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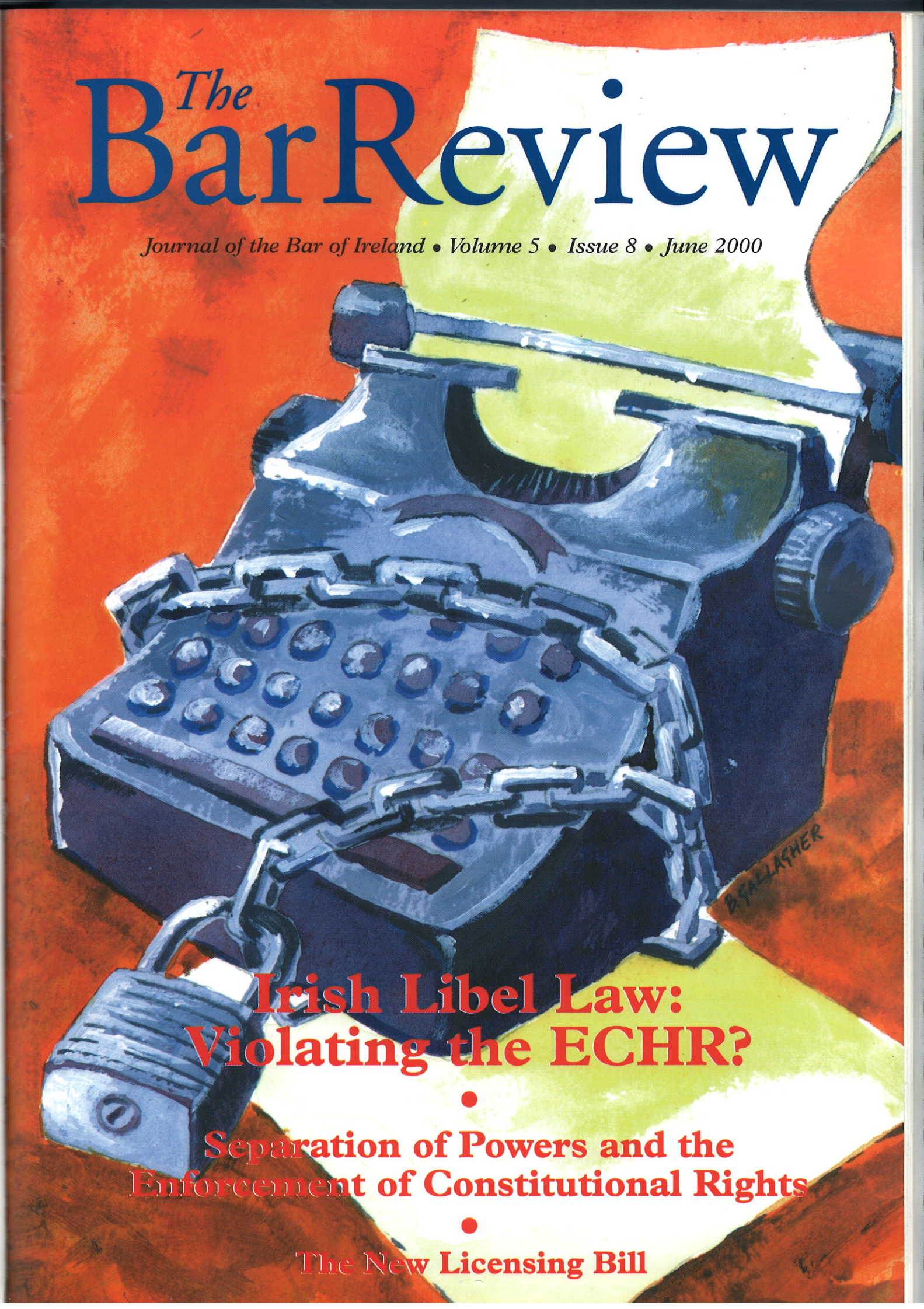

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Contents

409 OPINION

410 Irish Libel Law and the European Convention on Human Rights
Patrick Leonard BL

416 Separation of Powers and Mandatory Orders Enforcing Constitutional Rights
Blathna Ruane BL

423 The Intoxicating Liquor Bill, 2000
Constance Cassidy BL

429 LEGAL UPDATE:
A Guide to Legal Developments from 13th April 2000 to 12th May 2000

443 Litigating for the Pepsi Generation
Paul Anthony McxDermott BL

447 Ground Rents Reform
John Smith BL

450 EUROWATCH: the MIBI Agreement and its compliance with EU law
Sara Moorhead BL

453 ONLINE: Developments in Irish Electronic Publishing
Jennefer Aston, Consultant Librarian

457 KING'S INNS NEWS

458 BOOK REVIEWS

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FORGOTTEN TIGER CUBS

If society should be judged on the basis of its treatment of the disadvantaged, how will the society which has spawned the Celtic Tiger be judged in light of its treatment of needy children? In 1995 Geoghegan J in *F.N -v- The Minister for Education* [1995] 1 I.R. 409 declared that the State and its agents are under a positive duty deriving from the Constitution and exemplified in the Child Care Act, 1991 to safeguard the welfare of children in need of care. The State in consequence of that decision committed itself to providing required facilities. Since that time there have been many cases in which the High Court has been asked to vindicate the rights of children whose needs have not been met by the State. These range from children with special educational and medical needs to children in need of secure places of detention in their own interests. On a different analysis, they include children whose parents had done their best for them and children whose parents failed them. In many respects the needs of these children could be met by the provision of adequate resources, for example, by the provision of more secure places of detention, both within and outside the juvenile justice system, or by the provision of special educational facilities and services.

The State offered commitments to the High Court, to provide places of detention, in some instances under threat of injunction by the Court and in other instances voluntarily. These commitments have not been adhered to. Mr Justice Kelly in *T.D. (A Minor) -v- The Minister for Education and ors,* (together with a number of other cases) unreported, 25th February, 2000, considered the adherence by the State to these commitments. Kelly J found on the evidence that there had been lengthy delays in complying with the commitments given to the High Court. In some instances there were understandable reasons for these delays. However, in most cases the delays were the result of bureaucratic haggling or culpable delay. Kelly J's judgment stands as an indictment of the genuine willingness of the State to foster and cherish all of its citizens equally.

Perhaps a more invidious development manifested itself in the hearing of the T.D. case. The State authorities argued on instructions that the minor Plaintiffs did not have the locus standi to seek the vindication of their constitutional and statutory rights by appropriate declaratory or injunctive relief against the State. Not alone did this submission fly in the face of the evidence before the Court from a witness on behalf of the State, but it flew in the face of the earlier decisions in cases such as these, starting with F.N, in none of which such submission was made, and in respect of none of which has an appeal been taken. Mr Justice Kelly described this submission as "remarkable".

Having heard the evidence as to the future plans Kelly J invited the State to furnish an undertaking to the Court to abide by the commitment. This was expressly not forthcoming. In the circumstances, Kelly J granted the injunctions and concluded his judgment thus: "Even as things stand it will be fully seven years since the decision in F.N. before these facilities will be in operation. These children and others like them are at an important stage in their development. Much can be done for them. Their future lives as adults can be influenced for good but only if the appropriate facilities are available. They have a right to them. They ought to have been provided long before now. It is a scandal that they have not. A great deal of time has been lost. This Court can allow no more." Recently a number of children have had to be detained in adult psychiatric facilities because of the State's failure, notwithstanding that none had any psychiatric problems. Are we to await the death of one of these children before urgency is applied to this area? At present we all stand indicted.●

IRISH LIBEL LAW THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Patrick Leonard BL assesses the Supreme Court decision in the libel case of ***De Rossa v. Independent Newspapers plc*** *in light of the decision of the European Court of Human Rights in* ***Tolstoy Miloslavsky v. United Kingdom***

Background

In the recent case of *De Rossa v. Independent Newspapers plc* [1], the Supreme Court upheld an award of £300,000 damages for libel made to Prionsias de Rossa. This case deals with important issues as to the guidance which can be given to a jury in the assessment of damages in a defamation action, and the test to be applied by an appellate court in considering whether such an award is excessive.

The Supreme Court refused to alter the long standing practice of giving only general guidelines to a jury in a defamation action, and because of the changes introduced in other jurisdictions, the Irish law in this area is now materially different from that in England and Australia, and may not be in accordance with the European Convention of Human Rights. This article looks at the Supreme Court decision, a decision of the European Court of Human Rights concerning an English libel case, and also sets out how the Court of Appeal have radically changed the way in which a jury is charged, and the way in which an appellate court looks at a jury award. The Court of Appeal view these changes as a natural development of the common law, and as safeguards against unnecessarily large awards in defamation actions. Despite the extra buttressing that freedom of expression might be thought to have in Ireland through the provisions of the Constitution, the Supreme Court have declined to follow the Court of Appeal and have refused to introduce similar safeguards in this jurisdiction.

"Despite the extra buttressing that freedom of expression might be thought to have in Ireland through the provisions of the Constitution, the Supreme Court have declined to follow the Court of Appeal and have refused to introduce similar safeguards in this jurisdiction."

Independent Newspapers plc appealed to the Supreme Court on the issue of *quantum* only, and the appeal relied heavily on the decision of the European Court of Human Rights in *Tolstoy Miloslavsky v. United Kingdom*[2]. In the appeal, Independent Newspapers plc contended that the size of the award was excessive and wholly disproportionate to any damage done to Prionsias de Rossa's reputation, that it was so high as to amount to a restriction on the freedom of expression of Independent Newspapers plc in breach of article 10 of the European Convention on Human Rights, a violation of the Independent Newspapers plc's rights under Articles 40.3 and 40.6.1.i of the Constitution and further that the supposed rule of law or practice which restrained a judge and counsel in defamation actions from offering specific guidance as to an appropriate level of damages was inconsistent with Articles 40.3 and 40.6.1.i of the Constitution.

Article 10 of the European Convention on Human Rights provides that :

'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such

> formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 40.3 of the Constitution provides, *inter alia*, that:

> "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen..... (and) .....shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of the citizen."

Article 40.6.1 of the Constitution provides, *inter alia*, that :

> "The State guarantees liberty for the exercise of the following rights, subject to public order and morality : ... i. the right of citizens to express freely their convictions and opinions"

Tolstoy Miloslavsky v. United Kingdom.

The appeal by Independent Newspapers plc relied heavily of the judgment of the European Court of Human Rights in *Tolstoy Miloslavky v. United Kingdom.* This case arose out of a pamphlet written by Count Nikolai Tolstoy Miloslavsky about Lord Aldington concerning certain alleged activities of Lord Aldington during the Second World War. As a result of the distribution of that pamphlet by a Mr. Watts, Lord Aldington sued Count Tolstoy Miloslavsky and Mr. Watts for damages for libel in the English High Court, and was awarded damages of £1,500,000 together with costs. Count Tolstoy Miloslavsky appealed to the Court of Appeal, and during the course of an application by Lord Aldington for security for costs, Lord Aldington made an open offer not to enforce £1,200,000 of the jury's award (coincidentally reducing it to £300,000, the same figure awarded to Prionsias de Rossa). The Court of Appeal ordered that Count Tolstoy Miloslavsky furnish security for costs, which he failed to do, and ultimately the appeal was dismissed.

Following some further proceedings in the English Courts, Count Tolstoy Miloslavsky made a complaint to the European Commission for Human Rights that he had not had a fair hearing by an impartial tribunal as required by Article 6(1) of the European Convention on Human Rights (hereafter 'the Convention'), that the granting of security of costs by the Court of Appeal violated his right of access to court under Article 6(1) of the Convention and that the award of £1,500,000 constituted a violation of his right to freedom of expression as guaranteed by Article 10 of the Convention. The Commission declared the first portion of the complaint inadmissible, and expressed the opinion that there had been a breach of his right to freedom of expression under Article 10 of the Convention.

Before the European Court of Human Rights (hereafter the 'Court of Human Rights') Count Tolstoy Miloslavsky maintained that, in breach of Article 10 of the Convention, the amount of damages awarded against him could not be considered to have been 'prescribed by law' and that, *inter alia*, the size of the award was disproportionate to the aim of protecting Lord Aldington's 'reputation or rights' and was thus not 'necessary in a democratic society'.

In England, the extent to which a judge could give guidance on damages to a jury in a defamation case was strictly circumscribed and an award could only be overturned by the Court of Appeal if it was so unreasonable that it could not have been made by sensible people, but must have been arrived at capriciously, unconscionably or irrationally.

Firstly, the Court of Human Rights looked at whether the award was 'prescribed by law'. In its judgment, it had regard to the high degree of flexibility which it felt was justified in the calculation of damages for loss of reputation, the various criteria which would be taken into account by a jury in the assessment of such damages, and the review which could be carried out by the Court of Appeal, and held that the award of £1,500,000 was 'prescribed by law' for the purposes of Article 10.2 of the Convention.

The Court of Human Rights then held that : "having regard to the size of the award ... in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award, the Court finds that there has been a violation of the applicant's rights under Article 10 of the Convention".

The Court of Human Rights then turned to the question of whether the award was 'disproportionate' to the legitimate aim of protecting Lord Aldington's rights. It noted that the award was three times the size of any previous award, that great latitude was allowed to the jury, and that the Court of Appeal could not set aside an award simply on the grounds that it was excessive, but only if it was so unreasonable that it could not have been made by sensible people and must have been arrived at capriciously, unconscionably or irrationally. In light of this, it endorsed the view of the Court of Appeal in the libel case of *Rantzen v. Mirror Group Newspapers (1986) Ltd.* [3] that :

> "the scope of judicial control, at first instance and on appeal, ... did not offer adequate and effective safeguards against a disproportionately large award".

The Court of Human Rights then held that :

> "having regard to the size of the award ... in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award, the Court finds that there has been a violation of the applicant's rights under Article 10 of the Convention".

Changes introduced by *Rantzen v. Mirror Group Newspapers (1986) Ltd.* and *John v. MGN Ltd.*

In the cases of *Rantzen v. Mirror Group Newspapers (1986) Ltd. and John v. MGN Ltd.* [4], the English Court of Appeal substantially changed the way in which a jury was charged by the trial judge on the assessment of damages in a defamation action and in the test to be applied by an appellate court in considering the quantum of such damages. The changes were brought about in two steps.

"In the cases of *Rantzen v. Mirror Group Newspapers (1986) Ltd. and John v. MGN Ltd.* The English Court of Appeal substantially changed the way in which a jury was charged by the trial judge on the assessment of damages in a defamation action and in the test to be applied by an appellate court in considering the quantum of such damages."

A. *Rantzen v. Mirror Group Newspapers (1986) Ltd.*

The first changes in English law were made before the decision in *Tolstoy Miloslavsky v. United Kingdom* and these changes were viewed as a development of the common law. Although the provisions of Article 10 of the Convention were not part of English domestic law, in the case of *Rantzen v. Mirror Group Newspapers (1986) Ltd.*, the Court of Appeal noted that where freedom of expression was at stake, Article 10 of the Convention could be properly regarded as "an articulation of some of the principles underlying the common law". In particular the Court of Appeal took account of the following statement from *Attorney-General v. Guardian Newspapers Ltd. (No.2)* [5]

> "The exercise of the right to freedom of expression under article 10 may be subject to restrictions (as are prescribed by law and are necessary in a democratic society) ... It is established in the jurisprudence of the European Court of Human Rights that the word 'necessary' in this context implies the existence of a pressing social need, and that interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued. I have no reason to believe that English law, as applied in the Courts, leads to any different conclusion."

Applying this, the Court of Appeal held that :

> "The grant of an almost limitless discretion to a jury fails to provide a satisfactory measurement for deciding what is 'necessary in a democratic society' or 'justified by a pressing social need' ... the common law if properly understood requires the courts to subject large awards of damages to a more searching scrutiny that has been customary in the past. It follows that what has been regarded as the barrier against intervention should be lowered. The question becomes: 'Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and re-establish his reputation.' "

Accordingly, the test to be applied by the appellate court was substantially lowered, and imposes a requirement of 'necessity'.

Consideration was also given in *Rantzen v. Mirror Group Newspapers (1986) Ltd.* to the guidance which should be given a jury in defamation actions in relation to the assessment of damages. The Court of Appeal adopted the reasoning in the earlier cases of *Ward v. James* [6] and *Cassell & Co. Ltd. v. Broome* [7], and rejected the proposition that juries should be referred to other jury awards in defamation cases or to awards in personal injury actions.

However, in a substantial change of practice, the Court of Appeal held that juries should be referred to defamation awards made by the Court of Appeal under the power granted by section 8 of the Courts and Legal Services Act 1990. [This Act gave the Court of Appeal power to order a new trial on the ground that damages awarded by a jury were excessive or inadequate, or to substitute for the sum awarded by the jury a sum that the Court of Appeal thought proper.

B. *John v. MGN Ltd.*

More radical changes were introduced after the decision in *Tolstoy Miloslavky v. United Kingdom.* In *John v. MGN Ltd.*, the Court of Appeal looked afresh at the guidance which should be given to juries in the assessment of damages in defamation actions.

It noted that respect for the constitutional role of the jury and judicial reluctance to intrude into the area of decision making reserved to the jury had traditionally led judges presiding over defamation trials to confine their jury directions to a statement of general principles, eschewing any specific guidance on the appropriate level of damages.

In relation to this, the Court of Appeal stated :

> "Whatever the theoretical attractions of this approach, its practical disadvantages have become ever more manifest. A series of jury awards in sums wildly disproportionate to any damage conceivably suffered by the plaintiff has given rise to serious and justified criticism of the procedures leading to such awards. This has not been the fault of the juries. Judges, as they were bound to do, confined themselves to broad directions of general principle, coupled with injunctions to the jury to be reasonable. But they gave no guidance on what might be thought reasonable or unreasonable, and it is not altogether surprising that juries lacked an instinctive sense of where to pitch their awards. They were in the position of sheep loosed on an unfenced common, with no shepherd."

Having regard to a number of excessive libel awards, the changing views in other common law jurisdictions, and the decision in *Tolstoy Miloslavsky v. United Kingdom,* the Court of Appeal reconsidered the arguments against giving guidance to a jury. They agreed with the decision in *Rantzen v. Mirror Group Newspapers (1986) Ltd* that juries should not 'at present' be reminded of previous libel awards. This was, however, on the basis that those awards would have been made in the absence of guidance by a judge and might be themselves unreliable

markers, and they stated that this might change in the future. They agreed with the decision that juries should be referred to awards approved of or made by the Court of Appeal.

The substantial change was in relation to personal injury awards. The Court of Appeal looked again at *Cassell & Co. Ltd. v. Broome* in which it had rejected the idea of comparing awards of damages for loss of reputation to awards of damages for personal injury. The rejection was on the basis that compensation by damages for loss of reputation operated as a vindication of the plaintiff to the public and as consolation to the plaintiff for a wrong done, and not as a monetary recompense for harm which was measurable in money. In relation to this line of argument, the Court of Appeal stated :

> "This reasoning would weigh strongly against any attempt to equiparate damages for personal injuries and damages for defamation. It would not weigh so heavily, if at all, against reference to conventional levels of award for personal injuries as a check on the reasonableness of a proposed award of damages for defamation."

In Rantzen v. Mirror Group Newspapers (1986) Ltd., the Court of Appeal had concluded that there was no satisfactory way in which personal injury awards could be used to give guidance to juries in assessing damages in a defamation case. In *John v. MGN Ltd.*, on this point, the Court of Appeal made the following observation :

> "Much depends, as we now think, on what is meant by guidance: it is one thing to say (and we agree) that there can be no precise equiparation between a serious libel and (say) serious brain damage; but it is another to point out to a jury considering the award of damages for a serious libel that the maximum conventional award for pain and suffering and loss of amenity to a plaintiff suffering from very severe brain damage is about £125,000 and that this is something of which the jury may take account."

In light of this, and reversing the practice of the English Courts, the Court of Appeal held that:

> "The conventional compensatory scales in personal injury cases must be taken to represent fair compensation in such cases ... It is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable. The time has in our view come when judges, and counsel, should be free to draw the attention of juries to these comparisons."

The earlier case of *Ward v. James* had a further reason why figures should not be mentioned to a jury, stating that :

> "If the judge can mention figures to the jury, then counsel must be able to mention figures to them. Once that happened ... Each counsel would, in duty bound, pitch the figure as high or as low as he dared. Then the judge would give his views on the rival figures. The proceedings would be in danger of developing into an auction."

In *John v. MGN Ltd.*, the Court of Appeal was singularly unconvinced by this argument, and in fact suggested that the practice of suggesting figures would induce a mood of realism in the parties. It stated that :

> "We can for our part see no reason why the parties' respective counsel in a libel action should not indicate to the jury the level of award which they respectively contend to be appropriate, nor why the judge in directing the jury should not give a similar indication. The plaintiff will not wish the jury to think that his main object is to make money rather than clear his name. The defendant will not wish to add insult to injury by underrating the seriousness of the libel. So we think the figures suggested by responsible counsel are likely to reflect the upper and lower bounds of a realistic bracket. The jury must of course make up their own mind and must be directed to do so. They will not be bound by the submission of counsel or the indication of the judge. If the jury make an award outside the upper or lower bounds of any bracket indicated and such award is the subject of appeal, real weight must be given to the possibility that their judgment is to be preferred to that of the judge. The modest but important changes of practice described above would not in our view undermine the enduring constitutional position of the libel jury. Historically, the significance of the libel jury has lain not in their role of assessing damages but in their role of deciding whether the publication complained of is a libel or no. The changes which we favour will, in our opinion, buttress the constitutional role of the libel jury by rendering their proceedings more rational and so more acceptable to public opinion."

C. Compliance with Article 10 of the Convention.

In *Tolstoy Miloslavsky v. United Kingdom*, the Court of Human Rights had held that the scope of judicial control of awards in defamation, at first instance and on appeal, ... did not offer adequate and effective safeguards against a disproportionately large award. By allowing a jury's attention be drawn to awards approved or substituted by the Court of Appeal, and to damages awarded in personal injury actions, the Court of Appeal have introduced safeguards at first instance. By changing the test for an appellate court to : "Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and re-establish his reputation?" the Court of Appeal introduced safeguards on appeal.

