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- **The Jury on Trial: Reflections on *DPP v. Haugh***
- **Constitutional Implications of Plea Bargaining**
- **Mrs Nevin's Pictures - A European Gloss**

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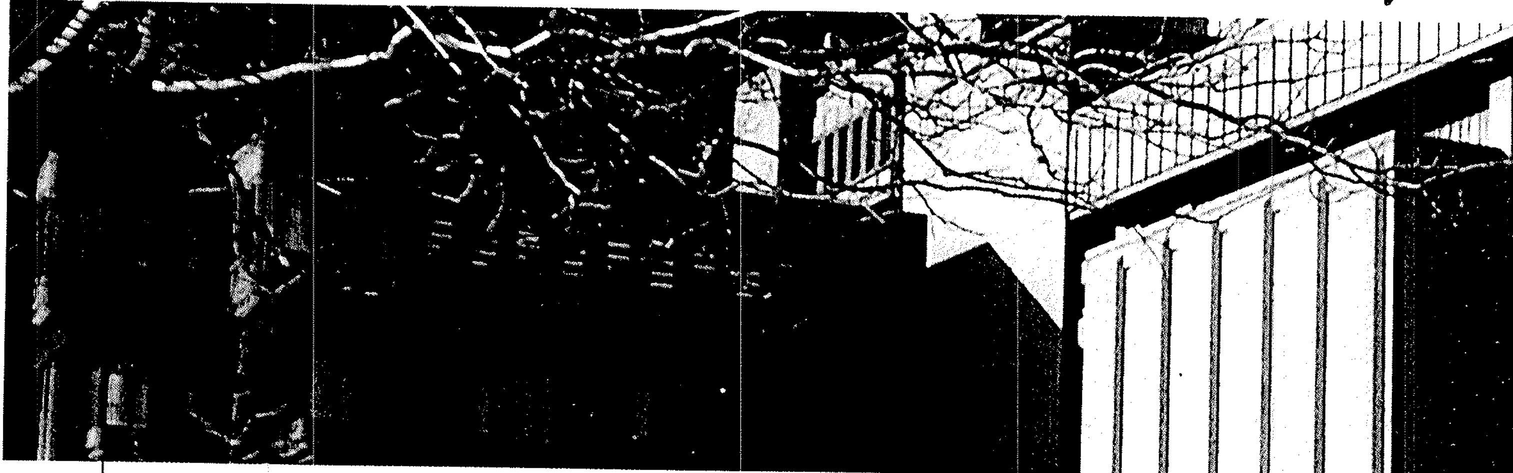

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Cian Ferriter is stepping down as editor of the Bar Review to concentrate on his practice at the Bar. He would like to thank the Editorial Board and all those who helped to make the Bar Review such a success this year, particularly Paul Gallagher SC, Jeanne McDonagh, Des Mulhere, Niamh Hyland and Adele Murphy, and the teams at Noted Marketing and Design, the Design Room and Vision Print.

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THE HUMAN RIGHTS COMMISSION

The Good Friday Agreement contained a commitment to the establishment of institutions in the Republic of Ireland and Northern Ireland which would be charged with monitoring and promoting human rights in each jurisdiction. The strategy envisaged in the Good Friday Agreement was that the establishment of the Human Rights Commissions would be followed by the formation of a Joint Committee of Representatives on Human Rights which would ultimately promote a Charter of Human Rights for the island as a whole.

The Northern Ireland Human Rights Commission was set up last year. The recent enactment of the Human Rights Commission Act, 2000 by the Oireachtas paves the way for the establishment of the Human Rights Commission in this jurisdiction. The Minister for Justice, Equality and Law Reform has also announced that the European Convention on Human Rights will be incorporated into Irish law this Autumn. It is expected that the first meeting of the Joint Committee of Representatives will take place in the next few months. Each of these developments is significant in its own right; taken together they represent a markedly-heightened level of political commitment to the protection of human rights in Ireland.

The Human Rights Commission Act gives the Human Rights Commission a wide-ranging set of powers which confer upon it the potential to be a vital and progressive force for human rights in this jurisdiction. The Commission's functions include the following:

- to keep the law and practice of the State under review as regards adequacy and effectiveness of human rights protection;
- to make recommendations on measures to strengthen, protect and uphold human rights in the State;
- to promote understanding and awareness of human rights, which can include provision of financial assistance for research and educational activities.

However, it is the powers of the Commission in relation to legal proceedings which may give it real teeth. The Act gives the Commission the power to conduct inquiries into human rights issues on its own initiative or on behalf of others. The Commission may apply to appear as *amicus curiae* in proceedings before the Superior Courts which concern human rights. Crucially, it can also institute legal proceedings on behalf of a person or class of persons in human rights matters. It can also institute proceedings impugning the constitutionality of legislation. The Commission thus has the power to act as a watchdog with bite on behalf of all the citizens of the State, and has the power to ensure redress is obtained for individuals or groups of individuals where human rights are being violated. The scope and effectiveness of these powers will only become apparent when the Commission is up and running. However, it is fair to say that the powers conferred upon the Commission give it the potential to be a body which governments will ignore at their peril.

If this legislative mandate is to realise its potential, it is vital that the Human Rights Commission be properly resourced, both in terms of finances and personnel. The Government has yet to indicate how appointments to the Human Rights Commission are to be filled; it is hoped that the positions will be publicly advertised to ensure that the Commission's membership reflects the experience and expertise available across the spectrum of the human rights community. Equally, it would be a cruel irony if a body which is designed to protect the rights of marginalised sectors in our community is hampered in its effectiveness by a lack of resources from the political centre.

The respect and protection afforded to human rights in a society, and the mechanisms by which such respect and protection are effected, are the measure of that society's worth. Ireland can go some way towards demonstrating its true worth as a society by ensuring that the Human Rights Commission will be able to effectively deploy in practice the extensive powers it has been granted on the paper of the Human Rights Commission Act. ●

THE JURY ON TRIAL: REFLECTIONS ON DPP -V- HAUGH

John L. O'Donnell BL offers some reflections on the role of the parties and the trial Judge in shaping the composition of the jury, in light of the recent decision of a Divisional High Court in **DPP v. Haugh.**

Introduction

That trial by jury is one of the most fundamental rights of a person accused of a crime is a standard-issue component of any defence lawyer's closing speech. The concept appears to go back to the time of the Magna Carta. Intrinsic, of course, to the process of trial by jury is the process of jury selection. The concept of trial by a jury of one's peers1 has been the subject of comment throughout the years. Shakespeare's Angelo (a brooding Giuliani-type presence attempting to clean up Vienna in *Measure for Measure*) acknowledges certain difficulties inherent in the process[2], observing:

> "I do not deny/ the jury passing on the prisoner's life, may, in the sworn twelve, have a thief or two/ guiltier than him they try."

The picture was further clouded (until all too recently) in this jurisdiction by the exclusion from service of women as well as those who did not meet certain minimum property owning requirements. It is still less than 50 years since in order to serve on a jury in England one was required to hold certain types of property, including "a house containing not less than 15 windows". The abolition of the exclusion of women and the property qualification as a result of the decision in *de Burca and Anderson v. Attorney General*[3] gave the legislature an opportunity to enact a new code replacing the Juries Act, 1927; this found its form in the Juries Act, 1976. But there has been precious little litigation or debate in this country concerning the role of the parties and the trial Judge in shaping the composition of a jury. The judgements of the Divisional Court in *DPP -v- Haugh*[4] provide a welcome opportunity for considered debate on this intriguing issue.

Pre-trial Publicity - What the Papers Say

The conduct of the hearings of the McCracken Tribunal aroused substantial public interest and received widespread coverage in the media. Of particular interest was the performance of the former Taoiseach Charles J. Haughey who eventually attended before the Tribunal in order to give evidence. The media coverage of this event was intense and at times frenzied. Even after he had concluded giving his evidence to the Tribunal commentators waxed lyrical (and not so lyrical) as to what steps should be taken in relation to the manner in which he had conducted himself during the Tribunal's investigation. Mr. Haughey was and is no stranger to controversy or adverse publicity, and in the words of Carney J:

> "The mention of his name is liable to engender strong feelings of support or, in larger measure of late, embittered condemnation."

In due course he was charged and returned for trial to the Dublin Circuit Criminal Court to face two charges of obstructing the McCracken Tribunal. Mr. Haughey elected for trial by jury. This trial had initially been fixed for the 21st March, 2000 but in December 1999 Mr. Haughey sought an adjournment of the trial until a reasonable period of time had elapsed after the report of the Moriarty Tribunal had been delivered to the Oireachtas. Put shortly, Mr. Haughey feared that the publicity generated by the McCracken and Moriarty Tribunals had so damaged his reputation and standing (and had so inflamed public passions against him) that there was a real risk that he would not receive a fair trial if his trial took place on the appointed date. Instead he argued what was referred to as "the fade factor" should be allowed to take effect; whereby his trial would be adjourned until the effect of this adverse publicity had abated.

Before the trial commenced, therefore, a number of fundamental constitutional rights appeared to be in issue: the right to trial by a jury unprejudiced by pre-trial publicity, the right of the media to freedom of expression and the right of the community to have crimes prosecuted.

"Obviously a trial Judge can give various warnings and directions both prior to the empanelment of a jury and during the trial as to both the manner in which the jury should conduct themselves and in particular the way in which they should disregard all matters other than the evidence before them. In *DPP -v- Haugh* however the issue raised (by the trial Judge himself) was whether he could introduce additional safeguards or procedures to copperfasten Mr. Haughey's right to trial by a jury unprejudiced by pre-trial publicity. Interestingly the Respondent trial Judge did not take the view that there was a real or serious risk that the accused would receive an unfair trial; if he had been of the view that there was such a risk the appropriate step would have been to prevent the trial from going ahead."

It is almost trite to state that an accused's right to a fair trial implicitly incorporates the requirement that the trial take place before a jury unprejudiced by pre-trial publicity. As stated in *D -v- Director of Public Prosecutions*[5] this means that an accused person is entitled to a jury which is capable of concluding a fair determination on the facts as presented at the trial. This right to a fair trial is, in the hierarchy of constitutional rights, superior to the community's right to prosecute. The interaction between the right to a fair trial and the right of freedom of expression (and indeed the right of the community to have crimes prosecuted) had been examined in *Irish Times Limited & Ors. -v- Ireland*[6], but there the perceived threat to the right to a fair trial was the nature, extent and manner in which the trial itself would be reported upon and covered generally by the media. A different issue arose in *DPP -v- Haugh*:

"A different issue arose in *DPP -v- Haugh*: was the exercise of the media's right to expression prior to the trial itself such that the right to a fair trial under normal procedures had been compromised and that therefore an alteration to those procedures was required in order to make an otherwise unfair trial fair?"

was the exercise of the media's right to expression prior to the trial itself such that the right to a fair trial under normal procedures had been compromised and that therefore an alteration to those procedures was required in order to make an otherwise unfair trial fair?

The impact of extensive and possibly prejudicial pre-trial media coverage on the fairness of an accused's trial had already been considered by the Supreme Court in D -v- DPP and Z -v- DPP7. In both of those cases the Supreme Court acknowledged that it would be naive in modern society to hope to empanel a jury which had not heard anything about a case of considerable notoriety. However the mere fact that an offence has received significant publicity does not of itself mean that the trial of that offence would be unfair. But it is only where a real risk of an unavoidable unfairness of trial is established that a trial of an accused will be halted. Finlay C.J. noted in Z -v- DPP 8:

> "In many instances, pre-trial publicity may be particularly damaging in regard to the question of a fair and unprejudiced trial; where a trial Judge is faced with the dilemma that, to remind the members of the jury at the commencement and during the course of the case of that publicity, and to point out that they must in its entirety ignore it in carrying out their deliberations which must be completely confined to the evidence sworn before them, he may be reminding jurors of a publicity or of a link between the publicity and the case they were trying of which they were unaware. No such danger exists in this case and I take the view that a trial Judge will be able in a specific way, and with considerable specific detail, to point out to a jury at the very commencement of the trial accepting the admitted fact that the trial must be associated with *Attorney General -v- X* [1992] 1 I.R. 1, that the controversy, media publicity, newspaper and magazine commentary arising from that case and from other issues of national policy which were in a sense raised by it are wholly irrelevant to the trial and must be completely put out of their minds. I am satisfied that a jury so fully and amply instructed will be able to bring to the trial of the case an impartial mind and will be particularly scrupulous about preventing themselves or indeed, in a sense preventing each other, from deciding the case based on any view arising from this type of general publicity or controversy."

Obviously a trial Judge can give various warnings and directions both prior to the empanelment of a jury and during the trial as to both the manner in which the jury should conduct themselves and in particular the way in which they should disregard all matters other than the evidence before them. In DPP -v- Haugh however the issue raised (by the trial Judge himself) was whether he could introduce additional safeguards or procedures to copperfasten Mr. Haughey's right to trial by a jury unprejudiced by pre-trial publicity. Interestingly the Respondent trial Judge did not take the view that there was a real or serious risk that the accused would receive an unfair trial; if he had been of the view that there was such a risk the appropriate step would have been to prevent the trial from going ahead. Of interest too is the fact that the

particular procedure (novel in this jurisdiction at any rate) proposed by him was proposed primarily to assist the DPP and the accused in the exercise of their challenges during the process of jury selection although neither of the parties had specifically requested assistance in this regard.

The Questionnaire - Are you now or have you ever been...?

The Defence legal team had sought an adjournment of Mr. Haughey's trial until a reasonable period of time had elapsed after the report of the Moriarty Tribunal had been delivered to the Oireachtas. This application was based on the submission that in the current climate of public opinion because of the publicity which had been generated by the McCracken and Moriarty Tribunals his reputation and standing had become so damaged and public passions so inflamed against him that there was a real risk that he would not receive a fair trial. The trial Judge refused the adjournment application (which was opposed by the prosecution) but did indicate that he would consider it appropriate in the instant case to give further consideration to what additional safeguards and procedures over and above the norm might be adopted in the selection of persons to serve on the jury, perhaps even questioning individual potential jury members before either party is expected to exercise the right of challenge whether with or without cause shown. He suggested the option of sending a questionnaire; while an opportunity was furnished to the parties to suggest draft questions, the only party which did so was the Defence legal team. The trial Judge subsequently produced a questionnaire and covering letter which he indicated he intended circulating to members of the jury panel. However he placed a seven day stay on his Order sending out the letter and questionnaire in order to allow the Director of Public Prosecutions to bring such proceedings as he might consider appropriate. The Applicant duly supplied by way of judicial review to the High Court for an Order of certiorari quashing the learned trial Judge's Order together with a declaration that the Juries Act, 1976 (and the Constitution and the common law of Ireland) do not permit the inquisition or interrogation of potential jurors in the manner contemplated by the learned trial Judge's Order.

"The questionnaire posed a total of fifteen questions. A number of the queries related to matters investigated by the McCracken Tribunal or the Moriarty Tribunal; other questions queried whether the effect of the publicity and media coverage could be put from the juror's mind so as to give Mr. Haughey a fair trial. While the questionnaire was relatively short (and certainly far pithier than the voluminous types of questionnaires sent out to potential jurors in the United States) it was undoubtedly unique in Irish law. The issue was: Was it within the lawful jurisdiction of the trial judge to direct such a questionnaire? Recognising the significance of the issue, a Divisional High Court heard and determined the Director of Public Prosecution's application by way of judicial review for the reliefs set out above."

The letter indicated that "a standard questionnaire" was being sent to each member of the jury panel so as to elicit information relevant towards challenges or towards such persons being excused from service in the jury selected for the trial of Mr. Haughey. It indicated that the Court had ruled that "special or extraordinary measures" should be taken in the selection of a jury empanelled for Mr. Haughey's trial because Mr. Haughey

> "...is such a well-known figure and because he has been the subject of such an amount of media interest and attention, particularly arising from the McCracken Tribunal and the Moriarty Tribunal."

The questionnaire posed a total of fifteen questions. A number of the queries related to matters investigated by the McCracken Tribunal or the Moriarty Tribunal; other questions queried whether the effect of the publicity and media coverage could be put from the juror's mind so as to give Mr. Haughey a fair trial. While the questionnaire was relatively short (and certainly far pithier than the voluminous types of questionnaires sent out to potential jurors in the United States)[9] it was undoubtedly unique in Irish law. The issue was: Was it within the lawful jurisdiction of the trial judge to direct such a questionnaire? Recognising the significance of the issue a Divisional High Court heard and determined the Director of Public Prosecution's application by way of judicial review for the reliefs set out above.

The critical section under consideration was Section 15(3) of the Juries Act, 1976. It provides:

> "Before the selection is begun the Judge shall warn the jurors present that they must not serve if they are ineligible or disqualified and as to the penalty under Section 36 for doing so; and he shall invite any person who knows that he is not qualified to serve or who is in doubt as to whether he is qualified or who may have an interest in or connection with the case or the parties to communicate the fact to the Judge (either orally or otherwise as the Judge may direct or authorise) if he is selected on the ballot."

Could this power to invite members of the jury panel to communicate certain facts to the Judge relating to a possible interest in or connection with the case be interpreted in such a way as to allow the trial Judge to formulate a questionnaire of the type under consideration? Carney J. was of the view that there was no express statutory power provided to the trial

Judge to devise a questionnaire in Section 15(3) or indeed in any other section of the Act. Nor in his view was there any implied power contained within the Act for the trial Judge to take the initiative in question. Carney J. also took the view that having regard to the decision of the Supreme Court in *The People -v- Lehman*[10] there was no inherent jurisdiction in the trial Judge to take the initiative he did. But the Supreme Court in that case indicated that it was "well settled that Counsel for an accused is not entitled to question a juror with a view to ascertaining whether a right of challenge should be exercised". Despite the notoriety attaching to Mr. Haughey and the offences alleged against him, Carney J. saw no reason why a special set of rules should be devised for him which would have no application to any other case in the future. Not alone would this be offensive to the constitutional imperative that all citizens should be equal before the law, but it would also open the door to similar arguments for other "special" procedural rules being applied in other "special" cases. Carney J envisaged the possibility of a notorious gangland figure facing trial before the ordinary Court who could seek to have a similar questionnaire issued; to receive such a questionnaire in such a case would in the view of Carney J *"strike terror into the jury panel"*. Whether receipt of such a questionnaire would cause any additional apprehension to a juror available for selection to the trial of such a notorious criminal may be open to debate, though it is certainly unlikely to ease his mind in relation to the task ahead.

Laffoy J was also of the view that there was no express or implied power contained within the Act which would enable a trial Judge to take such an initiative. She took the view that Section 15(3) only allowed for a very limited departure from the general rule that the business of selecting a jury for a particular trial is to be conducted viva voce in open Court. Clearly the advance issuing of a written questionnaire to be filled in by jurors before coming to Court would be a breach of that principle. It was also Laffoy J.'s view (following *Lehman*) that neither of the parties to a criminal trial can engage in "exploratory questioning" of a potential juror; indeed it is clear from *The People (AG) -v- Singer*[11] that to do so "on the hazard" would amount to an abuse of the process of the Court". The trial Judge was obliged to ensure that fair procedures which would result in a jury unaffected by pre-trial publicity. Laffoy J. quoted from the judgement of Hamilton P. (as he then was) in *Z -v- DPP*[12]:

> "Where an obstacle to a fair trial is encountered, the responsibility cast on a trial Judge to avoid unfairness particularly to the accused is heavy and burdensome but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and determine the issues save where there is a real risk of the likelihood of an unfair trial. The responsibility is discharged by controlling the procedures of the trial, by adjournments or other interlocutory orders, by rulings on the presumption of innocence, onus of proof, the admissibility of evidence and specially by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer. More than usual care however is called for in the empanelling of the jury and in the conduct of a trial in cases of this nature."

There appears to be no doubt but that the trial Judge was motivated simply and solely by a desire to secure a fair trial for Mr. Haughey and to obtain a jury for this purpose who would be competent, impartial and representative. O'Donovan J's judgement expressly acknowledges the trial Judge's motivation in this regard. However O'Donovan J poses a number of penetrating questions in the course of this judgement. He observed that if the Respondent trial Judge was not satisfied that there presently existed a real or serious risk that Mr. Haughey would not receive an unfair trial, what was the purpose of the additional safeguards or procedures proposed (other than on a "to be sure to be sure" basis which was hardly a good reason for departing from the procedure)? In addition he noted that Section 15(3) of the Act by requiring the trial Judge to warn jurors that they must serve if they are ineligible or disqualified and by inviting them to communicate if they have an interest or connection with the case thereby protects an accused person from a potentially prejudiced juror. Obviously a dishonest potential juror who deliberately fails to disclose circumstances pertaining to himself which might cast doubts on his impartiality constitutes a potential risk to the fairness of the trial - but such a dishonest potential juror is as likely to be dishonest when replying to a questionnaire as in the face of the Court, so what extra "protection" could the issuing of a questionnaire provide to an accused person in this context? Intriguingly, O'Donovan J was of the view that it was more likely that there would be an honest response from potential jurors assembled in open Court than from potential jurors who have time to consider the implications of a questionnaire and perhaps discuss those implications with relatives or friends; potential jurors in responding to such a questionnaire might tailor their replies depending on whether or not they would wish to sit on a jury whereas those who would not wish to do jury service would furnish replies which were calculated to provoke a challenge to their service and vice versa.

All three Judges had no difficulty in intervening by way of

"The judgments of the divisional Court in *DPP -v- Haugh* do make a number of matters clear. The trial Judge cannot vary the procedures applicable to a trial simply because of the notoriety of the accused or the offence of which he is charged. Instead the trial Judge must ensure that fair procedures are observed by giving strict warnings in respect of the obligations of potential jurors and also in the course of the trial giving appropriate warnings and making appropriate rulings as he sees fit. Neither the parties nor the trial Judge is permitted to engage in "exploratory questioning" (which includes issuing a questionnaire) in order to discover whether or not any of them have a potential interest in or connection with the case which might be inappropriate. So it seems we will be spared the lengthy pre-trial voir dire scrutiny of individual jurors so beloved of American trial lawyers."

judicial review to set aside the Respondent trial judge's ruling even though it was clearly an interlocutory ruling in relation to a criminal trial, having regard to the precedent which the use of the questionnaire would set for future trials.

The Decision

The judgements of the divisional Court in *DPP -v- Haugh* do make a number of matters clear. The trial Judge cannot vary the procedures applicable to a trial simply because of the notoriety of the accused or the offence of which he is charged. Instead the trial Judge must ensure that fair procedures are observed by giving strict warnings in respect of the obligations of potential jurors and also in the course of the trial giving appropriate warnings and making appropriate rulings as he sees fit. Neither the parties nor the trial Judge is permitted to engage in "exploratory questioning" (which includes issuing a questionnaire) in order to discover whether or not any of them have a potential interest in or connection with the case which might be inappropriate. So it seems we will be spared the lengthy pre-trial *voir dire* scrutiny of individual jurors so beloved of American trial lawyers. While obviously either party may challenge a juror before the administration of the oath for "cause shown" Section 21(3) of the Juries Act requires that such a cause be shown immediately upon the challenge being made. The difficulties in utilising the "cause shown" challenge are highlighted as a result of the judgements in *DPP -v- Haugh;* it is clear that even questioning as to potential conflict of interest or possible bias of a juror is not permitted. Given that the only information at present supplied to the parties relating to each juror is his or her name, address and occupation, the circumstances in which either party could immediately show cause for a challenge to a juror must be limited. For example, to show that a potential juror for a bank robbery trial is or was a bank manager would not of itself be sufficient to constitute cause shown (though it might well be a factor which the juror himself might consider in deciding whether or not he had an "interest" in the trial in question).

"Quotas have also been considered in the United Kingdom, where the Royal Commission of Criminal Justice recommended that offences with racial dimensions should have a quota of jurors from the same ethnic group as the defendant. Should Ireland's increasingly multi-racial society consider similar changes, in cases involving Travellers for example? It is unlikely there would be any great enthusiasm for such alterations here, and in any case there is no firm evidence that quotas of this sort produce fairer or more impartial juries."

Other Issues

The Special Criminal Court

It seems reasonable to conclude that the right to trial by jury is more firmly entrenched than ever as a fundamental constitutional right of any person facing trial. However, in the case of scheduled offences and offences where the Attorney General certifies that the ordinary Courts are inadequate to secure the effect of administration of justice and the preservation of public peace and order in relation to the trial of a person of a non-scheduled offence this right is abrogated, the trial of such offences taking place instead before the Special Criminal Court.[13]. It is obviously tempting to see this procedure as a variation of the normal procedures afforded to a person undergoing trial for a criminal "offence (and thereby arguably analogous to the variation in procedures suggested by the respondent trial judge in *DPP v.Haugh*). Of course this process is expressly provided for by statute, and its constitutional validity has been upheld by the Supreme Court on numerous occasions. In any event the circumstances in which unscheduled offences are transferred to the Special Criminal Court tend as a general rule to relate more to an apprehension that juries might be intimidated or put in fear rather than an apprehension that press coverage of charges and the accused prior to the trial make a fair trial by jury impossible.

