The Bar Review

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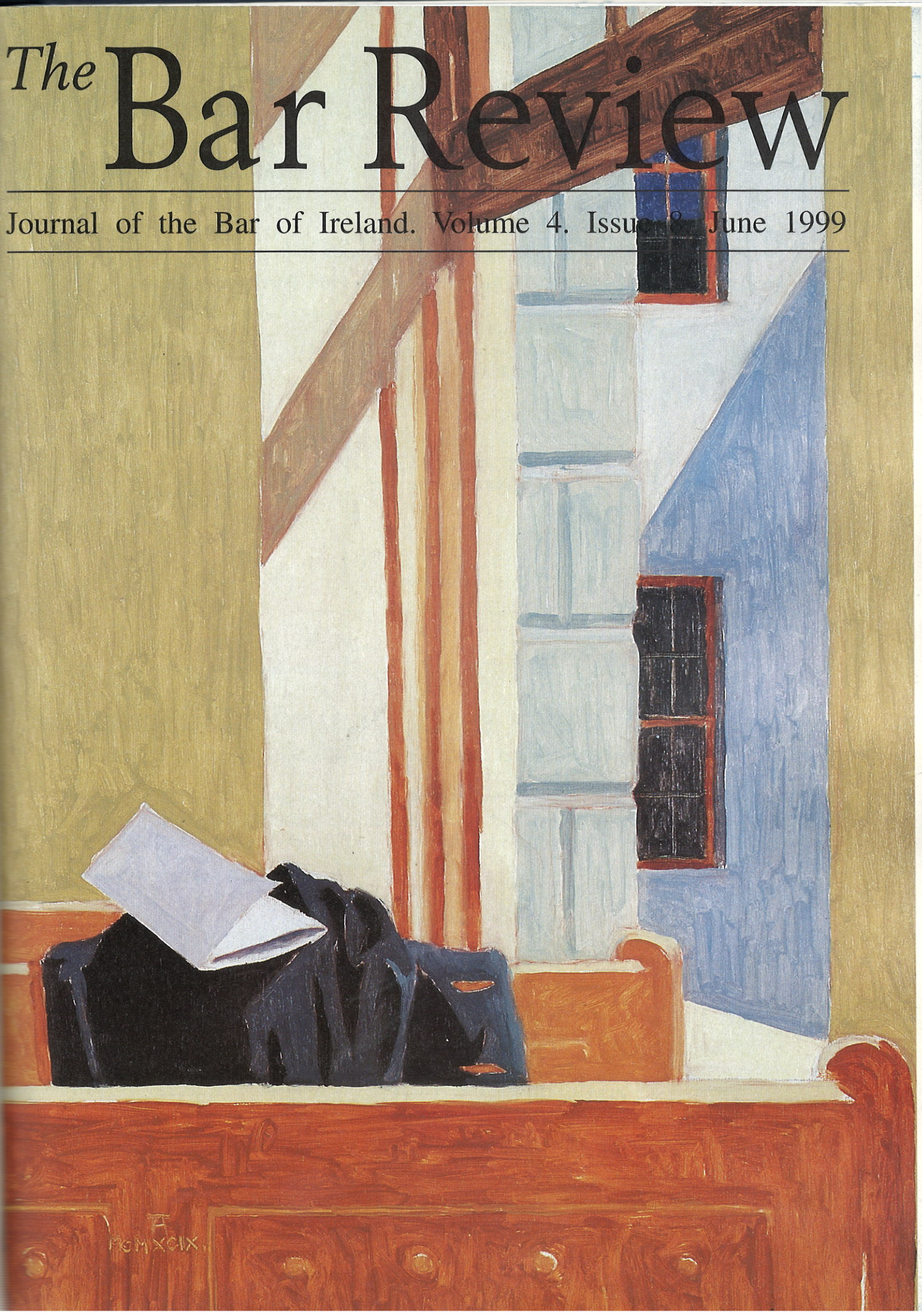

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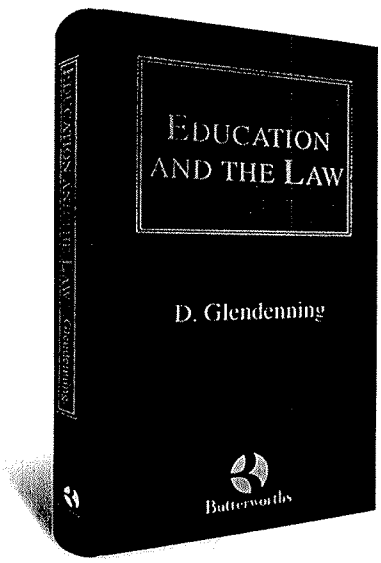

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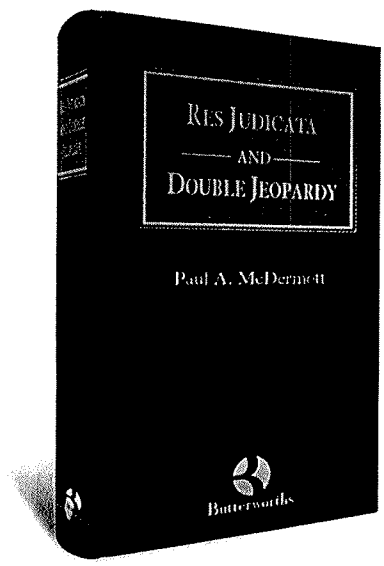

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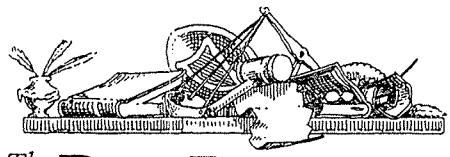

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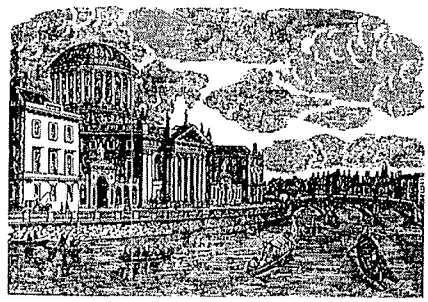

Clasp Celebrates 10 Years with Summer Party On 23rd July, 1999 In the Law Library, Distillery Building, Church Street At 5 o'clock

CLASP was founded in 1989 by Barristers and Solicitors who were anxious to alleviate the plight of those under-privileged young people who lived in the vicinity of the Four Courts and Blackhall Place. Since its foundation, CLASP has raised over £100,000 with its popular Christmas and Summer parties as well as through its annual Sponsored Walk. Charities which have benefited from CLASP fund-raising activities include the Salvation Army Hostels, The Merchant's Quay Project, Crosscare and the work of Fr. Peter McVerry, amongst others. In that time, CLASP is grateful for the gracious support of the Bar Council and the Incorporated Law Society.

Tickets for the Summer Party are available from the following in the Law Library: Rita Walsh, Peadar O'Reilly, Dermot Manning, Brona Cousins and Neil O'Driscoll.

●

New Institute of Criminology for UCD

A generous private donation has facilitated the creation of an Institute of Criminology at UCD, according to the new UCD Law Alumni Journal. The creation of the Institute is in part a response to the need for sustained and scientific study of crime in Ireland and will enable crime in all its manifestations to be studied and analysed from a wide range of perspectives. The primary objective of the Institute will be to engage in high quality, interdisciplinary research on crime and punishment in Ireland and to develop a close working relationship with governmental, professional and other bodies and agencies actively involved in the prevention, detection and punishment of criminal conduct.

ICCL Memorial for Rosemary Nelson

Ms Gareth Pierce, Solicitor, talks with The Attorney General, Mr. David Byrne. S.C., at the recent ICCL memorial for Rosemary Nelson, held in Blackhall Place.

John MacMenamin, S.C., speaking at the recent ICCL memorial for Rosemary Nelson, held in Blackhall Place.

Speaking for the Children

It has been said that respect for human rights begins with the way a society as a whole cares for its children. While Irish people clearly cherish children, Irish society as a whole has been less consistent in its care of children.

Children and children's issues have been starkly apparent in the legal system of late. In the media, there have been highly publicised cases of child sexual abuse and other forms of child abuse. But children are involved in many ways in our legal system. There are questions concerning the status of children, such as adoption, guardianship, custody and access. Children come into civil cases as plaintiffs when they are injured or damaged. They come into criminal cases either as victims of crime, or, sadly, as accused perpetrators. And especially they come into family law cases, either where there are disputes between parents regarding the care and custody of children or when there are disputes between parents and the State regarding who is fit to care for children.

And while there is a plethora of laws dealing with children's issues, what is lacking is a cohesive policy regarding children. One area in which this lack of a cohesive policy is particularly evident is the law concerning the appointment of representatives for children who are, for one reason or another, involved in the legal system.

There are two possible forms of representation for a child in Ireland: either a guardian ad litem or a solicitor, who may, if necessary, instruct counsel. These forms of representation are not mutually exclusive. However, although the law allows for the possibility of such appointments, it does not provide any answers to the many crucial questions that arise in connection with the representation of children in legal proceedings.

Efforts must be made to resolve issues such as: Which children are entitled to representation? What form should that representation take? Should a child's wishes be represented to the court, or the child's best interests, or both? What are the duties of such representatives? What are the liabilities of such representatives? What training is required? What facilities should be available to children's representatives? Should children be represented by paid representatives, or by volunteers? Should representation be limited to the duration of the legal proceedings, or should it continue until the child reaches majority?

These questions are now being considered in detail, both by members of the Bar and members of the Incorporated Law Society. Increasingly, there is extensive international co-operation amongst lawyers. Recently, the Family Lawyers' Association held a seminar to listen to the views of an American specialist in paediatric law. The American legal system has been wrestling with the same issues regarding the representation of children as the Irish legal system, but has the benefit of being at it longer and having broad experience across the 50 states.

A perfect, unified policy will not be achieved overnight. . A good beginning would be to maintain statistics on the level of representation of children in legal proceedings.

In order to develop a unified policy in the longer term however, it is clear that there needs to be broad, multi-disciplinary co-co-operation amongst government, the legal profession including the judiciary, the social services, the medical profession, and other concerned voluntary groups.

Investigating Child Abuse

M.Q. v Robert Gleeson and the City of Dublin Vocational Educational Committee and Frances Chance and the Eastern Health Board

TERESA BLAKE, Barrister

This article exam*ines the High Court decision of M.Q. v Robert Gleeson and the City of Dublin Vocational Educational Committee and Frances Chance and the Eastern Health Board* Barr J.[1](unreported 13th February 1997) hereinafter *MQ*. It considers the relevance of this judgement for health boards and its implications for the manner in which investigations of allegations of abuse ought to be conducted. It concludes that *MQ* states important minimum standards in respect of the investigation of abuse by health boards. The comprehensive judgement deals with related significant matters of recording and dissemination of information relating to allegations of abuse and the matter of suspension of an alleged abuser.

I. The Nature of the Case

This was a judicial review of the actions of the Eastern Health Board [EHB] and the City of Dublin Vocational Educational Committee[VEC]. The applicant *MQ* was a participant in a VEC course which lead to a Certificate in Social Studies and a Community Care Award which would qualify him to take up a position in child care work or to proceed to further qualification in social work.

On learning of his involvement on the course, the EHB concluded, in the light of their experience of him and the numerous allegations which had been made about him, that he was not a suitable person to engage in child care work, a conclusion strongly contested by the applicant. The EHB had received many complaints and matters had been brought to its attention about the alleged conduct of the applicant towards his own children and his partner's children between 1973-1994. The applicant had been in a long-term relationship with MG, who had three children in care when she commenced her relationship with *MQ* The couple had three children together, K born in 1974, A.M born in 1975 and M born in 1981. The Court noted that:

> *'Although some of the complaints are of a grievous nature, none appears to have been put to the applicant at any time prior to January 1996; no complaints were referred to the police by the EHB for investigation nor did the board seek to take any of the applicants children into care by reason of his alleged misconduct towards them. A.M. who was born with cerebral palsy, was seriously disabled physically and mentally all her life. It appears to have been the opinion of the EHB that having regard to the straightened circumstances of MG and the applicant , and their inexperience in dealing with a severely handicapped child, it was desirable that A.M. should be taken into care. However, no such order was made and she remained in the care and custody of her parents until she died in 1993.*[2]'

The EHB formed an opinion it had a statutory duty to inform the VEC of the concerns it had and recommend *MQ*'s removal from the course. At the time of the EHB action to remove him, *MQ* was on placement as a play assistant in a play centre in the Dublin area. On receiving the information from the EHB, the VEC removed him from the course. The applicant challenged

- the right of the EHB to furnish information about him to the VEC with a view to having him excluded form the course
- the decision of the VEC to act upon the allegations made about him without giving him an opportunity to defend himself and to exclude him from the course.[3]

II. The Matters Addressed by the Court

In it's judgement, the Court held that the applicant was entitled to proceed against each respondent by way of judicial review and proceeded to deal with the following:

(a) The Scope of the Duty owed by a Health Board .

The court referred to Part II of the Child Care Act 1991.[4] It noted that health boards are the public bodies having responsibility for children in their respective functional areas who to their knowledge are not receiving adequate care and protection. Section 3(1) provides-

> *'It shall be a function of every health board to promote the welfare of children in its area who are not receiving adequate care and protection'*

The Court acknowledged the Act confers wide powers on a health board to assist it in the protection and care of children in need of such help. It noted the Act is silent on the obligations on health boards in taking appropriate steps to protect unidentified children who may be put at risk in the future by a person who to the knowledge of the board represents a potential hazard for children who may come under his /her care.[5] The specific statutory duty on a health board is directed towards identifying categories of children to which a health board owes a duty of care under the Act. Mr Justice Barr held

'The categories thus identified include children who by reason of a potential situation in the future are liable to require protection at that time from a prospective danger the nature of which is presently known or reasonably suspected by a health board. It is present knowledge or reasonable suspicion of potential harm which is the essence of the Health Board's obligation to children.

In my opinion once a situation comes to the knowledge of a Health Board relating to children being put at risk, there is no real distinction between present and future risk'

Further he held-

'I have no doubt that in the exercise of their statutory function to promote the welfare of children, health boards are not confined to acting in the interest of specific identified or identifiable children who are already at risk of abuse and require immediate care and protection, but that their duty extends also to children not yet identifiable who may be at risk in the future by reason of a specific potential hazard to them which a board reasonably suspects may come about in the future.'[6]

Referring to the statutory duties of health boards and the requirement of fair procedures in the handling by a board of complaints of child abuse he stated:

'Subject to the proper exercise of its functions in the matter of complaints about child abuse and its duty to afford the applicant the benefit of fair procedures, I have no doubt that in the instant case, on the premise that it had taken appropriate steps to inform itself, the board would have been entitled to form an opinion that the applicant was unfit for child care work and would have had an obligation under Section 3(1) of the 1991 Act to communicate its opinion to the VEC with a view to having him removed from the social studies course on which he was engaged.'[7]

The Court noted a health board when investigating such complaints does not have to wait until a child is abused.

'On the contrary, on becoming aware that he proposed to embark on a career of child care and was attending an educational course to qualify for such work, the board had an obligation to protect children who in its considered opinion would be at risk of abuse by the applicant should he carry out his stated intention of embarking on a career in that area. Such an obligation would require the communication by the board of its opinion to the VEC coupled with a request to remove him from the course in question'.[8]

III. Investigation of Allegations of Child Abuse

(a) The Evidence of Abuse.

In *MQ* the court acknowledged the fundamentally different roles of health boards and the DPP. The court noted the evidential difficulties with regard to proof of abuse in law by a particular suspect. It noted,

'There are many circumstances which may indicate that a particular person is likely to be (or to have been) a child abuser, but there is insufficient evidence to establish such abuse in accordance with the standards of proof required in a criminal or civil trial. For example, the abused child through fear, family pressure, age or mental capacity may be unable to testify against the abuser or, in the case of repeated physical injuries sustained by a child, there may not be sufficient evidence to rule out accidents and to establish proof of abuse in law by a particular suspect. However there may be evidence sufficient to create, after reasonable investigation, a significant doubt in the minds of competent experienced Health Board or related professional personnel that there has been abuse by a particular person. If such a doubt has been established then it follows that a Health Board cannot stand idly by but has an obligation to take appropriate action in the circumstances where a person who the board reasonably suspects has indulged in child abuse is in a situation, or is planning to take up a position, which may expose any other child to abuse by him/her'.

Barr J, sets the requirement for a health board to conclude there has been abuse as comprising of two elements:

- evidence sufficient to give rise to a reasonable suspicion to a competent experienced professional that a particular person has abused and
- evidence that, that person is in a situation which may expose another child/children to abuse by him or her.