The Majority decision in *De Rossa v. Independent Newspapers plc.*

The majority decision in *De Rossa v. Independent Newspapers plc* was delivered by the Hamilton C.J.. and relied heavily on the previous Supreme Court decision of *Barrett v. Independent Newspapers Ltd*[8]. A dissenting judgment was delivered by Denham J.

In relation to the role of an appellate court, the majority held that as the assessment by a jury of damages in a defamation action had an unusual and emphatic sanctity, an appellate court should be slow to interfere with it, but that nevertheless a jury's discretion was not limitless, and an award must be fair and reasonable having regard to the relevant circumstances and must not be disproportionate to the injury suffered by the plaintiff and the necessity to vindicate the plaintiff in the eyes of the public. They then held that the appellate court was only entitled to set aside an award of damages by a jury in a defamation action if it were satisfied in all the circumstances that the award was so disproportionate to the injury suffered and the wrong done, that no reasonable jury would have made the award. In relation to the guidance which could be given to juries on the assessment of damages, the majority held that in assessing the

"In relation to the guidance which could be given to juries on the assessment of damages, the majority held that in assessing the quantum of an award in a defamation action, a jury could not be given guidelines by the court or counsel on the appropriate level of damages, on other defamation awards, or on personal injury awards. In coming to this decision, the majority followed the reasoning in the earlier English cases of *Ward v. James and Cassell & Co. Ltd. v. Broome,* and refused to follow the practice set in *John v. MGN Ltd*"

quantum of an award in a defamation action, a jury could not be given guidelines by the court or counsel on the appropriate level of damages, on other defamation awards, or on personal injury awards. In coming to this decision, the majority followed the reasoning in the earlier English cases of *Ward v. James and Cassell & Co. Ltd. v. Broome,* and refused to follow the practice set in *John v. MGN Ltd.*

In relation to the quantum of the award, the majority held that having regard to the gravity of the libel and the defendant's conduct, the award was not disproportionate to the injury suffered and the wrong done and was not such that no reasonable jury could have made.

In a sole dissenting judgment, Denham J. considered the development of the law in *Rantzen v. Mirror Group Newspapers (1986) Ltd.* and *John v. MGN Ltd.* and also looked at similar developments in the Australian cases of *Carson v. John Fairfax and Sons Ltd.* [9] and *Crampton v. Nugawela*[10] and the New Zealand case of *Television New Zealand Ltd. v. Quinn.*[11] Denham J. then held that guidelines should be given to a jury on the level of damages awarded in previous libel cases made or affirmed by the Supreme Court, and in relation to the level of damages in personal injury cases, and that having regard to all the circumstances of the case, the award of £300,000 was excessive and should be reduced to £150,000.

Compatibility of Supreme Court decision with Article 10 of the European Convention of Human Rights.

In *Tolstoy Miloslavsky v. United Kingdom*, the Court of Human Rights decided that there had been a violation of Count Tolstoy Miloslavsky's rights under Article 10 of the Convention for three related reasons, namely :

A. the size of the award,

B. the lack of adequate safeguards against a disproportionately large award at trial

C. the lack of adequate safeguards against a disproportionately large award on appeal.

A. *The Size of the Award*

Although the award in *De Rossa v. Independent Newspapers plc* is much smaller than that made against Count Tolstoy Miloslavsky, the Court of Human Rights had noted in its criticism of it that it was three times larger than any previous libel award in the United Kingdom. Similiarly, the award against Independent Newspapers plc was more than three times the previous highest Irish libel award of £90,000. This award was approved by the Supreme Court in the 1993 case of *McDonagh v. Newsgroup Newspapers Ltd.*[12] and was described by the Supreme Court in that case as being 'at the top end of the permissable scale'. It is hard to understand that the top end of a permissable scale in 1993 was £90,000, whereas only 6 years later the "top of the bracket" had become £300,000.

Just as English libel awards continued to be high in the aftermath of *Rantzen v. Mirror Group Newpapers Ltd.*, Irish juries continue to make substantial awards. On the 11th November, 1999 a jury awarded Denis O'Brien the sum of £250,000 in a defamation action against Mirror Group Newspapers Ltd. The appeal of Mirror Group Newspapers Ltd. will be heard by the Supreme Court on the 22nd June next.

Whether or not European Court of Human Rights condemns the practice approved by the Supreme Court, the award in *De Rossa v. Independent Newspapers plc* sets a very high benchmark for defamation awards. In *Sinnott v. Quinnsworth*[13], the Supreme Court have capped the general damages which can be awarded in respect of general damages to £150,000, and taking into account the effects of inflation this figure is thought now to be in the region of £225,000. One has to ask whether it can be right, in the words of Bingham M.R., that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable.

B. *Adequate Safeguards against disproportionate awards at trial.*

The generally accepted practice of only giving a jury statements of general principles on the assessment of damages was upheld by the Supreme Court in *De Rossa v. Independent Newspapers plc.* This is substantially the same position as existed in England prior to *Rantzen v. Mirror Group Newspapers (1986) Ltd.*, which was criticised in *Tolstoy Miloslavsky v. United Kingdom.* In light of this it is certainly arguable that the Supreme Court decision is in conflict with the Convention. Rather than deal with any specific faults of the accepted practice at the trial stage, the Supreme Court appear to have taken the view that the system as whole in Ireland (including the right of appeal to the Supreme Court) was satisfactory. This seems to be on the basis that if the award to Prionsias de Rossa was acceptable, the question of adequate safeguards did not arise, and if the award was too great that it would have been reduced on appeal.

It seems unfair however, to have a system in place which because of the lack of adequate safeguards against a disproportionately large award at the trial stage, requires defendants to incur the extra risk and cost of an appeal in order to vindicate its rights. In this area, the common law as developed and applied in Ireland would appear to be significantly different from England and some other common law jurisdictions. Whereas the Court of Appeal saw the changes in the area of freedom of expression as being a development of

the common law which was in line with the European Convention on Human Rights, the Supreme Court who could have relied on the Constitution, has declined to introduce reforms that would bring the common law in Ireland firmly in line with the practice approved of by the Court of Human Rights.

The objection to the giving of guidelines appears to be threefold : that it would interfere with the discretion of the jury, that it would lead to confusion, and that personal injury awards and defamation awards are not comparable. The Chief Justice paints a picture of a jury being buried in figures and has stated that the introduction of the guidelines would lead to utter confusion. This does not appear to have been the English experience, and displays a rather low view of the ability of a jury. Surely the view of Denham J. is preferable where she holds that "Information does not fetter discretion ... guidelines would give relevant information and aid comparability and consistency".

C. *Adequate Safeguards against disproportionate awards on appeal.*

The Supreme Court appears at first to say that the Irish test is the same as that which predated *Rantzen v. Mirror Group Newspapers (1986) Ltd,* (was the award so unreasonable that it must have been arrived at capriciously, unconscionably or irrationally?).The Court then appears to say that this is same test as that set out by Henchy J. in *Barrett v. Independent Newspapers Ltd.*[14], (whether a reasonable jury applying the law to all the relevant considerations could reasonably have made the award, and whether it was so disproportionately high that it could not stand?). Despite the submissions of Independent Newspapers plc, the Supreme Court expressly rejected the test laid down in *Rantzen v. Mirror Group Newspapers (1986) Ltd,* (could a reasonable jury have thought that the award was necessary to compensate the plaintiff and to re-establish his reputation?).

It appears that the test applied by an appellate court in Ireland lies somewhere between the pre *Rantzen v. Mirror Group Newspapers (1986) Ltd* test which looks to see if the award was so unreasonable that it must have been made capriciously, unconscionably or irrationally, and the *Rantzen v. Mirror Group Newspapers (1986) Ltd* test which looks to see if the award was necessary to compensate the plaintiff. It seems certain that the Irish test is higher than that set in *Rantzen v. Mirror Group Newspapers (1986) Ltd* and approved of by the Court of Human Rights in *Tolstoy Miloslavsky v. United Kingdom.*

This begs the question as to whether the Irish test provides an adequate safeguard at the appeal stage against disproportionate awards. One of the criticisms of the United Kingdom in *Tolstoy Miloslavsky v. United Kingdom* was that the pre *Rantzen v. Mirror Group Newspapers (1986) Ltd* practice failed "itself to provide a requirement of proportionality". In contrast to this, the Supreme Court have emphasised that an award of damages by a jury in a defamation action must not be disproportionate to the injury suffered by the plaintiff and the necessity to vindicate the plaintiff in the eyes of the public. As against this, Article 10.2 of the convention requires restrictions on the right to freedom of expression to be 'necessary in a democratic society', which has been interpreted as requiring proportionality and a pressing social need. In rejecting the test laid down in *Rantzen v. Mirror Group Newspapers (1986) Ltd.,* the Supreme Court declined to incorporate the concept of 'necessity' into the test which they would apply to awards, and the concept of a pressing social need does not appear to be incorporated in the Irish test. Accordingly, it is unclear whether the test laid by the Supreme Court in *De Rossa v. Independent Newspapers plc* is in accordance with the Convention.

Conclusion

As will be seen from the above, it can be argued that as a result of the decision of the Supreme Court in *De Rossa v. Independent Newspapers plc,* that the substantive national law of Ireland in relation to one aspect of freedom of expression is in conflict with the obligations of Ireland under the European Convention on Human Rights. This contention will be tested in the European Court of Human Rights as Independent Newspapers plc have made a formal complaint to the European Court of Human Rights in relation to the case of *De Rossa v. Independent Newspapers plc.*. Constituent parts of our practice in this area appear to be in conflict with the decision in *Tolstoy Miloslvasky v. United Kingdom.* It remains to be seen however whether the practice taken in its totality is sufficient to safeguard the right to freedom of expression under the Convention.[15]●

"It can be argued that as a result of the decision of the Supreme Court in *De Rossa v. Independent Newspapers plc*, that the substantive national law of Ireland in relation to one aspect of freedom of expression is in conflict with the obligations of Ireland under the European Convention on Human Rights. This contention will be tested in the European Court of Human Rights as Independent Newspapers plc have made a formal complaint to the European Court of Human Rights in relation to the case of *De Rossa v. Independent Newspapers plc.*"

1. [1999] 4 I.R. 1.
2. (1995) 20 E.H.R.R. 442.
3. [1994] Q.B. 670.
4. [1997] Q.B. 586.
5. [1990] 1 A.C. 109.
6. [1966] 1 Q.B. 273.
7. [1972] A.C. 1027.
8. [1986] I.R. 13
9. (1993) 67 A.L.J.R. 634
10. (1996) 41 N.S.W.L.R. 176
11. [1996] 3 N.Z.L.R. 24.
12. Unreported, Supreme Court, 23rd November, 1993.
13. [1984] I.L.R.M. 523
14. [1986] I.R. 13.
15. See also Michael Kealey, "Irish developments in defamation", Communications Law, Vol.4, No.5, 1999, p.194; Eoin Quill, "Jury Instructions on the Quantum of Damages in Defamation Cases in the Wake of *De Rossa*" (Delivered at TCD School of Law Conference on 22/1/00); Karyn Woods, "Pressure on Ireland may have to come from Europe", The Times, 8th February, 2000.

THE SEPARATION OF POWERS GRANT OF MANDATORY ORDERS TO ENFORCE CONSTITUTIONAL RIGHTS

Blathna Ruane BL *examines the separation of powers issues arising out of recent case law dealing with the grant of mandatory orders against the Executive to enforce constitutional rights, particularly in the area of facilities for children in need of care.*

Introduction

Some recent High Court decisions of Kelly J in regard to the enforcement of constitutional rights of disturbed children have focused attention on the circumstances in which mandatory orders can be made against a Minister to remedy breaches by the Minister of an individual's constitutional rights and the issue of the separation of powers[1].

One of the most important functions of the executive and legislature is to determine how taxpayers' money will be expended in the light of competing demands on public funds, and such decisions would generally be regarded as policy issues and matters properly for the legislature and the executive to determine. Whilst the courts have often had to make decisions which have significant budgetary consequences for the executive and legislature[2], the courts have been cautious about making positive orders which would effectively require sizeable amounts of public funds to be spent in a particular way[3].

However, two recent decisions of Kelly J where he granted mandatory injunctions compelling the Minister for Health to complete developments for the treatment of disturbed children, involving of necessity considerable expenditure from the public purse, demonstrate that in appropriate circumstances such far reaching orders will be made. In *DB (A Minor, suing by his Mother and Next Friend) v. The Minister for Justice, the Minister for Health, the Minister for Education, Ireland and the Attorney General and the Eastern Health Board*[4], delivered on 29 July 1998, Kelly J, exercising the original jurisdiction of the High Court derived directly from the Constitution itself, rather than from statute, granted a mandatory injunction directing the building of two secure units for the treatment of disturbed children by a specified date.

In a more recent decision, of 25 February last, dealing with a group of cases, known as *TD (A Minor, suing by His Mother and Next Friend) v. Minister for Education, Ireland and Attorney General, the Eastern Health Board and By Order the Minister for Health and Children*[5] Kelly J made similar orders requiring ten other facilities to be built by specified dates. The cumulative effect of these orders is to oblige the State to make heavy expenditure within specific time frames, on specifically targeted projects, in accordance with court orders.

"The cumulative effect of these orders is to oblige the State to make heavy expenditure within specific time frames, on specifically targeted projects, in accordance with court orders"

Background

The background to these decisions may be briefly stated as follows. In 1995 in *F(N) v. Minister for Education*[6], in a landmark decision, Geoghegan J held that the State had a constitutional obligation to establish, as soon as reasonably practicable, suitable arrangements of containment with treatment for another child in a similar situation. Geoghegan J stated:

> "In summary I take the view that the State is under a constitutional obligation towards the applicant to establish as soon as reasonably practicable, either by use of Section 58(4) of the Act of 1908 or otherwise, suitable arrangements of containment with treatment for the applicant."

However, Geoghegan J did not make mandatory orders giving explicit directions to the Minister to carry out certain works but adjourned the case. Within a week of Geoghegan J's decision, evidence of the Department of Health's proposals for the provision of such facilities had been provided to the High Court and so it appeared that works would be undertaken by the Department to remedy the problem without any mandatory relief being required.

Following the judgment of Geoghegan J in 1995, many other applications were brought to the High Court on behalf of children in similar predicaments, who also required treatment in the secure facilities which were to be provided. In April 1997 in the course of one such application which Kelly J heard[7], it emerged that the plans for the provision of facilities, about which evidence had been given to the High Court in 1995, were not going to be realised, but the court had not been informed of that altered situation. It was clear from evidence given in the course of the case, that the facilities were not going to be ready until 2001. However, Kelly J was given further assurances that the facilities would after all be provided for.

The Judgment in *DB*

Against that background, judgment was given by Kelly J in *DB* in 1998. The applicant, DB, was a disturbed child with a personality disorder who needed care by the Eastern Health Board in a secure unit from which he would not be able to escape. In June 1995 the High Court had already given directions regarding the applicant's custody, and control by the Eastern Health Board. However, there was no appropriate accommodation available for the applicant, as well as for a number of other children who had similar difficulties. The applicant sought a mandatory injunction directing the Minister for Health, the Minister for Education and Ireland to provide sufficient funding to allow the Eastern Health Board to build, open and maintain a 24 bed high support unit at Portrane, County Dublin suitable for his needs. He also sought an order compelling the Minister for Health to do all things necessary to facilitate the building, opening and maintenance of that unit.

Counsel for the Minister for Health had submitted that the Minister for Health had not deliberately frustrated the applicant's rights and argued that an unprecedented order of the type sought should not be made. He also argued that insofar as it would involve the court becoming involved in matters of policy, it was impermissible for such an order to be made.

Kelly J reviewed the history of the steps taken towards providing the units. He referred to the history of delay and administrative wrangles. The difficulty created by the situation was obvious from Kelly J's comment at the outset of his judgment, where he referred to the "impossible situation in which the Superior Courts have been placed when asked to make orders in favour of applicants who require secure containment, only to find that no such facilities are available".

Kelly J refused to accept that there were the restrictions claimed by the Minister on the court's jurisdiction to make the orders sought and referred to Article 40.3.1 of the Constitution under which the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. He also cited dicta of Hamilton CJ in *DG v. Eastern Health Board*[8] when he stated that "the courts have the jurisdiction to do all things necessary to vindicate such rights" and the earlier seminal words of O'Dalaigh CJ in *The State (Quinn) v. Ryan*[9] that the courts' powers to vindicate "are as ample as the defence of the Constitution requires".

Kelly J concluded that in carrying out its constitutional function of defending and vindicating personal rights

> "The Court must have available to it any power necessary to do so in an effective way. If that were not the case, this Court could not carry out the obligation imposed upon it to vindicate and defend such rights. This power exists regardless of the status of a respondent. The fact that in the present case the principal respondent is the Minister for Health is no reason for believing that he is in some way immune from orders of this Court in excess of mere declarations if such orders are required to vindicate the personal rights of a citizen.".

"In his vigorous assertion of the court's power to make such orders, Kelly J was therefore drawing on longstanding jurisprudence dealing with the wide powers of the courts to enforce constitutional rights."

He went on to point out that the Minister for Health, who was the principal respondent, was not immune from orders of the court in excess of mere declarations if such orders were required to vindicate the personal rights of a citizen. He also rejected the argument that the court did not have jurisdiction

to interfere with the administrative branch of government in the way sought by the applicant. In support of this he cited dicta from Finlay CJ in *Crotty v. An Taoiseach*[10] where Finlay CJ said that the Supreme Court had "a right and duty to interfere with the activities of the executive in order to protect ... the constitutional rights of individual litigants". In his vigorous assertion of the court's power to make such orders, Kelly J was therefore drawing on longstanding jurisprudence dealing with the wide powers of the courts to enforce constitutional rights.

While holding firm on the principle of the courts' entitlement to make orders of the type sought as necessary, Kelly J went on to state that such orders would not be made lightly. This was because of the system of government established by the Constitution which is based on the principle of the separation of powers between legislature, executive and judiciary. He stated it was to be expected that each of the branches of government should demonstrate a respect for each other and their respective functions. As a demonstration of the application of that principle he referred to the decision in *District Justice McMenamin v. Ireland*[11] where, an injustice having been identified, the Supreme Court considered that it was not necessary to make any further order, even a declaration, in the expectation that the other branches of government would respond timeously to remedy that injustice. Kelly J quoted Hamilton CJ, in that decision who stated:

> "I do not propose to make a declaration giving effect to my views because, having regard to the respect which the separate organs of government, the legislature and the Government and the judiciary have traditionally shown to each other, I am satisfied that once the Government is made aware of a situation with regard to this constitutional injustice, it will take the necessary steps to have the matter remedied in accordance with law and in accordance with its constitutional obligations."

Kelly J pointed out that the *DB* case was rather different on the facts. He then went on to identify four separate factors to be taken account in deciding whether or not to grant the orders in that case.

First, he pointed out that Geoghegan J had already declared the obligations of the State towards minors of this type. In so doing the "constitutional proprieties" owed by the court to the executive had been observed and the Minister had been given an opportunity to act to put matters right. However, the court expected steps to be taken as soon as reasonably practicable. Secondly, if the declaration was to be of any benefit to the minors, the steps had to be taken expeditiously as otherwise they would have achieved their majority. Thirdly, the effect of a failure to provide the appropriate facilities had a profound effect on the minors and put them at risk of harm and possibly even the loss of their lives. Fourthly, due regard had to be had to the efforts made by the Minister to deal with the difficulties. If the court concluded that all reasonable efforts had been made to deal efficiently, effectively and proportionately, then no order of the type sought would be made.

In his cautious approach to the exercise of the wide jurisdiction available to him and in particular the adoption of the fourth principle, which allowed the Minister quite a wide margin of appreciation, Kelly J is consistent with the approach of the courts in their dealings with the other organs of government. Juxtaposed with the assertion of their very wide jurisdiction to compel compliance by the executive and legislature with their constitutional obligations, the courts have traditionally been cautious in the exercise of their powers in an area where sensitivities of the separation of powers may arise. In keeping with the spirit of the separation of powers, the courts themselves have identified some principles of interpretation, which have had the effect of reducing intervention by the courts in the business of the legislature, from that which might otherwise have occurred. The courts have developed these principles on the basis of their being implicit in the constitutional framework, without having been compelled to do so by the explicit text of the Constitution. Thus, for example, since 1938, the Supreme Court has applied the benefit of principle of the presumption of constitutionality to legislation enacted by the Oireachtas, unless unconstitutionality is clearly established[12]. The effect of this principle of constitutional interpretation is to give a significant margin of appreciation to the legislature, whilst at the same time ensuring compliance with the Constitution. Likewise favourable presumptions have been applied to the executive, such as, for example, that in ratifying the Sunningdale Agreement, the Supreme Court presumed that the executive had not intended to infringe Articles 2 and 3 of the Constitution[13]. The courts have therefore themselves endeavoured to observe the principle of respect for the other organs of government.

Having set out the factors for consideration Kelly J then reviewed the facts and concluded that the Minister's response had not been proportionate, efficient, timeous or effective. Over six years had passed since Geoghegan J's judgment and some of the young people were going to be adults without the State having discharged its obligations. Kelly J referred also to the fact that the Minister had been invited to give an undertaking that the facilities would be operative by the time specified by the Minister's officials, but no such undertaking was forthcoming. Based on these factors, Kelly J concluded that it was appropriate to make mandatory orders.

Kelly J then addressed the argument that such orders would involve policy-making. In *DB* there was evidence that the policy of how to provide such units had already been worked out by the Minister but was not implemented. Kelly J relied on this evidence in stating that he was satisfied that the court would not be involved in the making of policy. Undoubtedly, the granting of mandatory orders in this type of situation places the courts in the extremely difficult position of having to monitor closely the detailed implementation of policy by a Minister in areas which Ministers may traditionally have considered to fall exclusively within the purview of the executive rather than the judiciary. The making of such mandatory orders at first glance may appear like the formulation of policy insofar as it involved the judiciary ordering the executive to spend public funds in a very particular way. However essentially Kelly J's decision concerned enforcement of rights which had already been defined previously and not the formulation of policy. It was inherent in the nature of the particular breaches in these cases and their ongoing nature over several years that their remedy would involve some form of detailed enforcement by the court.

Otherwise, in the face of ongoing procrastination, it is hard to see how applicants would have obtained any meaningful relief.

In any event, Kelly J rejected the idea that the court did not have any entitlement to become involved in "what were called matters of policy". He said:

> "If such an intervention were required in order for this Court to carry out its duties under the Constitution in securing, vindicating and enforcing constitutional rights, then, in my view, it would be open to it to so do. One would hope that such a situation would not arise."

