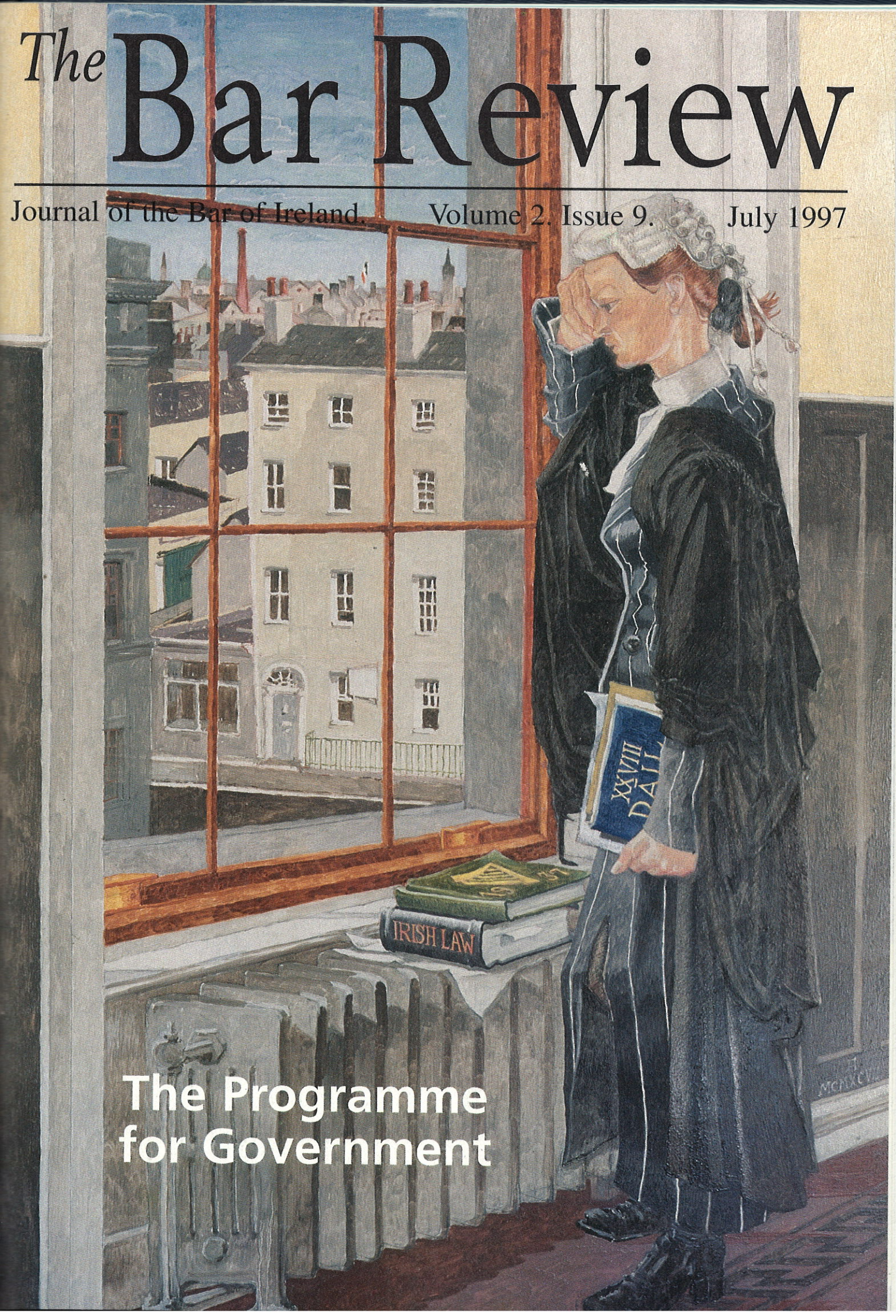
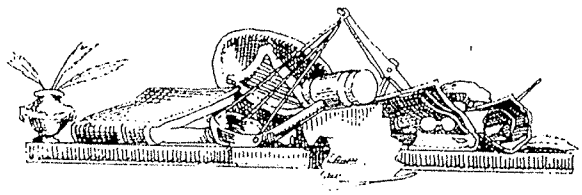
The Bar Review

Journal of the Bar of Ireland. Volume 2. Issue 9. July 1997



The Programme for Government

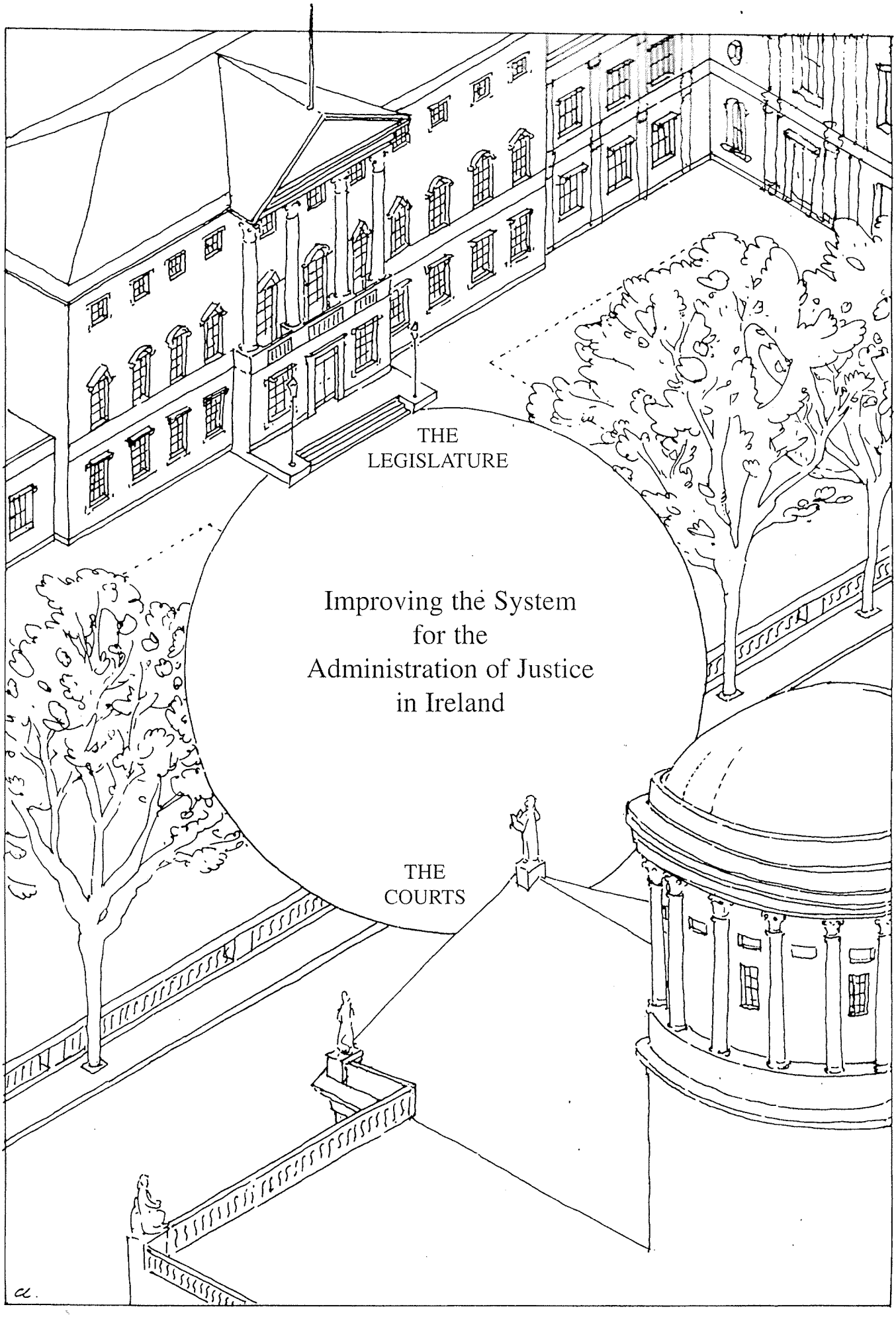


The Bar Review

Volume 2. Issue 9. July 1997. ISSN 1339-3426

Subscription (October 96 to July 97, 9 issues) £65.34 inclusive of VAT: £11.34 airmail post inclusive. Editorial and subscription correspondence to:

Editor: Edel Gormally
Bar Council Office
Law Library Building, Church Street
Dublin 7
Telephone + 01 804 5014
Fax + 01 804 5150
e-mail: edel@lawlibrary.ie


THE
LEGISLATURE
Improving the System
for the
Administration of Justice
in Ireland
THE
COURTS

The Programme for Government

The Programme for Government identifies an understandably broad range of concerns and priorities for the new administration. Certain initiatives concerning the administration of justice are of particular interest.

The Bar Council welcomes in particular the commitment to establish an independent Courts Service to enhance the efficient operation of the courts system. The Bar Council have been happy to work, through the Denham Commission, with the previous administration with regard to the details of such a Courts Service Board and would urge early action by the Government in pursuance of this commitment. The introduction of fast track trials for certain categories of serious offences is another welcome initiative which should lead to greater efficacy in the operation of the criminal law.

Certain other proposals require further consideration. While the focus on the needs of the victims of crime is very welcome and has been a particular concern of the Bar Council in its work with the Court Userís Group, it is hoped that the priority to be given to separate legal representation for the victims of rape and sexual assault will receive due public debate and consideration prior to its introduction. In this regard the Government's planned conference on the Victims of Crime is an innovative and worthwhile initiative to precede any such changes.

Comprehensive juvenile justice legislation, the full implementation of the Child Care Act and review of the role of the courts system in protecting children are all welcome as is consideration of whether a Constitutional referendum to underpin the rights of children is desirable.

The use of the justice system "imaginatively by creating a Drug Court system which would involve court-supervised treatment programmes as an alternative to criminal prosecution for less serious drug-related offence" is an innovative idea which will, in order to be suitably effective, require investment not only of adequate resources but also appropriate training and education of the persons who will be concerned with the relevant supervision

The proposed review of the right to silence touches on issues of central importance to public order and respect for the rule of law. The debate on any changes to the right of silence must be rooted firmly in the context of our Constitution and other supports in our legal framework such as the European Convention on Human Rights and United Nations Covenant on Civil and Political Rights. It is vital that a possible clamour for change based on a well intentioned desire to protect society is counterbalanced by an understanding that society can be best protected by protecting the rules and institutions which guarantee respect for the rights of all members of that society, including in particular those who stand accused but not convicted of the most heinous crimes against society.

It is appropriate to pay due respect to the outgoing administration and in particular to the previous Minister for Justice, Ms Nora Owen, T.D., for the improvements effected in the Court system during her term of office.

We welcome the new Minister, Mr. John O'Donoghue, T.D., and indeed all those who will play a part in this administration. The Bar is conscious of the integral part which the Courts play in any civilised society. It is conscious of how important it is that society has confidence in the Courts and that the Courts operate freely, fairly and efficiently. The Bar Council will do all in its power to assist the Government in effecting every improvement possible to the system for the administration of justice in Ireland.

Erratum for Annual Report

The Annual Report erroneously omitted to record Nehru Morgan Pillay as a member of the Criminal Bar Committee during the past year. Brian Dempsey SC is also not recorded as a member of the Legal Information Committee.

●

Training in Library Data-bases

Training is currently available to members on all databases in the library.

Interested members contact Donna McKeelry (ext. 4621)

●

Vacation Dates

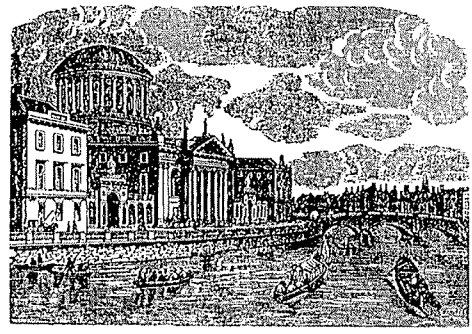
The Law Library will be open from 9.30am to 4.15 pm from Friday, 1st August to Friday, 3rd October. The issue points will be closed to facilitate stock-taking from Friday, 1st August to Monday, 11th August.

●

UCD Diploma in Arbitration (Dip. Arb) and Diploma in International Arbitration (Dip. Int. Arb)

The Faculty of Law, UCD, offers two new courses of study in Arbitration Law and Procedure leading to the award of aDiploma in Arbitration or a Diploma in International Arbitration. The course, commencing in October, 1997 will consist of evening lectures and a number of week-end seminars to be given by distinguished arbitration experts and practising members of the Chartered Institute of Arbitrators.

The course has been accredited by the Chartered Institute of Arbitrators in London and candidates who successfully complete the course will be eligible for election to Associate Membership of the Chartered Institute of Arbitrators



(A.C.A. I. Arb.) and will further be exempted from Papers A and B of the Instituteís Felloship (F.C.I. Arb) Examinations.

Applications will be considered from practising solicitors or barristers, or solicitors and barristers actively engaged in legally connected employment; graduates holding an approved university law degree or law-based interdisciplinary university degree; and the holders of such other academic and/or professional qualifications and/or experience as would satisfy the Faculty that they are able to participate in the course.
The course co-ordinator is Mr. G. Brian Hutchinson, BCL, LLM, DAL, ACIArb, B.L., Associate Dean, Faculty of Law, UCD

Please contact Brian Hutchinson at Faculty of Law, Roebuck Castle, UCD, Belfield, D. 4. Tel: 706 8342.Fax 269 2655 Email arbitration@ucd.ie

●

The Country Air Association

The last week of term, at the end of July sees Tony Aston and his team of collectors going around the Law Library for the Country Air Association. The Bar has sent subscriptions to this small charity since the early years of this century, The CAA was founded in March 1887 to send deserving persons for a weeks holiday away from the city centre. In the first few years the Associations annual income was £145 and a weeks full board in a farmhouse anywhere from Balbriggan to Bray cost 9s for a man, 8s for a woman and 5s to 7s for a child.

Today applications are processed and holidays arranged by the voluntary secretary and treasurer and a small committee chaired by the Archdeacon of Dublin, the Venerable Gordon Linney.

In 1996 the CAA gave a weeks break to 63 adults and 55 children. The average cost of a weeks holiday nowadays is £100 and over £11,000 was spent by the Association for its very worthy cause in 1996.

The Annual Collection in the Law Library has always been highly successful and the Association urges members to continue to support the collection this year.

●

New Bar Council Elected

Congratulations and best wishes to the following members who were elected to the Council for 1997/1999

Senior Panel
Gerard Durcan, SC
Patrick Hanratty, SC
Rory Brady, SC
Michael Gleeson, SC
Conor Maguire, SC

Junior Panel
David Sutton
Tony Hunt
Emily Egan
Sara Moorhead
Peter Somers

●

New Bar Council Chairman and Officers Elected

Congratulations and best wishes to John MacMenamin. SC. who succeeds John Nugent SC as Chairman of the Bar Council.

The new Vice-Chairman is Liam McKechnie. SC. Michal Durack, SC remains the Honorary Treasurer, Feargal Foley is the Honorary Secretary, Oonagh McCrenn remains the Chair of the Liaison Committee. Gerard Durcan, SC is the Chairman of the Professional Practices Committee and Rory Brady, SC is the new Chairman of the Internal Relations Committee. Conor Maguire SC remains the Chairman of the Library Committee.

The Sinn Féin Funds Judgment Fifty Years On[1]

Gerard Hogan, Barrister

On July 31st., 1947 the Supreme Court delivered judgment in the case of *Buckley v. Attorney General*[2]. In this celebrated decision the Supreme Court held that the key provisions of the Sinn Féin Funds Act 1947 were unconstitutional. While this was only the fourth occasion[3] in which legislation enacted by the Oireachtas was found to be unconstitutional, this decision proved to be not only a stunning reverse for the Government of the day on a matter of considerable political sensitivity, but the judgment of O'Byrne J. for the Court still remains one of the cornerstones of modern constitutional law. In many ways, contemporary constitutional law may be said to have begun with this judgment delivered fifty years ago this month. This article may be viewed, therefore, a somewhat nostalgic attempt to sketch out the hugely complicated background to this great decision[4].

The Sinn Féin Funds case has its origin in the Treaty split of December 1921/January 1922. The Standing Committee of Sinn Féin met three days after the Treaty was signed on December 6th, 1922 with President de Valera in the chair[5]. The minutes record the following key exchange:

> "The President said that we all know that a peculiar situation has arisen in regard to the Peace Treaty and we must be quite frank about it here. I mean in regard to the money and property of the Sinn Féin Organization. After a short discussion the following resolution was on the motion of Michael Collins, Vice President, seconded by Mrs. Wyse Power, unanimously adopted:
>
> 'That all the money and other property of the Organization be vested in the President as Trustee.'
>
> This resolution was supported by Eamonn Duggan TD. Hon. Treasurer and A. Griffith TD, Vice President."

The validity of this resolution was later to prove to be one of the central features of the substantive hearing when it ultimately came to be tried by Kingsmill Moore J. following the invalidation of the 1947 Act[6]. At all events, as is well known, the Sinn Féin Party itself split following the ratification of the Treaty by Dail Eireann in January 1922 and the subsequent civil war. On the 6th November 1922, Eamonn Duggan and Jennie Wyse Power attended a meeting of the Sinn Féin Ard Comhairle (then a much depleted body which was completely in the hands of the anti-treaty faction):

> "They refused to hand over funds or recognise Mr. de Valera as trustee on the grounds that circumstances had entirely changed and refused to recognize the authority of the Officer Board."[7]

The ownership of the remaining Sinn Féin Funds was to prove to be contentious for the next twenty-five years or so. The determination as to who was the rightful owner of the funds was not only a matter of considerable symbolic importance (since it was a cardinal tenet of post-Civil War Sinn Féin that it - together with the almost legendary Second Dail - was the true successor to the original Sinn Féin Party), but possession of the funds themselves would have given the anti-Treaty side (who were starved of financial resources) a considerable financial windfall.

Following the ending of the Civil War in May 1923, the anti-treaty side sought to reconstitute the Sinn Féin Party and set about re-gaining possession of the funds. On December 12th, 1923, Mr. O'Dalaigh, the new Honorary Secretary, wrote to Senator Jennie Wyse Power (as she had become)[8] in her capacity as the former treasurer of the Party seeking the return of the moneys[9].

Senator Wyse Power and her co-trustee, Eamonn Duggan TD[10] then sought legal advice and were advised by Timothy Sullivan KC[11] to lodge the moneys in court under the Trustee Acts[12]. Their solicitors, Messrs. Corrigan & Corrigan, then wrote on February 15th., 1924 to Mr. O'Dalaigh informing him that £8,610 - a sum approaching £3 million in present day values - was lodged in the High Court to the credit of the trusts of the Sinn Féin Organization[13].

Rather curiously, nothing further appears to have happened in this matter until 1941. Sinn Féin appear to have taken the view that they would not seek recourse in the "enemy" courts of the Free State until the threat of the Bill forced their hand[14]. At all events, by this stage, first, Eamonn Duggan and, subsequently, Jennie Wyse Power had died and His Honour Judge Wyse Power, as executor of his mother's estate, became the personal representative of the surviving trustee by whom these moneys were so lodged. On November 19th, 1941, the solicitors for Sinn Féin wrote to the Chief

State Solicitor informing him that they proposed to take steps to apply to the High Court to recover the moneys in question and inquiring whether the Attorney General made any claims to the moneys. The Chief State Solicitor then replied on December 6th, 1941 by saying that:

> "The Attorney General is aware of the existence of the funds which have been lodged in the High Court....He is also alive to the fact that these funds were originally subscribed for a public purpose and he desires me to inform you that both he and the Government would have to reserve to themselves complete freedom to take any steps that the public interest might require in the event of proceedings being instituted in relation to these funds.
>
> You will, of course, appreciate that nothing in this communication is to be read as an admission that the parties whom you represent have any claim to these funds."

On January 19th, 1942 proceedings were issued in the name of Margaret Buckley, the then President of Sinn Fain and eight other officers and members of the party claiming declarations as against both the Attorney General and Judge Wyse Power that the party was entitled to the funds and seeking orders directing the payment out of the funds to the Honorary Treasurers of the party. The prospect of a claim on the funds clearly troubled both the Government and Judge Wyse Power. The Taoiseach saw Judge Wyse Power on February 16th, 1942 and Mr. de Valera expressed the view that as the funds had been

> "....widely subscribed by all classes of the people in the whole of Ireland to further the stated National objectives during the period 1917-1921, whatever legal case might be made on the one side or the other the fairest and most satisfactory ways to deal with the Funds, in view of the deep and almost equal division which occurred at the time of the Treaty, would be to devote them, by agreement if possible, to some National purpose in harmony with the general National aims of that period."

It seems evident both from the note of this conversation and the Chief State Solicitor's letter that Mr. de Valera was already contemplating special legislation which would deal with the funds question.

