopt a particular policy which would have the effect of refusing a licence to otherwise suitable candidates. In this regard the High Court judgment in *Carrigaline Company Limited v. Minister for Transport, Energy and Communications*[16] emphasised that there had to be a careful balance between the adoption of a policy which could ensure consistency in the operation of a regime and would hopefully reduce the possibility of capricious or arbitrary decisions, and, inflexible adherence to such a policy which may result in an injustice. Essentially in O'Neill the Supreme Court[17] held that the Minister, in fettering the exercise of his statutory discretion by excluding the possibility of granting a licence which would conflict with the exclusivity scheme, had not achieved that delicate balance according to the measurement of the scales of the 1947 Act.[18]

Owen O'Neill's resounding success before the highest court in the land represents a perfect example of what can be achieved by applicants through the judicial review process. The judgment of the Supreme Court illustrates a judicial willingness to vindicate an applicants' rights despite the undoubted ramifications this decison may have on the State regime of livestock artificial insemination and indeed in other analogous areas of the State. This judicial self-confidence in exercising its constitutional position as the judicial arm of govern-

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Legal Update

A directory of legislation, articles and written judgments received from 20th May to 13th June 1997.
Judgment information compiled by the researchers in the Judges Library, Four Courts
Edited by Desmond Mulhere, Law Library, Four Courts, Dublin 7

Administrative Law

Statutory Instruments

Electoral act, 1997 (commencement) order, 1997
S.I.233/1997
Commencement date: 1.6.97

Houses of the Oireachtas (members) pensions (amendment) scheme, 1997
S.I.212/1997
Commencement date: 31.10.95

Oireachtas (allowances to members) (constituency telephone allowance) (amendment) regulations, 1997
S.I.201/1997
Commencement date: 1.1.97

Oireachtas (termination allowance) (amendment) regulations, 1997
S.I.211/1997
Date signed: 9.5.97 6.6.97

Admiralty

Statutory Instrument

Merchant shipping (liability of shipowners and others) act, 1996 (commencement) order, 1997
S.I.215/1997
Commencement date: 6.2.97

Agriculture

Statutory Instrument

National Milk Agency (conduct of elections) regulations, 1997
S.I.185/1997
Date signed: 4.6.97

National Milk Agency (election day) regulations, 1997
S.I.184/1997
Date signed: 3.6.97

Banking

Article

The bankers' books evidence acts, 1879 and 1959
Dunne, Anne Davies, Louise
2(7)(1997) BR 297

Building & Construction

Statutory Instrument

Building Regulations Advisory Body order, 1995 (amendment) order, 1997
S.I.200/1997
Date signed: 12.5.97

Children

Articles

The Child Plaintiff
Birmingham, George Boyle, Helen
2(7)(1997) BR 299

The Defence of Infancy
Hanly, Conor
1996 ICLJ 72

Commercial Law

Articles

Recent Australian developments in commercial law
Burton, Gregory
1997 CLP 120

What Goes on in the IFSC?
Daly, Brian
9(1997) ITR 277

Company Law

Crindle Investments and Ors. v. Wymes and Anor. High Court: Murphy J. 27/03/1997

Directors; defendant directors of Bula Holdings and Bula Ltd. maintaining and pursuing litigation on behalf of those companies and also individual claims; possible conflict in pursuance of two claims alleged by plaintiffs; whether fiduciary duty owed to the plaintiffs specifically as shareholders; whether defendants actions constitute an infringement of any constitutional right of plaintiffs
Held: Insufficient evidence to impose duties in the nature of a trust beyond those held in capacities as directors; presumption that parties who elect to have relationship governed by corporate structures intend duties to be governed by legal provisions relating to such structures; even where fiduciary duty exists remedies under Companies Act, 1963 apply; constitutional rights of defendants cannot be restricted in favour of plaintiffs without the establishment of wrong doing, injunctions refused

Article

Use of civil law remedies to combat corporate fraud
Igoe, Pat
1997 ILTR 94

Constitutional Law

In the Matter of Article 26 of the Constitution of Ireland and in the Matter of the Employment Equality Bill, 1996
Supreme Court: Hamilton C.J.*, O'Flaherty J., Denham J., Barrington J., Keane J.
(* Decision of the Court delivered by Hamilton C.J.)
15/05/1997

Article 26 reference; Bill to promote equality and prohibit discrimination and harassment in employment; whether Court obliged to consider whole Bill and all its provisions; whether exemption from prohibition on age discrimination for those aged 65 and over or under 18 contrary to Art. 40.1; whether exclusion from Bill's provisions for members of Defence Forces, Garda Siochana and Prison Service contrary to Art. 40.1; whether provisions prohibiting discrimination on grounds of age contrary to employers' rights under Art. 40.3.2 or Art. 43; whether provision allowing religious, educational or medical institution under direction of religious body to discriminate on religious ground where reasonable to do so to maintain religious ethos or to take action reasonably necessary to prevent employee from undermining religious ethos contrary to Art 40.1 or Art. 44; whether provisions obliging employers to provide appropriate facilities for disabled employees without payment of compensation contrary to Art. 40.3.2. or Art. 43; whether imposition of vicarious liability on employer for criminal acts of employee contrary to Art. 38.1 and Art. 40.1; whether exemption from provisions of Bill concerning employment of individuals with propensity to engage in unlawful sexual behaviour contrary to Art. 40.1; whether provisions allowing for document certified by Director of Equality Investigation to be received as prima facie evidence of facts in criminal proceedings contrary to Art 38.1 and Art. 40.1; whether provisions empowering authorised persons to enter premises to obtain information material to investigation of case contrary to Art. 40.5; whether requirement on those attending before Director or Labour Court to answer non-incriminating questions put to them contrary to Art. 40.3.2
Held: Court obliged to consider whole Bill and all its provisions; provisions obliging employers to provide facilities for disabled employees without payment of compensation unconstitutional; imposition of vicarious liability for criminal acts unconstitutional; proof by way of certificate unconstitutional; rest of Bill not found repugnant

Murphy v. I.R.T.C. & Attorney General
High Court: Geoghegan J.
25/04/1997

Judicial review; refusal to permit transmission of advertisement notifying religious event pursuant to s.10(3), Radio and Television Act, 1988; whether advertisement a religious advertisement contrary to s.10(3); whether s.10(3) invalid having regard to constitutional right of free practice of religion under Article 44; whether s.10(3) invalid having regard to constitutional right to communicate under Article 40.3.2; whether s.10(3) invalid having regard to constitutional right of free expression under Article 40.6.1; relationship between right to communicate and right of free expression
Held: Advertisement contrary to s.10(3); s.10(3) not invalid; no attack on right of free practice of religion; right of free expression a particular aspect of right of free expression relating to influencing of public opinion; no infringement of right of free expression as advertisement not directed towards influencing public opinion; no infringement of right to communicate as restriction reasonable in public interest

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Consumer Law

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S.I.186/1997

Commencement date: 1.9.97

Consumer information (diesel and petrol) (reduction in retail price) order, 1997
S.I.179/1997
Commencement date: 19.5.97

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Copyright, Designs & Patents

Article

Is there liability for playing music to telephone callers "on hold"?
Newman, Jonathan
1997 CLP 109

Criminal Law

People (D.P.P.) v. Cooney
Supreme Court: Hamilton CJ., Denham J., Barrington J., Keane J., Murphy J.
29/05/1997

Identification; Criminal Justice Act, 1984 sections 4 & 10(1); Appeal pursuant to s.29
Courts of Justice Act, 1924; whether trial judge should have withdrawn case from jury as sole evidence connecting accused based on courtroom identification; discretion; whether 'dock identifications' irremediably tainted due to association with earlier identifications made during unlawful custody; principles applicable to 'dock identifications'.
Held: Trial judge's discretion correctly exercised in circumstances; absence of male fide in infringement of constitutional right, rights upheld due to inadmissibility of parade evidence; matters in book of evidence subsequently ruled inadmissible does not retrospectively invalidate return for trial.

Quinn v. D.P.P & District Judge Brennan
High Court: Morris J.
18/04/1997

Prohibition sought preventing criminal proceedings on basis that statement of charges failed to disclose D.J.'s jurisdiction by not stating date or place on which alleged offences were committed; whether D.J. deprived of jurisdiction
Held: Jurisdiction founded on summons; defects in statement of charges did not deprive D.J. of jurisdiction

Lennon v. District Justice Brennan & D.P.P.
High Court: Smyth J.
30/04/1997
Summons containing complaint of assault; whether D.J. entitled to delete words in summons calling upon accused to show cause why he ought not be bound to keep peace
Held: D.J. acted properly in deleting provisions

D.P.P. (Dooley) v. Lynch
High Court: Costello P.
01/05/1997

Case stated; arrest on private property under s.49(8), Road Traffic Act, 1994; whether arrest valid; whether Gardai have power of entry in addition to that granted by s.39(2), Road Traffic Act, 1994; whether burden of proof on State to show accused had no legal interest in private property on which he was arrested
Held: Arrest valid; implied consent for Gardai to enter property to carry out duties; burden on State to establish arrest not in breach of accused's constitutional rights properly discharged

Statutory Instrument

Criminal justice (legal aid) (amendment) regulations, 1997
S.I.232/1997
Date signed: 27.5.97

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1996 ICLJ 72

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O'Leary, Julianne
1996 ICLJ 55

Drugs, drug prohibition and crime : a response to Peter Charleton
Murphy, Tim
1996 ICLJ 1

The interpretation of a revenue offence in extradition law
O Caoimh, Aindrias
2(7)(1997) BR 295

The ethics of police interrogation and the Garda Siochana
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1996 ICLJ 46

Diminished responsibility as a defence in Irish law: past English mistakes and future Irish directions
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Regional technical colleges act, 1992 (amendment) (no 2) order, 1997
S.I.199/1997
Commencement date: 7.5.97

Employment Law

Boland v. Phoenix Shannon pie High Court: Barron J. 18/04/1997

Termination of employment; interlocutory order sought restraining dismissal; plaintiff alleging that there was no justification for dismissal and that procedures leading to dismissal were unfair; whether fair issue to be tried; balance of convenience
Held: Order made restraining dismissal; fair issue to be tried; balance of convenience in plaintiff's favour; overstatements in presentation of defendant's case and unsatisfactory investigation of matters in dispute by defendant; damages not adequate remedy

Statutory Instruments

Employment regulation order (contract cleaning (city and county of Dublin) joint labour committee), 1997
S.I.187/1997
Commencement date: 1.6.97

Hotels joint labour committee (for the areas known until 1st January,1994 as the County Borough of Dublin and the Borough of Dun Laoghaire) establishment order, 1997
S.I.174/1997
Commencement date: 1.5.97

Labour services act, 1987 apprenticeship rules, 1997
S.I.168/1997
Commencement date: 1.5.97

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Masselot, Annick
1997 ILTR 96

Grant aided internationally traded services
O'Sullivan, Mary
9(1997) ITR 274

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Waste management (register) regulations, 1997
S.I.183/1997
Date signed: 30.4.97 28.5.97

Equity & Trusts

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Issue estoppel and abuse of process

in civil proceedings: a new departure?
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European Communities (contracts for time sharing of immovable property - protection of purchasers) regulations, 1997
S.I.204/1997
Commencement date: 19.5.97

European Communities (energy labeling of household electric washing machines) (amendment) regulations, 1997
S.I.208/1997
Date signed: 13.5.97

European Communities (fees for health inspections and controls of fresh meat) (amendment) regulations, 1997
S.I.207/1997
Date signed: 15.5.97

European Communities (general product safety) regulations, 1997
S.I.197/1997
Date signed: 30.5.97

European Communities (importation of fish from Third Countries) regulations, 1997
S.I.192/1997
Commencement date: 7.5.97

European Communities (pesticide residues) (fruit and vegetables) (amendment) regulations, 1997
S.I.218/1997
Commencement date: 22.5.97

European Communities (pesticide residues) (products of plant origin, including fruit and vegetables) regulations, 1997
S.I.221/1997
Commencement date: 22.5.97

European Communities (trade in fish) regulations, 1997
S.I.191/1997
Commencement date: 7.5.97

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2(7)(1997) BR 277

The intended legal framework for the introduction of the single European currency
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Who should register?
Gaffney, Dermot
9(1997) ITR 259

Evidence

D.P.P. v. Keogh
High Court: Kelly J.
03/06/1997

Consultative case stated; s.8 Criminal Law (Sexual Offences) Act, 1993; failure to comply with direction; whether 'reasonable cause' for suspicion;whether entitlement to adduce evidence of previous character and activities of accused prior to date of alleged offence; whether evidence of nature and type of area of alleged offence can be adduced; whether sufficient admissible evidence
Held: Evidence concerning previous behaviour of accused inadmissible; constitutionally fair procedures; evidence of nature and type of area can be adduced

Family Law

Statutory Instrument

Pension schemes (family law) regulations, 1997
S.I.107/1997
Commencement date: 27.2.97

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Tax implications of marital breakdown - part II
Walpole, Hilary E
9(1997) ITR 268

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Statutory Instruments

Cod (restriction on fishing) (no 4) order, 1997
S.I.203/1997
Commencement date: 1.5.97 to 31.5.97

Cod (restriction on fishing) (no 5) order, 1997
S.I.228/1997
Commencement date: 1.6.97 to 30.6.97

Haddock (restriction on fishing) (no 3) order, 1997
S.I.225/1997
Commencement date: 1.6.97 to 30.6.97
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S.I.229/1997
Commencement date: 1.6.97 to 31.7.97

Monkfish (restriction on fishing) (no 5) order, 1997
S.I.230/1997
Commencement date: 1.6.97 to 31.7.97

Monkfish (restriction on fishing) (no 6) order, 1997
S.I.227/1997
Commencement date: 1.6.97 to 31.7.97

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S.I.226/1997
Commencement date: 1.6.97 to 31.7.97

Health Services

Statutory Instrument

Health (amendment) (no 3) act, 1996 (commencement) order, 1997
S.I.209/1997
Commencement date: 1.1.98

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1997 ILTR 100

Information technology and access to the law
Gleeson, Dermot
2(7)(1997) BR 293
The internet as a tax resource
Kelly, Jed
9(1997) ITR 287

Injunctions

Vitalograph (Ireland) Ltd. and Ors. v. Ennis Urban District Council and Anor.
High Court: Kelly J. 23/04/1997

Interlocutory; second defendant's land being used by travelling community as unauthorised halting site; nuisance; whether owner of lands liable; whether criteria for interlocutory injunction established; s.27 Local Government (Planning and Development) Act, 1976
Held: Owners liable; failure to take appropriate steps within reasonable period of time to end nuisance; injunction restraining nuisance granted; unnecessary to consider s.27 relief

Insurance

Carna Foods Ltd & Anor. v. Eagle Star Insurance Co. (Ireland) Ltd.
Supreme Court: Hamilton CJ., Keane J., Lynch J.
28/05/1997

Appeal; whether implied term in insurance policies to give reasons for cancellation or declinature of renewal of policies; whether intention of parties to imply term; of officious bystander test; whether breach of Competition Act, 1991, sections 4 & 5.
Held: Appeal dismissed; basic principles of law preclude the implication of such a term in insurance policies

Intellectual Property

O'Neills Irish International Sports Co. Ltd. and anon v. O'Neills Footwear Dryer Co. Ltd.
High Court: Barron J. 30/04/1997

Passing Off; defendants marketing product with name of 'O'Neills'; whether use of name calculated to lead others to believe goods are those of another; characteristics identifying passing-off; whether damage caused
Held: Damage is violation of property right in its reputation or goodwill; plaintiffs entitled to injunction

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Article

"Tax treaties rule, ok?" the effects of treaty relief on anti-avoidance " enactments"
Haccius, Charles H
9(1997) ITR 233

Judicial Review

O'Neill v. The Minister for Agriculture and Food & Ors.
Supreme Court: Hamilton C.J., Keane J., Murphy J.
14/05/1997

Challenge to ministerial scheme; control of practice of artificial insemination in cattle; Livestock (Artificial Insemination) Act, 1947; Regulations 1948; licensing system;
applicant granted licence to establish an artificial insemination station but refused licence to distribute semen; ministerial policy to grant licences pursuant to a specified area; exclusivity scheme not enacted by regulations; whether scheme ultra vires 1947 Act and/or Art. 86 and 90, Treaty of Rome; presumption of constitutionality; Art. 15.2; policies and principles of the legislation; legitimacy of adopting a policy
Held: Appeal allowed; scheme found ultra vires; certiorari and declaratory relief granted

Georgopoulus v. Beaumount Hospital Board
Supreme Court: Hamilton CJ.,O' Flaherty J., Barrington J.
04/06/1997

Fair Procedures; decision to terminate appellant's employment by Board; requirements of natural and constitutional justice; whether correct standard of proof applied; whether failure to afford opportunity of plea in mitigation after decision on facts amounted to breach of fair procedures; whether availability of legal assessor to give advice in the absence of appellant was breach of same.
Held: Appeal dismissed; balance of probabilities appropriate standard; degree of probability required is proportionate to the nature and gravity of the issue; rules of natural justice do not require a plea in mitigation subsequent to findings of guilt in each case; advice on matter of law where tribunal engaged in determining a question of fact is not in breach of requirements.