An important requirement for a health board to satisfy is to ensure its investigation is conducted by an appropriately qualified person. Further, that person must draw conclusions that are based on evidence.

The Court noted the sharp conflict between the Board and the Applicant as to the allegations of physical and sexual abuse and negligence made against him[9].

The Court accepted that the board had an abundance of information which, if found to be credible after proper investigation, would lead to the conclusion that the applicant was not suitable for a career in child care. It also noted,

'there was no proof of any of the allegations of child abuse made against the applicant and it also would have emerged on investigation that he had not been confronted with any of them.[10]

(b) Reasonable Investigation

The first requirement on a health board is to carry out a reasonable investigation of the allegations referred to it. The requirements of such an investigation were stated by the Court as follows:

'In the ordinary course in serious cases the complaint should be put to the alleged abuser in course of the investigation and he/she should be given an opportunity of responding to it. However, an exception in that regard may arise where the board official concerned has a reasonable concern that to do so might put the child in question in further jeopardy as, for example, where the abused child is the complainant. An obligation to offer an alleged abuser an opportunity to answer complaints made against him/her would arise in circumstances where the board contemplates making active use of the particular information against the interest of the alleged wrongdoer-

such as publication to a third party as in the present case or embarking on proceedings to have a child or children taken into care[11]

Such an investigation would as a minimum require the Health Board to do the following:

- Take all reasonable steps to interview the alleged abuser
- Furnish him/her before the interview with notice of the allegations in short form
- Give him/her reasonable opportunity to make their defence
- Carry out such further investigations as might appear appropriate in the light of the information furnished by him/her in response to the allegations
- Form no opinion as to the complaint until those investigations had been made and the information derived as a result had been carefully assessed.

(c) The Exceptional Circumstances.

The only situation in which the above investigation procedures can be derogated from is clearly stated by Barr J. It is where there is a reasonable concern that to put the allegations to the alleged abuser *might put the child in question in further jeopardy ,as, for example, where the abused child is the complainant'*

(d) Taking Care Proceedings

The remarks made in the judgment in regard to the taking of care proceedings relate to the 'functions'' of a health board under the Child Care Act, 1991, specifically a health board's powers and duties to apply to the District Court for an order under the Act where it is considered necessary to do so for the protection and welfare of a child/children[12]

(e) Checking the Relaibility of Information before Referring Elsewhere.

In *MQ*, Barr J, having referred to the *two cardinal rules of natural justice* [13], emphasised the Health Board's duty of fairness also by reference to the need to consider-

- the gravity of the allegations made
- the serious consequences for the applicant
- the harm done by publication
- the need to check information is accurate before referring on elsewhere.

The Court stated as follows,

'A Health Board ought always to remember that such complaints, if unfounded have of their nature a potential for great injustice and harm, not only to the person complained of but perhaps also to the particular child or children sought to be protected and others in the family in question. A false complaint of child abuse, if incorrectly interpreted by a health board, could involve the destruction of a family as a unit by wrongfully having the children it comprises taken into care. It may also destroy or seriously damage a good relationship between husband and wife or long-standing partners' [14]

Where a health board has carried out all of the steps described above and has formed the opinion that the allegations are well founded, it has an obligation to take appropriate action, including making a report to the Gardai and/or others.

The *MQ* judgement makes clear the significance of carrying out an investigation in a certain manner. It states the Health Board must come to a conclusion/decision on the allegation before it can refer it on to the Gardai or another body.

Up to now, health board personnel have been carrying out investigations by reference to the Department of Health *Child Abuse Guidelines (1987)* and the *Notification of Suspected Cases of Child Abuse between Health Board's and Gardai (1995)*. These guidelines are currently under review. Any new guidelines /protocol to be introduced must regard the *MQ* decision as the statement of the minimum standard rules in respect of investigations of allegations of abuse.

(f) Recording Information relating to the Investigation of Alleged Abuse.[15]

Arising from a health board's obligation to investigate child abuse is its obligation to keep records of such allegations. Barr J referred to the obligation to create such records as being *in the interest of professional competence*. Proper record keeping of such an investigation is also necessary from the alleged abuser's perspective, as a document of public record is being created. The objective should be to create a fair, reasonable assessment of each complaint or finding about the alleged abuser.

The records of an investigation into alleged abuse should contain the following:

- A reasonable investigation of each complaint by an experience officer of the board
- The record should include factors favourable to the alleged abuser
- The Health Board's assessment of the weight attaching to each allegation should be stated and objectively based.

(g) The Duty Owed by the VEC.

The principles of natural and constitutional justice applied to the manner in which the VEC dealt with the information referred to it by the EHB. The Court noted that *MQ* was a student in good standing with them. They were required to afford him the benefit of fair procedures in their assessment of the complaints made against him by the EHB and in the context of his continued participation on the social studies course. Their investigation should have covered the following:

- To obtain details of the charges against him.
- To inform the applicant of them.
- To give him a reasonable opportunity to respond.
- To decide the question posed by the EHB in the light of the information and the applicant's responses to it.

The court held the VEC could rely on the EHB opinion if satisfied it was reasonably based, unless the applicant's defence established there was no reasonable justification for it or at least there were serious grounds for doubting its validity.

Before acting on allegations of abuse from a health board, a party to whom the allegations are communicated must examine them in the context of their knowledge of the alleged abuser and be satisfied that they are reasonably based. taking account of the alleged abuser's defence

(g) The Suspension of the Applicant from His Course.

In respect of the actions of the VEC in removing *MQ* from the course *until he could prove his suitability to be reinstated* the Court stated:

'In short the ball was played into the applicant's court but he was being put into an impossible situation as he was not informed of the allegations against him and therefore could not respond in a meaningful way [16]'

The Court stated suspension should

only be resorted to in exceptional circumstances. Where it is necessary for good reason, its extent should be no further than is necessary in the circumstances. The court accepted there was a reasonable argument to be made that *MQ*'s removal from the play centre in the final week of his placement was unjustified as it was established that the children at the centre were not at risk from him. In the circumstances, the Court found the suspension was wider than necessary, was unfairly harmful to the applicant and, in the circumstances, was unlawful

IV. The Judgement of the Court

The High Court set out in detail what it regarded as the mistakes made by the Health Board and concluded in respect of it's actions –

> *'In the light of the foregoing, the conclusion is inescapable that the EHB failed in its duty of affording the applicant the benefit of constitutional justice and fair procedures in not furnishing him with information as to the charges against him; in not giving him an adequate opportunity to defend himself; in not taking reasonable care in checking the accuracy of information furnished to the VEC, and in taking a crucial decision adverse to the applicant regarding his suitability for child care work without first taking the foregoing steps and reviewing the matter in the light of whatever defence he might raise.'*[17]

Mr Justice Barr held that:

- the EHB had failed to apply fair procedures and to comply with the rules of natural justice in regard to the manner in which it had passed information about the applicant on to the VEC.
- the VEC's decision to remove the applicant from his course was unlawful.

Comment

This is an extremely important judgement. It demonstrates the application of public law requirements of fair procedures to child protection and welfare matters in a thorough and comprehensive manner. The following themes are clear.

(a) Child Protection Perspective

– The law relating to a health board's obligations concerning a future risk posed to children and investigation of allegations of abuse by reference to a health board's obligations under Section 3 (1) of the Child Care Act, 1991, is set out clearly.

The nature of the evidence and level of suspicion required to trigger further action by a health board is as follows:

– *Immediate action on the part of a health board.* Once a health board has present knowledge or reasonable suspicion of potential harm to a child / children it is required to act to protect them. It cannot stand idly by.

– *Exceptional circumstances.* The exceptional circumstances recognised in the judgment where allegations need not be put to an alleged abuser reflect the provisions of Part 111 of the Child Care Act, 1991 relating to the protection of children in emergen

– *Allegations of abuse.* the judgment recognises the importance of evidence and the proper interpretation of it as being a significant component in child protection / family work undertaken by health boards.

(b) Minimum standards and Fair Procedures

– The minimum standards a health board must comply with – the requirements of natural and constitutional justice – in respect of the rights of an alleged abuser are well stated.

– The requirements regarding the recording of an investigation set a good minimum standard for the creation of such records.

(c) Dissemination of Information / Referral on to Another

– The circumstances under which a health board may disseminate information is well stated.

– The circumstances under which action against a suspected child abuser, such as suspension from a child-care course, might by justified is also well stated.

– The procedural rights of a suspected abuser in the context of a matter being referred to another are dealt with in a thorough manner. ●

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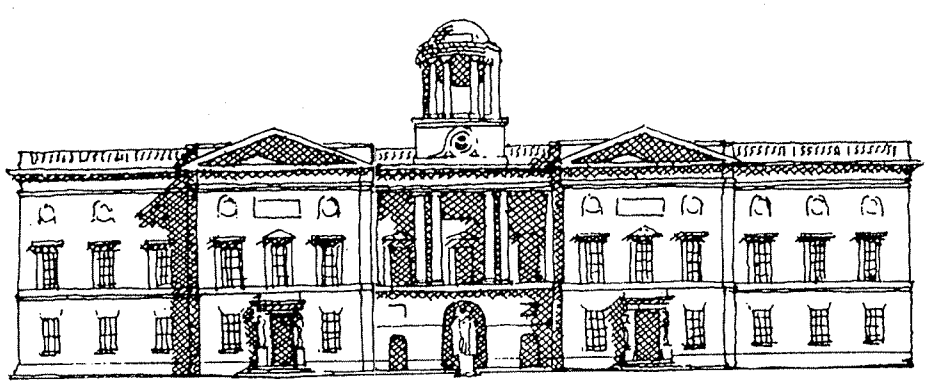
1 There was no Irish authority on point. Several English cases were opened.
2 See page 3 of the judgement.
3 MQ had a good record with the VEC.
4 Child Care Act (No. 17) 1991.
5 See page 18 of the judgement.
6 See page 19 of the judgement.
7 See page 20 of the judgement.
8 see page 20 of the judgement.
9 See page 26 of the judgement.
10 See page 29 of the judgement.
11 see page 22 of the judgement.
12 Sections 13, 17, 18, 19 of the Child Care Act, 1991.
13 Barr J, relied on McDonald v Bord na gCon [1965] IR217; The State (Gleeson) v Minister for Defence [1976] IR 280 and Beirne v Commissioner of An Garda Siochana [1993] ILRM 1
14 see page 23 of the judgement.
15 See page 21 of the judgement.
16 See page 34 of the judgement.
17 See page 33 of the judgement.



Copyright and Related Rights Bill 1999:

Defences to Copyright Infringement

PAULINE WALLEY, Barrister

This article is devoted to how the Copyright and Related Rights Bill 1999 deals with defences to copyright infringements. In order to examine this, two preliminary issues must be addressed. First, what are the existing defences to infringements under the current legislation, and to what extent, if any, are those defences modified or amplified under the new Bill, and are they likely to remain post enactment? Secondly, it is essential to recall what new rights the Bill confers because all of the defences, both existing and new, must be viewed in the light of the expanded rights. The structure of this talk will thus focus first on the existing infringement provisions before moving on to discuss the draft provisions in the Bill.

Exisiting Defences Under CopyRight Act 1963

> "Plagiarise, plagiarise, plagiarise;
> Only, be sure always to call it, please,"Research"."
>
> *Tom Lehrer*

Although the Copyright Act 1963 sets out a number of prohibited acts in relation to works protected by copyright[1], certain acts which might otherwise be infringements, are permitted.[2] These are justified broadly speaking on the grounds of public interest or policy. Some, although not all, are set out in the 1963 Act and have a statutory basis, and these include the significant "fair dealing" exceptions. As Clark points out, many of these fair dealing exceptions owe their origins to the Berne Convention which attempts to strike a balance between right holders and users.[3] Other exceptions have evolved through case law and occupy broad categories which have been identified or stratified by academic writers such as Laddie, Copinger and Clark. It is proposed to deal briefly with these exceptions before examining the issues posed by the Bill.

1. Fair Dealing Defence

The most important exception or defence is that of "fair dealing" in relation to Part 11 rights as set out in Sections 12 and 14 of the 1963 Act. These provide that no fair dealing with a literary, dramatic, musical or artistic work will constitute an infringement of the work in the following situations:

(a) Research or Private Study[4]

Making copies of a copyright work for research or private study is permitted under these statutory provisions. However, the use must be genuine and bona fide for research or private study, and this will be construed narrowly. Courts construe what is private by looking at the volume and quantity copied, and whether the copier obtains commercial as distinct from private benefit from the copying. For that reason, volumecopying in a college or commercial enterprise would not be viewed as fair dealing.

In *American Geophysical Union v. Texaco*[5] , the internal copying of scientific texts properly purchased for internal usage in a large organisation was held not to be a "fair use" in the US. Likewise, in *Basic Books Inc. v. Kingo Graphics*[6,7] , classroom copying on an excessive scale was held to be an infringement. More recently, the case taken by the Newspaper Licensing Authority against Marks and Spencer for internal copying of relevant newspaper articles highlights the same point. Marks and Spencer argued fair dealing both under private research and reporting of current events and lost; the court held that they were obliged to seek a licence from the NLA if they intended to copy and circulate the cuttings.[8]

In Ireland, the issue of classroom and college copying is one where the Irish Copyright Licensing Agency has taken an increasingly strong stance. Since 1992, the Agency has offered licences to educational institutions to regulate the unauthorised copying of Irish publishers, but it is fair to say that this has had a mixed response, and it is likely only to be resolved once widespread litigation has established a baseline. The issue has also arisen in other jurisdictions relating to cramming guides which purport to offer criticism of the text as well as the text of the work itself, but which are in fact bald infringements with little or no attempt at additional narrative or criticism.[9]

(b) Criticism or Review [10]

Making copies of a copyright literary, dramatic, musical or artistic work for the purpose of criticism or review is permitted if accompanied by a sufficient acknowledgement. Thus, substantial extracts may be copied, and even in some case entire pieces, although it must be said that copying an entire piece will usually exceed the fair dealing defence. However, there have been cases where, for example the copying of a whole poem has been justified under this heading.[11] In *Johnstone v. Bernard Jones Publications*, the republication of a pools system or table for comparative purposes was held to be fair dealing as the comparison was genuinely made and not a deliberate attempt to copy the core part of the plaintiff's work.[12] Criticism or review may be entirely hostile and even defamatory and still be deemed acceptable under this defence on the issue of copyright as in the Scientology case of *Hubbard v. Vosper*.[13] This principle has also been applied in cases where news monitoring services "lift" pieces from other sources and supply them on in a commercial manner to other users for commercial benefit.[14]

Sufficient acknowledgement includes

not only identification of the title and source of the work, but also its author.

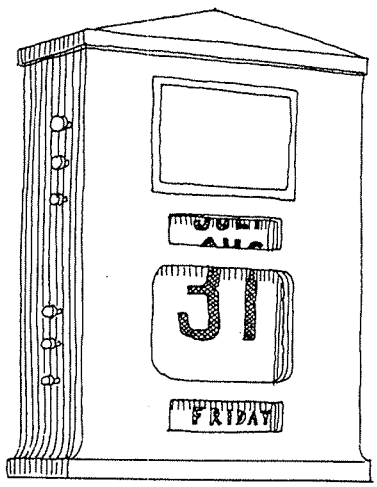
(c) Reporting Current Events

This provides that the reproduction of parts or extracts of literary, dramatic, or musical works for the purpose of reporting current events is permitted providing accompanied by a sufficient acknowledgement. Laddie suggest that a liberal interpretation should be given to this exception as it is in the public interest that it should be informed on matters of public concern.[15] When extracts from the Annie Murphy book were published, this defence was successfully raised to resist interlocutory proceedings. It is arguable whether the extensive recopying of large extracts of the Terry Keane memoirs by newspapers other than the Sunday Times (which had the copyright) would amount to fair dealing under this heading.[16] Under Section 14(2), no fair dealing of an artistic work which is broadcast or included in a film for the purpose of reporting current events is an infringement.

In summary, the fair dealing exception is the most important defence, yet it is difficult to define its exact parameters. The above headings and the wording of the sections in the Act give some guide, but it is largely a question of fact, degree and impression. One has to look at a number of factors including whether the impugned work competes with the original copyright work, and whether it amounts to a substitute[17]. In the New Zealand case of *TVNZ v. Newsmonitor*, the court said one must look at the nature of the work, the use made by the defendant, the quantity of material taken, and the effect of the taking on the plaintiff's work. One must also look at the quantity taken. In some case, a small taking, if essential to the work may be sufficient, whereas in other cases the taking may be much more substantial before the defence runs out.[18] Trade custom or practice may also be considered, although this is by no means an absolute rule.