The proceedings made relatively rapid progress throughout 1942[15], culminating in the delivery of the plaintiffs' reply on November 4th, 1942 . The proceedings then came to an abrupt halt until November 1945, mainly because of the plaintiffs' inability to put their existing solicitor in funds. Following a motion brought by the Attorney General to dismiss the action for want of prosecution, the plaintiffs' new solicitor served a notice for trial just within the time stipulated by the Master of the High Court. The case was originally listed for hearing before Overend J. in November 1946, but the matter had to be adjourned because of an on-going dispute between the plaintiffs and their former solicitor who claimed an unpaid solicitor's lien.

In March 1947 the Sinn Féin Funds Bill was published. Section 10 was the key provision and it provided as follows:

> "(1) On the passing of this Act, all further proceedings in the pending action shall, by virtue of this section, be stayed.
> (2) The High Court shall, if an application in that behalf is made ex parte by or on behalf of the Attorney General, make an order dismissing the pending action without costs."

Provision was also made by s.2 for the establishment of Bord Cisti Sinn Féin which, in due course, following the anticipated dismissal of the pending action, would acquire the funds of Sinn Féin lodged in court[16]. Section 4(1) provided that the Chief Justice - or his Judicial nominee- was to be Chairman of the Board.

These provisions were shown to Chief Justice Maguire by Attorney General O'Dalaigh immediately before the Bill was published[17]. While the Chief Justice did not comment on the constitutional dimensions of the Bill - he, perhaps, would considered this to be inappropriate - these provisions met with his disfavour. As he was later to write to the Attorney General on April 28th, 1947 with his recollection of the details of the meeting:

> "I stated that I disliked these provisions on the grounds that they imposed upon the Chief Justice or his nominee duties which would take them away from their normal work in the Courts. I added, however, that while I disliked these proposal in the Bill for this reason...my attitude was that if the legislature as a matter of public policy decided to impose such duties upon the Chief Justice or other Judges that I would feel it my duty to endeavour to carry them out.
>
> Having studied the Bill that evening I came to the conclusion that by reason of the number of classes from which applications might come before the Board, the work of the Board almost certainly would take up considerable time. Accordingly, I telephoned the Attorney General on the following morning to say that I felt that it would not be proper for me to detach myself from my work as Chief Justice in the Supreme Court for a long period and that the Attorney General should take it that I would take advantage of the alternative provision in the section to nominate another Judge to act as Chairman."

The Chief Justice's unhappiness with the machinery of the Bill was quickly to prove to be one of the least of the Government's problems. The media were largely hostile to the Bill thus, in a full-page editorial entitled "Brushing the Courts Aside", The Irish Independent had this to say about the "revolutionary procedure" to be brought about by the Bill:

> "If the Sinn Féin Funds Bill becomes law the Legislature will have established the precedent of directing the Courts what decision to make in any case that may come before them. That is real seriousness of the Bill - not the question of the fate of the comparatively small sum of money involved. "

Having quoted verbatim from the terms of section 10, the leader-writer went on to denounce as fallacious examples cited to the Dáil by way of justification for the Bill. The leader-writer continued:

"It is true that both here and elsewhere Acts have been passed to amend the law following decisions of the Courts. These have all been cases in which the Legislature hurriedly amended the law because they did not desire it to remain what the Courts had found it to be. There is nothing improper or unconstitutional in that course, however undesirable it may at that time be; so far from being an attempt to usurp the functions of the Judiciary it is a course that acknowledges the right of the Judiciary to decide and interpret the law.

Now the claim has gone much further. It was asserted by the [Taoiseach] yesterday that Parliament is supreme and that it can take any case from the Courts "if the public good demands." That is fundamentally and patently incorrect. Under the Constitution of Eire, following the principles of the United State Constitution, the Legislature is supreme only within its own sphere, that is, within the limits of the power conferred on it by the Constitution. One of the functions of the Courts is to declare null and void any Act which the Legislature may have passed contrary to the Constitution; and this function it has on some occasions already had to exercise against Acts passed by the present Government. The phrase 'if the public good demands' is only another way of describing what the majority may think suits it. The public must bear in mind that this arrogant claim to 'take any case from the Courts' if once conceded to any Government may be invoked to-morrow or the next day to prevent individual citizens or organisations of civil servants or teachers or trade unions asserting their rights against the Executive. If this precedent were once established, the Judiciary could no longer protect the rights of the citizen.'[18]'

For those of us who - rather complacently- tend to assume that constitutional law began in the 1960s with the era of Chief Justice O'Dalaigh and Walsh J., this superbly-written editorial displays a striking grasp and appreciation of the constitutional issues involved.

His Honour, Judge Wyse Power

It is doubly ironic, therefore, that the leader-writer had a more acute insight into these issues than was displayed by Attorney General O'Dalaigh when he prepared an opinion for the Government on March 18th, 1947 in which he confidently predicted that the constitutionality of the Bill would be upheld. His argument was that there was no express provision of the Constitution which prevented legislation of this kind:

"[Article 15.5] of the Constitution does pronounce against retroactive legislation, but in a limited way only by a prohibition against acts being declared infringements of the law which were not so at the date of their commission. The Bill in question does not offend against this provisions of the Constitution; and it is to be inferred that all other retroactive legislation is permissible.

If the principle that the Oireachtas is not competent to legislate in respect of any matter pending before the Courts is valid, it follows that the limitation on the powers of the Oireachtas applies as much to repealing legislation as to legislation containing new positive provisions; that it applies at all times until the final Court has pronounced upon the matter; and it would seem logical to add that it should extend to allow the successful litigant to garner the fruits of the Court's judgment without interference."

While there is some force in this argument - and, it may be recalled, that the courts have never completely excluded the possibility in all circumstances of legislative curtailment of the fruits of a court victory[19] - nevertheless the Attorney appeared to overlook completely the central questions which were to arise in the subsequent litigation, namely, the fact that the Act sought to compel the courts to decide a pending case in a particular fashion and the far-reaching interference with property rights.

However, the Attorney was clearly concerned about the constitutional issue and lengthy - and, indeed, learned - memoranda - were subsequently prepared dealing with comparable issues from US constitutional law. The cases thus summarised in the Attorney's memorandum included the celebrated - but much criticised- post-Civil War decision of the US Supreme Court in *Ex parte McArdle*[20]. In that case, Congress, fearing that a habeas corpus application from a prisoner in military detention in Mississippi might be

used as a means of invalidating the military government which was in charge pursuant to the Reconstruction Plan adopted after the Civil War, enacted legislation which sought to repeal the statutory appellate jurisdiction which had been invoked by McArdle. It was hoped thereby to deprive the Supreme Court of jurisdiction to hear the pending appeal and, surprisingly, that Court meekly accepted the statutory termination of their jurisdiction to hear the appeal. As we shall see, the Irish Supreme Court was - quite properly- far more robust in its approach and even though *McArdle* has never formally been overruled, it is unlikely to be followed by a modern US Supreme Court[21].

Constitutional issues were also very much to the fore in the subsequent Dáil Debates, although this forum also afforded the Government and Opposition a convenient opportunity to trade Civil War insults - an opportunity which most Deputies considered to be far too valuable to pass up. Mr. deValera justified the introduction of the Bill on the ground that the funds would "otherwise have been frittered away in legal costs"[22] and on the basis that the funds should be expended on some common benevolent project which reflected the original aims of the (pre-Civil War) Sinn Féin organization.

At the same time, the debate highlighted a serious weakness in the Mr. de Valera's own personal position. If, as he had frequently charged in other circumstances, the pro-Treaty side had brought about a coup d'etat in the summer of 1922[23], it followed logically that the post-1922 Sinn Féin Party was the rightful owner of the funds. A further awkward feature of the litigation was that paragraph 3 of the Attorney's defence - filed in 1942 when Mr. de Valera was still Taoiseach- insisted that by 1924[24] the original Sinn Féin organisation "had ceased to exist and to function" and that it has not "since existed or functioned as alleged or at all." This point was well made in open letter sent by Sinn Féin to the national media in March 1947:

"We were informed that Mr. de Valera was contemplating legislation to confiscate our funds and we were, therefore, forced to take action in the Courts to establish that these funds are the lawful property of Sinn Féin. The Attorney General became a defendant and pleaded that Sinn Féin ceased to exist prior to 1924. This left us no alternative but to prove the continuity of Sinn Féin from its foundation in 1905 to date [Mr. de Valera] as President [of Sinn Féin] and sole trustee made every effort to recover the said funds for the organisation up to the year 1926 when he resigned from Sinn Féin. Sinn Féin during the period of Mr. de Valera's presidency declined to avail of the machinery of the Courts to recover the Funds and the Standing Committee of Sinn Féin in the years following Mr. de Valera's resignation adopted the same attitude of the intentions of the Fianna Fail Government to pass a Bill confiscating our funds... [To] pass a Bill now, to deprive us of our rights to our funds, is nothing more or less than confiscation of private property, and an infringement of the rights of private property and an interference with the Courts set up under Mr. de Valera's much vaunted Constitution."

Several opposition Deputies also drew attention to what was perceived to be an inconsistency of approach on the part of the Taoiseach. Deputy McGilligan's comments on the Committee Stage of the Bill may be taken as representative:

> "The Taoiseach as an individual called Sinn Féin together in 1926 as President of that organisation. The defendant in this pending action is saying that Sinn Féin disappeared before 1924. I would like to hear the Taoiseach's answer to that."[25]

The Taoiseach rather lamely replied that he would give it in due course. The opposition appears to have suspected that the Bill was simply an elaborate device to prevent the Taoiseach being required to give evidence in respect of a period- 1922-1926- when he might have to face awkward cross-examination. However Attorney General O'Dalaigh's briefing notes for use by the Taoiseach during the Dáil Debates give, perhaps, a fairer explanation:

> "...it was a very proper course for the Attorney General, sued on behalf of the People, formally to deny continuity of organisation in order that the matter might be made a formal issue in the action. The clear duty of the Attorney General was by his Defence to raise for decision all matters of historical controversy. The Attorney General having thus very properly raised this matter as an issue in the action, it is suggested that there is some inconsistency between that course and the Taoiseach's own personal course in 1923. The purpose of court pleadings is not to give evidence: it is to raise issues for decision by the Court. Such evidence as the Taoiseach might have to give as to the events of the period is not affected by court pleadings."

The Sinn Féin Funds Act 1947 was duly signed into law on May 27, 1947. On June 10th, 1947, Mr. Andreas O'Keeffe[26] applied *ex parte* to the High Court for an order pursuant to s.10 of the Sinn Féin Funds Act 1947. He originally applied to Dixon J. who was sitting in the (old) Court 6[27] and who had charge of the chancery list. Dixon J. had, however, earlier settled the Attorney General's defence and was thereby unable to rule on the application[28]:

> "Mr. Justice Dixon suggested that the application should be made to the President, adding 'I was at one time a party to that action.'

Mr. O'Keeffe, in reply to the Judge, said that the Act did not specify the Court in which the application was to be made and he had come to that Court because the case had been assigned to the late Mr. Justice Overend, in whose Court Mr. Justice Dixon was now sitting. He understood that the President had the case in his list at one time, but that he was not anxious to try it because of personal associations with the parties and with the matters.

Mr. Justice Dixon - I think I was very much closer than that. If the Act merely says the High Court there could be no objection to applying to the President or to any other judge."[29]

Mr. O'Keeffe then renewed the application before Gavan Duffy P. later that day. The encounter proved to be a torrid one, as the following exchanges demonstrate:

President- Is there any precedent for a statute interfering with a pending action, pending trial?

Mr. O'Keeffe - So far as I can recall, the Accidental Fires Act [1943] did that. There was a disastrous fire in the Athlone Woolen Mills and a number of adjoining properties were involved. The owners of one of the properties brought an action in the High Court, which they lost. They appealed and the Supreme Court gave a decision in their favour. That decision was not affected by the Act, but any other actions, started meanwhile, were stayed. Apparently that Act was never questioned.

President - I have difficulty in seeing how this enactment can be reconciled with the Constitution.

Mr. O'Keeffe- There was also the Erasmus Smith case.

President- That was a settlement by consent....If you have anything to say in favour of the constitutionality of the Act, I will hear you; otherwise I shall decline the application.

Mr. O'Keeffe- The only thing I find difficult is to determine in what way the Act could be unconstitutional. I am at a loss to appreciate that.

President - Because judicial power is vested in the Courts. This is a judicial matter brought before the Courts for judicial determination. No other organ of the State, in my view, has the right to interfere pending that judicial determination....

Mr. O'Keeffe then offered to obtain further information about the background to, and the aftermath of, the Accidental Fires Act 1943. Gavan Duffy P. is then reported to have stated that "he did not think it would help" and then proceeded to give judgment immediately in which he declared the 1947 Act to be unconstitutional on the ground that it interfered with the principle of the separation of powers. In fact, so far from the judgment being *ex-tempore*, Gavan Duffy P. had prepared his decision in advance and had apparently directed all other members of the High Court that if this application was sought to be made before them that it should be referred to him[30].

The State's appeal against Gavan Duffy P.'s judgment opened in the Supreme Court on June 23, 1947 and was to last for four days. The appeal had originally been mentioned before that Court on June 16, 1947, but on that occasion the Court had directed that notice of appeal be served on Mrs. Buckley and the other plaintiffs in the main action. It may be noted that whereas Chief Justice Maguire had been sitting in the Supreme Court when the Attorney's appeal was first mentioned, he excused himself for the main appeal, owing no doubt to the fact that, first, by virtue of s. of the 1947 Act, he was to be Chairman of the Bord Cisti Sinn Féin established by the Act and, secondly, by reason of his lengthy meeting in April 1947 with Attorney General O'Dalaigh where the functioning of the legislation had been discussed. In the absence of the Chief Justice, the senior ordinary High Court judge - Martin Maguire J. - sat along with Murnaghan, Geoghegan, O'Byrne and Black JJ. to make up the full complement of five judges.

As the 1947 Act was a law which had been enacted by the Oireachtas established by the Constitution, the "one judgment" rule contained in Article 34.3.3 applied. Again, as is well known, the single judgment delivered by O'Byrne J. on behalf of the Court dismissing the Attorney's appeal is justly celebrated. Yet the extensive newspaper coverage of the four day oral argument provides us with some clues on the question of whether the Court was divided. While, of course, every practising barrister knows that there is nothing more dangerous than to attempt to draw inferences from questions posed by members of the Supreme Court during oral argument, nevertheless the tenor of every remark made by Black J. suggests that he was in dissent. Three examples may be given.

On the first day of the appeal, Black J.'s interventions struck a slightly strident tone, when in contrast to the questions of Murnaghan and O'Byrne JJ. - who were pressing counsel for the Attorney on the question of the elevated status of property rights under Article 43.1.1 as natural rights "antecedent to all positive law" - the former exclaimed:

> "I cannot understand the meaning of this term 'natural right'. It strikes me that natural right, if it means something antecedent to positive law, only means the right of the strongest to take what he can and hold what he gets."[31]

Black J.'s interventions during the course of the argument presented by Mr. J.A. Costello SC on behalf of the Sinn Féin plaintiffs were also decidedly hostile. As Mr. Costello SC sought to rely on Article 40.3 - and this, it must be recalled, was some sixteen years before Kenny J.'s decision in *Ryan v. Attorney General*[32] - the following exchange took place:

> "In reply to Mr. Justice Black, Mr. Costello said that if a manifest injustice was brought to attention of the Court, and it could not be justified by law or some other means within the Constitution, then it was the duty of the Court to remedy that injustice. It was the duty of the Court to see that the legislature did not take away the right of the citizen to come to court.
>
> Mr. Justice Black- It seems to have been done a good many times."[33]

On the following day, Mr. Costello SC returned to this theme saying that the effect of Article 40.3 was that the courts were "the guardian of the citizens' rights against legislative tyranny.

Here Mr. Justice Black remarked that Mr. Costello appeared to be putting the Constitution into a straightjacket.

The Constitution had a zip fastener, replied Mr. Costello, and could easily get out of the straight jacket. That was the people's Constitution, given by themselves to themselves and enacted for themselves and, if there were a sufficient number of the people in favour of having the Constitution amended, they very easily could have it amended."[34]

The interventions of the other judges tended to lean in favour of the plaintiffs. On the first day of the appeal, O'Byrne J. effectively backed Mr. Richard McLoughlin SC, leading counsel for the Attorney, into a corner:

"Mr. Justice O'Byrne - If the action had proceeded to trial in the ordinary the plaintiffs have established their claim, as representing this organisation.

Mr. McLoughlin - I admit that.

Mr. Justice O'Byrne - Then, are we to deal with this case upon the basis that the claim might have been established and the plaintiffs might be entitled to this money as representing this organisation.

Mr. McLoughlin - I am making my first submission, at all events, on the assumption that the plaintiffs might have obtained a decision of a valid Court that they were entitled to this money as the representatives of this organisation.

Mr. Justice O'Byrne - Well, then, is the effect of the legislation to divert from the objects of an association the moneys of that association and to apply them to a different purpose as set out in the Statute.

Mr. McLoughlin- That is the effect of the Sinn Féin Funds Act..."

The Attorney General's side never really recovered from this concession. In his subsequent judgment for the Court, O'Byrne J. described the concession in the following terms:

> "In the circumstances of this case we do not see how counsel could legitimately have adopted any other course. In so dealing with the case on this basis, the effect of the Act is to take away from the plaintiffs the trust moneys and to deprive the plaintiffs of all rights therein."[35]

O'Byrne J. pounced on this concession and the following exchange then took place:

"Mr. Justice O'Byrne - Would you say that a law taking away property from an individual was a law delimiting in public interest the exercise of the right to private property?

Mr. McLoughlin - I say that a law which may in its effect take away the private property of some individual is within the scope and the meaning of the word 'delimit' in Article 43.
Mr. Justice O'Byrne - You can go on from one to another, and so, and it is all right until you reach the last.

Mr. McLoughlin- Well, of course, if I were to be driven to have to argue that supposition then I would have to say that it is not a reasonable supposition, with all respect. I would be, I think, unable to argue the case on the assumption that the Legislature may do things which, as one of the other judges said, must only lead to a revolution."[36]

Against that background it was but a short step to a finding of unconstitutionality.

The press reaction to the judgment was that of pleasant surprise, as if they had not really expected that a Supreme Court all but one of whose members[37] had been appointed by Mr. de Valera interpreting a Constitution of which he had been the political architect could really find against him in a case of such sensitivity. The mood was best summed up by The Irish Times editorial:

> "We have no concern with the custody of the Sinn Féin Funds, but we are deeply concerned with the right of Irish citizens under the Constitution. These rights....have been vindicated in striking fashion by the Judiciary. In our opinion, Mr. de Valera and his advisers acted most unwisely when they decided to try to forestall a legal decision by means of ad hoc legislation...From every point of view it is essential that the complete independence of the Courts shall be maintained and safeguarded in every possible way."

In the end, Mrs. Buckley's victory was a phyrric one. Following a lengthy hearing before Kingsmill Moore J. in the spring of 1948 the latter concluded that the existing Sinn Féin organisation was not in any legal sense "a continuation of the organisation which had held its two Ard-Fheiseanna in 1922 and which had melted away in the course of that year as the result of the political strife culminating in the Civil War."[38] In those circumstances, the post Civil War Sinn Féin could not "substantiate any claim to the property of the members of the organisation existing in 1922." The issue of the funds, therefore, which had beset Irish political and legal life off and on for the best part of half a century thus ebbed away anti-climactically.

As we close this recollection of a golden anniversary, it is salutary to reflect that on how the internal strife within Sinn Féin so affected the political and constitutional life of the State. Historians frequently point to Mr. de Valera's resignation from Sinn Féin and the founding of Fianna Fail in 1926 as a turning point in the evolution of constitutional politics. But the legal profession should also fondly remember that a bitter dispute between former allies concerning the ownership of Sinn Féin's funds gave the Supreme Court the opportunity 50 years' ago this month to set Irish constitutional law in a new direction. ●

1. My thanks are due to Ms. Catriona Crowe of the Public Record Office and Mr. John Conlon, Assistant Secretary, Constitution Review Group for their considerableassistance in locating the Sinn Féin Funds File (SR 11/41) in the Public Record Office. I should also like to thank Gerard Quirk Esq. (who is a nephew of Judge Wyse Power's wife, Minnie) for the photograph of Judge Wyse Power.

2. [1950] IR 67.

3. The other cases were *The State (Burke) v. Lennon* [1940] IR 136; *Re Article 26 and the School Attendance Bill,* 1942 [1943] IR 334 and *National Union of Railwaymen v. Sullivan* [1947] IR 77

4. Considerations of space prevent the much fuller treatment which this subject -and, in particular, an analysis of the significance of the decision - undoubtedly deserves.

5. Other distinguished persons in attendance included Arthur Griffith; Darrell Figgis; Eamonn Duggan; Siobhan Bean an Paoraigh (Jennie Wyse Power); Michael Collins; Hannah Sheehy Skeffington and Austin Stack.

6. *Buckley v. Attorney General* (No.2) (1950) 84 ILTR 9. Kingsmill Moore

J. held (at 19) that the resolutions were *ultra vires* the then existing Sinn Féin Constitution. *Buckley v. Attorney General* (No.2) (1950) 84 ILTR 9, 26, per Kingsmill Moore J.