O'Connell v. An tArd Chlaraitheoir
High Court: Laffoy J.
21/03/1997

Application to quash registration of death by clerical employee of hospital where death occurred; whether employee an "informant" under s.10, Births and Deaths Registration Act (Ireland), 1880; whether employee an "occupier" of the hospital under s.38, 1880 Act; whether entry made in register constituted evidence of death; whether failure of City Coroner to furnish certificate in form prescribed under s.50(2), Coroners Act, 1962 vitiates registration
Held: Employee a qualified informant; employee not an occupier; registration constitutes evidence of death; no requirement for certificate as Coroner did not make inquiry

Ni Eili v. Environmental Protection Agency
High Court: Kelly J.
06/05/1997

Challenge to grant of incinerator licence

under Environmental Protection Agency Act, 1992; whether applicant entitled to expand grounds for seeking judicial review outside two month limitation period provided for by s.85 (8) of 1992 Act
Held: Grounds of challenge cannot be extended outside limitation period; matter of exercise of judicial discretion, not prepared to allow alteration

Tiernan v. North Western Regional Fisheries Board
High Court: Barr J.
12/05/1997

Certiorari sought to quash refusal of application for salmon dealing licence; applicant given no opportunity to make submissions regarding his case; whether breach of natural and constitutional justice; whether Board entitled to refuse application on ground of insufficient resources to monitor business
Held: Certiorari granted; Board failed to act fairly and reasonably; Board not entitled to refuse application on ground of insufficient resources

O'Loughlin v. District Justice McMenamin & the D.P.P.
High Court: McGuinness J.
15/05/1997

Criminal proceedings; failure to execute original arrest warrant; no certificate attached to warrant at time of re-issue setting out why it had not been executed; whether warrant invalid; whether three year delay in executing warrant unconscionable or inexcusable
Held: Jurisdiction to re-issue not affected by failure to attach certificate; D.J. had full jurisdiction to deal with matter irrespective of validity of warrant; delay acceptable as largely applicant's fault and no specific evidence of prejudice

Negligence

HMW (nee F) v. Ireland & Ors.
High Court: Costello P.
11/04/1997

Action for damages for emotional upset, stress and psychiatric problems; alleged delay in giving of direction by A.-G. for endorsement of extradition warrant for execution under Sections 44A & 44B, Extradition Acts, 1965 & 1987; whether A.-G. owed plaintiff duty of care at common law to consider extradition request; whether defendants owed plaintiff a constitutional duty under Art 40.3 to consider request and process it speedily
Held: No common law duty as no relationship between A.-G. and victims of crimes referred to in warrants; even if sufficient relationship of proximity, contrary to public policy to impose duty on A.-G.; no constitutional duty owed to victims; no discrete cause of action for breach of right to bodily integrity

Pensions Law

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Pension schemes (family law) regulations, 1997
S.I.107/1997
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Baxendale-Walker, Paul
9(1997) ITR 264

Planning

Malahide Community Council Ltd. v. Fingal County Council & Gannon Homes Ltd. & Ors.
Supreme Court: Hamilton C.J., Keane J., Lynch J. 14/05/1997

Application for leave to apply for judicial review; draft development plan; green belt zones; objections and representations made to plan; two resolutions passed prior to draft becoming plan; one resolution to preserve green belt failed; second resolution passed to zone lands as residential; leave only granted to challenge second resolution in High court; function of courts in reviewing a development plan; whether relevant material before planning authority on which to base its decision; locus stand) of applicant company; ss.19(7), 21A Local Government (Planning and Development) Act, 1963
Held: Judicial review claims dismissed; obiter: applicant company no locus stand)

Lancefort Ltd. v. An Bord Pleanala & Ors.
High Court: Morris J.
13/05/1997

Judicial review; service of notice of motion and grounding documentation; two month limitation period for service of notice under s.82, Local Government (Planning & Development) Act, 1963; whether time limit contained in Ord. 122, r.9, R.S.C. 1986 applicable to s.82; whether service of documents on agent of company limited by guarantee at personal residence sufficient
Held: Service sufficient; time limit in Ord. 122 inapplicable to s.82; service on agent declared sufficient under Ord. 9, r. 15, R.S.C., 1986 as party adequately informed and not prejudiced

Practice & Procedure

Barnaby (London) Ltd. v. Mullen
Supreme Court: Hamilton C.J., Murphy J., Barron J.
25/04/1997
Service of enforcement order; judgment debt obtained in English court; Master granted order enforcing judgment; requirement of personal service; whether service complied with Master's order; whether defendant fixed with knowledge of order; whether inference of fixed knowledge sufficient; Ord.42 R.S.C.; Brussels Convention 1968; Jurisdiction of Courts and Enforcement of Judgments (EC) Act, 1988
Held: Appeal allowed; Master's order not complied with; substituted service should have been sought

Bula Ltd. & Ors. v. Crowley & Ors.
High Court: Barr J.
29/04/1997

Proceedings under Statute of Limitations, 1957, alleging that status of receiver and debts due to bank had expired; issue as to whether payment of interest was lawful already determined in earlier proceedings; whether determination binding on plaintiffs; whether plaintiffs seeking to re-open issue of fact already decided against them; whether finding in question necessary to determination of issues in earlier proceedings; whether finding fundamental to those proceedings
Held: Determination binding on

plaintiffs
McElwaine v. Hughes
High Court: Barron J.
30/04/1997

Joinder of third parties to proceedings; third parties put on notice of possible claim but not served with notices until after receipt of reply to notice for particulars; whether third parties served as soon as reasonably possible under s.27(1)(b), Civil Liability Act, 1961
Held: Third parties served as soon as reasonably possible; reasonable to wait for receipt of Notice for Particulars

Foran v. O'Connell
High Court: Morris J.
06/05/1997
Application to renew summons pursuant to Ord. 8, r. 1, R.S.C. 1986; whether renewal would do injustice to defendant
Held: Application granted; no injustice to defendant

SFL Engineering Ltd. v. Smyth Cladding Systems Ltd.
High Court: Kelly J.
09/05/1997

Joinder of third parties to proceedings; delay of almost two years; whether third parties served as soon as reasonably possible under s.27(1)(b), Civil Liability Act, 1961; whether plaintiff entitled to rely on alleged oral assurance
Held: Unreasonable delay in serving third parties; third party notices set aside

Statutory Instrument

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S.I.196/1997
Commencement date: 14.5.97

Articles

The bankers' books evidence acts, 1879 and 1959
Dunne, Anne Davies, Louise
2(7)(1997) BR 297

Applications for security for costs and the prohibition of discrimination on grounds of nationality in EC law
Dignam, Conor
2(7)(1997) BR 305

Use of civil law remedies to combat corporate fraud
Igoe, Pat
1997 ILTR 94

Road Traffic

Statutory Instruments

Road traffic (public service vehicles) (amendment) regulations, 1997
S.I.193/1997
Date signed: 8.5.97

Road traffic (signs) regulations, 1997
S.I.181/1997
Commencement date: 1.10.97

Road traffic (traffic and parking) regulations, 1997
S.I.182/1997
Commencement date: 1.10.97

Road traffic act, 1994 (commencement) order, 1997
S.I.180/1997
Commencement date: 1.5.97 and 1.10.97

Sea & Seashore

Statutory Instruments

Harbours act, 1996 (election of employee directors) (postal voting) regulations, 1997
S.I.190/1997
Date signed: 7.5.97

Harbours act, 1996 (staff of Dun Laoghaire Harbour Company) regulations,1997
S.I.188/1997
Commencement date: 3.3.97

Social Services

Statutory Instrument

Social welfare (miscellaneous control provisions) regulations, 1997
S.I.155/1997
Commencement date: 1.4.97

Social welfare act, 1997 (section 32) (commencement) order, 1997
S.I.161/1997
Commencement date: 8.4.97

Sports

Article

Greyhounds : sport with tax break
Field, Michael
9(1997) ITR 283

Taxation

O'Siochain (Inspector of Taxes) v. Neenan
High Court: Smyth J.
04/04/1997

Increase in Widow's Social Welfare Contributory Pension granted in respect of qualified children pursuant to s.95, Social Welfare (Consolidation) Act, 1981; whether increase classified as income of widow for income tax purposes
Held: Increase not income of widow; monies paid on basis that they would be laid out for child's benefit

In the Matter of the Valuation Acts and in the Matter of the Irish Management Institute Premises
High Court: Geoghegan J. 01/05/1997

Appeal by way of case stated from valuation of premises by Valuation Tribunal; whether Tribunal correct in law in holding buildings as being partly used for commercial purposes
Held: No question of law involved; no error in law

Proes v. Revenue Commissioners
High Court: Costello P.
05/06/1997

Domicile; taxpayer born in Ireland, married in England, returned to Ireland following husband's death; whether English domicile of choice abandoned following return to Ireland
Held: Domicile of choice not abandoned as intention to return to reside permanently in
England not abandoned

Statutory Instrument

Income tax (employments) regulations, 1997
S.I.231/1997

Commencement date: 6.4.97 and 6.6.97

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O'Sullivan, Mary
9(1997) ITR 274

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Walpole, Hilary E
9(1997) ITR 268

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Gaffney, Dermot
9(1997) ITR 259

Torts

Article

Compensation for catastrophic injuries
Kidney, Anthony
2(7)(1997) BR 267

Transport

Statutory Instruments

Air navigation (notification and investigation of accidents and incidents) regulations, 1997
S.I.205/1997
Commencement date: 25.7.97

Air navigation (operations) (amendment) order, 1997
S.I.220/1997
Date signed: 27.5.97

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S.I.206/1997
Date signed: 12.5.97

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S.I.219/1997
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Retail price (diesel and petrol) display order, 1997
S.I.178/1997
Commencement date: 19.5.97

Wills

Williams & Anor. v. Shuel & Anor. In the Matter of the Estate of Harry Lefroy, Deceased
High Court: Morris J. 06/05/1997

Will; construction; trust created; residuary estate held in trust for nieces and nephews; interpretation of respective shares of nieces and nephews; whether each received life interest only; whether testator died partially intestate; "fundamental rule" in interpreting a will; intention of testator
Held: Testator did not die partially intestate; shares survived

At a Glance

European provisions implemented into Irish Law up to 13/06/97

Information compiled by Mary Smartt, Law Library, Four Courts, Dublin 7.

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Commencement date: 19.5.97

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S.I.208/1997
(DIR 95/12, 96/89, 92/75) Amends SI 109/1996
Date signed: 13.5.97

European Communities (fees for health inspections and controls of fresh meat) (amendment) regulations, 1997
S.I.207/1997
(DIR 93/118) Amends SI 34/1995
Date signed: 15.5.97

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S.I.197/1997
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Date signed: 30.5.97

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Commencement date: 22.5.97

European Communities (pesticide residues) (products of plant origin, including fruit and vegetables) regulations, 1997
S.I.221/1997
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Commencement date: 22.5.97

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2/1997 - European Parliament Elections Act, 1997
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commencement to be by statutory instrument

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

4/1997 - Criminal Justice (miscellaneous provisions) Act,
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signed 04.03.1997

5/1997 - Irish Takeover Panel Act, 1997
signed 12.03.1997

6/1997 - Courts Act, 1997
signed 20.03.1997

7/1997 - Dublin Docklands Development Authority Act,
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8/1997 - Central Bank act, 1997
signed 31.03.1997

9/1997 - Health (provision of information) Act, 1997
signed 01.04.1997

10/1997 - Social Welfare Act 1997
signed 02.04.1997

11/1997 - National Cultural Institutions Act, 1997
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signed 18.04.97

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signed 21/04/97

14/1997 - Criminal Law Act, 1997
signed 22.05.1997

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signed 03.05.97

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

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signed 10.05.97

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33/1997 - Licensing (combatting of drug abuse) Act
signed 21/05/97

34/1997 - Hepatitis C Compensation Tribunal Act
signed 21/05/97

ABBREVIATIONS

BR - Bar Review

CPLJ - Conveyancer & Property Law Journal

DULJ - Dublin University Law Journal

GILSI - Gazette Incorporated Law Society of Ireland

ICLR - Irish Competition Law Reports

ICLJ - Irish Criminal Law Journal

IFLR - Irish Family Law Reports

ILT - Irish Law Times

IPELJ - Irish Planning & Environmental Law Journal

ITR - Irish Tax Review

JISLL - Journal Irish Society Labour Law

MLJI - Medico Legal Journal of Ireland

P & P - Practice & Procedure

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

The Duty of Care of Livestock Owners was considered by the Supreme Court in O'Shea v. Tilman and Force Holiday Farm Limited[1]

Margaret Cordial, Barrister,
examines the case and its significance.

Prior to the Animals Act 1985, negligence did not attach to landowners whose animals strayed onto the highway and caused damage thereon. The law was as stated in *Searle v Wallbank*[2] as follows:

> "An underlying principle of the law of the highway is that all those lawfully using the highway, or land adjacent to it, must show mutual respect and forbearance. The motorist must put up with the farmer's cattle and the farmer must put up with the motorist".

Section 2(1) of the Animals Act, 1985 removes this immunity and where animals are found straying on the public highway, this constitutes prima facie evidence of negligence on the part of their owner.