Post Trial Publicity - Effect On Retrial

In highlighting the decision of the Court of Criminal Appeal in *The People -v- Lehman, DPP -v- Haugh* implicitly suggests an answer to the vexed question: how can an impartial jury be found to retry a person previously convicted of a notorious crime whose conviction in the first trial may have been accompanied by extensive publicity? It is difficult not to think of the lurid and intense publicity which poured forth after the conviction of Catherine Nevin for the murder of her husband. The decision of *The People -v- Lehman* is however of some assistance. Lehman had been found guilty in the Central Criminal Court on the charge of murdering his wife but his conviction had been set aside by the Court of Criminal Appeal

"In highlighting the decision of the Court of Criminal Appeal in The *People -v- Lehman, DPP -v- Haugh* implicitly suggests an answer to the vexed question: how can an impartial jury be found to retry a person previously convicted of a notorious crime whose conviction in the first trial may have been accompanied by extensive publicity?"

on the grounds that certain questions had been put to the accused on cross-examination which were irrelevant and tended to prejudice him. Before the retrial commenced Counsel for the accused sought to question each juror before he was sworn as to whether he had read newspaper reports of the proceedings in the Court of Criminal Appeal with reference to the questions asked of the accused in cross-examination at the previous trial. The trial Judge refused to allow Counsel for the accused to question the jurors in this manner and the Court of Criminal Appeal upheld his ruling in this regard. Publicity post-conviction may be qualitatively different but in essence the same issue arises on a retrial: is there a real and serious risk that the accused will not get a fair retrial?

Representativeness

There are various other issues surrounding the right to trial by jury which are more difficult to resolve. One of these is the issue of "representativeness": are the juries selected for the trial of criminal (or indeed civil) cases in Ireland truly representative of the citizenry of the State? The qualifications and exemptions from jury service together with the relative ease with which a person determined enough to seek to have himself excused will be able to accomplish this have led to growing concerns in this regard. There is perhaps a feeling which is all too common that "the jury system is important, but not for me". How this can be redressed is problematic; it may require a mixture of educational persuasion and stricter regulatory reinforcement[14], though whether even this carrot-and-stick approach would be sufficient is an open question. Quotas have also been considered in the United Kingdom, where the Royal Commission of Criminal Justice[15] recommended that offences with racial dimensions should have a quota of jurors from the same ethnic group as the defendant. Should Ireland's increasingly multi-racial society consider similar changes, in cases involving Travellers for example? It is unlikely there would be any great enthusiasm for such alterations here, and in any case there is no firm evidence that quotas of this sort produce fairer or more impartial juries.

Conclusions

Ultimately it is for each individual juror called upon to do jury service to "self assess his qualification, competence and impartiality"; as Laffoy J puts it. The scheme of the Juries Act, 1976 reposes trust in such a citizen and relies on his integrity. All of the judges in *DPP v. Haugh* seemed confident that jurors can and will act with the requisite degree of responsibility and conscientiousness having regard to their obligations[16]. So if an individual juror believes he will have no difficulty in giving "a true verdict in accordance with the evidence" (to paraphrase the oath taken by each juror) why should either of the parties or even the trial Judge be permitted to cast doubts on his ability to do so by badgering him with a questionnaire or other interrogations? There are of course complications associated with this process of "self-assessment"; a juror who commences the trial believing he will be able to give an impartial verdict may during the course of the evidence have second thoughts or doubts in this regard. Such difficulties of course can occur irrespective of whether or not jury vetting takes place at all, whether by questionnaire, voir dire or otherwise. As things stand however the integrity of the method of jury selection (and indeed the integrity of the citizenry called to do jury service to carry out the requisite self-examination of their own ability to try the issues before them in a fair and impartial manner) appears to have received a ringing endorsement in the judgements of the Divisional Court in *DPP -v- Haugh.* ●

1 Some commentators have suggested that the use of the phrase "jury of one's peers" in Clause 39 of the Magna Carta was a simple way for the earls and barons to ensure that they were not tried by a tribunal of their inferiors. See Holdsworth, *A History Of English Law* (Vol. 1, 7th edition Methuen & Co. & Sweet & Maxwell 1956) Whatever initial ambiguity there may have been, there is no doubt now but that an accused who pleads Not Guilty puts himself "upon God and the country, which ye are". See Sir Patrick Devlin, *Trial By Jury* (3rd edition, Stevens, 1966).

2 Act 2 Scene 1 line 173[1976] IR 38

4 Unreported, High Court, Carney J., Laffoy J., O'Donovan J., 12 May 2000

5 [1994] 2 IR 465

6 [1998] 1 IR 359

7 [1994] 2 IR 476

8 at page 508

9 A fictional example of which is described at length in John Grisham's novel *The Runaway Jury.*

10 [1947] IR 137

11 [1975] IR 408

12 At page 495

13 Offences Against The State Act,1939 (as amended)

14 As noted by the Victoria Law Reform Committee's Report on Jury Service in Victoria, December 1996

15 In 1993

16 The Common Law Commissioners of England in 1853 (quoted in Erle, The *Jury Laws and their Amendment,* 1882) observed that juries were often "unaccustomed to severe intellectual exercise or to protracted thought". The evidence in Ireland would appear to suggest otherwise.

ONSTITUTIONAL IMPLICATIONS OF PLEA BARGAINING

In the first of two articles dealing with the constitutional implications of plea bargaining, ***Peter Charleton SC and Paul Anthony McDermott BL*** *discuss judicial plea bargaining, a topic which has rarely been addressed seriously in academic or professional debate in this jurisdiction.*

Introduction

A 'plea bargain' is a practice whereby the accused foregoes his right to plead not guilty and demand a full trial and instead uses a right to bargain for a benefit.[1] This benefit is usually related to the charge or the sentence. In other words, plea bargaining means the accused's plea of guilty has been bargained for and some consideration has been received for it.[2] A plea bargain is a derogation from the concept that a judge can only decide a sentence after a hearing in an open court.

The term 'plea bargaining' is used to cover different things. It is sometimes used to describe discussions between the prosecution and an accused's legal advisers concerning the charges upon which an accused will be presented for trial and including indications that the accused is prepared to plead guilty to certain offences. This may be described as prosecutorial plea bargaining. The term also covers discussions in which the trial judge takes part. In such an arrangement counsel for the accused and the prosecution attend the judge in his private chambers and discuss an arrangement whereby, upon the judge indicating the probable sentence the accused, through his counsel, indicates that he will plead guilty. This may be described as judicial plea bargaining. The purpose of this article is to consider the constitutionality of introducing any form of plea bargaining into this jurisdiction.

A fit subject for discussion?

Plea bargaining is not something that tends to be talked about in this jurisdiction. It is submitted that the following description of the position that used to prevail in Canada could also be descriptive of the present position in Ireland:

> "Professor Graham Parker has observed that as recently as 1965 the whole subject was treated as a 'dirty little secret'. He suggests that most lawyers took the following pharisatic attitude: 'Yes, it probably exists but it is only practised by inferior criminal lawyers. We would rather not discuss it and then, perhaps, it will go away.' It has also been suggested that, until recently, plea bargaining in Canada could be likened to a mysterious ghost freely strolling the halls of our criminal courts, no one knowing exactly what it is or what force it carries, and no-one daring to ask for fear the answer might reveal that which we would rather leave unknown."[3]

The Current Position

The current position in this jurisdiction is that, in theory, neither form of plea bargaining occurs. Thus, Eamonn Barnes, Ireland's first Director of Public Prosecutions, has said of plea bargaining:

> "...if such a practice were to be introduced here, appropriate legislative sanction for it would be at least desirable, if not absolutely essential. Some time ago I discovered that the practice had begun to grow of prosecution counsel accompanying defence counsel to the judge's chamber for the purpose of expressing a view, if asked by the judge, on a sentence which might be imposed. As I felt that in the absence of legislation such a practice was thoroughly undesirable and should be stopped, I issued a circular instruction to that effect. Prosecution counsel are not authorised to enter into any bargain or agreement about sentence and as far as I know they do not now ever do so."[4]

However some commentators not in practice suspect that some form of unregulated plea bargaining has at some stage occured in this jurisdiction. One commentator writing on the so-called 'Sheedy affair' in the New Law Journal has described the Irish criminal justice system in the following terms:

> "Another ramshackle aspect of the system are the overcrowded lists. This has spawned virtual plea bargaining between counsel and judges on sentences to avoid trials and the reading of reports in advance of

hearing. All this is, of course, inconsistent with the administration of justice in public but it has to be tolerated to clear the lists."[5]

: this comment refers to the Sheedy case, it is inaccurate. 'here is nothing to suggest that solicitors and counsel for the efence or prosecution acted in any way improperly in that ase. In so far as the comment raises the spectre of unregulated lea bargaining it is worthwhile using it as a spur to a more etached discussion. The practice of the law is important, but ɔ too is the theory on which the law is based. If we are to xamine to what extent plea bargaining could be permitted nd, if it exists, to what extent it could be lawful, then we need ɔ look at the underlying theory.

"Whatever the merits of plea bargaining generally, it is beyond the boundary of any known rules that it should ever occur in the privacy of the judge's chambers."

UDICIAL PLEA BARGAINING[6]

'lea bargaining in private

Vhatever the merits of plea bargaining generally, it is beyond he boundary of any known rules that it should ever occur in he privacy of the judge's chambers. The idea that justice hould be administered in public is not a new one. Bentham ›bserved:

> "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial. Under the auspices of publicity, the cause in the court of law, and the appeal to the court of public opinion, are going on at the same time ... It is through publicity alone that justice becomes the mother of security."[7]

\rticle 38 of the Irish Constitution is based on a similar oundation and requires that justice should be administered in ›ublic. If there is to be any exception a post-1937 law is equired to regulate and authorise the administration of justice n private. It is submitted that the propriety of any liscussion as to sentencing, either prior to a plea of ;uilty, or prior to a sentence hearing in court, hould be considered in the light of the :onstitutional position. It is also to be noted that in *'he People (DPP) v Cox and Keeler*[8], Murphy J. :haracterised a meeting between counsel and the udge subsequent to which a plea of not guilty was :hanged to guilty as being "a most regrettable ·ituation". Murphy J. stated that:

> "The revolutionary changes introduced by s 2 of the Criminal Justice Act, 1993, may put an end to pre-trial discussions between the trial judge, counsel on behalf of the Director and counsel for the accused, or it may mean that any such discussions will take a different form. Certainly, counsel must in future recognise that any sentence imposed by a trial judge (or any sentence that it is anticipated that he will impose) will be subject to review by this court, so that any course of action taken by the accused must have regard to that legal reality."[9]

Other jurisdictions, without a constitutional imperative of a public trial, have also rejected the concept of judicial plea bargaining. In *Marshall*[10] the Supreme Court of Victoria warned that "Nothing would be more likely to undermine public confidence in the administration of justice than the knowledge that it was possible to 'negotiate' with the Court in private as to the sentence to be imposed."[11] The Supreme Court held that to allow the principle of a public hearing "to yield to an expedient for clearing the lists is to clear the lists at too high a price."[12] The Court continued:

> "We do not know that such discussions are common in Victoria but we are clearly of the opinion that any such discussions should not take place. Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the accused, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice."[13]

The European Convention on Human Rights must also be taken account of in this jurisdiction. The Minister for Justice, Equality and Law Reform has announced that he "is currently giving serious consideration" to incorporating the Convention into Irish law.[14] Unless otherwise determined by the Oireachtas, international human rights treaties are not part of domestic law and so cannot be directly relied upon by litigants.[15] This was established in *Re Ó Laighléis*[16] where Maguire C.J. stated:

> "The Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or obligations additional to those of domestic law."

However international human rights treaties may be used by judges as a guide to public policy, as an aid to statutory interpretation or as the basis of a plea of legitimate expectation. Article 6 of the European Convention on Human Rights

"The European Commission has long held that Article 6 does apply to the sentencing decision in a trial. The obligation for public report stems in part from 'the need to protect individuals from arbitrary judgment and, perhaps, to ensure that the belief of society in the criminal justice system is maintained.' There is nothing in the Article which could justify counsel traipsing into the judge and hammering out a deal that makes a subsequent court hearing somewhat less transparent as to its processes."

provides that in the determination of a criminal charge:

"Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The European Commission has long held that Article 6 does apply to the sentencing decision in a trial.[17] The obligation for public report stems in part from "the need to protect individuals from arbitrary judgment and, perhaps, to ensure that the belief of society in the criminal justice system is maintained."[18] There is nothing in the Article which could justify counsel traipsing into the judge and hammering out a deal that makes a subsequent court hearing somewhat less transparent as to its processes.

Article 9 of the Union Internationale des Avocats International Charter of Legal Defence Rights provides that judicial proceedings must be in public and "Every sentence passed in a criminal or civil matter must be made in public, except where the interests of minors are concerned or where the trial is concerned with matrimonial differences or the care of children."

England and Wales

In England and Wales the practice of judicial plea-bargaining is governed by the principles laid down by the Court of Appeal in Turner.[19] The Court held that there should be freedom of access between counsel and judge but that any discussion must be between judge and both counsel. The defendant's solicitor can be present if he chooses. The judge should never indicate the sentence he is minded to impose or that he would impose one sentence on a verdict of guilty and one sentence on a plea of guilty. Parker LCJ stated:

"The judge should ... never indicate the sentence which he is minded to impose. A statement that on a plea of guilty he would impose one sentence, but that on a conviction following a plea of not guilty he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential."[20]

The result is that nothing may transpire that could possibly be regarded as a bargain prior to a hearing or an inducement to the accused to forgo his right to a trial. The restrictions are in fact so severe as to render a trip to see the judge in private something of a waste of effort. Later case law reinforces this initial impression.

The exception to this is that the judge can indicate that whatever course the defence adopts, the sentence will or will not take a particular from, e.g. imprisonment or fine. This enables a defendant who knows that he faces imprisonment if convicted to determine that he should plead guilty in order to obtain a reduction in his sentence. Parker LCJ stated:

"...it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g. a probation order or a fine or a custodial sentence."[21]

In *Winterflood*[22] the Court of Appeal held that, where possible, any discussions should take place in the court room, in the absence of the jury if necessary, with a note made of the proceedings. Roskill LJ stated:

"...it is undesirable, unless absolutely necessary, for private discussions to take place between judge and counsel during the trial, although what happened here was done with the best of intentions and produced in the result a shortening of the trial."[23]

In its most recent consideration of the matter the Court of Appeal has indicated that it is invariably inappropriate for counsel to approach a judge seeking an indication as to the length of sentence he was minded to impose, and that it was all the more undesirable where the basis of the approach was that the defendant might be prepared to plead guilty in the light of the indication; *Ryan*[24]. The Court also held that where an indication of the likely sentence is conveyed to the defendant, it is binding not only on the judge who gave it, but also on any other judge by whom the defendant is sentenced.

A Crown Court study conducted for the Royal Commission on Criminal Justice found that over 85% of prosecution and defence barristers and 67% of judges thought that the *Turner* rules should be reformed to permit more realistic discussions of plea and sentence.[25] The Royal Commission itself recommended that judges should be able to indicate to defence counsel the highest sentence they would impose in response to a guilty plea at the point at which the discussion was taking place.[26] Professor O'Malley has suggested that:

"Most critics of the Turner approach do ... concede that there may be relevant but sensitive issues, such as the fact that the accused is suffering from a terminal illness, which would be more appropriately brought to the judge's attention in chambers rather than in open court."[27]

One issue that can arise here is Garda co-operation after capture. If the accused gives leads to, for example, his source of drug dealing then his statements in that regard will be protected from disclosure because of the threat to his life.[28] Co-operation in detecting crime is a major factor in mitigation of sentence. Yet to mention that co-operation in open court is to invite retribution. The only way around this problem is to leave such facts to the good sense of a probation report. The fact that such reports are not for publication gives one room for manoeuvre as to what may be contained in them at the express request of an accused. It also makes one wonder that a secret element continues to exist in the public process of sentencing and as to whether that in itself is constitutionally justifiable.

Australia

In *Marshall*[29] the Supreme Court of Victoria indicated, following a full review of the then existing authorities, that the practice of asking a trial judge in open court as to what the appropriate sentence would be on a plea of guilty, was wrong. The Full Court (Young CJ, McInerney and McGarvie JJ) stated as follows:

"It has been said that an accused person needs to have (perhaps, is entitled to have) as much information before him as possible when he makes the decision between pleading guilty and pleading not guilty and that where it is possible to obtain for him information as to the likely sentence to be incurred there is no reason why he should not be given that information and indeed positive reasons why he should be. What we have already said in the course of this judgment will show why we regard such an argument as specious and why an accused cannot be entitled to such information from the court. It is the task and responsibility of an accused's legal advisers to advise him as to the likely sentence. That responsibility cannot be transferred to the court and it is not legitimate to attempt to do so.

"In its most recent consideration of the matter the Court of Appeal has indicated that it is invariably inappropriate for counsel to approach a judge seeking an indication as to the length of sentence he was minded to impose, and that it was all the more undesirable where the basis of the approach was that the defendant might be prepared to plead guilty in the light of the indication"

We now turn to explain why we do not find it necessary to discuss the English cases in detail and why in particular we do not propose to consider the rules laid down in *R v Turner* [1970] 2 QB 321; [1970] 2 All ER 281. The reason is simply that there is a very important difference between the procedure and administration of the criminal law in England and Victoria. In Victoria the Crown has a right of appeal against a sentence imposed if the Attorney-General considers that a different sentence should have been passed and is satisfied that an appeal should be brought in the public interest: Crimes Act, s 567A. No such right exists in England. Thus, if a judge were asked before arraignment to give an indication of the sentence likely to be imposed, the Crown, might by its silence give the impression of being content with the indication and yet appeal as soon as the indicated sentence was imposed. In our opinion such a practice would tend to weaken public confidence in the administration of justice. The prosecutor before a sentencing judge in accordance with the long tradition of the law invariably refrains from expressing an opinion as to the sentence to be passed ... The prosecutor should certainly assist the court by reference to relevant statutes, but we would, with the greatest respect, doubt whether the prosecutor's duty extends to assisting the court to avoid appellable error if that means to urge the court not to impose a sentence less than a specified sentence: see *R v Tait* (1979) 24 ALR 473 at p 477.[30]

s submitted the above remarks accord with the Irish law in ; area since the passing of the Criminal Justice Act 1993, ich allows for appeals against unduly lenient sentences. On wider issue as to whether such an appeal, if stymied by nce, in fact requires the prosecution to state, as in the ited States, a view that the circumstances call for at least X .rs, we express no view.

ınada

›st Canadian decisions, despite the influence of US law, have ›recated the giving of advance indications of sentence. In *bien*[31] the Ontario Court of Appeal (MacKinnon ACJO, ırtin, Lacourciere JJ.A.) indicated as follows:

"With great deference to a very experienced and able trial judge, I am of the view that it is not advisable for a judge to take any active part in discussions as to sentence before a plea has been taken, nor to encourage indirectly a plea of guilty by indicating what his sentence will be. It was apparent in the instant case that the sentence was going to be the same whether the respondent changed his plea or not, and there was no suggestion or implication as far as the trial judge was concerned that the sentence would be lighter if the respondent changed his plea to guilty. A trial judge can only determine what a just sentence should be after he has heard all of the relevant evidence in open court on that subject and listened to the submissions of counsel."

In Roy[32] the Ontario Court of Appeal (Brook, Arnup and Howland JJ.A.) went so far as to hold that a trial judge, sitting without a jury, would lose the appearance of objectivity by initiating a discussion as to sentence in the middle of a trial. In that case the trial judge interupted the trial and indicated that he wished to give the accused some idea as to "what range of sentence he may be faced with, it is only fair to him too". The Ontario Court of Appeal commented:

"A judge conducting a trial without the intervention of a jury is of course the tryer of fact and determines the question of guilt or innocence. In my opinion he cannot initiate such a discussion after entering upon the trial and hearing evidence and still preserve the appearance of impartiality and being of an open mind, which qualities are so essential to a fair trial and the meaning of the presumption of innocence. The fact that he initiates such a discussion and sends counsel to the accused with talk of pleas of guilty and terms of sentence could reasonably result in apprehension by the accused that the judge presiding at his trial had reached some conclusion about the case. It does not hurt to repeat again that justice must appear to be done. This is not limited simply to what is seen from the floor of the court-room or by the public, but includes what transpired here. It is also vital that justice must appear to be done, to the accused man in particular. In these circumstances we think the trial lacked this quality and therefore it cannot stand."

One of the problems that judicial plea bargaining can lead to is illustrated by the decision of the Ontario Court of Appeal in *Rajaeefard*.[33] The accused was charged with assaulting his wife. He was represented by a student from a legal aid clinic. The trial judge told the student in the courthouse hallway that on a plea the accused could expect to get a suspended sentence and probation but if convicted after a trial, the judge would impose a sentence of ten to fifteen days in jail. The accused pleaded guilty but later submitted that the plea was not voluntary. The Ontario Court of Appeal quoted the following passage from

the Martin Report on resolution discussions:

> "The Committee is of the opinion that a judge presiding at a pre-hearing conference should not be involved in plea-bargaining in the sense of bartering to determine the sentence, or pressuring any counsel to change their position. The presiding judge may, however, assist in resolving the issue of sentence by expressing an opinion as to whether a proposed sentence is too high, too low or within an appropriate range."[34]

On the facts of the case the Court concluded that the judge's conduct improperly pressurised the accused into pleading guilty and that his plea of guilty was not freely and voluntarily given. The Canadian Sentencing Commission has argued that:

> "The basic concern with active judicial participation in plea bargaining is the erosion of a judge's role as an objective, non-partisan arbitrator. One rationale for involving the judge in the negotiation process is that it would enhance the intelligence of the guilty plea by informing the defendant of the anticipated sentence prior to the entry of the plea. However ... the actual effect of such intervention could have the opposite effect. This research suggests that because the judge is an authoritative, dominating figure in the process ... the court's intervention could effectively coerce the accused into accepting the agreement and pleading guilty."[35]

Arguments against judicial plea bargaining

It had been stated that judicial plea bargaining "...is so clearly unjustifiable and a distortion of the criminal law process that nothing more need be said about it."[36] It is submitted that judicial plea bargaining is undesirable for at least the following reasons:

(i) It is not uncommon for a judge to take a view of the offence and of the offender after he has heard the plea which is more adverse to him than the view initially formed upon a reading of the papers. Walker and Padfield have warned:

> "One danger with this approach is that the judge is being asked to speak with inadequate information, particularly when a PSR has not yet been prepared. Of even greater concern, such a process may lead to a presumption of guilt. Any move from the court room to the judge's chambers smacks of secrecy and administrative convenience, and a loss of due process safeguards".[37]

(ii) If a judge is asked to give a prior indication of sentence he is likely to feel inhibited from subsequently passing a more severe sentence. If he succumbs to this inhibition, he would fail to pass the appropriate sentence. However if he does pass a sentence more severe than he had previously indicated the accused would have a justifiable feeling of injustice.

(iii)If the accused thought that the sentence as indicated by the judge was unacceptable the arraignment "would have to be postponed or the trial would have to proceed in an incorrect atmosphere."[38]

(iv)The accused may misunderstand what is being indicated by the judge and it might be difficult for an appeal court to discover if the accused was genuinely the victim of a misunderstanding.

(v) The accused may feel pressurised into pleading guilty. Ferguson and Roberts have argued:

> "As a final argument against express judicial plea bargaining, it could develop that an accused would find it too difficult to reject a judicially offered bargain out of an apprehension that if he did reject it the judge would be annoyed and would not conduct a fair trial or would meet out a harsher sentence. While this could well be a false concern, if it is conceivable that an accused person would react in this way, it is an argument against judicial plea bargaining that cannot be ignored."[39]

These objections apply equally where the judicial plea bargaining occurs in chambers as when it occurs in open court.

Another problem

Judicial plea bargaining raises another serious problem. Suppose someone is charged with drink driving causing death. The grieving relatives are in court waiting for the trial to begin. A likely sentence is agreed in chambers and the defendant pleads guilty. The trial judge now has two options. He can admit in open court that a deal has been done and simply announce the sentence without hearing any evidence. The alternative option is for the judge to say nothing and to permit the sentence hearing to proceed as normal. The family listening to the evidence will be under the impression that the judge is making up his mind as he listens to the evidence. The judge may even try to bolster that impression by asking questions of the witnesses and nodding or frowning at the answers. In any event it is not easy to describe this as anything other than difficult to justify should the relatives later learn of the earlier hearing.

