INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

INDEX TO VOLUME 86 – 1992

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A comprehensive index to all subjects covered in the *Gazette*, January to December, 1992.

2) ALPHABETICAL CASE INDEX:

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3) LEGISLATION INDEX

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1. SUBJECT INDEX

This is a comprehensive index to subjects covered in the *Gazette*, the major headings being – Articles, Associations and Societies; Book reviews, Company Law, Correspondence, Editorials, European Communities; Law Society, Lost Wills, Practice Notes, President's Message, Solicitors, Sports activities etc.

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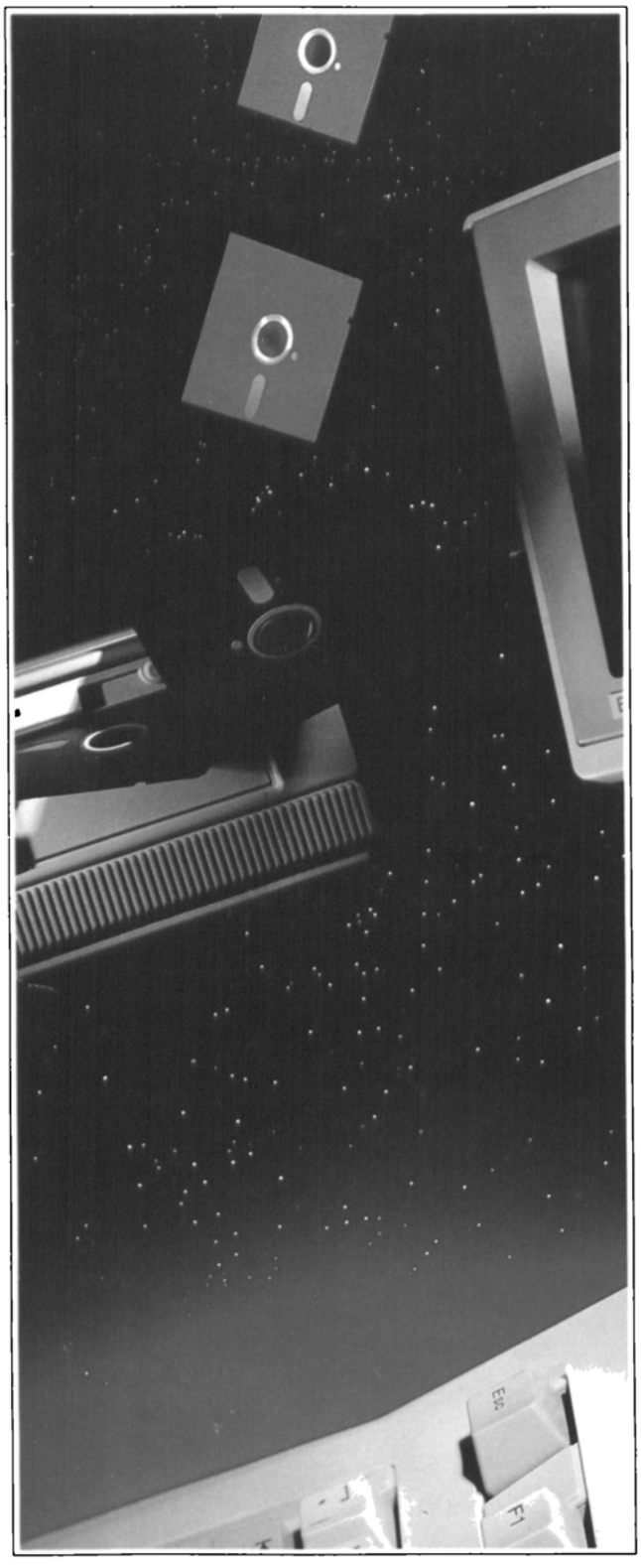

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Viewpoint

An End to Compulsory Irish for Solicitors?

As every lawyer knows, the legal profession is the only profession in Ireland that still requires a knowledge of Irish on the part of those seeking admission. Solicitors and barristers must, as a matter of law, pass examinations in the Irish language before they can be admitted. In the case of solicitors, there are in fact *two* Irish examinations prescribed under the Solicitors Act, 1954 and these examinations take the form of both a written and an oral test.

There can be little doubt that it is essential that there should be available in this country lawyers – both solicitors and barristers – who are competent in the use of Irish and who are capable of conducting legal business and representing their clients through the medium of Irish. As officers of the court, lawyers have a duty to the court and, because the first official language of this country is Irish, clients have a right to have their business conducted in Irish if they wish. However, most solicitors take the view that the present position under which Irish is legally *compulsory* is unfair on the profession as a whole and, because of the manner in which the system operates, does not meet the objective which it purports to serve. A policy of seeking the revival of the Irish language through coercion and compulsion has not so far succeeded and has been largely abandoned now in virtually every other sphere of our national life. Can anybody seriously suggest that a requirement imposed on a person at the commencement of his professional legal studies to pass examinations in Irish reasonably ensures the availability in this country of practitioners with competence in the language? The profession feel that they are discriminated against (other professions do not have compulsory Irish) and they cannot see how such a policy is grounded in practical reality.

Many members of the profession are extremely disappointed that the recently published Solicitors (Amendment) Bill, 1991 does not contain a provision abolishing the Irish language requirement for solicitors. This is all the more surprising when it is borne in mind that, some time ago, the Law Society made it clear that it had urged on the Government the replacement of the present compulsory Irish for all solicitors with a commitment that the Society would establish and maintain panels of solicitors who were willing and able to provide legal services through the medium of Irish. The Law Society was offering to accept this as a legal obligation. For reasons best known to themselves, the Government appear unwilling at present to accept this very reasonable proposition.