In ***DB***, where the policy-making argument was also raised, Kelly J made an even stronger assertion of jurisdiction in stating:

> "I therefore reiterate my view that there is a jurisdiction vested in the Court to intervene in what has been called policy in an appropriate case. Such an intervention would occur only in limited circumstances and where absolutely necessary in order for this Court to carry out its duties under the Constitution in securing, vindicating and enforcing constitutional rights. Because of the respect which each branch of Government is expected to afford to the others one would hope that such a situation would not arise." [14]

Kelly J's judgments display a refusal by the court to be detoured from its constitutional function of the enforcement of constitutional rights on the grounds that an issue of policy might be involved in its decision. Kelly J did not give any detailed indication as to how such intervention might occur in an appropriate case, although he made clear that the court could prevent the Minister changing his policy if that interfered with the enforcement of the order. Kelly J stated:

> "The granting of this injunction means that the Minister is no longer at large concerning the approach to be adopted to solving the problems. The development proposed will now have to be completed and within the time-scale specified. If there is to be any future change of policy or if the time indicated cannot be met, application will be made to this court on the part of the Minister for a variation of the injunction. This will mean that not merely will the court have to be informed of all of these developments (something sadly lacking to date) but objectively justifiable reasons will have to be furnished to it as to why the injunction should be varied. A variation will not be granted lightly. This will afford to the court an opportunity of much greater involvement than it has been possible to have in the past. It will mean for these minors that the court, having declared their entitlements, will now see to their implementation in a direct way."

On the facts of ***DB*** a policy had been formulated. Theoretically, however if a Minister were to ignore totally a decision of the court to provide a service or a facility and had no policy to provide facilities, then the court would be faced with a very difficult situation. It seems very unlikely that the court would engage itself in policy formulation since such a task would be an extremely difficult one for a court to discharge. The possibility that the function of policy formulation would have been already exclusively assigned to the Minister by legislation or by implication from the Constitution itself, would complicate matters further. Instead the court would probably be more likely to direct the Minister to formulate a policy, the realisation of which the court could then have enforce. In default of compliance with such an order, the usual remedies of contempt would then have to be considered.

Contempt by Minister or the State?

The nature of the court's powers of contempt in relation to a Minister and the State itself have not yet been considered in this jurisdiction. It has been considered under English law by the House of Lords in *M -v- Home Office*[15] in 1993. This decision was described by Sir H.W.R. Wade as having been "perhaps the most important question of constitutional law to arise for more than two centuries"[16]. The English constitutional framework, and in particular the protected position of the Crown in English constitutional theory, is very different to the Irish constitutional scheme. Nonetheless the decision is of interest in exemplifying some of the difficult issues which could theoretically arise in the enforcement of orders against the State and a Minister and the implications arising from a Minister's official and personal capacity.

"essentially Kelly J's decision concerned enforcement of rights which had already been defined previously, and not the formulation of policy. It was inherent in the nature of the particular breaches in these cases and their ongoing nature over several years that their remedy would involve some form of detailed enforcement by the court. Otherwise, in the face of ongoing procrastination, it is hard to see how applicants would have obtained any meaningful relief."

The case concerned a deportation of a Zairean citizen contrary to a court order. The Home Secretary, acting on advice, had himself been involved in the decision making relating to the unlawful deportation and the failure to secure M's return. The Home Office and the Secretary of State claimed that neither the Crown nor a Department of State nor a Minister of the Crown acting in that capacity, should be amenable to proceedings in contempt because there was no power in the courts to grant injunctions against such persons. The House of Lords held that it was incumbent upon the Secretary of State to obey the order of the court and in not doing so he committed contempt. It also held that while a finding of contempt of court could not be made against the Crown directly, such a finding could be made against a Government Department or a Minister of the Crown in his official capacity

and the finding should accord with the body against which the order breached had been made. A finding of contempt could be made against a Minister personally where the contempt related to his own default. In that case, the injunction had appropriately been granted against the Minister in his official capacity as Secretary of State for the Home Department and it was the Department for which he was responsible that had been guilty of contempt. Accordingly, the Secretary of State for the Home Department should be substituted as being the person against whom the finding of contempt was made.

While the House of Lords was clear in its willingness to accept its contempt jurisdiction in relation to Ministers or Government Departments, the judgments are unclear as to what precise action could be taken on foot of a finding of contempt. Lord Woolf said that it would not be appropriate to fine or sequester the assets of the Crown or a Government Department or an officer of the Crown acting in his official capacity. He was of the view that a finding of contempt would nonetheless not be pointless because the very fact of making such a finding would vindicate the requirements of justice. In addition, an order for costs could be made to underline the significance of the contempt. Lord Woolf considered that it would be a matter for Parliament to determine what should be the consequences of a finding by the court of a contempt. This is because the Crown's relationship with the courts does not depend on coercion. Lord Woolf's approach leaves the final sanction with Parliament which might not be much use to the applicant who would then be dependant upon action by Parliament, rather than the courts, for a remedy for breach of rights. The matter would then become a political rather than a legal issue. Lord Templeman took a different view and stated:

> "For the purpose of enforcing the law against all persons and institutions, including Ministers in their official capacity and in their personal capacity, the Courts are armed with coercive powers exercisable in proceedings for contempt of court."

The judgments also do not clarify in what circumstances sanctions could be brought against the Minister in his personal capacity if the Minister was personally responsible. Lord Woolf accepted that the Minister personally might have a liability for contempt where the contempt related to his own default. Lord Templeman stated that if the Minister had personally broken the law, the litigant could sue the Minister in his personal capacity. However, because he concluded on the facts that the Home Secretary had not personally been guilty of contempt, he did not detail what coercive powers could be used and he did not consider the susceptibility of the Home Secretary to imprisonment.

Since *Byrne -v- Ireland*[17] the position of the State in Irish constitutional law is very different from the position of the Crown under English law. The State under Irish law does not enjoy the wide-ranging immunity provided to the Crown. *Byrne* and the wide obligation of the Irish courts to provide remedies for a breach of constitutional rights[18] would suggest that it may be possible to sequester the assets of the Minister, as a corporation sole, in his official capacity and also suggests that a minister who is personally involved in breach of a court order would not have any constitutional immunity by virtue of his position. However, these points have never been considered and some difficult issues could arise. For example, consideration would have to be given to the compatibility of an order of sequestration, against assets held by a minister in his official capacity, with the provisions of Article 28 of the Constitution whereby executive functions are assigned to the Government and individual ministers, if the sequestration of those assets prevented the minister from performing his executive constitutional duties under Article 28. Would the making of such an order infringe the principle of the separation of powers set out in Article 6? Likewise, having regard to the views expressed by Finlay CJ in *Pesca Valentia v. Minister for Fisheries*[19] where he said that it was not appropriate that any injunction should ever be given against Ireland, it is unclear whether the Irish courts would be prepared to go as far as finding the State in contempt or enforcing contempt orders against the State itself. It seems more likely that findings of contempt would be made and enforced through orders against the relevant minister responsible.

"*Byrne* and the wide obligation of the Irish courts to provide remedies for a breach of constitutional rights would suggest that it may be possible to sequester the assets of the Minister, as a corporation sole, in his official capacity and also suggests that a minister who is personally involved in breach of a court order would not have any constitutional immunity by virtue of his position."

Conclusion

The decisions in *DB* and *TD* demonstrate that, notwithstanding the optimistic words of Hamilton CJ in *District Justice McMenamin -v- Ireland*[20], it will not invariably be the case that the executive, once made aware of a constitutional injustice, will take steps to remedy it. Ultimately the courts are dependent on the co-operation of other organs of state for the enforcement of their orders and if that is not forthcoming then the courts are powerless. As Nolan LJ observed in the Court of Appeal in *M v. Home Office*[21] judgments and orders of the courts are meaningless without the willingness and ability of the executive to enforce them - and to enforce them where necessary against individual members of the executive itself. The reality of these limitations on the power of the judiciary to protect individual rights was colourfully described by the late Professor John Kelly:

> ".....the ultimate protection of human rights in a democracy lies with the people themselves. If they allow villains into Government, a piece of paper will not protect them from the consequences, nor must they expect a few learned men in wigs and gowns to save the fools from the knaves they have elected." [22]●

1 See generally on mandatory orders Bradley, *Judicial Review* (Dublin 2000) p.17ff and 753ff and pp.678-691 on the granting of orders of mandamus; on the liability of the State and Ministers see Hogan and Morgan, *Administrative Law in Ireland* (3rd edn.), (Dublin 1998) 819-827, 914-921, on the separation of powers see generally Gwynn Morgan, David, "*The Separation of Powers in the Irish Constitution*", (Dublin 1997).

2 See for example *Murphy v. Ireland* [1982] IR 241 and *The State (Healy) v. Donoghue* [1976] IR 325.

3 See for example *O'Reilly v. Limerick Corporation* [1989] ILRM 181; *Comerford v. Minister for Education* [1987] 2 ILRM 134 and *The State (C) v. Frawley* [1976] IR 365.

4 [1999] 1 IR 29

5 Unreported, High Court, 25th February 2000.

6 [1995] 1 IR 409.

7 The background history is set out more fully in the judgment of Kelly J in *DB*.

8 [1997] 3 IR 511 at 522.

9 [1965] IR at 122.

10 [1987] IR 713 at 773.

11 [1996] 3 IR 100.

12 This was first enunciated by Hanna J in *Pigs Marketing Board v. Donnelly* [1939] IR 413. This principle was further developed in the 1960s with what is called the double construction rule whereby if two interpretations of a statutory provision are reasonably open, one of which is constitutional and the other is unconstitutional, then it is presumed that the Oireachtas intended only the constitutional construction and that is the construction which the court should uphold. See *McDonald v. Bord na gCon* (No.2) [1965] IR 217 and Kelly J.M., "*The Irish Constitution*" (3rd edn.) pp.458-459. The effect of this development is to make it less likely that the provision will be struck down. It is interesting to note that this self-restraining policy was developed relatively close to time when the Supreme Court made the strong assertion of wide jurisdiction made by O'Dalaigh CJ in *The State (Quinn) -v- Ryan* [1965] IR 70.

13 See *Boland v. An Taoiseach* [1974] IR 338.

14 The issues raised and the approach of Kelly J in *TD* are very similar. However, in *TD*, in addition the Minister for Health and Children argued that the Court ought not to grant the mandatory relief sought on the grounds that such an order would lack specificity. Kelly J rejected that argument on the grounds that similar type orders made in *DB* had not given rise to the slightest difficulty on the Minister's part, either in knowing what was required of him or in doing it. Kelly J also rejected the argument that the applicants lacked locus standi to bring the applications.

15 [1994] 1 AC 377.

16 [1992] 108 LQR 173 quoted in "*Arlidge Edie & Smith on Contempt*" (London 1999) at p.119.

17 [1972] IR 241.

18 See *Meskell -v- CIE* [1973] IR 121.

19 [1985] IR 193.

20 [1996] 3 IR 100.

21 [1992] 1 QB 270 at 314.

22 See Kelly "*Fundamental Rights in the Irish Law and Constitution*" (2nd edn.) (Dublin 1967) at p.73.

INVITATION TO PROPOSE

The Revenue Commissioners wish to invite proposals from suitably qualified experts to provide training to Revenue staff as part of their continuing programme of training in legal processes, including court procedures. The person selected should be available to provide between 10 and 25 training days in the period November 2000 to December 2002. The exact number of days will be decided by the Revenue Commissioners.

SUITABLE PERSONNEL

The person selected should be a qualified barrister with expertise in cross-examination, preferably in criminal law. Experience in the educational / training field would be an advantage. S/he should be available for the duration of the schedule outlined. Unavailability for a limited number of courses may be acceptable subject to the provision of cover in the form of a suitable substitute.

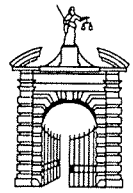
PROPOSALS SHOULD BE ADDRESSED TO:

Mr. Jerry Skehan,
Training Branch,
Office of the Revenue Commissioners,
D'Olier House,
D'Olier St.,
Dublin 2.

Tel: 01 - 6776433 Fax: 01 - 6716321

The final date for receipt of proposals is 4pm on Friday, 14 July, 2000.

Website http://www.revenue.ie **Revenue**



NTOXICATING LIQUOR BILL, 2000: A COMMENTARY

Constance Cassidy BL *outlines the reforms in licensing law proposed in the Intoxicating Liquor Bill, 2000 and suggests that the Bill does not go far enough in modernising our antiquated licensing code.*

Introduction

Following lengthy and prolonged consideration of submissions from interested parties including the licensed vintners, the competition authority and the legal profession, the Intoxicating Liquor Bill, 2000 has finally been put before the Oireachtas. The Bill provides for extensive changes in the current law, the foundation statute of which is the Licensing (Ireland) Act 1833, which is still in force. Given the breadth of subject matter addressed in the bill this article can only address some of the principal changes to the existing law, proposed therein.

The Bill includes the following proposed amendments to the law as it stands:

1. An extension of the permitted hours during which intoxicating liquor can be sold in public houses, premises to which off licences are attached, premises to which special restaurant licences are attached and registered clubs.
2. The introduction of a new concept referred to as a "temporary closure order" which will be imposed upon a licensee convicted of offences relating to sale of intoxicating liquor to under age persons.
3. Grant of a new publican's licence where the licence being tendered for extinguishments in substitution therefore is a licence attached to premises situate anywhere in the State.
4. Further and more extensive grounds of objection to the grant of a new licence are proposed.
5. Restrictions which currently obtain in relation to the grant of a wine retailer's off licences are removed.

The Bill does, however, fall short of the comprehensive codification of the licensing code which is required, and results in the addition of one further statute to the existing eighty odd statutes which comprise the present code.

Just a few of the many anomalies which it has failed to rectify are as follows:

(i) **Weekdays in summertime:**
10.30am to 11.30pm

(ii) **Weekdays for the rest of the year:**
10.30am to 11.00pm

(iii) **Sunday:**
12.30pm to 2.00pm
4.00pm to 11.00pm

(iv) **St. Patrick's Day (if it falls on a weekday):**
12.30pm to 11.00pm
Otherwise Sunday hours apply

(v) **Christmas Day:** Trading prohibited all day

(vi) **Good Friday:** Trading prohibited all day

(vii) **Sundays which fall on December 23rd or 24th in any year:**
10.30am to 11.00pm

It fails to provide for a grant of licences for modern facilities which are of increasing social importance in the present day such as Museums, Art Galleries, Bowling Alleys, Interpretative Centres, Cinemas, Sports Stadia, Community Centres, Conference Centres and other similar venues.

It does not remedy the law relating to theatre licences, the grant of which appear to be controlled in accordance with an arbitrary set of criteria operated by the Revenue Commissioners.

It fails to remedy the situation concerning hotel licences in the country. There are a considerable number of hotels in the State the owners of which are under the mistaken impression that the licence attaching to their premises is a full seven day publican's unconditional ordinary licence, and not the conditional hotel licence granted pursuant to the provisions of Section 2 Paragraph 2 of the Licensing (Ireland) Act, 1902. This is an anomaly which has resulted because the form of licence which is issued by the Revenue Commissioners to the hotelier and the publican is identical. Many of these licensees holding hotel licences run their premises as public houses in happy ignorance of their continuing obligations, under the terms of such licence, to have available at least ten (or if situate in the County Borough twenty) bedrooms available for the travelling public: certain of such hotel premises also require to be registered with Bord Failte as a condition of the renewal of the licence and certain of the licences contain a prohibition on having a public bar on the premises. The Bill has made no attempt to address and resolve this anomaly.

I now propose to deal with certain of the principal amendments proposed by the Bill. It should be noted that at the date of writing, a number of amendments by other interested parties are being proposed. The comments which I make relate to the form of Bill as published in March, 2000.

PERMITTED HOURS

Present Law

The hours during which trading is permitted in respect of public houses and off licence outlets are as follows:

Further, drinking up time is for a period of up to thirty minutes after normal closing hours. Drinking up time at present does not apply where a special exemption order has been granted. The hours during which the holder of a special restaurant licence may trade differ from the holder of a publican's licence and an off licence, in that during weekdays the sale of intoxicating liquor is permitted from 12.30pm to 12.30pm on the morning of the following day and the provisions relating to Sundays and Christmas day also differ.

Proposed Amendments

Insofar as ordinary publican's licences and off licences are concerned, a licensed premises will now be permitted to remain open from 10.30am to 11.30pm on Mondays, Tuesdays and Wednesdays and from 10.30am to 12.30am on the following day on Thursdays, Fridays and Saturdays. Sunday opening will be from 12.30pm to 11.00pm.

So the distinction between summertime and wintertime is abolished, as is Sunday closing between 2pm and 4pm.

The prohibition against opening on Christmas Day or Good Friday continues.

Thirty minutes drinking up time will be permitted on all days.

Where premises are engaged in trading other than selling intoxicating liquor, such as a Supermarket or a Public House and Restaurant, these premises will now be able to open for non-licensed business between 7.30am in the morning and 10.30am on weekdays and between 7.30am and 12.30pm on Sundays. Further, these premises can also open for the sale of intoxicating liquor off the premises only between 8.00am and 10.30pm on weekdays (but not on Sundays).

The permitted hours for serving intoxicating liquor in a hotel or a restaurant are now proposed to be extended by one hour over and above the time to which the premises may lawfully sell intoxicating liquor, provided the intoxicating liquor is supplied with a meal. Insofar as a special restaurant licence is concerned, the Bill proposes that the revised permitted hours are extended by one hour over and above the time to which the premises may lawfully sell intoxicating liquor, provided it is supplied with a meal. The revised permitted hours which apply to publican's licences and off licences also apply to clubs.

"Insofar as ordinary publican's licences and off licences are concerned, a licensed premises will now be permitted to remain open from 10.30am to 11.30pm on Mondays, Tuesdays and Wednesdays and from 10.30am to 12.30am on the following day on Thursdays, Fridays and Saturdays. Sunday opening will be from 12.30pm to 11.00pm.

So the distinction between summertime and wintertime is abolished, as is Sunday closing between 2pm and 4pm.

The prohibition against opening on Christmas Day or Good Friday continues.

Thirty minutes drinking up time will be permitted on all days. "

SPECIAL EXEMPTION ORDERS

It is also proposed to change the law relating to special exemption orders which are orders granted by a District Court Judge exempting the holder of a licence in respect of premises which are a restaurant or a hotel, from the provisions or where the holder of the licence can prove that a public dancing licence applies in respect of the premises and where a meal is provided.

The Bill proposes to abolish the twofold requirement, that

i. the premises be an hotel or a restaurant; and

ii. that the licensee be obliged to provide a meal as a condition of the special exemption order.

The restriction on the granting of a special exemption order for any time on a Sunday (i.e. after midnight on a Saturday night and after closing time on a Sunday evening) is also to be removed, although the restriction on the grant of special exemptions for Monday mornings beyond 1.00am, except on a Monday morning that is a public holiday, is retained. (Presumably to avoid too many Monday sick days!). As the law presently stands the Judge has the discretion as to the time during which a special exemption order can be granted; the usual time limit imposed by a Court is up to 1.30am and sometimes to 2.00am. The proposal now is that special exemption orders should be granted in normal circumstances to 2.00am unless the court considers it expedient to grant an exemption for a shorter period.

The proposed changes outlined in the above paragraphs have attempted to deal with the public demand for late night drinking which at present can be accommodated only by licensees with hotel and restaurant licences.

UNDER AGE PERSONS

The legislature has always regarded the offence of serving intoxicating liquor to an under age person very seriously. Part IV of the Intoxicating Liquor Act, 1988 (which repealed the provisions in the Childrens Act, 1908 creating the relevant offences) imposed a higher duty of care on the licensee and his servants or agents in relation to under age drinking. An even higher duty of care is now proposed by the Bill.

The majority of the offences relating to serving under age persons, created under Part IV of the Act of 1988 are endorseable.

The Bill imposes what can only be described as a draconian measure following a conviction for certain of the offences provided for under the 1988 Act. Following conviction of the licensee of such offences in the District Court, the Court has no discretion but is obliged to impose a temporary closure order in respect of the premises concerned for a period (a) not exceeding seven days in respect of a first such offence and (b) of not less than seven and not more than thirty days in respect of a second or any subsequent offence.

Not surprisingly the licensed vintners are most up in arms at this provision. First it is very difficult to defend such a prosecution; the proposal is that the defence of "reasonable grounds" in believing that a person was over eighteen years cannot now be advanced. Secondly, the penalty which a Court will be obliged to impose will be exceptionally severe; it would perhaps be more realistic for the legislature to provide that the Court itself can have the discretion to distinguish between a genuine error made by a publican or a member of staff, and a person who deliberately breaks the law.

NEW EXCEPTION TO THE LICENSING (IRELAND) ACT, 1902

Part IV of the new Bill among other matters, creates a further new exception to the general prohibitory terms of the 1902 Act which is discussed below. It also provides for the upgrading of restricted licences (i.e. six day publican's licences and early closing licences) to full seven day publican's licences. It also proposes to amend the existing law relating to an ad interim transfer of a licence to provide that the District Court must be satisfied at ad interim stage that the Applicant is a "fit" person.

A dramatic reform to the licensing code contained in part IV of the new Bill is the introduction of the new exception to the 1902 Act contained in Section 15 of the Bill. The Licensing (Ireland) Act 1902 which came into force on July 31st 1902 is permanently operative (until the Oireachtas otherwise determines). (The Oireachtas has still not otherwise determined). The general prohibition contained in Section 2 of the Act of 1902 provides... "From and after the passing of this Act (a) no licence shall be granted for the sale of intoxicating liquors, whether for consumption on or off the premises, except...."; a number of exceptions are contained in the Act of 1902, and other exceptions were enacted in subsequent legislation.

Repeal of existing exceptions

Three of the exceptions of the general prohibition on the grant of a new licence have been repealed; two are contained in the 1902 Act and one in the 1960 Act. These exceptions are as follows:

(i) **Expiring Lease**

Section 3 of the Act of 1902: this provided for the grant of a licence in respect of premises situate in the immediate vicinity of premises to which a licence was attached but which became surrendered or extinguished by virtue of the expiration of a lease.