Conclusion

Law is executed through the court system in a panoply clad in majesty. The judge comes into a large court room with the public and the press present, with the accused in his appointed place and counsel dressed in their appropriate clothing for court. Everything that happens within that context is transparent and is easily subject to the fundamental right of a democratic society to criticise one of its own processes of government. In contrast, judicial plea bargaining, if it ever takes place, is subject to no safeguard save the honesty and integrity of those who may choose to participate in it. The presumption of innocence is something which is not to be regarded as a political shibboleth. It is the constitutional basis of the manner in which the system of law is administered in Ireland. Lawyers are supposed to believe in the ideology behind the law, as an expression of the desire to seek justice, apart from being also required to glibly state certain rules. They are there for the benefit of the community and not simply as an aid in legal argument. One must, fundamentally, consider whether any form of plea bargaining could possibly assist in the administration of justice in the context of the presumption that the accused is innocent. Let us take a situation where a person is in fact innocent, but has the weight of what one practitioner refers to in closing speeches to juries as "an unfortunate concatenation of events" against him or a number of people who choose to tell lies against him. It is very tempting in such circumstances for a person presumed to be innocent,

notwithstanding the existence of these as yet unproven facts, to take a practical and pragmatic view in relation to the decision he is faced with as to whether to plead guilty or not. If the result will be a non-custodial sentence the temptation becomes even larger especially if that indication comes from the trial judge himself. The existence of the possibility of such a system simply cannot assist in the administration of justice. There are two consequences which result from a criminal conviction. The first is the imposition of a sentence. A suspended sentence is, in itself, a sentence although it is served out in the community, as indeed is the sentence of a person convicted of murder and sentenced to life imprisonment who was later released on licence after perhaps an average of between seven and twelve years of actual incarceration.[40] The second consequence is the imposition of the stigma on a person's character that they have committed a criminal offence. This lasts forever in our jurisdiction and carries with it the important consequences of difficulty in obtaining employment and difficulty in obtaining visas to travel or to travel and work in foreign countries. The imposition of either sanction should be possible only after those fundamental rules which assist in the just disposal of a case have been rigorously complied with. We simply think, after having examined the relevant authorities, that judicial plea bargaining is not constitutionally permissible. ●

1. An earlier version of this article was prepared for the National Prosecutors Conference summoned by the DPP, Mr James Hamilton in May 2000. The views expressed are of the authors above.
2. Ferguson and Roberts "*Plea Bargaining: Directions for Canadian Reform*" (1974) 52 Can Bar Rev 497 at 501
3. Ferguson and Roberts "*Plea Bargaining: Directions for Canadian Reform*" (1974) 52 Can Bar Rev 497 at 500.
4. See Barnes "*Reflections on the Past 24 Years as Director of Public Prosecutions*" (1999) 4 Bar Review 389 at 393
5. Lysaght "*A Tale of Two Judges*" (1999) 149 NLJ 666.
6. See generally Ferguson "*The Role of the Judge in Plea Bargaining*" (1973) 15 Crim LQ 26
7. Jeremy Bentham 'Draft of a Code for the Organisation of the Judicial Establishment in France' Works IV p 316; cited in Cheney & Others *Criminal Justice and the Human Rights Act 1998* (1999) para 5.6. Judges react in different ways to publicity. One example is the trial of British nanny Louise Woodward in Massachusetts. Ms. Woodward was convicted of second degree murder but on appeal a conviction of manslaughter was substituted. The appeal prompted daily news coverage of the scene outside the courtroom where different groups protested claiming that the original verdict was correct or was unjust. Such was the media and public frenzy that Judge Zobel first published his decision on the appeal on the internet.
8. Unreported, Court of Criminal Appeal, October 12, 1998.
9. Section 2 of the Criminal Justice Act 1993 provides: 'If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.'
10. [1981] VR 725
11. [1981] VR 725 at 733
12. [1981] VR 725 at 734
13. [1981] VR 725 at 732
14. The Irish Times, February 29, 2000.
15. See generally Lester "The Challenge of Bangalore: Making Human Rights A Practical Reality" [1999] E.H.R.L.R. 273; Hunt *Using Human Rights Law in English Courts* (1997); Hogan "The Belfast Agreement and the Future Incorporation of the European Convention on Human Rights in the Republic of Ireland" (1999) 4 Bar Review 205.
16. [1960] I.R. 93 at 125. See also *Norris v The Attorney General* [1984] I.R. 36 at 67 where O'Higgins C.J. said "Neither the Convention on Human Rights nor the decision of the European Court of Human Rights in *Dudgeon v United Kingdom* is in any way relevant to the question which we have to consider in this case." Similarly in *O'B v S* [1984] I.R. 316 at 338 Walsh J. stated that a case of the E.Ct.H.R. to which he had been referred "can have no bearing on the question of whether any provision of the Act of 1965 is invalid having regard to the provisions of the Constitution."
17. See the Commission Report in Application No. 4623/70 (1972) cited in Cheney & Othrs *Criminal Justice and the Human Rights Act 1998* (1999) para 5.6.
18. Cheney & Others *Criminal Justice and the Human Rights Act 1998* (1999) para 5.6.
19. (1970) 54 Cr App R 352
20. (1970) 54 Cr App R 352 at 360-361
21. (1970) 54 Cr App R 352 at 361
22. (1979) 68 Cr App R 291
23. (1979) 68 Cr App R 291 at 293
24. Court of Appeal, Unreported 30 April, 1999. The Times, April 30, 1999.
25. Zander and Henderson Crown Court Study. Prepared for the Royal Commission on Criminal Justice (London, 1993).
26. Report of the Royal Commission on Criminal Justice Cmd 2336 (London, 1993) pp 110-114
27. Sentencing Law and Practice (Dublin, 2000) para 10.45
28. *Ward v Special Criminal Court* [1998] 2 ILRM 493
29. [1981] VR 725. See also *Tocknell*, New South Wales Supreme Court, Unreported, 28 May, 1998
30. [1981] VR 725 at 735
31. 1982) 67 CCC (2d) 341.
32. (1976) 32 CCC (2d) 97
33. (1996) 104 CCC (3d) 225
34. Martin Report, Recommendation 73.
35. "*Sentencing Reform: A Canadian Approach*", Report of The Canadian Sentencing Commission, 1987 at pp 424-425.
36. Ferguson and Roberts "*Plea Bargaining: Directions for Canadian Reform*" (1974) 52 Can Bar Rev 497 at 500.
37. Sentencing: Theory, Law and Practice (2nd ed, London, 1996) p 11.
38. *Marshall* [1981] VR 725 at 734
39. "*Plea Bargaining: Directions for Canadian Reform*" (1974) 52 Can Bar Rev 497 at 558
40. See Charleton, McDermott & Bolger, *Criminal Law* (1999) para 7.112

EXAMINERSHIPS AFTER THE COMPANIES (AMENDMENT) (NO. 2) ACT, 1999

Declan Murphy BL, Lecturer in Law, U.C.D., outlines the provisions of the Companies (Amendment) (No. 2) Act, 1999 which introduced some significant reforms to the system of company examinership.

1. Introduction

The process of examinership of companies, instituted by the Companies (Amendment) Act 1990 has undergone a profound change following the enactment of Part II of the Companies (Amendment) (No.2) Act of 1999. For ease these Acts will be referred to throughout as the 1990 Amendment Act and the 1999 Act respectively. Part II of the 1999 Act was brought into effect as from 1 February 2000.[1]

In the 1999 Act, the Government has implemented, albeit belatedly, most of the recommendations contained in the First Report of the Company Law Review Group[2]

The Company Law Review Group ("the CLRG") had noted that the salvage of ailing companies brought about through examinership involved costs which had to be borne by creditors of the ailing company (whose rights were impaired), those trading with the company (whose contracts might be repudiated), and those competing with the company (who would have to face competition from a revitalised company whose debts had been, in part, compulsorily written down). It, however, thought that public interest might justify these inconveniences.

At para 2.8 the CLRG gave the following less than ringing endorsement of examinership:

> "We experienced some difficulty in formulating a precise statement of the public interest justification for the examinership process with its associated impairment of the rights and interests of creditors and competitors. Yet, within the Group, and indeed in many of the submissions made to us, there is a belief that examinership, albeit in a modified form, is a useful mechanism to be available in Irish company law."

As the CLRG noted at para 2.12 :

> "[m]any of the submissions made to us criticised the existing legislation arguing, in particular, that it does not give sufficient focus to viable companies and that it does not give sufficient protections to the interests of creditors. We accept the thrust of these particular criticisms and many of our recommendations relate to these issues."

This comment provides a useful means for reviewing the changes wrought by the 1999 Act.

Under the heading of focus on viable companies, the 1999 Act has raised the threshold condition for the appointment of an examiner, and now requires the majority of the investigative work to have been done before the inception of the process. These changes are reviewed in Section 2 below.

Under the heading of increased protection to creditors, the following might be noted:

i. the protection period has been shortened from three months to 70 days
ii. banks may now set off credit and debit balances of a company in examinership
iii. expenses incurred by the examiner and certified by him will no longer be given priority over the holders of fixed charges
iv. shareholder consent is no longer necessary for a scheme to be approved by the court.

These and other changes are considered in Section 3 below.

The 1999 Act, also contains many technical amendments relating to the conduct of the examinership of which the treatment of guarantees and leases might particularly be noted. These are considered in Section 4.

2. Appointment of an Examiner

The new test

As interpreted by the Supreme Court in *Re Atlantic Magnetics Ltd*[3]an examiner could be appointed if some worthwhile purpose would be served by his appointment, there being some *identifiable* prospect of the survival of the company and the whole or any part of its undertaking as a going concern. This test was further refined and explained by Keane J (as he then was) in the High Court in *Re Butlers Engineering Ltd*[4] where it was made clear that the petitioners should adduce evidence supporting the contention that there was such an identifiable possibility.

Reporting in 1994, before the handing down of *Re Butlers Engineering Ltd,* the CLRG recommended that the court should have to be satisfied that there is a *reasonable* prospect of the survival of the company and the whole or part of its undertaking.

Section 5(b) of the 1999 Act, gives effect to this recommendation by amending section 2(2) of the 1990 Amendment Act.

It remains to be seen how significant a change has been brought about. Some guidance might, however, be found inUK cases on the appointment of Administrators under the Insolvency Act, 1986 which apply a very similar test, viz., whether there is a reasonable or real prospect of survival[5]

The Independent Accountant's Report

Under the 1990 Amendment Act as enacted, it was not necessary to advance detailed information about the company and about the proposed plan to save it when petitioning the court for protection; although, as noted above, courts were reluctant to accept bald and unsupported assertions. It was originally the first function of the examiner to investigate the company and to report to the Court within 21 days under section 15.

The 1999 Act abolishes the section 15 report, and instead requires that a petition now be accompanied by a report of an independent accountant which contains substantially the same information as would have been contained in the section 15 report.

Thus the independent accountant's report must contain information about the company and a statement of its affairs. It must state his opinion as to whether the company and the whole or any part of its undertaking has a reasonable prospect of survival, and whether the formulation, acceptance and confirmation of proposals for a compromise would offer such a reasonable prospect.

It must also detail how the company is to be funded during the protection period and it must state his recommendations as to which pre-petition liabilities should be paid[6].

The requirement that such a report accompany the petition serves to shorten the protection period, as this period may now be exclusively devoted to the negotiation and formulation of proposals for a scheme of arrangement. However, it also places a very great hurdle in the way of those seeking protection.

It has been quite frequently the case that court protection is sought only when a debenture holder (usually a bank) placed the company in receivership. In such circumstances a petition must be presented within three days, or the receiver's appointment will not be disturbed. Petitioners reacting to the appointment of a receiver must now brief an independent accountant and assist him in the preparation of the report within three days. This will be difficult where the petitioner is the company or its directors, and almost impossible where the petitioner is a creditor.

Section 9 of the 1999 act inserts a new section 3A into the 1990 Amendment Act, which allows for a period of interim protection when by virtue of exceptional circumstances outside the control of the petitioner, and which he could not reasonably have anticipated, the report of the independent accountant is not available.

However section 3A(3) provides:

> "For the avoidance of doubt, the fact that a receiver stands appointed to the whole or any part of the property or undertaking of the company at the time of the presentation of a petition ...shall not, in itself, constitute...exceptional circumstances outside the control of the petitioner."

This provision will make it almost impossible, in practical terms, for a company or its directors to seek interim protection where a receiver stands appointed. However, it is submitted that creditors who could not have anticipated the appointment of the receiver and who do not receive the full co-operation of the directors upon the appointment of a receiver can not be said to be relying on the appointment of the receiver *in itseslf* as the exceptional circumstance. Rather such a creditor would be relying on the absence of information about the company's affairs prior to the appointment and the lack of co-operation afterwards as exceptional circumstances which could not have been reasonably anticipated.[7]

Where interim protection is granted it lasts for no more than ten days unless the tenth day fall on a Saturday or a Sunday, in which case the protection will last until the following Monday. It is very important to note that there is no possibility of certifying expenses while the company is in interim protection.

If a report of the independent accountant is not submitted by the expiry of the interim protection period the company shall cease to be under the protection of the court.

If the petitioner is a creditor the directors may be required to co-operate in the preparation of the report.

Appointment of Examiners to Corporate Groups

Under section 4 of the 1990 Act the court may appoint an Examiner of one company to be an Examiner of a related company[8]. This power has frequently been used, and many of the most significant examinerships have related to large groups, e.g. the Goodman group and the Kentz group.

The test for the appointment of an examiner over the related company was potentially defective in that it allowed such an appointment to the related company even though it not be in the interests of the creditors of the related company. Section 4(2) provided as follows:

> "In deciding whether to make an order ...[i.e. to appoint an examiner to the related company], the court shall have regard to whether the making of the order would be likely to facilitate the survival of the company, or of the related company, or both, and the whole or any part of its or their undertaking as a going concern."

Read strictly, this *might* allow a court to subsume the interests of the related company (and its creditors) to those of the company to which it was related.

The 1999 Act, amending section 4, now requires that an appointment may only be made to the related company where the court is satisfied that there is a reasonable prospect of the survival of the related company and its undertaking as a going concern.

The protection of the separate interests of the creditors of the related company is further enhanced by section 24(4A) (as inserted by section 24(c) of the 1999 Act. This new subsection prohibits a court from confirming a scheme in relation to the related company "if the proposals would have the effect of impairing the interests of the creditors of the [related] company in such a manner as to favour the interests of the creditors or members of any company to which it is related...."

3. Increased Creditor Protection

Shortened Protection Period

The Examiner must report to the Court on the outcome of meetings to consider his proposals within 35 days of his appointment as against the 42 days originally allowed[9]

The length of the protection period has been considerably reduced, from three months to 70 days[10]; though there remain the possibility of extending this period under section 18(3)-(4)

As noted above this saving of time arises because the investigative work of the examiner, which could take up to 21 days, is now done prior to the presentation of the petition.

Bank Set-Off

Section 5(2)(h) of the 1990 Amendment Act (inserted by section section 181 of the Companies Act, 1990) prevented banks, building societies, TSB, ACC and ICC (amongst others) from setting off accounts of a company under the protection of Court.

The CLRG noted at para 2.34

> "This treats bank creditors differently from other types of creditors. It could also result in a bank which is not a net creditor of a company involuntarily becoming a significant creditor. In examining this issue we considered whether a restriction on set-off should be extended to all creditors but were not in favour of such a measure. We also took account of views expressed by the Central Bank which indicated that the restriction has created difficulties in implementing internationally accepted practices of allowing offsets for capital adequacy purposes."

Section 14(b)(ii) of the 1999 Act deletes section 5(2)(h) of the 1990 Amendment Act and restores the right of set-off as between accounts.

Priority of Certified Liabilities

Under section 10(2) of the 1990 Amendment Act, an Examiner may certify liabilities incurred by him which are necessary to the survival of the company and its undertaking as a going concern. These certified liabilities are treated as expenses of the Examinership and are accorded priority in any compromise or in any subsequent receivership or winding-up by section 29(3) of the 1990 Amendment Act. Under section 29 this priority over-rode both fixed and floating chargeholders.

This power of certification, with its associated priority, gave Examiners easy access to funding (often considerable) during the protection period. One of the central complaints of debenture holders (and in particular bankers) in relation to the whole institution of examinership was that the power of certification very seriously undermined the value of fixed security.

The Company Law Review CLRG was concerned that "[a]ny doubt over the value of security, in particular that of a fixed security, impacts on the availability and cost of credit to Irish business.[11]" Accordingly, it recommended that certified expenses (but not an examiner's remuneration and costs) lose their priority in relation to fixed charges. This is given effect to by section 28 of the 1999 Act which amends section 29 of the 1990 Amendment Act.

Abolition of Requirement of Shareholder Consent to Scheme

The desired object of the process of examinership is that the Court confirms a scheme of arrangement which will enable the company and the whole or part of its undertaking to survive.

Under section 24(4)(a) of the 1990 Amendment Act a Court would only have jurisdiction to confirm the proposals where, inter alia, at least one class of members whose interests would be impaired by the implementation of the proposals accepted them.

To many it seemed strange that members would be given such a right of veto over proposals when almost invariably the company would be insolvent, and where the creditors would be asked to forego some of their claims[12]. The consequence of such a veto would ordinarily be that shareholders would have to offered some continued participation in the company beyond what their equity might strictly allow, in order to gain their support.

Section 24 of the 1999 Act amends section 24 of the 1990 Amendment Act by eliminating the requirement that at least one class of members need consent. Members who feel aggrieved by proposals may always object under section 24 (4)(c) on the grounds that the proposals are not fair and equitable to them as a class, or that the proposals are unfairly prejudicial to them individually.

Payment of pre-petition debts

Equality between creditors is an important goal in any insolvency procedure, and the 1999 Act re-enforces this equality.

If pre-petition debts are to be repaid in examinership section 5A of the 1990 Amendment act (as inserted by section 15 of the 1999 Act) requires that the independent accountant's report have contained a recommendation that they be discharged in whole or in part.

The court, as might be expected, retains a discretion to allow payment of pre-petition debts where it is satisfied that failure so to pay would reduce the prospects of survival of the company and its undertaking[13].

4. Technical Amendments

Treatment of Guarantees and Leases

Under the 1990 Amendment Act, while a company was under the protection of court guarantees could not be enforced[14]. Despite criticisms of this provision from lenders the CLRG recommended that this position continue.

The 1990 Amendment Act did not however address the issue of how guarantees were to be treated in any scheme of arrangement. In *Re Selukwe Ltd*[15], the High Court modified a scheme which would have released directors from liability and in *Re Wogans (Drogheda) Ltd*[16], the High Court refused to confirm a scheme because it failed to deal with the contingent rights of subrogation or indemnity which the guarantors would have against the company.

This issue was looked at by the CLRG at para 2.33 of its First Report:

> "...[W]e recommend that the guarantor should not have a right of subrogation in respect of the impairment. It follows that the guarantor is the person most immediately concerned with the impact of the compromise or scheme of arrangement. It would be reasonable, we believe, where creditors intend subsequently to enforce the guarantee to require them to assign to the guarantor any rights to vote on a scheme of arrangement that are associated with a particular debt."

Section 25 of the 1999 Act implements this recommendation by inserting a new section (Section 25A) into the 1990 Amendment Act.

Under section 25A(1)(c)(i) the creditor must give the guarantor notice of the meeting to consider the examiner's proposals. Should the creditor fail to serve the notice within the required period, *the guarantee may not be enforced.*[17]

Lessors[18] are now protected by new Section 25B of the 1990 Amendment Act (introduced by section 26 of the 1999 Act) which prevents a scheme from modifying the amount of rent payable in future or exempting a company from the consequences of failing to comply with covenants after the scheme comes into effect.

Treatment of Pre-petition contracts

Examiners are now prohibited from repudiating pre-petition contracts. However, this prohibition does not prevent them from disregarding negative pledge clauses in pre-petition contracts where they serve a notice under section 7 (5B) of the 1990 Amendment Act[19] informing the counter-party to the contract that enforcement of the negative pledge would be prejudicial to the survival of the company and the whole or part of its undertaking as a going concern.

Provisions relating to Receivers

The 1999 Act amends the law relating to the payment of preferential debts by a receiver who is appointed and subsequently displaced by an examiner[20]. Section 6A of the 1990 Amendment Act (as inserted by section 17 of the 1999 Act) allows the receiver to apply to court to disapply the preferential scheme under section 98 of the 1963 Act.

Financial Institutions and the Central Bank

The 1999 Act alters the regime in relation to bodies regulated by the Central Bank. While this article is too short to detail these changes one important drafting defect of the Act should be noted.

In relation to types of companies mentioned in the Second Schedule to the 1999 Act, the petitioner *shall* notify the Central Bank before presenting the petition.

Para 7 of the Second Schedule refers to any company "that is engaged in the business of accepting deposits or other repayable funds or granting credits for its own account." While the Oireachtas obviously intended that para 7 would tie in with the definition of banking business contained in the Central Bank Acts, this is not the effect.

The essence of banking business is the acceptance of repayable funds *from the public* AND (not *or* as in para 7) the granting of credits on its own account. The failure to mention the public nature of the enterprise together with the use of "or" instead of "and" means that most businesses should fall under para 7.

It is submitted however that the courts should not invalidate the presentation of a petition merely because the Central Bank has not been notified in accordance with section 3(2)(c)(ii) in such a case.

5. Conclusion

The 1999 Act adds further to the complexity of company legislation and makes the longstanding argument for consolidation urgent and compelling. Without the benefit of privately published codes company law would be all but unworkable.

"The amendments to the 1990 Amendment Act should reduce the number of companies which, having enjoyed Court protection, ultimately finisl by being wound-up. While this is to be welcomed, the necessary consequence will undoubtedly be further to reduce the proportion of ailing firms tc which examiners will be appointed."

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That said, examinership will continue to play a vital role in the restructuring of corporate groups. This has been the area in which the mechanism has been highly successful in the last decade, and the alterations to the procedure should not undermine that role.

Examinership is by and large unsuited to the rescue of small companies insofar as it is expensive and relatively cumbersome. The costs involved in appointing an examiner to small firms generally outweigh the benefits to the creditors. While receiverships work well in this context, the Oireachtas might give some thought to encouraging voluntary arrangements.

"However, the Oireachtas should be complimented on reforming insolvency law at a time of unequalled prosperity when interest and insolvency rates have rarely been lower. With interest rates now beginning to edge up once more one feels that the new Act will be put to the test sooner rather than later."

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1 cf Companies (Amendment)(No. 2) Act, 1999 Commencement Order, 1999, S.I. 406 of 1999. As yet there have been no amendments to Ord. 75B of the R.S.C. which deals with examinerships.

2 December 1994

3 [1993] 2 IR 561

4 Unreported 1st. March 1996. This decision was followed in *Re Westport Property Construction Company Ltd.*, (unreported, High Court, Budd J. , 13th. September 1996), *Re Advanced Technology Centre Ltd* (unreported High Court, Kelly J., 13th. March 1997) and *Re Cavan Crystal Glass Ltd* (unreported High Court, Kelly J. 27th. March 1998 and unreported Supreme Court 2nd. April 1998). It should be noted that in *Cavan Crystal Glass* the Supreme Court, though endorsing Keane J.'s refinement of the *Atlantic Magnetics* test reached a different conclusion to the judge below.

5 cf.*Re Primlaks* (U.K.) Ltd [1989] BCLC 734, *Re Harris Simons Construction Ltd* [1989] BCLC 202, *Re SCL Building Services Ltd.* [1990] BCLC 98, *Re Rowbotham Baxter* [1990] BCLC 397.

6. The report should also contain an opinion as to whether any deficiency is properly accounted for and whether the facts warrant further enquiry as regards any potential fraudulent or reckless trading.

7. The CLRG, in the 1994 Report, had not specifically recommended a provision in such uncompromising terms as new section 3A(3). It had recommended that interim protection be available in exceptional circumstance which could not reasonably have been anticipated. At para 2.17 it said as follows:

"We would, for example, consider it improbable that the appointment of a receiver would be cited as a reason why a pre-petition report could not be prepared. In the normal course there is likely to be a period of communication between the company and the debenture holder before the receiver is appointed. In these circumstances, we would consider that the appointment of the receiver might be reasonably anticipated by a company or its directors."

8. The concept of related company is defined by section 4(5) of the 1990 Amendment Act

9. cf. section 18(2) of the 1990 Amendment Act as amended by section 22(b) of the 1999 Act.