8. This remarkable woman had been the first President of Cumann na mBan and had also been a District Justice in the Dáil courts between 1920 and 1922. She had been made a Senator in 1922 and continued as a member of that body until its abolition in May 1936. See generally, O'Neill, From Parnell to deValera: A Biography of Jennie Wyse Power, 1858-1941 (Blackwater Press, 1991).

9. The letter recited that the Árd Comhairle of Sinn Féin had passed a resolution on November 27th, 1923 instructing the Standing Committee:

   "...to demand from the former Treasurers of Sinn Féin all monies belonging to the organisation, and that all debts due by the organisation previous to October 22, 1922 be discharged and the balance be voted to the Released Prisoners and their Dependents."

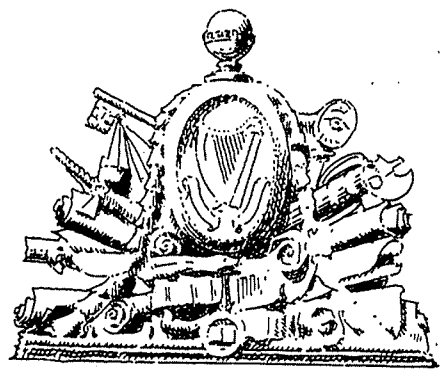
10. Eamonn Duggan was originally a Sinn Féin TD for Counties Louth and Meath, 1921-1923. He was later a Cumann na Gael TD for Co. Meath and served in the Cosgrave administration as a Parliamentary Secretary to the Government and to the Minister for Finance.

11. Later President of the High Court, 1924-1936; Chief Justice, 1936-1946

12. Sullivan advised that:

    "....the safe course for Querists to take is to pay the money in their hands into Court under the Trustee Act. They hold the money as constructive Trustees, but they cannot decide what persons are entitled thereto in the circumstances."

13. According to The Irish Times, August 2, 1947, the funds were now valued at about £24,000. This sum would be worth approximately £5 million in modern day values.



14. See letter of March 13, 1947 from Sinn Féin to the national newspapers.

15. The delivery of the plaintiffs' statement of claim on June 17th, 1942 prompted an immediate official response of a particular kind: Special Branch reports on each of the plaintiffs were furnished to the Garda Commissioner on July 21st.1942!

16. Section 11(1).

17. According to a memorandum prepared by Maguire C.J., the meeting "was in conformity with the usual practice in regard to Bills affecting the Judges or the Courts." Neither Maguire C.J. nor the Attorney General could remember precisely the date of the meeting, but it appears to have been towards the end of February 1947.

18. The Irish Independent, April 30,1947.

19. See, e.g., *Howard v. Commissioners of Public Works* (No. 3) [1994] 3 IR 394 (the Oireachtas could by new legislation confer powers on the defendant to build certain works, despite an earlier judicial decision to the effect that such construction work was *ultra vires* the defendants' powers).

20. 74 US 7 (1869)

21. See, e.g., Van Alystene, "A Critical Guide to Ex parte McArdle" (1973) 15 Ariz.L.Rev. 229.

22. 104 Dáil Debates, Cal. 1755. This is what ultimately happened, as lengthy litigation left only a small balance of the funds.

23. See, e.g., Mr. De Valera's speech on the legitimacy of the Irish Free State, 28 Dáil Debates. Col. 1393-1405 (March 14, 1929)

24. i.e., the date of the lodgment of the funds in the High Court.

25. 105 Dáil Debates, Col 741

26. Subsequently Attorney General, judge of the Supreme Court, President of the High Court and judge of the European Court of Justice

27. Now the Hugh Kennedy Court.

28. Dixon J. was made Attorney General in October 1942 (i.e., a few months after settling the defence) and held office until his appointment to the High Court in April 1946. During this period he had advised the Government on the conduct of the litigation, another factor which would have debated form rulingon the application.

29. The Irish Times, June 11,1947.

30. This story is well told in Golding, George Gavan Duffy (Dublin, 1982). The late McCarthy J. -who was then devilling for Andreas O'Keeffe - confirmed to this writer that at the conclusion of the oral argument Gavan Duffy P. simply produced a (clearly pre-prepared) judgment from his inside jacket pocket and proceeded to read it out!

31. The Irish Times, June 24,1947. 32 [1965] IR 287.

32. [1965] IR 287

33. The Irish Times, June 25,1947.

34. The Insh Times, June 26,1947.

35. [1950] IR at 83-4.

36. Ibid.

37. Murnaghan J.

38. [1950] IR 67.

The Evidence of Children - The English Experience

Copy paper delivered by Dr. John Spencer, Selwyn College, University of Cambridge to the recent Bar Council Conference on the Evidence of Children

Ten years ago, the rules of evidence In England seemed designed to prevent the courts from hearing what children had to say, or if they managed to hear it, to stop them acting on it. The competency requirement was interpreted to make most little children ineligible to testify. The hearsay rule ensured that where the child was unable to tell his tale in court, no third party could repeat to the court the tale that he had told outside it. The principle that witnesses give their evidence in open court under adversarial examination applied to children as it did to adults, and ensured that where children got as far as the witness box, many were too scared and confused to say anything coherent. The rule against narrative, alias the rule against previous consistent statements, alias the rule against self-corroboration, made sure that where children did manage to get as far as actually speaking in the witness-box, their fractured utterances could not be supplemented by any previous statement they had made in less stressful circumstances. And if despite all this the child managed to give coherent evidence, the rules about corroboration required the court to treat the evidence with scepticism at best, and sometimes banned it from acting on it altogether. For good measure, other rules of evidence put strict limits on what evidence the court could hear by way of corroboration. In criminal cases, the court would normally refuse to hear evidence that the defendant made a habit of doing to children what this child said he had done to him, and would also refuse to allow an expert to give a view on whether the child was credible or not. This collection of restrictive rules applied not only in criminal proceedings where the issue was whether or not an adult should be punished, but to a large extent in civil proceedings too, where the issue was the future of the child. Only in the juvenile court - the magistrates' court which dealt with young offenders - were the normal rules of evidence sufficiently relaxed to make it fairly easy for the courts to hear the evidence of children.

This restrictive attitude towards children's evidence stemmed only in part from lawyers' obscurantism. It also reflected widely-held beliefs about the reliability of children's evidence that were widely held in earlier tines. The legal rules were invented in a climate of opinion that held that children have weak memories, are highly suggestible, tend to lie and fantasise, and should be disbelieved when they make complaints about sexual offences because sexual offences against children are in fact extremely rare. During the 1970s and 1980s a large body of research called these opinions into question. Although it remained (and still remains) clear that children's evidence was problematic, it was now generally accepted as worth more weight than society had previously thought. In England (as in Ireland) this discovery led to an intense debate about the legal rules, which soon underwent a number of important changes. A key event was the report of a Home Office Committee, chaired by judge Pigot[1].

This roundly condemned the way that serious child abuse cases were currently tried, and proposed a radical new scheme under which the whole of a child witness's evidence (cross examination and all) should be taken in advance of trial, video-recorded, and the videotapes used in substitution for live evidence from the child. Although widely welcomed, by lawyers as well as child-care professionals, the Pigot scheme was too radical for the Home Office, which promoted instead a truncated version of it under which videotapes of interviews with child witnesses were made admissible in evidence in criminal proceedings, but the child still has to come to court for the final trial in order to be cross-examined live. This scheme was enacted by the Criminal Justice Act 1991, and at the moment is still with us, although there is continual pressure for the original Pigot scheme to be enacted.

Competency

Originally, child witnesses had to give sworn evidence, and if they were too immature to understand "the nature of an oath" they could not give evidence at all.

In 1885 the law was changed to allow a young child to give unsworn evidence, in criminal proceedings if "in the opinion at the court he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth". Even after this reform a child would still be rejected as a witness unless before giving evidence he could explain to the judge why it is important to tell the truth, and case-law added the gloss that children under 6 were to be automatically rejected. Various critics attacked this rule, arguing that whether a young child understood the duty to speak the truth ought to affect the weight of his evidence, not its admissibility, and the Pigot Committee said that it ought to be abolished. The Government accepted this, and eventually got this done by legislation. It made heavy weather of it, because the provision of the Criminal Justice Act 1991 that was meant to abolish the competency

requirement was obscurely drafted, and had to be repealed and replaced. Since 1994, however, the relevant provision[2] has been the following:

1. a child's evidence in criminal proceedings shall be given unsworn.

2. a deposition of a child's unsworn evidence may be taken for the proposes of criminal proceedings as it that evidence had been given on oath.

3. a child's evidence shall be received unless it appears to the court that the child is incapable of giving intelligible testimony.

4. In this section 'child' means a person under fourteen years of age.

This clearly abolishes the competency requirement for child witnesses in criminal proceedings.

This does not mean the end of attempts in criminal proceedings to persuade judges to refuse to allow child witnesses to give evidence, however, because the sort of issues that were formerly raised as affecting whether the child is competent to give evidence are sometimes recycled as attempts to persuade the trial judge to exercise his power under s.78 of the Police and Criminal Evidence Act 1984 to exclude any piece of prosecution evidence, the admission of which would make the trial unfair. ("Nobody would put any weight on the evidence of a child as young as this; therefore it is unfair to allow her to give evidence against my client; therefore, My Lord, please exercise your discretion to exclude it").

Nor does the abolition of the competency requirement extend to civil proceeding. Before 1989, children could only give evidence in civil proceedings if they did so on oath. The Children Act 1989 enables children to give unsworn evidence provided they satisfy the watered down test of competency which from 1585 to 1991 applied in criminal cases, but the more recent provisions designed to abolish the competency requirement altogether apply to criminal proceedings only. In practice this does not matter greatly, however, in civil proceedings evidence from the mouth of the child himself is usually unnecessary.

Hearsay - the orality principle

The hearsay rule did not apply in wardship, and in other kinds of civil proceedings involving children the rule was in practice often bent. Then as a result of the Children Act 1989 the law came into line with practice: under s.96(3) the Lord Chancellor was given power to make Regulations trenching on the rule in children's cases, the current form of which[3] is as follows:

In (a) civil proceedings before the High Court or a county court; and (b)(i) in family proceedings, and (ii) civil proceedings under the Child Support Act 1991 in a magistrates' court, evidence given in connectionwith the upbringing, maintenance or welfare of a child shall be admissiblenotwithstanding any rule of law relating to hearsay.

Thus in civil proceedings involving children, children now give evidence very rarely, and their accounts of incidents are usually put before the court by means of videotapes of earlier interviews, or by the oral evidence of those who have interviewed them. In consequence the debate is now no longer about the admissibility at hearsay evidence, but about the weight that it is proper for the court to give it.

In criminal proceedings involving children, however, the hearsay rule and the principle of orality is still alive and well. The Pigot Committee, as we saw, proposed a scheme that would have replaced the live child witness with videotapes of an earlier examination and cross-examination, but this scheme was rejected by the Government and the basic position is still that if a criminal court is to hear a child's account of an incident, that child must come to court. To the hearsay rule there are a number of general exceptions, including a provision of the Criminal Justice Act 1988 which allows the court (if the judge so rules) to hear the statement a witness earlier gave to the police if that witness later fails to give evidence at trial "through fear". In practice, however, it is very rare for a criminal court to receive the evidence of a child witness as hearsay under one of these exceptions.

If giving live evidence is a pill the child must swallow, statute and case-law have made various attempts to sweeten it a little. These include the possibility of using screens to prevent the child having to see the defendant (R v K. Y and Z [1990] 2 QB 355); enabling certain children to give evidence via a live video link (Criminal Justice Act 1988 s.37); allowing the child to be accompanied in the witness-box by a "support person"; a discretionary power in the judge to clear the court when a child gives evidence in a sex case (Children and Young Persons Act 1933 s.37); and protecting the child against the worst rigours of the traditional cross-examination, both by forbidding unrepresented defendants to cross-examine children (s.34A CJA 1988), and by recognising that the judge may stop the cross-examination where the child becomes distressed (Wyatt 1990 Crimnal Law Review 343). Unlike in Ireland, however, the law has not so far been changed to allow the judge to allow both the examination and the cross-examination of a child witness to be carried out via a single neutral examiner, although in 1989 the Pigot Comnlttee recommended this.

The use of previous statements: the "rule against narrative"

Although scarcely an issue nowadays in civil cases, In criminal cases it is still broadly true that a witness's previous statements may be used to discredit him, but not to enhance his credit or to fill the gaps in his courtroom testimony (Beattie (1990) 90 CrAppR 303). To this rule there are number of well known exceptions, which apply to child and adult witnesses alike. In particular, the party calling a witness may call evidence of that witness's previous statements (a) in order to rebut a suggestion of recent fabrication, (b) where the statement is one in which the witness previously identified the accused, and (c) where the prosecution is for a sexual offence and the previous statement comes within the definition of a 'recent complaint'.

The truncated version of the Pigot scheme enacted by the Criminal Justice Act 1991[4] adds, in effect, a new and important exception to the rule against narrative which is specific to children.

Provided it is the right kind of offence (sex, violence or cruelty to children), the right kind of court (Crown Court, or the youth court trying someone who would have been tried in the Crown Court if old enough), and the right kind of child (under 14 when the tape was made and still under 15 at the date of trial, extended to 17 and 18 in a sex case), a videotape of an earlier interview with a child witness is admissible in evidence provided the judge grants leave. This rule was designed for (but is not legally restricted to) interviews carried out by special teams of police officers and social workers following the procedures recommended in official Governmental guidelines in a document entitled the "Memorandum of Good Practices"[5]. Where such an interview is put in evidence, the underlying idea is that it should actually replace the child's live evidence in-chief, and not merely supplement it. The Act provides that "Where a video recording is admitted under this section...that witness shall not be examined in chief on any matter which, in the opinion of the court, has been adequately dealt with in his recorded testimony." The thought behind this provision is a kindly one; the idea is to save the child from having to tell his story one more time in examination in-chief. (The downside of this, of course, is that when the child comes to court he or she is immediately plunged into a hostile cross examination, with no initial 'warm-up' in the form of questioning from a person who is sympathetic).

Although Judicial leave is needed, the judge is required to give leave unless one of three conditions are met [6]. The first is where "...it appears that the child will not be available for cross-examination": so making sure that the child has to come to court for the trial. The second is failure to disclose the circumstances in which the tape was made, as required by Crown Court Rules. And the third is where 'the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording ought not to be admitted'. The usual reason for a judge to exclude a videotape 'in the interests of justice' is likely to be that the interview has been badly conducted but in a recent case the Court of Appeal also indicated that a videotape should be excluded where the child was known to have retracted the allegations after making them (Parker [1996] CrimLR 511).

Complex and detailed as the current videotape provisions are, they fail to answer a number of important questions. One of these is whether, having seen the tape, a jury that wants one can have an 'action replay' of the crucial parts. The Court of Appeal has decided that it can - provided that after they have seen it, the judge reminds them of any relevant answers the child later gave in cross-examination (Rawlings [1995] 1 WLR 178).

Corroboration - the weight the law attributes to the evidence of children

In England, as in Ireland, the criminal courts were at one time forbidden by statute to convict on the uncorroborated evidence of unsworn children, and this restriction was supplemented by a case-law duty in the trial judge to warn the Jury of the danger of accepting the uncorroborated evidence of any child, even where giving evidence on oath. These rules were abolished by the Criminal Justice Act 1988. There remained for a time the parallel common law rule requiring a 'corroboration warning' about the danger of convicting on the uncorroborated evidence of the complainant in a sex case: which, as child witnesses are often complainants in sex cases, meant that judges were still legally required to disparage their evidence in many cases. Then in 1994 the duty to give a corroboration warning in a sex case was abolished by too (Criminal Justice and Public Order Act 1994 s.32). Thus there is no longer any rigid requirement for judges to warn juries that children are not credible as witnesses. (Equally, however, no rule actually forbids a judge to give a warning of this sort if he thinks it right to do so).

Although what were usually called 'the rules about corrobation' have been abolished in England, important issues still remain about what evidence may be used in a criminal case to support the evidence of a child, and particularly in a sex case. A thorny question which has several times perplexed the House of Lords is the status of evidence that the defendant has done the same thing that child A complains about to other children too. At one time, evidence of what he had allegedly done to B and C was admissible only where what they described was 'strikingly similar' to the conduct alleged by A. In 1991, however, the House of Lords ruled (in effect) that we should strike out the word 'strikingly' before 'similar': it was enough that B and C described behaviour broadly similar (DPP v P [1991] 2 AC 447). In 1995 the House of Lords also decided that complaints by B and C could be used to bolster the credit of the key witness A even where (as is usually the case) the complainants had had the chance to put their heads together: it was not necessary for the prosecution to show that each complaint and each complainant was completely independent of the others. (In England the broad question of evidence of bad character and previous misconduct is at present being studied by the Law Commission.)

The 'corroboration rules' have never applied in civil cases, but in recent case-law there has been serious discussion about the weight that it is proper to put on the evidence of children, particularly when (as now usual in a civil case) it takes the form of hearsay. The suggestion has sometimes been made and ultimately rejected by the Court of Appeal (Re W (Minors) (Wardship: Evidence [1990] FCR 286) - that although hearsay evidence alone might justify a finding that a child had been abused, as a matter of law it could never justify a finding that a child had been abused by a named person. A related discussion has taken place concerning the degree of certainty to which allegations of child abuse must be proved, with one school or thought taking the view that before a civil court can make a finding that a child has been abused by a particular person, it must be satisfied to a standard higher than the usual civil standard, which is of course the balance of probabilities. A recent House of Lords decision, however, reasserts the rule that findings of fact in civil proceedings are reached on the balance of probabilities, even where the issue is whether a child has been sexually abused (In re H Minors [1996] AC 563).

A question that has caused a lot of dif-

ficulty in England is how far expert evidence is admissible to help the court decide the weight to put upon the evidence of a child. At present, the criminal courts have set their face against it. In Robinson (1994) 98 CrAppR 370 the Court of Appeal said it was not open to the prosecution to call a child psychologist to tell the Court that an alleged victim of a sexual assault, a teenager with learning difficulties, was brighter and less suggestible than she might seem. Behind this restrictive ruling probably lies the distrust that the courts feel for expert witnesses selected and called by the parties. In civil proceedings concerning children, where for various procedural reasons experts tend to be more neutral and the courts have more confidence in experts, they frequently hear evidence from child psychiatrists and psychologists bearing on the question of whether a particular child has been abused. Until recently it was held to be improper for the expert to tell the court directly that in his view the child was telling the truth saying that he had been abused; but a recent Court of Appeal decision has departed from this rather narrow view. In Re K and R [1996] 2 FUR 617 the Court of Appeal said, in effect, that the expert is free to say that he believed the child had told the truth, and no injustice was done by this because the judge is no less tree to reject the expert's view.

Conclusion: where are we now?

Are the rules in England relating to the evidence of children now in a satisfactory state? Much could be said about this and here I shall confine myself to a series at short points.

First, few complaints are heard about the way in which child witnesses (or child defendants) are treated during criminal proceedings against young offenders which are held in what was formerly called the Juvenile Court (renamed the Youth Court in 1991). Its proceedings are informal, and the public are excluded. The problem of young children rarely arises (partly because the age of criminal responsibility is ten, and partly because there is a practice of not prosecuting the younger offenders, who are usually let off with a caution). Where criticism is heard about the way that children as defendants are treated in the courtroom, it is usually directed at what happens in those rare cases like the James Bulger affair - where the case is too serious to be tried in the Youth Court and the child defendants appear in the dock at Crown Court instead.

Secondly, there are not too many complaints nowadays about the way the children's evidence is handled in civil proceedings concerning children. With the Children Act 1969 came a policy of making sure that the courts handling proceedings brought under it have some measure of specialist knowledge. As we saw, ways have been devised of putting the child's account of events before the court without making his or her come to court to give live evidence. Here the criticisms are, if anything, the other way: that the civil courts ought to be readier, when necessary, to take direct evidence from children, or to speak directly to children in order to ascertain their views.

But thirdly, in England we are still far from solving the problems of children as witnesses in criminal proceedings brought in the ordinary criminal courts against defendants who are adults. If in theory we have abolished the competency requirement, the Crown Prosecution Service remains very reluctant to prosecute in cases turning on the evidence of young children, for fear that their evidence will not be believed. Despite the live video link and the use of videotapes, child witnesses still have to come to court to give live evidence: a process sufficiently stressful that other prosecutions are dropped in order to spare the child from having to undergo it. There is grave disquiet, too, about the process of cross-examination. Obviously in a criminal case the defence must be give their chance to put their questions to the child and to challenge his or her version of events, but the traditional type of defence cross-examination, in the course of which the prosecution witness is alternately badgered for details he cannot remember and accused of telling lies, is widely thought to be inappropriate for young or highly traumatised children. (A recent training video for judges, prepared by the NSPCC with the cooperation of the Judicial Studies Board, may eventually help to alter unsuitable practices.) There is some disquiet about the exclusion of expert evidence (particularly after a high profile sex-ring case where everyone was convicted, which was then followed by civil proceedings in which the judge was persuaded by expert evidence that a number of the allegations apparently believed in the criminal case were questionable). And there is further criticism of the exclusion of evidence of tendency and bad character. On the one hand it is said to be ridiculous to hide from a criminal court the fact that a defendant on trial for sexually abusing children has a criminal record for sexually abusing children, and hence sexual tendencies directed towards them. On the other hand, it is said to be vital to stop the jury knowing this, because it would inflame them against him and lead then to convict him however weak the rest of the evidence. Perhaps both these views are correct: which makes one wonder whether child abuse cases are really suitable for juries, and vice versa.