Burden of Proof

In civil cases, the burden of proof normally lies upon the Plaintiff who is alleging negligence, however in cases of negligence where animals stray onto the public highway, the presumption of res ispa loquitor shifts the burden of proof onto the Defendant to show that he has taken all reasonable care to ensure that his animals will not cause damage by straying onto the public road and, that there is no reasonable grounds or proof that he has failed to take such care.

In *Mc Caffrey V Lundy*,[3] it was held that where a Plaintiff gives evidence of his motor vehicle colliding with animals which have wandered onto the public highway and is able to identify the owner of these animals, then there is a prima facie case to be answered by the landowner to rebut the presumption of negligence on his part and to prove on the balance of probabilities, that they had taken such care as was reasonable to see that damage was not caused by their animals escaping from the land onto the public highway.

It was held that any other interpretation or application of the onus or proof in cases like this would render the plaintiff's case impossible

> "because of the impossibility in many situations of the plaintiff ascertaining the conditions of the landowners fences which knowledge is peculiar to the landowner".

The burden on the landowner is not one of strict liability but he must prove that he has exercised reasonable care in maintaining fences and gates and taken all reasonable steps to ensure that his stock could not stray from his land onto the public highway.

This was reaffirmed in *O'Reilly V Lavelle*[4] where Johnson J. stated that cattle properly managed do not wander onto the road and therefore the burden of proof in this case shifts to the defendant to show that he took all reasonable care of his animals.

In this case the plaintiff had not specifically pleaded *res ispa loquitor* in his pleadings but sought to rely on the doctrine. Counsel for the Plaintiff submitted that while he had not specifically pleaded the doctrine he was entitled to rely on it provided his pleadings were adequate and that the facts proved showed the doctrine to be applicable.

Johnson J. held that the doctrine does not have to be pleaded before a Plaintiff may rely on it.

> "If the facts pleaded and the facts proved show the doctrine is applicable to the case, that is sufficient. I believe that is no matter more appropriate for the application of the doctrine of res ispa loquitor than cattle wandering on the highway".

Duty of care

In *McCaffrey v Lundy* the condition of the fencing and gate were considered by the Court in order to determine whether the Plaintiff had exercised reasonable care in maintaining his fences in a stock-proof condition and had taken all reasonable steps to ensure that his stock did not stray onto the public highway.

Brennan J. felt that the day had arrived when gates leading from lands where stock were kept, onto busy public highways, should be kept locked and he felt that maintaining a lock on the gate would not be of any great inconvenience to any farmer. He considered that the gate in this case could have been easily opened by a child, a vandal, a passer-by, a person with a grudge or a severe gust of wind or even animals rubbing or scratching against the gate. He held that because the gate in question was not locked, the defendant

was guilty of negligence. He also found the fencing not to be adequate in a number of places.

From this case the law in relation to the duty of care appears to require landowners not only to bolt gates onto their land where stock are held, but also to fix gates with locks. Fencing must also be maintained in adequate condition and where such reasonable precautions are not taken, liability would appear to attach to landowners.

Johnson J. held that an number of animals had strayed onto the highway and that this accident was caused due to inadequate fencing in that the cattle had not only been able to stray onto the public highway but were also able to return to the defendants field. He felt that it was highly improbable that some stranger had opened the gate of the field and remained there until the animals returned and than closed it.

The condition of the gate on the lands was not considered and the matter was essentially decided on the basis that one possibility was more likely than another. It was held to be more likely that the cattle had escaped onto the road due to inadequate fencing than that someone had opened the the gate, let out the cattle, waited until the cattle had returned to the field and closed the gate again.

Implications of O'Shea v Tilman

In this case, the plaintiff was driving along a busy highway at night, on dimmed headlights, when a horse crashed onto the roof of his car. An Agricultural Consultant gave evidence that he was satisfied that the fencing was adequate for ordinary commercial horse purposes and he was of the view that someone must have let the horse out onto the road. An equestrian expert also testified that the only way the horse could have escaped was if someone had opened the gate, and that while the horse could have jumped the fence it was highly unlikely that it would do so itself without being urged or forced.

In the High Court the Trial Judge considered that either the horse had gotten out due to inadequate fencing or that someone had opened the gate. On the balance of probabilities he held the first possibility to be much more likely than the second.

On appeal in the Supreme Court, Flaherty J. held that while the statute imposes an onus on the Defendant to show that he took reasonable care it does not impose strict liability. He felt that the defendants had disproved any negligence on their part through the evidence of their expert witness who stated that the fencing was adequate and this testament was not contradicted by the Plaintiff.

He considered that the Trial Judge's approach to matter on the basis that one possibility was more likely than another was incorrect. His essential task is to decide whether reasonable care had been taken by the owners of the horse in the circumstances of the case as is required by the Act. He considered that the Trial Judge had gone close to imposing strict liability and that this went too far beyond the scope of the Act.

Keane J. said that matters were under the Defendants control and the accident was such as in ordinary circumstances does not happen if those who exercise management use proper care. This he said would constitute reasonable evidence that the accident arose from want of care in the absence of an explanation from the Defendants. However, here an explanation was tendered and the evidence of the defendants and their expert witnesses was that the horses did not stray onto the road due to inadequate fencing and that in their opinion all reasonable care had been taken to prevent the animals straying onto the highway.

Keane J. considered that because of this explanation the Trial Judge had erred in his reasoning when he went on to hold that it was more likely that the fencing was inadequate. He considered that even if the Trial Judge was satisfied as a matter of probability that the horse had managed to surmount the fence, it does not necessarily follow that this was due to any want of reasonable care on the part of the Defendants. Keane J. considered that in cases where the Court is satisfied that the Defendant has taken all reasonable care and precautions which ought to be taken by him to prevent an animal escaping, then the fact that the animal succeeds in escaping onto the road is not the result of any negligence on his part.

It would therefore appear that while section 2 of the 1985 Act has abolished the old immunity from the law of negligence previously enjoyed by owners of land from which animals have strayed onto the highway, it does not go so far as to impose strict liability or absolute liability on such persons.

The law on the matter would appear to be as follows:

1. Where a defendant has brought animals onto land and where these animals stray from the land onto the highway, this constitutes a prima facie case of negligence.
2. Where the Defendant fails to adduce evidence to rebut the presumption of negligence on his part (ie. that he had taken all due care to ensure his gates and fences were maintained in such a manner as to prevent animals escaping), the Court would be entitled to find against the defendant.
3. Where however, the defendant can show that he has taken reasonable care to prevent animals escaping from his land, he is not required to take any further steps or prove how his animals came to be on the public highway.
4. Where the Court believes that reasonable care has been taken by the defendants to ensure their animals could not stray onto the public highway and even if the animals still escape, the Court is not entitled to find that this was due to want of care on the part of the defendants. Once negligence is disproved the Statute does not impose liability as it is not a case of strict liability.
5. The Court is not entitled to base its conclusions on the likelihood that one situation is more likely than another and to impose a finding of negligence on that basis. Even if one situation is more likely than another this does not entitle the Court to find that the defendant has been negligent. ●

1. Supreme Court, 23rd October, 1996
2. 1947 AC 341
3. ILT, October 1988, page 245
4. 1990 Johnson J. High Court unrep.

cont'd from page 334

ment is matched only by the self-belief and persistence of the Applicant himself, having initially lost a ten day hearing in the High Court and eventually succeeding before the Supreme Court. ●

1. Supreme Court, May 14, 1997 High Court, July 5, 1995 (Budd J.)

2. Ibid.

3. Hamilton C.J., Keane J. and Murphy J.

4. Section 3 (1) "The Minister may make regulations for controlling the practice of artificial insemination of animals to which this Act applies and, in particular, for prohibiting the distribution and sale of semen of animals to which this Act applies except under and in accordance with a licence."

5. Per Budd J., O'Neill v. The Minister for Agriculture and Food & Others, July 5, 1995.

6. Ibid.

7. Interestingly Murphy J. in acknowledging that the artificial insemination regime which was predicated upon the division of the State into nine areas was established by its incorporation into a ministerial scheme which was implemented by the imposition of the conditions in the statutory licences, particularly those relating to "operational areas", held that:

   However if, as is the case, those provisions would be ultra vires the Minister if incorporated in a statutory instrument subject to review by the Oireachtas a fortiori they would be in excess of any executive power which he would have to give effect to the legislation or the regulations thereunder.

8. Section 10 of the Livestock (Artificial Insemination) Act, 1947 provided that every regulation made under the Act was to be laid before each House of the Oireachtas, as soon as might be after it was made, with a power for each House to pass a resolution within 21 days annulling the regulation. Further, introducing an exclusivity scheme by way of a series of administrative decisionsresulted in the by-passing of the publication requirements of the Statutory Instruments Act, 1947.

9. Murphy J.

10. Article 15.2. of the Constitution provides that,
    1. The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.
    2. Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures.

11. City View Press Limited v. An Chomhairle Oiliuna [1980] IR 381, 398. See also O'Higgins C.J. in Cassidy v. The Minister for Industry and Commerce [1978] IR 297 quoted with approval by Blayney J. in Purcell v. The Minister for the Environment, Unreported, Supreme Court, December, 6, 1995 :-

    "Under the Constitution the sole and exclusive power of making laws for the State is vested in the Oireachtas and there is no other legislative authority. As a consequence where, as in this case, a statutory instrument made by a Minister is impugned, the Courts have the duty to inquire whether such instrument has been made under powers conferred, and for the purposes authorised, by the Oireachtas. If the powers conferred by the Oireachtas on the Minister do not cover what was purported to be done then, clearly, the instrument is ultra vires and of no effect. Equally, if the rule making power given to the Minister has been exercised in such a manner as to bring about result not contemplated by the Oireachtas, the Courts have a duty to interfere...".

12. Per Murphy J.

13. Per Murphy J. who also referred to the decision of Atkin LJ in AG v. Wilts, United Dairies [1921] 39 TLR 781 where he declined to infer that a power expressed in wide terms included the right to raise taxation.

14. [1970] IR 317.

15. Section 3 enabled the Minister to grant or refuse a licence at his/her discretion, to attach conditions, and to revoke a licence in certain circumstances.

16. [1997] 1 ILRM 241, 248.

17. The Supreme Court (Keane J.) however, was of the view that there was no doubt that the Minister complied with his obligation to hear and respond to the case being made by the Applicant and therefore could not be criticised on this ground.

18. In this regard Keane J. referred to the following cases, East Donegal Co-operative Livestock Mart Limited & Others v. The Attorney General [1970] IR 317, Carrigaline Company Limited v. Minister for Transport, Energy & Communications [1997] 1 ILRM 241, 284 (judgment delivered by Keane J. in the High Court), R v. Port of London Authority, Ex Parte Kynoch [1919] 1 KB 176, 184, British Oxygen Limited v. Minister of Technology [1971] AC 610, The State (McGeough) v. Louth County Council [1956] 107 ILTR 12, McNamee v. Buncrana UDC [1983] IR 213.

Towards a European Judicial Area

The Hon. Mr. Justice Paul Carney, (President, Irish Association for the Protection of the Financial Interests of the European Union).

The budget of the European Union has been defined as the visible sign of a true patrimony common to citizens of the Union. The budget is also referred to as the supreme instrument of European policy. The debate as to whether fraud on the budget is a mere 1% or is 10% ongoing. The developing concern, however, is that while borders are opened up throughout the Union allowing free movement of criminals, fraudsters and the laundered proceeds of crime, prosecutors have to stop at the individual frontiers of each Member State in their pursuit of the same.

Traditional methods of co-operation in law enforcement have been found to be inadequate. The resources of the financial control section of the European Commission have accordingly been devoted to the establishment of a prosecutorial and judicial free trade area to be known as the European Judicial Space. In this proposed European Judicial Area the prosecutor in respect of European budgetary crime will not hit a barrier at Member State borders and the Judges warrant will run throughout the Union.

It is proposed that fraud against the European budget will be established as a European crime, though interestingly it will not be punishable when admitted to and resiled from before discovery. Market rigging will be a crime where liable to harm the financial interests of the communities. Community officials will commit community crimes if they engage in corruption or abuse of office. It is proposed that there will be crimes in relation to the budget for misappropriation of funds, disclosure of secrets pertaining to office, money laundering and conspiracy.

Of the procedural provisions in the "Corpus Juris", as the proposals are called, the most radical and innovative is Article 18 which provides that for the purpose of the investigation, prosecution, trial and execution of sentence concerning the newly created European budgetary crimes the territory of the Member States of the Union shall constitute a single legal area.

The prosecutor will be the European Director of Public Prosecutions based in Brussels with an office in the capital city of each Member State. The European Director of Public Prosecutions will investigate crimes against the budget looking for evidence of innocence as well as of guilt. He will exercise or delegate the following powers:-

(a) the questioning of suspects;
(b) the collection of documents and computer held information
(c) conduct searches, seizures and telephone tapping on authorisation from a Judge;
(d) notify charges to the accused;
(e) make applications for remand in custody or bail where there is reason to believe a budgetary crime has been committed.

The budgetary crimes prosecuted by or under the supervision of the European Director of Public Prosecutions will be tried by a National Independent Court appointed by the Member State. These Courts are to consist of professional Judges specialising in economic and financial matters and not Jurors or Lay Magistrates. In this country this aspect will have to be examined in the light of Article 38 of the Constitution. Rights of suspects and accused are to be fully vindicated. They will have the protection of the European Convention of Human Rights together with such body of statute and case law as exists in the relevant Member State for the protection of the rights of the defence. In protection of these rights there will be established a "Judge of Freedoms". He will protect the rights of the suspect from the investigation stage to committal for trial.

The discussions and negotiations concerning the establishment of the "Corpus Juris" and the implementation of the necessary administrative investments signal an exciting development in the protection of the financial interests of the European Community. With discussions ongoing, a date for the establishment of the European Judicial Area has however not yet been specified. ●

Restrictions On Directors Of Insolvent Companies

Brian P. Farren, Barrister

considers the relevant legislation and recent case law

Part VII of the Companies Act, 1990 (the "1990 Act") introduced reforms to Irish Law to deal with restrictions and disqualifications of company directors. Essentially, Chapter 1 of Part VII introduced a reform whereby any person who has been a director of an insolvent company within twelve months immediately preceding the insolvency could be restricted as to the companies with which he might become involved for a period of five years. Chapter 2 of Part VII expanded the grounds on which a court can exercise its discretion to disqualify directors who, by reason of their conduct, should not be permitted to continue to act as directors[1]. Chapter 3 deals with enforcement of Chapters 1 and 2. This article is concerned with the imposition of restrictions under Chapter 1.

Background

Chapter 1 introduced a means of combating the so-called "phoenix syndrome" whereby the controllers of an insolvent company re-establish themselves in another company thus abusing the privileges of limited liability.[2] In the recent case of *In The Matter Of Business Communications Limited,*[4] Mr. Justice Murphy outlined the rationale behind the legislation which provides for the imposition of restrictions and prohibitions on directors:

"Since the introduction of legislation permitting people to incorporate with limited liability, it has been recognised that the protection which this conferred on those taking advantage of the privilege has had to be counterbalanced by statutory provisions to protect and safeguard the interests of those dealing with them. The protection to potential creditors has been amplified by provisions which require the directors to make and preserve appropriate records to enable them to manage the business of the company in a competent fashion. Over a long period of time the legislature has introduced many provisions in an effort to prevent the abuse by directors of their special position to the detriment of outsiders.