10. cf. section 5(1) of the 1990 Amendment Act as substituted by section 14(a) of the 1999 Act.

11. cf. Para 2.31 of the First Report of the CLRG

12. cf. Para 2.42 of the First Report of the CLRG.

13. cf. section 5A(2) of the 1990 Act

14. cf. section 5(2)(f) of the 1990 Act

15. Unreported, High Court, Costello J. , 20th December 1991

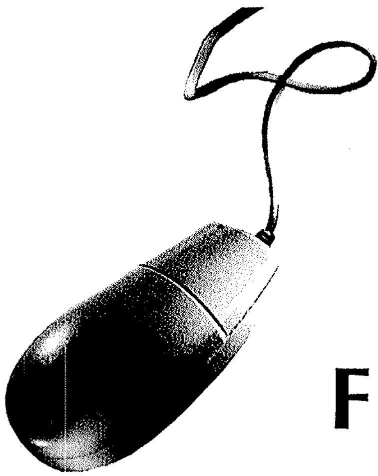
16. Unreported, High Court, Costello J., 7th May 1992.

17. Section 25A(1)(c)(iv) allows the creditor to enforce the guarantee notwithstanding his failure to give appropriate notice, if a scheme is not adopted or does not come into operation *and* the creditor obtains the leave of court.

18. Section 25B not only protects lessors of and, but also lessors or hirers of other property whose value is substantial (i.e. so-called "big-ticket" leasing creditors)

19. as inserted by section 18 of the 1999 Act.

20. Section 6A also allows a receiver to apply to Court where an examiner may yet be appointed.



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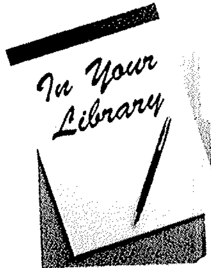

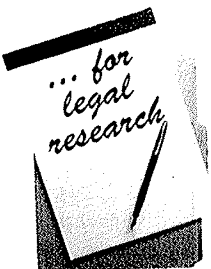

Irish Case Law

Irish Reports from 1950; Judgements of Court of Criminal Appeal (Frewen) 1950-83. UNREPORTED CASES from July 1986.

Northern Ireland Case Law

Northern Ireland Law Reports from 1945; UNREPORTED CASES from 1984.

English Case Law

The All England Law Reports from 1936; reported cases from 35 other leading law reports; Tax cases from 1875; UNREPORTED CASES from 1980.

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Reported and UNREPORTED decisions of the Court of Justice since 1954; European Commercial cases from 1978; European Human Rights Reports from 1960; European legislation (Celex).

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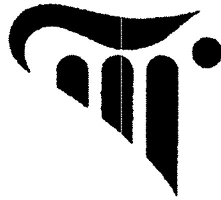

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Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 5, Issue 9

A directory of legislation, articles and written judgments received in the Law Library from 15th May 2000 to 14th June 2000.
Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

Student A v. Dublin Secondary School
High Court: **Kearns J.**
25/11/1999

School; discipline; interlocutory injunction; two plaintiffs were final year students in defendant secondary school; defendant school a private primary and secondary school; headmaster had expelled first and second plaintiffs from defendant school for using cannabis in the toilets of a licensed premises in the course of a private party; schoolís code of conduct provided that use of illicit drugs would result in expulsion and that there was 'zero tolerance to drugs'; first plaintiff had attended defendant school from age of four; second plaintiff had enrolled as student of defendant school two months before expulsion; accepted that second plaintiff had never seen code of conduct; subsequent to expulsion both sets of parents had met separately with headmaster in an effort to persuade him to reverse or vary his decision; headmaster had declined to do so and had informed parents of their right of appeal to defendant school's board of governors; board of governors considered written representations including apologies and expressions of remorse; no meeting between either parents or students and the board before confirmation of the expulsion by the board; interlocutory injunction sought to restrain expulsion of plaintiffs; plaintiffs claiming that constitutional right to education has been interfered with, that fair procedures were not observed and that the penalty imposed was disproportionate to the severity of the offence and that defendant school failed to take into account extenuating circumstances, including honest admissions by plaintiffs; whether school had authority to exercise such authority over plaintiffs; whether rules of natural justice have been breached.
Held: Matter adjourned to permit parents and plaintiffs to address board of governors before possible imposition of serious sanctions; gravity of particular offence and its implication for safety and welfare of other pupils are matters which go to nature of penalty imposed; immediate suspension may be necessary to maintain discipline within a school, particularly if pupils are placed in physical danger; defendant school entitled to take an extremely severe line in relation to drug use, even of soft drugs; ëzero tolerancei approach not unreasonable; nevertheless, decision to expel, particularly a final year pupil, can be regarded as quasi-judicial; courts reluctant to interfere with autonomy of school in relation to discipline; students or parents ought not to have been precluded from making representations and submissions prior to ultimate sanction of expulsion; ex post facto submissions to headmaster insufficient; lawyers should not be present on either side before the board of governors.

Articles

The legal challenge to the Irish government in the 1790's
Gaynor, Tony
XXXIV(1999) IJ 300

Mary Robinson's presidency: relations with the government
Gwynn Morgan, David
XXXIV(1999) IJ 256

Statutory Instruments

Appointment of special adviser (no.2) order, 2000
SI 100/2000

Marine and natural resources (delegation of ministerial functions) order, 2000
SI 45/2000

Animals

Statutory Instrument

Importation of Dogs and Cats (amendment) order, 2000
SI 56/2000

Arbitration

Telenor Invest A.S. v. I.I.U. Nominees Ltd.
High Court: **O'Sullivan J.**
20/07/1999

Arbitration; interlocutory injunction; interpretation of shareholding agreement between the plaintiff and the first named defendant; plaintiff seeks interlocutory injunction directing the first named defendant to take steps to cause its nominees on the Board of Directors to resign or, alternatively, to restrain them from acting pending the determination of the dispute; first named defendant seeks a stay on all proceedings by the plaintiff on the ground that the dispute between them is the subject of an arbitration agreement; whether the shareholding agreement is an agreement within the meaning of s.2, Arbitration Act, 1954, and s.2, Arbitration Act, 1980; whether application of s.22(1)(h), Arbitration Act, 1954 has been suspended in relation to what are termed íforeign agreementsî by necessary implication of the enactment of the Arbitration Act, 1980; whether the criteria for the granting of an interlocutory injunction have been satisfied.
Held: Interlocutory injunction granted to plaintiff pending the determination of the dispute relating to the interpretation of the agreement; first named defendant is entitled to a stay of plaintiffis proceedings in so far as they relate to that dispute.

Children

Article

Provision of childcare facilities by an employer
Mee & Purcell
13 (2000) ITR 141

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Working Group to Review the Child Abuse Guidelines
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N176.C5

Commercial Law

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

Commercial; statutory interpretation; plaintiff appeals order and judgment of High Court; plaintiff advanced loan to defendant secured by charge on defendantis property; defendant defaulted on repayment of loan; plaintiff commenced proceedings for an order for possession of the charged property pursuant to s.62(7), Registration of Title Act, 1964; order refused by High Court on ground that plaintiff had no licence to carry on business of lending money in this jurisdiction contrary to the provisions of the Moneylenders Acts, 1900 and 1933; whether plaintiff comes within exceptions to requirements of the Moneylenders Acts, 1900 and 1933 as provided by s.136, Central Bank Act, 1989 and Article 2(1)(a)(iii), Moneylenders Act, 1900 (s.6(E)) Order, 1993 (SI No. 167 of 1993).
Held: Appeal allowed and matter remitted to High Court to determine whether plaintiff comes within the provisions of Article 2(1)(a)(iii) of the 1993 Order.

Articles

Security for costs in relation to corporate plaintiffs
Delany, Hilary
2000 ILTR 58

The anatomy of a security document
Prentice, William
2000 CLP 83

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Company Law

O'Gorman v. Kelleher
High Court: Carroll J. (ex tempore)
19/07/1999

Company law; injunction; removal of directors; specific performance; plaintiffs and defendants were directors of a business; all were also shareholders therein; plaintiffs and defendants fell out and two actions were generated; first, a section 205 petition relating to the oppression of minorities and, second, a plenary summons seeking specific performance of an alleged agreement by first defendant to sell all his shareholding to plaintiffs together with ancillary injunctive relief; allegations made both by plaintiffs and defendants; all allegations contested; whether plaintiffs entitled to an injunction restraining first defendant from exercising voting rights attaching to such shares as were said to be the subject of the alleged agreement; whether existence of a pre-emptive clause in the articles of association weighed against the granting of the injunction; whether application for an injunction defeated by delay; whether balance of convenience favoured the grant of the injunction.
Held: Interlocutory injunction granted, with liberty to apply, restraining first defendant from exercising voting rights in respect of disputed shares contrary to interests of plaintiffs.

Articles

Appropriating the assets of failed companies: tracing in equity into a diminished fund
McGrath, Michael
5(7) 2000 BR 393

Security for costs in relation to corporate plaintiffs
Delany, Hilary
2000 ILTR 58

The residual nature of the minority shareholder remedy
Glennon, Lisa
2000 CLP 14

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Constitutional Law

Riordan v. An Taoiseach
Supreme Court: Hamilton C.J., Denham J., **Barrington J**., Keane J., Murphy J.
20/05/1999

On 20th May, 1998, appellant had brought application before High Court seeking an injunction restraining the holding of a referendum on 19th Amendment to the Constitution; application had been dismissed; referendum had been held and people had approved proposal contained in 19th Amendment of the Constitution Bill, 1998; President had duly signed amending Act and had promulgated it as a law; amendment had thereupon become part of the Constitution; appellant had then served notice of appeal against High Court order dismissing application for injunction; whether the constitutional amendment, though approved by the people, was still an Act of the Oireachtas and therefore caught by the provisions of Article 15.4 of the Constitution; whether there had been compliance with the provisions of Article 46 of the Constitution in purporting to amend the Constitution; whether it is constitutionally permissible for the people to consent to the amendment of the Constitution subject to a condition later to be fulfilled.
Held: Appeal dismissed.

Consumer Law

Statutory Instrument

Consumer credit act, 1995 (section 2) regulations, 2000
SI 113/2000

Contract

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Contracts of employment
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Copyright, Patents & Designs

Article

Copyright and related rights bill, 1999 and the music industry
O'Dwyer, Colm
5(7) 2000 BR 350

Criminal Law

Director of Public Prosecutions v. Lafferty
Court of Criminal Appeal: **Keane C.J.**, Kelly J., O'Higgins J.
22/02/2000

Dangerous driving causing death; circumstantial evidence; burden on prosecution in respect of offence of dangerous driving causing death; whether trial judge should have withdrawn case from jury; whether when the speed at which someone is driving is in issue, evidence of the speed at which that person was travelling a few moments earlier is admissible as circumstantial evidence; s.53 Road Traffic Act, 1961 as amended by s.61 Road Traffic Act, 1968 and by s.49 Road Traffic Act, 1994.
Held: Burden on prosecution is to establish that at the time and place specified in the indictment the applicant was driving the car in a manner that was dangerous to the public and caused the deaths of the victims; evidence of speed shortly before accident admissible circumstantial evidence; trial judge correct not to withdraw case from jury; application for leave to appeal dismissed.

P. v. D.P.P.
High Court: **Geoghegan J.**
05/10/1999

Criminal; delay; judicial review; prohibition; injunction; alleged offences of gross indecency and indecent assault perpetrated upon a minor on one occasion in 1977; complainant first reported the alleged offences in 1995, some 18 years later; whether relief could be granted against respondent; whether prejudice to applicant could be presumed; whether alleged defence of alibi prejudiced by lapse of time; whether delay by the Gardaí justified preventing the case from proceeding. Held: Prohibition only available against inferior tribunals and no judge of the Circuit Court joined as a party to the proceedings; application could be treated as one for an injunction against respondent; dominance of alleged perpetrator over victim not essential for delay to be reasonable; mere fact that now more difficult to substantiate an alibi does not justify discontinuation of prosecution; where there has been a long period of time between alleged offences and date of complaint, of paramount importance that there should be no blameworthy conduct on part of gardaí; injunction granted.

People (D.P.P.) v. Sheedy
Court of Criminal Appeal: **Denham J.**, Geoghegan J., McGuinness J.
15/10/1999

Criminal law; appeal against sentence; applicant had pleaded guilty to the offences of dangerous driving causing death and driving a mechanically propelled vehicle in a public place while exceeding the lawful blood-alcohol quotient; applicant had been imprisoned for a period of 4 years on the former count, to be reviewed after 2 years; applicant was also disqualified from holding a driving licence for 12 years; it had been ordered that the applicant be disqualified from holding a driving licence for a period of 1 year in respect of the latter count; matter had come on for review and Circuit Court had ordered that balance of custodial sentence, approximately 3 years, be suspended, subject to certain conditions; D.P.P. had successfully sought a judicial review of this review order; applicant had then faced the balance of a 4 year sentence *simpliciter;* applicant seeks leave to appeal against sentence imposed; whether sentence unduly severe; s.53 (2), Road Traffic Act, 1961, as amended by s. 51, Road Traffic Act, 1968; s.49 (7), Road Traffic Act, 1961, as inserted by s. 10, the Road Traffic Act, 1994.
Held: Application for leave to appeal treated as the appeal; this was not an appropriate case to sentence on the review date formula of sentencing; orders of sentence on their face stated that applicant was to serve 4 years in prison; evidence established that intention of trial judge was for applicant to serve 24 months in custody, which in the circumstances of the case was equivalent to a 3 year prison sentence; accordingly, orders of sentence did not accurately reflect trial judge's intention and should not be upheld; intent of trial judge that applicant serve 24 months in custody upheld; sentence accordingly varied to one of three years' imprisonment.

People (D.P.P.) v. Sheedy
Court of Criminal Appeal: **Denham J.**, Geoghegan J., McGuinness J.
21/12/1999

Order to vary; on 15th October, 1999, Court of Criminal Appeal had given judgment on an application for leave to appeal by the applicant against a sentence of four years; Court had upheld intent of trial judge that applicant serve 24 months in prison, which was equivalent to a 3 year prison sentence, i.e. 36 months; application to vary; it transpired that if applicant was actually to serve twenty four months in custody, then appropriate sentence was one of 34 months, 10 days.
Held: Order varied accordingly.

Articles

International mutual assistance
O'Reilly, Patrick F
5(7) 2000 BR 390

Murder, intention and the inference of intention
Stannard, John E
XXXIV(1999) IJ 202

Relational liability in criminal law
McAuley, Finbar
XXXIV(1999) IJ 100

The accomplice corroboration warning
McGrath, Declan
XXXIV(1999) IJ 170

The sex offenders bill, 2000
Bacik, Ivana
5(7) 2000 BR 387

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Sex offenders law, policy and practice
Bristol Jordans 2000
M544

Statutory Instrument

Bail Act, 1997 (commencement) order, 2000
SI 118/2000

Defence Forces

Kinlan v. Minister for Defence
High Court: **Ó'Caoimh J.**
24/02/2000

Hearing loss; requirement for hearing aid; assessment of damages; whether plaintiff required hearing aid.
Held: Plaintiff does not require hearing aid at present; plaintiff failed to demonstrate the necessary motivation to warrant being awarded the capital costs of hearing aids at present; appropriate capital figure awarded in respect of hearing aids required by plaintiff in ten years' time.

Education

D.P.P. v. Best
Supreme Court: **Denham J., Keane J., Murphy J., Lynch J., Barron J.**
27/07/1999
Home education; case stated; non-attendance of children of respondent at school; children educated at home by respondent; District Court prosecution pursuant to s.17(2), School Attendance Act, 1926; consultative case stated as to whether fact that legislature has not defined what constitutes suitable elementary education for purposes of s.18(2)(c), School Attendance Act, 1926 prevents district judge from convicting respondent; appeal from judgment of High Court; whether fact that district judges might form different views as to whether suitable elementary education was being provided is valid consideration; whether suitable elementary education constitutes education exceeding the constitutional standard of a certain minimum education, moral, intellectual and social; whether absence of Irish language from home education would, of itself, mean that constitutional standard of a certain minimum education had not been reached.
Held: Case stated answered in negative; appeal allowed.

Statutory Instruments

Education and Science (delegation of ministerial functions) order, 2000
SI 78/2000

Education and Science (delegation of ministerial functions) (No.2) order, 2000
SI 79/2000

Employment

Article

Provision of childcare facilities by an employer
Mee & Purcell
13 (2000) ITR 141

Regulation of part-time work
O'Mara, Ciaran A
2000 CLP 91

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Statutory Instruments

Employment regulation order (provender milling joint labour committee), 2000
SI 43/2000

Employment regulation order (contract cleaning (city and county of Dublin) joint labour committee), 2000
SI 84/2000

Entertainment

Article

Copyright and related rights bill, 1999 and the music industry
O'Dwyer, Colm
5(7) 2000 BR 350

Environmental Law

Murphy v. Wicklow County Council
Supreme Court: Hamilton C.J., **Denham J., Murphy J.,** Lynch J., Murray J.
02/12/1999
Environmental; planning; judicial review; glen established as nature reserve by establishment order (S.I. 178 of 1980); public road running through glen; nature reserve defined in establishment order as lands delineated in map other than any part thereof which formed part of a public road; respondent proposed to widen road; applicant sought order prohibiting respondents from carrying out works in nature reserve until statutory instrument modified; interpretation of statutory instrument; High Court gave judgment for respondent; appeal; whether statutory instrument to be amended in view of proposed road widening; whether statutory instrument fixed to original public road; whether the managerial role imposed upon the relevant Minister by the Wildlife Act, 1976 and the establishment order prevents the construction of the widened road through the glen until establishment order is amended; s.15, Wildlife Act, 1976.
Held: Appeal dismissed.

Ní Eilí v. Environmental Protection Agency
Supreme Court: Hamilton C.J., Denham J., Barrington J., Keane J., **Murphy J.**
30/07/1999

Environmental law; integrated pollution control licence; notice party (Roche Ireland Ltd.) had applied to the respondent for an integrated pollution control licence to install a vapour/liquid incinerator; as nature and scheme of proposed project lay within scope of EC (Environmental Impact Assessment) Regulations, 1989, those Regulations and the Local Government (Planning and Development) Regulations, 1994, required notice party to supply an environmental impact statement; following the giving of notice by

respondent of its Proposed Determination, an oral hearing was held at which numerous objections were received from various individuals and organisations; respondent determined to grant the licence, subject to conditions; applicant appeals against dismissal of judicial review application by High Court; whether decision of respondent to grant licence was unreasonable; whether a licence, if granted at all, should have been a licence under s. 83 of the Environmental Protection Agency Act, 1992; whether the respondent had acted unlawfully in granting the licence when notice party had not at that time submitted precise details of the incinerator proposed to be used; whether the respondent had breached its statutory duty to provide reasons for its decision to grant the licence.
Held: Appeal dismissed.

Equity & Trusts

Article

Appropriating the assets of failed companies: tracing in equity into a diminished fund
McGrath, Michael
5(7) 2000 BR 393

European Law

Articles

A discretionary jurisdiction for the European court of justice
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Extradition

Adams v. Director of Public Prosecutions
High Court: **Kelly J.**
12/04/2000

Extradition; judicial review; rule of specialty; service of proceedings outside jurisdiction; sovereign immunity; duty of Counsel in applications *ex parte;* applicant had been extradited to State in respect of sexual offences; because of the rule of specialty it would have been impossible to prosecute sexual offences unless appropriate waiver was forthcoming from relevant authority in requested state; third named respondent, Her Majesty's Secretary of State for the Home Department ('the Home Secretary), had issued a certificate of waiver in that regard; application *ex parte* had been made to High Court for leave to issue proceedings seeking to prohibit D.P.P. from continuing prosecution of sexual offences pending before Central Criminal Court and an order of *certiorari* quashing the District Judge's order returning applicant for trial; against third named respondent, orders of *certiorari* quashing certificate of waiver and leave to file an additional affidavit on the constitutional position of the third named respondent were sought; applicant had been granted leave and High Court had directed, *inter alia,* that service be effected upon the British Ambassador in Ireland or such other person authorised to accept service on behalf of the Home Secretary; application by Home Secretary to set aside High Court order and to dismiss the proceedings as against him; whether purported service at the British Embassy in Dublin was lawful; whether service could validly be effected at the Foreign and Commonwealth Office in London in circumstances where no order granting leave to serve outside the jurisdiction had either been sought or obtained; whether Home Secretary entitled to sovereign immunity; whether matter should be adjourned pending resolution by European Court of Human Rights of whether Member States of the Council of Europe can still rely on sovereign immunity; Extradition (Rule of Specialty and Re-Extradition for purposes of Part III of Extradition Act, 1965) Order, 1994; Order 11, Rules of the Superior Courts, 1986; Diplomatic Relations and Immunities Act, 1967; Vienna Convention on Diplomatic Relations, 1961.
Held: Application allowed; order of High Court granting leave to bring proceedings against Home Secretary set aside; order permitting service of judicial review proceedings upon British Ambassador in Ireland was in direct conflict with statutory provisions affording immunity to him from civil and administrative jurisdiction of the State; OO. 11 and 11a of the Rules of the Superior Courts, 1986, do not encompass judicial review proceedings; Court has no jurisdiction apart from that conferred by O. 11 to permit service of its process outside the State; Home Secretary entitled to rely on sovereign immunity in respect of certificate sought to be quashed; European Convention on Human Rights and Fundamental Freedoms is not part of Irish domestic law; by issuing certificate, Home Secretary did not thereby waive entitlement to sovereign immunity; remedy available to one against whom an ex parte order is made is to apply to Court to set it aside, not to appeal to the Supreme Court; application to set aside need not be heard by judge who made original order; on any application made ex parte, utmost good faith must be observed; this obligation extends to Counsel.

Attorney General v. Oldridge
High Court: **Kearns J.**
10/11/1999

Extradition; consultative case stated from District Court; respondent was alleged to have given false and fraudulent information and to have provided false assurances to certain banks that another would soon receive financing from a secret cartel which would then be applied in discharge of sums due from that other to the banks; respondent had had no part to play in

setting up of fraudulent scheme which had occurred before suggested involvement of respondent; whether essential requirements for a charge of conspiracy under Irish law could be said to exist insofar as respondent was concerned; S. 52, Courts (Supplemental Provisions) Act, 1961; Extradition Acts, 1965 - 1995.
Held: Facts did not disclose offence of conspiracy to defraud as understood in Irish law, insofar as respondent was concerned.

Myles v. Assistant Commissioner of an Garda Síochána
High Court: **Geoghegan J.**
13/10/1999

Extradition; applicant wanted in England on a charge of conspiracy to defraud; applicant's claim for release under section 50, Extradition Act, 1965, as amended; whether there was correspondence between allegations as set out in extradition warrant and any offence under Irish law; whether common law offence of conspiracy was carried over under the Constitution; whether delay rendered extradition unjust.
Held: Application refused.

Family Law

Southern Health Board v. An Bord Uchtála
Supreme Court: **Denham J.**, Barrington J., **Keane J.**, Murphy J., Lynch J.
11/06/1999
Family; adoption; abandonment of parental rights; applicant made fit persons order in respect of child; child given into care of foster parents; District Court made order returning child to parents, the notice parties; place of safety order made; second fit persons order made committing child into care of applicant; child given into foster care; foster parents applied to adopt child; respondent made declaration under s.2, Adoption Act, 1988 that if Court made order authorising adoption under s.3(1) of the 1988 Act it would make an adoption order in favour of foster parents; High Court made order authorising respondent to make adoption order in favour of foster parents; appeal; whether evidence was such that trial judge was entitled to exercise his discretion and determine that adoption was appropriate means by which to supply place of parents and was proper remedy; whether sufficient evidence to establish failure of duty by parents towards child; whether such failure will continue without interruption until child is eighteen years of age; whether sufficient evidence before trial judge upon which to reach conclusion that parents' failure constituted abandonment of parental rights with respect to child; Children Act, 1908.
Held: Appeal dismissed. Decision of High Court confirmed and order made authorising Adoption Board to make an adoption order in relation to child in favour of foster parents.