(ii) **Population Increase in a City of Town**

Section 4 of the Act of 1902: this provided for the grant of a new licence for premises situate in a city or town where there was a certain increase in population in the city or town and where the licence which was offered for extinguishments was situate within the same city or town.

(iii) **Rural Area**

Section 13 of the Intoxicating Liquor Act, 1960: this provided for a grant of a licence in a rural area in substitution for two licences attached to a premises anywhere in the state, which are of the same character as the licence being applied for. Insofar as an on

licence is concerned the premises in the rural area must be situate at least one mile distant from a public house which was licensed prior to the 4th of July 1960.

GRANT OF NEW LICENCE

The Bill now proposes that any person intending to apply for a new licence (whether it be an off licence or an on licence) can apply to the District Court (for an off licence) and the Circuit (for an on licence) and tender for extinguishments in substitution a licence attaching a premises anywhere in the state. This is a dramatic change: heretofore it was extremely difficult to create new licensed supermarkets or public houses in provincial towns and in certain areas in Dublin because of the stringent requirements contained in the Licensing Code (some of which are outlined above). For example, the only way in which a large retail concern like Dunnes Stores or Super Valu could licence premises in a provincial town was to acquire an off licence in the immediate vicinity of the premises which it wished to license or if the premises were to be situate within the County Borough of Dublin or in a large town, an increase in population had to be proven and the licence to be extinguished was required to be situate in the same city of town. Under the Bill there will be no requirement of immediate vicinity in an application under Section 15 of the Bill, nor will there be a requirement that the licence to be extinguished be of the same character as the licence which is to be granted. As off licences are much rarer than on licences, the requirement to extinguish a licence or licences of the same character as the licence being sought, prevented many applications in provincial towns.

The Bill is, however, flawed in that the Applicant is required to prove that the premises, subject to the application, is not licensed and has never been licensed. It is hard to see why it is felt necessary to include this provision. Its inclusion, however, means that a premises to which a wine retailers on licence a wine retailers off licence, a special restaurant licence attaches, is not entitled to apply under this section for a new publican's licence or, indeed, for a new off licence. At the present time there are a large number of Supermarkets which have the benefit of wine retailers on licences (which entitles the holder thereof to sell wine for consumption on and off the premises to which it attaches). If they seek now to upgrade the licence to a full off licence - which in fact comprises three licences, namely a wine retailer's off licence, a beer retailer's off licence and a spirit retailer's off licence - they are precluded from so doing, as such premises is presently licensed. This was presumably not intended by the Bill.

"The Bill now proposes that any person intending to apply for a new licence (whether it be an off licence or an on licence) can apply to the District Court (for an off licence) and the Circuit (for an on licence) and tender for extinguishments in substitution a licence attaching a premises anywhere in the state. This is a dramatic change: heretofore it was extremely difficult to create new licensed supermarkets or public houses in provincial towns and in certain areas in Dublin because of the stringent requirements contained in the Licensing Code "

NEW GROUNDS OF OBJECTION TO THE GRANT OF A LICENCE

In an application for the grant of a licence under Section 15 of the Bill more extensive grounds of objection are provided for than exist at present. These grounds are as follows:

i. The character, misconduct or unfitness of the Applicant.

ii. The unfitness or inconvenience of the new premises.

iii. The unsuitability for the needs of persons residing in the neighbourhood.

iv. The adequacy of the existing number of licensed premises of the same character in the neighbourhood.

The first two grounds of objection are common to applications for all on licences.

The third ground of objection appears to be unfortunately worded: can the premises be deemed to be prima facie unsuitable if no persons reside in the neighbourhood? It is conceivable that a public house can be built in the city centre in an area where there is very little residential population, or indeed in the middle of one of anew business park where again, there is very little residential population.

In the fourth ground of objection it is unclear as to what the expression "of the same character" means. Does "of the same character" actually refer to the licence i.e. that an application is made for an on licence then the Court must take into account other on licences in the neighbourhood? Or does it refer to licensed premises of a particular type i.e. super pubs, sporting pubs, café pubs, etc. It is unsatisfactory that this expression leads to a number of differing interpretations

CONCLUSION

This article has touched upon some of the principal provisions contained in the Bill. Certainly an attempt has been made to transform the intoxicating liquor code to meet the needs of modern society. As outlined above, however, there are inconsistencies in the Bill as drafted, which will lead to difficulties in its interpretation, if not amended.●

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Legal The Bar Review Update
Journal of the Bar of Ireland. Volume 5, Issue 8

A directory of legislation, articles and written judgments received in the Law Library from the 13th April 2000 to the 12th May 2000.
Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

Statutory Instruments

Health and children (delegation of ministerial functions) order, 2000
SI 32/2000

Health and children (delegation of ministerial functions) (no.2) order, 2000
SI 33/2000

Justice, equality and law reform (delegation of ministerial functions) order, 2000
SI 44/2000

Agriculture

Statutory Instrument

Brucellosis in cattle (general provisions) (amendment) order, 2000
SI 57/2000

Air Navigation

Statutory Instruments

Irish aviation authority (fees) order, 2000
SI 24/2000

Irish aviation authority (rockets and small aircraft) order, 2000
SI 25/2000

Irish aviation authority (aerodrome standards) order, 2000
SI 26/2000

Arbitration

Library Acquisition

Brown & Marriott
ADR: principles and practice
2nd ed
London Sweet & Maxwell 1999
N398

Statutory Instrument

Arbitration Act, 1980 (New York convention) order, 2000
SI 41/2000

Banking

Library Acquisition

Donnelly, Mary
The law of banks and credit institutions
Dublin Round Hall Sweet & Maxwell 2000
N303.C5

Statutory Instruments

Central bank act, 1971 (approval of scheme EUROHYPO European Mortgage Bank plc and Europaische Hypothekenbank S.A.) order, 2000
SI 52/2000

Central bank act, 1971 (approval of scheme of Anglo Irish Corporate Bank Ltd & Anglo Irish Bank Corporation Plc) order, 2000
SI 53/2000

Bankruptcy

O'Maoileoin v. Official Assignee
High Court: **Laffoy J.**
21/12/1999

Bankruptcy; practice and procedure; validity of order adjudicating applicant bankrupt; delay of the applicant in seeking annulment of the order adjudicating him bankrupt; applicant had been adjudicated bankrupt on the petition of a creditor; verifying affidavit which supported the petition had not been signed nor sworn in the presence of the Commissioner for Oaths referred to in the jurat of the affidavit; bankruptcy dormant until respondent had become aware of the fact that the applicant had been working in London; despite requests applicant had refused to cooperate with the respondent; applicant seeking orders annulling the order adjudicating him bankrupt and setting aside the order of the court whereby it was ordered that the aid of the High Court of Justice (in Bankruptcy) in England and Wales be sought; whether a fraud had been perpetrated on the court; whether the adjudication had been procured by mala fides; whether the applicant is estopped from applying for annulment at this juncture by reason of his conduct in the bankruptcy and his unconscionable delay in bringing the application; whether the applicant is guilty of inordinate and inexcusable delay in bringing his application; whether the delay on the part of the applicant was negatived or mitigated by the fact that the respondent had been appraised of the applicant's assertion that the adjudication should be declared nugatory; whether it was part of the functions of the respondent to question the validity of the order adjudicating the applicant bankrupt; whether the balance of justice favours allowing the applicant to proceed with his application or dismissing it on the ground of delay; whether the applicant should have been put on notice of the intention of the respondent to apply for an order seeking the aid of the High Court of Justice (in Bankruptcy) of England and Wales; whether there had been inordinate and

inexcusable delay on the part of the applicant in bringing his application to dismiss the order; whether the balance of justice favoured alloing the applicant to proceed with his application under s.135 Bankruptcy Act, 1988; s.85(5)(b) Bankruptcy Act, 1988.
Held: Application under s.85(5)(b) dismissed, application under s.135 dismissed.

Library Acquisition

Milman, David
Corporate insolvency: law and practice
3rd ed
London Sweet & Maxwell 1999
N310

Charities

Library Acquisition

Picarda, Hubert A P
The law and practice relating to charities
3rd ed
London Butterworths 1999
N215

Children

Article

Risk assessment in child care proceedings
Buckley, Helen
2000 (1) IJFL 6

Statutory Instruments

Health and children (delegation of ministerial functions) order, 2000
SI 32/2000

Health and children (delegation of ministerial functions) (no.2) order, 2000
SI 33/2000

Civil Liberties

Article

The equal status bill, 1999 - equal to the task?
Power, Conor
5(5) 2000 BR 267

Commercial Law

UPM Kymmene Corporation v. BWG Limited
High Court: **Laffoy J.**
11/06/1999
Commercial; breach of warranty; defendant agreed to sell entire issued share capital in three companies to plaintiff under share purchase agreement; whether defendant misrepresented funded status of pension schemes in relation to past service liability; whether plaintiff's representatives were given oral assurances that pension schemes were fully funded; whether misrepresentation amounted to breach of warranty; whether plaintiff contributorially negligent in failing to ascertain true position; whether, if breach of warranty, plaintiff is entitled to amount equivalent shortfall.
Held: Breach of warranty not established; plaintiff's claim dismissed.

Articles

A single regulatory authority for financial services sector
O'Regan Cazabon, Attracta
5(5) 2000 BR 233

Grasping the nettle and meeting the challenge of the co-ordinating financial regulatory reform and consumer redress schemes
Marrinan Quinn, Paulyn
3 (1999) IILR 82

The report of the implementation advisory group on the establishment of a single regulatory authority for the financial services sector
O'Regan Cazabon, Attracta
3 (1999) IILR 75

Library Acquisitions

Donnelly, Mary
The law of banks and credit institutions
Dublin Round Hall Sweet & Maxwell 2000
N303.C5

Hudson, Alastair
Credit derivatives law, regulation and accounting issues
London Sweet & Maxwell 1999
N300

Hudson Alastair
Swaps, restitution and trusts
London Sweet & Maxwell 1999
N300

Hull, John
Commercial secrecy: law and practice
London Sweet & Maxwell 1998
N250

Milman, David
Corporate insolvency: law and practice
3rd ed
London Sweet & Maxwell 1999
N310

Company Law

Horgan v. Murray
High Court: **O'Sullivan J.**
17/12/1999
Company; partnership; practice and procedure; company incorporated by plaintiff and defendants for purpose of conducting public relations business; first named defendant had threatened to pull out of business unless given control of business; plaintiff seeks declaration that partnership relationship existed and injunction restraining defendant from dissipating assets; plaintiff claims that defendants unilaterally purported to terminate partnership and have run company to his exclusion; plaintiff had previously instigated proceedings pursuant to s. 205 Companies Act, 1963 and proceedings for unfair dismissal; whether any basis for inferring partnership relationship existed between parties; whether obligations or rights additional to those arising under companies code contemplated or agreed between parties; whether plaintiff can only take action if he can bring himself within exceptions to rule in *Foss v. Harbottle*; whether statement of claim discloses reasonable cause of action for defamation; whether statement of claim abuse of process of court as all complaints relied on would be remedied by other proceedings; O.19 r.18 Rules of the Superior Courts.
Held: Statement of claim struck out insofar as it claims damages for defamation as disclosing no reasonable cause of action; balance struck out as an abuse of the process of the court.

Kinsella v. Somers
High Court: **Budd J.**
23/11/1999
Company; receivership; application for directions; applicant is director and shareholder of company; respondent is receiver of company; receiver provided applicant with information on receivership; application for directions pursuant to s.316, Companies Act, 1963; applicant seeks from receiver further information as to assets of company since inception of receivership, information as to respondent's fees and accounts in respect of receivership; whether applicant entitled to be furnished with accounts and documents by receiver in course of receivership;

whether applicant has adduced evidence that he is being unfairly prejudiced by some actual or proposed action or omission on part of receiver; whether applicant proved that the matter comes within the peculiar circumstances in which the court would consider it just to make an order; whether there was a failure to show that the information required for specific purpose; whether there was a failure to show receiver had not acted reasonably in refusing to provide further information to applicant.
Held: Application refused.

Articles

Corporate capacity and ostensible authority and their "inextricable" entwinement on display
Linnane, Howard
2000 CLP 37

Deferred consideration as payment for company acquisitions
Carey, Gearoid
2000 CLP 43

Disclosure of interests in securities under part IV of the companies act 1990
Nolan, Sean
2000 CLP 31

Library Acquisitions

Grier, Ian S
Voluntary liquidation and receivership: a practical guide
4th ed
London Sweet & Maxwell 2000
N262.5

Loose, Peter
The company director powers, duties and liabilities
8th ed
Bristol Jordans 2000
N264

Statutory Instruments

Companies (fees) order, 2000
SI 63/2000

Companies (forms) order, 2000
SI 62/2000

Companies (amendment) (no.2) act, 1999 (commencement) order, 2000
SI 61/2000

Companies (amendment) (no.2) act, 1999 (bonding) order, 2000
SI 64/2000

Competition

Library Acquisitions

Kerse, Christopher S
EC antitrust procedure
4th ed
London Sweet & Maxwell 1998
W110.4

Van Der Woude & Jones
E.C. competition law handbook 1999/2000
1999/2000 ed
London Sweet & Maxwell 1999
W110

Constitutional Law

Article

The equal status bill, 1999 - equal to the task?
Power, Conor
5(5) 2000 BR 267

Consumer Law

Article

Grasping the nettle and meeting the challenge of the co-ordinating financial regulatory reform and consumer redress schemes
Marrinan Quinn, Paulyn
3 (1999) IILR 82

Contract

Article

Making contracts over the internet
Bolger, Peter
1999 3(3) IIPR 20

Library Acquisition

Chitty on contracts
28th ed / by H.G. Beale
London Sweet & Maxwell 1999
N10

Copyright, Patents & Designs

Articles

Implementation in Ireland of the EC directive on the legal protection of designs
Shortt, Peter
1999 3(3) IIPR 16

The international protection of industrial designs under the Beirne convention and the Hague agreement (part 1)
O'Reilly, Bill
1999 3(3) IIPR 26

Trade marks & international exhaustion
Maher, Imelda
5(5) 2000 BR 243

Coroners

Library Acquisition

Lecky & Grier
Coroners' law and practice
Belfast SLS Legal publications 1998
L254.C4

Criminal Law

D.P.P. v. M.S.
Court of Criminal Appeal: **Denham J.**, Geoghegan J., McGuinness J.
01/02/2000

Criminal; sentencing; jurisdiction of Court of Criminal Appeal; applicant had been convicted of rape and had been sentenced to six years imprisonment; applicant seeking leave to appeal against sentence; whether the Court has jurisdiction to consider the up-to-date reports on the applicant and suspend a latter part of his sentence on conditions set out in a programme of release; whether, if the Court has such jurisdiction, the circumstances exist in this case wherein the court would order the suspension of a latter part of the sentence of the applicant on the terms and conditions set out in a special programme of release.
Held: The Court has jurisdiction to consider up-to-date reports and to suspend a latter part of the sentence on conditions set out in a programme of release; application adjourned as to whether the circumstances exist under which the court could suspend the latter part of the sentence.

D.P.P. v. Kelly
Court of Criminal Appeal: **Barron J.**, O'Higgins J., Quirke J
13/12/1999

Criminal; similar fact evidence; joinder of counts on indictment; applicant had been tried on two counts of attempted buggery, one count of buggery and one count of indecent assault; applicant had been convicted on the two counts of attempted buggery and had been sentenced to seven years imprisonment;

applicant seeking leave to appeal against the conviction and the sentence; whether each of the counts in so far as they related to a different boy should have been tried separately; whether there was a sufficient degree of nexus between the counts of attempted buggery and the other counts to justify their being heard at the same time; whether the inclusion of the facts relating to the counts of indecent assault and buggery created an unfair prejudice resulting in an unsatisfactory trial; whether the trial judge should have allowed the counts relating to attempted buggery to go to the jury; whether the evidence relating to one of the counts of attempted buggery was admissible in relation to the other count of attempted buggery; whether further matters rendered the trial unsatisfactory and the convictions unsafe.
Held: The joinder of the two counts of attempted buggery with the counts of indecent assault and buggery was incorrect; the trial judge should have acceded to the direction in relation to one of the counts of attempted buggery; the trial was unsatisfactory and the convictions unsafe; appeal allowed; no retrial should be ordered.

Geaney v. D.P.P.
High Court: **O'Sullivan J.**
08/12/1999

Criminal; judicial review; prohibition; fair procedures; attendance of witness at summary trial; applicant seeks to prohibit the respondents from processing his case without the attendance in court of a witness; whether the first named respondent had an obligation to procure the attendance of the witness in summary proceedings; whether the first named respondent had an obligation to tender the witness to the applicant for examination in the District Court; whether fair procedures have been respected.
Held: Relief refused.

D.P.P. (McTiernan) v. Bradley
High Court: **McGuinness J.**
09/12/1999

Criminal; consultative case stated; arrest without warrant; unlawful arrest; right to liberty; accused seeks to have charge against him dismissed on the ground that his arrest was unlawful; whether it is for the trial judge to decide that unlawful arrest would require the court to refuse to hear the case; whether the jurisdiction of the District Court is affected by the fact that an accused has been brought before the Court by an illegal process; Art 40.4.1 of the Constitution.
Held: The trial judge is entitled to dismiss the case if he feels there has been a deliberate and conscious violation of the accused's rights.

S.M. v. D.P.P.
High Court: **McGuinness J.**
20/12/1999
Criminal; sexual abuse; delay; dominion; judicial review; prohibition; delay; charges of sexual and physical abuse by applicant who was principal teacher in school and in which complainants were pupils between 1967 and 1974; applicant seeks order of prohibition restraining respondent from taking further steps in criminal proceedings brought against him and order prohibiting District Court from proceeding with charges against him; whether delay in making complaints such that prohibition of trial should be ordered; whether applicant has discharged onus of establishing that there is a real risk of an unfair trial; whether dominion existed; whether any person independent of authority structure of school to which complainants could turn; whether dominion could have lasted after date complainants left school; whether lack of particularity in the charges is ground for concluding that trial is likely to be unfair; whether health board offered inducements to former pupils to make complaints such that evidence of complaint is inadmissible; whether question of whether health board offered inducements could be effectively dealt with through cross-examination; whether delay in investigation of complaints is such as to render applicant's trial unfair.
Held: Relief refused.

Articles

Arrest and detention: a review of the law
Ryan, Andrea
2000 ICLJ 2

Organised crime, moral panic and law reform: the Irish adoption of civil forfeiture
Meade, John
2000 ICLJ 11

The confessional state - police interrogation in the Irish Republic: part1
White, John P M
2000 ICLJ 17

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Employment

Coastal Line v. Services Industrial Professional Union
High Court: **O'Sullivan J.**
16/12/99

Employment; working time directive; plaintiff claims employees, members of defendant, are excluded from ambit of Organisation of Working Time Act, 1997; whether employees excluded from purview of legislation; whether employees come within the general ambit of the directive whether employees excluded subject to the provision by employer of compensatory rest days, breaks and time off; whether it is open to the Court to entertain an argument which has the effect of reopening findings of fact in the Labour Court; whether Court in a better position to make findings of fact; whether it be unfair to the defendant to allow the plaintiff to present arguments in the teeth of their own submissions to the Labour Court; whether it is open to make submissions that the work activities of employees cannot constitute them dockers or persons engaged in the provision of services at a harbour or airport within the meaning of the Organisation of Working Time (General Exemptions) Regulations 1998, (S.I. No. 21 of 1998): whether the Organisation of Working Time (Exemption of Transport Activities) Regulations, 1998 (S.I. No. 21 of 1998 apply to the plaintiffs; whether as a matter of law it was impossible or incorrect for the Labour Court to find that employees were dockers or persons engaged in the provision of services at a harbour; art. 17 Council Directive 93/104/EC.
Held: Reliefs sought by plaintiff refused; it was open to the Labour Court to find that employees were dock workers within the meaning of art. 17 and were involved in the provision of services at a harbour within the meaning of S.I. No. 21 of 1998.

Article

Enforcing claims under the employment equality act, 1998
Bolger, Marguerite
5(3) 1999 BR 110

Statutory Instruments

Employment regulation order (security industry joint labour committee), 2000
SI 20/2000

Employment regulation order (retail grocery and allied trades joint labour committee), 2000
SI 51/2000

Environmental Law

Murphy v. Wicklow County Council
High Court: **O'Sullivan J.**
13/12/1999

Environmental; habitats; interlocutory injunction; delay; plaintiff alleges that the Glen of the Downs road scheme is in breach of art. 30, European Communities (Natural Habitats) Regulations, 1997 (S.I. no. 94 of 1997); plaintiff seeks injunction restraining defendant from carrying out road scheme; whether there is a serious question to be tried as to whether art. 30 applies; whether where the plaintiff cannot give an undertaking as to damages the balance of convenience still favours the plaintiff; whether delay in bringing the proceedings is part of the circumstances to be considered in the discretion of the court.
Held: Relief refused on grounds of delay; interim injunction discharged.

Statutory Instruments

Air pollution act, 1987 (environmental specifications for petrol and diesel fuels) regulations, 2000
SI 72/2000
(DIR 93/12, 98/70)

Environmental protection agency (advisory committee) regulations, 2000
SI 48/2000

Waste management (hazardous waste) (amendment) regulations, 2000
SI 73/2000
(DIR 98/101, 91/157)

European Union

Murphy v. Wicklow County Council
High Court: **O'Sullivan J.**
15/12/1999

Reference to the European Court of Justice; application by plaintiff requesting reference of preliminary questions to the European Court of Justice pursuant to Article 234 (formerly Art. 177), Treaty of Rome; whether the court can refer preliminary questions to the European Court of Justice where a decision has already been given.
Held: Application refused; authority to refer a question to the European Court of Justice contingent upon the court being of the opinion that a decision on the question by the European Court of Justice is necessary to enable it to give a judgment.