If these problems seem intractable, however, we should not give up hope. If there is still a long way to go before we find a satisfactory way of trying child abuse cases, the progress that has been made over the last ten years is still remarkable. If we keep on looking for better solutions we may find them in the end. ●

1. Report of the Advisory Group on Video Evidence, Home Office, 1989.
2. Section 33A of the Criminal Justice Act 1988, inserted by Schedule 9 paragraph 33 of the Criminal Justice and Public Order Act 1994.
3. Children (Admissibility of hearsay evidence' Order 1993.
4. Which did it by inserting a new section, s.32A, into the Criminal Justice Act 1988.
5. Home Office and Department o: Health, Memorandum of Good Practice on Video recording interviews with Child Witnesses for Criminal Proceedings, HMSO 1992.
6. Criminal Justice Act 1988 s.32A (3).

   See generally J.R.Spencer and Rhona Flin, The Evidence of Children, the Law and the Psychology (Blackstone Press, 2nd edition 1993).

Technology in the Courts

Cian Ferriter, Special Projects Manager

A recent feature in The Guardian on the IT revolution in the english courts included a cartoon with a 'Robojudge' being addressed by a bewigged mechanical barrister in front of a jury of computer screens, with the caption 'time for terminal justice'. While such caricatures play on the traditional technophobia of 'computers taking over the world', the impact of technology in the court system should not be underestimated. As the Working Group on a Courts Commission under the chairmanship of Mrs Justice Susan Denham continues its analysis of the structure and operation of our court system, it is timely to look at the IT initiatives being introduced in the court systems of other jurisdictions.

The changes in the English courts are being spearheaded by Lord Woolf, Master of the Rolls, whose 1996 report on the civil justice system in England and Wales included far-reaching proposals on the use of IT in the courts. His report has been adopted by the new Labour government. Its recommendations included the introduction of an electronic court listing system, increased involvement of the judiciary in IT applications and training, more widespread use of litigation support systems within the legal profession, use of video-conferencing in courts and electronic publication of primary legal materials. The proposals are now being costed and plans drawn up for their phased implementation.

It is interesting that it is now the judiciary in England who are pushing for greater use of IT in litigation. Under a project called JUDITH over 300 English judges have been supplied with personal computers which they use for taking notes during trials, communicating with one another through a special judicial communications network and accessing the Internet and electronic databases for research purposes. These judges have also undergone IT training. Many of these judges are now instructing legal teams to use electronic applications (including litigation support systems) to manage cases.

It may be useful to outline some of the principal applications of IT in the courts and their benefits.

Computer Aided Transcription (whereby the testimony of witnesses is simultaneously recorded as text on judges' and lawyers' computers in the courtroom) has greatly improved the management of large cases, as it allows for the storing, indexing and searching of huge quantities of data. Once the material is electronically stored it can be called up on screen in seconds, so that if a witness refers to a matter that had been mentioned by another witness three months previously, you could immediately access the earlier evidence and compare the two. Similarly, points can be noted on the screen, and arguments advanced or discarded as they occur. This technology has been used in the Irish courts in some cases like *Tara v Bula Mines*. It is likely in the medium term that such systems will become standard for any case likely to run for more than a few days.

Video-conferencing is also being used by some English judges to hear interlocutory applications and procedural motions. This allows a barrister to move/contest a matter from a remote location without having to travel to the court. This could be of particular use for solicitors and barristers based outside Dublin to dispose of routine applications listed for Dublin.

The electronic publication of judgments on the Internet as soon as they are delivered would facilitate the full promulgation of our law and give flesh to the constitutional precept that our justice is administered in public. House of Lords decisions are now published on the Internet within a few days of being delivered, where they can be accessed by lawyers and public alike. Similar requirements to publish judgments on the Internet exist in the US, Canada and most notably in Australia.

Perhaps the most important application of IT in the courts will be that of judicial case management systems. The objective should be to have all the procedural documentation for a case - pleadings, affidavits, orders, case histories - available electronically on one database that the judge (in court or in chambers) could retrieve from a central source. Judges can then monitor the 'flow' of each case on an individual basis, and the overall state of the lists on a collective basis. This would facilitate more efficient allocation of judicial resources and enable close monitoring of case progress. The objective of such systems is to ensure, where trial in an action is unavoidable, that cases proceed as quickly as possible to a final hearing which is of strictly limited duration. Such systems were pioneered in the USA where they have helped reduce delays and have facilitated easier access to the courts. Ancillary benefits would include the electronic issuing of orders and decisions. The second report of the Working Group on a Courts Commission raised the issue and a subsequent conference on the matter helped highlight its benefits. It is expected that a final report will issue on the topic with specific recommendations.

There is also considerable scope for using IT to improve administrative case management.

The technology for these applications has been available for some time; we are merely witnessing their introduction into the legal sphere. Ultimately the matter is one of political will and available resources. It is hoped that the Working Group on the Courts Commission will address the specific applications for IT in the Courts system, perhaps by initiating some pilot projects as in England, and the wider context of an IT strategy for the Court system so that the judiciary, court administrators, lawyers and the public will be able to reap the benefits of a more streamlined, efficient system in the longer term. ●

The Bar Review
Volume 2. Issue 9. July 1997. ISSN 1339-3426

Legal Update

A directory of legislation, articles and written judgments received from 14th June to 18th July 1997.
Judgment information compiled by the researchers in the Judges Library, Four Courts
Edited by Desmond Mulhere, Law Library, Four Courts, Dublin 7

Administrative Law

Statutory Instruments

Aliens (amendment) (no 2) order, 1997
S.I.280/1997
Commencement date: 1.7.97

Aliens (amendment) (no 3) order, 1997
S.I.277/1997
Commencement date: 29.6.97

Electoral act, 1997 (commencement) (no 2) order, 1997
S.I./1997
Commencement date: 11.6.97

Local government (planning and development) (no 3) regulations, 1997
S.I.261/1997
Commencement date: 24.6.97

National archives act, 1986 (prescription of classes of records) order,1997
S.I.281/1997
Commencement date: 26.6.97
There is no record of the order of 1991 - the Department of An Taoiseach has no copy of it

National cultural institutions act, 1997 (commencement) order, 1997
S.I.222/1997
Commencement date: 2.6.97 and 1.1.98

Registration of electors order, 1997
S.I.244/1997
Commencement date: 11.6.97

Article

O'Neill v. the Minister for Agriculture and Food & others
- the implications for administrative law
Bradley, Conleth
2(8)(1997) BR 332

Agriculture

Article

O'Neill v. the Minister for Agriculture and Food & others
- the implications for administrative law
Bradley, Conleth
2(8)(1997) BR 332

Animals

Statutory Instruments

Greyhound race track totalisator (Super) (Trio) Jackpot amendment regulations, 1997
S.I.223/1997
Commencement date: 28.5.97

Article

The duty of care of livestock owners was considered by the Supreme Court in O'Shea v. Tilman and Force Holiday Farm Limited
Cordial, Margaret
2(8)(1997) BR 345

Arbitration

Article

Behind closed doors?
Conlon, Michael
1997(July) GILSI 12

Banking

Foskett v. Deasy
Supreme Court: **Murphy J.,** Lynch J., Barron J.
03/06/1997

Debtor; adjudication of bankruptcy; whether error in bankruptcy proceedings; misdescription of petitioner; monies invested in developing lands abroad by a number of investors; petitioner sued on behalf of other investors; whether petitioner/creditor entitled to bring petition on behalf of other creditors; representative order made abroad; whether such order made outside the state operative within the state; lex fori; whether in fact suing as trustee for investors; Bankruptcy Rules, SI 79/1989
Held: Appeal dismissed; bankruptcy order upheld

Statutory Instruments

Central Bank act, 1971 (approval of scheme of Irish Bank of Commerce Ltd and Anglo Irish Bank Corporation public limited company) order, 1997
S.I.282/1997
Date signed: 23.6.97

Article

Electronic banking and the consumer: what price convenience?
Donnelly, Mary
1997 CLP 132

Electronic banking
O'Boyle, Conal
1997(June) GILSI 29

Children

M.Q. v. Gleeson
High Court: **Barr J.**
13/02/1997

Child care; employment; rights and duties of health board; natural and constitutional justice; applicant seeking to qualify as social worker; allegations of child abuse by applicant received by health board; applicant suspended from

course following request from health board; whether health board under duty to request removal; duties of health board to alleged abuser; whether health board complied with requirements of natural and constitutional justice
Held: Suspension did not comply with requirements of natural and constitutional justice

Statutory Instruments

Child care (pre-school services) (amendment) regulations, 1997
S.I.268/1997
Date signed: 20.6.97

Library Acquisition

Council of Europe
European convention on the exercise of children's rights, and explanatory report Strasbourg Council of Europe 1997
M208.11

Article

Suffer the little children
O'Doherty, Sora
1997(June) GILSI 12

Commercial Law

Statutory Instruments

Irish Takeover Panel act, 1997 (commencement) (no 2) order, 1997
S.I.255/1997
Commencement date: 1.7.97

Irish Takeover Panel act, 1997 (prescribed stock exchange) regulations, 1997
S.I.256/1997
Commencement date: 1.7.97

Prompt payment of accounts act, 1997 (commencement) order, 1997
S.I.239/1997
Commencement date: 2.1.98

Articles

Tales of the anti-competitive : privilege and exclusion in legal concepts of hotels
McDonald, Marc
1995 DULJ 46

The effect of regulation upon the securities market : no bouncers on Anglesea Street please
O'Hanlon, Niall
1997 ILTR 110

Company Law

Phoenix Shannon plc. v. Purkey
High Court: **Costello P.**
07/05/1997

Directors; retirement; meetings; failure to convene annual general meeting of company within requisite period under s.131, Companies Act, 1963; whether directors obliged to retire at meeting deemed to have retired on last day on which meeting should lawfully have been held
Held: Directors not deemed to have retired

Articles

"Substantial property transactions" between directors and companies: section 29 of the Companies act 1990
Courtney, Thomas B
1997 CLP 142

Restrictions on directors of insolvent companies
Farren, Brian P
2(8)(1997) BR 349

The role of equity in the winding up of a company :
beneficial ownership,insolvent companies and the rights of creditors
Fealy, Michael
1995 DULJ 18

Competition Law

Donovan v E.S.B.
Supreme Court: Hamilton CJ, **Barrington J,** Keane J., Murphy J., Barron J.
03/07/97

Abuse of a dominant position; relevant market; damages; whether trial judge correctly identified market; ESB dominant in the market for the supply of electricity; whether trial judge correct in finding defendant abused a dominant position in a sub-market; whether damages should be awarded where abuse unintentional
Held: Appeal dismissed; damages awarded in respect of period prior to introduction of amended system

Chanelle Vetinary Ltd. v. Pfizer (Ireland) Ltd.
High Court: **O'Sullivan J.**
05/06/1997

Agreement; distribution; abuse of a dominant position; application to dismiss all claims; termination of distribution agreement; alleged infringements of ss. 4 and 5, Competition Act, 1991; whether plaintiff had established prima facie case
Held: Prima facie case made out; application dismissed

Constitutional Law

Farley v. Ireland
Supreme Court: **Murphy J.*, Lynch J.*, Barron J.*** (*ex-tempore)
01/05/1997

Family; legislation; challenge to validity; claim that provisions of the Guardianship of Infants Act, 1964 and the Family Home Protection Act, 1976 unconstitutional; whether on facts claim sustainable; whether claim frivolous and vexatious; marriage breakdown; wife given custody of children; bias of judge; criticism of decision of court
Held: Proceedings dismissed; claim unsustainable

Equal Status Bill 1997, In re
Supreme Court: **Hamilton C.J.***, O'Flaherty J., Denham J., Barrington J., Keane J.
(* Decision of the Court delivered by Hamilton C.J.)
19/06/1997

Article 26 reference; constitutionality of Bill; certain provisions of Bill dependant upon enactment into law of Employment Equality Bill; ss. 40(3) and 71 of Equal Status Bill similar in terms to ss.63(3) and 15 of Employment Equality Bill which was found repugnant; whether Court not withstanding repugnancy of these two sections, obliged to consider constitutionality of remaining provisions of Bill; presumption of constitutionality; different circumstances to be considered

Held: Bill found unconstitutional; ss. 40(3) and 71 found repugnant; futile for Court to consider constitutionality of remaining provisions

O'Hagan v. Governor of Portlaoise Prison
High Court: **Kelly J.**
30/05/1997

Habeas corpus; release and re-arrest; whether Attorney General aware of unlawful detention before date of release; whether respondent correctly implemented ministerial direction to release prisoners; whether real release of applicants from custody; whether re-arrest while original charges extant lawful; whether undue delay in release
Held: Applicants detained in accordance with law; order for release refused

Articles

The making of a constitution : the case of South Africa
Asmal, Kader
1995 DULJ 1

Letting in the light
Johnson, Mary
1997(June) GILSI 16

Copyright, Designs & Patents

Library Acquisition

Bainbridge, David Ian
Software copyright law
3rd ed
London Butterworths 1997
N112.7

Criminal Law

D.P.P v. E.H.
High Court: **Kelly J.**
22/04/97

Assets of defendant frozen pursuant to order under s.24 Criminal Justice Act, 1994; application to vary order; relevant principles; test applied.
Held: Application refused; defendant failed to show he had no other assets available.

D.P.P. v. Bartley
Central Criminal Court: **Carney J.**
13/06/1997

Sentence; victim impact; effect of rejection of victimís credible complaints; duty of Gardai to investigate complaint of felony
Held: Sentence imposed taking account of victim impact

Ward v. Minister of Agriculture
High Court; **Morris J.**
24/06/97

Delay; alleged possession of "angel dust"; plaintiff's premises searched in March 1992; summonses served February 1994; defendants awaiting outcome of related test case; whether unreasonable and unconscionable delay in the application for and service of the proceedings.
Held: Delay not unreasonable; order of prohibition refused.

Library Acquisitions

Heard, Brian J
Handbook of firearms and ballistics : examining and interpreting forensic evidence
Chichester Wiley 1997
N186.1

Mitchell, Andrew R
Mitchell, Taylor & Talbot on confiscation and the proceeds of crime
2nd ed
London S & M 1997
M594.7

Articles

The bail act, 1997
Bacik, Ivana
1997 (3) P & P 7

Separate legal representation for rape victims : a fair system
Mac Giolla Ri, Eoin
2(8)(1997) BR 320

Defamation

Hennessey v. K-TEL Ireland Ltd.
Supreme Court: Murphy J., **Lynch J.**, Barron J.
12/06/1997

Libel; qualified privilege; malice; whether words published in letter constitute qualified privilege; issue of malice; onus on plaintiff to prove malice; presumption of no malice where qualified privilege exists
Held: Appeal dismissed; existence of qualified privilege; no evidence of malice

Library Acquisition

Barendt, Eric
Libel and the media : the chilling effect
Oxford University Press 1997
N343

Education

Statutory Instruments

Dublin Institute of Technology act, 1992 (assignment of function) order, 1997
S.I.224/1997
Commencement date: 1.9.98

National Council for Education Awards act, 1979 (designation of institutions) (amendment) order, 1997
S.I.279/1997
Date signed: 18.6.97

Universities act, 1997 (commencement) order, 1997
S.I.254/1997
Commencement date: 16.6.97

Employment Law

Statutory instruments

Employment regulation order (agricultural workers joint labour committee) 1997
S.I.216/1997
Commencement date: 1.6.97

Employment regulation order (retail grocery and allied trades joint labour committee), 1997
S.I.238/1997
Commencement date: 25.6.97

Article

Suffer the little children
O'Doherty, Sora
1997(June) GILSI 12

Environmental Law

Statutory Instrument

Waste management (packaging) regulations, 1997
S.I.242/1997
Commencement date: 1.7.97

Article

Flynn, Tom
The Litter pollution act 1997
1997 IPELJ 47

European Community Law

SIAC Construction Ltd. v. Mayo C.C.
High Court: **Laffoy J.**
17/06/1997

Public procurement; Remedies Directive; review; rejection of applicant's tender to respondent; whether different judicial review criteria applicable to review under Remedies Directive; whether decision unreasonable
Held: Decision not unreasonable; usual judicial review criteria applicable

Statutory Instruments

European Communities (authorisation, placing on the market, use and control of plant protection products) (amendment) regulations, 1997
S.I.290/1997
Commencement date: 3.7.97

European Communities (cereal seed) (amendment) regulations, 1997
S.I.243/1997
Commencement date: 1.7.97

European Communities (conservation of wild birds) (amendment) regulations 1997
S.I.210/1997
Commencement date: 1.6.97

European Communities (extraterritorial application of legislation adopted by a Third Country) regulations, 1997
S.I.217/1997
Date signed: 23.5.97

European Communities (seed potatoes) (amendment) regulations, 1997
S.I.252/1997
Date signed: 28.5.97

European Communities (telecommunications services monitoring) regulations 1997
S.I.284/1997
Commencement date: 23.6.97

European Communities (trade in bovine animals and swine) regulations, 1997
S.I.270/1997
Commencement date: 1.7.97

Library Acquisitions

Goyder, Joanna
EC distribution law
2nd ed
Sussex Wiley
1996
W110

Phelan, Diarmuid Rossa
Revolt or revolution :
the constitutional boundaries of the European Community
Dublin Round Hall S & M 1997
W84

Articles

News from the 'CCBE'
Whelehan, Harry
2(8)(1997) BR 330

An ever whiter myth : the colonisation of modernity in European Community law
Bergeron, James Henry
1995 DULJ 66

Collins, Anthony M
Community law and its impact on the law of privilege
1997 ICLR 2-9

Legal professional privilege in Community law
Fennelly, Nial
1997 ICLR 2-1

Evidence

Article

The expert witness and the courts
O'Flaherty, Hugh
3 (1997) MLJI 3

Family Law

Article

Procedural aspects of divorce before the Circuit court
Jackson, Nuala E
1997 (2) P & P 3

Fisheries

Statutory Instruments

Bass (restriction on sale) order, 1997
S.I.285/1997
Commencement date: 1.7.97 to 30.6.98

Cod (restriction on fishing) (no 6) order, 1997
S.I.276/1997
Commencement date: 1.7.97 to 31.7.97
Date signed: 24.6.97

Control of fishing for salmon (amendment) order, 1997
S.I.259/1997
Date signed: 17.6.97

Haddock (restriction on fishing) (no 4) order, 1997
S.I.275/1997
Commencement date: 1.7.97 to 31.7.97

Health Services

Library Acquisition

Finlay, Thomas A
Report of the Tribunal of Inquiry into the Blood Transfusion Service Board
Dublin Stationery Office 1997
N398.1.C5

Food Safety Advisory Board
Food Safety Advisory Board :
first annual report 1995/1996
Dublin Food Safety Advisory Board [1997]
N185.2.C5

Kingston, James
Abortion and the law
Dublin Round Hall Press
1997
N172.7.C5

Housing

Statutory Instrument

Housing (miscellaneous provisions) act, 1997 (commencement) order, 1997
S.I.247/1997
Commencement date: 1.7.97

Information Technology

Articles

The internet : what's all the fuss?
Rothery, Grainne
1997(July) GILSI 24

2001, a date odyssey
Kennedy, Greg
2(8)(1997) BR 328

Breaking the paper chain
Rothery, Grainne
1997(June) GILSI 18

International Law

Library Acquisition

Coomaraswamy, Radhika
Reinventing international law : women's rights as human rights in the international community
C200

Article

Complaints to the UN human rights committee
Conlan Smyth, David
1997 (3) P & P 5

Legal Profession

Statutory Instrument

Solicitors act, 1954 (section 44) order, 1997
S.I.241/1997
Commencement date: 13.6.97

Articles

News from the 'CCBE'
Whelehan, Harry
2(8)(1997) BR 330

An ever whiter myth : the colonisation of modernity in European Community law
Bergeron, James Henry
1995 DULJ 66

The implications of the distillery site development for the Bar
Ferriter, Cian
2(8)(1997) BR 326

Doing the business
FitzGerald, Kyran
1997(July) GILSI 20

Legal professional privilege in Community law
Fennelly, Nial
1997 ICLR 2-1

Just the job?
FitzGerald, Kyran
1997(June) GILSI 26

Breaking the paper chain
Rothery, Grainne
1997(June) GILSI 18

Local Government

Statutory Instruments

Local government (planning and development) (no 3) regulations, 1997
S.I.261/1997
Commencement date: 24.6.97