(Continued on page 5)

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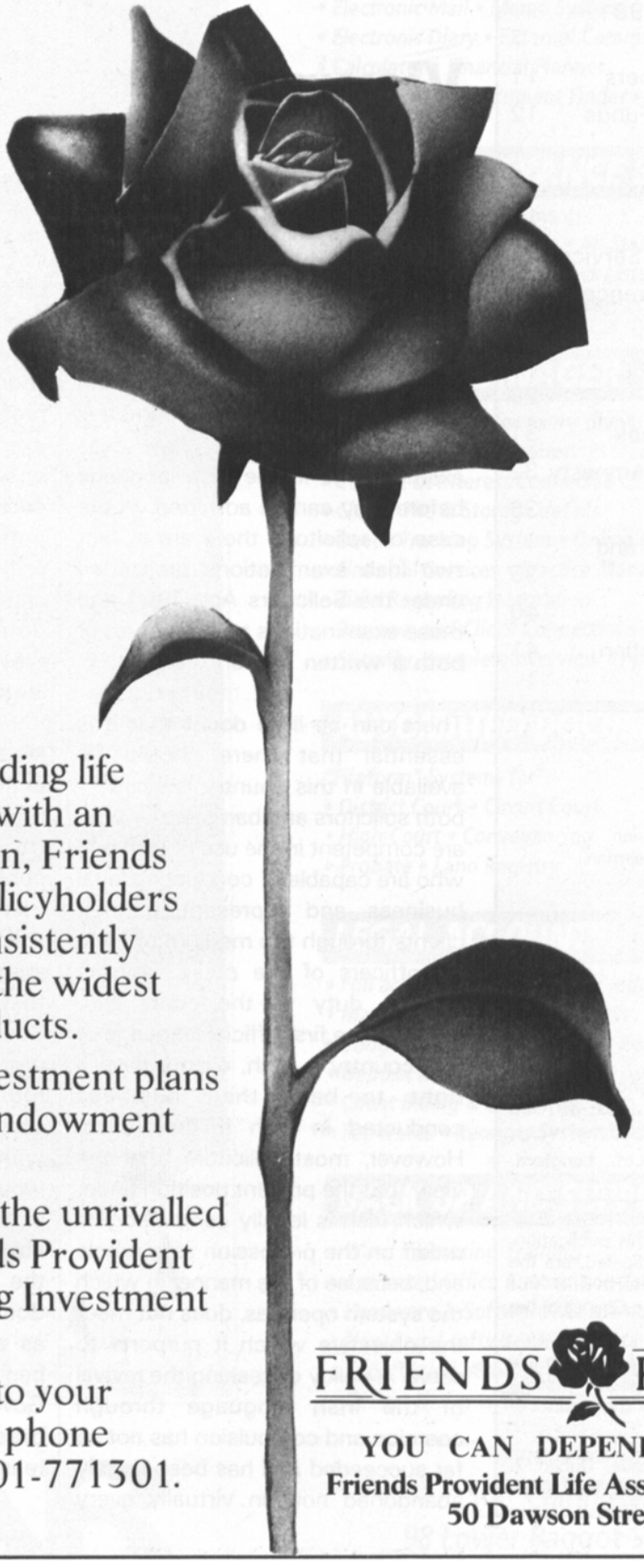

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From the President

Briefing on Current Issues

Having completed two and a half months as President, the pressures of this function have become very real. A brief summary of some situations may help to bring Members up to date:-

1. ***Chris Mahon:-*** I was saddened, and yet pleased for him, to preside over his retirement function. Chris has been a stalwart friend to the Law Society for over a decade. He goes to the Bar Council of Northern Ireland. He will be missed by all of us. He was approachable, understanding and, where necessary, compassionate. On behalf of us all, I wish him well in his new function, and assure him that he will always be welcome at Blackhall Place.

2. ***FLAC:-*** You will find an Appeal in this Gazette. Please pay particular regard to it. Funds are urgently needed, and we do all accept that remarkable work is achieved by the Centres. Please give generously, reflecting your known concern for the less privileged. Subscriptions can be sent, separately, to P.J. Connolly at the Law Society.

3. ***Berlin:-*** This Gazette contains much material on the Conference. Ireland, and Irish Lawyers, must be deeply committed to the New Europe. We are learning to partake, and so I warmly invite and encourage you to participate. Everything possible is being done to keep pricing within a very reasonable range. Early indicators show immense interest. Please return your application and deposit, *immediately.*

4. ***Objectives:-*** Your officers and Council are concentrating on the Solicitors Bill, on the present status of legal costs, on provisions to have District Judges and solicitors made eligible for appointment as Judges of the Higher Courts, and on improving and opening up relations between the membership of the Society, that is our own solicitors, and the main administration, committees, Council and officers. The Law Society belongs to all solicitors.

At a presentation to Chris Mahon, former Director of Professional Services, who retired from the Law Society at the end of December were L-R: Adrian Bourke, President, Chris Mahon and Noel Ryan, Director General.

5. ***Committees 1991/1992:-*** There have been substantial changes in chairmen and membership. This follows a wide consultative process. It is felt, as a general rule, that chairmen, like the officers, should not serve more than one year. Nor should there necessarily be an automatic right of succession by a vice-chairman. Greater opportunities will open up for all members of the Council and committees, and there will be a broader spectrum of ideas and policies available.

1992 is a momentous year. I hope it is happy, and even prosperous, for you all. The Society is most receptive to ideas, comments and criticism, and I invite you to send these to me.