Article

Implementation in Ireland of the EC directive on the legal protection of designs
Shortt, Peter
1999 3(3) IIPR 16

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London Sweet & Maxwell 1999
W110

Extradition

Stanton v. O'Toole
High Court: **O'Donovan J.**
07/12/1999

Extradition; habeas corpus; corresponding offence; delay; applicant seeks an order for his release from custody pursuant to s.50, Extradition Act, 1965 and an order for his release from custody on the grounds that his detention is not in accordance with law pursuant to Article 40.4.2, Constitution; applicant challenges the validity of District Court order; District Court Judge identified the offence specified in the warrant as corresponding with the offence of rape contrary to s. 2 Criminal Law (Rape) Act, 1981; whether the offence specified in the warrant corresponds with an offence of rape contrary to s. 2; whether the offence specified in the warrant corresponds with any other offence under the law of the State which is an indictable offences or an offence punishable on summary conviction by a maximum period of six months; whether the offence specified in the warrant corresponds with the offence of rape contrary to s. 4 Criminal Law (Rape) Act, 1990; whether an indictment framed in the terms of the offence specified in the warrant, which is certified as being a single offence, would be bad for duplicity and uncertainty and would not be allowed go to an Irish jury; whether the indictment would expose the applicant to practices which are unfair or unjust; whether it is unjust, oppressive and invidious to extradite the applicant on grounds of delay; whether the lapse of time was accompanied by other exceptional circumstances; whether the failure to explain the delay in initiating the extradition proceedings amounts to exceptional circumstances within the meaning of s. 50(2)(bbb), Extradition Act, 1965 as inserted by s. 2(1)(b) of the Extradition (Amendment) Act, 1987; whether the affidavit asserting non-compliance with usual practice of Scottish courts invalidates the warrant pursuant to s.55, Extradition Act, 1965.
Held: Applications dismissed; order for the delivery of the applicant to recite that the offence specified in the warrant corresponds an offence under the law of this State, which is an indictable offence, namely, rape contrary to s.4.

Family Law

Article

Domestic violence: the case for reform
McIntyre, Owen
2000 (1) IJFL 10

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Fisheries

Statutory Instruments

Celtic sea (prohibition on herring fishing) order,2000
SI 58/2000

Elections to regional fisheries boards (2000 election application) regulations, 2000
SI 29/2000

Fisheries (amendment) act, 1991 (fisheries co-operative societies 2000 election and ballot) rules,2000
SI 31/2000

Fisheries regions (amendment) order, 2000
SI 77/2000

National Salmon commission (establishment) order, 2000
SI 80/2000

Regional fisheries boards (date for holding of first elections after commencement of section 7 of fisheries (amendment) act, 1999) order, 2000
SI 30/2000

Restriction on fishing by means of beam trawls in parts of the Irish Sea, order, 2000
SI 65/2000

Garda Siochana

Walsh v. Minister for Finance
High Court: **Murphy J.**
13/03/2000

Garda compensation; personal injury; damages; applicant had sustained severe personal injury while on duty as official driver; applicant subsequently rammed by a stolen motorcar which compounded his injuries; whether and to what extent the present symptoms of the applicant were related to the earlier accident.
Held: Applicant awarded damages of £25.000, together with special damages of £86.83.

Article

The confessional state - police interrogation in the Irish Republic: part1
White, John P M
2000 ICLJ 17

Health

Statutory Instruments

Health and children (delegation of ministerial functions) order, 2000
SI 32/2000

Health and children (delegation of ministerial functions) (no.2) order, 2000
SI 33/2000

Health (eastern regional health authority) act, 1999, (establishment day) order, 2000
SI 68/2000

Immigration

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Immigration act, 1999 (section 11) (commencement) order, 2000
SI 9/2000

Refugee Act 1996 (section 6 and first schedule) (commencement) order, 2000
SI 8/2000

Information Technology

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Murray, Karen
1999 3(3) IIPR 31

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Bolger, Peter
1999 3(3) IIPR 20

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Clarke, Seamus
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Furlong, John
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Insurance

Article

Making motor insurers pay
Glanville, Stephen
2000 (March) GLSI 32

Legal Profession

Articles

Show me the money!
Daly, Stephen
2000 (March) GLSI 14

Starter's orders
Halpin & Flynn
2000 (March) GLSI 18

Trends in legal information provision
Furlong, John
5(5) 2000 BR 277

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Solicitors acts, 1954 to 1994 (practising certificate 2000) regulations, 1999
SI 467/1999

Solicitors acts, 1954 to 1994 (practising certificate 2000 fees) regulations, 1999
SI 472/1999

Limitation of Actions

Article

Institution of proceedings and the statute of limitations
Phelan, Sara
5(5) 2000 BR 272

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Health and children (delegation of ministerial functions) order, 2000
SI 32/2000

Health and children (delegation of ministerial functions) (no.2) order, 2000
SI 33/2000

Negligence

Curran v. Cadbury (Ireland) Ltd.
Circuit Court: **McMahon J.**
17/12/1999
Negligence; nervous shock; vicarious liability; plaintiff employed as machine operator by defendant; machine stopped and fitter entered it for purposes of repair out of sight of plaintiff; plaintiff turned on machine, became aware of presence of fitter in machine, became frightened that she caused injury to fitter and subsequently suffered post traumatic stress disorder; whether defendant owed plaintiff a duty of care; whether defendant failed to take reasonable care; whether plaintiff's psychiatric illness could be reasonably foreseen as a consequence that would flow from defendant's lack of care; whether there was a breach of the common law duty to take acre; whether defendant vicariously liable for negligence of employees; whether plaintiff suffered a compensatable injury which was reasonably foreseeable; whether plaintiff involuntary participant; whether there are policy reasons why plaintiff should be denied recovery; whether it would be unjust to deny compensation; whether defendant in breach of Safety, Health and Welfare at Work (General Application) Regulations, 1993; whether plaintiff owed duty by defendant as employer to take reasonable care to prevent employee suffering psychiatric illness due to her conditions of employment.
Held: Damages and costs awarded to plaintiff.

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London Butterworths 2000
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Pensions

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McLoughlin, Aidan
Pensions: revenue law & practice
3rd ed
Dublin Institute of Taxation 1999
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Practice & Procedure

Clare Taverns v. Gill
High Court: **McGuinness J.**
16/11/1999
Practice and procedure; jurisdiction; Brussels Convention; contract; agreement whereby defendant agreed to purchase and first named third party agreed to supply computer equipment; first named third party claims contract governed by conditions of sale appearing on reverse side of invoice sent to defendant; conditions contained clause stating that any contract of which conditions formed part shall be governed by laws of England and buyer submits to the jurisdiction of the English courts; first named third party seeks setting aside of third party proceedings against it or alternatively the striking out of the third party proceedings against it on grounds that by virtue of Article 17, Brussels Convention, 1968 and the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988 the court has no jurisdiction to hear and determine plaintiff's claim against it; whether court has jurisdiction to hear and determine plaintiff's claim against first named third party; whether clause is an exclusive jurisdiction clause; whether clause constitutes agreement within meaning of Article 17, Brussels Convention; whether clause extends to reliefs other than that of breach of contract.
Held: Service of third party notice on first named third party set aside.

Moloney v. Jury's Hotel
Supreme Court: **Barrington J., Lynch J., Barron J.**
12/11/1999
Practice and procedure; negligence action, trial judge referred to hospital notes; persons who made notes not called to give evidence; notes mutually contradictory and inconsistent with nature of plaintiff's injuries as described by doctors who gave evidence; trial judge made finding that it appeared as matter of probability that there was no water constantly in area of refrigerator despite conflict of testimony on this point; High Court dismissed plaintiff's claim; appeal; whether trial was satisfactory; whether hospital notes were evidence to which judge could have regard; whether the notes are of no evidential value and should not have been used by the trial judge to detract from the weight of plaintiff's testimony; whether trial judge's finding that plaintiff failed to prove as matter of probability there was water on the floor can stand; whether trial judge's finding that there was no water constantly in area of refrigerator can stand.
Held: Appeal allowed; remitted to High Court for retrial.

De Rossa v. Independent Newspapers PLC
High Court: **Geoghegan J.**
07/03/2000
Practice and procedure; taxation of costs; non-party discovery; item of costs claimed by notice party for services of general secretary of notice party and work done by members and officers of notice party in connection with preparation for discovery; Taxing Master disallowed item in its entirety and confirmed this view on review; appeal; whether Taxing Master erred in disallowing claim in its entirety; whether finding unjust; whether time devoted to discovery process by senior or retired members of notice party to be paid for; whether notice party claim excessive; whether remarks made in ruling gave appearance of bias on part of Taxing Master; whether in the exceptional circumstances of the case the matter should be remitted to the other taxing master for reconsideration.
Held: Claim remitted to other Taxing Master for reconsideration.

Glynn v. Govenors and Guardians of the Hospital for the Relief of Poor Lying-in Women, Dublin
High Court: **O'Sullivan J.**
06/04/00

Dismissal for want of prosecution; delay; prejudice to defendants; defendant seeks dismissal of action for want of prosecution; whether Court has jurisdiction to dismiss an action brought and maintained within statutory limitation period; whether inordinate delay excusable; whether the fact that the plaintiff was in her minority and the fact that all material of relevance was not available to plaintiffs during period of delay are features which must be weighed in balance by the Court in deciding whether the interests of justice require that the plaintiff be permitted to continue; ; whether failure to dismiss would result in an unjust trial.
Held: Application dismissed; court has jurisdiction to dismiss action brought within limitation period; however, delay would not lead to an unjust trial because of survival of notes, records and contemporaneous professional witness.

Criminal Assets Bureau v. H.
High Court: **O'Sullivan J.**
15/03/00

Mareva injunction; application to vary injunction to allow for payment out of monies required for business, accountant's fees, legal costs, valuation of goods purchased after injunction granted; whether more fees included in application than authorised by earlier order; whether Court has jurisdiction to refer legal fees to taxing master given that there is no dispute between defendants and their lawyers and that earlier order intended payment of fees on a solicitor and client basis; whether earlier order authorised legal expenses on a solicitor and client basis.
Held: Terms of mareva injunction varied to allow for business expenses; application relating to accountant's fees denied; earlier order provided for legal expenses on a solicitor and client basis; legal fees sent for taxation and injunction varied to extent of taxed fees; application relating to goods purchased after injunction granted refused.

Articles

Institution of proceedings and the statute of limitations
Phelan, Sara
5(5) 2000 BR 272

Show me the money!
Daly, Stephen
2000 (March) GLSI 14

Starter's orders
Halpin & Flynn
2000 (March) GLSI 18

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Ni Chulachain, Sinead
5(5) 2000 BR 239

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SI 50/2000

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SI 39/2000

Jurisdiction of courts and enforcement of judgements act, 1998 (section 4(2)) (declaration) order, 2000
SI 40/2000

Rules of the superior courts (no.1) (powers of attorney act, 1996) 2000
SI 66/2000

Property

Article

Property and superannuation reform in Australia: a danger averted, or an opportunity missed?
Dewar, John
2000 (1) IJFL 2

Refugees

Statutory Instruments

Immigration act, 1999 (section 11) (commencement) order, 2000
SI 9/2000

Refugee Act 1996 (section 6 and first schedule) (commencement) order, 2000
SI 8/2000

Road Traffic

Doran v. Cosgrove
Supreme Court: **Keane J.,** Lynch J., Barron J.
12/11/1999
Road traffic accident; apportionment of liability; collision between motor car and van; plaintiff as passenger in car suffered personal injuries; first and second named defendants are owner and driver of car respectively; third named defendant is personal representative of deceased owner and driver of van; conceded by first and second named defendants that accident was caused by the negligence of either or both drivers; High Court apportioned damages equally between both drivers; appeal by third named defendant; whether case against third named defendant should have been dismissed; whether there was any basis in evidence for inference drawn by trial judge that there was lack of judgment amounting to negligence on part of driver of van in making turn; whether trial judge erred in law in treating third named defendant as concurrent wrongdoer and proceeding to apportion liability equally.
Held: Appeal allowed; order giving judgment for plaintiff against first and second named; claim against third named defendant dismissed.

Article

Making motor insurers pay
Glanville, Stephen
2000 (March) GLSI 32

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Tax implications of marital breakdown
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SI 54/2000

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SI 25/2000

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Wardship

Article

Wardship: time for reform?
Ni Chulachain, Sinead
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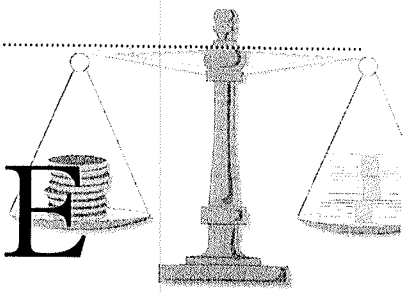

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(DIR 79/373, 80/511, 82/475, 86/174,91/357)

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(DIR 85/73, 96/43)

European communities (importation of bovine animals and products obtained from bovine animals from the United Kingdom) regulations, 1999
SI 464/1999
(DEC 98/256, 94/474, 96/239, 1999/514)

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SI 4/2000
(DIR 95/53, 98/68, 99/20)

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SI 46/2000
(DIR 97/12)(REG 820/97, 2628/97, 2629/97, 2630/97, 494/98, 1678/98)

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SI 59/2000
(DEC 1999/842)

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SI 60/2000
(REG 2382/96)

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(DIR 90/388, 96/2, 96/19, 97/13)

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Arbitration clause - Rescission of a contract - Right to reimbursement of advance payments
Judgment delivered 17/02/2000

C434/97 Commission of the European Communities v French Republic
Court of Justice of the European Communities
Action for failure to fulfil its obligations - Directive 92/12/EEC - Specific tax levied on beverages with a high alcohol content
Judgment delivered 24/02/2000

C-8/98 Dansommer A/S v Andreas Gotz
Court of Justice of the European Communities
Brussels Convention - Article 16(1) - Exclusive jurisdiction in proceedings having as their object tenancies of immovable property - Scope
Judgment delivered 27/01/2000

C-23/98 Staatssecretaris van Financien v J. Heerma
Court of Justice of the European Communities
Sixth VAT Directive - Transactions between a partner and a partnership
Judgment delivered 27/01/2000

C-34/98 Commission of the European Communities v French Republic
Court of Justice of the European Communities
Social security - Financing - Legislation applicable
Judgment delivered 15/02/2000

C-164/98 DIR International Film Srl, Nostradamus Enterprises Ltd, United International Pictures BV v Commission of the European Communities
Court of Justice of the European Communities
MEDIA Programme - Criteria for the grant of loans - Discretionary power - Statement of reasons
Judgment delivered 27/01/2000

C-169/98 Commission of the European Communities v French Republic
Court of Justice of the European Communities
Social security - Finance - Legislation applicable
Judgment delivered 15/02/2000

C-190/98 Volker Graf v Filzoer Maschinenbau GmbH
Court of Justice of the European Communities
Freedom of movement for workers - Compensation on termination of employment - Refusal where a worker terminates his contract of employment in order to take a job in another Member State
Judgment delivered 27/01/2000

C-207/98 Silke-Karin Mahlburg v Land Mecklenburg-Vorpommern
Court of Justice of the European Communities
Equal treatment for men and women - Access to employment - Refusal to employ a pregnant woman
Judgment delivered 03/02/2000

C-293/98 Entidad de Gestion de Derechos de los Productores Audiovisuales (Egeda) v Hosteleria Asturiana SA (Hoasa)
Court of Justice of the European Communities
Copyright - satellite broadcasting and cable retransmission
Judgment delivered 03/02/2000

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Committee - Dail

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2nd stage - Dail *(Initiated in Seanad)*

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2nd stage - Dail **[p.m.b.]**

Children bill, 1999
Committee - Dail

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

Commission to inquire into child abuse bill, 2000
Committee - Seanad *(Initiated in Dail)*

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

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

Containment of nuclear weapons bill, 2000
Committee - Seanad

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

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

Criminal justice (illicit traffic by sea) bill, 2000
1st stage - Dail

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

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

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

Customs & excise (mutual assistance) bill, 2000
1st stage - Dail

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

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

Electronic commerce bill, 2000
2nd stage - Committee *(Initiated in Seanad)*

Electoral (amendment) (donations to parties and candidates) bill, 2000
1st stage - Dail

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

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

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

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

Family law bill, 1998
2nd stage - Seanad

Gas (amendment) bill,2000
1st stage - Dail

Health (miscellaneous provisions) bill, 2000
1st stage - Dail

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

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

Human rights commission bill, 1999
2nd stage- Seanad **(Initiated in Dail)**

Illegal immigrants (trafficking) bill, 1999
Committee - Dail

Insurance bill, 1999
Committee - Dail

International development association (amendment) bill, 1999
2nd stage - Dail

Intoxicating liquor bill, 2000
Committee - Seanad

Irish nationality and citizenship bill, 1999
Committee - Dail *(Initiated in Seanad)*

Landlord and tenant (ground rent abolition) bill, 2000
2nd stage - Dail **[p.m.b.]**

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

Local government bill, 2000
1st stage - Dail

Local government (financial provisions) bill, 2000
2nd stage - Seanad *(Initiated in Dail)*

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

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

Mental health bill, 1999
Committee - Dail

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

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

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

Organic food and farming targets bill, 2000
2nd stage - Dail **[p.m.b]**

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

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

Planning and Development bill, 1999
Committee - Dail *(Initiated in Seanad)*

Prevention of corruption (amendment) bill, 1999
1st stage - Dail

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

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

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

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

Protection of children (hague convention) bill, 1998
2nd stage - Seanad *(Initiated in Dail)*

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

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

Public representatives (provision of tax clearance certificates) bill, 2000
1st stage - Dail

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

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

Registration of lobbyists bill, 1999
1st stage - Seanad

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

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

Road traffic (Joyriding) bill, 2000
2nd stage - Dail **[p.m.b.]**

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

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

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

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

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

Sea pollution (amendment) bill, 1998
Committee - Dail

Sea pollution (hazardous and noxious substances) (civil liability and compensation) bill, 2000
1st stage - Dail

Sex offenders bill, 2000
2nd stage - Dail (Resumed)

Shannon river council bill, 1998
Committee - Seanad

Social welfare bill, 2000
Committee - Seanad (Initiated in Dail)

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

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

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

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

Teaching council bill, 2000
1st stage - Dail

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

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

Trade union recognition bill, 1999
1st stage - Seanad

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

Trinity college, Dublin and the University of Dublin (charters and letters patent amendment) bill, 1997
Report - Seanad **[p.m.b.]**

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

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

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

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

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

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

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

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

Whistleblowers protection bill, 1999
Committee - Dail

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

Youth work bill, 2000
1st stage - Dail

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Acts of the Oireachtas 2000

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

1/2000 Comhairle Act, 2000
Signed 02/03/2000

2/2000 National Beef Assurance Scheme Act, 2000
15/03/2000

3/2000 Finance Act, 2000
Signed 23/03/2000

5/2000 National Minimum Wage Act, 2000
SI 95/2000 = (Rate Of Pay)
SI 96/2000 = (Commencement)
SI99/2000=(Courses/Training)

ABBREVIATIONS

BR= Bar Review
CIILP= Contemporary Issues in Irish Politics
CLP= Commercial Law Practitioner
DULJ= Dublin University Law Journal
GLS= Gazette Society of Ireland
IBL= Irish Business Law
ICL= 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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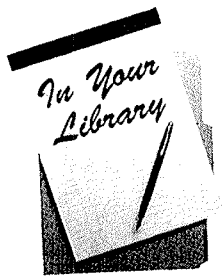

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ITIGATING FOR THE PEPSI GENERATION

Paul Anthony McDermott BL *outlines an unusual offer and acceptance case which recently came before the US District Court in New York.*

Introduction

Every day adverts make more and more extravagant claims about their goods. Difficult questions of contract law can arise when one attempts to distinguish mere advertising puff from legally binding promises. The general rule is that advertisements do not constitute offers. An exception to the rule is where the advertisement is clear, definite, and explicit and leaves nothing open for negotiation. Every practitioner will be familiar with the case of *Carlill v Carbolic Smoke Ball*[1] where an offer to pay £100 if the defendant's Smoke Ball failed to prevent influenza was held to be legally binding. Last summer saw what must rank as one of the most unusual offer and acceptance cases ever brought before a court. In *Leonard v PepsiCo*[2] the plaintiff sought specific performance of an alleged offer of a Harrier Jet featured in a television advertisement. The case not only provides a useful analysis of the offer/puff dichotomy, it also represents the first judicial consideration of whether a parallel system of justice should be established for the Pepsi Generation.

The Alleged Offer

The commercial under scrutiny opens upon an idyllic, suburban morning, where the chirping of birds in sun-dappled trees welcomes a paperboy on his morning route. As the newspaper hits the stoop of a conventional two-story house, the tattoo of a military drum marks the appearance of a well-coiffed teenager preparing to leave for school. While the teenager confidently preens, the military drumroll again sounds as the subtitle "T-SHIRT 75 PEPSI POINTS" scrolls across the screen. Bursting from his room, the teenager strides down the hallway wearing a leather jacket. The drumroll sounds again, as the subtitle "LEATHER JACKET 1450 PEPSI POINTS" appears. The teenager opens the door of his house and, unfazed by the glare of the early morning sunshine, puts on a pair of sunglasses. The drumroll then accompanies the subtitle "SHADES 175 PEPSI POINTS." A voiceover intones, "Introducing the new Pepsi Stuff catalogue," as the camera focuses on the cover of the catalogue. The scene then shifts to three young boys sitting in front of a high school building. The boy in the middle is intent on his Pepsi Stuff Catalogue, while the boys on either side are each drinking Pepsi. The three boys gaze in awe at an object rushing overhead, as the military march builds to a crescendo. The Harrier Jet is not yet visible, but the observer senses the presence of a mighty plane as the extreme winds generated by its flight create a paper maelstrom in a classroom devoted to an otherwise dull physics lesson. Finally, the Harrier Jet swings into view and lands by the side of the school building, next to a bicycle rack. Several students run for cover, and the velocity of the wind strips one hapless faculty member down to his underwear. The teenager opens the cockpit of the fighter and can be seen, helmetless, holding a Pepsi. Looking very pleased with himself, the teenager exclaims, "Sure beats the bus," and chortles. The military drumroll sounds a final time, as the following words appear: "HARRIER FIGHTER 7,000,000 PEPSI POINTS.'"