1.2. Limited Educational Exceptions

The fair dealing provisions of Sections 12 and 14 have also been modified in a limited way for certain specific educational uses. The uses of short passages from a copyright work for inclusion in a



school compilation is permitted providing stringent conditions are met.[19]

Section 53 also permits reproduction of copyright works for the purpose of teaching as long as the reproduction does not take place by a duplicating process such as a photocopier, and reproduction for the purposes of examination papers is also permitted under this section. Finally the reproduction of a literary dramatic or musical work by a class is not an infringement where the performance is for teachers and class members only, or otherwise directly connected with the activities of the school.[20]

1.3. Reproduction for the Purpose of Judicial Proceedings

Reproduction of literary, dramatic and musical works for the purpose of judicial proceedings is not an infringement[21], nor is a report of such proceedings which includes the reproduction. This exception also applies to artistic works[22], films[23], sound and TV broadcasts.[24]

1.4. Express or Implied Contractual Terms

Copyright works are of course subject to the normal rules of contract in relation to the contractual arrangements between parties. Very often, the terms of the Act are overriden by contract, and it is only in the absence of agreement on a specific issue that the provisions of the Act may come into play. If an agreement has an express provision permitting reproduction in a specific way, then obviously this is a complete defence to the use of the work in that way. The difficulty arises when the parties have not expressly agreed as to the permitted uses, or there is ambiguity as to whether such use was authorised. Typically, a creator may grant a licence to use the work in a particular way and discover that the work is being used in other contexts not authorised. The user then claims as a defence either that he is the assignee and not a licensee, or alternatively that the use was impliedly authorised by virtue of the terms of the agreement between the parties. It is a question of construction in each case as to what was agreed, and whether any particular provisions of the Act will operate in the absence of specific agreement.

1.5. Non Voluntary Licensing of Recordings of Musical Works

One of the most significant provisions in the 1963 Act is Section 13 which deals with reproductions of sound recordings of musical works. As mentioned earlier, the author's right to permit or prohibit reproduction is as set out in Sections 7 and 8 of the Act. However, Section 13 contains a very substantial exception to the composer's right to authorise reproduction of his musical work. It provides that "any person may manufacture a record of a musical work or an adaptation of that work as long as the work has been made or imported into the State by the rightholder or with the rightholder's licence". This is subject only to the rightholder's right to a fair royalty, and as Clark points out the principle behind the provision is to permit wide public access to recordings of musical works while giving the creator equitable remuneration.[25]

1.6. Public Performances

As you know, public performance rights are thin on the ground in the 1963 Act, and the Performers Protection Act 1968 has only been utilised for criminal infringements, despite the solid authority of *Rickless v. United Artists Corp.*[26] to support the use of equivalent UK legislation for civil litigation. There are some loosely grouped provisions regarding exemptions for public performance in the 1963 Act which include

- Sound recordings played in clubs or associations which are charitable in nature may not be infringements if certain criteria are met.[27] This provision also applies to places were the inmates or residents sleep as part of the provided amenities. In both cases a charge for admission will negate the

exception unless the fee is exclusively for the charitable body.

- The recitation or reading of reasonable extracts of a published literary or dramatic work with sufficient acknowledgement [28]
- The playing of sound recordings in public or by broadcast or communicated through a diffusion service are not infringements if an equitable remuneration is paid under Section 17(5)
- Newsreel films which are more than fifty years old if broadcast or heard in public are not an infringement [29]

1.7. Public Policy

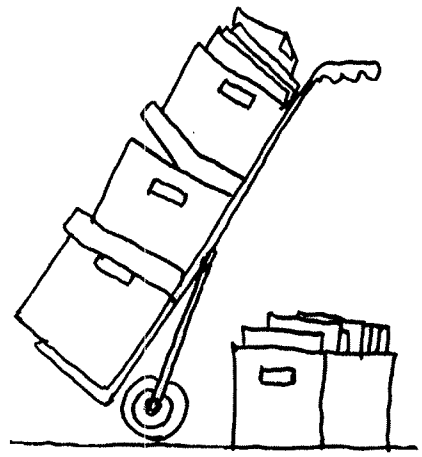
Although most copyright law is regulated within a statutory framework, certain exceptions have evolved through case law grounded on a public policy issue. The accepted infringements in the case of *Hubbard v. Vosper* were justified by the court on the grounds that the public had a right to know how the cult of Scientology operated, and how members were inducted. The text books cite many cases where remedies were refused for undoubted infringements on the grounds that the work was obscene or blasphemous.[30] Public policy also arose in the controversial English case of *British Leyland v. Armstrong Patents* [31](sometimes known as the spare parts case) where the House of lords refused to uphold the copyright in the artistic drawings of the spare parts on the grounds that if a retailer sold motor vehicles, this included an inherent right to purchase spare parts economically for its repair.

The above represents a general summary of the key defences available to a client when faced with an infringement action under the existing statutory regime.

2. The Copyright and Related Rights Bill 1999

Before looking at the defences, it is important to remember the origins of the Bill, and the source for its drive and impetus. Ireland has outstanding obligations in relation to

- Berne Convention 1886
- Rome Convention for the Protection of Performers 1961
- Rental and Lending Rights Directive 1992
- Cable and Satellite Directive 1993
- TRIPS 1994
- Database Directive 1996



- WIPO Treaty on Copyright 1996
- WIPO Treaty on Performers and Phonograms 1996
- Proposed Directive on Copyright Harmonisation

These omissions have been the subject of complaint under the GATT mechanism and from the European Commission, and the consequent pressure to produce the draft Bill last year was evident. Yet the Bill proposes to implement an enormous amount of change, both in the amplification of existing rights to meet technology changes and in the conferring of new rights, both economic and moral. The Bill restates the categories of protection as including literary, dramatic, musical and artistic works as well as sound recordings, film, TV and radio broadcasts, as well as published editions. These are now called "works", and all the provisions regarding rights, infringements and exemptions apply to "works".

So how will defences look after implementation of the Bill?

3. Defences Under the New Copyright Bill

The first point which should be made is that although the Bill will supersede the 1963 Act and its satellite legislation, many of the key

concepts and the case law remain. Thus, fair dealing is still a central concept to defences, although the Bill now provides that the defence is available to all categories of work. The old Part 11/ Part 111 distinctions are virtually abolished, and the Bill is now concerned with "works". Performers rights are greatly enhanced and include rights for recorded and live performances as well as rental and lending rights.

3.1. Fair Dealing Defence

Fair dealing is defined in Section 49(4) as "the making use of a literary, dramatic, musical or artistic work, film, sound recording, broadcast, cable programme, non electronic database or typographical arrangement of a published edition which has been lawfully made available to the public for a purpose and to an extent justified by the non-commercial purpose to be achieved".

Some of the exceptions are familiar, whilst others have been updated:

(a) Private research or private study

- Chapter 6, Section 49 provides dealing with a literary, dramatic, musical, artistic work, sound recording, film, broadcast, cable programme or non electronic database for the purpose of "private research or private study" is not an infringement.
- Note that the old provision is amended slightly by the insertion of the word private before research, and old Part 111 works are included in the defence. Librarians and archivists must be particularly careful when making copies of works available to students/library users to adhere to the strict criteria in Sections 61 and 62 to avoid infringements.

(b) Criticism or review

Where a work is reproduced for the purpose of criticism or review, it is not an infringement of the work if accompanied by a sufficient acknowledgement.[32] This will be available for films which was not the case under the 1963 Act. In *Time Warner v. Channel 4*[33], the substantial reproduction of parts of Kubrick's 'A Clockwork Orange' in a TV documentary was permitted even though it was highly critical and possibly gave a distorted view of the film.

(c) Reporting of current events

Fair dealing of a work other than a photograph for the purpose of reporting current events will not infringe if accompanied by a sufficient acknowledgement, but this is not required when reporting current events by means of a sound recording, film, broadcast or cable programme.[34]

3.2. Educational Exceptions

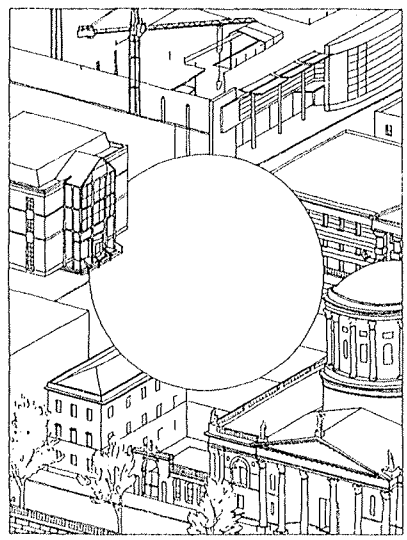
- Under Section 52, copyright in a literary dramatic, musical or artistic work or typographical arrangement is not infringed if copied in the course of instruction by the instructor, not on a reprographic process and with sufficient acknowledgement.
- A similar provision exists regarding copies of sound recordings, films, broadcasts, or original databases with the added proviso that only one copy can be made
- The inclusion of a short passage from a literary dramatic or musical work original database or typographical arrangement of a published edition of an educational anthology where the material is mainly non copyright and where the original work is not intended for use in these establishments, will not be an infringement.
- Section 54 permits the performance of a literary dramatic or musical work in educational establishments where the audiences are limited to teachers and students and those directly associated with the school, and also includes the playing of a sound recording film broadcast or cable programme for the purpose of instruction.
- Reprographic copies of passages of works from literary dramatic or musical works or typographical published editions or original databases are permitted under certain circumstances, but are limited to 5% in any calendar year, and only where there is no licensing scheme in operation.
- Reproduction for the purposes of examination is permissible (s52(5))
- Public performance of recordings of performance or sound recordings film etc permitted if is for the purpose of instruction, or related to school activities under certain conditions.[35]

3.3. Reproduction of Judical Proceedings

Copyright in a work is not infringed by anything done for the purpose of judicial or parliamentary proceedings, or the reporting of same.[36] The section cannot be used as a defence to the infringement of copyright in a report of such proceedings.

3.4. Reproduction for Public Administration

Reproduction for the purposes of statutory inquiries (that fashionable beast), copying of public records, material on statutory registers are permitted exceptions in the Bill under Sections 67-70.



3.5. Public Performances

The Bill devotes a significant space to performers rights, which many would say is long overdue. Performers will have a wide range of rights in relation to the authorisation or prohibition of their performances, including recorded performances, live performances and bootlegging copies as well as moral rights. The exception/defence provisions relating to performers are set out in Part 111,Chapter 4 and replicate many provisions mentioned above in earlier parts of the Bill. These include:

- Performers' property rights are not infringed by the making of a recording of the whole or part of a broadcast or cable programme including that of a live performance for private or domestic use
- Performers' rights of reproduction are not infringed by the making of a copy of a recording for private or domestic use.[37]
- Fair dealing of a performance or a recording of a performance for the purpose of criticism or review is not an infringement.[38]
- Copying of a recording of a performance for the purpose of instruction is not an infringement where the instructor performs the copying, or it is for examination purposes.[39] Educational establishments also have an exemption re the lending right of performers if the lending is for the purpose of education.[40]
- Ditto the playing or showing of a sound recording film broadcast or cable programme for teachers and pupils in a school for school activities or instruction.[41]
- Performing rights are not infringed by reproduction for the purpose of judicial or parliamentary proceedings[42], statutory inquiries[43], public records or statutory registers.[44]

3.6. Databases

Databases receive statutory recognition in the new Bill and are defined as " a collection of independent works data or other materials arranged in a systematic or methodical way and individually accessible by any means. It is original if the content represents the original creative thinking of the author. Exemptions include:

- Fair dealing for the purpose of private research or study[45]
- Fair dealing for the purpose of instruction or a course of instruction where the instructor performs the extraction and the source is indicated.
- Usage of databases in judicial or parliamentary proceedings is not an infringement, nor usage in the reporting of same.[46]
- Ditto usage re statutory inquiries, public records and statutory registers[47], as well as communication of same to Government or the Oireachtas.[48]

3.7. Computer Programmes

The provisions regarding the protection of computer programmes as set out in Directive 150/1991 and as implemented in SI26/93 are restated in the Bill. Programmes are protected as "works", and exemption/defence provisions include:

- Permitted use of the works for the making of a back-up necessary for lawful use of the work[49]
- Permitted use to make permanent or temporary copies of all or part of the programme for the purpose of achieving interoperability of an independently created work with other works providing specific conditions are met and providing this does not conflict with the authors authorisation.[50]
- Permitted use to make permanent or temporary copy of all or part of the programme or a translation, adaptation or arrangement if this is necessary to achieve its intended purpose including error correction.[51]
- It is not clear how the above permitted exceptions interact with the express provision in Section 49(5) which provides that it is not fair dealing to convert a computer programme from a low level computer language to a higher level computer

language, or converting a computer programme in an incidental manner in the course of converting that programme.

4. Conclusion

The above is just a brief summary of some of the most important defences/exceptions which are contained in the Bill. Much of what was contained in the original Act in relation to defences remains; the concept of fair dealing has been retained and defined; the Part 11/Part 111 distinctions have been abolished, and fair dealing applies as a defence across the board; private research and private study has been tightened; performers rights have been greatly expanded with a consequent imposition of permitted fair dealing exceptions; exemptions regarding databases and computer programmes usage have been refined; there is much greater definition and control in relation to copying in libraries and archives.

However, there are still lots of questions which remain unanswered; the Internet issue appears to have been dealt with by the expanded "making available right", but may in fact be more limited than it appears if the act is merely placing material on the Internet rather than making copies available on the Internet[52]. Thus it might be a sufficient defence to say that no copies were made available.

Does the new restricted act of copying rather than reproduction narrow or expand the copyright catchment area. It can be argued that it is narrower (sheet music example), but conversely it may prohibit activities which were not possibly covered by the term "reproduction"; for example an artist who copies in the style of another but does not pass off or necessarily infringe under traditional rules.

The Bill seems to envisage a much stronger licensing role in relation to permitted usage, (particularly in relation to performers rights, the expanded rental and lending rights, and copying in libraries and archives), but without stating clearly who is responsible for what. Exceptions are permitted unless a licensing body exists under certain provisions such as the reprographic provisions re educational establishments. This seems too woolly, and needs to be addressed. The whole issue of independent regulation of the collecting societies has been ignored, which is unacceptable given the significant change in the law regarding presumptions of ownership.

Performance rights are classified as property and non-property rights; it is not clear as to why this is so, and what is the practical effect of the distinction. Does this mean that constitutional provisions relating to personal property and property rights under Articles 40.3 and 43 of the Constitution apply? If they are classified as property rights, it is submitted that this must be so, which brings an enormous additional jurisprudence to the copyright infringement action. Will collecting societies be able to avail of those rights in litigation on behalf of the creator, or will defences vary depending on whether the plaintiff is the original author or a collecting society?

Copyright law is about the balance of rights between the essentially monopolistic status of the copyright owner, and the necessary public interest in making works available to the public. The Bill is a significant and important piece of legislation, which confers important new rights and obligations on owners and users. As such the defences are extremely important as they are the mechanism by which we achieve a fair balance of these rights. Is it sufficient to achieve this balance by producing a Bill which very clearly reflects the "wish list" of sectors who have lobbied the Department long and hard, and to assume that whatever protections are necessary for consumers and users are included by the Department? Perhaps a copyright forum established by the Government is the next step in this debate to ensure that this balance is achieved.

This lecture was delivered to a public audience in the Law Library Distillery Building on Tuesday 15th June 1999, as part of a series of lectures on copyright law organised by the Copyright Association of Ireland. •

1 CA 1963 ss 8(6); 9(8)
2 CA 1963 ss 12, 14
3 Articles 9,10 and 10 bis Berne Convention
4 CA ss12, 14
5 (1994) 29 IPR 381
6 See also Longman Group v. Carrington Technical Institute 1990 New Zealand case
7 (1991) 23 IPR 565
8 This case is under appeal
9 Sillitoe v. McGraw Hill [1983] FSR 545
10 CA ss 12(1) (b), 14 (1) (b)
11 In Sillitoe, the copying of the text was disallowed because there was no accompanying critical text to justify the defence.
12 [1936-45] MCC
13 [1972] 1 All ER 1023
14 TVNZ v. Newsmonitor (1993) 27 IPR 441; De Garis v. Neville Jeffress Pidler Pty. (1990) 18 IPR 292
15 The Modern Law of Copyright and Designs Laddie, Prescott and Vittoria
16 In the row between the Daily Mail and the Sun newspaper over the latter's publication of private letters between the Duke and Duchess of Windsor to which the former had copyright, the court held that the Sun could not avail of the reporting current event defence.
17 Ravenscroft v. Herbert Whitford J
18 In the Clockwork Orange case, reproducing 10% of the work in a critiques was held permissible.
19 CA1963 s12(5)
20 CA 1963 s53(3)
21 CA 1963 s12(3)
22 CA 1963 s14(6)
23 CA1963 18(5)
24 CA 1963 18(5)
25 Clark and Smyth Intellectual Property Law in Ireland p 322
26 [1988] QB 40
27 CA 1963 s17(8)
28 CA 1963s 12(4) and (12)
29 CA 1963 s18(7)
30 Lord Byron v. Dugdale (1823) LJ OS Ch 239; Baschet v. London Illustrated [1900] 1 Ch
31 [1986] FSR 221
32 CRRB 1999 s 50
33 [1993] 28 IPR 454
34 CRRB 1999 s 50 (2) and (3)
35 CRRB 1999 s 212 and 213
36 CRRB1999 s67
37 CRRB 1999 s194
38 CRRB 1999 s210
39 CRRB 1999 s212
40 CRRB 1999 s 215
41 CRRB 1999 s 213
42 CRRB 1999 s 224
43 CRRB 1999 s225
44 CRRB 1999 s 226-7
45 CRRB 1999 s 312(1)
46 CRRB 1999 s314
47 CRRB 1999 s 315-317
48 CRRB 1999 s 318
49 CRRB 1999 s 76
50 CRRB 1999 s77
51CRRB 1999 s 78
52See the wording of Section 39 CRRB 1999

The Children Act, 1997

RAGHNAL Ó RIORDAN, Barrister

This Act is a useful addition to the growing compendium of Family Law Acts, which serves a number of functions.