Adrian P. Bourke,
President

Solicitors Benevolent Fund AGM

Notice is Hereby Given that the One Hundred and Twenty Eighth Annual General Meeting of the Solicitors Benevolent Association will be held at the Incorporated Law Society's Building, Blackhall Place, Dublin, on Friday 13 March, 1992 at 12 noon:

1. To consider the annual report and accounts for the year ended 30 November, 1991.
2. To elect directors.
3. To deal with other matters appropriate to a General Meeting.

Clare Leonard
Secretary □

Viewpoint

(Continued from page 3)

We would urge that this is a matter that should be reconsidered. The Society will, we understand, be seeking to have the Bill amended in the course of its passage through the Oireachtas to replace the present discriminatory approach. In our view, this succeeds only in paying lip-service to the language, does nothing to advance respect for it or to further its promulgation in the sense of ensuring that there are lawyers available with competence in the language and who are willing to provide legal services to clients who want their business conducted in the Irish language. □

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The Competition Act, 1991 – An Overview

Introduction

The Competition Act, 1991 introduces for the first time into Irish law comprehensive rules on competition. As such, the Act is based upon the competition rules of the European Community, mirroring the principles contained in the EEC Treaty and applying them in the domestic context. Whilst the Community's rules will continue to apply where trade between Member States is affected, the Competition Act will apply where competition within Ireland is undermined.

by
John Meade,
EC & Competition
Department,
Arthur Cox

John Meade

The new competition rules are contained in Sections 4 and 5 of the Act. These provisions are based upon Articles 85 and 86 of the EEC Treaty, respectively. Generally, Section 4 prohibits restrictive agreements and practices while Section 5 prohibits the abuse of a dominant position.

In reviewing agreements and practices under Sections 4 and 5 of the Act reference may be made to the practice and jurisprudence of the EC Commission and the European Court of Justice in relation to Articles 85 and 85 of the EEC Treaty. Reference may also be made to any analagous EC legislation. This has been made clear by the new Competition Authority which has been established under the Act. In particular, in reviewing agreements under Section 4, the Authority has stated that parties may refer to the case law of the Commission and Court in relation to Article 85 and any relevant Community rules, such as block exemption regulations.

The new rules are to be enforced primarily through the Courts. In contrast to the situation at the EC level, the Competition Authority's primary role is to review agreements as to their compatibility with Section 4 of the Act. The Competition Authority does not have enforcement powers as such.

Commencement

The Act came into force on 1st October, 1991. However, Section 6 (2) (b) of the Act, which permits parties to take proceedings in the Circuit Court on the basis of Section 5, is not yet in force and indications are that it will not be brought into force until experience has been gained in the application of the Act.

The previous restrictive practices legislation is generally repealed. However, the Minister for Industry and Commerce has stated that the 1987 Restrictive Practices (Groceries) Order will remain in force whilst the Minister reviews a report prepared by the Fair Trade Commission on the application of the Groceries Order. There is provision in the Act for the continued application of the Groceries Order though it has been questioned whether these provisions have the effect of keeping the Groceries Order in place.

Scope of the competition rules

The competition rules will apply to "undertakings", defined as "individuals, bodies corporate or unincorporated bodies of persons engaged for gain in the production, supply or distribution of goods or the provision of services". Generally, the rules will apply to both private and public companies engaged in commercial activities. It is also worth noting that the new rules will apply not only to industry and commerce but also to the professions and any institutions providing services.

Section 4 – restrictive agreements and practices

Generally, any agreement or practice between companies or individuals which restricts competition within the State is prohibited and void by virtue of Section 4 (1) of the Act unless notified to, and permitted by, the Competition Authority under Section 4 (2) of the Act. It should be noted, however, that an agreement which contains provisions which are unacceptable under Section 4 may still be enforceable provided those unacceptable provisions may be severed or otherwise removed from the agreement.

Section 4 (1) provides that "all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void". Examples are given in Section 4 (1) of the type of practices which are unlawful, for example, price fixing or market sharing.

It is important to distinguish between certain types of restrictive agreements or practices which will always be unacceptable and those which, although restrictive of competition, may be ultimately compatible with the Act. For example,

any form of cartel will always be prohibited under the Act. In contrast, an arrangement such as a joint venture which infringes Section 4 (1) may be permitted under Section 4 (2) where it is seen ultimately to benefit the market.

It is also worth noting that Section 4 (1) will apply to the decisions of trade associations. It was not apparent from the initial draft of the Competition Bill as to whether this would be the case, but, following an amendment introduced by the Minister, it would now appear that trade associations are subject to review under Section 4 of the Act.

The parties to an agreement which appears to restrict competition within the meaning of Section 4 (1) may notify their agreement to the Competition Authority for its approval under Section 4 (2). Generally, a restrictive agreement may be permitted under Section 4 (2) where, ultimately, it brings more benefit than harm to the market.

For example, an exclusive distribution agreement may infringe Section 4 (1); in particular, if exclusivity forecloses competition from the distributor's competitors. However, an exclusive agreement may be permitted under Section 4 (2) provided that it does not contain any provisions which unduly restrict competition. The type of provision in an exclusive distribution agreement which might be unacceptable under Section 4 (2) would be any arrangement whereby the supplier dictated the prices and conditions at which the distributor would resell the goods supplied under the agreement.

Approval is granted under Section 4 (2) in the form of a licence. Four conditions are listed in Section 4 (2) which must be satisfied if a licence is to be granted. Generally, the agreement must improve production or distribution or the provision of services or technical or economic progress whilst allowing consumers a fair share of the resulting benefit. At the same time, the agreement must not contain unnecessary restrictions and must not allow the parties the possibility of substantially eliminating competition.