The Alleged Acceptance

Inspired by this commercial, the plaintiff, who lived in Seattle, set out to obtain a Harrier Jet. He explained to the Court that he was typical of the Pepsi Generation; "he is young, has an adventurous spirit, and the notion of obtaining a Harrier Jet appealed to him enormously." He consulted the Pepsi Stuff Catalogue. The amount of Pepsi Points required to obtain the merchandise listed therein ranged from 15 for a Jacket Tattoo ("Sew 'em on your jacket, not your arm.") to 3300 for a

Mountain Bike ("Rugged. All-terrain. Exclusively for Pepsi."). It also included such items as a Bag of Balls ("Three balls. One bag. No Rules") and Pepsi Phone Card ("Call your mom!"). The catalogue noted that in the event that a consumer lacked enough Points to obtain a desired item, he could purchase additional Points for ten cents each, provided that at least 15 original Points accompanied the order. The plaintiff initially set out to collect 7 million Pepsi Points by consuming Pepsi products. After some time it slowly began to dawn on the plaintiff that he would never be able to buy or drink enough Pepsi to collect the necessary Points fast enough. Cleverly re-evaluating his strategy, the plaintiff concluded that buying Pepsi Points would be a more promising option. Through acquaintances, the plaintiff ultimately raised about $700,000 for this purpose.

In March 1996, plaintiff submitted an order form, fifteen original Pepsi Points, and a check for $700,008.50. He appeared to have been represented by counsel at this time, as the check was drawn on the account of an attorney. At the bottom the order form, plaintiff wrote in: "1 Harrier Jet" in the "Item" column. He stated that the check was to purchase additional Pepsi Points "expressly for obtaining a new Harrier jet as advertised in your Pepsi Stuff commercial." In May 1996, the defendant rejected the plaintiff's order and returned the check, explaining that:

> "The Harrier jet in the Pepsi commercial is fanciful and is simply included to create a humorous and entertaining ad. We apologize for any misunderstanding or confusion that you may have experienced and are enclosing some free product coupons for your use."

The plaintiff clearly felt that a few free drinks tokens were a poor substitute for a Harrier Jet and promptly issued proceedings. In response, PepsiCo successfully brought a motion before a U.S. District Court in New York to dismiss the case.

Advertisements as Offers

Wood J. began by noting that the general rule is that an advertisement does not constitute an offer. Nor is an advertisement transformed into an offer merely by a potential offeree's expression of willingness to accept the offer through completion of an order form. The exception is where the advertisement is clear, definite, and explicit, and leaves nothing open for negotiation. In the present case that exception was not satisfied for two reasons:

i) First, the commercial could not be regarded in itself as sufficiently definite, because it specifically reserved the details of the offer to a separate writing, the catalogue. The commercial itself made no mention of the steps a potential offeree would be required to take to accept the alleged offer of a Harrier Jet.

ii) Second, even if the catalogue had included a Harrier Jet among the items that could be obtained by redemption of Pepsi Points, the advertisement of the Jet by both television commercial and catalogue would still not constitute an offer. The absence of any words of limitation such as "first come, first served," rendered the alleged offer sufficiently indefinite that no contract could be formed. A customer would not usually have reason to believe that a shopkeeper intended exposure to the risk of a multitude of acceptances resulting in a number of contracts exceeding the shopkeeper's inventory.

Thus the Court concluded that the Harrier Jet commercial was merely an advertisement and not an offer.

Rewards as Offers

The plaintiff also relied on a different species of unilateral offer, involving public offers of a reward for performance of a specified act. As was stated Bowen LJ in *Carlill v Carbolic Smoke Ball Co.*, "if a person chooses to make extravagant promises . . . he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them." [3] The Court noted that there is a distinction between typical advertisements, in which the alleged offer is merely an invitation to negotiate for purchase of commercial goods, and promises of reward, in which the alleged offer is intended to induce a potential offeree to perform a specific action, often for non-commercial reasons.

In the present case, the Harrier Jet commercial did not direct that anyone who appeared at Pepsi headquarters with 7 million Pepsi Points on the Fourth of July would receive a Harrier Jet.

"The Court held that no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier Jet. In evaluating the commercial, the Court stated that the test was not the defendant's subjective intent in making the commercial, or the plaintiff's subjective view of what the commercial offered, but rather what an objective, reasonable person would have understood the commercial to convey. If it was clear that the offer was not serious, then no offer had been made. Before this question could be answered, it had to be determined whether the Pepsi generation could be analysed by a judge or only by their own peers."

"The plaintiff's insistence that the commercial was a serious offer required the Court to give serious consideration as to why the commercial was 'funny'. Wood J. modestly observed that explaining why a joke is funny is a daunting task; and he quoted the essayist E.B. White for the proposition that, "Humour can be dissected, as a frog can, but the thing dies in the process." After a surprisingly exhaustive line by line analysis of every aspect of the commercial, Wood J. concluded that the commercial was the embodiment of what the defendant characterised as 'zany humour.' "

Instead, the commercial urged consumers to accumulate Pepsi Points and to refer to the catalogue to determine how they could redeem their Points. In other words, the commercial sought a reciprocal promise, expressed through acceptance of, and compliance with, the terms of the order form. In addition, the catalogue contained no mention of the Harrier Jet. Because the alleged offer in this case was, at most, an advertisement to receive offers rather than an offer of reward, the Court held that there was no offer made in the circumstances of this case.

Objective Reasonable Person Standard

The Court held that no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier Jet. In evaluating the commercial, the Court stated that the test was not the defendant's subjective intent in making the commercial, or the plaintiff's subjective view of what the commercial offered, but rather what an objective, reasonable person would have understood the commercial to convey. If it was clear that the offer was not serious, then no offer had been made. Before this question could be answered, it had to be determined whether the Pepsi generation could be analysed by a judge or only by their own peers.

Judges Don't Drink Pepsi

The plaintiff claimed that the question of whether the commercial conveyed a sincere offer could only be answered by a jury composed of, *inter alia*, members of the "Pepsi Generation," who are, as the plaintiff put it, "young, open to adventure, willing to do the unconventional." He claimed that a federal judge would view his claim differently than fellow members of the "Pepsi Generation." The Court held this argument to be completely without merit. The case at issue presented a question of whether there was an offer to enter into a contract, requiring the Court to determine how a reasonable, objective person would have understood defendant's commercial. Such an inquiry was commonly performed by courts on motions for summary judgment.

Judges Do Know What's Funny

The plaintiff's insistence that the commercial was a serious offer required the Court to give serious consideration as to why the commercial was 'funny'. Wood J. modestly observed that explaining why a joke is funny is a daunting task; and he quoted the essayist E.B. White for the proposition that, "Humour can be dissected, as a frog can, but the thing dies in the process."[4] After a surprisingly exhaustive line by line analysis of every aspect of the commercial, Wood J. concluded that the commercial was the embodiment of what the defendant characterised as "zany humour" for the following reasons:

i) The implication of the commercial was that Pepsi Stuff merchandise would inject drama and moment into hitherto unexceptional lives. It thus made exaggerated claims similar to those of many television advertisements: that by consuming the featured clothing, car, beer, or potato chips, one will become attractive, stylish, desirable, and admired by all. A reasonable viewer would understand such advertisements as mere puffery, not as statements of fact.

ii) Wood J. felt that the callow youth featured in the commercial was a highly improbable pilot, one who could barely be trusted with the keys to his parents' car, much less the prize aircraft of the United States Marine Corps. In particular the judge focused on the fact that rather than checking the fuel gauges on his aircraft, the teenager spent his precious preflight minutes preening. Wood J. also noted with disapproval that the youth's concern for his coiffure extended to his flying without a helmet. Finally, the judge observed that the teenager's comment that flying a Harrier Jet to school "sure beats the bus" evinced "an improbably insouciant attitude toward the relative difficulty and danger of piloting a fighter plane in a residential area, as opposed to taking public transportation."

iii) Wood J. held that the notion of travelling to school in a Harrier Jet was an exaggerated adolescent fantasy. In the commercial, the fantasy was underscored by how the teenager's schoolmates gaped in admiration, ignoring their physics lesson. In addition, the force of the wind generated by the Harrier Jet blew off one teacher's clothes, literally defrocking an authority figure. As if to emphasise the fantastic quality of having a Harrier Jet arrive at school, the Jet lands next to a plebeian bike rack. In a somewhat understated conclusion, Wood J. noted that, "This fantasy is, of course, extremely unrealistic. No school would provide

landing space for a student's fighter jet, or condone the disruption the jet's use would cause."

iv) Wood J. accepted evidence from the official web page of the United States Marine Corps, that the primary mission of a Harrier Jet is to "attack and destroy surface targets under day and night visual conditions." He noted that the jet is designed to carry a considerable armament load, including Sidewinder and Maverick missiles and that, "Fully loaded, the Harrier can float like a butterfly and sting like a bee -- albeit a roaring 14-ton butterfly and a bee with 9,200 pounds of bombs and missiles." In light of the Harrier Jet's well-documented function in attacking and destroying surface and air targets, armed reconnaissance and air interdiction, and offensive and defensive anti-aircraft warfare, Wood J. felt compelled to conclude that "depiction of such a jet as a way to get to school in the morning is clearly not serious even if, as plaintiff contends, the jet is capable of being acquired 'in a form that eliminates [its] potential for military use.'" Although the judgment is silent on the point, presumably the plaintiff was alluding to the 'extreme sports' so beloved of the Pepsi Generation when he advocated the non-military use of Harrier Jets.

v) The number of Pepsi Points the commercial mentioned as required to "purchase" the Jet was 7 million. To amass that number of points, one would have to drink 7 million Pepsis (or roughly 190 Pepsis a day for the next hundred years), or one would have to purchase approximately $700,000 worth of Pepsi Points. At the relevant time the cost of a Harrier Jet was $23 million dollars, a fact of which plaintiff was aware when he set out to gather the amount he believed necessary to accept the alleged offer. Even if an objective, reasonable person were not aware of this fact, he would conclude that purchasing a fighter plane for $700,000 was a deal too good to be true.

In light of the obvious absurdity of the commercial, the Court rejected plaintiff's argument that the commercial was not clearly in jest.

Discovery

The plaintiff demanded discovery relating to how the defendant itself understood the offer. Wood J. rejected this request since such discovery would serve only to cast light on the defendant's subjective intent in making the alleged offer, which was irrelevant to the question of whether an objective, reasonable person would have understood the commercial to be an offer.

Wood J. also rejected the plaintiff's assertion that he should be afforded an opportunity to determine whether other individuals had also tried to accumulate enough Pepsi Points to "purchase" a Harrier Jet. The possibility that there were other people who interpreted the commercial as an "offer" of a Harrier Jet would not render that belief any more or less reasonable. The alleged offer had to be evaluated on its own terms.

The Statute of Frauds

Under the New York Statute of Frauds a contract for the sale of goods for the price of $500 or more is not enforceable unless in writing. Here there was no writing between the parties that evidenced any transaction. The commercial was not 'a writing' and the plaintiff's completed order form did not bear the signature of defendant, or an agent thereof. Thus, even if there had been a valid offer and acceptance, there was no enforceable contract.

Conclusion

The Harrier Jet in the Pepsi case is certainly a long way from the offer of £100 for a Smoke Ball that failed to prevent influenza in *Carlill v Carbolic Smoke Ball.*[5] Crucial to the outcome of the latter case was the fact that the defendants stated in their advertisement that they had deposited £1,000 in a named bank for the purposes of meeting claims. This led the English Court of Appeal to conclude that the offer was intended to be legally binding. Presumably, if the Pepsi advert had concluded by displaying a fleet of new Harrier Jets parked in the company car-park, the outcome of the case would have been different. In addition the teenager in the Pepsi advert contrasts with the distinguished figures who testified to the effectiveness of the Smoke Ball, including the Duchess of Sutherland and the Earls of Wharncliffe, Westmoreland, Cadogan and Leitrim.

The judgment in the *Pepsi* case will undoubtedly come as a relief to those companies who have been responsible for some of the more colourful advertising in recent years. It is once again safe to claim to be the Best Beer in the World, the Crumbliest Flakiest Milk Chocolate, Ireland's Favourite Cuppa or even The Taste of a New Generation. One thing is clear from the judgment of Wood J. The Pepsi challenge does not include an invitation to Litigate to the Max! ●

1 [1893] 1 QB 256

2 Unreported, US District Court for the Southern District of New York, August 4, 1999.

3 [1893] 1 QB 256 at 268.

4 Quoted in Gerald R. Ford, Humor and the Presidency 23 (1987).

5 [1893] 1 QB 256

ROUND RENTS

John Smith BL *outlines the provisions of the Landlord and Tenant (Ground Rent Abolition) Bill, 2000 which, if enacted, would mark the final step in the abolition of ground rents in Ireland.*

Introduction

The initiation of the Landlord and Tenant (Ground Rent Abolition) Bill, 2000 marks the beginning of a new effort to rid the State of ground rents. The new Bill (No. 7 of 2000) as moved by Deputy Eamonn Gilmore of the Labour Party in February 2000 is identical with a Bill previously put on the Order Paper of the Dail by Fianna Fail when in opposition. The move by Deputy Gilmore confirms there is no ideological division between the Labour Party and Fianna Fail on the issue of paying compensation to ground rent landlords. The move by Deputy Gilmore does, however, reflect the long political struggle to introduce this very necessary measure of legal reform, a measure which is welcomed by the legal profession as reducing the difficulties experienced in investigating title. Keane J. (as he then was), delivering judgment in the High Court in the case of *Irish Life Assurance Company Limited - Dublin Land Securities, [1986] IR 332* observed at 335.

> "It is a truism that the sale of one ground rent in Dublin for £50 can cause more nightmares to lawyers than that of an office block for millions of pounds".

The various Land Acts of the late 19th Century introduced under pressure from the Land League led by Michael Davitt and the Home Rule movement spearheaded by both Parnell and Davitt led to the achievement of "peasant proprietary" in Irish agricultural land. It caused the setting up of the Land Registry in the 1890s to record the millions of newly created freehold owners who were of course required to pay land annuities by way of compensating the British Government for the wholesale buy-out of the traditional landlord. However, these major developments in rural Ireland did not affect the situation in urban Ireland where building leases were the norm and where thousands of ground rents had been created over more than a 900 year period. In the early days of the new State, while the Land Commission was being empowered by the Oireachtas to expedite the division of the remaining large estates in rural Ireland, a much more conservative approach was being taken towards the sister system existing from feudal times in urban areas. The Landlord and Tenant Act of 1931 was the first major redressing of the balance between landlord and tenant in relation to what might be called head rents. However, the ground rent situation remained untouched until the 1960s when the Landlord and Tenant Commission under Judge Conroy of the Circuit Court made a report to Government. This report was followed by the Landlord and Tenant (Ground Rents) Act, 1967 which for the first time gave the right to the lessee to emancipate or "buy out" his interest thus winning the freehold from the superior landlord and any intervening landlord existing on his title.

"The various Land Acts of the late 19th Century introduced under pressure from the Land League led by Michael Davitt and the Home Rule movement spearheaded by both Parnell and Davitt led to the achievement of "peasant proprietary" in Irish agricultural land. It caused the setting up of the Land Registry in the 1890s to record the millions of newly created freehold owners who were of course required to pay land annuities by way of compensating the British Government for the wholesale buy-out of the traditional landlord. However, these major developments in rural Ireland did not affect the situation in urban Ireland where building leases were the norm and where thousands of ground rents had been created over more than a 900 year period."

But the 1967 Act did not lay the historical ghost and the resentments surrounding the payment of ground rents to landlords, to rest. In or about 1974 the Association for Combined Residents Associations (ACRA) commenced a campaign aimed at the total abolition of ground rents. This met its first success in the 1977 promise by the Fianna Fail Party as led by Jack Lynch to abolish existing residential ground rents. Having won the election in 1977, the Government of Mr. Lynch proceeded to bring in two enactments in 1978. The Landlord and Tenant (Ground Rents) (No. 1) Act, 1978 prevented the creation of new ground rents on domestic dwellings with the necessary saver for blocks of flats. The Landlord and Tenant (Ground Rents)(No. 2) Act, 1978 made it more economic for householders to buy out their freehold under the terms of the 1967 Act but did not fulfil the promise of the 1977 General Election Manifesto, pleading unspecified constitutional difficulties related to compensating the landlords.

The 1978 (No. 2) Act did however get rid of one penal provision on householders; it abolished the right of a landlord to seek the eviction of a householder for failing or refusing to pay the ground rent. This however left the threat of the Sheriff and the registration of any judgment obtained in the District Court by way of judgment mortgage on the property of the tenant. The position of householders on expiring or expired leases was also a matter that was left over to another day.

The ACRA campaign continued to fill the Courts with court cases as the builders of modern Ireland sought their ground rents.

One of the major holders of ground rents was Irish Life Assurance Company Limited. This Company had probably created very few ground rents but being in the business of collecting insurance premia, began to buy in ground rents and amassed a huge portfolio running to approximately 11,000 ground rents, mainly in the Dublin area.

Under the impact of the ACRA campaign, Irish Life was seeking to rid itself of its entire portfolio by the late 1970s. The Government, as the main shareholder instead of requiring Irish Life to seek to dispose of its portfolio to the individual householders involved, agreed to an Irish Life suggestion for a block sale of the entire portfolio. Ultimately a buyer was found in London who bought the entire portfolio on a multiplier basis of 3.36 times each individual ground rent for a purchase price in the region of £425,000.

This portfolio however included certain profitable opportunities described in the subsequent court case *Irish Life Assurance v Dublin Land Securities* by Mr. Frederick, the purchaser, as "plums" or "jewels in the potatoes".

Unknownst to Irish Life certain jewels of great price were included in the thousands of leasehold and other documents handed over to the new purchaser who formed a company, Dublin Land Securities, to take the conveyance of the entire portfolio. Among the unbuilt sites in the ownership of Irish Life was a stretch of land at Palmerstown over 7 acres straddling a Dublin City and County boundary which lands were subject to a Compulsory Purchase Order by Dublin County Council as confirmed by the Minister for the Environment in November 1979. The compensation payable for those lands amounted in total to a sum in excess of £594,000. While no ground rents were payable out of these lands they were mistakenly included (on Irish Life's evidence) in the handover of documents to Mr. Frederick of Dublin Land Securities.

There were also other freehold properties included in error. The High Court case was ultimately resolved in favour of Dublin Land Securities who insisted on its bargain on the basis that there could be no rectification in equity where there was unilateral mistake.

"The purpose of the Bill is to bring about the termination of all ground rents at a definite time in the future. The Bill, in its scope, applies to all ground rents in respect of private dwellings, local authority dwellings, and all other premises, held currently under a ground rent lease. As expressed in the explanatory memorandum: 'It marks the final step in the abolition of ground rents' "

The decision of the High Court was in due course appealed to the Supreme Court - [1989] IR 253 - which upheld the Order of the High Court. The bulk disposal of its portfolio had thus ended in disaster for Irish Life. The company had lost far more than it might have cost the company to use the provisions of the 1978 Act to give the freehold to every one of its 11,000 odd tenants for free.

However, the tenants were faced with a new landlord, Dublin Land Securities, and many hundreds of cases have been fought out in the District Courts in Dublin over the years to date.

Undoubtedly, the buying out provisions of the 1978 (No. 2) Act will have reduced the portfolio from 11,000 to perhaps half the number but the friction continues with many people refusing to pay ground rent on principle.

The present Bill, if enacted as drafted, may help to bring finality to the demise of this relic of feudal times. However, in providing for full compensation to landlords, it will undoubtedly run foul of those tenants who claim that they should be compensated for being levied with a ground rent which had no reasonable justification in fact or in law.

Terms of the Landlord And Tenant (Ground Rents Abolition) Bill, 2000

The purpose of the Bill is to bring about the termination of all ground rents at a definite time in the future. The Bill, in its scope, applies to all ground rents in respect of private dwellings, local authority dwellings, and all other premises, held

currently under a ground rent lease. As expressed in the explanatory memorandum: "It marks the final step in the abolition of ground rents".

The central purpose of the new Bill is achieved by Section 7, which is the key section of the Bill. Section 7 provides that on a day to be appointed by the Minister for Justice, Equality and Law Reform following the enactment of the legislation, the interest of a person holding property under a ground rent lease is enlarged to the freehold (fee simple) and all intermediate interests are extinguished. This would mean that all various strata of sub-lease that are so common in titles of urban property will be extinguished, leaving the person in occupation under the ground rent lease with the freehold.

"Undoubtedly the compensation provisions will be watched carefully by vigilant landlords. But there are many thousands of dormant landlords who will never seek to collect the compensation thus provided and this may give rise to a difficulty for the new freeholder in terms of releasing charges allowed for on the Register. However, these charges as such would not be major figures of money and could be allowed for at closing by way of set off."

With regard to compensating the landlords, the Bill provides that this compensation will be paid by the person who becomes the new freeholder. Section 18 of the Bill sets out the method of calculating the compensation to be paid. The method adopted is similar to that used in the 1978 Act as amended by the Landlord and Tenant (Amendment) Act, 1984.

There is one important difference, which is a concession to the campaign for the total abolition of ground rents, in that the method used for calculation of the lessor's interest where a lease has expired or has less than 20 years to run is abandoned, the compensation to be paid by persons in these situations is calculated on the same basis as the compensation for other categories.

By way of securing payment of the lump sums then payable to the former landlords, Section 19 provides for the creation of a charge or mortgage on the new freehold to secure payment of the compensation due. This charge, which is registrable, can be vacated by the payment of the compensation and the giving of a written receipt. Section 24 to 27 of the new Bill provides for the registration in the Land Registry of all the new freeholds thus created.

The new freehold can be registered in the Land Registry upon production of the "freehold certificate" and other documents of title.

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The costs of dealing with compensation claims and completing the "freehold certificate" is continued in terms of the 1978 Act at a nominal cost of £30.00.

Whether the Bill, if legislated for, gives the *quietus* to the old feudal system is a question that shall remain open.

A model for reform more favourable to existing householders was available in Section 74 of the Landlord and Tenant (Amendment) Act 1980. The Section dealt with a situation where leases for lives renewable forever created prior to 1st August 1849 but not converted into a fee farm grant under the Renewable Leasehold Conversion Act 1849 could be converted into an estate in fee simple subject to the equities.

"A model for reform more favourable to existing householders was available in Section 74 of the Landlord and Tenant (Amendment) Act, 1980. The Section dealt with a situation where leases for lives renewable forever created prior to 1st August 1849 but not converted into a fee farm grant under the Renewable Leasehold Conversion Act 1849 could be converted into an estate in fee simple subject to the equities."