Part I deals with commencement, general matters and interpretation. Section 1(2) brings the Act into force one month after its passing with the exception of Section 11 (which inserts new Sections 20, 21, 22, 26, 28 & 29 into the Guardianship of Infants Act, 1964), and the entire of Part III of the Act. Pursuant to Section 1(3) of the Act, S.I. No. 433 of 1997, Children Act, 1997 (Commencement) Order brought Section 11 partially into force by the insertion of some but not all of the new Sections set out in Section 11, namely, Sections 20, 21, 22 & 29 into the 1964 Act and further brought into force the entire of Part III of the Act commencing on the 1st of January, 1999.

Appointment of Guardians Made Easier

Part II covers issues of Guardianship, Custody & Maintenance. The most useful and practical effect of this Part is pursuant to Section 4 where the non-marital parents of a child can agree to declare that they are the parents of the child and agree to the appointment of the natural father as a Guardian without making application to court. Prior to this Act, an application to court was necessary under the Status of Children Act, 1987, to make an order for such an appointment. The procedure under Section 4 was regularised by S.I. No. 5 of 1998 Guardianship of Children (Statutory Declarations) Regulations, 1998, which came into force on the 1st of February, 1998. These Regulations provide the Statuary Declaration forms for declaring parenthood, appointing the natural father as guardian and setting out custody/access arrangements. The section also deals with certain presumptions in relation void and voidable marriages. Section 5 reiterates the present state of the law relating to the rights to guardianship of natural fathers:-

> *"Section 6 of the Act of 1964 is hereby amended by the substitution for subsection 4 (substituted by the Status of Children Act, 1987) of the following subsection:*
> *'where the mother of a child has not married the child's father, she, while living, shall alone be the guardian of the child, unless the circumstances set out under section 2(4) apply or there is an force an order under section 6A (inserted by the Act of 1987) or a guardian has otherwise been appointed in accordance with this Act.'"*

This reflects the position of the law as set out in *K v W* [1990] 2 IR 437 which was criticised by the Court of Human Rights.

Sections 6 and 7 regulate and amend the powers of appointment and re-appointement of guardians. Section 8 carries forward the standard amendment to previous Family Acts by increasing the age of dependency to 18 while in school, and 23 if in full-time education or at instruction at a wide range of institutions.

Joint Custody & Access For Relatives

Section 9 is an innovative one which adds important amendments to Section 11 of the 1964 Act. In particular, Section 11A therein empowers a court to declare parents joint custodians of children. While this section may not have any radical practical effect since children are usually then declared to be primarily residing with one parent, it is an important comfort to the parent, often the father, who may be losing day to day contact with children. It may also encourage a sense of joint responsibility. It seems wise in this context, it is submitted, to avoid the word "access" when negotiating times to be spent with the non residential parent. "Periods of joint custody to be enjoyed" , for instance, is one possible solution to avoid same.

Section 11B grants a more radical power to a court to allow certain relatives to apply to for access to children. These relatives are set to include any person who

a) is a relative of a child, or,
b) has acted in *loco parentis* to a child.

However, such person must first apply to the court *ex parte* for leave and must satisfy the criteria set out at Section 11B(3) which includes the connection with the child, risk of interruption to the child's life and the wishes of other guardians. Section 11B(4) gives the same rights in relation to adopted children. Section 11B, although it is more limited, recognises to some extent the helpful decision of Carroll J. in *D.(M.) -v- D(G.)* [1993] 1 Fam.L.J. 34 where she held, *inter alia*, that a court is entitled to make an access order under Section 11(1) of the 1964 Act to allow a child access to persons other than its natural parents. It is the right of the child with which the court is concerned, not the right of the adult.

Section 11C is important procedurally since it operates to the effect that no order made under the 1997 Act shall stayed by an appeal without a specific order of the original or appellate court.

Section 11 D is a significant interpretative one, worth quoting:

"In considering whether to make an order under section 6A, 11, 14, or 16 the court shall have regard to whether the child's best interests would be served by maintaining personal relations and direct contact with both his or her father and mother on a regular basis."

Part IV which amends the 1964 Act in relation to counselling and mediation was brought into force partially as set out above and reflects the anxiety of earlier family law acts to ensure that potentially litigious parents are made aware of, and are encouraged to avail of, methods other than court to resolve issues of custody, access and guardianship.

Sections 12 – 18 are practical amendments to bring other acts up to date or amend them to include earlier provisions or changes.

Television Link For Children's Evidence Admissibility of Hearsay Evidence

Part III is a far-reaching section dealing with the evidence of children, including evidence *via* television link, video recording, or intermediary and further regulates the admissibility of hearsay evidence.

Section 19 sets out necessary interpretations. Section 20 sets out the applicability of the Part. It applies to "civil proceedings before any court commenced after the commencement of this Part, concerning the welfare of a child."

This seems to cover any proceedings which concern children. The section also covers the welfare of a person in any civil proceedings who is of full age but who has a mental disability to such an extent that it is not reasonably possible for the person to live independently.

Section 21 deals with the terms under which evidence shall be given through television link which "shall be video-recorded." The remainder of the section covers the issue of perjury being punishable within the State even if the evidence is transmitted from outside the State.

Section 22 allows evidence to be given by live television and through an intermediary who shall be appointed by the court.

Section 23 covers the conditions for the admissibility of hearsay evidence of children, namely, the court considers that:-

a) the child is unable to give evidence by reason of age,
b) the giving of oral evidence by the child, either in person or under section 21, would not be in the interest of the welfare of the child.

However, Section 23 also contains safeguards that such statements shall not be admitted in evidence if the court is of the opinion that in the interests of justice it ought not to be, and further it shall consider all the circumstances including any risk that the admission will result in unfairness to any of the parties to the proceedings. Further, the section avoids ambushes being sprung on unsuspecting legal teams in relation to hearsay evidence by providing at subsection 3 that notice shall be given of any proposal to adduce same, and also particulars of such evidence.

Section 24 lists criteria a court shall consider when evaluating the weight, if any, to be attached to any such hearsay, including, whether it was contemporaneous to the events or matters stated, whether it involves multiple hearsay, whether any person has motive to conceal or misrepresent matters, whether the original statement was edited or a result of collaboration, and the circumstances of the hearsay.

Section 25 provides further considerations for a court relating to the credibility of such hearsay evidence and the admissibility of previous inconsistent statements. Section 26 also regulates the admissibility of documentary evidence including sound and video-recordings. Section 27 provides for the transfer of proceedings and Section 28 allows for the dispensing with the oath or affirmation to allow for the unsworn evidence of children under 14 or with a mental disability over that age, if the court is satisfied that a child can give an intelligible account of events.

Recent Case-Law, Children And Hearsay Evidence

Part III of the Act relating to the admissibility of hearsay evidence of children, must be considered in the context of the decisions of the Supreme Court in *S.H.B. -v- C.H.* [1996] 1 I.R. 219 where it was held, inter alia, per O'Flaherty J. at p. 239 that while hearsay evidence was admissible that such evidence by way of video tape interviews with the child at issue was simply material to back up the key evidence to be offered *viva voce* by the social worker in that case. Further, the issue was considered again in *E.H.B. -v- M.K. & M.K.* Unreported 29/1/99, where the Supreme Court in 5 separate judgements reversed the decision of the trial judge in admitting hearsay evidence, not on the fact of its admissibility, but due to the finding that the trial judge had failed to carry out a proper enquiry as to the appropriateness of its being admitted. The judgements recommend a process of enquiry listing factors for consideration not dissimilar to those in Part III and emphasise the need for a fair process and fair procedures. Indeed the judgements refer to the provisions of Part III in their decisions. Further, Keane J. quotes the useful judgement of the Court of Appeal in England, *In Re N* [1996] 2 FLR 214. which carefully sets out the criteria for interviews with children based on a wealth of experience, case-law, reports and guidelines of various Commissions dealing with the problems of child sexual abuse allegations. It would appear that any party attempting to rely on the provisions of Part III to admit hearsay evidence would be wise to consider these judgements as well.

Conclusions

This Act is a multi-purpose one to amend, reform and advance the law relating to various differing aspects of family law relating to children. It is to be welcomed, although it might have been useful if a further amendment had been considered to ease the restrictive application of section 11 of 1964 Act which only permits guardians to apply for orders relating to the welfare of a child. Section 9. inserting Section 11B also restricts applications by relatives to ones for access; this appears very confined. The artificial uses of Section 8 of the 1964 Act where parents die in order to have relatives appointed needs to be tackled. An *ex parte* leave procedure might be appropriate. •

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 4. Issue 8. June 1999

A directory of legislation, articles and written judgments received in the Law Library from 19th April 1999 to 11th June 1999.
Judgment Information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

Library Acquisitions

The All-Party Oireachtas Committee on the Constitution
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Company Law

National Irish Bank, In re
Supreme Court: O' Flaherty J., **Barrington J.**, Murphy J., Lynch J. and Barron J.
21/01/1999

Inspectors; investigation under the Companies Act, 1990; right to silence; self- incrimination; natural persons; trial in due course of law; investigation into affairs of NIB; claim that employees and former employees were entitled to refuse to answer questions put by Inspectors on the grounds of possible self incrimination; whether interviewees were entitled to refuse to answer questions on grounds that their answers might be incriminating; whether Court should give guidance as to correct interpretation of Inspectors' powers and implications for bank officials in refusing to answer questions put to them by Inspectors; whether statements given to Inspectors would be admissible at a subsequent criminal trial; Arts. 40.6.1, 40.3 and 38.1 of the Constitution; ss. 10 & 18, Companies Act, 1990
Held: Interviewees not entitled to refuse to answer questions; statement only admissible at subsequent criminal trial if trial judge satisfied confession was voluntary

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Carney, Tom
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Criminal Law

Donovan v. DPP
High Court: **Carroll J.**
23/02/1999

Judicial review; delay; order of prohibition sought preventing applicant's trial on forgery and larceny charges; applicant originally arrested in June 1994; charges subsequently struck out; applicant recharged in May 1996; applicant delayed in bringing application for relief; no reason furnished for delay in seeking relief; whether applicant had suffered prejudice as a result of five-week delay prior to original arrest; whether applicant had established risk of unfair trial as a result of delay between original arrest, striking out and re-arrest; whether applicant entitled to relief *ex debito justitiae* notwithstanding delay in seeking relief
Held: Relief refused; applicant had failed to establish prejudice; application made out of time without giving reason

DPP (Harrington) v. Kilbride
High Court: **Quirke J.**
22/02/1999

Case stated; delay; road traffic offence; delay of more than twelve months between date of commission of alleged offence and date when offence ultimately came up for hearing; accused suffered anxiety and concern while awaiting trial; whether in circumstances of the case delay was such as to infringe constitutional rights of accused; whether increased duration of anxiety and distress suffered by accused of itself amounted to specific prejudice
Held: Circumstances of the case did not disclose such unreasonable delay as would itself warrant dismissal of charge

O'H v. DPP
High Court: **O'Sullivan J.**
25/03/1999

Judicial review; allegations of sexual abuse; delay; sexual abuse allegedly occurred from 1981-1987; complainant informed boyfriend of abuse in 1989; formal complaint to gardaí in 1995; certain evidence not verified by affidavit; applicant seeking order of prohibition or injunction preventing continuance of criminal proceedings and order of mandamus directing respondent to furnish reports and records of complainant's psychiatrist; whether court can have regard to material in Book of Evidence where the statement containing the material is not verified by affidavit; whether applicant was in a dominant position over complainant; whether dominion and its after-effects explained delay in reporting alleged abuse to Gardaí; whether applicant has established a real and unavoidable risk of an unfair trial; whether order should be made directing respondent to procure complainant's psychiatrist's reports and to furnish copies thereof to applicant
Held: Order of prohibition and injunction refused; order of mandamus granted directing respondent to procure psychiatrist's reports and to furnish copies thereof to applicant

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McGrath, Declan
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Dillon-Malone, Paddy
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Feeney, Kevin
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Employment

Conlon v. University of Limerick
High Court: **Mc Cracken J.**
4/02/1999

Appeal; job application; alleged indirect discrimination on grounds of sex; plaintiff unsuccessfully applied for post of Professor of Law; post required several years experience at senior academic level; plaintiff claimed requirement amounted to indirect discrimination on grounds of sex; claim rejected by Labour Court; whether Labour Court applied wrong principles of law in making its determination; whether Labour Court misinterpreted ss.2 and 3 Employment Equality Act, 1977; whether Labour Court reached its conclusions on basis of evidence put forward by defendants; whether incorrect reference to s.2(c), 1977 Act invalidated Court's decision; whether fact that Court considered question of whether the requirements were essential prior to determining how different sexes were affected invalidated its decision; whether Court had objectively disposed of question of discrimination
Held: Appeal dismissed

Lonergan v. Slater- Townshend
High Court: **Macken J.**
9/02/1999

Injunction; specific performance; plaintiff seeking reinstatement as Chief Executive Officer of the Irish Council for People with Disabilities; plaintiff also seeking resumption of payment of his salary from purported termination date and injunction to restrain second and third named defendants from appointing another person to post of CEO; dispute as to whether plaintiff was employed pursuant to a contract of employment or was at all times employed pursuant to a consultancy agreement; dispute as to the period during which the plaintiff was on probation; whether there was a fair issue to be tried; whether plaintiff would suffer irreparable loss and damage if deprived of his salary; whether plaintiff would suffer irreparable loss and damage if not reinstated
Held: Order made requiring second defendant to continue to pay plaintiff's salary at the same rate as prior to his dismissal or termination and from the date of said dismissal or termination; order made restraining defendants from appointing any other person to the post of CEO

Hegarty v. The Labour Court
High Court: **Geoghegan J.**
12/03/1999

Judicial review; statutory interpretation; refusal by respondent to accept appeal against recommendation of Equality Officer as appeal received after 42 day time limit specified in s.8(e), Anti-Discrimination Pay Act, 1974; whether the date of "the Equality Officer's recommendation" in s.8(e) should be interpreted as meaning the date of receipt of the Equality Officer's recommendations
Held: Relief refused; date of Equality Officer's recommendation can only mean the date appearing on it; if the Oireachtas had intended that the 42 day period was to commence on the date the party received the recommendation then that would have been stated

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Equity & Trusts

K. v. B.

High Court: **Carroll J.**
26/02/1999
Application for removal of trustee; defendant sole trustee of plaintiff's mother's will; defendant seeking to sell house in which plaintiff lived with mother; claimed sale not in bona fide interests of child; whether defendant's decision to sell was motivated by animosity towards plaintiff's father; whether sale in best interests of plaintiff; whether there were grounds for removing the defendant as trustee
Held: Application dismissed; sale of house and investment of proceeds will ensure for benefit of plaintiff; no grounds for removing defendant as trustee

European Union

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Hyland, Niamh
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Tax competition and the European court of justice
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Supreme Court: Hamilton C.J., **O'Flaherty J.**, Denham J., **Barrington J.**, Keane J.
16/02/1999

Search warrant; admissibility; defendant arrested following search of his dwelling; search warrant issued by peace commissioner; peace commissioner unable to give evidence at trial; trial judge directed an acquittal on the basis that the absence of evidence to establish validity of search warrant invalidated subsequent arrest and detention; whether trial judge properly exercised his judicial discretion in holding that peace commissioner must give evidence to prove his state of mind at time of issuing the warrant
Held: Peace Commissioner must give evidence in person to establish his state of mind at time of issue of search warrant