Licences are granted for a specified period, though this may be extended subsequently, and may be granted subject to conditions. Alternatively, if the Competition Authority decides that an agreement does not restrict competition within the meaning of Section 4 (1), it may issue a certificate to that effect. Certificates are granted under Section 4 (4) of the Act. It is likely that parties will apply for certificates and licences in the alternative.

A decision on a licence or certificate may be appealed to the High Court. Appeals may be taken by the Minister and companies or trade associations "concerned", or any other person "aggrieved", by a licence or certificate.

One problem that companies will face, at least for the time being, is the absence of block exemption regulations. At the EC level, an agreement which infringes Article 85 (1) is automatically exempted and approved if it complies with the terms of an EC Commission block exemption regulation. This saves companies the time and costs involved in notifying agreements to the EC Commission for individual exemption under Article 85 (3). The Competition Authority has indicated that similar regulations may be introduced in due course. In the meantime, Irish companies may have to notify agreements to the Authority in circumstances where a block exemption regulation could operate to approve them automatically.

Section 5 – the abuse of a dominant position

Section 5 prohibits the abuse of a dominant position. It should be stressed that dominance as such is not unlawful, rather, it is the abuse of a dominant position that is prohibited by the Act.

In assessing issues under Section 5 one must firstly determine whether a company is dominant and, if so, whether it has abused its dominant position.

In relation to dominance, it is necessary to define the relevant market and the company's position in that market. The relevant market is determined by reference to the relevant product and geographical markets.

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The product market is generally defined as those products which may reasonably be substituted for each other. In determining this it is particularly important to review market trends and consumer preferences. For example, if the consumer would readily purchase product X when there are shortages of product Y then products X and Y may be deemed to be part of the same product market.

The geographical market is referred to in Section 5 as the "State or a substantial part of the State". At EC level the equivalent term in Article 86 has been defined as a substantial part of the European Community in economic terms; in other words, for the purposes of Article 86, an area may constitute a substantial part of the EC because, although geographically small, it is economically significant in the context of the relevant product market. If a similar approach is taken by the Irish authorities then, for example, Dublin is likely to be a substantial part of the State for many issues under Section 5.

Once the relevant market is defined, a party's position in that market must be assessed. A market share of 50% or more may be prima facie evidence of dominance. However, it is important to review not only market share but other issues which affect the company's position in the market, for example, its financial and technical resources, its ability to survive downturns in the market, brand loyalty, consumer trends, the relative position of its competitors and, in particular, barriers to entry to the market.

If a company is dominant any abuse of that dominant position is prohibited – there are no approval procedures in relation to Section 5. For example, predatory pricing may infringe Section 5. A refusal to supply a long standing customer with the intent to undermine the competitive threat that company poses may also constitute an abuse of a dominant position. Similarly, any discrimination in the terms of business offered by a dominant company, whether it be in relation to discounts, payment periods, or whatever, may be unacceptable under Section 5 unless objectively justified, i.e., perhaps, because the company receiving the best terms buys in bulk.

As a general comment, it is often helpful to consider why a dominant company chose to act in a certain way and the effect that had on competition. If the company's intention appears "malicious" from a competition perspective, and the impact upon competition detrimental, the company is likely to have abused its dominant position.

Enforcement of the competition rules

The Competition Authority's primary role is to review notifications under Section 4 of the Act. The Competition Authority does not have powers of enforcement as such. The competition rules are to be enforced primarily through the courts.

The Competition Authority has published a Form CA which must be completed on notification. Parties provide basic details on the Form CA, i.e., details on the parties and a general explanation of the agreement that is being notified. An annex should be attached to the Form CA which will contain the substance of the notification. The Authority has published a document outlining the information which must be included in the annex. In particular, the parties must provide arguments to justify the grant of a certificate or licence. These procedures are based upon those applied at the EC Level. There is also a notification fee of IR£100.

Parties to an agreement which was in place prior to 1 October, 1991 have until 1 October, 1992 to notify their agreement to the Competition Authority if they wish to seek a licence or certificate. If such an agreement is notified by 1 October, 1992 court proceedings may not be taken in respect of the agreement until the notification has been determined, on appeal to the courts if necessary. It is not entirely clear from the Act whether this principle applies where an agreement is notified before 1 October, 1992 but after proceedings have been instituted, but the general consensus of opinion is that it does.

In addition to its power to review notified agreements, the Competition Authority may undertake an investigation into a dominant position on the request of the Minister. To this end, the Authority has power to enter and search company premises. The Authority will report to the Minister. Ultimately, the Minister may regulate the structure of a dominant company. However, indications are that this procedure will not be used very often.

As noted, the competition rules are to be enforced primarily through private litigation. In general, actions based upon Sections 4 and 5 must be taken in the High Court, pending the introduction of Section 6 (2) (b). Parties may seek a declaration that a particular agreement or practice is unlawful and damages, including exemplary damages, where appropriate. Parties may also seek injunctive relief.

Proceedings may be taken by "aggrieved" persons. It remains to be seen how this term will be interpreted. There is also provision for proceedings to be taken by the Minister, though the Minister cannot seek damages. Proceedings can be taken against any undertaking which is, or has been, a party to an unlawful agreement or practice.

For example, a company denied supplies by a dominant company, might seek a declaration that the refusal to supply constitutes an abuse of a dominant position and an order that the dominant company resume supplies. The buyer might also seek damages.