In the recent case of *Grayan Building Services Ltd.*,[5] the Court of Appeal in England reviewed a decision of the High Court under the Company Directors Disqualification Act, 1986 in which the Judge of first instance having concluded that the director concerned had been guilty of certain misconduct was not satisfied that the director concerned remained unfit to act as such. In relation to that judgment Henry, LJ, reviewed the background to the English disqualification provisions and set out his views and comments as follows:

The concept of limited liability and the sophistication of our corporate law offers great privileges and great opportunities for those who wish to trade under that regime. But the corporate environment carries with it the discipline that those who avail themselves of those privileges must accept the standards laid down and abide by the regulatory rules and disciplines in place to protect creditors and shareholders. And, while some significant corporate failures will occur despite the directors exercising best managerial practice, in many, too many, cases there have been serious breaches of those rules and disciplines, in situations where the observance of them would or at least might have prevented or reduced the scale of the failure and consequent loss to creditors and investors.

"Reliable figures are hard to come by, but it seems that losses from corporate fraud and mismanagement have never been higher. At the same time the regulatory regime has never been more stringent - on paper even if not in practice. The parliamentary intention to improve managerial safeguards and standards for the long-term good of employees, creditors and investors is clear. Those who fail to reach those standards and whose failure contributes to others losing money will often both be plausible and capable of inspiring initial trust, often later regretted. Those attributes may make them attractive witnesses. But as Section 6 [of the Company Directors Disqualification Act, 1986] makes clear, the court's focus should be on their conduct, on the offence rather than the offender, the statutory corporate climate is stricter than it has ever been, and those enforcing it should reflect the fact that Parliament has seen the need for higher standards. Where serious breaches have been shown, tribunals when deciding the question of fitness should give clear reasons why they reached the decision they did on that question. I could not find such reasons here".

"Whilst the learned Judge was dealing with disqualification of directors under the relevant legislation in the United Kingdom and the commercial standards there, I believe that the general thrust of his comments is equally applicable to the restriction provisions under the Irish legislation and to the standards of commercial practice demanded by our legislature".

Companies & Directors To Whom the Legislation Applies

The issue of the imposition of a restriction order arises in relation to every insolvent company which is being wound up or is in receivership. Section 149 (1) provides that the Chapter applies to any company if, at the commencement of its winding-up it is proved to the court, or, at any time during the winding-up, the liquidator[3] certifies or it is otherwise proved to the court, that it is unable to pay its debts. Section 149 also provides that the

Chapter applies to any person who was a director or shadow director of such a company at the date of, or within 12 months prior to, the commencement of its winding-up. This means that resigning in advance of the ultimate failure of the company will not protect such directors against the restrictions.

Nature of the Restrictions Imposed

When imposing a restriction order under section 150 (1) of the 1990 Act, the court must declare that the person shall not, for a period of five years from the declaration, be appointed or act in any way, directly or indirectly, as a director or secretary or be concerned in the promotion or formation of any company unless such company meets certain minimum share capital requirements. Section 150 (3) sets forth these requirements which are that the nominal value of the allotted share capital of the company shall in the case of a public limited company, be at least £100,000 and in the case of any other company, be at least £20,000; each allotted share to an aggregate amount not less than such amounts shall be fully paid up, including the whole of any premium thereon, and each such allotted share and the whole of any premium thereon shall be paid for in cash.

Restriction Is Mandatory / Period Is Fixed

The court must automatically make a restriction order unless it is satisfied as to any of the matters in section 150(2). The obligation is mandatory except in the three circumstances set out. Mr. Justice Murphy has stated in the *Business Communications* case as follows:

"The introductory words to section 150, that is to say, the phrase ithe court shallî are clearly mandatory and leave the court with no discretion in those cases to which the Chapter applies unless the persons concerned establish that the case falls within one or other of the three exceptions set out in sub-section (2) of section 150. Again it is noteworthy that the period of restriction is a fixed period of five years and that, in the first instance at any rate, the court has no discretion to impose a lesser restriction".[7]

When Restriction Will Not Apply

Section 150 (2) sets out the following circumstances when a restriction order should not apply:

(a) that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by this section, or

(b) subject to paragraph (a), that the person concerned was a director of the company solely by reason of his nomination as such by a financial institution in connection with the giving of credit facilities to the company by such institution, provided that the institution in question has not obtained from any director of the company a personal or individual guarantee of repayment to it of the loans or other forms of credit advanced to the company, or

(c) subject to paragraph (a), that the person concerned was a director of the company solely by reason of his nomination as such by a venture capital company in connection with the purchase of, or subscription for, shares by it in the first-mentioned company.

Acting Honestly & Responsibly

Section 150(2) of the 1990 Act provides that the person concerned must show that he had acted both "honestly and responsibly". It is not necessarily easy to discern what constitutes acting iresponsiblyî in this context. Every case must of course be judged on its own facts. For instance, in *In The Matter Of Costello Doors Limited (In Liquidation)*,[8] Mr. Justice Murphy said as follows:

> " I may say in passing that I do not accept that anybody who agrees to act as director of a company can be excused from acting responsibly merely because he or she is a friend, relative or spouse of the proprietor of the company and accepts the office to facilitate the proprietor without being prepared to involve himself or herself in any aspect of the management of the company".
>
> "On the face of it, the maintenance of proper books and accounts and the employment of appropriate experts in relation to them will go a long way to discharge the onus of showing that the directors behaved responsibly. To this may be added the fact that [one of the directors] was himself a substantial investor in the company."
>
> "I accept the contention made on behalf of the Official Liquidator that the preservation of basic records is not an adequate compliance of the requirements of the Companies Act nor does it provide information in a suitable fashion so as to enable the management to make appropriate decisions or auditors to certify accounts but it does not seem to me that it is irresponsible to fail to write up the appropriate books for a particular period in the circumstance which existed in the present case."[9]

In *Costello Doors*, the employment of the person whose task it was to write up the records had been terminated at a particular point in time and thereafter although the books were not written up the primary records were retained. There was also evidence that the situation would be reviewed the following month. Even though the accountants had warned about defects in the control system, the learned judge did not believe that that necessarily involved a want of responsibility on the directors' part. Mr. Justice Murphy took the view "not without some hesitation" that the director in question had not acted dishonestly or irresponsibly.

In the *Business Communications* case, Mr. Justice Murphy said as follows:

> "Of course one must be careful not to be wise after the event. There must be no iwitch huntî because a business failed as businesses will. Again, one cannot demand that a new enterprise should have the clerical and administrative staff and access to professional advice which would be available to successful and long established companies. To

obtain exemption from the restraint which must otherwise be imposed by virtue of Section 150 of the 1990 Act, all that is required is the exercise of a suitable degree of responsibility. Ordinarily, responsibility will entail compliance with the principal features of the Companies Acts and the maintenance of the records required by those Acts. The records may be basic in form and modest in appearance. But they must exist in such a form as to enable the directors to make reasonable commercial decisions and auditors (or liquidators) to understand and follow the transactions in which the company was en- gaged."[10]

In *Business Communications,* the learned judge took the view that the continuation of the business for eight months after the directors had recognised in written communications between them that the situation was getting worse by the day (one advocating paying off a bank to discharge personal guarantees and the other recognising that the company should be wound down) and where payments were subsequently made to the bank was enough for the exemption not to apply and the directors were restricted.

In a recent case, *In The Matter Of Ambury Wholesale Electrical Ltd (In Liquidation).*,[11] Mr. Justice Shanley expressed the view that if the company were small and the deficiciency were large, effectively that was prima facie evidence that the directors had acted irresponsibly and a heavy burden was then placed on the directors to show that they had acted responsibly.[12]

Nominee Of Financial Institution Or Venture Capital Company

However, it has been said that the apparent separate exceptions to the imposition of the restriction contained in paragraphs (b) and (c) of subsection (2) of section 150 are entirely meaningless when both of those paragraphs are subject to paragraph (a) of the subsection. *In The Matter Of Cavan Crystal Group Ltd (In Receivership),*[13] Mr. Justice Murphy analysed the issue as follows:

It is now well accepted that this section [section 150 of the 1990 Act] is mandatory and that the court must impose the full statutory restriction unless the directors concerned discharge the onus of proof squarely imposed upon them of satisfying the court "as to any of the matter specified in subsection 2". Subsection 2 contains the three articles [sic] to which I have referred each related to the other by the conjunction "or". On the face of it one would expect to find three independent bases on which the applicant might escape the statutory sanction. In practice to date every director has sought to rely on paragraph (a) by proving that he acted "honestly and responsibly [sic] in relation to the conduct of the affairs of the company". Can a person in the position of Mr. Lynch rely on paragraph (b) on the basis that he is that type of nominee director described therein? Counsel has pointed to the fact that paragraph (b) is expressed to be "subject to paragraph (a)" so that in any event it would appear that whatever the status of the particular director he must always prove that he acted both honestly and responsibly. So construed it would seem to me that articles (b) and (c) are entirely meaningless. If a director has satisfied the court under paragraph (a) he does not have to rely on paragraph (b) and if notwithstanding the circumstances to which he became a director he must comply with the provisions of paragraph (a), there is no purpose served by relying on his special status. If it were necessary for me to resolve this conflict I would prefer to conclude that the legislature intended that where a person concerned established that he fell within the particular category of director designate in paragraph (b) or paragraph (c) that it was not necessary for him to establish that he acted honestly and responsibly. However in the circumstances of the particular case it is unnecessary for me to base my decision on any such dubious interpretation of the section.[14]

Burden of Proof

The burden of proof under the 1990 Act is effectively placed on the directors seeking to avoid restriction. Once it is established that the company which is being wound up or is in receivership is insolvent and that the person before the court is (or was in the previous year) a director or shadow director of it, then the court has to impose a restriction on him unless he can establish that he acted honestly and responsibly (or that he was a nominee as provided for in section 150(2)(b) or (c))[17]. As Mr. Justice Murphy said in *Business Communications:*

"It does seem that the most important feature of the legislation is that it effectively imposes a burden on the directors to establish that the insolvency occurred in circumstances in which no blame attaches to them as a result of either dishonesty or irresponsibility. In this respect the legislation differs from the very numerous other provisions contained in the Companies Acts which create various criminal or civil wrongs which may be pursued by the Director of Public Prosecutions in the case of criminal offences or creditors, contributories or liquidators in relation to civil wrongs or remedies. These other provisions generally entail the expenditure of considerable sums of money in relation to matters on which the moving party rarely has direct or adequate evidence and the proceedings are, in the nature of things, brought against persons who being associated with an insolvent company may well be impecunious themselves. Commercial history in this country shows that this wide range of remedies, whether criminal or civil, are rarely invoked and even less frequently successful."

"I accepted at once they [the directors] are persons to whom Section 150 applies and that the burden is on them, in their interest, to satisfy the court that they acted, or that either of them acted, honestly and responsibly in relation to the affairs of the company.[18]

Moreover, in light of the views expressed by Mr. Justice Shanley in *Ambury*, it appears that, depending on the extent of the insolvency, the burden may be a heavy one.[19]

It is worth also noting that if a director needs access to the books of a company to prepare answers to a section 150 applica-

tion, he may apply to the court if he was obstructed by the liquidator.

Restriction Provisions Not Retrospective

In *Ambury*, restrictions were not placed on the directors because almost all the activities of the directors with which the court was concerned took place before the 1990 Act came into force on 1st August, 1991. Mr. Justice Shanley accepted that the provisions of section 150 were not retrospective and following the decision of Mr. Justice Murphy in *Re Hefferon Kearns Ltd. (No. 1)*[15] held that only conduct after the coming into force of the Act can be considered for the purposes of imposing a restriction. The winding up of the company was commenced two weeks after the 1990 Act came into force.

Procedure For Application Under Section 150

Somewhat curiously, the 1990 Act does not provide a procedure for applying under section 150. No mention is made in Part VII of the persons who may bring an application under section 150 although clearly the section appears to expect that an application for a restriction order will come before it in every case of an insolvent liquidation or receivership. The courts have overcome this gap in court liquidations but it is not so clear that the same can be said in the case of voluntary liquidations. As Mr. Justice Murphy said in the *Business Communications* case:

> A particularly surprising feature of the novel provision is that neither the legislation or any rules made pursuant thereto impose a duty on any party or person to bring a case before the Court so that it can exercise the mandatory duty imposed upon it. In windings-up by the Court this lacuna has been overcome by the Court on the further consideration of the order for liquidation directing the Official Liquidator to bring the appropriate application on notice to persons appearing to be directors thereof. In the case of voluntary liquidations the Court does not have either the responsibility or the machinery for giving comparable directions. It may be that voluntary liquidators and receivers are not sufficiently conscious of the provisions of Chapter 1 of Part VII of the 1990 Act or else they do not see it as their function to bring relevant cases before the Court. Perhaps it may be necessary for the legislature to consider the provision of a particular sanction to ensure that the many cases which have obviously arisen since August 1991 are duly pursued. If not, there would be an apparent injustice to the directors of insolvent companies wound up by the Court as against those wound up voluntarily.[16]

Application For Relief From Restriction

Under section 152 a person the subject of a restriction order may within one year of the order being made (but not thereafter) apply to the court for relief in whole or in part from the restrictions and the court may, if it deems it just and equitable to do so, grant such relief on whatever terms and conditions it sees fit. The restricted person has to give fourteen days notice of his intention to apply for relief to the liquidator (or receiver) of the company involved. The liquidator (or receiver) must immediately notify creditors and contributories of that company and at the hearing of the application the liquidator, receiver or any creditor or contributory may appear and give evidence. I am not aware that any such applications have yet been made. Presumably, the provision of such a procedure implies that in theory at least the period of five years could be reduced.

Enforcement

Enforcement of the restriction provisions may be made against the restricted director and against the company that becomes involved with the restricted director.

Under section 161 of the 1990 Act, a restricted director who acts contrary to the provisions of section 150 commits a criminal offence. If convicted, he is automatically disqualified from acting in any manner in relation to any company for five years unless the court orders otherwise. Disqualification is defined in section 160(1) as follows

> "he shall not be appointed or act as an auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company or any society registered under the Industrial and Provident Societies Acts, 1893 to 1978."

Moreover, there are civil consequences as well. For instance, under section 163(3), if the restricted director acts in a manner or capacity which because of his restriction he is prohibited from doing and the company with which he becomes involved goes into insolvent liquidation, the court may on the application of the liquidator or a creditor declare that the restricted director is personally liable without limitation for all or part of the debts of the company incurred while the restricted director was so acting.