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Plaice (Control of Fishing in ICES Divisions VIIF and VIIG) Order, 1999
SI 76/1999

Garda Síochána

Carlton v. DPP
High Court: **Macken J.**
11/3/1999

Judicial review; Garda Síochána Complaints Board; complaints relating to alleged mistreatment by gardaí; inspector from same division as gardaí under investigation appointed to investigate matter; Board concluded that facts disclosed neither breach of discipline nor an offence; applicant challenging legality of the procedures adopted by Board; applicant alleging breach of confidentiality by investigating officer; whether any consideration was given to the status of the appointee; whether appointment of inspector complied with terms of internal circular relating to investigation of complaints under s.6(1)(a), Garda Síochána Complaints Act, 1986; whether appointment of person at inspector level complied with terms of s.6(1)(a); s.12, Garda Síochána Complaints Act, 1986
Held: Appointment of Inspector did not comply either with s.6, 1986 Act or with internal circular; decision of Board could not stand; order made quashing appointment of Inspector; order of prohibition granted in respect of criminal proceedings pending against applicant in respect of the incident

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Connolly, Johnny
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O'Dwyer, Colm
4(5) 1999 BR 276

Injunction

Pasture Properties Limited v. Evans
High Court: **Laffoy J.** *(ex tempore)*
05/02/1999

Interlocutory injunction; boundary dispute; alleged trespass; defendant developing land adjacent to plaintiff's property; alleged infringement of plaintiff's right-of-way; wall erected by defendant; alleged encroachment on plaintiff's property in construction of wall; whether fair issue to be tried between plaintiff and defendant as to location of boundary and alleged infringement of plaintiff's right-of-way; whether damages would be adequate remedy; whether plaintiff capable of giving adequate undertaking as to damages; whether balance of convenience favoured refusal of injunctive relief
Held: Relief refused; undertaking as to damages would not be adequate; balance of convenience favoured refusing relief

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Report of the Joint Committee on Justice, Equality and Women's Rights on the report of the Chief Justice into the circumstances leading to the early release from prison of Philip Sheedy dated the 14th day of April, 1999
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High Court : **Barr J.**
25/03/1999

Personal injury; liability; child injured when cotton dress caught fire; dress not treated with fire retardant; permanent warning label attached to dress; second warning tag attached to dress at time of purchase; whether defendant exercised reasonable care in marketing and sale of dress; whether defendant negligent in marketing dress without treatment by fire retardant; whether warnings attached to dress were adequate to discharge defendant's duty of care
Held : Defendant not negligent

Kane v. Kennedy
High Court: **Budd J.**
25/03/1999

Personal injury; sport; liability; plaintiff injured at school after colliding with wall while running to tip the cone marking home base during game of rounders; dispute as to position of the cone; whether defendants negligent; whether the cone marking home base was a safe distance from wall; whether plaintiff guilty of contributory negligence
Held: Defendant negligent; no contributory negligence on part of plaintiff

Pensions

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Planning for your golden years
O'Sullivan, Claire
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What do you know about your pension scheme?: an overview of the information which trustees of occupational pension schemes must give
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Practice & Procedure

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High Court: **Peter Kelly J.** *(ex tempore)*
14/01/1999

Procedure; discovery; use of documents obtained on foot of discovery orders; documents discovered by defendant; two applications brought seeking leave to use the documents in proceedings pending before Courts in Switzerland and Spain; all proceedings related to same or similar patents; whether Court has jurisdiction to modify implied undertaking that documents would only be used for the proper conduct of the action; whether special circumstances existed justifying the making of such an order; whether risk of injustice to plaintiff if documents are not disclosed
Held: Order made permitting use of documents for Spanish Courts but refusing documents for Swiss Court

W. v. B.
High Court: **Barr J.**
18/03/1999

Discovery; civil action; claim for damages for sexual assault and abuse allegedly perpetrated by defendant, while he was headmaster at plaintiff's primary school; defendant seeking discovery of medical and psychiatric reports and records relating to the issues raised in the action, which came into existence prior to time plaintiff first consulted his solicitor regarding the alleged abuse; whether documents in the nature of medical, psychiatric or counselling reports and notes relating thereto which come into existence in connection with the treatment of alleged child sexual abuse, prior to the plaintiff consulting his solicitor, are privileged and outside the scope of a discovery order
Held: Discovery ordered

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SI 87/1999

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Torts

Smithkline Beecham PlC v. Antigen Pharmaceuticals Ltd.
High Court: **McCracken J.**
25/03/1999

Injunction; passing off; application for interlocutory injunction restraining defendant from passing off its goods as the goods of the plaintiffs and from infringing plaintiffs' trade marks; plaintiff distributes and markets analgesic "Solpadeine"; defendant applied to register an analgesic under the name "Solfen"; registration opposed by plaintiffs; defendant's product on the market for five months; whether serious issue to be tried as to likelihood of association of the defendant's sign with the plaintiff's registered trademark; whether serious issue to be tried as to passing off; whether damages would be an adequate remedy for plaintiff or defendant; whether balance of convenience favoured granting of interlocutory injunction; s. 14(2), Trade Marks Act, 1996
Held: Relief refused

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McGrath, Declan
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T-1/96 Bocker-Lensing v Council of the European Union
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Action for damages – Non-contractual liability – Milk – Additional levy – Reference quantity – Producer having entered into a non-marketing undertaking – Voluntary decision not to resume production on expiry of the undertaking – Acts of national authorities

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delivery of a motor yacht

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Failure to fulfil obligations – Directive 80/778/EEC – Water intended for human consumption – Rules designed to ensure implementation of water-quality standards

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Abbreviations

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

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Contracting Authorities Under The Public Procurement Rules

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The Community public procurement rules impose an onerous burden upon all those who are obliged to comply therewith and non-compliance can have very serious consequences for all parties concerned. The question as to whether they apply to a given transaction thus often arises in practice. Whilst the financial thresholds are relatively straightforward to apply, the question as to whether the rules govern the activities of a specific client is often not as simple to answer. The existence of comprehensive provisions defining 'contracting authorities' under the public procurement directives and the preparation of lists of such authorities for that purpose do not prevent doubts and even disputes arising as to their precise interpretation and meaning. The purpose of this brief excursus is to inform practitioners of the most recent deliberations of the Court of Justice of the European Communities on this topic and to attempt to synthesise the current law as to what constitutes a 'contracting authority' for the purposes of the public procurement directives.[1]

Definition

Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts[2], Council Directive 93/36/EEC of 14 June 1993 co-ordinating procedures for the award of public supply contracts and Council Directive 93/37/EEC of 14 June 1993 concerning the co-ordination of procedures for the award of public works contracts[4] provides the starting point for our discussion. It states that 'contracting authorities' are the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law. The latter are defined as those:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- having legal personality, and
- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

Before examining the constituent parts of this definition in detail, it should be pointed out that the Court of Justice has expressly held that an entity must come within one of the specific categories provided for therein and cannot simultaneously fall within a number of these categories.[5] This can mean that different definitions apply to different types of contracting authorities. Thus to take one example, whilst an association formed by public authorities or bodies governed by public law need not have a separate legal personality in order to be subject to the directives, a body governed by public law must satisfy that requirement.

The State

For the purposes of these provisions the State includes the contracting authorities subject to the GATT Agreement on Government Procurement, to which the Community is a party. These are found at Annex I to the Supplies Directive. This refers to all Government Departments, the Houses of the Oireachtas and the President's Establishment, the Offices of Public Works, the Attorney General, the Director of Public Prosecutions, the Revenue Commissioners, the Ombudsman, the Comptroller & Auditor General, the Central Statistics Office, the Valuation Office, the National Gallery of Ireland, the State Laboratory, the Civil Service Commission and the Commissioners of Charitable Donations and Bequests.

Regional and local authorities

The concept of regional and local authorities is apparently self-explanatory. In Ireland it clearly includes county councils, borough corporations, urban district councils and town commissioners. It may also be taken to extend to Health Boards and Vocational Education Committees, although in the event of their being any doubt in the matter such bodies would seem to come within the definition of bodies governed by public law.

Associations of authorities or bodies governed by public law

These were not expressly mentioned until the adoption of the Services Directive in 1992. *Beentjes*[6] arose out of a challenge by a disappointed tenderer for a public works contract. The contract had been awarded by a local land consolidation committee, which, although established under Dutch law, did not have legal personality. One of the questions asked of the Court of Justice was whether that committee could be regarded as an "authority awarding contracts" as defined by Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts.[7]

Advocate General Darmon observed that bodies such as the land consolidation commission were a manifestation

of what he called the 'fragmentation of the administration'. This referred to the tendency on the part of states to entrust public functions to organs that were unattached to the public administration but nevertheless had no independent legal personality. He pointed out that whilst such organs were not subordinate in hierarchical terms to the 'traditional' administration, their activities and objectives involved competencies normally exercised by the public power. He concluded that the public procurement directives apply to the award of contracts by a body whose members are appointed by a State or local authority with functions that fall within the ordinary powers of the appointing authority and is endowed thereby with the means to perform those functions.[8]

The Court agreed with this analysis, holding that, for the purposes of the provision under review, the State should be interpreted in what was described as a functional fashion. The aim of the directive, which was to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts, would be jeopardised if it were to held not to apply solely because the body awarding the contract was not formally part of the public administration. Consequently, a body whose composition and functions are laid down by legislation and which depends upon the State for the appointment of its members, the observance of obligations arising out of its measures and the financing of the contracts which it awards, comes within the notion of 'the State' for the purposes of the public procurement directives.[9] This principle has recently been reiterated by a Full Court in *Gemeente Arnhem* where, in interpreting Article 1(b) of the Services Directive, it held that no distinction is to be made by reference to the legal form by which an entity is established and/or the manner by which the tasks it is supposed to fulfil are prescribed.[10]

Accordingly bodies that exercise public power can not escape from the application of the public procurement directives simply because they lack a separate legal personality or manifest themselves in a form other than one of those set out in Article 1(b). Article 1(b) now explicitly recognises "associations formed by one or several of such authorities or bodies governed by public law" as being among the categories of contracting authorities.[11] In view of the manner in which the Court of Justice has interpreted the concept of 'bodies governed by public law', *Beentjes* does not expand the concept of the State for the purposes of the public procurement directives.[12] It is submitted that the judgment is limited to ensuring that bodies exercising public power are caught by the public procurement directives, irrespective of their formal legal status. The functional approach of the Court of Justice thus extends only to ensure that the contractual activities of bodies exercising public power come within the ambit of the directives.

Bodies governed by public law

The Works Directive provides a list of the bodies and categories of bodies that are deemed to be governed by public law in each Member State.[13] Included amongst them are SFADCo,[14] Córas Tráchtála, the Irish Goods Council, the IDA, CBF,[15] Bord Fáilte, Údarás na Gaeltachta, An Bord Pleanála and the Local Government Computer Services and Staff Negotiations Boards. The categories of bodies deemed to be governed by public law in Ireland are third level educational bodies of a public character; national training, cultural or research agencies; hospital boards of a public character; national health and social agencies of a public character; and central and regional fishery boards. Since these lists are only "as exhaustive as possible" and may be reviewed periodically by the Member States in accordance with the procedures laid down in that directive, they are not determinative. Consideration must therefore be given to the definition and scope of the concept of bodies governed by public law. The issue came before the Court of Justice on a number of occasions in 1998.

Mannesmann[16] concerned certain activities of the *Österreichische Staatsdruckeri*.[17] In 1995 the ÖS purchased a private company engaged in rotary 'heatset' printing. Later that year the company established what amounted to an almost wholly owned subsidiary for the purpose of producing documents using this technique, which company ultimately became the defendant in the national proceedings. In an attempt to shorten the lead-time for the project, the ÖS initiated a tendering procedure in relation to certain works to be carried out at the subsidiary's plant. The ÖS inserted a clause into all the draft contracts reserving the right to assign all its rights and obligations thereunder to a third party of its choice at any time. That call for tenders was subsequently withdrawn and a new tendering procedure initiated. The ÖS then informed tenderers that the subsidiary would henceforth be responsible for the matter. In an action before the *Bundesvergabeamt*[18] the issue arose as to whether this tendering procedure had to be conducted in compliance with the relevant Community rules as incorporated into Austrian law.

The Court first considered whether the ÖS was a 'body governed by public law'. It observed that in order for that provision to apply each of the three conditions set out Article 1(b) of the Works Directive had to be satisfied.[19] The Court was satisfied that the ÖS met the second (that the body have legal personality) and third (that it be under State control) requirements.[20] As for the requirement that the ÖS be established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character,[21] the Court held that it was sufficient to show that it had been created for the specific purpose of meeting needs in the general interest, here the publication of official documents.[22] Once this requirement had been satisfied, it was immaterial that only a relatively small proportion of a body's operations involved meeting needs in the general interest and that it was primarily engaged in activities of an industrial or commercial character. As a consequence the public procurement directives apply to all of the contracts it enters into, even where some or most of them involve activities of an industrial or commercial nature.[23]

The Court was then asked to consider the defendant company's circumstances. Could a company (i) owned by a contracting authority, (ii) created in order to carry on commercial activities and (iii) in receipt of funds derived from the contracting authority's general interest activities be itself a contracting authority? The Court answered that question in the negative by referring to the principle that a 'body governed by public law' must be established for the specific purpose of meeting needs in the general interest that are not of an industrial or commercial character.[24] The Court also accepted that where a contracting authority enters into contracts as an agent for one of its subsidiaries and the

latter is not itself a contracting authority, the award of that contract is not governed by the public procurement directives.[25]

Gemeente Arnhem involved a dispute in the Netherlands where a private party challenged a decision by the municipalities of Arnhem and Rheden to award a contract for the collection and treatment of household and industrial waste to a public limited company that the two local authorities had established for that specific purpose. Article 6 of the Services Directive exempts from its application public service contracts awarded to another contracting authority on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision that is compatible with the EC Treaty.

The Court first found that Article 1(b) of the Services Directive distinguished between needs in the general interest of an industrial or commercial nature and those that were not.[26] The directive applied only to bodies engaged in the latter activities. It then went on to consider whether needs in the general interest not of an industrial or commercial character meant all those activities that could be or were being carried on by private undertakings. BFI claimed that once it was demonstrated that private undertakings could or did in fact compete for the provision of services, a public entity engaged in providing those services could no longer be regarded as satisfying needs in the general interest. The Court rejected this argument on four grounds. First, Article 1(b) did not define needs in the general interest by reference to who purported to satisfy them. Second, since the aim of the Services Directive was to prevent contracting authorities from preferring national tenderers in the award of public contracts, they could be guided by non-economic considerations in the award of contracts, *e.g.* incurring financial losses in order to follow the purchasing policy of a body upon which it depended. Third, since there are few activities that are incapable of being carried on by private undertakings, a requirement that no private undertakings were capable of meeting the needs for which the body in question was established would render meaningless the term 'body governed by public law'. Fourth, the objection that contracting authorities could evade competition by recourse to Article 6 of the Supplies Directive was refuted on the grounds that that provision applied subject to the condition that measures granting exclusive rights were otherwise compatible with the EC Treaty.[27]

The Court accepted that the existence of significant competition was a factor that could be taken into account when determining the presence of a need in the general interest. It nevertheless found that the removal and treatment of household refuse was a need in the general interest that Member States could require be carried out by public authorities or over the provision of which they could retain a decisive interest.[28]

Two judgments of the Court of Justice in cases emanating from this jurisdiction should also be mentioned briefly. *Commission v. Ireland*[29] and *Connemara Machine Turf Co. Ltd v. Coillte Teoranta*[30] involved not the interpretation of Article 1(b) of the Supplies Directive under the terms of which it is submitted that in view of the recent case law of the Court of Justice Coillte Teoranta would not have been considered as a 'body governed by public law' but Point VI of Annex I to Directive 77/62,[31] the precursor of the Supplies Directive. In the case of Ireland, this provided that "other public authorities whose public supply contracts are subject to control by the State" were 'contracting authorities' for the purposes of Directive 77/62. In identical passages in both judgments, the Court began its reasoning by stating that, since the purpose of the public procurement directives was to eliminate barriers to the free movement of goods, in order to give full effect to this principle the term 'contracting authority' must be interpreted in a functional manner. It then proceeded to emphasise that the State had established Coillte Teoranta and had entrusted specific tasks to it, including the provision of various facilities in the public interest. The State had the power to appoint the principal officers of the company. Account was also taken of the Minister's power to give specific instructions to Coillte Teoranta to comply with State forestry policy and to provide specified services or facilities and the powers retained by government ministers over the company's financial affairs. On this basis the Court held that "while there is indeed no provision expressly to the effect that State control is to extend specifically to the awarding of public supply contracts by Coillte Teoranta, the State may exercise such control, at least indirectly". It accordingly concluded that Coillte Teoranta was a "public authority whose public supply contracts are subject to control by the State" and that it was thus a contracting authority for the purposes of Directive 77/62.[32]

The interpretation of a provision that has been repealed for about five years[33] is perhaps of historical interest only. Nevertheless, the judgment of the Court of Justice appears to be seriously flawed in a number of respects. First, it is submitted that the Court's reliance upon its "functional approach" when faced with the issue as to whether a body is a contracting authority is misplaced. Until these two judgments, this concept applied exclusively in circumstances where unincorporated bodies had exercised State power or where the legal basis for the exercise of such powers was unclear. Unless it was alleged that, in carrying out its functions, Coillte Teoranta was engaged in the exercise of State power, for which there appears to have been no justification, it is hard to see how the principle relied upon applied to its circumstances. Second, whilst the Court proceeded on the basis that Coillte Teoranta's position *vis-à-vis* the State was such that the latter might exercise control, at least indirectly, over the former's public supply contracts, the provision under consideration referred to "other public authorities whose public supply contracts are subject to control by the State"[34]. There was no evidence whatsoever before the Court of Justice that this was in fact the case. Thirdly, on the basis of the Court's reasoning, since ministerial power subsists, in law if not in fact, in more or less the same fashion in almost all semi-State bodies, all of their contracting arrangements should have been regulated by the public procurement directives. If that is the case, the formulation introduced by the directives currently in force has had what must have been the wholly unintended consequence of exempting bodies formerly subject to the public procurement rules from those provisions. If the purpose of the directives is to promote the free movement of goods and services, then it is difficult to understand why the Community legislature, having brought the Irish semi-State sector into the net, was prepared to let it escape so easily! The unease with which one may regard these two judgments is tempered by the facts that they were handed down by a chamber and not by a plenary formation of the Court[35] and that their very limited

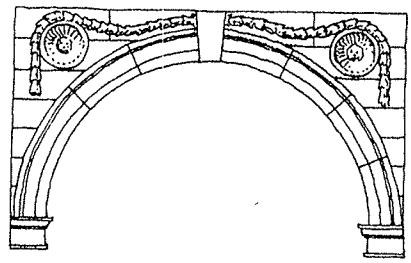
scope should make them relatively easy to distinguish.