The Mergers Act

The Competition Act introduces a number of important amendments to the 1978 Mergers, Take-overs and Monopolies (Control) Act. For example, an acquisition of shares

will now be notifiable to the Minister for Industry and Commerce under the 1978 Act where it results in the acquiring company obtaining more than 25% of the voting rights in another company; previously, the threshold was 30%. The Competition Act also introduces a number of amendments to procedures under the 1978 Act.

In addition, there is the possibility that mergers and acquisitions, including those which are notifiable under the 1978 Act, might be contested in the Courts on the basis of Sections 4 and 5 of the Competition Act. The relationship between the two Acts is not clear and this issue may not be fully resolved until tested in the Courts. In the meantime, lawyers will have to consider the possibility that a transaction, even one which is approved by the Minister under the 1978 Act, may be contested by a third party in the courts. For example, the acquisition of a minority shareholding in a competitor may fall within Section 4 (1) of the Act whilst the acquisition of one company by another company which is already in a dominant position may raise issues under Section 5 of the Act.

"It has to be said, however, that the lack of enforcement powers on the part of the Competition Authority may seriously undermine the effectiveness of the new legislation".

Comment

The Competition Act represents a major development in Irish Law. Traditionally, the market place in Ireland has been regulated by law to only a limited extent. This legislative environment can only have encouraged practices which may now need to be reviewed in the context of the new legislation.

As to the likely application of the competition rules, companies will need to ensure that their agreements and practices comply with Sections 4 and 5 of the Act. At the same time, companies can rely upon the new legislation in order to compete with their competitors. For example, a new entrant to a market dominated by one particular company may use Section 5 in an attempt to open up the market.

It has to be said, however, that the lack of enforcement powers on the part of the Competition Authority may seriously undermine the effectiveness of the new legislation. Given the costs and time constraints involved in High Court litigation, the policy of enforcement through the Courts may prove to be ineffective. Experience at the EC level might also suggest so. That said, Irish business has entered a new legislative era and companies will need to ensure that they not only comply with the new law but also use it to their advantage where appropriate. □

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New Council Members

Maeve Hayes, Brian Sheridan and John Shaw, newly-elected members of the Council of the Law Society, introduce themselves and outline their priorities.

Maeve Hayes

I am a Partner in the firm of Mason Hayes & Curran. Over the period of eighteen years, when our Managing Partner, *Maurice Curran,* was a member of the Council of the Law Society, I became conscious of the enormous amount of work that is done by the members of the Council for the benefit of the profession as a whole throughout the country. Then, when I myself became a member of the Conveyancing Committee many years ago, I found the monthly contact with the other members of the Committee very interesting and enlightening. I also found that one developed contacts with a wide range of solicitors around the country, who have conveyancing queries from time to time and whom the members of the Committee try to assist at all times but, in particular, at the monthly meeting. Coming up to the election in 1991 it was suggested to me that I should run for election to the Council which, having given it very brief consideration, I did and having been successfully elected (at least this year), I am looking forward to serving on the Council. Obviously at this stage it is a learning process and I anticipate that it will be some time before I will be in a position to be productive on the various Committees to which I have been appointed.

Brian Sheridan

It is particularly significant that the members of the Society have elected a Legal Aid solicitor to the Council and I hope in the coming year to promote interest in, and debate on, the development of a comprehensive scheme of civil legal aid.

Having been in private practice prior to joining the Legal Aid Board, I am aware of the problems of the profession but I hope also to act in some way as a voice for the many members of the Society who are practising in areas other than the private sector.

I feel that the solicitor makes a valuable contribution to the fabric of society and ours is in many fundamental respects a ''caring profession''. This unfortunately is not reflected in the public image of the solicitor and is an omission which we must actually strive to redress.

As a solicitor of some years experience, as an Executive member of the European Movement and as a long standing consultant at the Society's Law School, I hope that I can make a positive practical contribution to the diverse work of the Council and I am grateful to those who supported my election.

John Shaw

As a recently qualified solicitor, I would hope that my election will improve the lines of communication between the younger members of the profession and the Council and will also encourage the younger members to take a more active interest in the business of the Council and the Society generally.

In terms of matters which need attention, apart from the obvious ramifications of the Solicitors Bill, the public image of the solicitor could do with a radical overhaul. Each solicitor obviously has his or her own part to play, but it is important that the extremely valuable service that the solicitor provides to the general public be properly presented. Finally, coming from a family tradition of serving on the Council, it is a matter of considerable honour for me to have been elected by my colleagues and I take this opportunity of thanking you for your support.

□

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FLAC Appeals 'In Desperation' For Funds to Avert Crisis

The Free Legal Advice Centres (FLAC) has launched a desperate appeal to solicitors, barristers and friends to avert the closure of its services. FLAC has already had to lay off two of its four permanent staff, including our only solicitor, owing to lack of funding for the coming year. Even this drastic measure will not be sufficient and FLAC's services will close entirely unless we can achieve additional funding of £40,000.

Despite the essential service which we provide, FLAC does not receive any funding from the Government. We have been entirely dependent on the support of the legal professions and other supportive organisations and individuals.

FLAC provides a range of vital services which are not provided by any other organisation. These include the following:

- We provide a helpline for people with legal problems. FLAC gives advice or refers people to services which can deal directly with the special circumstances of their case. FLAC receives over 6,000 phone calls per year, the largest area of queries being family law.

- FLAC provides representation in well over 100 social welfare and employment tribunal cases each year. These cases are excluded from the government civil legal aid scheme, yet they are often of vital importance to the people involved.

- FLAC represents people in court cases involving important legal issues. For example, FLAC has represented a woman in a case, currently before the Supreme Court, which seeks to establish a constitutional right to legal aid. FLAC is also representing 2,000 married women in High Court proceedings to establish the right to equal treatment in social welfare.