P.K. (otherwise C) v. T.K.
High Court: **Murphy J.**
14/04/2000

Divorce; domicile; applicant, an American citizen, had come to Dublin in 1959 and had completed her Master's degree in 1963; applicant's parents had lived in New York for at least 10 years prior to her birth; applicant's parents were still in New York at time of her return to get married and at time of her return to New York after her separation; applicant had returned to New York in 1963 with respondent, an Irish citizen, whom she married; parties returned from New York in 1963; between 1963 and 1971 parties had resided in Ireland; in 1972 parties and their three children, born in 1964, 1965 and 1969, had gone to the United States; respondent had returned with two of the children in 1974 while applicant had returned later that year; applicant averred that in 1977, she had reluctantly gone to New York to obtain employment, since marriage had broken down and she had no financial support; prior to her departure, in 1977, a deed of separation had been signed between the parties; respondent, as plaintiff, had instituted divorce proceedings in New York and a decree of divorce had been obtained without opposition in 1980; applicant was still living in New York at that time and had continued to maintain accommodation there since that time; whether applicant was domiciled in Ireland or in New York at material time; Family Law (Divorce) Act, 1996.
Held: The domicile of the applicant at the time of the 1980 divorce was that of New York State; applicant had either reverted to her domicile of origin or had chosen New York as her domicile of choice by maintaining her residence there for the past 22 years.

Fisheries

Statutory Instruments

Bass (restriction on sale) order, 2000
SI 128/2000

Bass fishing conservation bye-law no.769 of 2000
SI 769/2000

Blue whiting (prohibition on fishing) order, 2000
SI 86/2000

Cod (restriction on fishing) (no.2) order, 2000
SI 89/2000?

Cod (restriction on fishing) (no.3) order, 2000
SI 111/2000

Haddock (restriction on fishing) order, 2000
SI 87/2000?

Haddock (restriction on fishing) (no.2) order, 2000
SI 112/2000

Hake (restriction on fishing) (no.2) order, 2000
SI 91/2000

Monkfish (restriction on fishing) (no.4) order, 2000
SI 88/2000

Monkfish (restriction on fishing) (no.3) order, 2000
SI 90/2000

Freedom of Information

Statutory Instrument

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SI 115/2000

Health

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Housing

Article

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Connolly, James
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Injunctions

Criminal Assets Bureau v. McSweeney
High Court: **O'Sullivan J.**
11/04/2000

Interim mareva injunctions; proceedings had been commenced by plenary summons against defendant seeking in excess of £ 1.6 million in income tax plus interest thereon; defendant seeks an order setting aside an ex parte interim mareva injunction made against him and continued thereafter from time to time; whether substantive proceedings were required to be brought by way of summary summons; whether defendant's constitutional rights had been breached by continuing interim order for such a long period without having an opportunity to put his case forward in the course of an interlocutory motion; whether Irish Courts have jurisdiction to grant mareva injunctions in cases brought by the Revenue Commissioners or at all; Taxes Consolidation Act, 1997.
Held: Application refused. Substantive proceedings can be brought not only by summary summons but also by plenary summons; delay not such as to infringe defendant's constitutional rights; jurisdiction of High Court includes a jurisdiction where appropriate to grant a mareva injunction.

Dubsky v. Drogheda Port Co.
Supreme Court: **Hamilton C.J.,** Denham J., Keane J., Barron J., Murray J. (ex tempore)
17/11/1999

Injunction; environmental law; High Court had granted an injunction requiring defendant to remove spartina from the vicinity of Drogheda port and to carry out certain work to the satisfaction of Dúchas; defendant recognised that there was an obligation to provide compensatory feeding grounds for birds wintering in the vicinity; plaintiff had brought proceedings in the High Court, alleging that the work being carried out was unlikely to create an alternative feeding ground and, indeed, was damaging the area and preventing its use in the future as a feeding ground; High Court held that it could not go behind the view of Dúchas, who were experts in the field, and refused to interfere with the injunction; plaintiff appealed to Supreme Court; whether High Court had erred in law in failing to give due consideration to plaintiff's affidavit evidence and in relying on a letter exhibited in an affidavit sworn by an officer of Dúchas stating that the work was being carried out in accordance with the requirements of the injunction; whether question as to whether or not there was compliance with the order was a matter for determination by the High Court having heard all the evidence in connection with the matter; whether injunction could be varied by Court, relying only on affidavit evidence.
Held: Appeal allowed; order of High Court set aside; interlocutory injunction granted restraining defendant from carrying out any excavation or other work pending the hearing of the action; issues raised remitted to acting President of High Court for allocation of a judge to determine the matter; that judge to give directions as to whether matter should be heard on affidavit or orally.

International Law

Articles

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2000 ILTR 106

International mutual assistance
O'Reilly, Patrick F
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Rt Hon Lord Irvine of Lairg
XXXIV(1999) IJ 1

Retirement of Chief Justice Hamilton - chairman of the Superior Court Rules Committee
Marray, Eamon
2000 (2) P & P 15

Media

Article

Reporting the courts : the media's rights and responsibilities
Rt Hon Lord Irvine of Lairg
XXXIV(1999) IJ 1

Medical Law

Articles

Female genital mutilation - and Irish perspective
Lalor, Niamh
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Regulating artificial reproductive technologies
Colbert, Maria J
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SI 109/2000

Negligence

Article

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Dunne, Mark
5(7) 2000 BR 383

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Pensions

Article

Understanding pensions in a changing environment
Connolly, Jim
13 (2000) ITR 145

Planning

Dublin Corporation v. Arnold Lowe and Signways Holdings Limited
High Court: **Morris P.**
04/02/2000

Planning; unauthorised use; application under s.27, Local Government (Planning and Development) Act, 1976 as substituted by s.19(4)(g), Local Government (Planning and Development) Act, 1992; applicants seeking an order directing the repondents to discontinue the unauthorised use of the premises for advertisement purposes and directing them to remove the advertisement hoarding; whether there is vested in the court a discretion to refuse the relief sought in a s.27 application on grounds of delay and acquiescence; whether the site had been used for the purpose of an advertising hoarding since before 1st October, 1964; whether there had been a break in continuity which destroyed any rights existing at that time; whether the Court could grant a mandatory order in terms sought by the applicants; whether section 27 proceedings are appropriate.
Held: Order granted directing the respondents to discontinue the unauthorised use of the premises; order directing them to remove the advertisement hoarding refused.

Fingal County Council v. R.F.S. Limited
High Court: **Morris P.**
06/02/2000

Planning; unauthorised development; application under s.27, Local Government (Planning and Development) Act, 1976 as substituted by s.19, Local Government (Planning and Development) Act, 1992; applicants seeking an order restraining the defendants from carrying on an unauthorised development on the premises for the warehousing of dry goods; whether a pre statute established user had been established; whether the five year limitation period had expired; whether the use of the premises at and prior to 1st October 1964 was different to the current use of the land.
Held: The applicants had failed to discharge the onus of proof; order refused; it was entirely reasonable for the applicants to institute proceedings under s.27; costs of bringing proceedings up to and including first day of hearing should be borne by the second-named defendant; no order as to costs made as between applicant and third-named defendant.

O'Flynn Construction Company Ltd. v. An Bord Pleanala
High Court: **Geoghegan J.**
12/11/1999

Planning; judicial review of decision of An Bord Pleanala; respondent dismissed applicant's appeal on ground that proposed development would materially contravene an objective set out in the development plan; respondent in setting out reasons for refusal of permission referred specifically to terms of the Local Government (Planning and Development) General Policy Directive, 1982 (SI No. 264 of 1982); respondent conceded that Local Government (Planning and Development) General Policy Directive (Shopping), 1998 (SI No. 193 of 1998) did not apply to applicant's application; respondent's inspector had taken the view that application for permission could be severed and that permission for one part of the proposed development ought to be granted; respondent however decided that application was for one integrated development; whether 1982 directive had been revoked at time of respondent's decision and there was no saving provision which kept the directive alive for the purposes of the appeal; whether notwithstanding its revocation the 1982 directive continued to apply to this application pursuant to provisions of the Interpretation Act, 1937; whether decision of respondent to treat the application as being for one integrated development was irrational; Local Government (Planning and Development) General Policy Directive, 1982 (SI No. 264 of 1982); Local Government (Planning and Development) General Policy Directive (Shopping), 1998 (SI No. 193 of 1998).
Held: 1982 directive was revoked on 10th June, 1998, and the 1998 directive replaced it on that date; 1982 directive did not continue to apply to this application pursuant to provisions of the Interpretation Act, 1937; respondent did not act irrationally in making its decision; order of certiorari granted and matter remitted to respondent for redetermination.

Article

The planning and development bill 1999 and the provision of affordable housing
Connolly, James
2000 IPELJ 18

Compulsory purchase under the 1999 planning bill
Grist, Berna
2000 IPELJ 15

Practice & Procedure

Bloomer v. Incorporated Law Society of Ireland
High Court: **Geoghegan J.**
03/12/1999
Practice and procedure; appeal from taxation of costs; in trial of action plaintiffs established that one of defendant's regulations which excluded them from like recognition and exemption from final examination of

defendant as that afforded to graduates of other universities who hold a primary degree in law was invalid as being discriminatory and contrary to Article 6 of the Treaty of Rome; High Court refused to make specific declaration to that effect and made costs order in favour of defendant; appeal; defendant changed its regulations; only matters before Supreme Court were form of relief to be granted in order and question of costs; Supreme Court inserted into High Court order declaration that regulation of defendants was invalid and awarded plaintiffs their costs in the High Court and half the costs of the appeal excluding costs in connection with written submissions made to Supreme Court; costs taxed and reviewed by Taxing Master; plaintiff's senior counsel and solicitor fees substantially reduced; appeal to High Court by plaintiff from taxation; whether costs should be revised upwards; whether if Taxing Master fell into error the fee awarded could be described as unjust; whether Taxing Master in taxing solicitor's fee correctly attached weight to fact that case was largely barrister led; whether correct that senior counsel's brief fee on appeal to Supreme Court should bear no relationship to brief fee for High Court hearing; whether need to attend to matters which arose as case progressed in High Court justified Master's increase in senior counsel refresher fee on review; whether insofar as counsel did work which was purely solicitor's work he is entitled to be remunerated for it; whether Taxing Master in taxing senior counsel's brief fee for High Court hearing fell into error in failing sufficiently to appreciate importance of case; whether brief fee allowed to senior counsel too low or within such a reasonable range that it should not be interfered with; whether regard should be had to evidence of fees marked by counsel for defendants.
Held: Taxing Master in taxing senior counsel's brief fee in High Court fell into error; new figure substituted for brief fee allowed to senior counsel; taxation affirmed in all other respects.

Connolly v. Casey
Supreme Court: Hamilton C.J., **Denham J.**, Keane J.
17/11/1999

Third party proceedings; setting aside; delay; defendant solicitors being sued for professional negligence; defence contained allegation of negligence on part of barrister; defendants joined barrister to proceedings as third party; whether delay in issuing and serving third party notice unreasonable; test for determining whether delay unreasonable; Order 16 rule 8(3) Rules of the Superior Courts, 1986; s.27(1)(b) Civil Liability Act, 1961.
Held: In considering whether third party notice was issued and served as soon as reasonably possible, court should consider the whole circumstances of the case and its general progress; delay not unreasonable; appeal allowed.

Fagan v. McQuaid
Supreme Court: **Hamilton C.J.**, **Denham J.**, Barrington J., Lynch J., Barron J.
09/12/1999

Application to set aside judgment; natural and constitutional justice; High Court had given judgment against applicants; applicants appealed to Supreme Court and then issued notice of motion seeking to have proceedings remitted for trial in High Court; motion and appeal listed for hearing on the same day; Supreme Court directed that motion would be dealt with first and if refused the appeal would be addressed; Supreme Court dismissed the appeal; applicants claiming that Supreme Court had decided against them on the appeal without having given them any proper opportunity to argue the issue; applicants seeking order setting aside or vacating judgment given by Supreme Court; whether Supreme Court has jurisdiction to rescind or to vary an earlier, final order of the Supreme Court; whether Supreme Court had failed to consider all the issues raised by the applicants; whether there had been a denial of fair procedures; Art. 34.4.1, 3 and 6 of the Constitution; s.1(1), Courts (Establishment and Constitution) Act, 1961.
Held: Supreme Court has jurisdiction to rescind or vary a final order of the Supreme Court, but only in exceptional circumstances and to protect constitutional rights; no such exceptional circumstances; no denial of fair procedures; application refused.

Phelan v. Goodman
Supreme Court: Barrington J., Keane J., **Murphy J.**
24/01/2000

Discovery; plaintiff seeking further and better discovery; limited banking documentation in relation to a bank draft was discovered by defendant; plaintiff contending that there is a very high probability that other relevant documentation exists and is available to defendant; denial by defendant on affidavit supported by affidavit of his solicitor; whether court should order defendant to swear further affidavit of discovery; whether further and better discovery should be ordered in relation to documents in respect of which privilege is claimed.
Held: Before ordering a new affidavit of discovery to be sworn, the court must be satisfied on the evidence before it that it is making a meaningful order; appeal dismissed.

Ruby Property Company Limited v. Kilty
High Court: **McCracken J.**
01/12/1999
Practice and procedure; application to dismiss plaintiffs' claim; property of first named plaintiff and family home of second and third named plaintiffs charged in favour of bank to secure all monies due and owing by second and third named plaintiffs to bank; bank took possession of family home after default in payments; receiver appointed over property of first named plaintiff by bank pursuant to debenture; bank subsequently sold second and third named plaintiffs'property; property of first-named defendant conveyed to second named defendant by receiver exercising right to sell the property under debenture; application by first and second named defendants to dismiss plaintiffs' claim on basis that claim has no reasonable prospect of success or, alternatively, for want of prosecution; application by second named defendant to dismiss plaintiffs' claim on ground that it is frivolous and vexatious; whether plaintiffs' claim frivolous and vexatious; whether plaintiffs' delay in reconstituting action after death of second and third named plaintiffs is inordinate and inexcusable or whether it is excusable given need to take out representation to two deceased plaintiffs; whether action fails insofar as it challenges receiver's right to sell; whether action fails insofar as it alleges sale of property by receiver at an undervalue; whether action fails insofar as it challenges appointment of receiver; whether second named defendant has good title to property and whether claim for damages for trespass against it fails.
Held: Plaintiffs'claim not frivolous or vexatious; delay was neither inordinate nor inexcusable; action fails insofar as it challenges receiver's right to sell the property; action does not fail insofar as it alleges sale at an undervalue; action fails insofar as it challenges appointment of receiver; claim against second named defendant struck out.

Wexford Rope and Twine Company Ltd v. Gaynor
High Court: **Barr J.**
06/03/2000

Security for costs; whether plaintiff unable to discharge its liability should costs be awarded against it; whether defendants have prima facie defence to plaintiff's claim; whether special circumstances existed that would justify the Court exercising its discretion whether or not to grant security for costs; whether inability of plaintiff to discharge award of costs caused by wrongs of the defendants; whether there had been unreasonable delay in bringing the application; s.390, Companies Act, 1963
Held: Security for costs granted.

Articles

Discovery in the District Court
Mullins, Patrick
2000 (May) GILS 23

Enforcement of foreign judgments in non-convention cases
Newman, Jonathan
5(7) 2000 BR 354

Recent developments in res judicata and double jeopardy
McDermott, Paul Anthony
2000 (2) P & P 11

Library Acquisition

Plant, Charles
Blackstone's civil practice 2000
London Blackstone Press 2000
N365

Property

Article

Second hand industrial buildings
Clery, Jim
13 (2000) ITR 137

Road Traffic

Statutory Instrument

European communities (motor vehicles type approval) regulations, 2000
SI 55/2000
(DIR 1999/100, 80/1268)

Sale of Goods

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Honnold, John O
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The Hague Kluwer Law International 1999
C233.2

Sea & Seashore

Statutory Instrument

Marine and natural resources (delegation of ministerial functions) order, 2000
SI 45/2000

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Admiralty jurisdiction and practice
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London LLP 2000
N330

Statutory Instrument

Merchant shipping (safe manning, hours of work and watchkeeping) (amendment) regulations, 2000
SI 85/2000

Stock Exchange

Library Acquisition

Admission and disclosure standards
May 2000
London Stock Exchange
London Stock Exchange 2000
N304.8

Taxation

Articles

Capital taxes stamp duty manual
O'Connor, Michael
Robinson, Keith
13 (2000) ITR 156

Second hand industrial buildings
Clery, Jim
13 (2000) ITR 137

Tax law and accountancy practice
MacLeod, James S
13 (2000) ITR 171

Tax strategy group: what the papers say
Fennell, David
13 (2000) ITR 178

Library Acquisition

Connolly, Margaret
Stamp duties consolidation act 1999 / editor Margaret Connolly
Dublin Butterworth Ireland 2000
M337.5.C5

Telecommunications

Library Acquisition

Garzaniti & Van Miert
Telecommunications, broadcasting and the internet: EU competition law and regulation
London Sweet & Maxwell 2000
W110

Torts

Article

Secondary victims & nervous shock
Dunne, Mark
5(7) 2000 BR 383

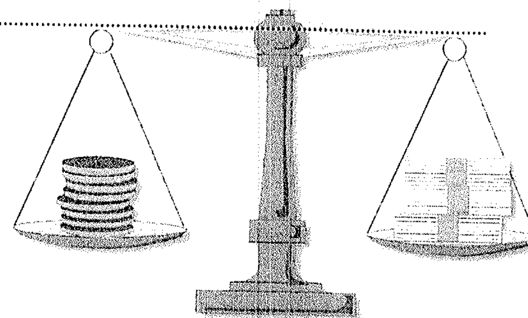
Library Acquisition

O'Rourke, Raymond
Food safety and product liability
Poole Palladian Law Publishing 2000
N39.P6.C5

Tribunals

Bailey v. Mr. Justice Flood
High Court: **Morris P.**
06/03/2000

Tribunal of inquiry; terms of reference; constitutional rights; hearing of evidence otherwise than in public; judicial review; *certiorari*; standard of review; respondent had decided that evidence of the applicants' financial affairs should be heard in public; applicants challenging this decision; whether applicants entitled to rely on privilege against self-incrimination; whether under terms of reference respondent could have undertaken preliminary investigation in private; whether proposed examination of applicants relevant to the work of the Tribunal under terms of reference; whether evidence it is proposed to admit is relevant; whether evidence ought to be admitted; whether respondent has jurisdiction to take evidence in private; proportionality; whether decision of respondent unreasonable; ss.1 & 2, Tribunals of Inquiry (Evidence) Act, 1921; s.5, Tribunals of Inquiry (Evidence) (Amendment) Act, 1979; s.2, Tribunals of Inquiry (Evidence) (Amendment) Act, 1997.
Held: Application refused.



AT A GLANCE

Bills of the Oireachtas

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

Activity centres (young persons' water safety) bill, 1998
2nd stage - Dail **[p.m.b.]**

Aviation regulation bill, 2000
Report - Seanad

Broadcasting bill, 1999
Committee - Dail

Cement (repeal of enactments) bill, 1999
Committee - Dail (Initiated in Seanad) (resumed)

Censorship of publications (amendment) bill, 1998
2nd stage - Dail [p.m.b.]

Children bill, 1999
Committee - Dail

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

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

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

Containment of nuclear weapons bill, 2000
2nd stage - Dail (Initiated in Seanad)

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

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

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

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

Criminal justice (safety of united nations workers) bill, 1999
Committee - Dail (Initiated in Seanad)

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

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

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

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

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

Electoral (amendment) (donations to parties and candidates) bill, 2000
2nd stage - Dail [p.m.b.] (resumed)

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

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

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

Family law bill, 1998
2nd stage - Seanad

Gas (amendment) bill,2000
2nd stage - Dail

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

Health (miscellaneous provisions) (no.2) bill, 2000
Committee- Seanad

Harbours (amendment) bill, 2000
1st stage- Seanad

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

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

Illegal immigrants (trafficking) bill, 1999
Committee - Dail

Industrial relations (amendment) bill,2000
Committee - Seanad

Insurance bill, 1999
Committee - Dail

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

Intoxicating liquor bill, 2000
Committee - Dail (Initiated in Seanad)

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

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

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

Local government bill, 2000
1st stage - Dail

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

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

Mental health bill, 1999
Committee - Dail

Merchant shipping (investigation of marine casualties) bill 1999
2nd stage - Seanad (Initiated in Dail)

Nitrigin eireann teoranta bill, 2000
1st stage - Dail

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

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

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

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

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

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

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

Prevention of corruption bill, 2000
2nd stage - Dail [p.m.b.]

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

Proceeds of crime (amendment) bill, 1999
2nd stage - Dail

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

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

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

Protection of workers (shops)(no.2) bill, 1997

2nd stage - Seanad

Public representatives (provision of tax clearance certificates) bill, 2000
2nd stage - Dail [p.m.b.]

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

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

Registration of lobbyists bill, 1999
1st stage - Seanad

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

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

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

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

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

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

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

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

Sea pollution (amendment) bill, 1998
Committee - Dail

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

Sex offenders bill, 2000
Committee - Dail

Shannon river council bill, 1998
Committee - Seanad

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

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

Statute law (restatement) bill, 2000
1st stage- Seanad

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

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

Teaching council bill, 2000
1st stage - Dail

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

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

Town renewal bill, 2000
1st stage - Dail

Trade union recognition bill, 1999
1st stage - Seanad

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

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

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

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

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

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

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

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

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

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

Whistleblowers protection bill, 1999
Committee - Dail

Wildlife (amendment) bill, 1999
Committee - Dail (Resumed)

Youth work bill, 2000
1st stage - Dail

Acts of the Oireachtas 2000

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

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

2/2000 National Beef Assurance Scheme Act, 2000
(Signed 15/03/2000)
SI 130/2000 = (Commencement)

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

4/2000 Social Welfare Act, 2000
(Signed 29/03/2000)

5/2000 National Minimum Wage Act, 2000
(Signed 31/03/2000)
SI 95/2000 = (Rate Of Pay)
SI 96/2000 = (Commencement)
SI 99/2000 = (Courses/Training)

6/2000 Local Government (Financial Provisions) Act, 2000
(Signed 20/04/2000)

7/2000 Commission To Inquire Into Child Abuse Act, 2000
(Signed 26/04/2000)

8/2000 Equal Status Act, 2000
(Signed 26/04/2000)

9/2000 Human Rights Commission Act, 2000
(Signed 31/05/2000)

10/2000 Mulilateral Investment Guarantee Agency (Amendment) Act, 2000
(Signed 07/06/2000)

ABBREVIATIONS

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

COURTS SERVICE

An tSeirbhís Chúirteanna

Family Law Reporting Service

The Courts Service plans to establish a pilot project for a period of one year to report on family law cases including court decisions, written judgments and statistics of cases coming before the courts.

The Courts Service seeks to engage on a contract for service basis a suitably qualified person with appropriate experience and skills to manage this project which is to provide a Family Law Reporting Service. This is an outstanding oppportunity for an ambitious and self-motivated legal graduate. The arrangement will be for a period of one year.

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Letters of application with full details of relevant experience should be sent to

Ms. Maire Ryan, Courts Service, Green Street Courthouse, Halston Street, Dublin 7 by 14 August 2000.

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Information submitted may be subject to disclosure under the Freedom of Information Act.

TRANSATLANTIC PERSPECTIVES
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21 and 22 July 2000
University College Dublin

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Keynote Speakers, Mr. Justice Hugh Geoghegan, Supreme Court of Ireland and Professor William B. Gould IV, Stanford University and former Chair, National Labour Relations Board

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Registration Form

Transatlantic Perspectives on Labour and Employment Law
Dates: 21 and 22 July 2000, University College Dublin

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For further information please phone (01) 706 8743 or e-mail James.Bergeron@ucd.ie. Please return all registration forms to James Bergeron, Co-Chair, Transatlantic Perspectives Conference, Faculty of Law, University College Dublin, Belfield, Dublin 4. All registration forms and conference fees must be received no later than Monday, 10 July 2000.

MPLOYERS' LIABILITY FOR EMPLOYEE STRESS

Mark J. Dunne BL *considers whether the Irish Courts are likely to embrace the concept that employers can be held liable for mental injury caused to employees as a result of stress at work.*

Introduction

While the courts have long since recognised an employer's liability for physical injury suffered by employees as a result of the employers negligence, the issue of whether employers were liable for mental injury arising from continuous exposure to stressful circumstances in the workplace was heretofore a grey area. However, in the last number of years, the courts and the legislature have begun to come to grips with the notion that an employer can be liable for mental injury caused as a result of stress at work.

In this article the law in relation to an employers liability for employee stress will be examined. The most recent case law in the area will be analysed as will the effect of the Safety Health & Welfare at Work Act, 1989 and its statutory instruments. It will be seen that while the Irish Courts have for a long time recognised that employers owe a general duty of care to employees to "take reasonable care for the servants safety in all circumstances of the case"[1] as of yet, they have not had to apply these principles to a case of psychological injury as a result of stress at work.

The UK Approach

However in the UK the growing awareness within the law of the effects of shock and psychological illness on psychological well being has meant that the courts there have had to grapple with this issue. In *Johnstone -v- Bloomsbury* Area *Health Authority*[2] a junior doctor suffered from stress and depression as a result of being required to work as much as 100 hours per week.