On the basis of the Court's case law, it is tentatively suggested that "a body governed by public law" is one that:

– is established for the specific purpose of meeting needs in the general interest that are not of an industrial or commercial character. Attention is to be focussed on the main purpose for which the body in question was created. It is irrelevant that some or most of the activities it engages in do not meet needs in the general interest, or are industrial or commercial in nature, or that a contracting authority owns it. When determining whether activities meet needs in the general interest or are of an industrial or commercial character it is irrelevant that the activities are capable of, or are in fact, being carried on by private undertakings. The existence of significant competition may, however, indicate that the activities in question do not meet needs in the general interest.

– has legal personality.

– is financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law •



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1 The article does not consider issues arising under the Utilities Directive: Council Directive 93/38/EEC of 14 June 1993 co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, p. 84, the Utilities Directive).

2 OJ L 209, p.1, hereafter the 'Services Directive'.

3 OJ L 199, p.1, hereafter the 'Supplies Directive'.

4 OJ L 199, p.54, hereafter the 'Works Directive'.

5 Case C-360/96 *Gemeente Arnhem & Gemeente Rheden v. BFI Holding BV* [1998] ECR I-6821, para. 27; Op. of La Pergola AG, paras 40 – 41.

6 Case 31/87 *Gebroeders Beentjes BV v. Netherlands* [1988] ECR 4635.

7 OJ Eng Sp Ed 1971 (II), p. 682. Article 1 provided that the State, regional or local authorities and the legal persons governed by public law specified in Annex I were to be regarded as "authorities awarding contracts".

8 Case 31/87 *Gebroeders Beentjes BV v. Netherlands* [1988] ECR 4635, Op. Darmon AG, paras 10 – 14.

9 Case 31/87 *Gebroeders Beentjes BV v. Netherlands* [1988] ECR 4635, paras. 11 – 12.

10 Case C-360/96 *Gemeente Arnhem & Gemeente Rheden v. BFI Holding BV* [1998] ECR I-6821, para. 62.

11 As per Case C-360/96 *Gemeente Arnhem & Gemeente Rheden v. BFI Holding BV* [1998] ECR I-6821, Op. of La Pergola, paras 40 – 41, relying, *inter alia,* upon the passages of the Opinion of Darmon AG in *Beentjes* referred to *supra.*

12 This conclusion is supported by the judgments in Case C-353/96 *Commission v. Ireland,* [1998] ECR I-8565, paras 25 – 26, 32 – 33 and Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta,* [1998] ECR I-8761, paras 19 – 20, 27 – 28 where the Court of Justice rejected arguments made by the plaintiffs in both proceedings on the basis of *Beentjes* that Coillte Teoranta was to be regarded as the State or a State authority. These judgments do not appear to support the wide interpretation of the State contended for Lee in *Public Procurement,* (London, 1992), pp. 55 – 57.

13 Works Directive, Annex I. The list is incorporated into the Services and Supplies Directives by their respective Art. 1(b).

14 Shannon Free Airport Development Company Ltd.

15 Córas Beostoic agus Feola, the Meat & Livestock Board.

16 Case C-44/96 *Mannesmann Anlagenbau Austria AG v. Strohal Rotationsdruck GesmbH* [1998] ECR I-73.

17 Austrian State Printing Office, hereafter 'ÖS'.

18 Federal Procurement Office.

19 Case C-44/96 *Mannesmann Anlagenbau Austria AG v. Strohal Rotationsdruck GesmbH* [1998] ECR I-73, paras 20 – 21.

20 Case C-44/96 *Mannesmann Anlagenbau Austria AG v. Strohal Rotationsdruck GesmbH* [1998] ECR I-73, paras 27 – 28. The Court noted that ministerial appointees appointed the director general, its accounts were subject to scrutiny by the Austrian Court of Auditors and the Austrian State held the majority of its shares.

21 as distinct from needs in the general interest having an industrial or commercial character: cf. Case C-360/96 *Gemeente Arnhem & Gemeente Rheden v. BFI Holding BV* [1998] ECR I-6821, paras 31 – 36.

22 Case C-44/96 *Mannesmann Anlagenbau Austria AG v. Strohal Rotationsdruck GesmbH* [1998] ECR I-73, paras 22 – 26.

23 Case C-44/96 *Mannesmann Anlagenbau Austria AG v. Strohal Rotationsdruck GesmbH* [1998] ECR I-73, paras 30 – 34.

24 Case C-44/96 *Mannesmann Anlagenbau Austria AG v. Strohal Rotationsdruck GesmbH* [1998] ECR I-73, paras 37 – 41, followed in Case C-360/96 *Gemeente Arnhem & Gemeente Rheden v. BFI Holding BV* [1998] ECR I-6821, paras 54 – 58.

25 Case C-44/96 *Mannesmann Anlagenbau Austria AG v. Strohal Rotationsdruck GesmbH* [1998] ECR I-73, paras 42 – 46.

26 Case C-360/96 *Gemeente Arnhem & Gemeente Rheden v. BFI Holding BV* [1998] ECR I-6821, paras 31 – 36.

27 Case C-360/96 *Gemeente Arnhem & Gemeente Rheden v. BFI Holding BV* [1998] ECR I-6821, paras 38 – 47.

28 Case C-360/96 *Gemeente Arnhem & Gemeente Rheden v. BFI Holding BV* [1998] ECR I-6821, paras 48 – 53.

29 Case C-353/96 *Commission v. Ireland,* [1998]ECR I-8565

30 Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta,* [1998]ECR I-8761

31 Council Directive 77/62/EEC of 21 December 1976 co-ordinating procedures for the award of public supply contracts (OJ L 13, p. 1).

32 Case C-353/96 *Commission v. Ireland,* paras 35 – 41; Case C-306/97 *Connemara Turf Co.,* [1998] ECR I-8761 paras 30 – 35.

33 The Supplies Directive was to have been implemented by the Member States on or by June 14th 1994 (Art. 34).

34 My emphasis.

35 By contrast a full court sat in both *Mannesmann* and *Gemeente Arnhem.*

Eamonn M. Barnes

Reflects on the past 24 Years as Director of Public Prosecutions

The beginning is often not a bad point at which to start a story. I was made aware of my appointment as Director of Public Prosecutions on 7 January 1975. The statutory instrument bringing the Prosecution of Offences Act 1974 into operation on 19 January had already been made. I had, accordingly, 12 days in which to organise a prosecution service, including staff, premises, telephones, stationery and other mundane but essential matters. It was also necessary within that time at least to initiate the functional relationship with the investigative service of the State, the Garda Síochana. In my view the subsequent development of that relationship has been a matter from which both services can justifiably take considerable satisfaction. However some of the consequences of that highly pressurised beginning persist to this day. In particular the inability to identify and establish the structures necessary for the creation of an efficient and cohesive prosecution service before the prosecutorial functions were transferred to the D.P.P. resulted in those structures never being established and not being addressed at all until recently. While much was achieved with the very limited resources which were available, I consider that it was a pity and a great loss to the public that a proper modern prosecution service with adequate structures such as exists in every other common and civil law jurisdiction, whether wealthy or under-developed, was not provided from the beginning. I am very glad that the Public Prosecution System Study Group has now been established to make recommendations in this context and that it is currently considering all relevant aspects of this issue. I hope that as a result of the Group's deliberations, a future D.P.P. will be in a position to direct a more cohesive and unified prosecution service than is currently possible. Such a service is no longer a luxury, if indeed it ever could properly have been regarded as such. It is essential to the proper security of the citizen and the community and the effective enforcement of the criminal law.

It may be helpful to put the establishment of the Office in its historical context. The 1960s were years of relative tranquillity in which serious crime was low in the register of public and social concerns. This changed with the 1970s, perhaps partly because of the outbreak of violence in Northern Ireland, perhaps partly for other social reasons not peculiar to Ireland. Whatever the reasons, serious and violent crime rapidly became a feature of our society. This development, together with our accession to the European Communities and the resultant pressures on the resources of the Attorney General, constituted one of the reasons for the creation of a new, separate and independent prosecution authority. 1974 had seen, among many atrocities in the island of Ireland, the appalling carnage caused by the Dublin and Monaghan bombs. The Office's first year, 1975 saw the murder of a very brave Garda, Michael Reynolds, in St. Anne's Park in Raheny and the kidnapping of the prominent Dutch industrialist Tiede Herrema. 1976 saw the murder of the British Ambassador to Ireland. It also saw murders of two young women, one in Wicklow and one in Connemara, for both of which two persons were subsequently convicted. Although these particular events in the first two years of the D.P.P.'s Office were exceptionally shocking to the community, they became, unfortunately, part of a very wide pattern of murders, armed and violent robberies and other serious offences against person and property which became almost commonplace. The Office could hardly have come into existence in more turbulent circumstances.

The years since 1975 have seen several more members of the Garda Siochana die in the line of duty, many other outrages such as the murders of Earl Mountbatten and his companions in 1979, and the emergence of new problems for the law enforcement agencies such as the dramatic increase in sexual crime, particularly the sexual abuse of children. As an Office we have rarely had the benefit of periods of calm during which we could consider the broad issues of policy and of standards which would normally be to the forefront of the thinking of public service agencies and particularly of those involved in the administration of justice. Despite the difficulties created by the environment within which we had to develop our service, I think we have succeeded in establishing high standards both of prosecutorial ethics and of efficiency comparable to any I know on the international scene.

I would not wish to create the impression that standards were low before our Office was established. The scope in practice of the functions performed by Attorneys General pre-1975 was somewhat different to that now obtaining, particularly in relation to the division of prosecutorial functions between the Attorney General and the Garda Síochána, but the ethical principles applied by the Office of the Attorney General were, as I personally know, very high indeed. Equally I would not wish to convey the impression that the Garda Síochána, when exercising prosecutorial functions pre-1975, were less than conscientious in seeking to do justice. I will deal with some aspects of this matter in the context of my own Office but again I am personally aware of the very high standards and concern for justice which have been exercised by the Garda Síochána when prosecuting criminal cases both at that time and since then.

High on our list of priorities in the early period of the Office was the neces-

sity to reinforce and demonstrate the constitutional and statutory independence of the Office. The necessity for that independence, and what must at times have appeared to be our obsession with it, have often been misunderstood. I do not propose to deal here with the subject in any detail. I merely state, as I have done many times, that the functional independence of a public prosecutor, like that of a judge, does not exist for its own sake or to boost the importance of the office or office holder. It is necessary, indeed essential, to enable the prosecutor to take decisions in an objective and impartial manner on matters which involve very important issues of justice for those affected by them. In a very real sense the independence of the D.P.P. is of far greater importance to the public then it is to him. In this context it should always be remembered that the exercise of our core function of deciding to prosecute or not to prosecute has the capacity, if wrongly exercised, for doing enormous injustice either to suspects or to victims. The necessity for prosecutorial independence is now generally accepted, though not always fully implemented, around the world. The jurisdictions in which it is not fully applied tend to be those in which problems regarding miscarriages of justice and breaches of human rights most often arise.

Another early priority was the need to reject, and be seen to reject, any attempt at political or other inappropriate influence in the discharge of the functions of the office. Section 6 of the Prosecution of Offences Act 1974 proved to be an invaluable aid in this process. I can say that from a very early date the making of representations prohibited by Section 6 ceased to be a problem for the Office. In this connection it may be worth mentioning, because it does not appear to be widely known, that the provisions of Section 6 have been extended to the D.P.P.'s functions under Section 2 of the Criminal Justice Act 1993 (appeals against sentences considered by him to have been unduly lenient) and that accordingly the D.P.P. cannot entertain any communication to him made for the purpose of influencing the making of a decision under Section 2, other than communications by one from the small range of the persons specified in Section 6. I would be glad if this were more widely known.

Unfortunately Section 6 does not prohibit or discourage attempts to pressurise the Office into prosecuting and some very inappropriate calls are publicly made from time to time either to initiate or to continue particular prosecutions or to increase perceived prosecution rates in relation to particular types of offence. Here the independence of the office is of particular importance. Prosecutorial decisions must of course always be taken on the particular merits of each individual case and on that basis only. To do otherwise would be to risk a dreadful injustice to the persons concerned.

The turbulence which existed when the D.P.P.'s Office was established was not confined to criminal activity. It is difficult in 1999 to appreciate fully the jurisprudential revolution which occurred in the 1970's and the 1980's, especially in the area of criminal justice. It started I suppose somewhat earlier with the *People -v- O'Brien*, 1965 IR.142. That was a somewhat unlikely vehicle for major constitutional pronouncements on exclusionary rules and the admissibility of evidence. The core of the case was the admissibility, or otherwise, of evidence relating to stolen goods found in the course of a search of premises pursuant to a search warrant which had contained a typographical error in specifying the address of the premises. The judgements of the Supreme Court, after ranging widely over the common law principles theretofore thought to apply to such situations, honed in on the constitutional considerations involved and promulgated the doctrine that evidence obtained in breach of a constitutional, as opposed to a common law, right of an accused was for virtually all practical purposes absolutely inadmissible. The decision, given at a time when, as I have said, serious crime was not a major problem in the country, had relatively little immediate impact on the criminal justice system other than to engender greater care when typing draft search warrants.