Were this approach adopted in the present Bill, then the lump sum arrived at could be treated as an equity, thus dispensing with any need for registration or certificates. Vigilant landlords would then become entitled to their compensation in due course but dormant landlords could sleep into infinity. Such an arrangement, while inequitable to nobody, would cause much less stress to the body politic. ●

THE MIBI AGREEMENT THE DIRECTIVE ON MOTOR INSURANCE

Sara Moorhead *BL* *analyses the decision of McMahon J. in the recent Circuit Court case of* ***Dublin Bus v. Motor Insurers' Bureau of Ireland*** *which considered the compatibility of the MIBI agreement with the EU Directive relating to insurance against civil liability in regard to the use of motor vehicles.*

Introduction

The Motor Insurers' Bureau of Ireland Agreement[1] dated 21st December, 1988 between the Minister for the Environment of the one part and the Motor Insurers' Bureau of Ireland of the other part has been the subject of consideration in a recent Circuit Court Judgement entitled *Dublin Bus v. Motor Insurers' Bureau of Ireland* delivered by McMahon J.[2]. This case helpfully analyses Clause 7.2 of the Motor Insurers' Bureau Agreement and also discusses the effects of the directive on the approximation of the laws of Member States relating to insurance against civil liability in regard to the use of motor vehicles.[3]

Background

The facts of the case were that in two separate but similar incidents, on the 1st and 17th February, 1997, the vehicles which were stolen or taken without their owners' consent were driven into the rear of buses operated by Dublin Bus. Dublin Bus sued the Motor Insurers' Bureau of Ireland for property damage in the District Court and an award was made in their favour. The Motor Insurers' Bureau of Ireland appealed such award to the Circuit Court. In their appeal they relied on Clause 7.2 of the 1988 Agreement.

Clause 7.2 of the 1988 Agreement

Clause 7.2 of the 1988 Agreement provides as follows:-

> "The liability of MIB of I for damage to property shall not extend to damage caused by a vehicle the owner or user of which remains unidentified or untraced"

The Motor Insurers' Bureau of Ireland argued before the Circuit Court that while the owner of the vehicle was identified and traced, the user of the vehicle was not and therefore they were not liable under Clause 7.2. They argued that to be liable under Clause 7.2, both the owner and user of the vehicle had to be identified and traced. Dublin Bus argued against this interpretation stating that it was sufficient if the owner was identified or traced and the Agreement clearly did not require both owner and user to be identified and traced.

In his judgement, McMahon J. dealt with two issues:- [4]

(i) The correct interpretation of Clause 7.2;

(ii) The correlation between Clause 7.2 and the Directive.

The judgement is very useful in its review of the background to setting up of the Motor Insurers' Bureau of Ireland and the evolution of claims for property damage over the years.

Under the previous Motor Insurers' Bureau of Ireland Agreement,[5] the Motor Insurers' Bureau of Ireland had no liability for property damage howsoever caused. As a result of the Directive, provisions were introduced in the 1988 Agreement for property damage. The Directive accepted that in each Member State, the Member State should be entitled to legislate for property damage in such a manner as to exclude fraudulent claims. An example of this would be where the owner of a vehicle deliberately crashed it into a tree and sought to recover for property damage. It has been accepted that in circumstances where both the owner and user remain unidentified and untraced, property damage is not recoverable. This was accepted by the European Union and Article 1.4 Paragraph 4 of the Directive provides as follows:-

> "Member States may limit or exclude payments of compensation by that body [MIBI] in the event of damage to property by an unidentified vehicle"

McMahon J. compared Article 1.4 Paragraph 4 of the Directive with Clause 7.2 and he came to the conclusion that Clause 7.2 had been incorrectly interpreted by the Motor Insurers' Bureau of Ireland. He stated as follows:-

> "An examination of Clause 7.2 and comparison with Article 1.4 Paragraph 4 of the Directive, however, clearly shows that the exclusion in the 1988 Agreement is not justified by the Directive in so far as it attempts to exclude payments of compensation when "the owner or user" is unidentified or untraced, even though the vehicle is located and identified.
>
> Clause 7.2 is more extensive than that which is permitted by the Directive as an examination of the facts in the present case clearly illustrates. The Directive allows an exception only when the vehicle is unidentified; if the vehicle is identified further restrictions which relate to the driver or user, traced or identified or not, are not permitted by the Directive and, accordingly, are not allowed in the national scheme"[6]

McMahon J. is critical of the Motor Insurers' Bureau of Ireland for making this argument before the Court, as they had previously acknowledged that there had been an error in the Agreement transposing the Directive into Irish Law[7].

Meaning Of Clause 7.2

In analysing the meaning of Clause 7.2, McMahon J. stated that as it was an exception to a general rule that it should be construed narrowly to detract as little as possible from the general rule which obliges compensation to be paid.[8]

As a result of that, he argued that the use of the word "or" between the words "owner or user" should not be given a disjunctive meaning as it would widen the ambit of the derogation. In construing the phrase "owner or user" McMahon J. looked at other provisions of the 1988 Agreement. He looked at Clause 2.2 which provides as follows:-

> "M.I.B. of I. hereby agrees that a person claiming compensation (hereinafter referred to as "the claimant") may seek to enforce the provisions of this Agreement by -
>
> 2.2 Citing as co-defendants the M.I.B. of I. in any proceedings against the owner or user of the vehicle giving rise to the claim except where the owner and user of the vehicle remain unidentified or untraced."

He noted the inconsistencies in the Agreement between the words "owner or user" and "owner and user". Clause 6 of the Agreement was also looked at:-

> "In the case of an accident occurring on or after the 31st December, 1988 the liability of M.I.B. of I. shall extend to the payment of compensation for the personal injury or death of any person caused by the negligent driving of a vehicle in a public place, where the *owner or user* of the vehicle remains unidentified or untraced."

The Motor Insurers' Bureau of Ireland have never contended that they are not liable for claims for personal injuries under Clause 6 where one of the situations prevails namely, either the owner or the user remains unidentified or untraced. McMahon J. held that there was inconsistency in the reasoning of the Motor Insurers' Bureau of Ireland in that they were applying different criteria to Clause 7 of the Agreement to that they applied to Clause 6. McMahon J. went on to hold under Clause 7.2 where either the owner or the user of the vehicle was identified and traced the party would have a valid claim for compensation under Clause 7.2.[9]

"The Motor Insurers' Bureau of Ireland have never contended that they are not liable for claims for personal injuries under Clause 6 where one of the situations prevails namely, either the owner or the user remains unidentified or untraced. McMahon J. held that there was inconsistency in the reasoning of the Motor Insurers' Bureau of Ireland in that they were applying different criteria to Clause 7 of the Agreement to that they applied to Clause 6. McMahon J. went on to hold under Clause 7.2 where either the owner or the user of the vehicle was identified and traced the party would have a valid claim for compensation under Clause 7.2"

The object of Clause 7.2 was to prevent fraud, especially where a claimant might damage his own property and claim the damage was done by someone who did not stop or could not be found. This scenario is still protected under Clause 7. It is accepted as a correct limitation on the liability of the Motor Insurers' Bureau of Ireland even under the Directive.

The Effect of the Directive

The Court then considered whether Clause 7.2 represented a correct implementation into national law of the provisions of the Directive. McMahon J. was of the view that Clause 7.2 did not represent the correct transposing of the Directive into Irish law. The Motor Insurers' of Ireland Agreement 1988 was drafted to give legal effect to many of the requirements of the Directive. This was acknowledged at the time by the Department of the Environment[10]

In this particular instance, Clause 7.2 was far in excess of what was allowed under the Directive. The most interesting part of the Judgement is that McMahon J. held that the Motor Insurers' Bureau of Ireland was as responsible as the State for the improper implementation of the Directive. A distinction was made between the failure to properly transpose the Directive into Irish law as opposed to the failure of the Irish Authorities to do so at all.[11]

The Motor Insurers' Bureau of Ireland were held, in relying on the interpretation that they wished the Court to place on Clause 7.2, to be in breach of the Directive. McMahon J. was quite trenchant in his criticisms of the Motor Insurers' Bureau of Ireland and stated as follows:

> "It is quite clear that had the Directive been properly transposed into Irish law, Clause 7.2 would not be in the form it is in now, and the Plaintiff/Respondent would only be facing a restrictive provision which conforms with the terms of the Directive. In that event, it would clearly be entitled to recover its property loss from the M.I.B. of I. In these circumstances, the failure to transpose the Directive into Irish law, and the continued failure by the relevant Irish Authorities to rectify the situation once the improper interpretation was recognised, caused the Plaintiff's loss. In failing to rectify the situation, and in failing to implement properly the Directive at the outset, there has been a breach of Article 10 EC (formerly Article 5 EC) and it is proper for this Court to grant the Plaintiff an appropriate remedy." [12]

"This case once again highlights problems which exist with the 1988 Agreement and the fact that it should be re-examined and perhaps redrafted. Certain provisions in it clearly do not conform with the Directive and certain provisions have become the subject of great controversy"

Analysis

This case once again highlights problems which exist with the 1988 Agreement and the fact that it should be re-examined and perhaps redrafted. Certain provisions in it clearly do not conform with the Directive and certain provisions have become the subject of great controversy.[13]

Practitioners are finding it harder to interpret the Agreement and advise in relation to appropriate courses of action as the Motor Insurers' Bureau of Ireland seeks to restrict recovery as much as they can. It is important to bear in mind that their ability to restrict recovery must be viewed in the context of the Directive and any attempt to limit liability which goes beyond that permitted by the Directive is clearly not valid. In furnishing advice, practitioners should bear in mind the effect of the directive on the 1988 Agreement and this judgement represents a valuable tool in comparing the two, although McMahon J. was happy to find for Dublin Bus, on interpretation of Clause 7.2 only. The stance of the Motor Insurers' Bureau of Ireland is somewhat difficult to understand as this situation was clearly not one which envisaged an exclusion of liability.

It is to hoped that in due course, a proper review of the Motor Insurers' Bureau of Ireland Agreement takes place in the light of the Directive and other problems that have existed in recent years. [13]●

1 The Motor Insurers' Bureau of Ireland Agreement dated 21st December, 1988.

2 Unreported, Circuit Court, McMahon J. 29th October, 1999

3 Directive 84/5 EEC The Second Council Directive 30th December, 1983 on the approximation of the laws of the Member States relating to insurance against Civil Liability in regards of the use of motor vehicles OJ No. L8/17,11/1/84

4 See Directive 84/5 EEC The Second Council Directive 30th December, 1983

5 30th December, 1964

6 See p 3 of the Judgement

7 Letter from Mr. M. Halligan Chief Executive MIBI in 1992 *Law Society Gazette* No. 7 August / September, cited at p 3 of the Judgement

8 See p 6 of Judgement

9 See p 8 of Judgement

10 See booklet published by the Department of Environment 21st December, 1988 (6527 Government Publications)

11 McMahon J. cited the following cases as examples of the latter case - C-392/93 *R v. H. M. Treasury ex parte British Telecommunications PLC* [1996] ECR 1-1631 and C-283, C-291and C-292/94 *Denkavit International v. Bundesamt Fuz Finanzen* [1996] ECR 1-5063

12 See p 15 of Judgement

13 See *Kavanagh v. Reilly and MIB* of I unreported, High Court, Morris J., 14th October, 1996 and *Devereux v. The Minister for Finance and the MIB of I*, High Court O' Sullivan J., unreported 10th February, 1998 (for a discussion of both cases see *Bar Review* Vol 3 No. 9 (July 1998))

DEVELOPMENTS IN ELECTRONIC IRISH LEGAL INFORMATION

Jennefer Aston, *Consultant Librarian to the Law Library,*
outlines the exciting range of new developments in electronic Irish Legal Information.

Introduction

This article reviews the developments in and availability of Irish legal information in electronic form. Information is also included on developments which are due shortly or that are expected during the year 2000 given the rapid change in this area. As we have traditionally been heavy users of material from the common law jurisdictions, some developments in other countries are also mentioned. It is not a comprehensive statement of all that is available but is a selective guide to some of the more important services and developments

Access to primary materials is an important tool in any jurisdiction and while this article deals with the very positive development of new materials coming on-line the disappearance of a long-standing service must also be marked. This is the withdrawal by Thomson of the Irish Law Reports Monthly 1976 - 1999 (which it controls through Round Hall) from ITELIS which is part of the Thomson rival Reed Elsevier. This is a backward step as WESTLAW (Thomson's on-line service) intends to provide service subject by subject incorporating only reports relevant to that subject.

Initial Developments in Electronic Information

In an electronic world history hardly gets a mention so it is perhaps worth noting where it all started in Ireland. The first intimation of what was to come was (in the early 80's) a feasibility study into a national Irish Legal database conducted by the UCD Department of Library & Information Studies, with the support of the NBST. The launch of ITELIS in 1984 was a major development which provided access to the Irish Reports & Irish Law Reports Monthly and over time to the vast array of services in other jurisdictions offered by its partner LEXIS. Within a short period the first generation of on-line services, offered at per minute charges, were joined by services on floppy discs, CD-Rom and now of course by Internet based services.

Publishers and the Internet

As with almost all business, the Internet is playing an increasingly important part in the provision of legal materials. The main legal publishers in the UK provide access to selections of their materials on web based services as follows:

Sweet & Maxwell can be found at *www.smlawpub.co.uk/*
Butterworths at *www.butterworths.co.uk*
Context at *www.justis.com*
WESTLAW at *www.westlaw.com/*
CCH at *www.cchnewlaw.co.uk*
Jordans at *http://www.jordanpublishing.co.uk*

Most of these are subscription services but Sweets has a lot of current information free.

Government Sites

Many Government Departments provide legal materials on their sites, e.g. double taxation agreements, decisions etc. An earlier On-Line article on Irish Legal Websites (*Bar Review* V5 issue 1 p31) reviews many of these. Many would-be users never find the very useful information on these sites because to the casual user it is not obvious how to use the overall search engine. For information on searching and how to see a list of sites see the note on the Information Commissioner's Site. The

Competition Authority provide a very good site with access to all its decisions. The Authority have also been prepared to provide their decisions to other services - both not for profit and commercial organisations. With regard to legislation the Attorney's site provides free online access to Acts from 1922-1997. The office is aware that searching on the site is unsatisfactory. Work is under way to improve both content and functionality.

The Information Commissioner's Office has a good site that provides the full text of all their decisions. Anyone bringing applications under the Freedom of Information Act should find this service useful. Searching on the site is by: name, date, case number or by section of the Act. Another approach is as follows: go back to the main Government home page, select search, put in "interview and promotion", click the "restrict to" option and using the small black arrow (in the corner of the box below that) bring up a list of all government sites, highlight Office of the Information Commissioner and run the search. This will actually bring you to quite relevant information in the Commissioner's decisions. This is also the quick way to find any of the Government sites.

The Courts Service site has developed since the last on-line article and now provides access to: the Legal Diary - a vital tool for practitioners ; Rules of Court for the Superior and District Courts; Staff telephone directory to ensure effective communication; information on the Courts' structure and offices; and dates of Law Terms. In the near future it is hoped to devote a section of the site to the provision of the texts of the written judgments of the Superior Courts. Other plans include 1) enhancement of the regional content along the lines of the information provided for the Galway District Court, together with a local map 2) a heritage section containing notes on the architectural history of local courthouses of note 3) a schools section containing an introduction to and explanation of the Courts.

Legislation

The text of all Acts and Statutory Instruments from 1922 - 1998 together with the chronological tables of the Statutes 1922 - 1998 has recently been published on CD-ROM at a cost of £20 as the "Irish Statute Book". It is intended that this CD will be an annual publication and that ultimately pre-1922 legislation will be added. The CD was produced for the Attorney General's office and is sold by the Stationery Office. This low cost access to the laws of the state was a "first" in the common law world which is still influenced by the concept of state/crown copyright and control. It was also essential as legislative materials may be out of print and are very expensive to buy. The statement in 1997 that the Government would no longer exact royalties for the use of statutory materials was the first step in this initiative to make the laws more accessible. The appointment of a Director of Statute Law Revision is further proof that the Office gives priority to these reforms. The introduction of the Statute Law (Restatement) Bill in the current Dáil session should ensure access will continue to improve. It is to be hoped that the development of these services will encompass the provision of a subject index to legislation as envisaged at the outset of the project.

A Review of Irish Electronic Information

(i) ITELIS

ITELIS was the first to offer access to Irish case law, and continues to do so including Irish Reports, unreported judgments, N.I. Reports, N.I. Judgments Bulletin and N.I. transcripts - Discussions to expand the Irish content are under way and in future Irish legal journals may be included in addition to legislation and ancillary case law. ITELIS who deal directly with LEXIS / NEXIS Europe will also continue to provide the LEXIS/NEXIS service in Ireland. The main developments in service have been a change in charges to a flat fee for the year rather than per second charging. Referred to as an "Unlimited Access Deal" this is now on offer to both barristers and solicitors.

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(ii) The Council of Law Reporting for Ireland - The Irish Reports

The Council of Law Reporting for Ireland and Context have combined in a joint venture to produce the Irish Reports and Digests from 1919 to date. The Digest element will also be of interest in Northern Ireland as it provides full coverage of case law with citators to N.I. statutory provisions and other cases. Available from the end of May this CD will be in the same format as the English Law Reports using the JUSTIS

software and will cost £1,200 for a single personal user (there are also some early purchase deals on price until the end of June). The JUSTIS software has a feature called the J-Link which is worthy of specific mention as it provides for a new level of integration between different resources in searching.

J-Link is a unique software application that comes free with JUSTIS. It enables you to link from a document reference outside of JUSTIS (e.g. report reference in another CD, catalogue record, e-mail, web site, Word document) directly to the full text document in a JUSTIS database. In the Irish Reports, for example, it would allow you go straight from a reference to an Act in the Irish Statute Book to the tables of cases which have considered that Act in the Digests. Alternatively you could go straight from a reference to an EU directive in a Statutory Instrument in the Irish Statute Book to the full text of the directive and all the European cases in the JUSTIS CELEX service if you subscribed to it. It gives you the ability to move smoothly and quickly to references - avoiding the need for complicated searches.

(iii) FirstLaw

FirstLaw started providing an on-line current legal information in 1998. The service is comprehensive as to the primary materials covered. All Acts, Statutory Instruments, Judgments, Explanatory Memoranda to Bills, and a selection of Employment Appeal Tribunal decisions are scanned and the full text loaded on the system. This is the only service to provide all primary materials full text with a search facility. FirstLaw also provide searchable abstracts of Irish journal articles. So far the service has not made much impact. This is more to do with the way the service has been offered and marketed in the past than the content. Previously there were charges for viewing the full text and / or printing it (in addition to the subscription paid). This year however the service is offered for a fixed rate of £150 for unlimited usage rather than on a pay as you go basis.

FirstLaw's latest service is called electronic Irish Weekly Law Reports (eIWLR) - all judgments of the Superior Courts from 1999 onwards, on CD-ROM. The first disc contained 163 cases with a promise that subsequent discs would contain all circulated reserved judgments for October 1999 to December 2000 from the Supreme Court, High Court, Court of Criminal Appeal, Courts Martial Appeal Court and Special Criminal Court. There has been a delay in the production of the next disc but subscribers who have been eagerly awaiting its arrival are likely to have an unexpected benefit to compensate for the delay. The text of all FirstLaw reported judgments are made available on their current awareness service and eIWLR subscribers may avail of that service in the interim. FirstLaw also provide the help desk service for the Irish Statute Book CD.

"Arguably the most radical development in making legal materials available since the establishment in the last century of the Council of Law Reporting, BAILII is an international initiative involving parties in Australia, Ireland and the United Kingdom. The project provides free web access from the UK and Ireland at http://www.bailii.org to primary legal materials."

(iv) Competition online

The Competition on-line service was the 1999 winner of a top fifty Legal Research Web Sites Award. This Internet based service is available free of charge after registration. It provides access to: all the decisions of the Competition Authority with a search facility and indexes; information on the regulation of public utilities; enforcement guidelines and other information from the Competition Authority; news and articles on competition, regulation etc; details of conferences and links to other sites. Competition Press also publish their journal and provide seminars.

(v) Tax services

Tax is the subject area best served electronically, with two commercial publishers Taxworld and Butterworth selling texts with commentary and the Institute of Taxation also providing a good electronic service. Butterworth Ireland published their Irish Tax texts using a Dublin based provider and Folio as a search engine. This was a development separate from the usual electronic publishing programme of Butterworth in the UK who normally use BOS software. Whether this divergence will continue following the partial closure of the Dublin office and the redundancy of most of the Butterworth Ireland staff remains to be seen.

(vi) BAILII British And Irish Legal Information Institute

"J-Link is a unique software application that comes free with JUSTIS. It enables you to link from a document reference outside of JUSTIS... In the Irish Reports, for example, it would allow you go straight from a reference to an Act in the Irish Statute Book to the tables of cases which have considered that Act in the Digests."

Arguably the most radical development in making legal materials available since the establishment in the last century of the Council of Law Reporting, BAILII is an international initiative involving parties in Australia, Ireland and the United Kingdom. The project provides free web access from the UK and Ireland at http://www.bailii.org to primary legal materials.

The first impetus for the creation of BAILII came from AustLII, the Australasian Legal Information Institute. AustLII provides a comprehensive free service giving access to legislation, case law and other legal materials from the various Australian jurisdictions, as well as material from New Zealand and the Pacific Rim States. AustLII has become an acknowledged world leader in the field because of its superior search facilities and coverage. Following AustLII's offer to help create a similar service in this part of the world, a high level steering group was set up in London. A preliminary meeting (co-ordinated by Dr John Mee, Dean of the Law Faculty at University College Cork) was subsequently held in the Law Library Building in February. This was attended by interested parties on this island, principally law librarians and officers from both State and professional bodies. Necessary permissions were obtained from the holders of primary data and an impressive quantity of Irish data was included in the pilot version of the service. BAILII in Ireland was launched by Mr Justice Iarfhlaith O'Neill in UCC on 5th April in the Boole building (an appropriate venue, given the use of Boolean logic in computerized searching). The launch was attended by a number of members of the judiciary, representatives from Northern Ireland, academics, practitioners librarians and students.

In common with other legal information institutes, BAILII aims to provide the raw primary legal materials i.e. the text of legislation and judgments (without annotation or headnotes). The power of this service derives from the software that builds the service (inserting hypertext links) and allows for sophisticated searching on a single or multi-jurisdictional basis. What is different about BAILII is the ability to jump directly from a reference to an Act within the text of a case, dealing with say adoption, by hypertext link straight to the text of the Adoption Act or the Child Care Act. Statutes are also "marked up" so that one can move from a term in one section straight to the definition of that term in an earlier section.