Local government (planning and development) (no 3) regulations, 1997
S.I.261/1997
Commencement date: 24.6.97

Medicine

Articles

In vitro fertilisation: the moral and legal status of the human pre-embryo
Madden, Deirdre
3 (1997) MLJI 12

Behind closed doors?
Conlon, Michael
1997(July) GILSI 12

Medical confidentiality: the role of the doctrine of confidentiality in the doctor-patient relationship
Doran, Kieran
3 (1997) MLJI 21

Mental treatment : the need for change
Vries, Ubaldus
1997 ILTR 114

Hepatitis C - after the tribunal report
Bowers, Fergal
3 (1997) MLJI 8

Judicial review of an award of the Hepatitis C compensation tribunal
Spellman, Jarlath
3 (1997) MLJI 27

Mental Health

Library Acquisition

Assessment of mental capacity: guidance for doctors and lawyers
London British Medical Association
1995
N155.3

Article

Mental treatment : the need for change
Vries, Ubaldus
1997 ILTR 114

Negligence

Cooper v. O'Connell
Supreme Court: Hamilton C.J., O'Flaherty J., Barrington J., **Keane J.,** Murphy J.
05/06/1997

Negligence; personal injury; aggravated damages; negligent dental treatment; assessment of damages; special damages; dispute concerning sum awarded for loss of earnings; whether amount awarded for loss of earnings adequate; whether intended business ventures on the part of the plaintiff should be taken into account; whether failure to earn any income exclusively attributable to negligent dental treatment; grounds for awarding aggravated damages; conduct of defendant; loss of income on investments; whether being forced to sell car constitutes loss attributable to negligence

Held: Appeal dismissed; award upheld
McKinley v. Minister for Defence
High Court: **Carney J.**
12/06/1997

Negligence; damages for loss of consortium; plaintifffs husband suffered severe personal injury in course of employment; claim for loss of consortium and servitium by wife; whether wife entitled to claim for total or partial loss of consortium; measure of damages; whether level of damages recoverable in respect of distress suffered on death of spouse; newspaper report of case; constitutional right of access to court
Held: Wife entitled to total or partial loss of consortium; level of damages to be awarded as for mental distress in the case of a death of a spouse

Dunne v. Dublin Cargo Handling Ltd. (in liquidation)
Supreme Court: **Murphy J.***, Lynch J., **Barron J.*** (*ex tempore)
30/04/1997

Personal injury; duty of care; employerís liability; collision between employee and crane unloading vessel; whether failure to provide adequate system of work
Held: Employer exercised reasonable care

Forde v. Underfoot Distribution Services Ltd.
Supreme Court: Murphy J., **Lynch J.***, Barron J. (*ex-tempore)
02/05/1997

Road traffic accident; liability; collision between lorry and motor vehicle; whether trial judge correct in apportioning fault equally between two drivers; whether plaintiff contributory negligent
Held: Liability not found equally between drivers

O'Leary v Cork Corporation
Supreme Court: O'Flaherty J., Barrington J, Keane J., Lynch J., Barron J.
04/07/97

Personal injury; plaintiff injured in course of employment; plaintiff subsequently diagnosed with multiple sclerosis; plaintiff alleged that multiple sclerosis developed as a consequence of the trauma of the accident; whether sufficient evidence to support finding by trial judge that plaintiff failed to prove that the disability was caused by the accident.
Held: Appeal dismissed

Whitely v. Minister for Defence & Ors.
High Court: **Quirke J.**
10/06/1997

Personal injury; limitation of actions; work related; plaintiff employed in the army; exposure to noise of machine gun fire during army career; whether plaintiff suffered hearing impairment or tinnitus as a result of noise exposure; whether defendant negligent in breach of duty in failing to provide adequate hearing protection; whether plaintiff suffered personal injury as a result of defendantís negligence; evidence of noise induced hearing loss; balance of probabilities; whether claim statute barred; Statute of Limitations (Amendment) Act, 1991; meaning of 'date of knowledge' pursuant to s.2 of Act; test to be applied; interpretation of 'significant' injury within the meaning of s.2(1)(b) of Act
Held: Claim dismissed; statute barred

Maguire v Smithwick
High Court; **Geoghegan J.**
27/06/97

Personal injury; limitation of actions; medical negligence; preliminary issue; whether claim statute barred; when plaintiff could be said to know that she had been injured.
Held: Case dismissed; action statute barred.

Baldwin v Foy & Forest Way Riding Holiday Ltd
High Court; **Laffoy J.**
01/07/97

Personal injury; whether horse riding course unsafe; whether plaintiffs failed to take due care; whether plaintiff failed to mitigate her loss.
Held: Defendants negligent; £56,000 damages awarded

Articles

The duty of care of livestock owners was considered by the Supreme Court in O'Shea v. Tilman and Force Holiday Farm Limited

Cordial, Margaret
2(8)(1997) BR 345

Litigation and evidence : speaking up for the maxim of res ipsa loquitur
Glanville, Stephen
1997 ILTR 121

Army deafness cases
Mahon, Alan P
2(8)(1997) BR 354

Oireachtas

Library Acquisition

Fianna Fail
Fianna Fail manifesto - 1997 : people before politics
Fianna Fail 1997
M232.C5

Planning

Fusco v. Aprile
High Court: **Morris J.**
06/06/1997

Injunction; application pursuant to s.27 Local Government (Planning and Development) Act, 1976; order sought to restrain respondent from selling hot food off premises; conduct of applicant; whether applicant acting bona fide; whether material change of use of premises; whether exempted development; limitation period for making application
Held: Order granted; material change of use of premises

Lancefort Ltd. v. An Bord Pleanala
High Court: **Morris J.**
06/06/1997

Judicial review; locus standi; substantial case; application for leave to review Bord Pleanala decision granting planning permission; whether locus standi should be determined at leave stage; whether applicant company had locus standi; whether substantial case
Held: Leave granted; locus standi and substantial case established

Kildare C.C. v. Goode
High Court: **Morris J.**
13/06/1997

Injunction; development; periods of abandonment; order sought pursuant to s.27 Local Government (Planning and Development) Act, 1976; restraining use of lands for purpose of extracting gravel; whether order restraining use inappropriate as activities constituted development; whether development exempted due to commencement prior to 1964; whether application brought within five years of commencement of unauthorised use; whether adequate proof of County Managerís order
Held: Order granted

Graves v. An Bord Pleanala
High Court: **Kelly J.**
17/06/1997

Appeal to An Bord Pleanala; service of appeal; appeal delivered to security man at place of Board's premises outside of office hours; whether s. 4(5)(b), Local Government (Planning and Development) Act, 1992 requirement that appeal be left with Board employee at office during office hours complied with; whether actual receipt of appeal sufficient to validate it under s. 17(1)(b), 1992 Act; whether Board estopped from denying validity of appeal by failure to respond to it
Held: Appeal invalid

Statutory Instrument

Local government (planning and development) (no 3) regulations, 1997
S.I.261/1997
Commencement date: 24.6.97

Waste management (packaging) regulations, 1997
S.I.242/1997
Commencement date: 1.7.97

Articles

Pharmacies and neighbourhood planning
O'Connor, Anne Marie
1997 IPELJ 57

Unauthorised travellers' halting sites
Simons, Garrett
1997 IPELJ 53

Pensions Law

Library Acquisitions

The Pensions Board
A guide to your scheme's annual report
Dublin Pensions Board [1997]
N193.4.C5

The Pensions Board
What happens when your pension scheme is wound up or a merger/acquisition takes place
Dublin Pensions Board [1997]
N193.4.C5

Practice & Procedure

Martin O'Callaghan Ltd. v. O'Donovan
Supreme Court: Murphy J., **Lynch J.***, Barron J. (*ex tempore)
13/05/1997

Judgment in default of appearance; application to set aside under O. 13, r. 11, Rules of the Superior Courts; whether High Court judge exercised discretion properly in refusing to set judgment aside
Held: Discretion properly exercised

Maigueside Communications Ltd. v. I.R.T.C.
Supreme Court: O'Flaherty J., Keane J., **Barron J.**
10/06/1997

Discovery; judicial review; radio licence applications; discovery of successful applications sought by unsuccessful applicants; whether documents relevant to proceedings
Held: Discovery refused; documents not relevant

UMP (Ballaghaderreen) Ltd. v. Nordstern Allgemeine Versicherungs-AG & Ors.
Supreme Court: **O'Flaherty J.***, Barrington J., Keane J. (*ex tempore)
24/06/1997

Summons; service; outside jurisdiction; whether service should be set aside; insurance claim; leave to serve summons granted pursuant to O. 11 Rules of the Superior Courts; error on face of affidavit; incorrect sub-paragraph stated; whether proceedings should have been instituted under the Lugano Convention; whether Court has jurisdiction under O. 11; discretion of court
Held: Leave granted to amend proceedings

Fingal County Council v. Lynch
High Court; **Geoghegan J.**
27/06/97

Joint liability; case stated; recovery of water charges; preliminary issue; whether demand made by plaintiffs adequate; whether plaintiff's wife should have been joined in the proceedings as an occupier of the premises; whether the liability for water charges is a joint liability or a joint and several liability.
Held: joint and several liability; not necessary that plaintiff's wife be joined in the proceedings.

Amec plc v. Bord Gais Eireann
High Court: Laffoy J.
04/07/97

Discovery; whether plaintiffs entitled to order for discovery; plaintiffs alleging breach of contract and conspiracy; whether plaintiffs' claims adequately pleaded or pleaded with sufficient clarity; whether defendants could know the claims being made against them and the issues established.
Held: Plaintiffs entitled to order for discovery

Statutory Instruments

District Court areas (variation of days and hours) (no 17) order, 1997
S.I.240/1997
Commencement date: 6.6.97

District court areas (variation of days and hours) (no 18) order, 1997
S.I.258/1997
Commencement date: 1.9.97

District Court districts and areas (amendment) and variation of days (no.2) order, 1997
S.I.288/1997
Commencement date: 16.7.97

Library cquisition

Goren, Simon L
The code of civil procedure rules of the federal republic of Germany of January 30, 1877 and the introductory act for the code of civil procedure rules of January 30, 1877 as of January 1988 Littleton, CO Rothman 1990

N350.G28
Articles

Suing in the sun
O'Carroll, Donall
1997(July) GILSI 10

Procedural aspects of divorce before the Circuit court
Jackson, Nuala E
1997 (2) P & P 3

Towards a European judicial area
Carney, Paul
2(8)(1997) BR 348

Pleadings
O Floinn, Benedict
1997 CLP 149

Rules of the superior courts : order 8 - renewal of summons
Mooney, Kilda
1997 (3) P & P 2

Rules of the superior courts : order 6 - concurrent summonses
Phelan, Sara
1997 (2) P & P 2

Sea & Seashore

Statutory Instrument

Continental Shelf (protection of installations) (Connemara Field) order, 1997
S.I.267/1997
Commencement date: 1.7.97

Harbours act, 1996 (commencement) (no 2) order, 1997
S.I.253/1997
Commencement date: 16.6.97 Date signed: 13.6.97 4.7.97

Social Services

Statutory Instruments

Social welfare (consolidated payments provisions) (amendment) (no 2) (increase in rates) regulations, 1997
S.I.237/1997
Date signed: 16.5.97

Social welfare (consolidated payments provisions) (amendment) (no 3) (disability allowance) regulations, 1997
S.I.251/1997
Commencement date: 4.6.97

Social welfare (consolidated payments provisions)(amendment) (no 4) (maternity and adoptive benefit) regulations, 1997
S.I.249/1997
Commencement date: 9.6.97

Social welfare (occupational injuries) (amendment) regulations, 1997
S.I.235/1997
Commencement date: 9.6.97

Social welfare (rent allowance) (amendment) regulations, 1997
S.I.236/1997
Commencement date: 12.6.97

Social welfare act, 1997 (section 22(1) and (2)) (commencement) order, 1997
S.I.250/1997
Commencement date: 4.6.97

Social welfare act, 1997 (sections 10 and 11) (commencement) order, 1997
S.I.248/1997
Commencement date: 9.6.97

Women's Health Council (establishment) order, 1997
S.I.278/1997
Date signed: 24.6.97

Taxation

Telecom Eireann v Commissioner of Valuation
Supreme Court; **Barrington J.,** O'Flaherty J., Lynch J.
04/07/97

Valuation; occupation; case stated; plaintiff's right to install and operate payphones in a shopping centre; nature of right of plaintiff under its licence; whether plaintiff had any right or easement over the land as contemplated in rating legislation; whether this amounts to a rateable hereditament; meaning of 'incorporeal hereditaments'; whether plaintiff in occupation of sites upon which telephones installed.
Held: appeal granted; Valuation Tribunal not correct in finding that that the plaintiff was in rateable occupation.
Library Acquisition

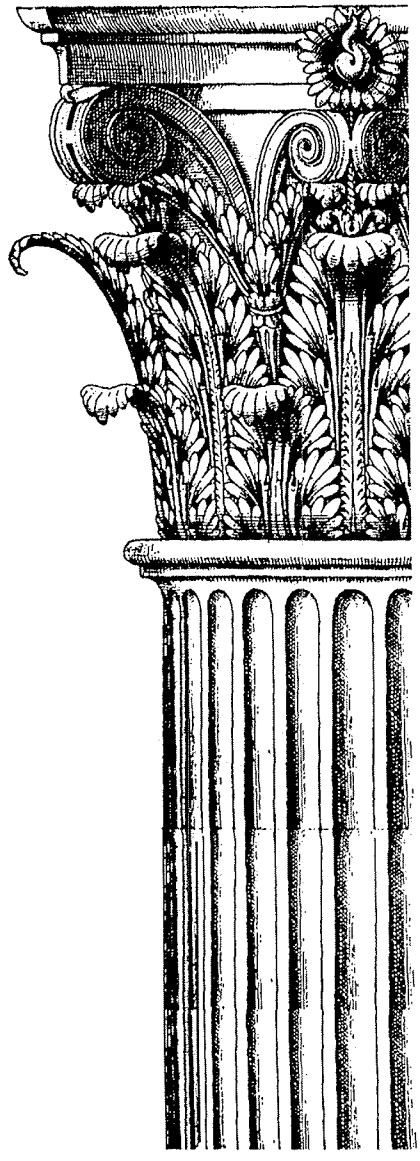
Bohan, Brian
Capital acquisitions tax consolidation
Incorporated Law Society of Ireland
1996
M337.16.C5

Telecommunications

Statutory Instrument

Telecommunications (amendment) (no 3) scheme, 1997
S.I.246/1997
Commencement date: PLEASE SEE SI

Telecommunications (amendment) (no 4) scheme, 1997
S.I.309/1997
Commencement date: 2.7.97 and 9.7.97



At a Glance

European provisions implemented into Irish Law up to 18/07/97

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

European Communities (authorisation, placing on the market, use and control of plant protection products) (amendment) regulations, 1997
S.I.290/1997
(DIR 91/414, 96/46, 96/68) Amends the European Communities(authorisation, placing on the market, use and control of plant protection products) regulations, 1994 to 1996 (SI 139/1994, SI 200/1995, SI 159/1996)
Commencement date: 3.7.97

European Communities (cereal seed) (amendment) regulations, 1997
S.I.243/1997
(DIR 96/72) Amends SI 48/1981
Commencement date: 1.7.97

European Communities (conservation of wild birds) (amendment) regulations, 1997
S.I.210/1997
(DIR 79/409) Amends SI 291/1985
Commencement date: 1.6.97

European Communities (seed potatoes) (amendment) regulations, 1997
S.I.252/1997
(DIR 96/72) Amends SI 343/1980
Date signed: 28.5.97

European Communities (telecommunications services monitoring) regulations, 1997
S.I.284/1997
(DIR 90/388, 92/44, 94/46, 95/51, 96/2, 96/19)
Amends s2(1), s98 and s111 of the postal and telecommunications services act, 1983
Commencement date: 23.6.97

European Communities (trade in bovine animals and swine) regulations, 1997
S.I.270/1997
(DIR 64/432, 94/42, 95/25) Amends SI 289/1994
Commencement date: 1.7.97

Waste management (packaging) regulations, 1997
S.I.242/1997
DIR 94/62
Commencement date: 1.7.97

Court Rules

District Court areas (variation of days and hours) (no 17) order, 1997
S.I.240/1997
Commencement date: 6.6.97

District court areas (variation of days and hours) (no 18) order, 1997
S.I.258/1997
Commencement date: 1.9.97

District Court districts and areas (amendment) and variation of days (no.2) order, 1997
S.I.288/1997
Commencement date: 16.7.97

Accessions List

Information compiled by Joan McGreevy, Law Library, Four Courts, Dublin 7.

Assessment of mental capacity: guidance for doctors and lawyers
London British Medical Association 1995
N155.3

Truth commissions : a comparative assessment : an interdisciplinary discussion held at Harvard Law School in May 1996
Cambridge, MA
Harvard Law School 1997
C200

Bainbridge, David Ian
Software copyright law
3rd ed
London Butterworths 1997
N112.7

Barendt, Eric
Libel and the media : the chilling effect
Oxford University Press 1997
N343

Bohan, Brian
Capital acquisitions tax consolidation
Incorporated Law Society of Ireland 1996
M337.16.C5

Coomaraswamy, Radhika
Reinventing international law : women's rights as human rights in the international community
C200

Council of Europe
European convention on the exercise of children's rights, and explanatory report
Strasbourg Council of Europe 1997
M208.11

Fianna Fail
Fianna Fail manifesto - 1997 : people before politics
Fianna Fail 1997
M232.C5

Finlay, Thomas A
Report of the Tribunal of Inquiry into the Blood Transfusion Service Board
Dublin Stationery Office 1997
N398.1.C5

Food Safety Advisory Board
Food Safety Advisory Board : first annual report 1995/1996
Dublin Food Safety Advisory Board [1997]
N185.2.C5

Goren, Simon L
The code of civil procedure rules of the federal republic of Germany of January 30, 1877 and the introductory act for the code of civil procedure rules of January 30, 1877 as of January 1988
Littleton, CO
Rothman 1990
N350.G28

Goyder, Joanna
EC distribution law
2nd ed
Sussex Wiley
1996
W110

Heard, Brian J
Handbook of firearms and ballistics : examining and interpreting forensic evidence
Chichester Wiley 1997
N186.1

Kingston, James
Abortion and the law
Dublin Round Hall Press
1997
N172.7.C5

Law Society Directory of expert witnesses and registered public service interpreters
London FT Law & Tax 1996
REF

Mitchell, Andrew R
Mitchell, Taylor & Talbot on confiscation and the proceeds of crime
2nd ed
London S & M 1997
M594.7

Phelan, Diarmuid Rossa
Revolt or revolution : the constitutional boundaries of the European Community
Dublin Round Hall S & M 1997
W84

The Pensions Board
A guide to your scheme's annual report
Dublin Pensions Board [1997]
N193.4.C5

The Pensions Board
What happens when your pension scheme is wound up or a merger/acquisition takes place
Dublin Pensions Board [1997]
N193.4.C5

Toulson, Roger G
Confidentiality
London S & M 1996
M209.P7

Acts of the Oireachtas 1997

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

1/1997 - Fisheries (commission) Act, 1997
Signed 12/02/1997
Commencement on signing

2/1997 - European Parliament Elections Act, 1997
Signed 24/02/1997
Commenced 21/04/1997 by S.I. 163/1997

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

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

5/1997 - Irish Takeover Panel Act, 1997
Commences in part 14/04/1997 by S.I. 158/1997
Remainder commences 01/07/1997 by S.I. 255/1997

6/1997 - Courts Act, 1997
Signed 20.03.1997

7/1997 - Dublin Docklands Development Authority Act, 1997
Commences in part 27/03/1997 remainder commences 01/05/1997 by S.I 135/1997.

8/1997 - Central Bank act, 1997
Commences 09/04/1997 by S.I.150/1997

9/1997 - Health (provision of information) Act, 1997
Commenced 01/04/1997

10/1997 - Social Welfare Act 1997
Commenced in part in act
Commenced in part by S.I. 161/1997 (08/04/1997)
Commenced in part by S.I. 250/1997 (04/06/1997)
Commenced in part by S.I. 248/1997 (09/06/1997)

11/1997 - National Cultural Institutions Act, 1997
Commenced in part by S.I. 222/1997 (02/06/1997 & 01/01/1998)

12/1997 - Litter Pollution Act, 1997
to be commenced by S.I.

13/1997 - Freedom of Information Act
Signed 21/04/97

14/1997 - Criminal Law Act, 1997
Commences 22/08/1997

15/1997 - Credit Union Act
to be commenced by S.I.

16/1997 - Bail Act
to be commenced by.S.I.