Furthermore, under section 164, the directors and officers of a company who, knowing that a person is restricted, follow his instructions are guilty of an offence and, if convicted, are themselves deemed to be disqualified although the section does not specify for how long[21]. While under section 165 such a disqualified person may also on conviction be personally liable for the debts of the company while he was so acting if he was acting on the instructions of a disqualified person, it does not appear that he may be personally liable if he acted on the instructions of a restricted person.[22]

Effect Of Restriction On Company in Relation to Which the Restricted Person Acts

As well as the effect that the declaration has on the person in respect of whom it is made, it also has important ramifications for any company in relation to which such a restricted person is appointed or acts in any way, whether directly or indirectly, as director or secretary or is concerned in or takes part in its promotion or formation. Section 155 of the 1990 Act places certain restrictions on such a company to prevent its capital from being eroded. Subsections

(2) to (11) of section 60 of the Principal Act (which deal with giving financial assistance by a company for the purchase of its own shares) are stated not to apply to any such company. If it is a private company, it is also made subject to sections 32-36 of the Companies (Amendment) Act, 1983 as if it were a public limited company, i.e., it becomes subject to similar statutory restrictions (with certain modifications) on the purchase of non-cash assets as a public company (but extended to cover directors and promoters as well as subscribers). Moreover, sections 32 and 37 of the 1990 Act itself will not apply to any such company so that the company may not avail of the exception to section 31 of the 1990 Act which permits loans or quasi loans and credit transactions for a director or a person connected with a director in certain circumstances.

Section 156 also imposes certain requirements as to shares allotted by such a company which are not fully paid up in cash as section 150(3) requires.

Under section 157 a court may, if it deems it just and equitable to do so, grant relief to a company to which section 155 applies.

Imposition Of Duties On Liquidators And Receivers

Section 151 imposes certain duties on liquidators and receivers. It provides as follows:

(1) Where it appears to the liquidator of a company to which this Chapter applies that the interests of any other company or its creditors may be placed in jeopardy by the relevant matters referred to in subsection (2) the liquidator shall inform the court of his opinion forthwith and the court may, on receipt of such report, make whatever order is sees fit.

(2) The relevant matters are that a person to whom section 150 applies is appointed or is acting in any way, whether directly or indirectly, as a director or is concerned or is taking part in the promotion or formation of such other company as is referred to in subsection (1).

(3) Any liquidator who contravenes subsection (1) shall be guilty of an offence and shall be liable -

(a) on summary conviction, to a fine not exceeding £1,000 and, for continued contravention, to a daily default fine not exceeding £50, or

(b) on conviction on indictment, to a fine not exceeding £10,000 and, for continued contravention, to a daily default fine not exceeding £250.

By reason of section 154 of the 1990 Act, section 151 applies equally where a receiver of the property of a company is appointed.

This provision appears to impose a wide watchdog type duty on liquidators and receivers. Notably, there is no provision made for the cost of compliance[23].

Register Of Persons Restricted

Section 150(4) provides that a prescribed officer of the court must furnish the registrar of companies with particulars of any restriction order. The examiner and the registrars of the High Court have been so prescribed. Under Section 153 (1), the registrar of companies must maintain a register of these particulars.

1. Before the 1990 Act, disqualification was provided for under section 184 of the Companies Act, 1963 ("the Principal Act")
2. See, generally, Linnane, Restrictions on and Disqualification of Directors (1994) ILT 132, at 133. In the article, the author reviews in some detail the recommendations in the Report of the Review Committee on Insolvency Law and Practice, chairman Sir Kenneth Cork, June 1982 CMND 8558, on which recommendations the legislation in Ireland dealing with these issues is modelled.
3. Section 154 provides that Chapter 1 also applies to any insolvent company over the property of which a receiver is appointed. However, the comment has been made that arguable for the Chapter to apply to a receivership, the receiver must be appointed over all of the of the companyís property. See Linnane, op cit., at 135
4. High Court, Unreported, 21st July, 1995 (Murphy, J.).
5. [1995] 3 WLR1 (Reported on 16th June, 1995).
6. High Court, Unreported, 21st July, 1995 (Murphy, J.), at 15 et seq.
7. High Court, Unreported, 21st July, 1995 (Murphy, J.), at 5.
8. High Court, Unreported, 21st July, 1995 (Murphy, J).
9. Id. at 3 et seq.
10. High Court, Unreported, 21st July, 1995 (Murphy, J.), at 17 et seq.
11. High Court, Ex tempore judgment, 3rd June, 1997 (Shanley, J.).
12. In Ambury, the issued and paid up share capital of the company was £100. The annual turnover in 1988 was approximately £350,000 and the deficiency in 1991 was approximately £206,891.
13. High Court, Unreported, 26th April, 1996 (Murphy, J).
14. Id., at 7 et seq.
15. [1992] ILRM 51.
16. High Court, Unreported, 21st July, 1995 (Murphy, J), at 5 et seq.
17. See, however, the Cavan Crystal case, supra.
18. High Court, Unreported, 21st July, 1995 (Murphy, J), at 18 et seq.
19. See discussion of Ambury supra.
20. In The Matter Of Verit Hotel & Leisure (Ireland) Ltd. [1997] 1 ILRM 110.
21. If the conviction is on indictment or of an offence involving dishonesty, then under section 160(1) of the 1990 Act, the disqualification should last 5 years unless the court orders otherwise. See MacCann, Companies Acts 1963-1990 (1993), 1018, note 4b to section 164.
22. See MacCann, op. cit., at 1018, note 4a to section 165.
23. See Linnane, op. cit., 135.
24. Companies Act 1990 (Part IV and VII) Regulations 1990 (SI No. 209 of 1991).

Army Deafness Cases

Alan Mahon, SC

Over the past two years and more particularly over the past six months or so, substantial numbers of claims for damages for hearing loss by present and former members of the Defence Forces have been listed for hearing in the High Court personal injury list, and to a lesser extent in the Circuit Court. It is expected that this category of claim will dominate the High Court personal injury list for the next eighteen months or so. The overall cost to the Exchequer will be enormous and the imposition on the time of the High Court and the Circuit Court will be considerable.

The great bulk of the claims are from serving and former soldiers of the Army who allege that their hearing has been permanently damaged as a consequence of long-term exposure to excessive levels of noise from the firing of heavy and light weapons, and explosives, and from other duties on the firing ranges carried out in close proximity to the firing of weapons by colleagues. A small minority of claimants are from the ranks of the Naval services, the Air Corps and the Army Band, and may involve different or additional sources of noise. Because of pressure of space, it is proposed to concentrate in this article on those cases where blame for hearing loss is attributed to the firing of weapons and/or explosives.

The attitude of the State to the deafness cases seems to vary from case to case. While the State has settled many of the claims to-date, significant numbers of cases have proved difficult or impossible to settle and have proceeded to a full trial. Awards and settlements have varied greatly, between circa £7,500 and circa £160,000, with the larger claims proving somewhat easier to settle. The variation in the figures indicates the significant variation in the degree of hearing loss from cases to case, and other variables such as age and occupational disability. This article proposes to separately examine the more important aspects of these claims.

Liability: Negligence

The state continues to consistently deny negligence in the Defences delivered in the deafness claims. It is now quite common for the State to concede negligence on the doorsteps of the Court (although sometimes leaving the Statute of Limitations plea in issue). In those cases where negligence has remained in issue and which were contested, the decisions have all been in the Plaintiff's favour. Unfortunately, it is the practice of the State to decline invitations to concede the negligence issue in advance of the hearing date, hence the necessity for the Plaintiff to be in a position to fully contest this issue if necessary and adduce the necessary proof to establish negligence and breach of duty. This means that an Acoustics expert must be retained in virtually every case. The Acoustics expert should prepare a comprehensive report detailing the various weapons guns and explosives which were fired or exploded in close proximity to the Plaintiff, and he should be in a position to give expert evidence on the noise emissions from the various weapons and explosives, and the likely effect of such noise levels on the hearing of those within close distances to the firing point. In cases where some form of hearing protection was provided to the Plaintiff, the Acoustics expert should be in a position to comment on the adequacy or suitability of such protection.

The essential reason for the success of the claims in relation to the negligence issue is the fact that in almost all cases the Army authorities failed to comply with their own written rules and regulations which were introduced by the Army for the express purpose of protecting the hearing of personnel of the Defence Forces. These rules and regulations are now commonly referred to as the "internal Army regulations and Training Circulars relating to the protection of hearing"[1] It is important to expressly plead a breach of these internal regulations and Training Circulars in the Particulars of Negligence in the Pleadings.

The internal Army regulations and Training Circulars are not Statutory Regulations. They were introduced and published by the Army authorities between 1955 and the present day. They amount to a clear and detailed acknowledgement by the Army authorities of the significant risk of hearing damage to personnel involved in all aspects of weapons firing and the use of explosives and pyrotechnics. It is clear from their precise detail that they were drawn up with the assistance of medical experts and experts in the field of Acoustics.

It is not practical to examine these internal Army regulations and Training Circulars in great detail in this article, although they should be studied by practitioners preparing Pleadings and cases for hearing. The essential provisions of the internal Army regulations and Training Circulars read as a whole, can be very loosely summarised as follows.

1. Suitable and properly fitting ear protection must be provided to all Defence Force personnel.

2. Defence Force personnel to be fitted for such protection under medical supervision.

3. Double hearing protection to be provided when working or firing in proximity to heavy guns.

4. Army Officers in charge of firing points to ensure that all personnel on the firing range are in possession of hearing protection and are wearing or using such protection.

Having gone to the trouble of producing these detailed and exhaustive internal regulations, it appears that the Army authorities proceeded to ignore virtually all of them, certainly until the late 1980s or early 1990s. The existence of these

regulations (which were frequently updated and improved throughout the period 1955 to-date) were kept a closely guarded secret and it is rare to find any member of the Defence Forces who knew anything of their existence until recent years, and until the first of the deafness cases came before the Courts.

Other armies in other jurisdictions provided appropriate hearing protection since the 1950s and 1960s, hence the unique and financially expensive spectacle of large numbers of Defence Forces personnel seeking compensation for deafness in this jurisdiction. It is generally agreed by ENT Specialists that if the Army had complied with its own comprehensive rules for the protection of the hearing of its personnel, there would now be no claims for deafness and indeed it is difficult to see how negligence and breach of duty could successfully be established in such circumstances.

Liability: Statute of Limitations

Defences delivered by the State in the deafness claims will almost always include a plea to the effect that the action is barred by virtue of the provisions of the Statute of Limitations (Amendment) Act 1991

In many of the cases, the State, having pleaded the Statute of Limitations in the Defence, drop this particular issue. To persist with this plea in the great majority of the cases would result in a great deal of time wasting and significantly heavier costs being borne by the State. However, in a smaller number of cases, there is a Statute of Limitations issue to be decided. This will usually arise in cases where the Plaintiff has left the Army many years ago or where there is some entry in the Plaintiffs LA30 (medical record) indicating that he might have had some knowledge of hearing problems prior to the commencement of the three year limitation period.

The Statute of Limitation 1957 provides that a Plaintiff has a period of three years from the date of the accrual of the action in which to institute proceedings to recover damages for personal injuries caused as a consequence of the negligence, nuisance or breach of duty of a third party. Section 2 of the Statute of Limitations (Amendment) Act 1991 provides that the time within which an action in respect of an injury may be brought depends on the Plaintiffis date of knowledge.

The relevant provision in the Statute of Limitations (Amendment) Act 1991 (section 2) is as follows.

2 (1) For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependent of the person injured) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:

(a) That the person alleged to have been injured had been injured,
(b) That the injury in question was significant,
(c) That the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,
(d) The identity of the Defendant, and
(e) If it is alleged that the act or omission was that of a person other than the Defendant, the identity of that person
(f) the additional facts supporting the bringing of an action against the Defendant; and
(j) knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(2) For the purposes of this section, a person's knowledge includes knowledge which he might 'reasonably have been expected to acquire'.
(a) From facts observable or ascertainable by him, or
(b) From facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.

(3) Notwithstanding subsection (2) of this section,.

(a) A person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and. where appropriate, to act on) that advice,
and
(b) A person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury.

The foregoing provision of the Statute of Limitations (Amendment) Act 1991 provides that a Plaintiff must have knowledge of certain facts in relation to the injury in respect of which he claims damages before the three year limitation period will begin to run. He must be aware of his injury, he must be aware that the injury is significant and he must be aware of the fact that the injury in question was caused in whole or in part by the act or omission which is alleged to constitute negligence, nuisance or breach of duty, and he must be aware of the identity of the Defendant.

In cases of deafness, it is almost always impossible to specifically date the onset of the condition. In most cases the deafness will be gradual and progressive and the significance of the injury will not immediately be apparent. It is therefore often difficult to specifically identify the commencement to-date of the three year limitation period in these cases.

Section 2 of the Statute of Limitations (Amendments) Act 1991 imposes an obligation on a Plaintiff to display a certain level of diligence in ascertaining the existence and extent and cause of the injury in question. For example, it imposes an obligation on a Plaintiff to seek medical or other expert advice "which it is reasonable for him to seek", although he will not be penalised where he has taken all reasonable steps to obtain such advice.

In a very recent decision in an Army deafness case of *Edward Whitely -V- The Minister for Defence, Ireland & the Attorney General*[2], the High Court found against a Plaintiff on the Limitation peri-

od and dismissed his claim for damages.

Mr. Whitely was a member of the Defence Forces between 1957 and 1978. During his period in the Army he had been exposed to excessive levels of noise from the firing of weapons without appropriate hearing protection, and as a consequence thereof he developed permanent noise induced hearing loss and tinnitus. Quirke J. found in favour of the Plaintiff in relation to the issue of negligence and breach of duty. He also found as a fact that the Plaintiff had sustained noise induced hearing loss and tinnitus as a result of being exposed to noise from the firing of weapons without appropriate hearing protection. In relation to the Statute of Limitations issue, he found against the Plaintiff declaring the action to be barred by virtue of the provisions of section 2 of the Statute of Limitations (Amendment) Act 1991.

Mr. Whitely admitted in evidence that from approximately 1979, and throughout the 1980s and 1990s he was conscious of a degree of hearing difficulty and also of occasional tinnitus. Mr. Whitely and his wife both gave evidence that his symptoms became worse in 1993, following which he sought medical advice in 1995, and commenced proceedings claiming damages for hearing loss and tinnitus in the same year.

In his Judgment Quirke J. considered the meaning of the word or term "significant" in section 2 of the Act of 1991. It was contended on behalf of the Plaintiff that whilst he had knowledge of dearness as early as 1979 or 1980 and the fact that he had been injured, he did not have knowledge that the injury in question was "significant" until some time between 1993 and 1995, and that accordingly his "date of knowledge" was no earlier than 1993.

Quirke J. stated

> "The 'date of knowledge' for the purposes of the 1991 Act is virtually identical to the 'date of knowledge" contemplated for the purposes of section 14 of the English Limitation Act 1980 which contains a similar provision as to the knowledge '. . . that the injury in question was significant' (see Subsection 14(1)(a) of that Act).

It is to be noted that section 14(2) of the English Act expressly defines an injury as significant 'if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a Defendant who did not dispute liability and was able to satisfy a judgment'. The above definition comprises a re-enactment of an identical provision in the Limitation Act 1975 which in turn was considered by Geoffrey Lane L.J. in *McCafferty -V- Metropolitan Police receiver*[3] in the following terms:

'It is not altogether clear to me why the word 'would' is used in that Subsection. It may be that one must understand such words as 'if he had considered the matter,' or it may be that it is because of the possibility of knowledge being imputed to the Plaintiff. . .