Another seminal case however was then, like Gray's Country Churchyard flower, blushing unseen and wasting its sweetness on the desert air, since it was reported in the Irish Reports in 1930. It is hard now to comprehend the impact which *Dunne -v- Clinton* (a civil action for damages for false imprisonment) had on the investigation, prosecution and trial of offences after it was re-discovered and applied to the legality of a suspect's custody, and therefore to his constitutional right to freedom, in the course of his trial for capital murder in the mid 1970's. Theretofore, while occasionally the matter might have been debated over hot whiskies by criminal lawyers as a theoretical rather than a practical problem, the general right of the Garda Síochána to "hold" or "detain" a suspect while they pursued their enquiries had not been seriously or generally challenged. The absence of any statutory power of detention for questioning or other investigation (apart from Section 30 of the Offences against the State Act 1939 or, briefly, Section 2 of the Emergency Powers Act, 1976, neither of which applied to criminal offences generally) while often commented upon by prosecution lawyers and by Gardaí, had not up to then constituted in practice a major obstacle to the successful investigation of crime. This changed dramatically in the late 1970's. The situation was reasonably well covered by the 1939 Act as far as crimes involving firearms or explosives were concerned, although doubts were from time to time voiced as to the applicability of Section 30 to non-subversive crime. Indeed it was held by the Central Criminal Court (*People -v- Quilligan*) that it did not so apply. Exercising a hard won prosecution right of appeal to which I will refer later, the D.P.P. appealed that decision to the Supreme Court, which reversed the decision of the Central Criminal Court (1986 I.R. 495). As far as all crimes other than those scheduled under the 1939 Act were concerned – virtually the entire spectrum of crime including murder unless the crime involved the use of a firearm or explosive or, until repealed, offences under the Malicious Damage Act 1861 – there was often no power of arrest and never a power of detention until the enactment of the Criminal Justice Act 1984. Even that measure, extremely limited though it is by international standards in relation to powers of detention and detailed though it is in its provision of safeguards for persons in detention, encountered considerable opposition to its enactment and did not become law until several years after the necessity for it had become pressing and obvious. A graphic example of the difficulties encountered by my Office, and by the Garda Síochaná, arising from the absence of a general power of detention is to be found in the *People -v- Shaw* 1982 I.R. 1, a Supreme Court decision arising out of the Connemara murder to

which I have already referred. At least in that case it proved possible to prosecute and ultimately to have the conviction upheld in two appeal courts, though it must be said with the utmost difficulty. In very many others we were unable either to initiate prosecutions or, where we could prosecute, to obtain convictions.

The principles in *O'Brien's* case were developed over the ensuing decades in a great number of decisions of the Superior Courts. I should stress that I am not in any way criticising any of the judgements in the cases to which I have referred or to which I will now refer. Indeed given the *ratio decidendi* of *O'Brien's* case, there was a logical inevitability to what followed. That *ratio* owed more to the United States Constitution and the jurisprudence in relation to constitutional rights developed in that country than it did to the common law tradition in these islands. That the courts here would look for persuasive precedents to a country having a written constitution rather than to jurisdictions not so endowed is not surprising. Whether one agrees with that approach or not, whether one accepts the underlying principle of *O'Brien* or not and whether the consequences of applying rigidly that principle were foreseen or not is at this stage entirely irrelevant. The constitutional principles involved are now well settled and would require a constitutional amendment to alter them.

I list the following cases as representative of the decisions which flowed from *O'Brien's* case (and in some cases from *Dunne -v- Clinton*) and which were given by the Superior Courts during the period since my Office was established.

People (DPP) -v- Madden 1977 IR 336
People (DPP) -v- Farrell 1978 IR 13
People (DPP) -v- O'Loughlin 1979 IR 85
People (DPP) -v- Walsh 1980 IR 294
People (DPP) -v- Lynch 1982 IR 64
People (DPP) -v- Conroy 1986 IR 460
People (DPP) -v- Byrne 1987 IR 364
People (DPP) -v- Healy 1990 2 IR 73
People (DPP) -v- Boylan 1991 1 IR 472
People (DPP) -v- Connell 1995 1 IR 244

Each of these cases was of importance for our criminal justice system. Some, such as *Madden*, *Farrell*, *Lynch*, *Byrne* and *Healy* could properly be described as milestone cases on the jurisprudential road since 1975. Perhaps *Healy* in particular, which established the constitutional nature of the right of access to legal advice and assistance when in custody and held that a denial of that right invalidated an otherwise lawful detention stands out as being particularly important. Each of those cases required a great investment of time and resources by my Office. All of them show a clear commitment by the courts to protecting and vindicating the legal and constitutional rights of persons suspected of serious crime.

The difficulties involved in prosecuting very serious criminal offences in the jurisprudential environment exemplified by the cases which I have listed are demonstrated by the cases of *Farrell* and *Byrne*. Both were perfectly correct in principle and I repeat I make no criticism of them. Both involved the onus on the prosecution to prove beyond doubt the legality of a suspect's detention. The legal context in which trials are conducted is not however appreciated at all outside the confined world of criminal practitioners and certainly not by the general public. Farrell was acquitted on appeal because a particular authorisation of a Garda Superintendent by the Commissioner to extend a Section 30 detention which was recited in a notice served on the accused had not been formally proved independently e.g. by calling the Commissioner or proving his signature on the document of authorisation. The legality of Byrne's detention was held not to have been proved because the validity of an extension of it under Section 30 which had undoubtedly been made by a Chief Superintendent could not be established as the Chief Superintendent had died in the meantime and his state of mind when making the extension could not be proved in evidence. We must have rules and strict rules for the administration of justice but it seems to me that when the courts have no option other than to render decisions such as these, a closer look needs to be taken at the means whereby purely formal proofs are led. I should add that the particular gaps demonstrated by these two cases were subsequently filled by legislation.

In the People *(DPP) -v- O'Shea* 1982 IR 384, my Office achieved what we regarded as being and what briefly proved to be a most valuable judgement by the Supreme Court. In essence it was that the People had a right of appeal to the Supreme Court under Article 34.4.3 of the Constitution from a decision of the Central Criminal Court acquitting a defendant. We worked very hard indeed to secure that judgement. We did so not with a view to appealing any jury verdict, however much we might disagree with it, rendered after a properly conducted trial in which all admissible evidence was placed before the jury. In fact no such appeal was ever brought by us. The right of appeal was seen by us as important mainly to enable the Supreme Court to decide important questions of law on which a ruling considered to be erroneous in law had been rendered by the trial judge and which, in the absence of an appeal, would remain binding on lower courts and persuasive in the Central Criminal Court. The case of *Quilligan* to which I have referred was an excellent example of the importance of the right. Without it the only possible remedy would have been legislation. Inexplicably, and without consultation with my Office, the Supreme Court decision in *O'Shea* was effectively reversed by Section 11 of the Criminal Procedure Act 1993 which in fact went further and abolished the right of appeal which lay, independently of *O'Shea*, against awards of costs following criminal trials in the Central Criminal Court. I have to say respectfully that I consider that the summary abolition of this hard won right was seriously mistaken. It was a most valuable right designed and intended to give access to the Supreme Court on rulings of law. I got the impression that the *O'Shea* judgement was opposed by certain ultra conservative legal persons who felt the fabric of civilisation would shatter if the slightest exception were to be made or appear to be made to the rule of double jeopardy. I suggest this view is erroneous in a number of respects. First, a major exception to *non bis in idem* has existed since 1857. Section 2 of the Summary Jurisdiction Act of that year, as extended by Section 51 of the Courts (Supplemental Provisions) Act of 1961, enables prosecution appeals against acquittals in cases of summary jurisdiction to be taken by way of case stated and it has long been settled that the jurisdiction of the Superior Courts to set aside a verdict of acquittal and remit for further trial extends to the issue of whether or not the prosecution evidence had warranted a conviction. Secondly it was never contended that the right of appeal contested for in *O'Shea* would extend to an appeal on the merits of a jury acquittal. The parameters of the right of appeal pronounced in *O'Shea* are very clearly stated in the judgements of Chief Justice

O'Higgins and of Mr. Justice Walsh. Until the right was abolished, my Office adhered rigidly to those parameters. Some very valuable statements of law were as a result obtained from the Supreme Court, not all of them by the way favourable to the contentions made by my Office. I believe of course that both as a matter of individual justice and of finality and certainty in the administration of the law, a jury verdict of acquittal arrived at after a trial conducted in due course of law, including the admission of all properly admissible evidence and correct rulings of law by the trial judge, should be final and unchallengeable. I would hold that view even in relation to suggestions now being made in the neighbouring jurisdiction that the discovery subsequent to an acquittal of incontrovertible evidence of guilt should be a ground for re-opening the case. But I believe that the proposition that all jury verdicts, however arrived at, are sacrosanct is untenable. In this connection I would quote the following words of Mr. Justice Walsh in his judgement in *O'Shea*:

> "Jury trial in criminal cases, which is made mandatory by the Constitution save in the exceptions provided for, is a most valuable safeguard for the liberties of the citizen. It must, therefore, be permitted to operate properly. It would be totally abhorrent if a conviction which had been obtained by improper means, such as the corruption or coercion of a jury, should be allowed to stand. It should be equally abhorrent if an acquittal obtained by the same methods should be allowed to stand. If attempts to sway the verdicts of jurors by intimidation or other corrupt means were allowed to go unchecked, they could eventually bring about the destruction of the jury system of trial. Persons who are tempted to do so would think twice about it if they were faced with the possibility that such efforts on their part could negative results which they had corruptly achieved. All prosecutions on indictment are, by virtue of the Constitution, brought in the name of the people and it is of fundamental importance to the people that the mode of trial prescribed by the Constitution should be free to operate, and be seen to operate, in a manner in which the law is respected and upheld.
>
> The examples of intimidation and corruption which I have taken are extreme examples, but it is necessary to take extreme examples to test the validity of the proposition that all acquittals by a jury in the High Court are unimpeachable."

I am strongly of the view that not alone should *O'Shea* have been allowed stand but that a clear system of prosecution appeals, albeit limited to issues of law, admissibility of evidence and procedure and possibly including the type of intimidation and corruption referred to by Mr. Justice Walsh, should be adopted. At present virtually all appellate rights, apart from the case stated procedure, are vested in the defendant. I believe more balance in our procedures is required.

In the same context, I believe that there is an unanswerable case for at least one long overdue change in the system of trial procedure which as a nation we inherited from our former masters. I refer to the procedure whereby various legal issues, notably those regarding admissibility of evidence and legality of detention, are debated at great and often inordinate length in what has become known as a trial within a trial while a jury is retired, often for very lengthy periods. I believe all such questions should be judicially determined as preliminary issues before the proceedings involving the jury are commenced. Such determinations should be appealable by both sides to an appropriate appellate court, again before the main trial begins. This would be greatly in ease of unfortunate jury persons who, under current procedures, can have their freedom of movement curtailed for weeks on end and secondly would enable them to concentrate on the evidence in a coherent manner without lengthy interruptions.

I should state that the views I have expressed regarding rights of appeal and trial procedures are not new. They are the product of our experience over the past 24 years and during that time have been stated by me on many occasions in various fora. I think the time is now opportune for them to be the subject of full debate and hopefully of action.

I might add that I think that criminal trials are very often inordinately long and costly. There is a strong case to be made for pre-trial conferences or other procedures where non-contentious issues and evidence could be agreed or admitted. Much time and enormous expense is incurred by the necessity to call evidence which, without any risk to the interests of justice, could be admitted pursuant to Section 21 and 22 of the Criminal Justice Act 1984. It has proved almost totally impossible for some reason to get the co-operation of defence lawyers to the use of those sections which for all practical purposes have remained inoperative since their enactment. The result is, for instance, the necessity for the attendance of often large contingents of Gardaí simply to prove the preservation intact of the scene of a crime, and the prolongation of the trial consequent on that attendance. At a time when criminal trial judges are struggling vainly to keep their lists reasonably up to date, this is a matter which requires urgent attention.

There has been much legislative innovation in the areas of the substantive criminal law and of criminal procedure, most of it representing very significant improvement on what had gone before. In this regard very great credit is due to the Law Reform Commission and to the Department of Justice, Equality and Law Reform. The area of criminal activity now most urgently in need of law reform is that of fraud, theft and dishonesty and related offences against property. I am particularly pleased that a Dishonesty Bill dealing with this most difficult and complex area will be processed through the Oireachtas in the very near future. Many relevant offences, notably those involving commercial fraud and financial malpractice, cause immense suffering and damage, often to persons least able to withstand the blow. Until now we have sought to counter such activities under legislation conceived in a very different era. The main statute dealing with most of these matters remains the Larceny Act 1916, the draftsmen whereof were unlikely to have had any conception of the electronic world in which we live and through which those with fraudulent intent and a modest proficiency in automated procedures can roam with impunity. We have been deeply frustrated on many occasions over the past 24 years at our inability to prosecute cases of obvious fraud, very often because there was no criminal offence to match the particular fraudulent activity. That aspect of the problem will I believe largely disappear with the enactment of the Dishonesty Act. It will not however solve all the problems in this area.

We live in an age of tribunals of enquiry. Needless to say I will make no comment on recent or current tribunals

or on their remits or work. I would however like to say a few words on the legislative framework within which they conduct their search for truth. I do so in the context of statements, repeated by me many times over the years, that in relation to at least certain types of criminal offence, an inquisitorial system of criminal investigation is much superior to an accusatorial one as a means of ascertaining truth with reasonable certainty. One such type of criminal offence is fraud.

Tribunals of enquiry operating under the Act of 1921 as amended by the Acts of 1979 and 1997 have certain distinctive characteristics, two in particular. The first is that they can compel, on pain of criminal sanctions, the co-operation of any person considered to possess information relevant to the particular tribunal's remit. The second, which is complimentary to the first, is that any such person is immune by statute (Section 5 of the 1979 Act) from criminal proceedings arising from his or her evidence to the tribunal other than for knowingly giving false evidence. With these characteristics a tribunal of enquiry is in a very strong position in which to get at the truth. There is I believe a clear message in this for anyone concerned with the efficiency of the criminal process. My Office has been the target of much criticism for perceived failures to prosecute in cases of fraud. Usually the failure has been either the lack of an offence to fit the fraud or the inability to compel, in the course of the investigation, the co-operation of witnesses necessary to prove an offence.

I would stress that I am not here talking about the right to silence of a suspect. I am talking about the current inability to compel non-suspects, or even minor suspects to whom criminal immunity could be extended, to co-operate in a criminal investigation. This is an inability not widely appreciated by the public. It is often fatal to an investigation. Under our purely accusatorial system, prosecutions based upon a suspicion as to what someone might say or as to what it is hoped the person would say are not permitted. If a witness refuses to co-operate with the Gardaí, there is usually little or nothing which can be done about it. Very often the item of evidence involved is simultaneously both innocuous and vital. It may be as simple as establishing from company records a link between a debit in one area and a credit in another. It may nevertheless be an essential proof without which a fraudster cannot even be charged, still less convicted.

I would be in favour of retaining, subject to certain purely procedural changes such as I have suggested above, our current accusatorial and adversarial system for the trial of offences. For criminal investigations however, I believe the case for compellability of witnesses as distinct from suspects is daily becoming more and more obvious if the public really requires serious crime to be confronted and defeated. For this purpose I see no necessity whatever for the introduction of any form of examining magistrate. The function could be perfectly well performed by members of the Garda Síochána.

I would like to make a few short and entirely inadequate observations regarding the Garda Síochána. Wearing a hat other than that of DPP I have, particularly in recent years, had the opportunity to observe other criminal justice systems, prosecutorial services and police forces in many countries around the world. I do not think that the Irish people appreciate properly the standard of our police force and of the service which they provide for us. I can assure you that it is second to none in my experience. My Office has to deal at arm's length with the Garda Síochána. That is how it should be. The independence of the Commissioner and his force in the exercise of the investigative function is every bit as important as the prosecutorial independence of my Office. This does not mean that there are not numerous areas of close co-operation between the two functions and in those areas I have and have always had the highest opinion of their expertise and commitment to justice. In the early days of the Office I was asked to supervise the investigation of a very important and sensitive matter. The then Commissioner assigned to me a very high powered and expert team. I quickly realised that, while remaining available to offer advice on request, I should not attempt to intervene in the investigation in any way but confine my activities to a prosecutorial judgement on the result. It is a practice we have followed ever since. I am aware that it is not the practice in other countries and that increasingly prosecutors are becoming involved in the investigation. Personally I consider our division of function to be much healthier and in the long run much more efficient.

One matter which has caused public comment from time to time and about which I have never, I think, spoken publicly is what is commonly but very inaccurately called plea-bargaining. In the forms in which it is to be found in other jurisdictions, plea bargaining does not exist in this country. It may be helpful for me to clarify a few matters which are often the subject of misunderstanding.

First, the practice of the prosecution and defence attending in a judge's chambers to ascertain what sentence would be imposed in the event of a particular plea of guilty being offered and to enter into an agreement about the matter does not happen here. It is quite common in other countries, notably in the United States of America. I believe that if such a practice were to be introduced here, appropriate legislative sanction for it would be at least desirable if not actually essential. Some time ago I discovered that the practice had begun to grow of prosecution counsel accompanying defence counsel to the judge's chamber for the purpose of expressing a view, if asked by the judge, on a sentence which might be imposed. As I felt that in the absence of legislation such a practice was thoroughly undersirable and should be stopped, I issued a circular instruction to that effect. Prosecution counsel are not authorised to enter into any bargain or agreement about sentences and as far as I know they do not now ever do so.

Secondly, the prosecution does not bargain in any real sense of that word with the defence regarding the offer or acceptance of a plea to a less serious offence. As far as I am aware, it never solicits such a plea or initiates a bargaining session regarding it.

Thirdly our firm policy is never to over-charge. Again unlike some other countries, we do not prefer a more serious charge than the evidence warrants in order to secure a plea or conviction to a less serious offence.