17/1997 - Committees of the Houses of the Oireachtas (compellability, privileges and immunities of witnesses) Act
Signed 5.05.97

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

19/1997 - International Development Association (amendment) Act, 1997
Signed 07.05.97

20/1997 - Organisation of Working Time Act
Signed 07.05.97

21/1997 - Housing (miscellaneous provisions) Act
Commenced 01/07/1997 by S.I. 247/1997

22/1997 - Finance Act
Signed 10/05/1997

23/1997 - Fisheries (amendment) Act
to be commenced by S.I.

24/1997 - Universities Act
Signed 14.05.97

25/1997 - Electoral Act
Signed 15.05.97

26/1997 - Non - Fatal Offences Against the Person Act
Signed 19.05.97

27/1997 - Public Service Management (no.2) Act
Signed 19.05.97

28/1997 - Chemical Weapons Act
Commenced 01/07/1997 by S.I. 269/1997

29/1997 - Local Government (financial provisions) Act
to be commenced by S.I.

30/1997 - Youth Work Act
Commenced 19/06/1997 by S.I. 260/1997

31/1997 - Prompt Payment of Accounts Act
Commences 02/01/1998 by S.I. 239/1997

32/1997 - ICC Bank Act
Commenced 21/05/97

33/1997 - Licensing (combating of drug abuse) Act
Commenced 21/06/1997

34/1997 - Hepatitis C Compensation Tribunal Act
to be commenced by S.I.

Bills in Progress - 14/7/1997

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

Adoption (no.2) bill, 1996 - report - seanad

Freedom of information bill, 1995 - committee - seanad

Merchant shipping (commissioners of irish lights) bill, 1997 - 2nd stage seanad

Registration of title (amendment) bill, 1997 - 1st stage - dail

Abbreviations

BR - Bar Review
CPLJ - Conveyancer & Property Law Journal
CLP - Commercial Law Practitioner
DULJ - Dublin University Law Journal
GILSI - Gazette Incorporated Law Society of Ireland
ICLR - Irish Competition Law Reports
ICLJ - Irish Criminal Law Journal
IFLR - Irish Family Law Reports
ILT - Irish Law Times
IPELJ - Irish Planning & Environmental Law Journal
ITR - Irish Tax Review
JISLL - Journal Irish Society Labour Law
MLJI - Medico Legal Journal of Ireland
P & P - Practice & Procedure

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

Pension Lawyers Response to The National Pensions Policy Initiative

Eamon Brady, A & L Goodbody
Member, Policy and Legislation Committee of the APLI

A National Pensions Policy Initiative ("NPPI") has been launched to facilitate a national debate on the further development of the national pensions system. This is jointlysponsored by the Department of Social Welfare and the Pensions Board. The aim of the NPPI is to establish the steps which need to be taken to achieve comprehensive pensionscoverage. As part of the NPPI, the Department and the Pensions Board, in February of this year, issued a Consultation Document and asked all interested parties to respond.

The Association of Pension Lawyers in Ireland (APLI), through its Policy and Legislation Committee, submitted a detailed response to the Consultation Document and in July of this year made an oral presentation at the National Pensions Conference organised by the Department and the Pensions Board. The following is a brief summary of some of the key points made by the APLI in its response.

Information and Awareness

In the APLI's view, one of the reasons for the relatively low levels of voluntary pensions coverage is the lack of knowledge of the importance of pensions. The APLI has suggested two fairly simple methods to increase pension awareness.

Firstly the State could require that a "pensions health warning" is included in the annual P60 of employees. This could simply draw employees' attention whether or not they have a pension arrangement. Secondly, while the law requires employers give to employees details of pension entitlements if they exist, it does not require them to expressly inform employees if no pension entitlement exists. A legal requirement to provide a written statement that there is no pension would highlight the issue.

Improvements to the Existing System

The APLI's response contained several suggestions to improve the existing voluntary pensions regime. In particular provision could be made to require an employer who provides an occupational pension scheme for permanent full-time employees to include permanent part-time employees who do like work. Other suggested improvements included reducing the maximum period within whichbenefits under an occupational pension scheme will vest from 5 years to 2 years, simplification of the Revenue treatment of pensions and ensuring that employees have a legal right to make additional voluntary contributions to an occupational pension scheme.

Personal Pensions

The APLI has suggested that existing arrangements in relation to Section 235 contracts (retirement annuity contracts) under the Income Tax Act, 1967 need to be examined. The APLI is of the view that some form of personal pensions along the lines in the UK should be developed and employers should be allowed to contribute to these arrangements on behalf of employees. However, protections will be needed, in particular to avoid the personal pension misselling which occurred in the U.K.

Mandatory Pensions

One of the proposals looked at in the Consultation Document is the possibility of making the provision of occupational pensions compulsory. The APLI, while acknowledging that the introduction of a mandatory system would increase the level of pensions coverage, believes that the success of any mandatory system will depend on the mandatory minimum level set. If the mandatory minimum is not sufficiently high then we could end up with the worst of both worlds - provision for new employees of an inadequate level of benefit and a detrimental affect on the adequacy of existing benefit levels. The effect on employment due to increased-labour costs will also need to be examined. The APLI has also pointed out that in any consideration of proposed legislation to introduce mandatory pensions it will be necessary to have close regard to the recent decision of the Supreme Court concerning the Employment Equality Bill.

Personal Retirement Accounts

The Consultation Document also looked at the introduction of personal retirement accounts (PRAs). The APLI envisages these would be low cost, easily established bank account type products targeted at lower income workers or people not presently working. Key features would include that the PRA would be established with an authorised deposit taker and would be interest bearing and free of DIRT. The account holder would able to make deposits out of pre-tax income with a limit on the maximum annual level of contribution and limits on the ability to withdraw money prior to retirement date.

The Pensions Board is now proceeding to examine the various responses to the Consultation Document and draw up recommendations on the steps which need to be taken. ●

The International Bar Association

Frank Clarke, S.C.,
the Bar's representative to the IBA reports on current developments

1. The IBA generally

The IBA was founded in 1947 in New York. It is the world's largest international organisation of Law Societies, Bar Associations, and individual lawyers engaged in international law. It is composed of over 18,000 individual lawyer members in 183 countries, and 173 Law Societies and Bar Associations who collectively represent more than 2.5 million lawyers.

In substance, the IBA operates on two levels. On the one hand, it is the international representative body for all national Lawyers Associations. In that context, the Bar Council and Law Society in Ireland are both members. It also represents individual lawyers who have some interest in law at an international level. In that regard, it is divided into three sections which are largely autonomous.

These are:

(a) the section on Business Law;

(b) the section on General Practice; and

(c) the section on Energy and Natural Resources Law.

Individual lawyers with an interest in any relevant area can join the IBA as an individual member for an annual fee of £50.00 and can also join a relevant section for a further fee of £50.00. However, from the Bar Council's point of view, it is probably the institutional membership that is most important. The IBA is recognised internationally as the principal voice for lawyers dealing with international bodies, e.g. the U.N. and the World Trade Organisation. I was appointed to be the Bar Council's representative on the Council of the IBA upon the appointment of Peter Shanley, S.C. (as he then was) to the Bench. I have been a member of the Council of the IBA for the last eighteen months or so.

2. Is the IBA of any relevance to individual barristers?

I suspect that the initial answer that most members of the Law Library would give to that question would be no. However, I believe they would, in the main, be wrong in so answering. There seems to me to be two principal areas in which the IBA are potentially of relevance to individual barristers:-

(a) There is an increasing tendency for liberalisation for trade throughout the world. One of the major changes introduced in the so-called Uruguay round of negotiations under the GATT regime was to include the provision of services (including legal services) in the area of trade for the purposes of International Agreements. One of the principal functions of the World Trade Organisation is to facilitate arrangements for liberalising trade in services. The WTO has started with the Accountants, but has already indicated that it intends to move on to other professions, most particularly lawyers, in early course. Certain preliminary contact has already taken place between the IBA and the WTO as a preliminary to those matters. It will be through the IBA that the voice of lawyers will be heard in relation to such arrangements. While the World Trade Organisation may seem very remote from the affairs from an ordinary barrister in individual practice, it should be noted that it will have as its functions important areas which could have a direct impact on practice at the Bar in Ireland. The whole maintenance of the independent profession of Barrister or Advocate, as practised in certain countries, could come under threat by rules which allowed freedom of movement from one country to another, but which did not recognise the existence of a divided profession in some of them. In addition, the existence and growth of multi-disciplinary practices, is something which needs to be faced. Certain European countries now permit joint practice between, for example, accountants and lawyers. There is a very real fear that, in time, if this practice is allowed to develop, the large multi-national accountancy firms will expand into the legal area. We already have almost all of the major multi-national accountancy firms represented in Ireland. It is most unlikely that they would allow Ireland to miss out on any international developments.

Suffice it to say that if the negotiations with the World Trade Organisation are not conducted properly and efficiently, there are very real risks for the continuance of the Bar as we know it. For that reason alone, our voice in the IBA is important.

(b) In addition, I believe there is individual merit in individual lawyers in practice discussing like problems with colleagues from other jurisdictions. New insights into the way particular areas of law can be effectively practised can be invaluable. Individual membership of the IBA could confer considerable benefits on individual barristers, as they could join the individual committees which deal with specific areas of law. The section General Practice is likely to be the relevant section for barristers. It has twenty three separate area committees. As a guide to the breadth of areas covered, one might note that:
Committee 1 deals with Real Estate Law;
Committee 4 with Family Law;
Committee 6 with Criminal Law;

Committee 7 with Administrative and Constitutional Law;
Committee 12 with Civil Litigation;
Committee 13 with Negligence and Compensation;
Committee 19 with Human Rights Law;
Committee 21 with Consumer Law.

The IBA organises regular conferences, both of a general and specific nature, at which discussions can take place.

3. International Forum for Advocates and Barristers (IFAB)

Like all the best things in the world, IFAB grew out of a conversation in a Pub. To be absolutely precise, it grew out of a conversation at a pavement cafe in Berlin during the course of the IBA Biennial Conference, held in October 1996, between myself, Andrew Hardy, Q.C. (then Dean of the Faculty of Advocates in Edinburgh, and, more recently, appointed Advocate (or Attorney General) of Scotland, and Malcolm Wallis, S.C., Chairman of the Bar Council of South Africa. I think we had all felt for some time that the particular needs of barristers and advocates, who practice as independent referral lawyers in the various jurisdictions which have that difference, were not adequately looked after within the IBA. From that grew the idea of IFAb, or a specific Section or Forum within the IBA to deal specifically with the interests of barristers. In addition to those countries (like ourselves, Northern Ireland, England and Wales, Scotland, South Africa, and Hong Kong) which have a formally divided profession, there are a growing number of countries within the Common Law world where individual lawyers in a unified profession, on a voluntary basis, agree to carry out their practice in the same way as barristers do in divided profession countries. This applies in all of the States of Australia, in New Zealand, and in Namibia. What we have in mind is an organisation which will, in the main, do three things:-

(a) It would operate as a mean of bringing the collective voting power of the barristers' organisations together within the IBA so that we can maximise our influence. For example, an important task will be to ensure that in any arrangements which emerge through the World Trade Organisation, the specific position of barristers or advocates, in the countries where they exist, will be protected.

(b) It is hoped to encourage individual barristers or advocates in the relevant jurisdictions to become individual members of the IBA. This is relatively inexpensive, and a worthy investment. The IBA organises major biennial conferences. The Sections also organise a major conference each year. There is, therefore, a significant conference once in each year at least. It is hoped, through IFAB, to include at each such conference a significant section that would be of particular interest to those practising as barristers or advocates. This would allow barristers from different countries, and practising in different ways, to meet and discuss matters of mutual interest (and, indeed, to socialise together);
and

(c) It would also provide representative bodies with a more formal and easier means of sharing information on matters of mutual interest. For example, I personally believe that the fact that an independent Bar has, in practice, survived notwithstanding fusion in countries such as New Zealand and Namibia is an important political point that can be used quite effectively at home.

The initial Steering Committee meeting of IFAB took place at the same time as the recent IBA Council meeting in New York. I had produced a draft set of regulations at the request of the two Co-Chairmen, Robert Owen, Q.C., of the Bar of England and Wales, and Malcolm Wallis, S.C.. That was discussed, and some amendments agreed. I am in the process of putting together a final version, including the agreed amendments. That will go forward to a meeting to be held at the same time as this year's IBA Conference in New Delhi in November. Hopefully, it will be adopted then. In particular, it is the current intention that a significant barristers' section will be included at the IBA Biennial Conference due to take place in September 1988 at Vancouver. It is something that all barristers in whatever country might like to note in their diary as a possible event.

Finally, some mundane details about the proposed structure of IFAB:

(a) It will have an Executive Committee which will consist of Officers and other members. They will be elected at an annual meeting which will take place in conjunction with the IBA Conference. Each National Bar Association will have voting power. Where a country is divided into States (such as South Africa or Australia) the voting power will be divided appropriately between the constituent members. An advantage of this scheme is that smaller countries cannot easily be out-voted. While the Bar of Ireland is in the middle of the range, it would seem clear that the Bar of England and Wales would have a disproportionate influence in the event of voting strength being based upon a number of members. The representative bodies of any group of barristers, whether representing barristers in a divided profession country, or representing those who, in practice, carry on their business as barristers in fused profession countries will be eligible for membership. It is expected that they will all take up membership, as the attendance at the New York Conference was extremely heartening, and those small number who were unable to attend sent enthusiastic letters of support. Also, anyone who is an individual member of the IBA will be able, in addition, to join IFAB as an individual member. This will probably be unnecessary in the case of Irish barristers who will be members through the Bar Council in any event. However, it may be of some use in relation to some countries where there is not a formal body representing those who carry on their business as barristers.

I will be happy to supply further details to interested members, including any necessary documentation. ●

Public houses - can they be "extended" in the District Court?

Rosario Boyle, Barrister

Section 6 of the Licensing (Ireland) Act 1902 sets out clearly that where premises to which an on-licence is attached are extended in area an application may be made, to the Circuit Court, for what is effectively a new licence in respect of the extended premises[1]. This is the express statutory provision for the licensing of premises which have been extended in area. However in recent years it has come to the attention of conveyancers and practitioners in the area of licensing law that applications are being made, at the annual licensing sessions in the District Court, to effectively 'license' premises where the area of such premises has been extended since the date of the last renewal. It would further appear that many of these applications are being listed before the District Court even where no 'need' to do so arises under the Courts (No 2) Act, 1986. It is proposed, in this short article, to show that the validity of licences granted on foot of these applications must be open to serious question.

The Historical Statutory Position

Prior to 1854 the holder of an intoxicating liquor on-licence who, at the end of the period for which it was valid, wished to obtain a renewal of it could get such renewal without having to go before the Justices. Excise officers were then empowered to grant renewals of licences upon production of a certificate signed by 6 householders of the parish as to the good character of the applicant and as to the peaceable and orderly manner in which the house had been conducted in the last year "without requiring the production of any certificate or other authority from any justice or justices of the peace ...".[2] From the coming into operation of s.11[3] of the Spirits (Ir) Act, 1854 however, an on-licence could not be renewed without producing a certificate from two or more Justices of the Peace "to the good character of such person, and to the peaceable and orderly manner in which such house had been conducted in the past year". The jurisdiction of Justices of the Peace to grant certificates for the renewal of on-licences was transferred to the District Court by s.77C of the Courts of Justice Act, 1924. This continued to be the position until the enactment of the Courts (No 2) Act, 1986 ('the 1986 Act') which provided, at s.4 (2), that, save in certain limited circumstances, set out at s.4 (5), it

> "shall not be necessary to produce a certificate of the District Court to an officer of the Revenue Commissioners empowered to grant a renewal of such a licence".

Renewals - the position before the 1986 Act

It has always been a prerequisite to the grant of any certificate of renewal (and indeed any certificate of transfer) of a licence that the premises in respect of which such certificate was sought were "premises which had been licensed in the previous year".

There are a number of 19th century English decisions where the higher courts allowed English Justices to consider, as a question of fact, whether or not the premises in respect of which a renewal certificate was sought were 'the same' or 'substantially the same' as premises in respect of which a licence had validly issued the previous year[4] This was so even where the premises to which such licences were attached had been substantially enlarged and extended. In the case of *Reg v Smith* (1866) 31 JP 259 e.g., the licensee acquired adjoining premises almost as large in area as the original and "threw the two houses into one". At the annual licensing sessions in August 1865 he applied for a certificate of renewal. It was refused by the Justices (the notices which would have enabled those same Justices to grant a certificate for a new licence to the applicant had not been given). The quarter sessions reversed this decision and this reversal was upheld by the Queen's Bench which, although finding that the "house when altered" had been made "larger and more commodious", decided that it would not interfere with the finding of the Justices at quarter sessions that the house was "substantially the same house" as before. In *Reg v Hampshire* JJ (1879) 44 JP 72 one Francis Wiltshire bought a small two storied "inn" on a particular street in Bournemouth and obtained a transfer of the attached licence in May 1878. He had also bought a larger unlicensed three storied house which adjoined the inn but was on a different street. He then operated both houses as one licensed premises even though they were still separately rated and the only communication between them was through a ground floor doorway which he had opened in the dividing wall. The licence was renewed at the annual licensing meeting on 30th September 1878 and Mr Wiltshire subsequently successfully defended a charge of trading in the three storied premises without a licence.

However it is very doubtful that these cases could ever have been regarded as reliable authority for the proposition that our District Court could grant a certificate of renewal or a certificate of transfer where premises had been extended since the last renewal because:-

(a) These decisions pre-date the enactment of the Licensing (Ir) Act, 1902 which severely restricted the power of the Irish excise authorities to grant new licences, and which specifically provided, at s.6[5], an exception whereby a licence could be granted where the taking in of "adjoining" premises or the "attaching" of extra premises to premises already licensed would render the said licensed premises more suitable for the business carried on therein";

(b) They also pre-date the conferring on our Circuit Court, by ss.50 and 77C of the Courts of Justice Act, 1924, of

exclusive jurisdiction in relation to the grant of new on-licences[6];

(c) They pre-date the enactment of the various Planning Acts and the consequent insistence by the courts that a licence only be granted in respect of premises built in accordance with the requirements of those Acts[7];

(d) They pre-date the requirement that a map or plan be produced at the hearing of an application for a new on-licence[8]; and

(e) They were given on foot of applications for renewal certificates pursuant to legislation which did not apply to Ireland[9] and which generally appears to have been more "pro-licensee" in relation to renewal certificates than the Irish legislation.

Renewals - the position after the 1986 Act

In conjunction with rendering a certificate of the District Court "unnecessary" in respect of the vast majority of renewals, the 1986 Act went on, at s.9 and the Second Schedule, to repeal s.11 of the Spirits (Ireland) Act, 1854 (referred to above) and to set out, at s.4(7) and (8), the new form of District Judge's certificate "required by subsection (5)" of that section. It would appear therefore that a District Court Judge no longer has any jurisdiction to grant a certificate in respect of the renewal of a licence save where one of the circumstances envisaged in s.4(5) has arisen - namely (i) that a notice of objection to the renewal of the licence has been lodged, (ii) the licence is one where the holder is abroad or cannot be found and the licence has expired, or (iii) it is proposed to convert the licence into a restricted licence. Effectively the legislature has abolished the former jurisdiction of the District Court to grant certificates leading to the renewal of on-licences and has substituted for it a new statutory jurisdiction to grant such certificates in the circumstances set out in s.4(5) of the 1986 Act.