"Whatever the answer to that particular problem may be, it is clear that the test is partly a subjective test, namely: would this Plaintiff have considered the injury sufficiently serious? And partly an objective test, namely: would he have been reasonable if he had not regardedit as sufficiently serious? It seems to me that . . . (the Subsection) . . is directed at the nature of the injury as known to the Plaintiff at that time. Taking that Plaintiff with that Plaintiff's intelligence, would he have been reasonable in considering the injury not sufficiently serious to justify instituting proceedings Or damages?"

Similar provisions contained within English Statutes have been considered within the Courts in England (see *Millar - V- London Electrical Manufacturing Company*[4] and *Knipe -VBritish Railways Board*[5] but it would appear that there has been no judicial considerations of Subsection 2(1)(b) of the 1991 Act within this jurisdiction and no similar consideration in any other jurisdiction of similar provisions in the absence of an express definition of the word 'significant'."

Quirke J. then went on to say

> "Accordingly section 2 of the 1991 Act expressly avoids any attempt to define what is meant by 'significant' injury within a meaning of Subsection 2(1)(b) of the Act and I take the view that by excluding any definition it was the intention of the legislator to avoid confining the sense in which the word 'significant' ought to be understood to the terms of the definition contained in section 14(2) of the English Act or to any particular terms. If I am correct and if it was intended that a broader test should be applied than was contemplated by the definition contained within section 14(2) of the English Act, then it would seem to follow that the test to be applied should be primarily subjective and that the Court should take into account the state of mind of the particular Plaintiff at the particular time having regard to his particular circumstances at that time.
>
> As I have indicated, I believe the appropriate test to be primarily subjective because it must be qualified to a certain extent by the provisions of Subsection 2(2) of the 1991 Act to which I have already referred. That Subsection introduces a degree of objectivity into the test and potentially requires the additional consideration of whether or not the particular Plaintiff at the particular time ought reasonably to have sought medical or other expert advice having regard to the symptoms from which he was suffering and the other circumstances in which he then found himself"
>
> It is clear therefore that in deafness cases where a Plaintiff was aware of a hearing impairment and/or tinnitus over a period of years prior to the commencement of proceedings, and where he was at all material-times aware as to the probable cause of his deafness there is a risk that his action for damages may be barred by virtue of the provisions of the Statute of Limitations. The question "ought he reasonably have been aware" is probably an appropriate one to ask in such cases. Occasional or minor episodes of deafness and/or tinnitus would not be expected to cause a difficulty in relation to the Limitation period. It

is quite common to hear tales from soldiers as to temporary periods of severe deafness and tinnitus after a day on the firing ranges, followed by a resumption of normal hearing (or what appeared to the individual to be normal hearing).

The assessment of hearing loss

Without any doubt, the most difficult aspect of the hearing loss case is the assessment of the type and extent of the hearing loss. It is this aspect which causes the most confusion and difficulty amongst Practitioners and Judges alike.

To add to the level of confusion and difficulty is the fact that ENT Specialists themselves often disagree as to the proper means of measuring or calculating the level of hearing loss and the extent of any disability flowing there from.

To even attempt to cope with the complexities of determining the level of hearing loss, a basis of understanding of the means used to assess hearing loss must be achieved.

The Audiogram is the essential test mechanism used by Audiologists and ENT Specialists to measure hearing loss. For accurate results, the test should always be carried out in proper soundproof conditions and by a qualified technician. ENT Specialists agree that the results of audiograms are usually reliable and difficult to fake. In most cases, there will be two or more audiograms carried out over two or three years and a roughly similar pattern will usually present itself in all of them. More accurate results may flow from a cortical brain stem evoked test, but this type of test is expensive and only occasionally used.

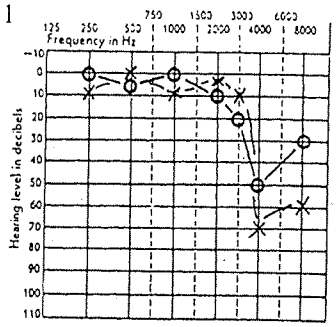
The Audiogram operates by exposing the patient to various frequencies of sound and measuring the extent of any loss of hearing at each frequency. Both the lower tones and the higher tones are measured. To comply with the provisions of the EU (Protection of Workers) (Exposure to Noise) Regulations 1990[6] and the Health & Safety Authority Guidelines[7] audiometric tests should be carried out at frequencies rangingfrom 500 Hertz to 8,000 Hertz. Against the frequencies, the level of hearing is calculated in decibels, the unit of sound measurement.

There is disagreement amongst ENT Specialists as to the extent of the ordinary speech range. Some maintain it is up to 3,000 Hertz and occasionally involves 4,000 Hertz, while others maintain that it ranges up to 4,000 Hertz and occasionally involves 6,000 Hertz.

There are different types and causes of hearing loss. These include loss from infection, or damage to the structure of the ear, or from perforation of the eardrum, or from ageing, or for congenital reasons or from noise. The Army deafness cases seek damages for noise induced loss. In some cases, where there is evidence of noise induced deafness, there may also be evidence of deafness from some other cause.

In cases of noise induced deafness, the audiogram graph will usually (but not always) have a particular appearance, which will indicate speech range hearing within normal limits (not exceeding 20 to 25 decibels up to 2,000 Hertz or 3,000 Hertz) and a sudden dip at 4,000 Hertz (or possibly 3,000 Hertz) and 6,000 Hertz but with a degree of recovery at 8,000 Hertz.

Fig. 1



X = Left Ear
O = Right Ear

Armed with the audiogram (preferably two or three audiograms taken at intervals over two, three or four years or more), the task of interpreting the findings must then be undertaken. There is considerable disagreement amongst the ENT Specialists as to how this should be done. In different countries various "systems" of determining the extent of the loss or the impairment or the handicap are used. Some use the AMA or American "system", others use the BAOL or British "system". The AMA "system" measuresthe Decibel loss up to 3,000 Hertz only and may not be ideally suited to determining the extent of noise induced loss because noise induced loss usually significantly affects the frequency of 4,000 Hertz and higher.

None of these so called "systems" carry official sanction in this jurisdiction. Of great relevance to the deafness claims is the fact that the Defence Forces themselves use a "system" for many years which involves measuring up to 4,000 Hertz. The Defence Forces take an average for each year of the Decibel loss at 1,000 Hertz, 2,000 Hertz and 4,000 Hertz. The averages for both years are then added together, divided by two and the result is deemed to be the overall average hearing loss.

By way of example, and using the Audiogram in Figure 1, the average hearing loss is measured in Decibels. In the left ear the loss at 1,000 Hertz is 10 Decibels, the loss at 2,000 Hertz is 5 Decibels and the loss at 4,000 Hertz is 70 Decibels. The total in the left ear over these three frequencies is therefore 85 Decibels. Divide this total by three and the average for this ear is 28.3 Decibels. In the right ear, the loss at 1,000 Hertz is nil Decibels, the loss of 2,000 Hertz is 10 Decibels and the loss at 4,000 Hertz is 60 Decibels. The total for this ear is 50 Decibels. Divide this total by three and the average for this ear is 20 Decibels. Add the totals for both ears and divide by two and the result is an average hearing loss of 24.15 Decibels.

The EU (Protection of Workers) (Exposure to Noise) Regulations 1990 and the Health & SafetyAuthority Guidelines stipulate that the Audiograms used to determine hearing loss for occupational purposes should measure the frequencies up to and including 8,000 Hertz.

Having regard to the "system" used by the Army Medical Authorities (measuring up to 4,000 Hertz) and the aforesaid Health & Safety Authority Guidelines (measuring up to 8,000 Hertz) it is surprising to note that the State, in contesting many of the hearing loss claims persist in calling ENT Specialist evidence in support of the AMA "system" (measuring up to 3,000 Hertz only).

The AMA "system" will very often result in a nil percentage or very low percentage hearing handicap or impairment, whereas quite a different picture results from measuring up to 4,000 Hertz or 8,000 Hertz. It should be noted that in determining a soldier's suitability to continue service in the Army, or his eligibility for promotion or suitability for UN service or security duties, the Army Medical Authorities will take account of the hearing loss measured over 1,000 Hertz, 2,000 Hertz and 4,000 Hertz and thereupon medically grade the personnel accordingly. In many cases, the Army Authorities will insist on medically downgrading a soldier for the purposes of his career, using their own system involving 4,000 Hertz and while at the same time they will, through their legal representatives adduce ENT evidence to state that the same individual has a nil or low percentage handicap or impairment on the basis of the AMA "systemi, measuring only up to 3,000 Hertz.

None of the "systems" are capable of measuring or calculating two specific symptoms that will be found in the majority of cases involving noise induced hearing loss.

The first symptom, which is common to all noise induced hearing loss sufferers, relates to the problem anddifficulty in understanding or following speech where there is background noise, such as the background noise that one would expect in a public house, or in a busy street or in the workplace. Many Plaintiffscomplain bitterly of the effect this difficulty has on their social life, their working life and their domestic life.

The second very common system is that of tinnitus, which is a ringing or buzzing in one or both ears. This may be temporary or permanent, although it is usually permanent. It can be a very distressing condition for many, while others seem to cope well with it. Plaintiffs usually complain that it causes a degree of discomfort and difficulty in situations where there is quiet or silent environment. Many complain of severe difficulties in getting to sleep or remaining asleep.

There is no medical treatment available for either the condition of noise induced dearness or tinnitus. In some cases the use of hearing aids can improve the degree of hearing in people who have noise induced deafness.

Quantum

Settlements and awards have varied to a significant degree to-date. A wide range of considerations are relevant in valuing a hearing loss claim including, the actual level and extent of the noise induced hearing loss, whether or not tinnitus is present and its extent, the age and occupation of the Plaintiff, whether or not there are other causes of dearness involved besides noise dearness, and if still in the Defence Forces, the likely affect on a Plaintiffs career, promotion, eligibility for overseas services and security duties, and where the individual is no longer in the Defence Forces or is likely to leave the Defence Forces in the foreseeable future, the likely affect on his suitability for work as a civilian. (It should be borne in mind that an increasing number of employers, particularly larger factories and industries insist on testing the hearing of prospective employees).

Quite clearly, every case is distinct and its value must be assessed on its own individual merits. Based onsettlements and awards to-date, a rough guide that might be followed in dealing with a case involvingsomeone between the ages of mid thirties and early fifties, would be to allow £1,000 for every 1 Decibelloss, calculated using the "Army system", up to about 25 Decibels or 30 Decibels average loss andassuming a moderate level of tinnitus. Such a rough rule of thumb would not provide fair compensationin cases involving average hearing loss higher than 30 Decibels or 3 5 Decibels, simply because with such cases, the level of hearing loss will be such as is likely to seriously threaten the Plaintiff's career, in or outof the Army, his fitness for many types of civilian jobs and would certainly cause considerable levels of distress and inconvenience in pursuing normal social and domestic activities.

Severe tinnitus should also have the effect of increasing the valuation of the case. In some cases, tinnitus can be particularly distressing and result in an individual requiring psychiatric intervention.

Because members of the Defence Forces enjoy free medical care, there is often no claim for special damages. In some cases however a Plaintiff may have lost one or more trips abroad with the UN which will give rise to a net loss of somewhere in the region of £5,000 per trip. In some cases a Plaintiff will have been deprived of promotion because of his hearing loss and consequent medical downgrading, and will therefore seek to recover the difference in wages between his existing rank and the rank to which he might have been promoted. In the more serious cases a Plaintiff may have been discharged from the Defence Forces because of his level of loss or alternatively is likely to be discharged in the foreseeable future, and substantial compensation will be claimed in respect of future loss of earnings, loss of pension and loss of gratuity, and will involve actuarial computations.

- Para 64, General Routine Order 43/1955, Para 36, Manual Range 1

1. Practices (Small arms) 1968, Training Circulars 6/1972, 6/1973, 9/1984, 21/1987, General Practice Order (2/1991) Manual Range Practices (small arms) 1993
2. High Court unrep. Quirke J. 10th June, 1997
3. (1977) ALL ER756 at page 775
4. (1976) 2 Lloyds Rep.284
5. (1972) 1 ALL E.R.673)
6. S.I. No. 157 of 1990
7. Issued by the Health and Safety Authority pursuant to S.I. No. 157 of 1990.

Eurowatch

Caitriona Keville, Barrister,

considers recent cases concerning the prohibition of discrimination on grounds of sex in Directive 76/207/EEC

The case of *Fennelly v. The Midland Health Board*[1] (currently under appeal to the Supreme Court) is significant for a number of reasons. First it deals with the question of whether a provision of an Irish statute, namely Section 265 of the Mental Treatment Act 1945, which has not been specifically repealed is superceded by subsequent domestic legislation, (the Employment Equality Act 1977) which has been enacted on foot of the provisions of a Directive (in this case Council Directive 76/207/ EEC, the Equal Treatment Directive). Secondly it deals with an instance of discrimination in the work place; not however from the point of view of a female worker insisting on her right to equal treatment but unusually from the perspective of a male worker insisting that a discriminatory provision be maintained in force.

The facts giving rise to this claim are as follows: Mr.Fennelly is one of eight male co-Plaintiffs, all of whom were or are still employed as male psychiatric nurses by the Defendant. Their claim centres on the contention that they were employed to look after male patients only. Their reasons for refusing to work on integrated wards were that it would offend the modesty of the female patients and they feared allegations of sexual assault. They support this claim by reference to Section 265 of the Mental Treatment Act 1945 which sets out as follows:

> "It shall not be lawful to employ a male person in the personal custody and restraint of a female patient in a mental institution"

Mr.Fennelly (whose case is representative of his co-plaintiffs) was rostered to perform nursing duties in a mixed ward. When he refused, he was suspended but he then actually carried out the duties requested of him. However he was then requested to work in an assessment unit again with both male and female patients. Mr.Fennelly made several requests for reassignment but was unsuccessful. Legal proceedings were issued and an interlocutory injunction was granted to the Plaintiffs on the 9th of March 1992, restraining the Defendant from requiring the Plaintiffs to work in or about the personal custody or restraint of any female patient. In the substantive action, the Plaintiffs were seeking declarations that the Defendant was in breach of its statutory duty, specifically Section 265 of the 1945 Act and in breach of their contracts of employment.

In order to rule on this matter, it was necessary for Carroll J. to consider the relevant employment equality legislation in the area, namely the Employment Equality Act of 1977 which was passed on foot of Council Directive 76/207/EEC of the 9th of February 1976. The purpose of this Directive is:

> "to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions....This principle is hereinafter referred to as the principle of equal treatment."

The Directive did however provide at Art. 2(2) for the possibility of derogation from the provisions of the Directive ie that Member States had the right to exclude from the field of application of the Directive those activities for which the sex of the worker constitutes a determining factor. It also provided however that Member States were generally under an obligation to abolish any legal provisions maintaining in force sex discrimination.