- FLAC provides training courses to voluntary and community groups, particularly in the areas of family, employment and social welfare law. We also produce information booklets and leaflets. For example, we have produced information leaflets on moneylending and the law and legal aid services.

The value of the services which FLAC provide has been widely recognised. Yet if we can not obtain a guarantee of additional funding for 1992, these services will have to close. We have written to the Minister for Justice calling on him to provide an immediate grant to FLAC to allow our work to continue. We have yet to receive any detailed reply from the Minister.

If our services have to close, those who currently avail of these services will have nowhere to go. Most of our clients are social welfare claimants who simply cannot afford paid legal services. Many are the victims of family breakups and may need immediate advice as to what they can do to obtain a barring order or to get money to support themselves and their families. Such people frequently cannot get advice from the government scheme. There are waiting lists of six months and more in many centres. We have been told by one centre that their waiting list is over 12 months.

We feel that FLAC's services are essential and cannot be allowed to close. The Government, and in particular the Minister for Justice, must provide funding for this service. However, we are also appealing to our many friends for whatever support, financial and otherwise, they can give. In doing so we are appealing directly to those who have supported us down through the years to stand by us in this, our most difficult hour. □

Mel Cousins
Administrator, FLAC.

At the Kerry Law Society Annual Dinner at Benners Hotel, Tralee, on Saturday, 7 December, 1991. Seated from left to right: Mr. Justice H. J. O'Flaherty, Supreme Court, Donal E. Browne, President, Kerry Law Society, Mrs. Louise McDonagh, County Registrar, Mr. Justice Richard Johnson, High Court. Standing from left: Michael O'Connell, Chairman, Kerry Law Society, Michael Davy, Secretary, Law Society of Northern Ireland, Frank Daly, Vice President, Incorporated Law Society of Ireland, Noel C. Ryan, Director General, Incorporated Law Society of Ireland, and Joseph B. Mannix, Hon. Secretary and Treasurer, Kerry Law Society.

Prosecuting Fraud in a Common Law Jurisdiction – A Reply

by
Michael Staines
Solicitor

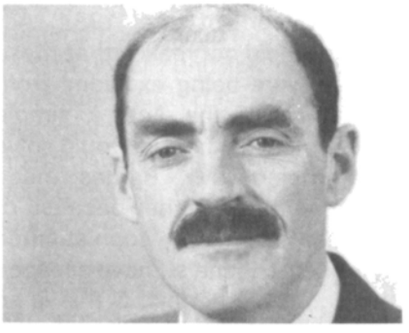
On the 16 November, 1991 the Criminal Law Committee of the Law Society hosted a seminar on the topic of "Criminal Law in the 1990s". There were several well known speakers from different countries. One speech, however, garnered most of the headlines in the public press. This was the address of *Eamonn Barnes,* the Director of Public Prosecutions. The paper he delivered was a well thought out dissertation on the difficulties encountered by the prosecution authorities, particularly in the area of fraud. The reason he was featured in the headlines, however, was because he claimed that many criminals were not even charged, let alone convicted, because the "right to silence" of a suspect hindered the proper investigation of crimes and because he suggested that this right be severely curtailed if not completely eliminated. Whereas I, and no doubt other defence lawyers, would agree with much of the content of his speech, I wish to take issue in this article with these views.

Retention of the right to silence

The first point made by Mr. Barnes was that the question or otherwise of the retention of the right to silence "has not been seriously and sufficiently addressed at any level academic, judicial or legislative in these islands". This is just not correct. The whole question has been considered by various committees and individuals both here and in the United Kingdom. One can instance the Criminal Law Revision Committee 1972 and the Royal Commission on Criminal Procedure 1981 in the UK, the O'Briain Committee 1978 and to a lesser extent the Martin Committee 1990 in Ireland and numerous articles by such well known academics as Professor *Rupert Cross* and Professor *Glanville Williams.* There are regular calls by both the police and prosecution authorities for its abolition. For instance such a call was the main plank of the Garda Representative Association's submission to the Martin Committee at the beginning of 1990. Furthermore a debate was initiated by a speech made by the then Assistant Commissioner *McLaughlin* at the Law Society some years ago and this debate culminated in the Criminal Justice Act, 1984 which has curtailed the right to a large extent. Despite the steady and persistent calls for its abolition neither of the legislatures in these islands was prepared to completely abolish the right though inroads have been made in relation to certain types of offences. This I believe is an acknowledgement by the two parliaments that the right to silence still serves a fundamental purpose in our society.

Tackle fraud loopholes

As indicated earlier, I can agree with much of what Mr. Barnes says about other aspects of our criminal law and procedures. He specifically declared at the beginning of his speech that he accepted the principle of the presumption of innocence both in relation to actual court hearings and indeed to bail applications. He notes that the effect of this acceptance is an acknowledgement that bail must not be refused to an individual even if it appears likely that he will commit crime in the future. Secondly, one must agree with him that there are several inadequacies in our substantive criminal law.