This view of the effect of the 1986 Act is corroborated by the reference, in s.4(6)[10] of that Act, to persons who "but for the passing of this Act, would have been authorised to object to the grant of a certificate required for the renewal of a licence". It is submitted that the legislature is, by this subsection, granting the public a new statutory right to object to the renewal of licences, their former right to do so having been abolished by the 1986 Act itself. Further corroboration can be found in the fact that all relevant references (save those dealing with practice and procedure) to "renewals" of licences have been deleted from the licensing code or have been amended to refer to applications either to the Revenue Commissioners for a renewal or to the District Court for a certificate under s.4(5) of the 1986 Act.[11]

Caveat Emptor

It is of vital importance to the purchaser of a licensed premises that the licence attached to it be a subsisting and valid one. The failure of a purchaser's solicitor to make pre-contract enquiries in relation to (a) all relevant facts regarding the licence attached to a premises for sale and (b) the true nature of any such licence, has been held to amount to negligence - see decision of Murphy J in *Kelly v Crowley* [1985] IR 212.[12] The current edition of the Law Society's Requisitions on Title is designed to disclose whether or not licensed premises have been "altered or enlarged" since they were first licensed and, if so, whether or not an application was made to the relevant Court under s.6 of the 1902 Act[13] and indeed the relevant requisition has been drafted in such a way that it can be used for the purposes of pre-contract enquiries[14]. It would be prudent therefore for lawyers to advise clients whose "on" licensed premises have been altered either by the addition of an extension or by the taking in of adjoining premises to make a "section 6" application to the Circuit Court under the 1902 Act. This is the only way to ensure that there will be no difficulty, on a future sale of the premises, in relation to the exact area of the licensed premises or the consequent validity of the attached licence. Further, while it will not be relevant in all cases, the granting of a certificate under s.6 of the 1902 Act will "clean" the licence of any endorsements and will entitle the holder to the relief available under s.25(4) of the Intoxicating Liquor Act, 1927 in the case of a first offence[15]. ●

1. "Nothing in this Act shall operate to prevent the granting of new licences, where the licensing authority thinks fit, to premises attached to or adjoining premises licensed for the sale of intoxicating liquors *at any time during the period of five years immediately before the day on which notice of an application for the grant of a certificate entitling the holder thereof to receive any such new licence is given, pursuant to rules of court, to the appropriate County Registrar or to the appropriate District Court Clerk, as the case may be;* Provided always, that such new licence as last hereinbefore mentioned shall only be granted in order to render the said licensed premises more suitable for the business carried on therein"- s.6 Licensing (Ir) Act, 1902 - words in italics substituted by s.24 of the ILA, 1960.
2. Section 1 Licensing (Ir) Act, 1833 (-subsequently amended by s.32 Intoxicating Liquor Act, 1943).
3. Now repealed - see below.
4. See *Reg v Licensing Justices of Bradford* (1896) 60 JP 265 where the premises had been altered, under threat of prosecution by the local sanitary authority, and the Justices were told, by the court of Queenís Bench, that they could not give a renewal certificate to part only of the premises but should consider whether or not 'the alterations had made the house substantially a new house' (p.266) and then either grant or refuse to grant the certificate of renewal.
5. Set out at n 1 above.
6. The only statutory exception to this exclusive jurisdiction being the new on-licence provided for by s.27 of the ILA, 1960.
7. See *Application of Thomas Kitterick* (1971) ILTR 105.
8. Circuit Court Rules, Order 42, Rule 8.
9. Geo 4, c.61 and Wine and Beerhouse Act, 1896.
10. "An objection to the renewal of a licence may be made by any person who, but for the passing of this Act, would have been authorised to object to the grant of a certificate required for the renewal of a licence in respect of the premises; and any such objection shall be deemed to be an objection to the grant of the certificate required by subsection (5) of this section".
11. Section 9 Courts (No 2) Act, 1986.
12. See also *Taylor v. Ryan* (unreptd.) High Court, Finlay P., 10 March 1983 where a solicitor who failed to make a pre-closing enquiry to establish the nature and validity of a licence attached to premises was held negligent.
13. Requisition number 40.
14. See para 16.103 of Wylie's Irish Conveyancing Law (second edition).
15. *DPP v Farrell* 114 ILTR 106.

Consent and the Use of Leased Vehicles

Conor Dignam, Barrister

Section 118 of the Road Traffic Act 1961 provides that, where a person uses a motor vehicle with the consent of the owner, that person shall, for the purposes of determining the liability of the owner for the injury caused by the negligent use of the motor vehicle, be deemed to have used the vehicle as the servant of the owner, in so far as that person has acted in accordance with the terms of the owner's consent.

The question of whether a driver has acted in accordance with the terms of the owner's consent thereby leaving the owner vicariously liable by virtue of section 118 is one which has particular significance in the context of leasing agreements for motor vehicles and has, in two recent cases, exercised the Courts.

In *Homan v Kiernan and Lombard & Ulster Banking Ltd.*[1] the first-named defendant took possession of a truck under a leasing agreement entered into with the second-named defendant ("Lombard"). Some three months later, while the first-named defendant was driving the truck it was in collision with the Plaintiff who brought an action for personal injuries in the High Court. Damages were agreed and the issue before the Court was as to who should satisfy the judgment. The leasing agreement provided - that "the lessee shall immediately after he has signed this agreement insure the goods and keep the same insured during the continuance of the hiring." In the event of a breach of this obligation Lombard was entitled to insure the vehicle and recover the costs thereof from the first-named defendant. There was a further term, Clause 7, at the front of the agreement which stated that "I/we have insured the vehicle in accordance with the terms of the agreement under the full comprehensive policy." The agreement was executed on the 29th August 1989 - though Lombard only approved the first-named defendant's loan application some days later, the same day as he took possession of the truck

It was conceded that the first-named defendant had not insured the vehicle as required under the agreement and Lombard contended that the first-named defendant's failure to insure vitiated the consent given to him.

The Supreme Court rejected this argument holding that Lombard's failure to check whether the first-named defendant had a suitable insurance policy in force indicated a lack of concern on their part as to whether he had taken out a policy. Furthermore Clause 7 was inoperative because at the time the agreement was executed there was no vehicle and no agreement in respect of which it could operate . The Court also adopted a public policy element of Keane J's decision in O *Fiachain v Kiernan*[2] in deciding that it would be a great hardship on the general public if leasing companies could let out vehicles on the road, as owners, and yet be in a position to say that the driving was not with their consent because no insurance had been taken out. Such a position would also be contrary to the policy of section 118 of the Road Traffic Act 1961.

Barron J addressed the same question in *Fairbrother v Motor Insurers Bureau of Ireland, Baker and Smurfit Finance Ltd*[3] although his conclusion was at variance with the Supreme Court decision in *Homan*. The leasing agreement in question in *Fairbrother* contained conditions which provided that (a) the vehicle should be insured and (b) that the lessee would not use the goods with the consent of the owner unless the lessee had insured the goods in the manner provided for by clause (a). On the hearing of the preliminary point as to who should satisfy the judgment Barron J held that the second-named defendant had no consent to use the vehicle in the absence of a valid policy of insurance, the evidence disclosing no such consent. In the premises the second-named defendant could not be said to be driving the vehicle as the servant or agent of the leasing company and the latter could, therefore, not be held vicariously liable for the negligence of the former.

The two cases can be distinguished on the facts and particularly on the terms of the relevant leasing agreement. The agreement in *Fairbrother* contained, at 4(a), an express clause that if the lessee failed to insure the vehicle in accordance with the agreement he would not be regarded as driving the vehicle with the consent of the owner. The agreement in *Homan* on the other hand contained no such express statement. It certainly contained a term requiring insurance to be taken out but it did not state expressly and clearly that consent was dependent on a valid insurance policy being in force. While the Court did not expressly consider the point that if a party wants to put a limit on the terms of a consent to user, he must do so in a clear fashion, it would appear prudent following the *Homan* decision that leasing companies should include such an express statement as existed in *Fairbrother* in their leasing agreements if they wish to escape liability for the negligent acts of lessees who have not complied with the strict terms of the lease agreement. That this is so is emphasised by the decision in *O Fiachain v Kiernan* in which Keane J held that once a vehicle is being used with the consent of the owner it is immaterial that the owner did not consent to the actual mode of user. In *Homan* the lessor's original consent can be described as a general consent to use the leased vehicle and it was immaterial that the

lessor had not actually consented to the lessee using the vehicle without it being insured. In *Fairbrother* on the other hand the original consent was, by the express terms of the agreement, a qualified consent to use the vehicle if the vehicle was insured.

The Supreme Court in *Buckley v Musgrave Brook Bond Ltd*[4] held that where there was evidence of a consent by the defendant to the use of his vehicle by a driver, the defendant was obliged to discharge the onus of establishing that his consent did not apply to the particular use which gave rise to the claim made against him. Whilst neither the High Court in *Fairbrother* nor the Supreme Court in *Homan* expressly considered this principle it can be seen to have influenced the respective decisions. In *Fairbrother* it was relatively easy for the leasing company to discharge the onus of proof in that their leasing agreement contained an express condition that consent was dependent upon the vehicle being insured by the lessee. The Supreme Court in *Homan* held that the lessor had given consent which was not dependent on insurance being taken out and that the lessor's failure to exercise its entitlement to insure the vehicle in the event that the lessee failed to do so indicated a lack of concern on the lessor's part as to whether the vehicle was insured. Both of these factors meant that the lessor failed to discharge the burden of proof which shifted to him once it was established that he had given an original consent to the lessee to use the vehicle.

The Court, in *O Fiachain v Kiernan* and in *Homan*, placed great emphasis on public policy and the policy of section 118 of the 1961 Act in reaching their conclusions, stating that the intent of the section is to protect innocent third parties injured through the negligent driving of a motor vehicle which is owned by a third party. This policy, whilst to some degree academic having regard to the role played by the Motor Insurers Bureau ('MIB'), has now been acknowledged by the Supreme Court and is an important factor to be considered when examining the consent, and the conditions placed thereon, given to lessees under leasing agreements.

In certain circumstances it may be open to a leasing company to sue a defaulting lessee for breach of contract. In a similar situation as existed in *Homan*, i.e. where the agreement contains an obligation on the lessee to insure the leased vehicle and a clause to the effect that the lessee has in fact insured the vehicle appears on the face of the agreement, the lessor may sue the lessee for breach of contract and misrepresentation. This avenue is significant where (a) the lessor has insured the vehicle and this insurance is required to pay out, the lessor thereby losing its no-claims bonus; or (b) where neither the lessor nor the lessee has insured the vehicle and judgment is obtained as against the MIB and the MIB then seeks to recover the amount of the judgment as against the lessor (ie. the owner of the vehicle). However the lessor may only recover the amount of the actual damage incurred and the economic realities may undermine the worth of this avenue to the lessor.

The decision of the Supreme Court in *Homan* is of significance not only for those involved in leasing motor vehicles but also for those who may find it necessary to sue for damages arising from the negligent use of a leased vehicle. It provides guidance to the former as to the contents of leasing agreement and to the latter in that, subject to the attention paid to the contents by the former, it will either allow them or prevent them from proceeding against the better mark. ●

1. (1997) 1 ILRM 384
2. Unreported High Court 1 November 1985 Keane J
3. (1995) 1 IR 581
4. (1969) IR 440.

Tax Advantages of the Distillery Facility

Tom Kavanagh, Kavanagh Chartered Accountants (668 0288), specialises in professional practices in the legal, medical and property fields.

He outlines the advantages to members of taking up accommodation in the Distillery Facility.

Tax Advantages

The tax advantages of availing of accommodation in the Distillery Facility are extremely attractive. My conclusion is that, given certain basic assumptions, that the proposal to take up accommodation is effectively self-financing provided the individualís net income (after overheads) is over £23,800 for a single person and £46,000 for a married person.

On Table 1 below, I set out an example of a single person, earning net income of £23,800 (after overheads) and comparing the net income after tax, under 2 options: the status quo, and taking up the "A" Accommodation in the Distillery Facility. This comparison demonstrates that the distillery option is self-financing.

On Table 2, I set out a similar example of a married person, earning net income of £46,000 (after overheads) and the comparison is under the "C" Accommodation in the Distillery Facility. Again this comparison demonstrates that the distillery option is self-financing.

It is important to note that my suggested "threshold" levels of £23,800 for a single person and £46,000 for a married person, are effectively the cut off point of where the Distillery option is most attractive. For example if a person's income is above the threshold levels mentioned, (say £60,000) then you can assume that the Distillery option is self-financing. If however a personís income is below the threshold levels, the advantage of the double rent relief will be reduced as a certain portion of relief can only be claimed at the lower tax rate of 26%. This will make the proposal less attractive.

Obviously if an individual's personal allowances are higher, for example if a person has made pension contributions, then the threshold levels will be higher than those stated in my examples.

Cash Flow Effects

As soon as accommodation becomes available on the 1 October 1997, an individual's cash flow is going to be adversely affected by the quarterly rent payments in advance. However, there can be an immediate cash flow benefit of reducing your payment on account for Income Tax on the 1 November 1997, provided your accounts year-end falls prior to the 5 April 1998. I set out on Table 3 a schedule outlining the level and timing of reductions in tax payments. For example, if your accounts year-end is the 31 December 1997, you will have paid 3 months rent which is available for double rent relief. You can now take this into account when you are estimating and paying your preliminary tax on the 1 November 1997. Similarly if your accounts year-end is the 31 March 1998 you will have paid 6 months rent and this can also be taken into account when calculating your tax payment on the 1 November 1997. However if your accounts year-end is after the 5 April 1998, for example the 30 April 1998 your year-end then falls into the 1998/99 tax year and therefore will only affect your tax payment on the 1 November 1998, which is one year later. I would point out that for cash flow purposes, for an individual, the optimum year-end is the 30 April and I would not advocate a change of year-end to facilitate a short term cash flow benefit to avail of the double rent relief.

If you avail of the Distillery Facility, your Income Tax payment on the 1 November each year will be dramatically reduced, thereby avoiding the cash flow headache of making one large payment in the year. You will notice from Tables 1 and 2, that the tax payments under the Distillery options are substantially lower than the status quo options. This payment on 1 November each year will also be reduced further (perhaps to nil) if you are engaged in a high percentage of work under the Government with-holding tax schemes.

In deciding which of the four types of accommodation is most advantageous, remember that if you choose an accommodation level higher than those shown in the examples, your threshold will also be higher.

Property Proposal

As a property proposal, the Distillery Facility has other advantages, being: prestigious office accommodation, three year break clauses, double rent relief and rates relief for 10 years and double rent relief also available for car parking. The cost of accommodation ranges from £35 - £41 per square foot. These make commercial sense, provided your income is above the threshold levels. Quality office accommodation in Dublin at present is extremely scarce. Quality office accommodation with Designated Areas status is almost non-existent. An opportunity such as this does not come around too often, and if it is not grasped now it may not be available at a future date. If you expect your average income levels over the next few years to be above the threshold levels as I have outlined, then you simply cannot let this opportunity pass.

Table 1 - Single person

Assumptions

1. VHI £200 allowable
2. No mortgage
3. No other allowances
4. Accommodation "A" at Distillery Facility £5,400 p.a. rent

		Status Quo	Distillery Accommodation "A"
Net Income (after Overheads)		23800	23800
Rent		-	5400
		23800	18400
Allowances			
Personal Allowance		2900	2900
Double Rent Allowance		-	5400
VHI		200	200
		3100	8500
Taxable Income		20700	9900
Tax @ 26%		2574	2574
48%		5184	-
Levies 5%		1108	868
2.25%		535	414
		9401	3856
Net Income after Tax	14399	14544	

Table 2 - Married person

Assumptions

1. Maximum Mortgage Relief (Non first time buyers)
2. No allowances used by spouse
3. VHI £400 allowance
4. No other allowances
5. Accomodation "C" at Distillery Facility £9000 p.a. rent

		Status Quo	Distillery Accommodation "C"
Net Income (after Overheads)		46,000	46,000
Rent		-	9,000
		46,000	37,000
Allowances			
Personal Allowance		5,800	5,800
Double Rent Allowance		-	9,000
Mortgage Relief allowed			988 988
VHI allowed			400 400
		7,188	16,188
Taxable Income		38,812	20,812
Tax @ 26%			5,148 5,148
48%		8,640	183
Levies 5%			1,108 1,108
2.25%			1,035 1,035
		15,931	7,474
Net Income after Tax		30,069	29,526

Table 3 - Reduction and Timing of Tax Payments

Tax Year	Y/E	Reduction in Tax payments Single Person Acc. "A"	Married Person Acc "C"	Date of Tax Payment
97/98	31/10/97	450	750	01/11/97
97/98	31/11/97	900	1,500	01/11/97
97/98	31/12/97	1,350	2,250	01/11/97
97/98	31/01/98	1,800	3,000	01/11/97
97/98	28/02/98	2,250	3,750	01/11/97
97/98	31/03/98	2,700	4,500	01/11/97
98/99	30/04/98	3,150	5,250	01/11/98
98/99	31/05/98	3,600	6,000	01/11/98
98/99	30/06/98	4,050	6,750	01/11/98
98/99	31/07/98	4,500	7,500	01/11/98
98/99	31/08/98	4,950	8,250	01/11/98
98/99	30/09/98	5,400	9,000	01/11/98

The above is based on an individual where income is above the threshold levels mentioned above.

The Irish Takeover Panel Act 1997

Niamh Hyland, Barrister

Introduction

In 1995, following the adoption of the Stock Exchange Act 1995, the Irish Stock Exchange separated from the International Stock Exchange of the United Kingdom and Republic of Ireland. Also in 1995, the Investment Intermediaries Act 1995 was adopted, inter alia, to implement Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field. The result of the adoption of the Investment Intermediaries Act 1995 was that UK regulatory bodies handed over the responsibility for Irish investment business firms to Irish regulators.

Due to these changes, it was no longer considered appropriate that the London Panel on Takeovers and Mergers, which had previously regulated takeovers and mergers in Ireland through the City Code on Takeovers and Mergers and Rules Governing Substantial Acquisitions of Shares, should govern Irish takeovers.

European Commission Proposal

In addition, on 7 February 1996, the Commission submitted a proposal for the 13th European Parliament and Council Directive on company law concerning takeover bids (COM (95) 655 final, OJ No. C 162/5). The aim of the proposed directive is to ensure protection for shareholders and to provide for minimum guidelines on the conduct of takeover bids. A framework Directive is proposed which will permit Member States the choice of how best to meet these aims in line with their existing structures. It will simply require Member States' own rules on takeovers to respect the following principles:

(a) equal treatment for all holders of securities in the target company who are in the same position;

(b) persons to whom the bid is addressed must have sufficient time and all necessary information to enable them to take a properly informed decision on the bid;

(c) the board of the target company must act in the interests of the company taken as a whole, with particular regard to shareholdersí interests;

(d) false markets must not be created in the securities of the target company, of the bidding company or any other company concerned by the bid;

(e) target companies must not be hindered in the conduct of their affairs for longer than is reasonable by a bid for their securities.

Given that the directive is only at a draft stage, Ireland is under no obligation to implement its provisions. However it indicates the direction EC law is likely to take in this area. The adoption of the Irish Takeover Panel Act ("the Act"), which respects the principles set out above, means that when the directive is adopted, assuming it is adopted in its present form, Ireland will have already complied with its provisions.

The Irish Takeover Panel Act

All of the above circumstances prompted the decision to establish an Irish Takeover Panel. The Irish Takeover Panel Act 1997 provides for the designation of a Takeover Panel ("the Panel") to monitor and supervise takeovers and certain other transactions in relation to securities in certain companies. The Panel has two main objectives:

- to protect shareholders in situations where takeovers or other relevant transactions (e.g. substantial acquisition of securities) are contemplated and/or put into effect; and
- to provide support and credibility for the Irish Financial Markets following the separation of the Irish Stock Exchange from London.

Commencement of the Act

The Act, with the exception of Section 5(3), Section 7 (1) and (2) and Sections 9-15, was commenced on 14 April 1997 by S.I. No. 158 of 1997. The remaining sections of the Act were commenced on 1 July 1997 by S.I. No. 255 of 1997.

Key Provisions of the Act

Definitions

Possibly the most important definitions in the Act are those of "control" and "takeover". Control is defined as meaning "in relation to a relevant company, the holding, whether directly or indirectly, of securities of the company that confer, in aggregate, not less than 30 per cent (or such other percentage as may be prescribed) of the voting rights in that company".

Takeover is defined as meaning "(a) any agreement or transaction (including a merger) whereby or in consequence of which control of a relevant company is or may be acquired; or (b) any invitation, offer or proposal made, or intended or required to be made, with a view to con-

cluding or bringing about such an agreement or transaction". It is not only "takeovers" which are subject to the Act but also any "other relevant transaction". These include any offer, agreement or transaction in relation to the acquisition of securities conferring voting rights in a relevant company which the Panel specifies to be a relevant transaction, as well as an agreement etc. entered into which is consequent upon a takeover or other relevant transaction.

The Act only applies to "relevant companies", which are defined in Section 2. Essentially these are public limited companies or other bodies corporate incorporated in the State whose securities are currently listed on the Stock Exchange or have been traded there within the previous five years. The Minister may also prescribe any other public limited company for the purposes of Section 2.

Sections 3-6 are concerned with the establishment of the Panel. It is to be composed of directors from specified bodies, including the Law Society of Ireland.

General Principles

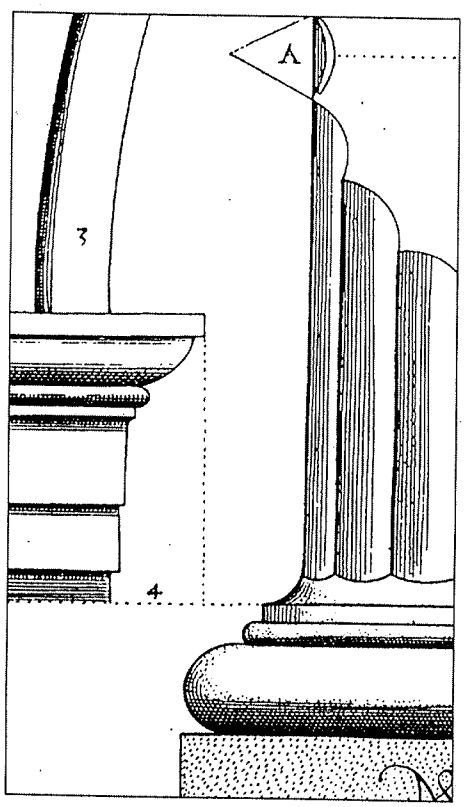
Sections 7 provides for the general functions of the Panel which are to monitor and supervise takeovers and other relevant transactions. The general principles which will underlie the operation and the activities of the Panel are set out in the Schedule to the Act. These are in the main similar to those in the City Code. In summary, they provide that:

- shareholders of the same class must be treated similarly
- information must be made available equally to all shareholders who accept the offer
- no offer may be made without serious consideration by the offeror
- shareholders must be in a position to make an informed decision on any offer
- the creation of a false market or misleading statements or conduct must be avoided
- offerees must not prevent shareholders from being given an opportunity to considering the merits of an offer
- directors of an offeree must not compromise their freedom to advise shareholders
- directors of both the offeree and the offeror must disregard their personal interest when acting in relation to the offer
- rights of control must be exercised in good faith and the oppression of a minority is unacceptable
- before an acquisition of securities which might result in an obligation to make an offer, capacity to implement the offer must be ensured
- offeree must not be disrupted in the conduct of its affairs beyond a reasonable time by an offer
- acquisition of securities shall take place only at an acceptable speed and shall be subject to adequate disclosure.