Fourthly, it follows that a plea to a less serious offence would not normally be appropriate or generally be accepted in the absence of some material change of circumstance such as the death of an important witness. An exception to this might very occasionally arise if for some humanitarian reason it was decided that the public interest and the interests of justice would be served by acceptance of the less serious plea.

Fifthly when there is such a material change of circumstance as renders the book of evidence no longer an accurate reflection of the evidence to be led by the prosecution, the defence would be informed and if at that stage a plea to a less serious offence were offered it would be considered, the guiding principle always being the public interest and the interests of justice. Again prosecution counsel should not invite the offer of such a plea.

I would make just one final point. Reform of our criminal law is at a very advanced stage and will shortly be complete. I am strongly of the view that it should now be codified both as to substantive law and criminal procedure. Even after reform it is spread over very many years and many statutes. In a system in which ignorance of the law is no excuse, it is inexcusable that it is so inaccessible to members of the public. Even criminal lawyers often have the utmost difficulty in finding and ascertaining it with any confidence or certainty. Countries all around the world with much smaller resources than ours have long since codified their laws. Anyone familiar with the French system will recognise the two little red books, the penal code and the code of criminal procedure. which you can slip into your jacket pocket. As a matter of social justice, I think the Irish public is entitled to an accessible code in which they can easily ascertain their potential liabilities. The Irish criminal lawyer is entitled to no less. It could I believe be done relatively easily and quickly. •

Bar Council Conference

'Inquiries: the Rights of Individuals, Publicity & Confidentiality'

The Bar Council is holding a day long conference in the Law Library Distillery Building, Church Street, on Saturday, July 17th on the above topic. The speakers, from a number of jurisdictions, will look at various aspects of inquiries. The conference will conclude with a Questions & Answers session, with all speakers participating.

Speakers:

- ***Sir Richard Scott***, Vice Chancellor of the Supreme Court in England, who presided over the government inquiry into the supply of arms to Iraq
- ***Senator Chris Dodd***, Democratic senator for Connecticut
- ***Mark H.*** Tuohey III, a member of the group investigating the role and functions of the Special Prosecutor in the United States
- ***Rory Brady*** SC, Michael Collins SC, Paul Gallagher SC and Sara Moorhead BL from the Irish Bar
- ***Miriam O'Callaghan*** (Primetime) will be acting as moderator at the Questions & Answers session

Booking:

To book a place, please contact Mary O'Reilly at (01) 817 4614, before Friday 9th July or photocopy the form below and send it to Mary at the Distillery Building, Church Street.
Cheques can be made out to Law Library Services Ltd.

Bar Council Conference

'Inquiries: the Rights of Individuals and Confidentiality'

First Name: _____

Last Name: _____

Company: _____

Address: _____

Telephone: _____

Delegate fee £150 (includes lunch and refreshments)

FirstLaw Current Awareness Service

CIAN FERRITER, Barrister

The FirstLaw current awareness service represents an exciting development in Irish legal publishing. The service is delivered solely in electronic form, over the Internet. It aims to provide Irish legal practitioners with up-to-the minute legal information encompassing the latest developments in Irish case law and legislation and selected developments in EU law. It provides abstracts of all documents in addition to their full text. As such the service represents one of the first "value-added" electronic legal information services in this jurisdiction.

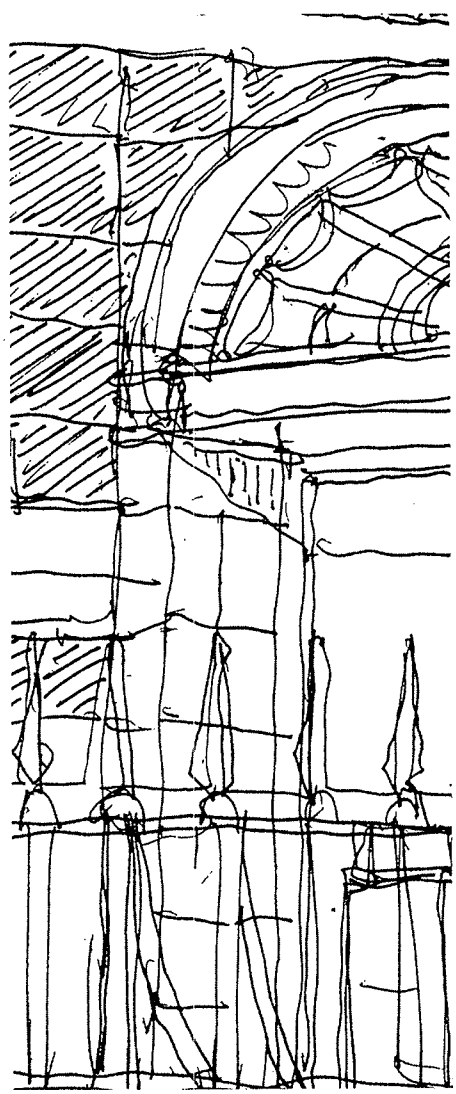
The service involves a Current Awareness Web site which publishes synopses and the full text of the following material:

1. all written High Court, Court of Criminal Appeal and Supreme Court judgments
2. all Acts, Bills and Statutory Instruments
3. selected ECJ judgments, Commission Decisions and EU legislation
4. bibliographic details of articles published in Irish legal journals and recently published text books
5. government announcements and press releases on proposed legislation and other legal developments

The information is kept on the Current Awareness site for 7 days at which point it is transferred into a searchable Archive of materials. The archive at present extends back to October 1998 but FirstLaw developer Bart Daly has ambitious plans to extend the archive to include older unreported judgments. It is also hoped to expand the service to include electronic legal text books and a wider range of European material.

The FirstLaw web site also offers a pilot Circuit Court listing service which is presently confined to the daily lists for the eastern circuit. It is hoped in time to extend this service to all Circuits as the Courts system benefits from increasing computerisation.

The real benefit of the FirstLaw service is that it provides the user with abstracts of all material in addition to the full text of the material. The full text may be downloaded onto a word processor or printed out. It also seeks to bring together in one service material that would otherwise have to be subscribed for from many different sources.



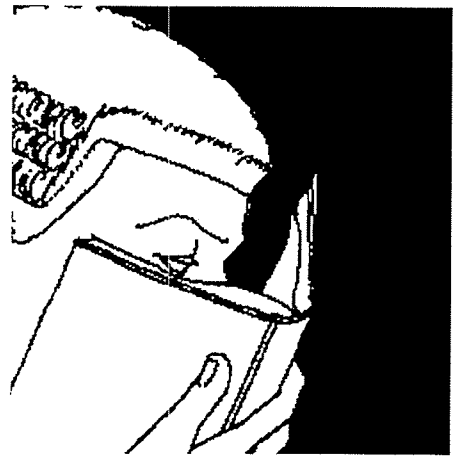
The material is clearly and concisely presented on the screen; a user is given the title and key words of the document; a mouse click brings up an abstract of the document and then a further click authorises the printing or downloading of the full text.

While it is appreciated that the service is in its infancy, it could benefit from some extra functionality. The search function for the archive service is at present quite limited; it does not appear possible to confine a search to a segment of a document (for example, the title or citations); the search terms entered are not highlighted in the text; there is no option to search within a document; a "masking" facility to cover variations on words is not available. Thus by entering the key words "Martin" and "Byrnes" to find the recent High Court personal injuries case of Martin v. Byrnes and MIBI, the service brought back 33 hits, including details of Minister Micheal Martin's weekly appointments diary! A "Search in Title" option would have avoided such a result. Some work on making available to the user the full range of the search engine's capabilities would improve the archive service considerably.

The service can be subscribed to for a flat £240 annual fee, with a charge of 10p per page for every full text document downloaded. Alternatively a user can avail of a pay-per-use fee of £1 for every access to the Daily Update service, in addition to the 10p per page download charge. The service is hosted by Lawlink who also provide the Securemail and electronic Legal Diary services over the Internet.

The Firstlaw service is to be warmly welcomed as a valuable addition to the growing range of electronic services available to the Irish legal practitioner. •

DISMISSAL LAW IN IRELAND
BY DR. MARY REDMOND
(PUBLISHER)
AND
TRANSFER OF UNDERTAKINGS – EMPLOYMENT ASPECTS OF BUSINESS TRANSFERS IN IRELAND AND EUROPEAN LAW
BY GARY BYRNE
(BLACKHALL PUBLISHING)



Two important texts in Irish employment law have been recently published, the authors are both practising Solicitors in this area.

The first edition of Dr. Redmond's book was published in 1982, a mere five years after the coming into force of the Unfair Dismissals Act. In the preface to that edition, she referred to the fact that since the passing of the legislation "hundreds of employers" had been called upon to defend their decisions pursuant to the provisions of the Act. Since that time, many thousands of employers have had the same experience. The Act has been amended, such that the numbers and classes of employees now protected by the provisions has grown immensely. Despite the views and, in some cases, the best efforts of some politicians to exclude legal representation before the Employment Appeals Tribunal, the fact is that the majority of cases heard before that body now involve legal representation. This development is not surprising having regard to the complexity of an ever increasing body of Statute Law, the potential level of awards under the Statute and the emotion generated by the breakdown of the employment relationship which is often described as being akin to the breakdown in Family Law matters.

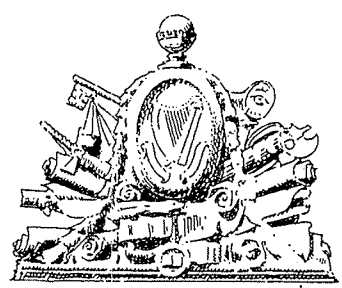
Dr. Redmond's long and eagerly awaited new book reflects the enormous growth in this area and deals comprehensively with the enormous volume of material now available. This is reflected in the fact that the book is more than twice as long as the first book and yet, the author has succeeded in marshalling a huge range of authorities into a cohesive structured review which, undoubtedly, will result in this book being as well, if indeed not better, regarded than the first edition and constantly used by practitioners in this area.

Dr. Redmond's first book was written when she was an academic. This new book has the benefit of her enormous academic scholarship coupled with the practical experience and expertise of a Solicitor working in this area of the law.

The book deals not only with the statutory remedy of Unfair Dismissal but also deals fully with the common law remedy of wrongful dismissal and also with what the author recognises as the most important development in this area of the law in recent years, that being the granting of injunctive relief to restrain the dismissal of employees. Dr. Redmond's observation that recent interlocutory decisions of the Irish Courts seem to reflect "an overly arithmetical rather than an algebraic approach" is perceptive and there is no doubt that there is an urgent need for a definitive analysis by the Courts of the circumstances in which injunctive relief will be granted. At this time, the vast majority of cases have only been dealt with at the interlocutory stage, where arguments that the balance of convenience demands that the employee remains on the payroll, have generally outweighed submissions that damages would ultimately be an adequate remedy.

This book will undoubtedly appeal to a wide audience, it will be the well thumbed bible of practitioners in this area and should be compulsory reading for personnel managers and trade union officials.

Mr. Byrne's book also reflects the enormous knowledge of another leading practitioner in this area. Whilst the Transfer of Undertakings Directive came into force in the European Union at about the same time as the Unfair Dismissals Act, 1977, implications of that Directive were somewhat slower to appear. The Directive was incorporated into Irish Law by regulations made in 1980 (S I 306 of 1980) however, they remained an interesting but largely dormant set of rules until the important decision of the High Court in *Mythen – v – Employment Appeals Tribunal & Others* [1990] 1 IR 98. That decision confirmed that the Employment Appeals Tribunal, in dealing with matters under the Unfair Dismissals Act were obliged to apply the provisions of the Regulations. Since that time, the Regulations have been recognised as being of the utmost importance. Mr. Byrne's book is the first full analysis of the effect and application of these Regulations in Irish Law and includes reference to an analyses of the leading decisions of the European Court.



The author deals comprehensively with the rights and obligations under the Regulations. His knowledge and experience in the wider employment law field is obvious in the manner in which he treats the Regulations in the context of other issues. Indeed, he not only deals with the Regulations themselves but in each chapter also deals comprehensively with related areas. The effect is that this book's usefulness is not solely limited to dealing with Transfer of Undertakings issues but also has an appeal as a general text on employment law. By way of example, in dealing with reorganisation and rationalisation of businesses, Mr. Byrne not only sets out fully the obligations under the Regulations in the context of collective redundancies but also gives a useful review of the law relating to such matters as selection for redundancy and the statutory obligations in relation to notification and consultation.

As with Dr. Redmond's book, Mr. Byrne's work also deserves a wide audience and the two authors have succeeded in adding important new works which will be of immense value to us all. The fact that Dr. Redmond and Mr. Byrne, as busy practising Solicitors, have taken the time and effort to share with us their enormous knowledge, is to be commended and it is hoped that the success of their efforts will encourage others to follow their path.

–Tom Mallon, SC

FINIS

COURT AND COURT OFFICERS ACT. 1995

THE JUDICIAL APPOINTMENTS ADVISORY BOARD

APPOINTMENT OF FOUR JUDGES OF THE DISTRICT COURT

- Notice is hereby given that four vacancies are due to arise in the Office of Ordinary Judge of the District Court. The Minister for Justice, Equality and Law Reform has requested the Board under Section 16 of the Act to exercise its powers under that section and to make recommendations pursuant to it.

- Practising Barristers or Solicitors who are eligible for appointment to the Office and who wish to be considered for appointment should apply in writing to the Secretary of the Board, Office of the Chief Justice, Four Courts, Dublin 7 for a copy of the application form. Completed forms should be returned to the Board's secretary, Mr. Brendan Ryan, on or before **5.00 p.m. on Friday, 16th July, 1999.**

- Applications already made in respect of vacancies in the Office of Ordinary Judge of the District Court will be regarded as applications for this and all subsequent vacancies in the District Court unless and until the Applicant signifies in writing to the Board that the application should be withdrawn.

- It should be noted that this advertisement for appointment to the Office of Ordinary Judge of the District Court applies not only to the vacancies due to arise but also to any future vacancies that may arise in the said office during the six month period from the 1st July, 1999.

Applicants may at the discretion of the Board by required to attend for interview.

Canvassing is prohibited.

Dated the 1st July, 1999

SECRETARY
JUDICIAL APPOINTMENTS ADVISORY BOARD

Applications are invited from suitably qualified persons to fill the position of

Director of Public Prosecutions

The office of Director of Public Prosecutions was established under the Prosecution of Offences Act, 1974. The function of the Director is the direction and supervision of public prosecutions and related criminal matters in accordance with the relevant legal provisions. The post of Director of Public Prosecutions which is a full-time Civil Service post will become vacant upon the retirement of the current Director in September 1999.

Applicants must:

- be a practising barrister or a practising solicitor,

and

- have practiced as a barrister or solicitor for at least ten years.

Service for any period in a position in the Civil Service for appointment to which practice as a barrister or a solicitor was a necessary qualification, will be regarded as practice as a barrister or a solicitor for that period and persons while holding such positions will be regarded as practising barristers or practising solicitors as the case may be.

Salary £86,691 (net of appropriate contribution in respect of personal superannuation benefits)

Superannuation: There is provision for superannuation

The appointment will be for a term of seven years and will not be renewable.

Applications will be considered by the Committee established under the Prosecution of Offences Act, 1974 to select candidates for appointment to the office. Candidates may be interviewed; in such an event the Committee may, at their discretion, decide that a number only of the applicants shall be invited to attend for interview. The appointment will be made by the Government.

Application forms and further details of the terms and conditions which will apply may be obtained from:

Mr. Donagh Morgan,
Secretary to the Selection Committee,
Department of the Taoiseach,
Room 140, Government Buildings,
Upper Merrion Street,
Dublin 2.

Telephone (01) 6194121

E-mail Donagh_Morgan@taoiseach.irlgov.ie

Closing date for receipt of applications: 5.00 p.m., Friday, 9 July 1999

The Government is committed to a policy of equal opportunities.

Editor of the Bar Review

Applications are invited for the position of

Editor of the Bar Review

The Review is published on a monthly basis, nine times during the court year. This is a part-time post suited to a barrister of at least four year's standing or having equivalent suitable experience. The role will include the following requirements:

- To decide, in conjunction with the Editorial Board, on features and nominate authors for article for each issue of the Review.
- To organise the collection and editing of manuscripts.
- To liaise with photographer, designer and printers in co-ordinating the timely production of the journal each month.
- To ensure the timely delivery of the Review to all subscribers, members and others on the mailing list.
- To oversee printing and distribution of binders for the Review.
- To act as secretary to the Editorial Board of the Bar Review.

Applicants are invited to submit
a current resumé by Monday, 12th July to:
Jeanne McDonagh,
Press & PR Manager,
158/159 Church Street,
Dublin 7.

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