Michael Staines

There is no adequate statutory code concerned with fraud. There should be. Unfair difficulties are caused to the prosecution particularly in fraud cases by out-dated rules against hearsay evidence which were developed in an era when computers did not exist. I can see no difficulty in having these rules amended. I do disagree with him however, when he moves on to discuss what he describes as the "paucity" of powers entrusted to the police in Ireland. He states that as a general rule a Garda can only arrest a person for the purpose of bringing him before a court and that he cannot be arrested for any other purpose such as questioning. In practice the statutory exceptions to this rule have had the effect that the "general rule" applies only to a small category of offences. Section 30 of the Offences Against the State Act, 1939 allows a Garda to arrest a person and have him detained for a period of 48 hours. Arrestable offences under this Section are set out in the Schedule to the Act and include mainly offences of subversive nature and fire-arm type offences. It does not extend to such serious crimes as rape, murder or burglary. It was because there were no "detention" provisions for those serious crimes that the prosecution authorities sought and were granted the detention provisions contained in Section 4 of the Criminal Justice Act, 1984. These provisions apply

to almost all serious crime. Mr. Barnes rightly pointed out that some crimes in the fraud area such as conspiracy to defraud and falsification of accounts were not caught by the Section. The reason such crimes are not caught is entirely historical and the draughtsmen of the 1984 Act obviously did not realise that these crimes were being excluded from the ambit of the Act. A simple amendment to the Act would solve the problem. Mr. Barnes made much of the fact that because of this loophole many "sophisticated upmarket criminals" have escaped the rigour of the law. If this is so and he provided no evidence that it is, it is a loophole that can be easily closed without interfering with the right to silence. Similarly, Mr. Barnes stated that essential powers of the police such as powers of entry, search and seizure are even more restricted and are often non existent. This is news to me but, if it is so, surely it would be more appropriate to recommend how they could be updated rather than attacking the right to silence.

Protection of suspects

Mr. Barnes concedes that any dilution of the right to silence would require the introduction of safeguards for the protection of suspects. I believe that he is being sincere about this but some of the safeguards mentioned by him, such as audio and video taping of interviews, have been recommended as far back as 1972 in the UK (cf Criminal Law Revision Committee Eleventh Report) and in 1978 in Ireland by the O'Briain Committee. Indeed similar recommendations were again made in 1990 by the Martin Committee. To date nothing has been done about them here. The Regulations for the Treatment of Persons in Custody in Garda Siochana Stations (S.I. 119/1987) have had, insofar as they go, a beneficial influence from both the prosecution and defence perspective but they do not provide for electronic recording of interviews. The other recommendation made by Mr. Barnes that a judicial figure might oversee interrogations would certainly be a welcome development but whether it would work in practice is open to doubt. The Criminal Law Revision Committee in the UK were of the view that such a system would be unworkable. However, it must be admitted that if adequate safeguards were implemented and certainly if they extended to a right of a suspect to have either a judicial figure or indeed even his solicitor present throughout all interviews one of the main arguments against abolishing the right to silence would disappear.

"If adequate safeguards were implemented and certainly if they extended to a right of a suspect to have either a judicial figure or indeed even his solicitor present throughout all interviews one of the main arguments against abolishing the right to silence would disappear."

Investigate scene of the crime

The kernel of the problem lies in differing perspectives as to how Gardaí should conduct investigations. There is no doubt that the vast majority of Garda investigations are based on the desire to have a suspect confess his guilt. The main thrust of the investigation is therefore to arrest a likely suspect, interview him in the Garda station away from his family, friends and other supports and to obtain a confession. Obviously the right to silence can be a huge hindrance to such an investigation. My argument is that it would be preferable for all to move the locus of the Garda investigation out of the interview room in the police station and start with the scene of the crime. This would require increased reliance on forensic testing and proper detective work. In making this suggestion I am only echoing the remarks made by the O'Briain Committee at page 14 when they stated that the extremely high percentage of serious crime solved by confessions... "seems to indicate a high degree of reliance on self incrimination, and an inability or reluctance to secure evidence by scientific investigation and by persevering police enquiries". I believe that many Gardaí would prefer this new approach. There is no doubt that confessions have been obtained by illegal and unconstitutional means in the past and that innocent people have been convicted. Mr. Barnes recognises this. These cases must be seen as open wounds on the system of justice. Furthermore, even when the Gardaí act in a proper manner allegations of impropriety may be made against them by an accused attempting to have a confession set aside. A large amount of criticism directed at Gardaí stems from this over-reliance on confession. If alternative means of investigating crime are not developed a great many Gardaí will take the easy way out and rely on confessions. Surely pushing up the "crimes solved" statistics by interviewing a drug addict who will admit to anything in order to get bail cannot be good for the morale of the force.

Presence of lawyer during questioning

Mr. Barnes refers to the "sophisticated upmarket criminal". This creature is also mentioned by the Criminal Law Revision Committee who refer to them as "sophisticated professional criminals". Their argument is that these persons know their legal rights very well and use the right to silence to avoid conviction or even charge. The vast majority of suspects are however poor, badly educated and not properly equipped to deal with the huge trauma associated with being in a police station. The Martin Committee set out at page 32 what it must be like to be deprived of personal liberty in a Garda station. "In particular, where the person being interviewed is young

or of limited education or powers of expression, the isolation from friends and the strange surroundings coupled with the loss of liberty can readily tilt the balance of fairness against him. To cope with persistent questioning requires exceptional faculties. The dominant matter in the mind of such a person must be to regain freedom as soon as possible, with a strong temptation to say or sign whatever it is felt will achieve speedy release. This temptation becomes compelling where the suspect may be suffering from drug withdrawal symptoms''. Mr. Barnes claims that the fact that such a person has a right of immediate access to a lawyer countervails these pressures. This right is indeed an important one (though the Government does not regard it as being so important as to undertake to pay solicitors under the Legal Aid System for attendances at Garda stations) but the solicitor is not as yet entitled to remain with the suspect during questioning.