Section 8 provides for the rule making power of the Panel. These Rules, which are likely to reflect the London Panelís Rules, will set out in detail the requirements that must be complied with by parties engaging in a takeover or other relevant transaction.

Powers of Panel

Sections 9-12 deal with the enforcement powers of the Panel. Section 9 provides that the Panel may make rulings and give directions, and enumerates in some detail the matters in respect of which directions can be given by the Panel. It may also amend, revoke or suspend rulings or directions which it gives.



Section 10 gives the Panel the power to advise, admonish or censure a party to a takeover or other relevant transaction. Any person so advised may appeal the matter to the Court.

Section 11 gives the Panel the power to conduct hearings, and sets out a number of rules in relation to those hearings. Section 12 provides that the Panel may apply to the Court where a ruling or direction given under Section 9 has not been complied with. Section 13 provides that the only way a challenge may be made to the validity of a rule made by the Panel, or a derogation from or waiver of such rule, or a ruling or direction by the Panel is by judicial review. Presumably for reasons of certainty this application must be made within seven days of the relevant decision which is an unusually short time limit by any standards.

Section 15 is designed to ensure that transactions which have been concluded cannot be unscrambled, even where all relevant rules have not been complied with. It provides that, apart from circumstances where the Panel itself applies to Court to have its rulings and directions enforced, transactions which are carried out in accordance with rules etc. that are subsequently found to be invalid or quashed, or are carried out in contravention of rules etc. cannot be annulled. Again, this provision serves the interests of legal certainty.

One concern that had been expressed related to the potential liability of the Panel. Section 20 addresses this potential problem by providing protection against liability for the directors or members of the Panel unless they acted in bad faith.

Conclusion

In conclusion, the establishment of an Irish Takeover Panel is a welcome and timely development particularly in the light of the growing independence of the Irish economy from that of the UK. Clearly, it will take some time before the Panel accumulates á significant body of experience given the relative paucity of takeovers and other relevant transactions in the Irish context. However the 1997 Act has provided a comprehensive and well thought out statutory framework within which the Panel will operate. ●

The C.L.A.S.P. Garden Party

Pictured at the C.L.A.S.P. Garden Party held in the Law Society, Blackhall Place, on Friday 18th July, were...

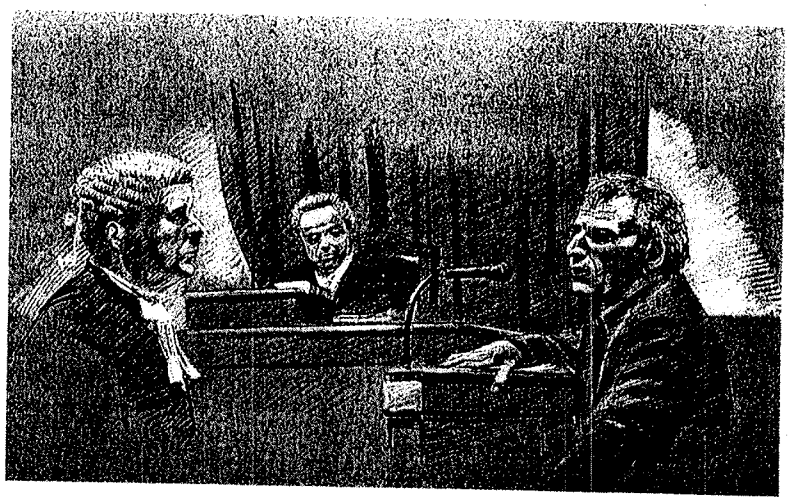
*From left to right:*Eve Mulcoavy, MarieLouise McMahon, Sheila Agnew and Suzanne McNulty.

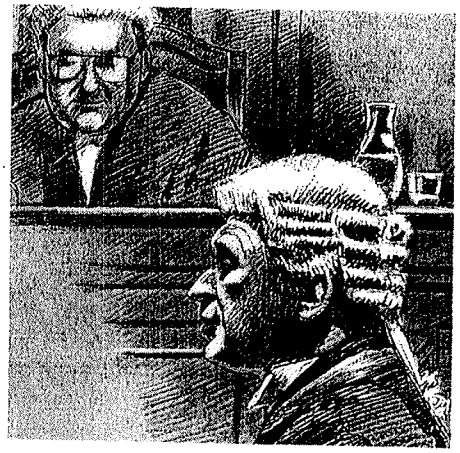
From left to right: Stephen Fitzpatrick, Caitriona Murray and Michael Barr.

*From left to right:*Amanda McGovern and Pauline Keating.

Courtroom Illustrations for Sale

Jon Berkeley has worked as a courtroom illustrator for RTE News on the most high profile cases and hearings of the past five years and has a collection of original sketches including some from the beef tribunal, the Brendan O'Donnell case, the De Rossa libel case, the hepatitis C tribunal and the Dunnes Payments tribunal. This work is now available for sale. If interested, please contact Deirdre O'Connell at 839 1961





INFORMATION TECHNOLOGY LAW IN IRELAND, *by Denis Kelleher and Karen Murray, Butterworths, £50.00*

In their introduction, the authors observe that virtually every aspect of law can be shown to have some connection with information technology. They have wisely decided to focus on the areas where a substantive body of law has developed viz. intellectual property law, computer misuse, privacy and data protection. For completeness however they have included discussion of relevant aspects of competition law, computer data as evidence in court proceedings, the control of the internet and there is a chapter devoted to developments in electronic commerce.

The first chapters are devoted to intellectual property issues with an emphasis on copyright protection of computer programs and the rights of owners and users of computer programs. In this section there are also chapters on licensing and assignment of copyright, databases, trademarks and domain names, trade secrets, confidential information, protection of semiconductor chip topography and a very readable introduction to the patentability of computer programs.

For many reasons computer programs have come to be protected by copyright law. If the developments could have been foreseen, perhaps there would have been an argument for the creation of a *sui generis* right for programs, as is the case with rights in semiconductor chips and even databases. In the event, computer programs classified as "literary works" and their authors have been extended the benefit of copyright protection under the Copyright Acts 1963 and 1987 and more recently the European Communities (Legal Protection of Computer Programs) Regulations 1993.

In this book, the authors have bravely faced into the *terra incognita* of copyright law as applied to digital data processing. It is an excellent book and they have proven themselves to be adept guides in the ever-changing terrain. It is inevitable and appropriate that the law will always follow, rather than dictate, the direction of innovation, but thirty four years is acknowledged to be far too long a lead time. The Act of 1963 is obviously out of date and it is well known that a new

Copyright Bill has been promised for some time. Drafting such a bill is a massive task and in fairness to the legislators, not only must they deal with the innovation itself, and balance the often conflicting interests of the various lobby groups and the public interest, they will also have to transpose and accommodate the growing body of initiatives coming from Brussels. In the particular area of information technology law, the drafters will need to be aware of the difficulties presented by the ever-changing shape of these industries.

The developments in infomation technology has presented not one but a myriad of discrete industries, each with its own manufacturing, marketing and distribution model. Most obviously they are classified as hardware and peripheral manufacturing and software manufacturing. Each of these sectors has many industries within it. There are the huge multinationals, many of whom have based their European operations in Ireland, but there are many smaller companies and individuals engaged in manufacturing, providing content, contracting, sub-contracting, localisation, marketing, distribution and after sales support. More recently, the internet has produced its own industries such as service providers and web-site designers and multi-media product design and production is blossoming. These are often relatively small undertakings.

In approaching Information Technology Law in Ireland, Denis Kelleher and Karen Murray had to deal with a paucity of Irish authority on copyright. Such cases seldom reach court in this jurisdiction. The result is an irresistible temptation to fill the gaps in the canvas by reference to English and USA authorities. The USA authorities in particular, have been decided in the context of a very different body of law. Even English authorities need to be treated with caution at this stage.

And there are many gaps in the canvas. When the principal Copyright Act was passed, even the most prescient could not have imagined the ubiquitous use of digital technology which we now take for granted. In 1963 this technology was in its infancy, known only to a few scientists and engineers. To those busy with their Christmas shopping, RAM was a farm animal. "Programmes" were either broadcast by RTE, or purchased in the theatre foyer. Computers and computer games were not on the requisition list.

Even in 1987, when the law was amended, the two most pressing problems in copyright law related to whether there should be a copyright in motor car and machine parts and the unauthorised sale of merchandising material at rock concerts. In 1997, our e-mail, laptops, VCR's, mobile phones, microwave cookers, alarm clocks and CDs are either run on, or almost entirely dependent on digital technology. Within the next few years digital TV will be commonplace.

Even in the past five years, there are three notable developments in these fields of communications technology and digital data processing technology. The amazing growth of the internet and the widespread availability of relatively inexpensive personal computers capable of handling multi-media programs are obvious revolutions in this area but perhaps most significantly, the major change has been that most ordinary people have become familiar with computers in very recent times.

It has been reported that during the recent Pathfinder landing on Mars, over 100 million visits were paid to the NASA internet site. The growth of the internet has already challenged and changed the marketing and distribution models for the IT industry itself and probably every other industry. It is a challenge which software producers have had to face. Already a large amount of software products are available over the internet from the manufacturers. There is also a notable increase in the sales of computer systems with bundles of software included in the deal which should reduce the temptation to make

unauthorised copies.

Most PCs sold now have a CD drive and sufficient processing speed and memory to support multimedia programs which allow for image manipulation, video and sound editing. These technical effects can be seen most commonly in CD-ROM programs and computer games. These techniques essentially involve taking an image, sound recording or video clip, converting it, if necessary, into digital data and then manipulating these data to create an altered image, sound or video clip as the case may be. These techniques are known as "morphing", "sampling" and so on and are in widespread use in photography, special effects and dance music. From a legal perspective this obviously affects the rights of the owner of the copyright in the artistic work, sound recording or cinematograph film which is being used as content. The IT industries necessarily operate in a global market. In the light of these developments those using copyright content, must be conscious not only of economic rights in common law jurisdictions such as Ireland, but also of 'les droits morals' of the authors in other jurisdictions.

This is not the first time that copyright law has been asked to meet the challenge of change. One hundred years ago, photographs became movies which became talkies. Piano rolls were followed by phonograms and juke boxes. Radio and television all presented challenges in their time. All of these issues were met and can be found in the law reports.

There is an undoubted need for the promised legislation. One fears that in this ever changing area, it will be out of date quite quickly and may present as many questions as answers. In the absence of the promised legislation this book is even more welcome.

Another important issue in intellectual property law in this area is the registration of and rights in domain names. The registration procedure is addressed, albeit very briefly in the book.This will undoubtedly become an ever more controversial area as the legislators or the courts, will inevitably have to decide on the status of these registrations and the extent to which the principles of administrative law, trade mark law and the law of passing off applies.

In the second part of the book, the authors focus on how the law deals with computer misuse. There is a basic explanation of hacking and computer viruses. There is a detailed analysis of the offences and defences under the Criminal Damage Act 1991, in particular the offences of causing damage to property, threatening to damage property, unauthorised access to a computer, and possession of anything with intent to cause damage to data. There is also a review of some of the other offences which may be committed against, with or by means of computers. Bringing this information together in one volume will prove to be most valuable.

The third section addresses data protection, the control of data processing under the Data Protection Act 1988 and issues of privacy raised by developments in information technology. The book concludes with a number of informative chapters on miscellaneous matters such as the use of computer data as evidence in court proceedings and the Criminal Evidence Act 1992. There is a chapter on the control of content on the internet and a chapter on the developments in electronic commerce. Finally there is a chapter devoted to liability for defective computer products and services.

The authors have wisely kept the emphasis on the practical. Consequently, however, it is beyond the scope of a book such as this to grapple in any detail with the ethical and jurisprudential problems posed by these developments. What is becoming of the public domain? Should these rights be protected by criminal sanctions or left to right owners to protect themselves through civil remedies or self-help procedures? How will the common law accommodate the imminent arrival of 'les droits morals' into the jurisprudence? Should the internet be controlled?

As for presentation, this is a very well produced book. The printing and presentation are of excellent quality. The footnotes, index and tables are most helpful although they could have been improved by more references to the growing body of articles which have been published in Irish learned journals.

The breadth of the survey undertaken, the hypotheses presented, where there is a notable absence of Irish authority, the anecdotes, and the accessible style which comes from a command of the subject-matter, make this book a valuable asset to practitioners, academics and students.

- James Bridgeman, Barrister

●

EDUCATION AND THE CONSTITUTION, *by Michael Farry, Roundhall Sweet & Maxwell 1996, £29.95*

This very welcome text heralds the importance of the now clearly emerging changes taking place in the field of education in Ireland.

The wide range of material covered in the textbook gives an extremely good overview of a wide number of concerns in relation to education and the Constitution, set in a historical perspective and includes a comprehensive guide to the case law in this area. There are also very extensive references in each chapter to the relevant articles of the Constitution. The underlying conflict underpinning the Constitution between the Catholic Social Principles and the Liberal Principles underpinning Articles 42 and 44 does not emerge as a result. There are superficial references to this aspect. For example, with reference to *Crowley -v- Ireland* [1980] I.R. 102, concerning a case which arose out of a strike over the appointment of an individual whom it was alleged, his Lordship, the Bishop of Cork and Ross, had directed should be appointed Principle Teacher to a Primary School in Drimoleague, Co. Cork. The individual concerned was ineligible for permanent appointment and was appointed on a temporary basis initially. The INTO regarded the manager's failure to make a permanent appointment as an attempt to give the post to an ineligible teacher at the expense of eligible and suitable INTO members. The INTO sent strike notice and the teachers in schools under the manager went on strike. A directive was sent to teachers in schools adjoining Drimoleague Parish, instructing them not to enrol Drimoleague pupils who might seek admission because of the strike in their own schools and this circular was later withdrawn. The Plaintiffs claimed damages against the INTO by reason of a conspiracy to deprive them of their constitutional right to free education, the issue was whether or not the issuing of the

directive was unlawful and a conspiracy to deprive the children of their constitutional right in order to bring pressure to bear upon the manager of the Drimoleague School. This case is most interesting in that it highlights the various categories of rights which can arise in certain circumstances within the educational field: the rights of parents, the rights of children, the rights of teachers and the role of the State in relation to these rights as well as the role of the Court in applying the broad statements underpinning constitutional rights to the modern context. The author devotes an entire chapter to the various aspects of this particular case and provides food for thought in relation to the various conflicting rights. The chapter is descriptive rather than providing an in depth analysis of this conflict. The text might very usefully have addressed possible alternative approaches by the INTO in pursuance of the difficulty caused by the attempt by the Department of Education to breach its own rules and by the possible alternative measures which might have been adopted by the INTO in seeking redress while avoiding a claim for damages against them in relation to the rights of the pupils. The role of the State in administering the system of education was open for further analysis in this regard. What is interesting, in educational terms, is the balancing of the various rights involved.

Chapter 4 deals with the significance of the State's obligation "to provide for" education rather than the wording contained in the earlier drafts of the 1937 Constitution "the State shall provide free primary education", the text gives us a very comprehensive analysis of Article 42.4, the original draft seemed to suggest a direct obligation with the insertion of the preposition "for" appearing as a protective insertion in the 1937 Constitution. Reference is made to Article 2 of Protocol 1 of the European Convention on Human Rights, signed on November 4th, 1950 and ratified on February 25th, 1953 and which came into force on September 3rd, 1953 which stipulates "No person shall be denied the right to education. In the exercise of any function which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." It is suggested that this Article shows a bias to parental rights, rather than to the rights of the child and it is anticipated that this tension may well be one which will come to the fore in future litigation in this area. Reference in this regard in made in the Constitution Review Group and the suggested wording for the new Article, with reference to Article 42.4, "Every child has a right to free primary and second level education. The State shall provide for such education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, where appropriate, provide other educational facilities or institutions with due regard, however, for the rights of the parent, especially in the matter of religious and moral formation.

Chapter 6 in relation to "the quality of primary education", is thought provoking and references made to an article written by Mr. Justice Brian Walsh, "Existence and Meaning of Fundamental Rights in Ireland, Human Rights Law Journal at page 178", and he quotes, " what does or does not constitute primary education will be decided in the light of the circumstances and conditions prevailing at the time the question was raised and not those prevailing at the time the Constitution was enacted... the basic minimum requirement of primary education naturally becomes greater with the progress of society and increasing standards of living and improvements in the quality of life." A very interesting question is raised in relation to the O'Donoghue case[1] where the Court was not convinced that the State was meeting the specific obligation imposed on it by Article 42.4 of the Constitution to provide for free primary education, in the case of the Applicant who had been offered a place in the Cope Foundation (a Cork institution for persons suffering from severe mental and physical handicap, administered by the Cork Polio and After Care Association), the Court dealt with the special needs of the Applicant and points to an emerging area of litigation in educational terms. Interestingly in this regard the Constitution Review Group recommended that Article 42.3.2 might be amended to read, "The State shall require that children receive a certainminimum education as may be determined from time to time by the law, providedthat the State, shall at all times, have due regard tot he rights of parents to make decisions concerning the religious and moral education of their children".

Again the questions raised by this case in what is a developing area are the rights of children, for example, children with special needs, their parents and as against that the extent of the States duty in providing "a certain minimum education", and "in view of actual conditions".

Chapter 8 dealing with the "control of education and parents", deals with Articles 42.3.1 "the State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State", and Article 42.4, "the State shall, when the public good requires it, provide other educational facilities or institutions, with due regard, however for the rights of parents, especially in the matter of religious and moral formation". In the context of current and often conflicting views, on whether private education is entitled to public funding without public control, while the opposing view points are set out at some length, these do not appear to be analysed in the context of the Article sighted. In contemporary Ireland an interpretation of these Articles appears to allow for the development of pluralism in the provision of a multiplicity of type of school, which is obviously emerging at primary level, as is seen in the Gael Scoil movement, the multi-denominational model emerging from the "educate together movement", which are developing alongside the existing structures at primary level. A similar development appears to be afoot at second level given the emergence of Community Schools, Community Colleges, alongside the various existing types of second level school. All in all this work constitutes an interesting contribution to this developing area of educational law.

- Bronagh O'Hanlon, Barrister

1. unreported, High Court, O'Hanlon J., May 27th, 1993. See also Irish Times, June 26th and July 1 st, 1992 and Cork examiner, May 28th, 1993.

LAW REPORTING COUNCIL

EDITOR

The Incorporated Council of Law Reporting for Ireland, founded in 1866, is committed to producing comprehensive and authoritative reports of the decisions of the Superior Courts in Ireland in a prompt and practical manner.

The Council now wished to recruit an editor upon the appointment of the previous editor to the Bench.

The successful candidate must be a member of the Irish Bar, will have a good academic record, an enthusiasm for the law, an eye for detail and a strong committment to work. The position will not prevent the successful candidate from practising at the Bar.

The salary is expected to be £24,000 per year with the possibility of a bonus of up to £5,000 depending on performance.

If interested, please write in strict confidence, enclosing a curriculum vitae to:

Chairman,
Law Reporting Council,
Law Library,
Four Courts,
Dublin 7.

The closing date for receipt of application is Friday, September 12, 1997

Canvassing will disqualify

To all members of the legal profession

EBS BUILDING SOCIETY
CLARE STREET, DUBLIN 2
(BESIDE GREENE'S BOOKSHOP)

OPENING HOURS
9.30 A.M. TO 5.00 P.M.
NO LUNCH CLOSURE

WE OFFER

- *MORTGAGES AT EXCELLENT RATES*
- *WIDE RANGE OF DEPOSITS*
- *NO BANK CHARGES*

MANAGER PADRAIC HANNON WILL BE MORE THAN PLEASED TO DISCUSS YOUR MORTGAGE REQUIREMENTS NOW OR IN THE FUTURE

THIS BRANCH AT CLARE STREET IS PARTICULARLY STRUCTURED TO CATER FOR THE REQUIREMENTS OF BARRISTERS AND SOLICITORS

JUST TELEPHONE
01 6763663, OR 6762135
OR 087 633039
FOR AN IMMEDIATE QUOTE

PADRAIC HANNON
MANAGER

EBS
BUILDING SOCIETY