Section 17(2)(c) and (d) of the 1977 Employment Equality Act provided:

"For the purposes of this section the sex of a person shall be taken to be an occupational qualification for a post in the following cases:

(c) where an establishment or an institution is confined (either wholly or partly) to persons of one sex requiring special supervision or treatment and the employment of such persons of that sex is related to either the character of the establishment or institution or the type of care, supervision or treatment provided in it,
(d) where either the nature of or the duties attached to a post justify on the grounds of privacy or decency the employment of persons of a particular sex.

Sections 17(c) and (d) were repealed by SI 302/1982. A new section 17 was substituted which is not relevant in this context. The repeal of Section 17, combined with a change of approach in the area of psychiatric services in the mid-eighties, led to Mr. Fennelly and the other Plaintiffs being requested to carry out duties involving both male and female patients. It was from this period that the current difficulties arose.

Keane J. ruled at the hearing of the interlocutory application that the question that arose was whether, where a provision of an Irish statute had not been specifically repealed (ie Section 265(1) of the Mental Health Act 1945) equality legislation passed to implement a Directive could operate to overide the effect of the earlier statute. He took the view that Section 265 should apply on the

grounds that modern statutes are slow to suppose the legislature overlooked an express repeal but intended to repeal a section by implication and also that a general Act does not impliedly repeal a more specific Act.

Carroll J. however did not see the issue as being a question of whether the Employment Equality Act 1977 (as amended) impliedly repealed Section 265. Rather she felt that the question to be considered was whether in fact there existed an effective derogation by the State from Council Directive 76/207/ EEC to support the continued application of Section 265. In order to answer this question, it was necessary to look to the relevant jurisprudence of the ECJ on the interpretation of domestic legislation in the light of the relevant Directive. The first case cited was that of *Ratti v. Ministero Public*[2] which concerned Italian domestic legislation in relation to labelling. The domestic legislation should have been amended to comply with two Council Directives. The question for the ECJ was whether an individual who has complied with the provisions of the relevant Directives can request the national court not to apply national provisions incompatible with the Directives, even where the Directives had not been implemented into the internal legal order. The ECJ held that where the time limit for the implementation of a Directive had expired, a Member State may not apply its internal law to a person who has complied with the provisions of a Directive, (as long as the obligations contained in the Directive are sufficiently precise and unconditional).

In the case of *Johnson v. The Chief Constable of the RUC*, the derogation set out in Art.2(2) of Directive 76/207 was considered. It appears from this case that this derogation is only an option for Member States and that it is for the national courts to see whether this option has been exercised in provisions of national law and to construe the content of those provisions. iThe question of whether an individual may rely upon a provision of a Directive in order to have a derogation laid down by national legislation set aside only arises if that derogation went beyond the limits of the exceptions permitted by Art.2(2) of that Directive. The ECJ in Johnson looked to its previous rulings in *Von Colson and Kamann v. Land Nord rhein - Westfalen*[3] and *Harz v. Deutche Tradx GmbH* [4], and also to Art.5 of the EC Treaty as authority for the proposition that all State authorities including the courts are under an obligation to take all appropriate measures to ensure that the result envisaged by a Directive is achieved. Therefore, in applying national law ie the provisions specifically introduced in order to implement Directive No.76/207, the courts are required to interpret national law in the light of the wording and purpose of the Directive in order to achieve the result referred to in Art.189.3 of the EC Treaty.

Carroll J. also referred to the fact that in Johnson, it was the Chief Constable acting as an emanation of the State who was seeking to take advantage of the State's failure to comply with Community law, whereas in this case it was the individual Plaintiffs who were seeking to rely on the State's failure to specifically repeal Section 265.

She then found that Section 265 was discriminatory and that once the derogation contained in Section 17 of the Employment Equality Act was repealed, there was no longer any justification for the continuation of S.265 in domestic law because "in the hierarchy of legislation, the Directive takes precedence over domestic law". She further added that it did not make any difference that this case involved individual Plaintiffs seeking to uphold a discriminatory provision and a public body which claims that such a provision no longer applies.

Thus in answer to the Plaintiff's claim that they must have the benefit of existing contracts of employment unless varied by agreement, it was held that their duties are set out in Art.33 of Mental Hospitals (Officers and Servants) Order 1946, (SI 203 of 1946). This sets out that the duties of male and female nurses are identical with the exception of subparagraph 25. In the present case it was held that there was no change in duties, only in patients and therefore the Plaintiffs claim for breach of duty, breach of statutory duty and breach of contract was dismissed.

Case C-180/95 Draehmpaehl v. Urania Immobilienservice

Another interesting judgment also concerning Directive 76/207/ EEC, was given by the ECJ in the case of *Draehmpaehl v. Urania* on the 22nd of April 1997, where the Court held that compensation amounting to three months salary for discrimination based on sex was insufficient. Thus a provision of the German Civil Code which limited damages in this way was held to be incompatible with European law. The case arose when the applicant, Mr. Draehmpaehl responded to an advertisement in a daily newspaper which specifically stated that a female assistant wasrequired for the company in question. Mr. Draehmpaehl received no reply to his application. He then applied to the Arbeitsgericht (German industrial tribunal) for compensation, claiming that he was qualified to do the job in question but had not been considered due to discrimination on the grounds of sex. The tribunal found that the applicant had been discriminated against as the advertisement had clearly been addressed to women and no grounds existed in this case to justify an exception being made to the principle of equal treatment. Therefore in the circumstances the respondent company were obliged to compensate the applicant.

However the tribunal stayed the proceedings pending a response from the ECJ on a number of questions referred under Article 177 of the EC Treaty. One of the questions asked was whether a provision of domestic law which places a ceiling of three months salary on the amount of compensation which applicants discriminated against on the ground of sex may claim, is in accordance with the Equal Treatment Directive. The ECJ in response said that while the Directive itself did not impose any specific sanction in the event of a breach, Art.6 of the Directive does set out that measures must be adopted which are sufficiently effective for achieving the aim of the Directive and that such measures can be relied upon before the national courts by the persons concerned *(Von Colson and Kamann v. Land Nordrhein-Westfalen)*.[5]

The ECJ also stated that the Directive further requires that in providing compensation for breach of the equality principle, a Member State must ensure that such compensation will guarantee real and effective judicial protection ie it must have a deterrent effect on the employer so that the discriminatory behaviour will not be repeated. The compensation must also be adequate in relation to the damage sustained, therefore mere nominal compensation would not satisfy the provisions of the Directive. In this case the ECJ did not accept the contention of the German government that three months salary was more than nominal compensation.

In conclusion the ECJ held on this question that where it was the situation that the applicant would have obtained the position had he not been discriminated against on the grounds of sex, then a provision of domestic law prescribing an upper limit of three months salary for the amount of compensation that may be claimed was not in accordance with Directive 76/207/EEC.

It is clear from this judgment (and the case in *Marshall v. South West Area Health Authority (No.2)* which involved a similar issue) that where discrimination is suffered on the grounds of sex, Member States are obliged to provide adequate and effective remedies that will allow persons discriminated against to assert their rights. The importance of such rights lies in effective mechanisms of enforcement and ultimately the availability of adequate compensation for loss suffered in the event of a breach. The *Draehmpaehl case* represents a further confirmation by the ECJ of its insistence on effective enforcement of rights under European law. ●

1. Carroll J. High Court, December 6 1996
2. 1979 ECR 1629
3. 1984 ECR 1891
4. 1984 ECR 1921
5. [1984] ECR 1891. pp18

Skeffington .v. Rooney

Eamon Cahill, SC

considers a recent Supreme Court decision concerning statutory privilege and immunity from discovery on grounds of public interest

It is over a century since *Marks .v. Beyfus*[1] established the principle of immunity from disclosure of information given in confidence to the Police. The policy is based on the belief that informants, who are often in possession of vital information, should in the public interest, be allowed to give such information safe in the assurance that their identities will not be revealed. This privilege status was confined to criminal investigations but there was a perceptible extension of the policy which began with the Judgment of Lord Scarman in *D .v. NSPCC*[2] where immunity from disclosure was granted to those who gave information relating to the ill treatment or negligent care of children to Local Authorities or other responsible bodies. A further extension was applied in *Director of Consumer Affairs .v. Sugar Distributors Ltd.*[3] to cover sources of information given to the Director of Consumer Affairs. Costello J. held that it was in the public interest that the Court should protect the effective functioning by the Director of his statutory powers.

Skeffington .v. Rooney[4] was a case where the Plaintiff had sued the Defendants, among whom were members of An Garda Siochana for an alleged assault and further a complaint of negligence in the driving of a motor vehicle, The Plaintiff had initially taken a complaint to the Garda Siochana Complaints Board, and in the course of the Civil action he sought Discovery from the Board of all documents in its possession relating to the complaints. The Board relied on a claim of statutory privilege with a further submission that the efficacy of its operations would be hindered by disclosure and that an assurance of confidentiality was a necessary requirement as a matter of public policy.

The Plaintiff's application failed before the Master but was reversed in the High Court where Barr J. considered that his function was to resolve the conflict between the public interest in the production of evidence and the public interest in the confidentiality of documents relating to the exercise of the quasi judicial statutory power of the Complaints Board. He examined the documents and found that there was nothing in them of a confidential nature nor was there anything to suggest that any of the persons who had made statements had done so on a confidential basis.

The issue of the Appeal to the Supreme Court centred around the intrepretation of Section 12 of the Garda Siochana (Complaints) Act, 1986. This

somewhat inconclusively worded Section provides that:

> "A person shall not disclose confidential information obtained by him while performing functions as a member of the Board, a Tribunal, or the Appeal Board, or as a member of the staff of the Board, unless he is duly authorised to do so."

The Defendant sought to rely on these provisions as grounds for the establishment of a claim of statutory privilege. Immunity from Discovery on grounds of statutory privilege has existed for many decades but its implications have only been recently been subject to judicial scrutiny. *Cully .v. Northern Bank*[5] afforded such an opportunity. In this action it was held that Section 31 of the Central Bank Act, 1942 was consistent with a claim of privilege on grounds of public policy. Section 31 requires officials of the Central Bank to take an Oath not to disclose information relating to business records or books which come to their knowledge, save in particular given circumstances.

The Diplomatic Relations and Immunity Act, 1967 provides that: "The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located". Similar explicitly worded provisions may be found in the Rules appended to the Defence Act, 1954. In particular, Rules 121 and 122 which places an embargo on the finding of Courts of Enquiry which are otherwise treated as confidential and should not be disclosed to interested parties, except as provided by statute. Much of these statutory provisions were recognised by *Mary O'Brien .v. Ireland*[6]. In the course of his Judgment O'Hanlon J. felt that the Oireachtas was free to claim privilege in its legislative provisions providing that there was no conflict with the overriding demands or requirements of the Constitution. Some claims for statutory immunity recognise a possible input by the Judiciary. Section 8 of the Adoption Act, 1976 is an example. This provides that a Court shall not make an Order for Discovery, inspection, production or copying of a Book or Record of the Adoption Board, unless it is satisfied that it is in the best interests of the child. This was so interpreted in *P.B. .v. A.L.*[7] where it was held that only the Court could decide if the withdrawal of such statutory privilege was in the best interests of the child.

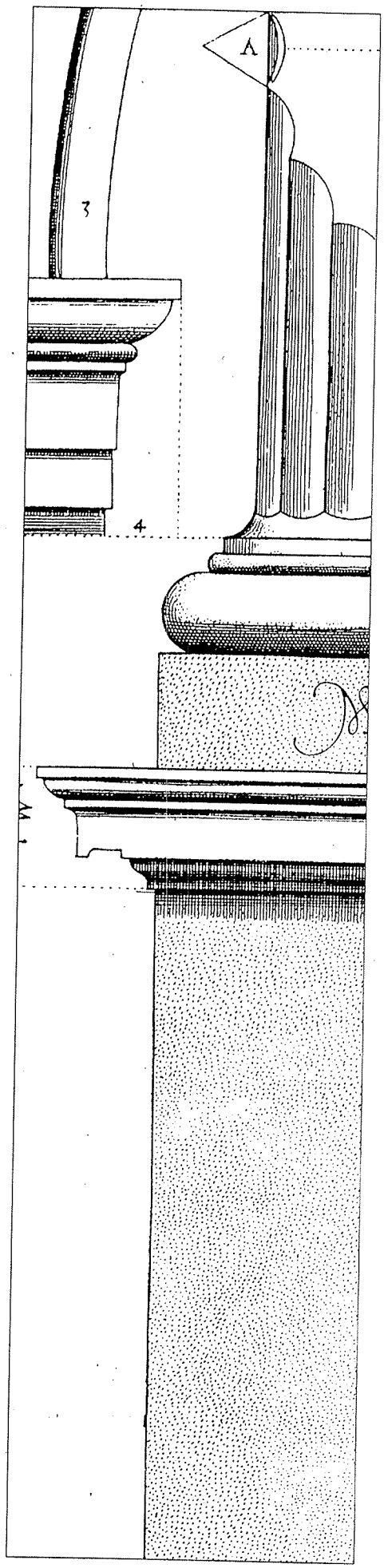
In all of these cases the claim of statutory privilege was clearly and unambiguously declared in the relevant statutory instruments. Section 12 of the Garda Siochana (Complaints Board) Act, 1986 was open to interpretation in Skeffington .v. Rooney. Not surprisingly Keane J. refused to construe the Section as one vesting statutory privilege in the Board.

> "If the Oireachtas had intended to confer a privilege or immunity on such documents, it would have used language similar to that contained in the other statutes to which I have referred".

(Most of these cases have been referred to in this Article.)

Irish Courts have, by tradition, cast a critical eye on any claim for an extension of executive privilege. Statutory privilege is a way of circumventing the judicial competence in discovery matters. The marker left by Keane J. and his colleagues in the Supreme Court suggests that any attempts by the State to encroach on judicial competence and to intervene in such matters will require clear and unequivocal claims for immunity. ●

1. 1890 25 Q.B.D
2. (1987) A.C. 171,
3. (1991) 1 I.R. 225
4. (S.C. 13th March, 1997)
5. (1984) 1 ILRM 587
6. (1995) 1 I.R. 568.
7. (1996) 1 ILR, 154



Personal Injuries Actions

James Nugent, SC, Chairman of the Bar Council,

considers the background to reform of personal injuries actions and comments on recent proposals recommending the introduction of a mediation service to deal with personal injuries arising from occupational injuries.

Any evaluation of the role of the Personal Injury action in our society must be placed in the context of the constitutional right to bodily integrity(article 40: 3:1) recognised by the Supreme Court in *Ryan -v- The Attorney General,* [1965 IR]. In proposing changes to the present system of compensating persons for personal injuries sustained due to the negligence, breach of duty or breach of statutory duty of another, the Government must be mindful of its constitutional obligation to protect and vindicate that right to bodily integrity. It is surprising that over the last twenty to twenty five years all suggestions for reform of the system for awarding damages for Personal Injuries seems to stem from Economic Ministries and not from the Departments of Justice or Equality and Law Reform. Economic considerations are, of course, important, but the system of justice, if viewed purely from an economic stand point alone will, undoubtedly, suffer. The claim by one person against another for compensation for injuries inflicted by the other, is essentially a question of justice and not of economics.