In the Court of Appeal, Stuart Smith L.J. stated that

> "it must be remembered that the duty of care is owed to the individual employee and different employees may have different stamina. If the Defendant, in this case, knew or ought to have known that by requiring him to work the hours they did, they exposed him to a risk of injury to his health, then they should not have required him to work in excess of those hours that he safely could have done".

The Judge referred to the case of *Paris -v- Stepney Borough Council*[3] where it was held that an employer owed a duty of care to take greater care of a one eyed man than a normal man in respect of risk of injuries to his eyes. The learned Judge went on to state

> "if employers know or ought to know that a workman has a vulnerable back they are in breach of duty in requiring him to lift and move weights which are likely to cause him injury even if a normal man can carry them without risk......... Although the principle that if you cannot stand the heat in the kitchen you should get out or not go in, may often be a sound one, it would have serious implications if applied in these circumstances"

Thus the Court of Appeal accepted the principle that an employer could be liable for work induced psychiatric injury. However while the duty of care was recognised the standard of care to be applied was still to be determined.

In *Petch -v- Customs & Excise Commissioners*[4] the Plaintiff who was a high ranking Civil Servant suffered a mental break-down in 1974 due to the pressure of his work load. The Trial Judge found as fact that the job which the Plaintiff had, was only allocated to

> "high flyers that is men and women of exceptional talent and the Plaintiff knew when he took the job that stress was an inevitable part of the price to be paid for attaining such high office and until the break-down showed himself not only to be able to cope with the existing workload but enthusiastic to take on more."

The court took the view that unless Senior Management were aware or ought to have been aware that the Plaintiff was showing signs of impending break-down or ought to have been aware that his workload carried a real risk that he would have a break-down, then they were not negligent. In dismissing his case it took the view that it had not been shown that the Defendants' Senior Management were aware or ought to have been aware in 1974 that the Plaintiff was showing signs of impending break-down or that his workload carried a real risk of break-down and had not acted negligently and thus they had not been in breach of their admitted duty to take reasonable care to ensure that the duties allocated to the Plaintiff did not damage his health.

In *Walker -v- Northumberland County Council*[5] a Social Work Officer engaged in a particularly stressful area of child abuse work, suffered a nervous break-down owing to pressures of work in November 1986 and was promised temporary support on his return to work in March 1987. The support was not forthcoming and the Plaintiff suffered a further break-down forcing him to retire. He brought an action against the Local Authority. In the High Court, Colman J. stated

> "there has been a little judicial authority on the extent to which an employer owes to his employees a duty not to cause them psychiatric damage by the volume or character of the work which the employees are required to perform. It is clear law that an employer has a duty to provide his employees with a reasonably safe system of work and to take reasonable steps to protect him from risks which are reasonably foreseeable. Where as the law on the extent of this duty has developed almost exclusively in cases involving physical injury to the employee as distinct from injury to his mental health, there is no logical reason why risk of psychiatric damage should be excluded from the scope of an employers duty of care or from the co-extensive implied term in the Contract of Employment. That said, there can be no doubt that the circumstances in which claims based on such damage are likely to arise will often give rise to extremely difficult evidential problems of forseeability and causation.This is particularly so in the environment of the professions, where the Plaintiff may be ambitious and dedicated, determined to succeed in his career in which he knows the work to be demanding, and may have a measure of discretion as to how and when and for how long he works but where the character or volume of the work given to him eventually drives him to breaking point. Given that the professional work is intrinsically demanding and stressful, at what point is the employers duty to take protective steps engaged? What assumption is he entitled to make about the employees resilience, mental toughness and stability of character, given that people of clinically normal personality may have a widely different ability to absorb stress attributable to their work?"

The learned Judge went on to say that the law did not impose upon an employer the duty of an Insurer against all injury or damage however unlikely or unexpected but it called for no more than a reasonable response - what is reasonable being measured by the nature of the neighbourhood relationship, the magnitude of the risk of injury which was reasonably foreseeable, the seriousness of the consequences for the person to whom the duty is owed and the cost and practicability of preventing the risk.

The Judge quoted with approval from the Australian decision of *Gillespie -v- Commonwealth of Australia*[6] where Miles C.J. referring to an employer's liability for work induced psychiatric injury observed that

> "Forseeability for present purposes is to be considered only in so far as the degree of remoteness of harm sustained by the Plaintiff set the perimeters of the steps that a reasonable person in the position of the Defendant would have taken to reduce the risk to the extent that any unnecessary risk was eliminated. In practical terms this means that the Plaintiff must show that the Defendant unreasonably failed to take such steps as would reduce the risk to what was a reasonable, that is, a sociably acceptable level. It may be that this takes the court into an area of value judgement for which the inscrutability of a jury verdict may provide a more appropriate means of expression".

"The approach of the Irish courts to psychiatric injury caused by stress in the workplace remains to be seen. However, in applying the duty of care test as set down in *Ward v McMaster* there is no reason why the Irish Courts could not and would not follow the approach of their U.K. brethren. Indeed it is clear that the Irish Courts have applied the exact same principle in cases concerning employers' liability for physical injury and indeed have limited the duty in exactly the same way. Furthermore in *Eithna Curran -v- Cadbury Ireland Limited* McMahon J. referring to the *Walker* decision stated that there was no reason to suspect that our courts would not follow this line of authority if it came before the courts."

Coleman J. noted that prior to the 1986 illness, it was not reasonably foreseeable to the Local Authority that the Plaintiff's work load would give rise to a material risk of mental illness. However, in relation to the second illness the Local Authority ought to have foreseen that if the Plaintiff was again exposed to the same work load, there was a risk that he would suffer another nervous break-down which would probably end his career. Therefore the Local Authority ought to have provided additional assistance to reduce the Plaintiffs workload even at the expense of some disruption of other work and in choosing to continue to employ the Plaintiff without providing affective help, it had acted unreasonably and in breach of its duty of care and therefore was liable in negligence for the Plaintiff's second nervous break-down.

The Approach of the Irish Courts

The approach of the Irish courts to psychiatric injury caused by stress in the workplace remains to be seen. However, in applying the duty of care test as set down in *Ward v McMaster* [7] there is no reason why the Irish Courts could not and would not follow the approach of their U.K. brethren. Indeed it is clear that the Irish Courts have applied the exact same principle in cases concerning employers' liability for physical injury and indeed have limited the duty in exactly the same way.[8] Furthermore in *Eithna Curran -v- Cadbury Ireland Limited*[9] McMahon J. referring to the Walker decision stated that there was no reason to suspect that our courts would not follow this line of authority if it came before the courts. Similarly in the case of *Saehan Media Ireland Limited -v- A. Worker*[10] the Labour Court stated that "work related stress is recognised as a health and safety issue and employers have an obligation to deal with instances of its occurrence which are brought to their attention".

Employers' liability pursuant to the Safety Health & Welfare at Work Act, 1989

Under the 1989 Act, employers have a duty to ensure and "so far as is reasonably practicable" the safety, health and welfare at work of all of its employees.[11] This means that the employer must provide a working environment that is "so far as is reasonably practicable" safe and without risks to the health of the employee - that is both physical and mental health.[12] However, as with the common law this duty and thus an employers liability is not absolute as is clear from the qualifying phrase "so far as is reasonably practicable". The employer is under a further duty pursuant to Section 6(2)(d) to provide "systems of work that are planned, organised, performed and maintained so as to be, so far as is reasonably practicable, safe and without risk to health". Here again, the onus is put on the employer to take all steps that are reasonably practicable in the system of work to prevent an employee suffering from a stress-related mental illness at work.

Conclusion

It is submitted that the Irish Courts will follow the approach taken by their UK brethren and hold that an employer owes a duty of care to employees in relation to psychiatric injury caused to employees as a result of occupational stress. The consequences of such an approach in terms of its effect on many professions such as teachers, nurses and junior doctors remains to be seen. However it must be noted that the duty is not an unlimited one. The onus is on the employee to show that the injury suffered was foreseeable and was caused by the work as opposed to some other factor. All that is required of an employer is to show that he acted reasonably in all the circumstances. Thus the employee's task in proving his/her case will be a difficult one. However, it is understood that a number of stress claims have settled prior to hearing in the Irish Courts and it will only be a question of time before the Courts get an opportunity to pronounce on the duty and standard of care to be applied in this area. ●

1. *Dalton -v- Frendo* Unreported Supreme Court 15th December 1977 per O'Higgins CJ
2. [1992] QB 333
3. [1951] AC 367
4. [1993] ICR 789
5. [1995] 1 ALL ER 737
6. [1991] 104 ACTR 1
7. [1988] IR 337
8. In *Dalton* op. cit it was held that an employer owes a general duty of care to employees to "take reasonable care for the servants safety in all circumstances of the case" That this duty is not an unlimited one is clear from *Bradley -v- CIE* [1976] IR 216 where Henchy J. stated that "the law does not require an employer to ensure in all circumstances the safety of his workmen. He will have discharged his duty of care if he does what a reasonable and prudent employer would have done in the circumstances". The Judge went on to say that "even where a certain precaution is obviously wanted in the interest of the safety of a workman, there may be countervailing factors which would justify the employer in not taking that precaution".
9. Unreported Circuit Court 17th December 1999.
10. [1999] 10 ELR 41.
11. Safety Health & Welfare at Work Act, 1989 Section 6(1)
12. See *Bradley -v- London Fire & Civil Defence Authority* [1995] IRLR 46.

UDGMENT MORTGAGES

-- A Last Writhing Gasp for the Technical Defence -

***Laurence J. McMahon BL** outlines the judgment mortgage procedure and a recent High Court case which would appear to finally close off the "technical defence" to having a judgment mortgage declared well charged against the judgment debtor's lands.*

Background

Judgment mortgages, as a convenient form of security peculiar to Ireland, are a means of enforcing a judgment. In those circumstances, to be effective as such, a creditor must firstly obtain judgment. So, if X owes a debt to Y and does not pay, then Y must first sue and obtain judgment against X for the said amount before he can enforce it as a judgment mortgage. What is important is that any judgment obtained is for a definite and specific sum. It matters not that the initial proceedings sought unliquidated damages.

Contents and Form of Judgment Mortgage Affidavit

In any event, once judgment has been obtained; the judgment creditor, as he is now referred to, must convert the judgment into a judgment mortgage. He does this by swearing the appropriate judgment mortgage affidavit. The information which must be included in that judgment mortgage affidavit (which is the judgment mortgage itself) is set out in Section 6 of the Judgment Mortgage (Ireland) Act, 1850, namely: -

a)The name or title of the cause or matter;

b)The Court in which the judgment was obtained;

c)The date of the judgment;

d)The name and usual or last known place of the abode of the Plaintiff and Defendant;

e)The title, trade or profession of the Plaintiff and Defendant;

f)The amount of the debt, damages or costs or money recovered or ordered to be paid;

g)A statement that to the best of the knowledge and belief of the deponent, the person against whom the judgment was obtained is seized or possessed or has a disposing power over the lands;

h)The County and Barony or town and County of City or Parish or the Town and Parish, in which the lands to which the affidavit relates are situated.

Registration of the Affidavit

Once the judgment mortgage has been sworn, it must be filed in the court in which it was obtained. Additionally, the judgment mortgage must be registered against the lands of the judgment debtor. This will be done in the Land Registry, if the title to the judgment debtor's land is registered, or in the Registry of Deeds, if not registered. By virtue of Section 8 of the Judgment Mortgage (Ireland) Act, 1850, registration of the affidavit has the effect of converting the judgment into a judgment mortgage. In so converting, the judgment mortgagee (as he is then referred to) will ultimately have the same powers and remedies as if the land had been mortgaged to him by deed. Importantly, the judgment mortgage will be invalid if not registered.

Furthermore, if the judgment debtor is a company, then you must ensure that any judgment mortgage is registered in the Companies office. Section 102 of the Companies Act, 1963 provides that a creditor must deliver two copies of the affidavit (certified to be correct copies by the appropriate registry) to the company within 21 days after the date of the registration of a judgment mortgage. The company must then within 3 days of receipt of the copies deliver one to the Registrar of Companies for registration. The appropriate registry is also required to "deliver a copy of the affidavit to the Registrar as soon as may be". Certain commentators have in the past made the point that non-compliance with Section 102 will inter alia result in the invalidity of the charge.[1]

The Well Charging Order

Once the above has been completed, it is then open to the judgment mortgagee to enforce it by bringing "well charging" proceedings. The judgment mortgagee will seek the following reliefs:

a) A Declaration that the sum secured by the Judgment with Courts Act interest is well charged against the lands or premises of the Defendant by virtue of the judgment;

b) An Order that in default of payment, sale of the lands or premises;

c) An Order the usual accounts and enquiries;

d) Costs.

Depending on whether the rateable valuation of the lands exceeds £200, the well charging proceedings can be issued either in the Circuit Court by means of an Equity Civil Bill, or in the High Court by way of Special Summons and grounding affidavit. On this point, practitioners should note that whilst the initial judgment can be obtained in the District, Circuit or High Court, there is still no procedure for enforcing it in the District Court. In those circumstances, such a judgment creditor should simply seek to enforce the District Court decree in the Circuit or High Court.

In the Circuit Court, the matter will usually come before the court by way of motion for judgment in default of appearance or defence. In the High Court the matter will be disposed of on the affidavits filed. Either way, if the application is successful, the orders sought will usually be granted subject to a three month stay in the event of the matter being subsequently disputed. It is of course also open to the court to exercise its discretion and to simply adjourn the proceedings for a time. It will normally do this if it feels that the defendant (or his or her spouse) is in a financial position to discharge the judgment, and can give the relevant undertakings.

Precedents and other useful information to assist in the drafting of a Judgment Mortgage Affidavits and well charging proceedings, as well as the proofs required can be found in a number of very good articles[2]. This article does not go into detail on those issues.

The Judgment Mortgages (Ireland) Act, 1850 is itself an archaic piece of legislation; many would accept that parts of Section 6 itself are drafted in an awkward and unintelligible manner. Indeed, Kenny J. in the case of *Re Flannery*[3] referred to the section as "perplexing". This comment goes a long way towards explaining why this area of law has been the subject of so many conflicting judicial pronouncements in this jurisdiction.

The problems themselves arise when after obtaining judgment, drafting the judgment mortgage affidavit, and registering it as a judgment mortgage, the judgment mortgagee attempts to seek a declaration that the judgment is well charged against the lands of the judgment debtor. It is at that stage that attempts will be made to attack the validity of the judgment mortgage affidavit; often through the raising of technical defences to the form of the judgment mortgage affidavit, and in particular non-compliance with the specific terms of Section 6.

Many practitioners familiar with this area of law, may remember 1992 as being somewhat of a watershed in the courts' approach to these technical defences. Indeed, many would argue that it marked the end of the raising of the technical defence based on non-compliance with Section 6.

"The problems themselves arise when, after obtaining judgment, drafting the judgment mortgage affidavit, and registering it as a judgment mortgage, the judgment mortgagee attempts to seek a declaration that the judgment is well charged against the lands of the judgment debtor. It is at that stage that attempts will be made to attack the validity of the judgment mortgage affidavit; often through the raising of technical defences to the form of the judgment mortgage affidavit, and in particular non-compliance with the specific terms of Section 6."

The Technical Defence and The Traditional Strict Approach

Up until 1992 the traditional approach taken by the Courts in this jurisdiction was by and large a strict one. In other words any deviation, error or omission in drafting the judgment mortgage affidavit, which resulted in non-compliance with the terms of Section 6 of the Judgment Mortgage (Ireland) Act, 1850 was deemed to be fatal to the validity of the affidavit. So, drafting the affidavit at that time, was a job fraught with potential difficulties. These difficulties, of course, would only become apparent when a challenge was mounted during the course of well charging proceedings.

The main omissions and defects, which have been litigated by defendants in the past, are: -

a) Errors in the description of the title, trade, or profession of the Defendant;

b) Errors in the description of the lands against which the judgment mortgage was registered;

c) Errors in the description of the names and addresses of the Defendant;

d) Omission of means of knowledge clauses;

An example of this strict approach was the 1992 decision of *Allied Irish Banks v. Griffin*[5]. In that case, the sole issue for the determination of the High Court was whether the description of the Defendant in the affidavit to register the judgment as a mortgage was valid. In that case, the Plaintiff had obtained judgment against the Defendant in the sum of £165,353,033. Ultimately, the Plaintiff had proceeded to register the judgment as a mortgage over the Defendant's lands. The affidavit to

register the judgment as a mortgage referred to the Defendant as:-

"...now a widow and at the time when the said judgment was obtained and entered up was a married woman".

The present proceedings arose when as is the usual practice, the Plaintiff subsequently sought a declaration that the sums due stood well charged against the Defendant's interest in the lands in question. However, at the hearing the Defendant raised the undisputed issue of the misdescription of the Defendant, in that at the time the judgment mortgage affidavit was sworn and registered, the Defendant was in fact a farmer and not a widow.

Denham J. in the High Court adopted a strict approach to the requirements of Section 6 of the Judgment Mortgage (Ireland) Act, 1850, and stated that a misdescription invalidated the affidavit, whether or not it misled or deceived any one. As a result, the flaw (albeit very much a technical one) was fatal to validity of the judgment mortgage affidavit, and the subsequent declaratory relief sought.

The Technical Defence and The Purposive Approach

One of the first cases to adopt the purposive approach was the old decision of *Thorp v. Browne*[6] Indeed the common-sense reasoning in this 1867 case has since been approved and commended in a number of landmark decisions in this area. In that case, a description of the Defendant in the judgment mortgage affidavit was set out:-

" as formerly of Ballina Park, in the County of Wexford and now of the City of Dublin".

The description, although not strictly complying with the requirements of Section 6, was held to be sufficient, in that it enabled the parties to be sufficiently identified.

Then there was the decision of *Harris v O'Loghlen*[7]. This case was concerned with the sufficiency of the description of the title and last known place of abode of the Defendant. The court, in coming to its decision, spoke of applying "masculine common sense" to Section 6, and followed a purposive approach.

Thereafter the case law becomes inconsistent with a series of decisions advocating the strict approach. These were the decisions of *In Re Murphy v. McCormack*[8] and *In Re Flannery*, where the courts were dealing with the sufficiency of the description of the judgment debtor's lands. In both cases, the courts decided that the description of the lands did not comply with Section 6. This was so, despite the fact that there was no real risk of doubt or ambiguity in regard to the identification of the lands.

However later, the purposive approach returned yet again in the decision of *Credit Finance v. Grace*[9]. This case concerned the description of the judgment debtor's lands. In that decision, the Supreme Court ignored the strict approach adopted *In re Murphy and McCormack* and In *Re Flannery*, and followed the earlier purposive approach of *Thorp v. Browne*.

Finally, the case of *Irish Bank of Commerce v. O'Hara*[10] dealt with the sufficiency of the description of name and usual or last-known place of abode of the Defendant, where the lands of the Defendant were described as the premises:-

"..known as 'Ashurst', Military Road, Killiney, Borough of Dun Laoghaire, barony of Rathdown and County of Dublin".

Again, one of the defences put forward was that the affidavit was defective, because it failed to mention the parish in which the land was situated. Strictly speaking there was therefore non-compliance with the terms of Section 6. The relevant portion of Section 6 provides that the affidavit must specify:-

"The County and Barony, or the Town or County of a City, and Parish, or the Town and Parish, in which the affidavit relates are situate."

However Costello J. in the High Court, who was later approved by the Supreme Court[11] in the same case, adopted a purposive approach to the requirements of Section 6. He looked at the purpose of the statutory requirement. He saw that the purpose of the requirement relating to the location of the lands was to identify with precision the location of the lands affected by the judgment mortgage, and to enable persons subsequently dealing with the judgment debtor and his lands to be warned of its existence. He felt that in the circumstance of this case, this was achieved. He indicated that to hold otherwise would:-

"offend against both common sense and justice".

It is noted that Denham J in *Allied Irish Bank -v- Griffin* was referred to the decision of Costello J in *Irish Bank of Commerce -v- O'Hara*, which had been decided four months earlier, and which was then under appeal to the Supreme Court. However, she distinguished the decision of *O'Hara* as it referred to the description of the lands, whereas *Griffin* was concerned with the description of the profession of the Defendant. On that basis she did not consider it as overruling the authorities as to description of the person.

Has the Loophole Closed Completely?

So the question must be asked. Did the Supreme Court decision in *Irish Bank of Commerce v. O'Hara* finally and irrevocably sound the death knell of the technical defence? For a number of reasons, it is submitted that it did not:-

1. *Previous inconsistency of the case law:-*

Undoubtedly, the decision of *Irish Bank of Commerce v. O'Hara* was emphatic in its terms, and the position of a judgment

"Did the Supreme Court decision in *Irish Bank of Commerce v. O'Hara* finally and irrevocably sound the death knell of the technical defence? For a number of reasons, it is submitted that it did not:"

debtor vis-á-vis the technical defence was greatly weakened as a result. However, the case law had been very inconsistent in its approach to Section 6 up until that point. For example, the Supreme Court had already advocated the purposive approach in the 1972 decision of *Credit Finance Limited v. Grace,* yet this case was never mentioned in the 1992 High Court decision of *Allied Irish Bank v. Griffin.*

2. *Possibility of confining the O'Hara and Griffin approaches to their own particular facts:-*

In *Irish Bank of Commerce v. O'Hara,* Finlay CJ. noted that the earlier decision of *Thorp v. Browne* concerned the identity of the judgment debtor rather than the identification of lands. However, Finlay CJ. was not prepared to see it confined to its own particular circumstances, and indicated that the purposive approach of *Thorp v. Browne* should apply generally.

That being the case, many would argue that Finlay CJ.'s comments in *O'Hara* closed the door firmly in the face of the technical defence. However, it would have been better if the court had been given an opportunity to specifically deal with the decision of *Allied Irish Bank -v Griffin* in which an affidavit was struck down on an entirely technical point. This was unfortunate, as the *Griffin* case had only been decided four months earlier.

In those circumstances, it is submitted that up to very recently, it would have been open to a Defendant to perhaps confine *O'Hara* to its own facts, and argue that *O'Hara* would not have been binding on the court in *Griffin* if it had been decided first. *O'Hara* was concerned with the location of land whilst Griffin was concerned with the description of the profession of the Defendant. Unfortunately, the *Griffin* case was not referred to or dealt with by the Supreme Court in *O'Hara,* where it is submitted, an attempt could have been made to batten down the hatches.

With that in mind, it was only a matter of time before an attempt was made to confine O'Hara to it own particular facts and circumstances. This opportunity arose in the recent High Court decision of Laffoy J. in the case of *Ulster Bank Limited v. Neil Crawford & Cathal Crawford.*[12]

The facts of the case concerned an application by the Plaintiff for a well-charging order against the Defendants. At the hearing, the only defence pursued by the Defendants, was that the title, trade or profession of each of the Defendants was mistakenly given in the judgment mortgage affidavit. It was argued that as the Defendants were referred to as the proprietor rather than as building contractor, the court should follow the strict approach of *Allied Irish Bank v Griffin.*

However Laffoy J. having considered a number of cases advocating the purposive approach, most notably the decision of *Irish Bank of Commerce v. O'Hara* stated: -

> "It seems to me that the approach I should adopt is to consider whether the affidavit...leaves any doubt whatever as to the identity of the person against whom the judgment...had been obtained."

Following *Thorp v. Browne* and *Irish Bank of Commerce v. O'Hara,* Laffoy J. continued:-

> "In my view, no doubt whatever is left by the affidavit...from which it is clear that the judgment was obtained against the Defendants as the proprietors of the business which trade as Crawford construction".[13]

In those circumstances Laffoy J. stated that the point taken by the Defendants was very much a technical one, and refused the relief sought

Conclusion

It is beyond doubt that the once inconsistent approach of the Irish Court in their approach to the Section 6 requirements was substantially remedied by the decision of the Supreme Court in *O'Hara.*

Up to that point there were two different Supreme Court decisions representing two separate and distinct strands of authority[14]. One advocating the purposive approach, and one advocating the strict approach, with the case law being applied in a haphazard and erratic manner. In the decision of *O'Hara,* the Supreme Court was given the opportunity to review both strands of authority. Ultimately it sided with the purposive approach authorities.

However the facts of *O'Hara* were very different from *Allied Irish Bank v Griffin. O'Hara* dealt with the description of lands, whilst *Griffin* dealt with a misdescription in the judgment debtor's profession. It is submitted that because of this, and because *Allied Irish Bank v Griffin* was not specifically dealt with in *O'Hara,* a kink was left in an otherwise closed door. That door has now been shut tightly by the *Crawford* decision.