BAILII now contains a sample of 1999 judgments from both the High and Supreme Courts, all of the Acts of the Oireachtas 1922-1998 (from the AG's service) as well as the decisions of the Information Commissioner and of the Competition Authority. In the near future, the site will also incorporate the Irish statutory instruments from 1922-1998. The Courts Service have agreed to make available judgments of the Irish Superior Courts once they have completed the ground-work for the inclusion of these judgments on their own web-site. It is hoped that this will occur in Autumn 2000 but, even before this, it is hoped that a method can be found whereby the 2000 judgments (at least of the Supreme Court) can be made available on BAILII.

As well as the above material, BAILII also contains inter alia many decisions of the House of Lords, the Court of Appeal and the English High Court from 1996, as well as the decisions of the various Scottish courts from 1998 and Northern Irish cases from 1999. In respect of legislation, the Northern Irish statutes are available (for the first time on the web) in consolidated form from 1495-1982, with more recent statutes to follow shortly. The Northern Ireland Acts are also useful to anyone interested in older Irish and UK Acts which continued in force after 1922 (many of these have not been amended by Stormont). These are not available electronically from any other source and include Acts such as the Banker's Books Evidence Act 1879 and Bills of Exchange Act 1882.

Although the BAILII project is in its infancy, sufficient progress has already been made to indicate that it will constitute a major resource for legal research in Ireland. It will be necessary in the near future to transplant the service to a centre on these islands and to put the organisation of the project on a more formal transnational footing. One looks forward to the consolidation of this important initiative and to its further expansion in the future.●

REFERENCES FOR ELECTRONIC IRISH LEGAL INFORMATION

Attorney General's site
www.irlgov.ie/ag

BAILII
www.bailii.org

Competition Authority *www.irlgov.ie/compauth/*

Competition online
www.clubi.ie/competition/compframesite/
Tel: +353 (0)1 2600577

Courts Service
www.courts.ie

FirstLaw
Tel +353 (0)1 809 0400
Fax +809 0409
www.firstlaw.ie

Government Site
www.irlgov.ie

Office of the Information Commissioner
www.irlgov.ie/oic

Institute of Taxation,
Tel: +353 (0) 1 6688222
Fax: 6688088
www.taxireland.ie

ITELIS
Tel: +353 (0) 1 671 7035
Fax: 671 7023

Stationery Office, Postal Trade Section,
4/5 Harcourt Road, Dublin 2.
Tel: +353 (0)1 6476000
Fax: (01) 4752760

Taxworld Ltd.
Tel: +353 (0)1 8728881
Fax: (0)1 8728979
www.taxworld@iol.ie

KING'S INNS NEWS

Dining

The following benching dates are scheduled to take place over the coming weeks:

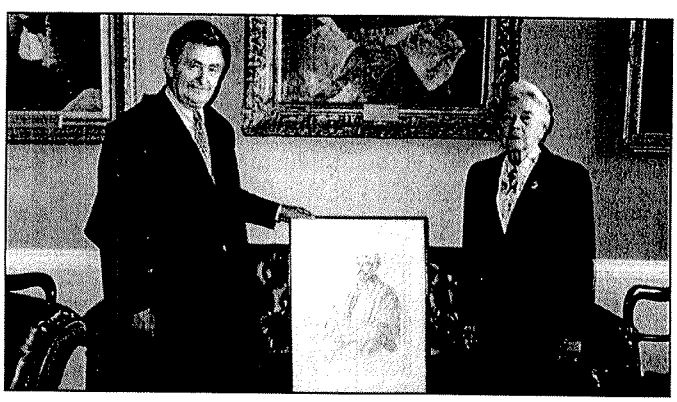
*Friday 23 June -	The Hon. Mr Justice Roderick Murphy
* Friday 7 July -	Mr Paul Callan SC
* Friday 14 July -	Mr Liam McKechnie SC
* Friday 21 July -	Mr James Salafia SC

Cottages for *Rental*

Refurbishment of our two storey cottage block is nearing completion. Altogether there will be five units each containing 2 bedrooms, living, kitchen, shower, storage and parking for one car. One of the units has two shower rooms. Kitchens have a washer/dryer, fridge/freezer, dishwasher, oven and ceramic hob. There is also a secure bicycle shed. Students and members of the Society will be offered the units in the first place. If you are interested in seeing a show cottage, please telephone David Morgan at 874 4840.

PRESENTATION OF PORTRAIT OF GEORGE GAVAN DUFFY

King's Inns is most grateful to Máire Gavan Duffy, daughter of Judge Gavan Duffy, for her generosity in providing King's Inns with the pen and ink portrait by Séan O'Sullivan, RHA. Most of you will remember Judge Gavin Duffy as the striking dark-haired man on the solicitors' bench in "High Treason" by Sir John Lavery. He was, of course, the very courageous lawyer and up-and-coming London solicitor who agreed to take on Sir Roger Casement as a client. Days after taking on his new client he suffered the ignominy of having his name removed as a partner by his firm of London solicitors. After the trial, he returned to Ireland where he succeeded in building up a good career at the Irish Bar. In 1936 he was appointed to the High Court and ended his career as President of the High Court.



Visit to King's Inns *by* the Transition year *from* Mount Carmel Secondary School

We were delighted to welcome about 20 pupils from our local girls' secondary school. They coincided with the High Court hearing, Meridan v. Eircom, that is presently taking place at King's Inns and were fortunate enough to be addressed by the Hon. Mr Justice O'Higgins who took some time off to give them a brief overview of the court system.

This was followed by a tour of the Inns. The class was, of course, delighted with the story behind the portrait of Tom Leffroy (Jane Austen's admirer) that hangs in the dining hall.

WORKING WITHIN THE LAW - A PRACTICAL GUIDE FOR EMPLOYERS EMPLOYEES

BY FRANCES MEENAN (OAK TREE PRESS, 1999)

Reviewed by Alex White, BL

This is the second edition of Frances Meenan's compendium of Irish employment law, reflecting the significant number of new statutory provisions which have been enacted since the earlier work was published in 1994. As its title makes clear, this book was and is primarily a guide for the "users" of the system. However, many practitioners will agree that it has also served as an extremely helpful reference work for lawyers.

The new edition continues the approach of combining an appeal to consumer and practitioner alike. For the employee or employer seeking to locate and clarify rights and entitlements there is a clear and accessible structure to the book. Ms Meehan also employs an easy presentational style serving, in the words of her own introduction, to "demystify" the law.

Employment law governs the relationship between two parties whose relationship to each other is not, typically, one of two equals. The relevant adjudicating bodies have attempted to reflect the special character and complexity of the employment relationship. Procedures tend to be less formal, and the trade unions in particular have often preferred not to turn to lawyers, but to rely on their own very extensive skills in representing members appearing before the various adjudicating bodies. This has led to a curious, though often very healthy and stimulating mix of lawyers, industrial relations specialists and trade union officials, as well as a far higher number of lay litigants than is the case in other areas of practice. In this context, Frances Meenan's book is perfectly pitched.

On the other hand, the enormous expansion in the number and complexity of statutory provisions and relevant case law has inevitably produced a demand for specialist analysis and advice. In the period since the first edition of this book there have been very significant developments, not the least of which has been the enactment of the Employment Equality Act, 1998 which became law in October 1999. The Act expands from two to nine the grounds upon which discrimination is prohibited in employment. Straight away in the first chapter of this new edition, Ms Meenan explains the main provisions of the new Act and their practical effects on areas such as the recruitment of staff. This is a very useful summary for the employer and for the employee or prospective employee. Of more interest to the lawyer or specialist on the other hand, is the interesting discussion of "positive discrimination", which has been the subject of two decisions of the European Court of Justice *(Kalanke v Freie Hansestadt Bremen [1995] IRLR 660* and *Marschall v Land Nordrhein-Westfalen [1998] IRLR 39).*

Throughout the book, the author combines an account of the current legal position with an indication of how the law works in practice. For example, a subject which often emerges in settlement negotiations at the Employment Appeals Tribunal is that of employee references. The decision of the English House of Lords in *Spring v Guardian Assurance plc and Others [1994] IRLR 460* sets out the elements of the duty of care owed by an employer to the employee in the preparation of references. The author provides a very useful summary of this judgment along with an explanation of its significance. Another area of

considerable importance at this time is the question of work permits. A number of changes have been introduced within the past year which are covered in this book, though it may be that more developments will follow soon in the light of the labour shortage currently existing in this country.

There is often confusion about the question of employment contracts as such, and in particular whether an employee is required to be given a written contract. While the law is clear that no such requirement exists, the Terms of Employment (Information) Act, 1994 sets out a range of matters on which an employee is entitled to be given information by the employer. These provisions had not been enacted in 1994 and Ms Meenan gives a very clear summary of what the requirements now are. She also includes a very helpful section on the typical contents of a written employment contract - incorporating the statutory entitlements to information, though in many instances going beyond what are the minimum legal requirements.

A number of controversies and developments have arisen in the area of trade union rights within the past five years. These are also addressed by Frances Meenan, though in somewhat less detail than is the case with "individual" employment rights. The Supreme Court judgment in *Halligan and Others v Nolan Transport (Oaklands) Limited [1998] ELR 177* is summarised. This deals with important matters such as what constitutes a *bona fide* trade dispute, and includes an exceptionally clear analysis by Mr Justice Murphy of the main provisions of the Industrial Relations Act, 1990. There is also a reference to the need for prudent conduct of secret ballots - perhaps the most controversial aspect of the *Nolan* case from the union's point of view.

At the time of writing of this review, the publication is awaited of a Bill on trade union recognition. This arises in the context of the agreement reached by the social partners known as the Programme for Prosperity and Fairness, though the precise contents of the new legislation is likely to reflect the Final Report of the High Level Group published in March 1999. There is a good summary of this latter report in Ms Meenan's book. However, the inclusion of the Trade Union Recognition Bill, *1998* (a Labour Party Private Member's Bill which was voted down by the Government) is a little confusing to the reader in the manner of its presentation. Understandably, the introduction of a statutory minimum wage is also dealt with only very briefly, since this initiative too is a very recent one.

"Practitioners will be aware that some of the more intriguing recent developments in employment law have not arisen by way of statutory provision, but arise from decisions of the courts. In some cases, there is uncertainly as to the likely course of the law in the future - for example, in the matter of "employment injunctions" which have become something of a fixture in the Chancery lists in recent years. Frances Meenan gives a good summary of the line of cases which have established this somewhat uncertain remedy. She also addresses other emerging areas such as bullying, and stress in the workplace, both of which are matters on which practitioners increasingly are being asked to advise."

Finally, practitioners will be aware that some of the more intriguing recent developments in employment law have not arisen by way of statutory provision, but arise from decisions of the courts. In some cases, there is uncertainly as to the likely course of the law in the future - for example, in the matter of "employment injunctions" which have become something of a fixture in the Chancery lists in recent years. Frances Meenan gives a good summary of the line of cases which have established this somewhat uncertain remedy. She also addresses other emerging areas such as bullying, and stress in the workplace, both of which are matters on which practitioners increasingly are being asked to advise.

The Organisation of Working Time Act, 1997 is another very significant piece of legislation enacted since the first edition of this book. The main provisions of this Act are explained clearly, particularly insofar as they relate to entitlement to annual leave and public holidays, repealing many older provisions. New rights under the Maternity Protection Act, 1994 (repealing the 1981 and 1991 Acts), the Adoptive Leave Act, 1995 and the Parental Leave Act, 1998 are also dealt with in a comprehensive manner. In areas where the law has not changed, the author nevertheless revisits many important aspects, adding new case law or other relevant developments where appropriate.

Working Within the Law is an excellent summary of the main legal provisions which will be of value to a wide audience, as its author intends. The "de-mystification" will be helpful to the general reader; and in many cases also to the lawyer. It is quite a task to encapsulate the entire body of any branch of law in one single text. However, this is precisely what Frances Meenan has achieved and she is to be commended highly for her second edition of this work, which is both a practical and scholarly contribution.●

COMPANY LAW

(Third Edition)

By Dr. Michael Forde SC (Roundhall Sweet & Maxwell 1999)

Reviewed by Mark J. Dunne BL.

Although there have been no radical changes in the area of Company law, since the introduction of the Companies Act, 1990 and the Companies (Amendment) Act, 1990 which prompted the second edition of this work, the publication of the third edition of Dr. Forde's Company Law is a timely and welcome update of the original text.

It is identical in style and layout to the two earlier editions, with each chapter being updated where necessary with the more recent case law and legislation. In particular chapter 17, dealing with court protection and examinerships succinctly incorporates the amendments made by the Companies (Amendment) (No. 2) Act, 1999 to company examinership. Similarly the changes made by the Irish Take Over Panel Act, 1997 is succinctly set out in chapter 12, which deals with take-overs and mergers.

Chapters 2 to 5 deal with company formation, corporate personality, the governance and memberships of companies, the management of companies and directors respectively. Chapters 6 to 8 deal with the issues of company capital and financing including company accounts, auditing and disclosure of information. Chapters 9 and 10 deal with shareholders and their rights and in particular chapter 10 deals comprehensively with the area of minority shareholders and their rights. Chapters 16, 17 and 18 deal with the areas of creditors and security and company insolvency by way of liquidation, receivership and examinership.

Throughout the text it is evident that the author has carefully and painstakingly compiled the law in a thorough and erudite manner. Each topic is covered comprehensively, and analysed in a critical and scholarly way. Despite the titanic nature of the task, in an ever growing and complex area of law, the author has managed to write a book that is complete and I suspect will be hugely beneficial to academics and practitioners alike and for this he must be congratulated.

However, as with all works of this complexity and magnitude, it is impossible to satisfy every reader and it is inevitable that some criticisms can and will be made. While Dr. Forde incorporates the most recent legislation and case law both in Ireland and England, into the text, a large proportion of the more recent Irish case law is dealt with by way of footnote rather than in the body of the text. Having said that it must be stated that the law is well set out and the book is very well referenced, so that a lawyer should have little difficulty gathering the most up to date Irish caselaw. Nonetheless it is somewhat unfortunate, that the bulk of the more recent Irish cases only appear in the footnotes, given the fact that it is an Irish company law book (although Dr. Forde does state in the preface that there "seems to be only two judgments of considerable significance given by the Irish Courts in the past seven years but both of them are unsatisfactory, if not wrong"). There are of course exceptions to this, none more obvious than the analysis and criticism of the case of *Greendale Developments Limited (No. 2)* [1998] 1 IR 8 (in which the author was Counsel for the Defendant) which begins in the preface and continues in chapters 3 and 14.

Another criticism of the book, is the lack of analysis of company law taxation. While it is acknowledged that this is an area deserving of a text of its own, it is unfortunate that the more salient principles of taxation as they effect company law are not dealt with.

From a practitioner's point of view, the book can be criticised for the dearth of company law practice and procedure to be found within the covers, especially given the fact that the author is a very experienced practitioner himself. The insertion of an appendix of company law drafting precedents would also have been a helpful addition.

Despite these criticisms, this book is a most valuable and welcome publication. It is a scholarly and informative text and is a must for the shopping list of every commercial lawyer or academic.●

BLOODY SUNDAY THE RULE OF LAW IN NORTHERN IRELAND

By Dermot P.J. Walsh (Gill & MacMillan, 2000)

Reviewed by John Connolly LLM

Professor Walsh has used Bloody Sunday as a metaphor to illustrate the manner in which the rule of law in Northern Ireland has, since its establishment, been submerged and ultimately subverted by a politico-military agenda. Firstly by the unionist controlled Stormont regime and then by successive British governments since the proroguing of Stormont in the wake of Bloody Sunday.

Walsh situates the events of the 30th January 1972, when British paratroopers shot dead fourteen unarmed civilians and wounded fourteen more, against the background of Stormont security policy. Reviewing the history of policing and, in particular, the operation of the Special Powers Act, Walsh concludes that this Act "coupled with the existence of the special constabulary and the paramilitary RUC, effectively placed the Stormont government in a position where it enjoyed powers similar to those current in times of martial law".

The use and abuse of these powers in the early days of civil rights agitation, and the tendency of the Stormont regime to respond violently rather than pragmatically to the moderate demands of the civil rights movement, played a significant role in creating the tensions leading up to the events of Bloody Sunday. Walsh then proceeds to demolish the Widgery tribunal which was established in its wake. Factors such as the composition of the tribunal, the manner in which legal representation was appointed, the interpretation of its terms of reference, the choice of location in Coleraine as distinct from Derry, the adversarial as distinct from inquisitorial nature of the proceedings, its refusal to call evidence from the members of the security committee which planned the operation, the refusal to consider evidence from the 700 witnesses who submitted statements to the Northern Ireland Civil Rights Association, or the wounded who were still in hospital. All these matters lead Walsh to his damning conclusion that the tribunal "was more concerned with exonerating the soldiers and the security and political establishments from blame than it was with exposing the full extent of the truth".

He also suggests that the injury to nationalist confidence in the inability of the northern state to reform, coupled with the insult that was the Widgery report, played a significant role in furthering nationalist alienation from the state. In this respect Bloody Sunday was a watershed in northern politics. The room for moderation within the nationalist community was significantly narrowed as a result of these events. Walsh's conclusion here, while it may be neither popular nor profitable to utter, deserves to be quoted in full;

> "The fact that a tribunal of inquiry vested with all the powers and privileges of the High Court and chaired by the Lord Chief Justice could produce such a report had a devastating effect on nationalist confidence in the rule of law and the integrity of the state. If they could not depend on the judicial arm of the state to deliver justice when they were shot on the streets en masse by British soldiers, why would they withhold support from those within their community who would use force of arms in an attempt to overthrow that state? It was not as if the state had treated them up to that point with equality and fairness in economic, social, cultural, political and security matters. The Widgery Report into Bloody Sunday therefore might be interpreted as the final straw which pushed a large section of the nationalist community into the IRA camp, thereby laying the foundations for the perpetuation of an armed struggle which the British authorities would find impossible to defeat by military or civil means over the next quarter of a century".

The ensuing 'dirty war' over the next twenty years would further erode confidence in the British legal system. Walsh presents developments since Bloody Sunday, as part of a policy which saw law and the justice processes subordinated to the immediate needs of security policy. He begins his systematic analysis by focussing on the wide-ranging measures contained in the Diplock report and enacted in the Northern Ireland (Emergency Provisions) Act 1973. These included detention without trial, wide powers of stop and search and interrogation, restrictions on the right to silence, bail restrictions, and the abolition of trial by jury. Walsh makes the point that "even the Stormont government had not dared to effect such a realignment in the whole balance and structure of the criminal trial".

It was against such a background that the many controversies during the period can be understood. Walsh, using a great deal of original research, identifies each individual controversy as part of a specific trend, with the common theme throughout being the continuous subversion of the rule of law to the military and political strategies of the British government. He associates the period 1972-1975 with a continuation of a military strategy which had commenced in 1970. The period 1975-79 he associates with a criminalisation policy. From 1979 to 1985, the 'supergrass' system was in operation, while the period up to the late 1980s he associates with a 'shoot-to-kill' policy. From the late 1980s to the mid 1990s, he suggests that "the dominant theme was collusion between the security forces and loyalist terrorists in the execution of republicans suspected by the security forces of being engaged in terrorism". He also highlights the commonly heard allegations of the intimidation by the RUC of lawyers who represented republicans. The murder of Belfast solicitor Pat Finucane and the recent murder of Lurgan solicitor Rosemary Nelson by loyalist paramilitaries, reinforces the potency and the immediacy of Walsh's insights.

Professor Walsh concludes that the equipping of the army and the police by the executive and the legislature with extensive and draconian powers, the imposition of severe constraints on the freedom of the individual in Northern Ireland, and the failure of the judiciary to act sufficiently in punishing abuses by the security forces and the state generally has led to a situation today whereby "the security forces patently do not feel any more threatened or constricted by the limits of the law than they did at the time of Bloody Sunday".

The current peace process is premised on a specific political approach to reaching a solution to the northern conflict. Politics is the art of the possible and this, when translated into the northern context, means attempting to find whatever compromise possible. This effort to reach out to the middle ground has paid off, not only in terms of the ratification by the people of Ireland of the historic Belfast Agreement but also in terms of the saving of lives. While such an approach to conflict resolution has obvious benefits, it also has limitations. It might be argued in fact, that this process has not really been about conflict resolution but about conflict management. For example, there has been very little attempt to reach agreement on the precise causes of the conflict. This is a weakness which has run like a major fault-line through the process often threatening to de-stabilise it. It is for this reason that this courageous and timely book must be welcomed.

Although attempts to find an accommodation between people of different traditions is a laudable objective, it must be remembered that the 'tradition' of one has often been to police the other. It is arguable that many Unionists are emotionally, economically and politically wedded to the existing security apparatus. It is unsurprising that the collapse of the northern executive occurred in the immediate aftermath of the acceptance of the British government of the recommendations of the Patten commission on policing. Furthermore, the reluctance of successive British governments to acknowledge their own wrong doing has led to a complicity between the more liberal and the more extreme elements of the British establishment. So, for example, a soldier who murders a teenage joy rider, as was the case with paratrooper Lee Clegg, receives different treatment to any other convicted murderer and is ultimately feted as a hero and then promoted within the ranks.

It might be the case of course that those who have suffered throughout the last thirty years of conflict, be they agents of the state, opponents of the state, or those caught up in the crossfire, will never share a common sense of truth and justice about what they have been through. Some have received the George's cross, others might find vindication in the Saville inquiry, which was established on the eve of the 26th anniversary of Bloody Sunday and is currently underway in Derry's guildhall.

It is the next generation whose faith in the rule of law must be established. Dermot Walsh, in a moving introduction, states that this book reflects one of the primary reasons why he became interested in a career in law. "It all began with my horror at witnessing the television coverage of the excessive and brutal force used by the police on the civil rights marchers in Derry in October 1968. Even though I was only ten years of age at the time the events sparked a very deep sense of commitment to challenge such injustice in whatever way I could".

Perhaps, for the current process to succeed, those involved will need to put their own suffering to one side, and begin to view the implications of their failure to reach a settlement through the eyes of that ten year old.●