Where, however, there is an economic cost to society, it is entirely appropriate for the Government to review the matter. It is for this reason that the Bar Council welcomed the establishment by the Government of an independent body, such as Deloitte and Touche, to prepare an economic evaluation of insurance costs in Ireland last year. The Bar Council co-operated with Deloitte and Touche in carrying out the survey by making a submission to it on the relevant issues and by attending the workshops organised by them.

Since the report on the economic evaluation of insurance costs in Ireland by Deloitte and Touche is the only truly independent survey of its kind carried out in this country, its findings are of singular importance. Some of its findings nullify many of the popular misconceptions concerning the area of Personal Injury Actions. For example:

1. It is the common belief that awards for General Damages in this country are significantly higher than in the U.K. Deloitte and Touche found that 85% of High Courts awards for General Damages fell within the range of the U.K. guidelines.
2. There is a perception that young people are being denied employment because of the high premia charged in respect of young drivers. Deloitte and Touche found that motor insurance costs is not a significant barrier in the aggregate to young people entering the job market.
3. There is a conception that if one compares like with like, the cost of employer liability insurance is significantly higher in Ireland than in the U.K. Deloitte and Touche found that 26% of the difference in cost between the two jurisdictions reflects differences in the composition of the Irish and U.K. labour forces, as between higher risk production and lower risk service activities.

There are a number of other interesting points which can be extracted from thisreport and which should form the basis of any future discussion on this topic.

For example, the report found that there has been an increase in the costs of employer liability and motor claims between 1985 and 1994 (which, incidentally, increased at the same rate here as in the U.K.). That increase is attributed to three matters: the impact of medical costs; the relationship between Special Damages awards and General Damages awards and the high level of legal costs, particularly in smaller claims.

The Impact of Medical Costs

It would not be appropriate to make any comment on the level of charges made by Doctors, Hospitals or Paramedics for the services which they render. There is, however, one aspect of this matter to which it is appropriate for me to refer. Every citizen of this country is entitled to free medical treatment. Under section 2(1) of the Health Amendment Act, 1986 a Health Board is required to make a charge on a person who has an entitlement to damages or compensation arising out of a Road Traffic Act in respect of In-Patient services or Out-Patient services. The charges made by the Public Hospitals under this section are what they term the "economic cost" of maintaining a Patient per day. This is arrived at by dividing the entire cost of running the Hospital by the number of beds in the Hospital and then dividing that figure by 365. In practice, that can mean that a fee paying patient in the private part of a Hospital can be charged less than the victim of a road traffic accident, who is treated as a public patient in a public ward. It seems to me that, at least in part, we are seeking to fund our Health Services by this device. It is important that when people are talking about increases in costs of motor claims, that this factor be highlighted, so that the responsibility for this particular increase would lie where it is appropriate for it to lie.

The High Level of Legal Costs

One of the temptations in facing this problem is to concentrate on what other

people might do to remedy the problem, rather than looking at what one might do oneself. Conscious of this temptation, the Bar Council specifically asked Deloitte and Touche when dealing with the issue of legal costs, to separate the issue of barristers fees from the other components making up the phrase "legal costs". It can be seen, from the cases studied by Deloitte and Touche (which were provided by employers and insurance companies, presumably being cases in which either the employer or insurance company felt that legal fees were too high), that the fees paid to barristers represent only a small percentage of what is termed as "legal fees".

This fact directly contradicts popular perception. Deloitte and Touche make it abundantly clear that barristers fees are not responsible for high legal costs incurred in a case. At the moment the term "legal costs" covers the fees paid to barristers, solicitors, engineers, architects, accountants, actuaries, doctors, private investigators, agricultural consultants, rehabilitation experts etc. A breakdown of these figure would be worthwhile in demonstrating the value and cost of various services concerned and placing barristers fees in the context of other services provided.

While it is clearly important to ensure that costs are kept as low as possible once legal action has been introduced it is equally clear that the most effective way of reducing insurance costs in this country is by the elimination of accidents and, therefore, claims. At the time of our submission to the Deloitte and Touche survey the statistics available from the National Authority for Health, Safety and Welfare at work were depressing. There were fourteen work place fatalities in 1986 and sixty-four work place fatalities in 1993. During the same period, however, the number of factory inspections declined by 35.7 %. In 1993, 3,543 factory accidents were reported to the Authority, but only 38 prosecutions ensued. The average penalty for convictions was £426. In light of these statistics, the Bar Council recommended:-

1. That every workplace should expect to undergo a full safety review every two or three years.
2. That a Safety Certificate had to be issued by the Authority before insurance cover could be granted, and
3. That breaches of Regulations and failure to have proper workplace insurance were to be rigorously prosecuted.

More recent figures now available show 59 workplace fatalities in 1996, 4,746 factory accidents were reported and 24 prosecutions ensued in that year.

There is one reported instance in which a sporting organisation required a renovation of one of its facilities. The organisation required it to be done quickly, so that revenue would not be lost from that facility. Because of the speed required there was, apparently, a higher insurance premium demanded, because the chances of fatality on the site was greater. To their shame, the Sports Authority accepted the risk and paid the higher premium. If that is the mentality displayed to the health and safety of workers, then it is hardly surprising that there are a multiplicity of accidents and claims in this country. In saying that, however, I do not wish to take away from the considerable efforts which have been made by the FUE and IBEC among others for improving their members' attitudes towards workers safety. Progress has been made on this front in recent years. It is, however, also true to say, that were it not for the Trade Union Movement in this country down through a long number of years, the health and safety of our work force would be considerably worse off than it is, even at the present. Everyone who works in the field of Personal Injury cases, however, knows that there is considerable work still to be done. Day after day, unnecessary accidents are allowed to happen. This is not just an economic problem resulting in high insurance premiums. This is a human problem which results in hardship and misery. It is a problem which must be addressed.

Proposals for Change

Deloitte & Touche recommended "that subject to detailed examination a Personal Injuries Tribunal should be established to reduce settlement costs in Personal Injury cases where the amount at issue is small, liability is not in dispute and both sides are in agreement to place their case before it". This option has now been considered by a working group established on foot of the Deloitte and Touche recommendation. This working group which consisted of Mr. Dan McAuley, Mr. Tom Wall of ICTU and Mr. Tom O'Malley, law lecturer, UCG, confined itself in its first phase to examination of a personal injuries tribunal dealing with claims arising from occupational injury. The working group recently reported and its majority report has recommended the establishment of a court-based Occupational Injuries Mediation Service as an independent office established within the framework of the courts, to implement a mediation-oriented system of claims for occupational injuries. It is suggested that the service should be authorised to deal with claims for compensation of up to £50,000 in which there is no substantial dispute between the parties on the issue of liability. A limitation period of 12 months from the date of the injury is proposed for the submission of claims. Applications would be dealt with initially by the Director of the Board who would submit the matter to a mediator who will endeavour to reach agreement between the parties. Where agreement is not reached the mediator shall recommend an award for acceptance by both parties. If one or other party does not accept the award within 30 days, the matter can be referred to the courts or referred, with the agreement of both parties, to arbitration. The decision of the arbitrator will be binding subject to appeal on a point of law to the High Court and subject to the general supervisory jurisdiction of the same Court under its powers of judicial review. It is proposed that at both mediation and arbitration hearings the parties shall be entitled to be represented by a person of their choice, including a lawyer.

These proposals are designed to introduce simplified and speedy procedures to deal with appropriate issues through conciliation based upon the consent of the parties. The proposed system meets the necessary criteria of consent, justice and economic sense which should inform all changes in this area and accordingly receives the support of the Bar Council.●

LAW AND THE MEDIA, *by Marie McGonagle, Roundhall, Sweet & Maxwell, £38.00*

The relationship between the media and the law has become a complex and at times controversial issue in Ireland, as elsewhere. Newspaper editors and broadcasters complain frequently about what they see as overly restrictive legal standards - notably in the areas of defamation and contempt. They also argue that the high level of awards in defamation actions is putting a brake on journalistic endeavour - to such an extent as to risk undermining the media as one of the essential pillars of democracy.

"Law and the Media - The Views of Journalists and Lawyers" is a collection of essays - some (though by no means all) of which are revised versions of presentations made to a Bar Council conference on the subject in late 1993. The essays amount to a dialogue of sorts between experts and practitioners in the field of the media and media law. There is, in some cases at least, a very real attempt here to grapple with the issues, rather than simply sound the battle drum.

Newspaper editors Conor Brady (The Irish Times) and Aengus Fanning (The Sunday Independent), along with Joe Mulholland of RTE, present the case for reform of our libel laws. Their frustration, particularly at the high level of libel damages, is perhaps predictable. Mr Brady writes of a "compo" syndrome. In Mr Fanning's case the subject is something of an obsession. His contribution is essentially a full frontal assault on what he sees as inordinately high awards, and he also indulges himself in a few swipes at the legal profession. Those who attended the conference in November 1993 will recall Mr Fanning's presentation. Unfortunately, readers of the book will not have the benefit of the robust replies given on that occasion by certain eminent members of the Bar!

Bickering aside, there are issues of fundamental importance raised in these essays. That the media editors are keen to defend their interests is not surprising. But this ought not to obscure the fact that their arguments are compelling, and

deserve to be addressed. In a complex and rapidly-changing society, where questions arising for public debate often require the most vigorous and detailed journalistic investigation, is it right that we should be content with libel laws which are perhaps more suited to an earlier era? And is there not a case, as proposed by the Law Reform Commission, for a new or an extended scheme of remedies? These might include, in addition to or as an alternative to damages, a more formalised system of retractions. There could also be the option of seeking a declaratory judgment from a court that a particular statement was false and defamatory, and/or a correction order.

The case for reform has been put cogently and carefully by Marie McGonagle in her own Textbook on Media Law (1996). In the volume under review here, she joins with Kevin Boyle in a shorter summary of the relevant law, the experience in practice (including some interesting statistics derived from High Court records) and the arguments for change. Among these is the proposal, also canvassed by the Law Reform Commission, for a defence of reasonable care, which McGonagle regards as essential to the operation of the media. She adds that "any move away from strict liability, however limited, is an improvement", and very much in line with the law in other European countries, such as France and Germany. However, it falls short of the European Convention on Human Rights, which refers at Article 10 thereof to the centrality of freedom of expression, "which must only be restricted to the extent necessary in a democratic society for the protection of, inter alia, reputation".

Kevin Boyle and Marie McGonagle also collaborate on a chapter dealing with contempt of court - another area ripe for reform in their view. There is a clear summary of the historical position, the current state of the law, and the experience in other jurisdictions. Running through this discussion is the suggestion that the courts, in common with many other institutions in the modern world, need to come to terms in a more convincing manner with the implications of technological advances in communications. It might be noted here that the need for more openness on the part of the courts and the legal system also appears to be a welcome preoccupation of the Courts Commission chaired by Mrs Justice Denham.

Boyle and McGonagle commend the approach taken by some Judges in recent years, where they have been less willing to make a finding of contempt on the part of the media. The authors mention an instance in 1992 when, in response to inaccurate reporting of an incest trial, Mr Justice Carney made the transcript of the trial available to the media so that they could correct their original reports. In general, they perceive an emerging view that the Irish public (and presumably by extension, Irish juries) are now quite media-wise, able to make up their own minds in a discerning manner, without being overly influenced by what they read, see or hear in the media.

The book also includes a contribution from Lord Williams of Mostyn on the subject of the application of the sub judice rule in the UK jurisdiction. In two final chapters the authors Eoin O'Dell (on Privacy) and T. John O'Dowd (on Broadcasting Policy and European Law) provide illuminating and detailed accounts of topics which are crucially important in any review of contemporary media law. Along with the detailed accounts given of the law of defamation and contempt of court to which reference has already been made, these two final chapters will be of enormous benefit to lawyers working in the field.

In general, this volume of essays is a hugely valuable and timely contribution to public debate, as well as to discussion amongst lawyers and media practitioners.

n conclusion, however, it is worth noting hat public debate generally is somewhat mbalanced on these issues. The advo-ates of a more liberal regime include ome strong and powerful interests, not east the Independent Newspapers. There s an obvious need for those who would rgue for a defence of the status quo (and learly such people exist, and they nclude many politicians) to be more orthright and visible on these issues, so hat a real debate can take place.

- Alex White, Barrister

THE RIAI CONTRACTS, A WORKING GUIDE, *by David Keane. £40.00*

t is hard these days to keep pace with the umber of text books being published on rish legal subjects. There are few awyers who are not in receipt virtually very week, of some form of promotion-l brochure from the large legal publish-ng house advertising the advantages of et another treatise. While this growth in egal erudition is welcome it is difficult to dentify which books will be of benefit to he practising lawyer. That problem does ot present itself in the case of David Keane's book. What marks out Mr. Keane's book as being special is the fact hat it is written by an author with many isciplines and directed at an audience vho posses different disciplines. Mr. Keane is an architect, a barrister and a easoned arbitrator in the prolific area of uilding contract disputes. Thus his pub-ication is a rare synthesis of the skills of he lawyer, the architect and the arbitra-or. It is the interaction of these various kills by the author that contributes to a ublication that is both practical and the-retical in its content.

Traditionally the lawyer, and I suspect the iligent architect, has recourse to English ext books such as Hudsons "Building nd Engineering Contracts" when con-ronted with a legal problem in a building ontext. But the quick and easy reference n such textbooks to some obscure nglish case - usually decided in the last entury - has become a poor substitute for egal research of Irish precedent. It is a urprising feature of this area of the law hat there are many reported Irish cases.

A brief perusal of John Leyden and Michael McGrath's "Irish Building and Engineering Case Law" demonstrates this. However, Mr. Keane has pulled together the relevant Irish case law and referred to it on a topic, and standard contract clause by clause, basis. This approach by the author makes research a much easier and more fruitful task.

The layout of the book is such that the reader can easily identify an area of interest by reference to the clause in the RIAI or GDLA or SF88 contract that is the subject of his concerns. The reader in the introductory section is given a broad and helpful analysis of the various duties owed by the professionals involved in the building business. There is also a helpful analysis of the principles applicable to the law of negligence and the limitation of actions. Thereafter each clause in the RIAI, GDLA and SF88 contracts is analysed, commented upon and legally assessed. At the end of each chapter Mr. Keane has set out a very helpful and lucid summary of:

(a) the architects responsibilities,
(b) the contractors responsibilities and
(c) the full citations of the cases referred to.

It is this executive summary that, I believe, will represent the greatest contribution of this book to the practising architect, the builder and the lawyer. While hitherto professionals in the building industry have used as their bible Hudson (even if that textbook can be quite obscure on occasion), I believe that in future, in Ireland, it will be to David Keaneís book that they will refer.

When dealing the with topic of "Delay and Extension of Time" Mr. Keane refers (at page 222) to one of the leading decisions, in this area of law of the Court of Appeal in the United Kingdom; Peak Construction (Liverpool) Limited v. McKenney Foundations Limited (1971) July 1 CA Unrep. It is a measure of the depth of the authorís erudition that he has access to unreported Court of Appeal decisions which usually come out in transcript form and are seldom available to Irish legal practitioners. However, I am pleased to advise that the Peak decision is now reported in Vol. 1 of the Building Law Reports. Mr. Keane is to be commended for his industry and the clarity with which he sets out the relevant contractual and legal principles. I have no hesitation in recommending this book to the Bar.

- Rory Brady, Senior Counsel

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