It is submitted that *Ulster Bank Limited v Crawford* was not a groundbreaking decision. *O'Hara* had done all the legwork. *Ulster Bank v Crawford* merely serves to confirm what we already knew: the demise of the technical defence. ●

1. See Keane J.'s comments in: "*Company Law in the Republic of Ireland*" at page 226
2. See Discussion by Christopher Doyle, Lecture under The Bar Council Continuing Legal Education Programme, Monday 17th October 1994
3. [1971] IR 10 at page 12
5. [1992] 2 IR 70
6. [1867] LR 2 HL 220 - See also the references therein In Re Smith & Ross 11 Ir Ch Rep 397 and In Re Fitzgerald's estate 11 Ir Ch R 356
7. [1888] 23 LR Ir 61 (C.A.) at page 81
8. [1930] IR 322
9. Unreported, Supreme Court, Finlay CJ., 9th June 1972
10. Unreported, High Court, Costello J, 10th May 1989
11. Unreported, Supreme Court, Finlay CJ., 7th April 1992
12. Unreported, High Court, Laffoy J., 20th December 1999
13. Ibid at pages 8 & 9
14. See the Supreme Court decisions in *Re Murphy and McCormack* and *Credit Finance Limited v Grace* which followed the strict and purposive approaches respectively.

MRS NEVIN'S PICTURES - A EUROPEAN GLOSS

Paddy Dillon-Malone BL *argues that a recent decision of the European Court of Human Rights provides support for the view that Carroll J.'s order prohibitng the print media from publishing any photographs of Mrs Nevin during the Nevin trial constituted a disproportionate attack on the freedom of the press as guaranteed by the Constitution and by the European Convention on Human Rights.*

Introduction

During the closing days of the trial of Catherine Nevin on charges of murder and soliciting to murder her husband, a trial which attracted enormous public curiosity and relentless media commentary throughout its course, at least one newspaper published a blacked-out silhouette of Mrs Nevin in an old photograph of herself and her husband in happier times. The dead-pan explanation in the caption was that the trial judge had prohibited the print media from publishing inter alia any photographs of Mrs Nevin for the duration of the trial. It was a telling protest, in that the superimposition of the featureless but familiar outline of Mrs Nevin's silhouette on the published photograph highlighted the very real restriction imposed on the press: if the press cannot describe the appearance and demeanour of a defendant in a criminal trial, and cannot publish his or her photograph, its role in reporting on the trial and its background risks becoming distant and dehumanised.

Although the validity of this order was questioned, it was never challenged by way of appeal. If an appeal had been pursued, the probable grounds of challenge would have been that the scope of the order was disproportionate, and that the trial judge failed to meet the exacting constitutional requirements for curtailing press freedom to report and comment on trials as laid down by the Supreme Court decision in *Irish Times Ltd v Ireland.*[1] In particular, the newspapers may have had a good arguable case that, whatever about a ban on comments tending to ridicule the appearance and demeanour of Mrs Nevin, the ban on publication of any related comments and on any photographs of the defendant was not necessary either for securing a fair trial or for ensuring that the administration of justice was not brought into contempt. Nor, to take another argument, could such a wide ban have been necessary to protect the privacy of the accused; and, finally, the ban on photographs possibly discriminated against the print media in an arbitrary manner.

In the event, possibly conscious of their responsibility to avoid further possible prejudice in the conduct of the trial, the newspapers confined themselves to editorial broadsides on the ban. However, a recent decision of the European Court of Human Rights, handed down just a month before the order made in the Nevin case, provides support for the view that the extent of the ban, and in particular the ban on any photographs of Mrs Nevin, constituted a disproportionate attack on the freedom of the press as guaranteed by the Constitution and by the European Convention on Human Rights.

The Ban in Mrs Nevin's Case

As is well known, Catherine Nevin's first trial was afflicted by a number of unfortunate false starts, and the trial judge, Ms Justice Carroll, was concerned to put a stop to the antics of those elements of the press which appeared to be caught in a cruel flirtation with Mrs Nevin which threatened to undermine the integrity of the second trial. During the first trial, Mrs Nevin's outfit and hairstyle changes had been minutely and gleefully picked upon, and Carroll J was also concerned to preserve the dignity and respect which she believed was owed to the defendant. The order was made on the first day of the new trial, in the context of a defence application to stay the proceedings on grounds of prejudice. This application was refused, on the grounds that any risk that Mrs Nevin would not get a fair trial could be avoided by appropriate rulings and directions.

According to Carroll J, a distinction was to be drawn between fair and accurate news reporting of the trial and 'colour pieces' which contained comment on Mrs Nevin's appearance and demeanour which were 'at times cruel, at times titillating and always intrusive'. She described these press items as being 'the worst kind of tabloid journalism designed solely to sell newspapers without any regard to Mrs Nevin's dignity as a human person.' In making the order, Carroll J stated that it was intended to curb the licence taken by some journalists - the defendant's right to a fair trial 'far outweighed' the media's right

to comment on her appearance and demeanour, and in the light of the the presumption of innocence attaching to the defendant, she was entitled to be treated with respect. A defendant was entitled to wear what she wanted to court without it being dissected in the press and, furthermore, her demeanour in court was a matter for the jury.[2]

Under the terms of the order, a ban was placed on comment on Mrs Nevin's hairstyle, dress, jewellery, nail varnish, reading matter or demeanour in court, as well as on publication of photographs of her in the press. The ban did not extend to radio or television because no complaint had been made in respect of their coverage, but in respect of the press Carroll J was persuaded that none of the print media had been without blame and that the circumstances required that 'the blanket nature of the intrusiveness' be tackled.[3]

The Ban in the Austrian Letter-bombing Case

In *News Verlags GmbH & CoKG v Austria,*[4] the European Court of Human Rights was called upon to consider the compatibility with Article 10 ECHR of a court prohibition on the publication of a defendant's photograph in connection with reports on the criminal proceedings against him. The defendant, B, was being tried on charges relating to a notorious letter-bomb campaign in Austria allegedly perpetrated by a neo-Nazi group of which B was a member. The applicant company, the publisher and owner of the Austrian magazine, *News*, had previously devoted a series of articles including a special edition to the activities of the extreme right and had identified B as one of the most brutal members of the neo-Nazi community in Austria and a possible successor to its then leader. One article had also stated that B and another person, R, were suspected of having despatched the bombs and that they had probably been behind the terror campaign.

Following the commencement of criminal proceedings against him, B brought proceedings against the applicant company under section 78 of the Austrian Copyright Act, seeking an order including an interlocutory injunction that it be prohibited from publishing his picture in connection with reports on any criminal proceedings against him. This statutory provision is directed against the abuse of pictures in public: it seeks to prevent a person from being disparaged by the publication of a picture, or to prevent his private life being made public or his picture being used in a misleading, disparaging or degrading manner.[5]

At first instance, the Vienna Commercial Court ruled that the statutory protection in the Copyright Act had to be weighed against the public interest in receiving information. In the case of serious allegations of violent and subversive crimes, this public interest justified the publication of a suspect's photograph in principle. Further, the Court found that it did not have to examine whether the accompanying comment violated B's right of privacy as he had failed to indicate which passages of the articles might go beyond the limits of acceptable reporting. This decision was overturned by the Vienna Court of Appeal, which held that an accused had a 'legitimate interest' within the meaning of the Act in not being denounced in public by the publication of his or her picture in connection with a disparaging and scandalous text which was not only insulting, but also a violation of the presumption of innocence. Despite this reasoning, the terms of the appeal court's ruling was to prohibit the publication of B's picture not only in connection with a text that was prejudicial but, more generally, in connection with any report on the criminal proceedings against him irrespective of the accompanying text. In affirming this ruling, the Supreme Court stated that there were no clear indications that the public interest justified publishing B's picture.

In alternative proceedings commenced by B seeking injunctions restraining the applicant company from publishing his picture in connection with such statements as had been made in the articles at issue, the Vienna Commercial Court subsequently granted a more limited perpetual injunction, banning such publication only if B was referred to as the perpetrator of the offences or if otherwise the rules of objective reporting were violated:according to the first instance court, having regard to the seriousness of the charges and the notoriety of the victims, the public interest in B's appearance outweighed his interest in not having his picture published as long as such reports did not overstep the boundaries of objective journalism. On appeal, however, the Vienna Court of Appeal re-imposed the more general prohibition by reference to the reasoning in its earlier judgment, adding that in circumstances where the damage had already been done by the offending text there was no onus on B to specify the statements which the applicant company should refrain from publishing in connection with his picture.

The Austrian Supreme Court agreed, finding that the right to impart information did not extend to the publication of B's picture in violation of B's statutory right of protection and, further, holding that the applicant company's freedom of expression had not been violated since it had not been prohibited from reporting on the proceedings. During the subsequent criminal proceedings, which resulted in a partial conviction of B, other newspapers remained free to publish B's picture.[6]

In its application to Strasbourg, the applicant company conceded that in an appropriate case the publication of an individual's picture in a trial report might give rise to a conflict as between the freedom of the press and the individual's right to protection of his or her private and family life. However, the photographs of B used in its reports did not infringe B's personal integrity as they were not in themselves degrading or defamatory. The applicant company also accepted that the State may be called upon to ensure that the media do not infringe the presumption of innocence by reports which might endanger the impartiality of the courts. Subject to these limitations, it argued that the choice of form and the means of communicating information was an essential element of press freedom : the reporting at issue was a unity of text and pictures which was protected by Article 10 ECHR in its entirety as well as in its single components.

The European Court of Human Rights agreed, recalling its unfailing reminder that freedom of the press constitutes one of the essential foundations of a democratic society in serving to impart ideas and information and acting as a public watchdog. In that role, journalists are allowed a certain leeway to

"In particular, the need for any restriction should be established convincingly by reference to the Convention test of 'necessity in a democratic society' which requires the Court to determine whether the interference in question corresponds to a pressing social need, whether it is proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient. In this particular context, the presumption of innocence and the right to a fair trial enjoyed by an accused were of relevance in balancing the competing interests at stake, but the Court stressed that within the limits of permissible comment the right and duty of the press to impart information and ideas was more than an element of free expression and was itself an aspect of the fair trial guarantee that proceedings be held in public."

exaggerate, and even to be provocative, as long as there is an issue of public confidence and an underlying basis of fact. More generally, the guarantee in Article 10 applies not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Thus, in the context of court reporting as elsewhere the exceptions of Article 10(2), including the protection of good name and the integrity of the courts, must be construed strictly.

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In the instant case, the Court reiterated that Article 10 ECHR protects not only the substance of ideas and information but also the form in which they are presented [7] - it was not for the courts to substitute their own views as to what reporting techniques should be adopted by journalists. There was accordingly an interference with the applicant company's freedom of expression. As to whether that interference was necessary, the Court found that although the objective of the ban was legimate (the protection of B's good name and of the integrity of the courts), the reasons given for the ban, although relevant, were not sufficient. According to the Court :

> 'It is true, as the government pointed out, that the injunctions did in no way restrict the applicant company's right to publish comments on the criminal proceedings against B. However, they restricted the applicant company's choice as to the presentation of its reports, while it was undisputed that other media were free to continue to publish B's picture throughout the criminal proceedings against him. Having regard to these circumstances and to the domestic courts' finding that it was not the pictures used by the applicant company but only their combination with the text that interfered with B's rights, the Court finds that the absolute prohibition of the publication of B's picture went further than was necessary to protect B against defamation or against violations of the presumption of innocence. Thus, there is no reasonable relationship of proportionality between the injunctions as formulated by the Vienna Court of Appeal and the legitimate aims pursued.'

Having regard to this finding, the Court found it unnecessary to examine the discrimination complaint under Article 14 in conjunction with Article 10 ECHR.

Comment

The decision of the European Court of Human Rights in *News Verlags v Austria* provides strong support for the view that the ban on publishing any photographs of Mrs Nevin for the duration of her trial was a disproportionate restriction on the right and duty of the press to report and comment on court proceedings. It also indicates that the scope of the ban on making any comment at all on Mrs Nevin's appearance or demeanour was similarly over-broad. That is not to say that the Supreme Court, if it had been seized of the matter, would have come to any different conclusion - the judgment in News *Verlags v Austria* also confirms that the approach of the European Court of Human Rights in reconciling the competing claims to free and contemporaneous reporting of criminal trials, on the one hand, with the rights of the accused, on the other, closely mirrors the reasoning of the Supreme Court in *Irish Times Ltd v Ireland.*[8] Both judgments attach considerable weight to the importance of a free press in the administration of justice, both insist that this freedom cannot be simply trumped by a simple appeal to the heirarchically superior interests of a fair trial, and both insist that detailed procedures and reasoned criteria be applied in any decision to curtail court reporting to the extent strictly necessary. In this particular context, therefore, if not in others, it appears that the Constitution defends press freedom in as robust a manner as the European Convention on Human Rights.[9]

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That is not to say that these types of prohibition could never be justified: as the European Court of Human Rights recognised, there may be circumstances in which even the publication of a picture accompanied by a correct statement of fact could unduly prejudice the right of the accused to a fair trial, as for example where identification may be an issue at trial. There may also be cases where the age of the accused or the nature of the offence requires that the physical identity of the accused be protected pending conviction. In addition, although Irish law has no generalised tort for invasion of privacy and has not yet acted upon the recommendation of the Law Reform Commission to establish such a remedy in cases inter alia of harassment,[10] it is undoubtedly the case that the Courts could, in the context of criminal proceedings, invoke the privacy rights of the accused in fashioning a court order designed to restrict prejudicial publicity during the trial. Thus, for example, family photographs and other private images could be distinguished from photographs of the accused coming and going to court.

Similarly, it appears to be a normal incident of the public interest in court publicity that the press should comment on the demeanour and appearance of those on trial. This is not just because such reports may bear on whether the accused understands and is following matters, but also because public confidence in the criminal justice system and on the sentences imposed by courts depends in part on a degree of human familiarity with the character and attitude of accused persons during the course of the trial.[11] Without that familiarity, the punishment imposed in the name of the people carries an additional risk of becoming brutalised and mechanistic. In this sense, the role of the press in paying attention to the personal demeanour of an accused, properly exercised, is not a matter of titillation or intrusion but plays an important part in the fairness of the proceedings as a whole. For this reason, as well as because the Courts are

"Quite apart from these considerations, these cases raise a wider, more interesting question. At what point can it be said that the right to a fair trial extends to a right to be treated with respect and dignity by the press? Whereas there will be cases in which matters get out of hand and threaten the fairness of the proceedings, and Mrs Nevin's case was certainly one of these, the notion that defendants in criminal proceedings have a wider right to respect from the media sits uneasily with the natural rough and tumble of public curiosity, press freedom and court publicity which the Constitution and the Convention also protect. In an appropriate case, the particular vulnerability or susceptibility of an accused could call for such intervention but more generally, it is suggested, the law does not guarantee any such right. In particular, the scope of what is protected under the rubric of fair and accurate court reporting, as opposed to prejudicial comment, properly extends to critical and descriptive observations on the conduct of an accused."

required to view any prior restraint on freedom of expression with some suspicion, a wholly unqualified ban on such comments should be scrutinised carefully with a view to identifying whether the same mischief could not have been avoided by a more specific prohibition, as for example a ban on comments tending to expose the accused to ridicule or contempt.

Another point of interest in both the Nevin case and the Austrian letterbombing case was the element of discrimination. In *News Verlag v Austria* the singling out of the applicant company formed an important part of the Court's reasoning in respect of the proportionality of the prohibition itself, and it is axiomatic that the necessity for a prohibition which is directed at one publisher only, or at one press medium only, as opposed to the media at large, will be very difficult to demonstrate even in the most serious cases of prejudice. In the case of a blanket ban on photographs of the accused, without reference to any text or innuendo, it is very difficult to justify. On the other hand, a Court is entitled to have regard to what Carroll J described as 'the licence' which particular journalists may have already taken in measuring the risk of prejudice which their continued coverage, as opposed to the coverage of third parties, might entail. For this reason, a challenge to a reporting ban on grounds of discrimination, it is suggested, may not be as easy to establish as might first appear.

Quite apart from these considerations, these cases raise a wider, more interesting question. At what point can it be said that the right to a fair trial extends to a right to be treated with respect and dignity by the press? Whereas there will be cases in which matters get out of hand and threaten the fairness of the proceedings, and Mrs Nevin's case was certainly one of these, the notion that defendants in criminal proceedings have a wider right to respect from the media sits uneasily with the natural rough and tumble of public curiosity, press freedom and court publicity which the Constitution and the Convention also protect. In an appropriate case, the particular vulnerability or susceptibility of an accused could call for such intervention but more generally, it is suggested, the law does not guarantee any such right. In particular, the scope of what is protected under the rubric of fair and accurate court reporting, as opposed to prejudicial comment, properly extends to critical and descriptive observations on the conduct of an accused.

We have come a long way, it is to be hoped, from the cackling public humiliations of the stocks and trial by ordeal visited on criminal defendants in medieval times. The Courts now have a duty to curtail the worst excesses of the public gallery, now represented by the modern press, where it threatens to undermine the basic dignity of a defendant in a criminal trial. A lurid press campaign which has the effect of characterising an accused as grotesque or laughable can very easily prejudice the fairness of proceedings, and it is established that a failure to intervene or rectify such prejudice could itself constitute a violation of the accused's rights under the Irish Constitution and under Article 6 ECHR.[12] Nonetheless, subject always to the special protections required to protect rights of privacy and to ensure a fair trial (as well as the integrity of the courts), it appears right that defendants in criminal cases who catch the attention of a truly free press must be prepared to take the rough with the smooth in matters of court reporting. ●

1 [1998] 1 IR 359.

2 The Irish Times, 10 February 2000.

3 Ibid.

4 Judgment of 11 January 2000.

5 No equivalent provision exists in Irish law - see generally *Law Reform Commission Report on Privacy* (1998).

6 B was later awarded damages for the breach by the applicant company of B's presumption of innocence in the words describing him as the 'perpetrator' of the letter bombing campaign.

7 *Jersild v Denmark* (1994) 19 EHRR 1; also *Chorherr v Austria* (1993) 17 EHRR 358.

8 Note 1 above.

9 On the size of jury awards in defamation cases, see Leonard, *Irish Libel Law and the European Convention on Human Rights* (2000) Bar Review 410-415. The very recent judgment in Bergens *Tidende v Norway*, ECHR, Judgment of 2 May 2000 demonstrates that the freedom of the pres s may require a private individual to take the rough with the smooth in the face of scathing and even unfair criticism of his or her professional or business practices in circumstances where the criticism bears on a question of wider public interest, for example a question of consumer or public health protection. Compare the decision of the High Court (Kelly J) in *Reynolds v Malocco* [1999] 2 IR 203. See also recently *Bladet Tromso & Stensaas v Norway*, Judgment of 20 May 1999; *Nilsen & Johnsen v Norway*, judgment of 25 November 1999; *Wabl v Austria*, judgment of 21 March 2000.

10 See note 4 above.

11 Cf. Tom O'Malley, Opinion, The Irish Times, 13 April 2000, who makes the point that it is doubtful whether the public was impoverished by having to wait a few weeks for certain information in the Nevin case.

12 For an analysis of the potential impact on a jury in a criminal trial of adverse media coverage of the defendant, see the article by John O'Donnell in this issue of the *Bar Review*. For Convention cases, see *Worm v Austria* (1997) 25 EHRR 454; X v UK (1969) 30 CD 70; *Hodgson v UK* (1987) 51 DR 136.

USING E-MAIL DISCUSSION GROUPS EFFECTIVELY

***Darius Whelan BL**, Lecturer in Law, Institute of Technology, Tallaght explains the use of e-mail discussion groups on the internet and outlines discussion groups of interest to lawyers.*

Introduction

Using the Internet primarily involves using a web browser and using an e-mail program. There is much talk of websites, web pages and domain names but the usefulness of e-mail, and in particular e-mail discussion groups, is sometimes overlooked. This article explains how to find relevant e-mail discussion groups, browse and search their archives of messages online and join the groups.

E-mail discussion groups obviously vary enormously in quality, but then so do websites. In some cases, the discussion group may be going through a quiet phase and nothing much of interest may be said. Another group might be having a vicious battle about a personal comment made two weeks previously that has no real relevance to the area being discussed. In the midst of all of this, you might, with a bit of luck and some patience, find a group that suits your requirements at the time. It may provide useful links and comments on websites that you never heard of, notices of upcoming conferences and discussion of recent legislation and cases.[1]

Finding Relevant E-Mail Groups

Three of the most important types of legal e-mail discussion groups are Listserv lists, mailbase lists and EGroups. The different names relate primarily to the software used to run the groups, rather than the nature of the groups. A good starting point for finding legal groups is the Law Lists guide maintained by Lyonette Louis-Jacques of University of Chicago Law Library.[2] This guide is fully searchable and very comprehensive. It gives technical details about each group, together with any websites that are run in conjunction with the groups. Elsewhere on her main website,[3] Louis-Jacques provides files on the top Internet law groups, international law groups and national groups.

Other indexes of legal groups include those at Oklahoma University[4] and the Hieros Gamos site[5], The best general indexes are Catalist[6], Tile.net[7], Liszt[8], Mailbase[9], Egroups[10] and Dejanews,[11]

Once you have found a group or groups that interest you, you will often be able to find basic information about the group at some of these sites. This information will include in what country the mail program is located, how many members it has, how long it has existed and whether it is moderated or not. A moderated group is one where each message is reviewed by editors first to ensure that it is relevant to the group's topic. All of this information can be of assistance in focusing your search on groups which are more suitable to your requirements.

Searching and Browsing Archives Online

Ordinary Internet search engines such as altavista or lycos do not search through archives of e-mail discussion group messages. Some of them include an option to search 'Newsgroups' but this refers only to usenet news groups which are only a portion of the groups available and which are generally of poorer quality than the other types of groups.

Archives of group messages can normally only be browsed and searched at the site which hosts the group. This site may have been referred to in Louis-Jacques's Law Lists guide, or may be found at one of the other sites listed earlier. Browsing through the archives of recent messages on a group is a very good way of discovering the general tenor and quality of the group. It can also be a means of accessing legal information from the group without having to commit yourself to joining the group. If the archive includes a search option, this means that sophisticated queries of the archive may be carried out. Many of the archives contain thousands of messages dating back a number of years that may contain valuable nuggets of information buried within them.

Joining E-mail Groups

Having found a discussion group which interests you and perhaps browsed through recent messages, you might now decide that you would like to join the group. This will mean that you will receive all messages posted to the group each day, and that you can ask questions or discuss issues with other group members. As is to be expected, the discussion groups use advanced e-mail software which automates many of the technical aspects of the groups' administration. Previously people would join the groups only by e-mail but increasingly it is possible to join a group simply by filling in a form on the web. For example, to join the euro-lex list which deals with all aspects of European law, go to www.listserv.gmd.de/archives/euro-lex.html and choose the '(Un)subscribe' link which allows you either to join (subscribe) or leave (unsubscribe from) the group. Alternatively, the

instructions in the Law Lists guide state that to join euro-lex you send the following e-mail message to listserv@listserv.gmd.de :

subscribe euro-lex Your Name

('Your Name' is replaced by your full name, e.g. Josephine O'Brien)

After that, you will receive technical e-mail messages welcoming you to the group and telling you how to leave it and so on.

You can choose either to participate actively in the group, or to 'lurk.' Lurking means being a member of the group without posting any messages to the entire group. The welcoming message will state how a message is sent to all members of the group. For example, a message for all members of the euro-lex group is sent to euro-lex@listserv.gmd.de . It is often advisable not to ask a question until you check the archive of messages online to see if it has been asked before.

A number of guides on writing messages to e-mail groups are available[12].This area is sometimes referred to rather patronisingly as 'netiquette' but does contain some useful pointers for beginners. For example, you are advised not to use all capitals in messages and to avoid sending short messages to the entire group saying things like 'I agree with Jim.'

If you would like to find out the names and e-mail addresses of the other members of the group, this can normally be done by sending a special command by e-mail. For example, to obtain a list of the members of the Restitution Law discussion group, send the following message to majordomo@maillist.ox.ac.uk :

who restitution

There are numerous advanced options available for those who want to customize their membership of groups. For example, you can choose to receive a daily digest of all postings to the group rather than receiving each message individually as it is sent out during the day. These advanced commands may often be carried out using web forms as well. The commands vary depending on the discussion group program which is being used by the host site. An example of the options available is provided by the Listserv General User's Guide[13]. For general resources on e-mail discussion groups, see part of Mary Houten-Kemp's Everything E-Mail site.[14]

Some Sample Groups

Euro-Lex
www.listserv.gmd.de/archives/euro-lex.html
This unmoderated group deals with all aspects of European law, both at national and international level. It was founded in Germany in 1992 by Renate Weidinger and currently has 880 members.

Lis-Law
www.mailbase.ac.uk/lists/lis-law/
Lis-law provides news and discussion on legal information and law libraries, with particular reference to UK and EU sources. It was formed in the UK 1993 and has 490 members.

IrishLaw
www.irish-law.org
IrishLaw is a moderated list dealing with Irish and Northern Irish Law, was founded by the author in 1994 and has 360 members.

BrehonAid
www.brehon.org and www.egroups.com/list/brehonaid/
This group discusses Brehon law and campaigns in support of the CELT project at UCC, which aims to publish Brehon law on the web. It was founded by Vincent Salafia in 1999 and has 39 members.

Uk.legal
www.deja.com/group/uk.legal
An example of a usenet newsgroup dealing with UK law.
Other sample groups include Bioethics Law, Business Law, Cyberia-L (discussing the law of cyberspace), Human Rights, Int-Law (Foreign and Comparative Law) Legal Ethics, Mental Health Law, and Sports Law.

Conclusion

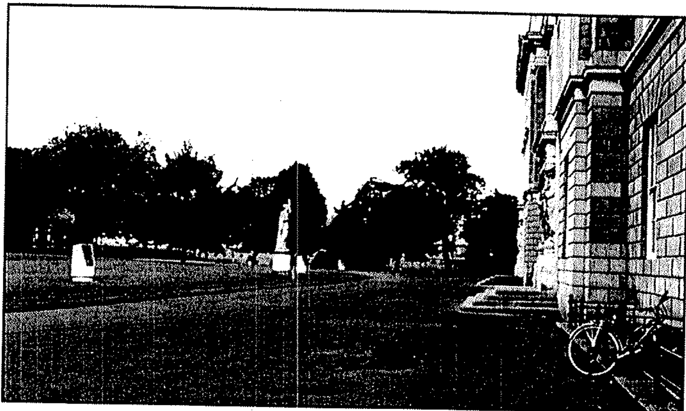
Barristers, solicitors and academics have always shared information and views with each other on the latest legal developments. E-mail discussion groups provide new opportunities to interact with lawyers and others on a global scale. Taking the example of the IrishLaw group, on numerous occasions interesting comparative angles have been raised by members outside Ireland on developments in Irish and Northern Irish law. Informal contacts by e-mail have lead to more formal dealings between members. Members who post messages to the group have had the opportunity to display to a wide audience their expertise in particular legal areas. And because e-mails appear so rapidly on members' desktops around the world, there have been swift responses to queries regarding cases on which information may be needed urgently. The decision to 'moderate' (edit) the messages to the group was taken three years ago and has meant that members are guaranteed that all messages concern Irish or Northern Irish law. Written guidelines on the moderation of the group are automatically sent to each member on joining, and the group has become more focused and therefore a more useful resource for the Internet community. For example, there was a lively discussion on possible constitutional challenges to the proposed changes in taxation of married couples in the recent budget, with contributions from members in Ireland, the UK and the USA.

E-mail discussion groups are a rich source of news, discussion and debate on all legal topics and lawyers with Internet access are urged to seek out relevant groups, browse through their archives, and consider joining the groups which are most pertinent to their own areas of specialisation.●

1. The web addresses in this article may be accessed at www.irish-law.org/email/
2. www.lib.uchicago.edu/~llou/lawlists/info.html
3. www.lib.uchicago.edu/~llou/
4. www.law.ou.edu/lists/
5. www.hg.org/listservs.html
6. www.lsoft.com/catalist.html (32,000 Listserv Lists)
7. www.tile.net/lists
8. www.liszt.com
9. www.mailbase.ac.uk (2,000 UK-based groups)
10. www.egroups.com
11. www.deja.com/usenet/ (Usenet news groups)
12. www.liv.ac.uk/~evansjon/roadmap/map07.html; www.albion.com/netiquette/
13. www.lsoft.com/manuals/
14. www.everythingemail.net/email_discussion.html

KING'S INNS NEWS

DIGGING IN..



Our surfaces are getting a facelift. Let us hope that we will have a changed aspect in October.

OUR STUDENTS

We would like to wish all our students a good holiday period. We know that many have already gone abroad to work in lawyers' offices (particularly in the United States); some are back in their full-time jobs after the break for examinations and others are preparing to go down to the Law Library in October. On that note, we take this opportunity of congratulating all our new graduates and of wishing them well with their careers.

HENRIETTA STREET

CONSERVATION STUDY PRESENTATION

The Henrietta Street Conservation Study was presented by the City Manager to the property owners on Henrietta Street in early June in the Benchers' Room at King's Inns. The study provides guidance for all the concerned interests in the future conservation of the street. The Chief Justice accepted the study on behalf of King's Inns and No. 11 Henrietta Street (former house of the Under-Treasurer of the Society).

As part of the EU co-funded Historical Area Rejuvenation Project (HARP), Dublin Corporation commissioned the Dublin Civic Trust to carry out a detailed conservation assessment and brief for the future of Henrietta Street. One of the prime objectives of HARP is to develop a co-ordinated approach for the future of the area through partnership with Dublin Corporation, private sector property owners and non-Government organisations.

The first stage of the study, which was completed in late 1998, comprised a detail archival, photographic and descriptive inventory of each individual house (twelve in total) identifying all features of significance worth of preservation.

The second and final stage of the study, the subject of this presentation, provides for a detailed structural and architectural conservation report for each of the individual buildings. This report together with a conservation based works programme and cost plan provides guidance for the property owners on the conservation and preservation of these unique buildings to the highest specification.

As a result of these studies, a new spirit pervades among the property owners in Henrietta Street. The residents are in active discussions with regard to the removal of the barrels. This will be a first step in ensuring that the street will be, once again, an agreeable place to visit or to walk through.

CCBE REVIEW

***Harold A. Whelehan SC** updates readers on the activities of the CCBE, the officially-recognised organisation in the European Union and the European Economic Area for the legal profession*

CCBE met in Plenary Session in Stockholm in late May. I attended with Geraldine Clarke of the Law Society. I would recommend that readers of this article would visit the CCBE website for general information (www.ccbe.org). In summary, CCBE was founded in 1960 and it the officially recognised organisation in the European Union and the European economic area for the legal profession. CCBE is incorporated as an international, non-profit making association under Belgian law.

The CCBE consists of 18 delegations whose members are nominated by the Bars and Law Societies of the 18 member states (there are 9 nations with observer status).

The objects for which the CCBE isestablished are:

a) to act as a joint body on behalf of the Bars and Law Societies of the EEA in all matters involving the application of the European Community Treaties, the Community law, the EEA agreement and the agreement of the 2nd May 1992 with adjusting protocol made the 17th March 1993 between EFTA states in their application to the profession of lawyer.

b) To co-ordinate the views, policies and activities of the Bars and Law Societies of the EEA in their common dealings with European Union, EEA and EFTA institutions

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

d) To further the achievements of the objectives of the European Union Treaties, EEA agreement and EFTA agreement in their application to the profession of lawyer

e) To act as the joint body of the Bars and Law Societies in the EEA in supervising the inter-state practice of the legal profession throughout the EEA and most particularly, in attending to the proper implementation by the Bars and Law Societies and by the States of the Directive, aiming at facilitating the practice of the profession on a permanent basis in a Member State other then that in which the qualification was obtained.

f) To represent the Bars and Law Societies of the EEA in their dealings with the other organisations of lawyers and with other authorised and third parties (such as the UIA, IBA and AIJAG) to study all questions affecting the profession of lawyer and to develop the practice of that profession and more generally to defend and promote the interests of the profession of lawyer.

The CCBE maintains a permanent delegation to the European Court of Justice and the Court of First Instance of the European Communities, the European Jurisdictions of Human rights and the EFTA court.

Most of the work of the CCBE is done by committees and ad-hoc committees formed from specialist members who study various issues and prepare submission for transmission to the European Institutions on subjects such as competition, organised crime, money laundering, electronic commerce and ethics.

The CCBE has been involved in seeking to protect the independence of the legal profession in relation to a number of matters such as the application of the directives on the provision of lawyer's services and the recognition of diplomas, the preparation of a further directive to facilitate the exercise by lawyers of the right of establishment and now its implementation in the internal law of the members states, the harmonisation of rules of professional conduct, particularly on legal professional privilege, specialisation and advertising, the protection of the consumer of legal services, legal aid and legal expenses insurance, the education of young lawyers and the rights of defence and also the protection of the legal profession and its independence, having regard to the threat to that independence, the development of multi-disciplinary partnerships and the international establishment of GATS.

In the course of the plenary meeting in Stockholm, consideration was given to a report of a review group which has assessed and considered the activities of the CCBE. Consideration is being given to the possibility of the CCBE expanding the scope of its activity to provide educational back-up, library facilities, reference facilities within the CCBE, perhaps the acquisition of an information system to do with practice and procedures before the European Courts and the analysis of substantive law, dissemination of information to the Bars and Law Societies for onward transmission to their members.

There must be considerable doubt as to whether such increased activities would be sustainable and effective. Further consideration is being given to the issue. The feasibility of such a development is being carefully considered. At the moment I feel that the costs would be enormous to the CCBE and to the constituent organisations and the service would not necessarily be helpful. However the examination of the possibility is in itself worthwhile.

The CCBE spends a lot of time and energy and some finances in helping the development of independent Bars in the emerging Central European and Eastern countries. Plainly speaking, these activities are funded by EU funds in the form of grants for specific seminars and projects and the dissemination of general information to lawyers seeking to establish an independent legal profession in countries where no such profession existed. This work has been most worthwhile and has been helpful and supportive to the indigenous lawyers in these countries. Many of these lawyers are seeking to establish themselves against a background of economic expansion by inward investment which has brought on its shoulders the establishment of law firms based in more developed countries which establish branches within the jurisdiction of the emerging countries. These firms frequently do not encourage or employ lawyers from the home country and leave them at a considerable disadvantage due to the evolving state of legal education and the absence of educational programmes for exposure to foreign, European or other international law.

The PECO committee continues, insofar as possible, to support and encourage local Bars and Law Societies of these emerging countries in the face of very difficult conditions.

The issue of access to justice is featuring very prominently at the moment with the CCBE. This is due to the need to respond to a Green paper published by the Commission entitled 'Legal Aid in Civil Matters - the problems confronting the cross-border litigant'. I am serving on an ad-hoc committee which prepared a response of the CCBE to the Green Paper but I intend to write an article which will summarise the general principle and work of the committee in a later issue of the Bar Review.

The CCBE is also considering the feasibility of establishing a 'European Lawyers Database' on the Internet. This discussion has been going on for almost two years. The CCBE Technology Committee as a first step, carried out a feasibility study by which the professional implications of such a database were elaborated. This work was done with the financial support of the European Commission.

The CCBE is seeking funds to carry out further investigations into this project. I believe the project should continue and that funding will be obtained from the Commission but a decision on the project will have to made in the light of certain reservations about publicity aspects and other practical difficulties relating to guaranteeing the accuracy of data, the day to day business of feeding and updating the project. Problems could arise in relation to processing lawyer's personal data (who and how). This in turn could raise issues concerning liability for unresolved data protection. Other difficulties will have to be considered relating to the Code of Conduct when it comes to listing preferred areas of practice, and so on.

However it does seem worthwhile to allow the project to be examined on the positive side and when a feasibility exercise has been completed, a proper judgement can be made.

A matter of continuing concern is the implementation of the establishment directive which was due to be finalised in March of this year. The CCBE is committed to ensuring that the implementation of the Directive will be done in a way which will preserve the overall independence of the legal profession, the highest standards of practice in each country, effective screening and admission procedures in each host country and the application of the Code of Conduct of both the host country and the jurisdiction in which the travelling lawyer originally qualified.

This is just a summary of the most relevant issues considered at the Plenary Session and in respect of which there is ongoing work with the CCBE Secretariat and the various committees having responsibility. ●

"SUMMATION BLAZE" LITIGATION SUPPORT SOFTWARE

***Aillil O'Reilly BL** reviews the Summation Blaze litigation support software which is frequently used in large-scale litigation in the US.*

Summation Blaze is a piece of litigation support software that allows a practitioner to digitally store and retrieve documents as well as perform rapid searches in up to several million pages of trial transcript. The program can dramatically improve productivity although it only becomes cost effective once a case generates a certain volume of documents.

Technological advance in the computer industry has been so great that the computing power delivered by an office machine now far exceeds the requirements of its traditional uses. Even a humble desktop PC has the ability to process massive amounts of data at high speed. However, the Irish legal profession largely ignores this powerful tool. Office computers are mainly used for word processing: a straightforward application in computing terms. The real potential of computing lies in their ability to laboriously search huge amounts of data quickly and accurately. Computer memories are now so large that most will permit entire banker's boxes of documents to be recorded digitally. The tools exist to do jobs which would be very time consuming or simply impractical. This is of instant application to trial transcripts and large documentary files. It allows rapid and accurate reference to transcripts and documents whilst at hearing and also speedy cross-reference to evidence on transcript while preparing legal submissions.

Summation Blaze is a software product made by *Summation* Legal Technologies Inc of San Francisco, USA. Summation is the leading legal document management system in the United States[1]. It is regularly used for cases with over a million document pages allowing rapid review of documentary and transcript evidence. To illustrate the agility of the system: in the recent anti-trust litigation against Microsoft, the Department of Justice used *Summation Blaze* to prepare and illustrate its case. David Boies, the lead prosecutor for Justice, described how he was able to refute Microsoft's testimony again and again by producing key documents "culled from millions of pages of documents" at critical moments[2]. Microsoft, on the other hand, had a highly respected team form Sullivan & Cromwell whose favoured litigation support tools were a legal pad and a pen. It has already been used in this jurisdiction in some of the leading commercial cases to instantly check through thousands of pages of transcript and respond to questioning.

Summation is an easy tool to master. It uses a graphical representation of a filing cabinet and folders to store documents. This intuitive visual system makes it easy to organise documentary evidence and transcripts. Any document that is in, or can be converted to, ASCII[3] format can be added to the database. Most of the court stenography services employ compatible software. To load a transcript you simply insert the floppy disk from the stenographer, select load, 'click' on the document and the program performs the indexing. The document is then displayed in whatever file cabinet that you choose. To speed the search process, *Summation* contains an indexing feature called *Blaze*. "Blazing" a document sorts and indexes every word contained in it, making subsequent searches almost instantaneous. Annotations in the form of electronic 'sticky' notes, can be added. These in turn may be searched and cross-referenced.

Summation also sells a compatible product called *CaseScan*.This is a scanning facility that also speeds up the process of text recognition and organisation of documents. The process starts with the document being scanned, like making a digital photocopy. It is important to note that your computer interprets the scanned document image as a picture, not searchable text. A process called Optical Character Recognition (OCR) then converts any text in the image into text as the computer understands it. *CaseScan* achieves this conversion at the same time as the scanning process.

Once scanned, this digital copy is attached to a document database record in *Summation*.This need only be a brief description of the scanned document. It is like a list of 'discovered' documents, allowing each to be identified and retrieved as needed without the bulk and inconvenience of bankers' boxes full of paper.

It is possible to search the scanned text once it has been put through the OCR process. Scanned documents without text in the *Summation* system can also be retrieved if properly described by their database record. A CD-ROM can hold upwards of 10,000 documents in this fashion, making even very large cases portable. While scanning costs more than photocopying for the first copy, replication costs are dramatically reduced thereafter.

It must be emphasised that a database is only as good as its raw data. Transcripts need to be checked for errors when they arrive from the stenographer and scanned documents need to be accurately described. If used properly *Summation Blaze* and *CaseScan* allow a practitioner to work much faster both in Court and for trial related paper work. ●

The Summation range is available from Anne Dunne & Co, at tel. 01-6673536 or a_dunne@compuserve.com from $995 (basic), $1750 (gold) to $2495 (platinum). Once acquired the product may be used by that lawyer in as many cases as it is required. A maintenance contract is available for each program.

1. The AM Law Tech survey covers the largest 100 US firms ranked by gross revenue as reported in the July issue of *The American Lawyer*. 93 of the firms responded and 43% of those said that they employed Summation, 12.5% more than *Summation's* closest rival.
2. Justice's Secret Weapon Against Microsoft: Software, *Business Week*, March 15, 1999, page 40.
3. ASCII is an acronym for the code that the computer uses to convert letters, numbers and symbols that appear on the screen to a numerical format that it can understand. ASCII files contain no special formatting information (like italic, bold, etc.).

TAKEOVERS MERGERS LAW IN IRELAND

By Blanaid Clarke

(Roundhall Sweet & Maxwell, 1999)

Reviewed by Kim Fitzgerald BL

In an agreement that will bring together such well-known household brands as Flora margarine, Knorr soups and Hellmann's mayonnaise, Anglo-Dutch group Unilever recently announced its intention to pay $20.3 billion for the US giant Bestfoods. This transaction illustrates the enormous scale of merger and takeover activity in the global marketplace. In tandem with a worldwide trend towards consolidation and other factors such as the availability of finance and the comparatively low Eurozone interest rates, it is evident that such ventures will be an ever-increasing feature of Irish business life.

The law relating to mergers and takeovers encompasses an extensive range of subjects including company law, employment law, the law of tort, contract law and competition law. While there are copious texts, which address these areas individually, to date, no one Irish text has encapsulated them in the confines of a single book. In her new work entitled "*Takeovers and Mergers Law in Ireland*", Blanaid Clarke has set about addressing this gap and this book is intended to provide a comprehensive treatment of the law applicable to all stages of mergers and takeovers.

Written with both students and practitioners in mind, the book is set out in six parts, Part 1 gives a general overview of mergers and takeovers. Chapter 2 assesses the theories commonly put forward to explain why mergers and takeovers occur in the first instance.

July 1997 saw a highly significant development in relation to takeovers with the establishment of the Irish Takeover Panel, pursuant to The Irish Takeover Panel Act, 1997. The Irish Panel now regulates, monitors and supervises takeovers of Irish companies whose shares are listed on the Irish Stock Exchange. It has replaced the London Panel on Takeovers and Mergers, which had previously regulated such activity in relation to Irish listed companies. Considerable reliance was placed, however, on the structure of the London Panel in forming the Irish Panel and in part 2 Blanaid Clarke sets out the most pertinent factors concerning the operation of both panels.

This section of the book also contains a detailed examination of the Draft 13th Company Law Directive concerning takeover bids. The European Commission first proposed this over ten years ago and, if implemented, it will have far reaching consequences for both domestic and cross-border takeovers.

Competition Law merits close scrutiny in the context of takeovers and mergers and chapter 6 reviews relevant European, Irish and UK competition law. The author has validly and properly included UK legislation on the basis that Irish companies are most likely either to acquire or to be acquired by UK companies.

Part 3 of the text is concerned with the acquisition of public companies. In addition to setting out the procedural requirements for the takeover of such companies, the author considers the important dealing restrictions and disclosure requirements that prevail during the course of a takeover offer.

When a takeover has been concluded, the people for whom this transaction will have the most immediate significance are the employees. This issue is addressed in chapter 9 where the author sets out the duties that an employer owes to staff in such situations.

Of particular relevance to professionals working in this field, is chapter 10, which explores the role and responsibilities of advisers in the takeover process. There is an examination of the duty of care owed to clients, both expressly or by implication in contract law, and the common law duty of care. This duty is appraised by reference to recent Irish and English case law. The function of advisers in protecting confidential information is also considered. The author emphasises the restriction of the flow of such material by the use of "Chinese Walls" and again apt case law is cited.

In part 4 the author concentrates on the acquisition of private companies. She examines the various steps in this process from financing, pre-contractual negotiations, due diligence and the sale agreement through to the completion stage of the deal. Careful consideration is given once more in this section to the salient issue of how commercially sensitive information can be protected during the negotiation and sale processes.

Management buy-outs are the focus of part 5 of the text. The relevant provisions of the Companies Acts, The Stock Exchange Listing Rules, The Irish Takeover Rules and The Irish Association of Investment Managers Guidelines are all detailed here.

Of interest to lawyers and laymen alike is the final part of the book, which addresses hostile takeover bids. Terms such as "pac man", "reverse bear hug" and "showstopper" are explained. This portion also has a most useful analysis of the theories underlying management resistance to hostile bids, and conducts a thorough investigation of the legal restrictions on them in obstructing or pre-empting such offers.

Blanaid Clarke has had extensive experience of the law on relation to mergers and takeovers both as a lecturer in corporate finance law in University College Dublin and as a corporate finance practitioner. In writing this book she has drawn on her impressive wealth of knowledge and the result is an essential guide for any professional concerned with such activity. ●

THE CONFISCATION OF CRIMINAL ASSETS: LAW & PROCEDURE

Eds J. Paul McCutcheon & Dermot P.J. Walsh
(Round Hall Ltd., 1999)

Reviewed by Kerida Naidoo BL

To describe this collection of essays as a celebration of criminal assets seizure in general, and the Criminal Assets Bureau in particular, might be unfair; but to describe it as a balanced and objective analysis of the complex legal and social issues associated with the new and far reaching powers conferred by the Acts would be misleading. It may seem unusual to present such a damning indictment of a book so early in a review but it took only until the third page of their introductory overview of the subject for Messrs. McCutcheon and Walsh to recommend the Proceeds of Crime and Criminal Assets Bureau Acts to our European neighbours as a model which they should have no hesitation about adopting.

The first article in this collection was co-authored by the Chief Bureau Officer and the Bureau Legal Officer of the Criminal Assets Bureau. They begin their discussion, "*Targeting the financial wealth of criminals in Ireland: The law and practice*" by reviewing the circumstances in which the relevant legislation was enacted. They point out that "In the mid-1990's organised criminal gangs involved in drug-trafficking resorted increasingly to 'gangland murders' to protect their trade". While not wanting to appear churlish it has in fact been estimated that in 1994 gangland murders accounted for in the region of 15% of homicides while in 1995 the figure was approximately 9%. The authors go on to identify "Public alarm at the apparent rise in serious crime" which "reached fever pitch in the wake of the high profile and shocking murders" of Veronica Guerin and Detective Gerry McCabe.

There is no counterbalancing discussion of the manner in which public opinion was, arguably manipulated by the State, its law enforcement agencies, and a compliant media, into believing that these tragic but isolated events represented the public manifestation of a hugely powerful organised criminal underground which threatened the very fabric of Irish society when in fact that Ireland had, and continues to have, one of Europe's lowest crime rates. It is at least arguable that the augmentation of the forces of law and order by draconian powers which dilute the civil rights of every citizen, is a scenario potentially far more dangerous than any criminal activity as the greatest injustices invariably result from the abuse of the power exercised by a State over its citizens. There is no voice given to these perspectives in the authors' analysis.

In the next contribution, entitled "*Tracing the proceeds of crime: legal and constitutional implications*", Shane Murphy B.L. analyses the Proceeds of Crime Act in the context of potential unconstitutionality. Having comprehensively reviewed the available authorities the author concludes that the legislation is "entirely consistent with the goals and directives in the Irish Constitution and , in particular, that goal of protecting the community and ensuring that public order and peace are maintained." Given the attitude to date of the courts to the activities of the C.A.B. it is difficult to disagree that the Act will survive any future constitutional challenge.

"*British legislative developments on the confiscation of criminal assets*" is an outline of the British response to organised crime and was written by a Detective Sergeant with the West Yorkshire Police who concludes by expressing the hope that the British government will proceed with plans to introduce legislation akin to our own in an attempt to cure some of the weaknesses which he informs us currently beset the British regime.

Possibly the most interesting article in the compilation is "*The enforcement of money laundering legislation*" which was written by an accountancy professor who, rather unhelpfully from the perspective of the other contributors, points out that asset seizure does not in fact work, at least in so far as it does not 'result in a decrease in the magnitude of a problem'. In support of this contention the author looks at the American experience but he might equally have pointed out that in the first five months of the operation of the Proceeds of Crime Act only £2 million worth of property was seized; which is surprising given that the final contributor to this book, the Minister for Justice, Equality, and Law Reform apparently thinks that the Criminal Assets Bureau have dealt a 'death blow' to the supposedly vast and unexplained wealth of the criminal king pins who roam the country.

The Proceeds of Crime and Criminal Assets Bureau Acts represent a quite radical shift in the approach taken by the state to criminal activities which may result in the traditional criminal process, with its attendant safeguards against the risk of injustice, being circumvented in favour of punishment without proof of criminal guilt; this book makes no attempt to address either that or any other of the concerns associated with such a significant development and the orthodoxy upon which it is predicated that 'the innocent have nothing to fear'. However it does represent a useful insight into the perspectives of those proponents of the legislation. ●

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