Erosion of right to silence

My main criticism of Mr. Barnes' speech is that he neglects to mention that to a large extent the right to silence has already been drastically interfered with. There is a legal obligation on persons arrested under Section 30 of the Offences Against the State Act, 1939 to account for their movements and if they fail to comply with such a requisition under Section 52 of the Act they are liable to be charged and sentenced to six months imprisonment. Secondly, the Criminal Justice Act, 1984 criminalised a failure to give information in relation to fire-arms and ammunition (S15) and stolen property (S16). Furthermore an arrested person is now obliged in certain circumstances to account for various objects, substances or marks or objects found near him and if he fails to do so a judge or jury may draw whatever inferences they wish adverse to the accused (S.18). Similar inferences may be drawn if an accused person fails to comply with a request to account for his presence at a perticular place (s.19). Despite the huge campaign launched by prosecution authorities and Gardaí seeking from the Legislature such powers as those contained in Sections 15, 16, 18 and 19 of the Criminal Justice Act, 1984 these Sections are rarely, if ever, used. I have only once encountered the use of Section 16 and have never come across the use of Sections 15, 18 and 19. Similarly, it is only recently that persons have been charged for failing to account for their movements pursuant to a requisition under Section 52. If the prosecution authorities really feel that the right to silence is such an obstacle they would do better in my submission to utilise the powers they already have rather than seeking a further dilution of the right to silence.

Coherent reform of criminal law

There is no doubt that there are deficiencies in both our substantive criminal law and in our criminal procedures. There is a need as Mr. Barnes says for ''reforming statutes based on coherent general principles''. Defence lawyers would welcome reforms and indeed members of the Criminal Law Committee of the Incorporated Law Society of Ireland are contributing to different discussion papers of the Law Reform Commission. Mr. Barnes refers to the ''Big Lie'' underpinning the right to silence. I would suggest that his judgment has been clouded by a different ''Big Lie'' - that is that all of the difficulties encountered by prosecution authorities emanate from this dreaded right. I believe that reform of the law and procedures in other respects as suggested by him together with a change in the manner in which crime is investigated with a greater emphasis on forensic, detective and intelligence work might be the real answer to his problems. □

Michael Staines, Solicitor

U.S. Opportunity for Young Solicitor

Sixteen young business people from all over Ireland will be given an opportunity to work in the United States for six months under a scheme announced recently by the International Fund for Ireland (the sponsors) and Hay MSL Ireland Management Consultants. There is an opening in the programme for a young solicitor to spend six months in a firm of lawyers in New Jersey.

Any firm which would like to sponsor one of its younger solicitors on this programme, or obtain further details should contact *Damien Hand,* Hay Management Consultants, New Mount House, 22-24 Lower Mount Street, Dublin 2. Telephone: 765994. □

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SYS Conference Focussed on Competition, Insolvency and Choice of Law

Kilkenny proved to be a particularly successful venue for the Autumn Conference of the SYS. The Newpark Hotel attracted a large number of the older 'young solicitors' – for some it was their first SYS weekend but certainly not their last. This may have had something to do with the golf at Mount Juliet. It may also have been due to the high quality of the lectures.

The first lecture on Saturday was given by *Brian Cregan* B.L., Director of Legal and Competition Policy, Confederation of Irish Industry. This was a most helpful and practical overview of the Competition Act which came into force on 1 October, 1991. Among the ground covered were the features of European Competition Policy upon which the Irish Competition Act is based, the structure of the Act itself, the role of the courts and the Competition Authority. The second lecture – 'Insolvency – Implications for Property Lawyers' – was delivered most eloquently by *Eugene McCague,* solicitor, Arthur Cox. Having dealt with the ground rules for purchasing property from liquidators and receivers, Mr. McCague then went on to clarify many of the grey areas surrounding the issues affecting landlords on the one hand and liquidators/ receivers on the other when dealing with insolvent tenant companies.

The black tie banquet and dance on Saturday evening featured The Hot City Jazz Orchestra which certainly lived up to everyone's expectations.

The new Chairman of the SYS, *James McCourt,* gave his opening address in which he thanked in particular the hard-working sub-committee which organised the conference – *Maureen Walsh* (main organiser), *Paul Marren* and *Gavin Buckley.*

Despite the lateness of the hour the night before, the final lecture on Sunday morning given by *Gerard Hogan* B.L., Trinity College, Dublin, was well received. His lecture on 'The Rome Contract Convention' or The Rome Convention on Choice of Law Applicable to Contractual Obligations' was an in depth study of the subject including case law on the topic and its particular relevance to Irish litigation lawyers. The Convention itself came into force generally on the 1st April, 1991 having been ratified by the required seven States (not including Ireland, apparently for constitutional reasons).

(Continued on page 19)

ADVANCE NOTICE

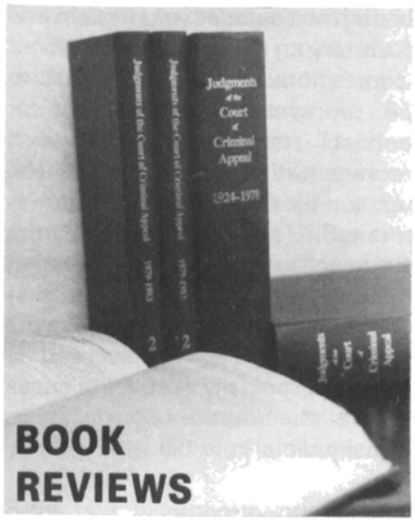
Society of Young Solicitors – International Spring Conference
Friday 8 to Sunday 10 May, 1992
Slieve Donard Hotel, Newcastle, Co. Down, Northern Ireland.

The Society of Young Solicitors is pleased to announce that the Spring Conference this year will be a joint one with the Younger Members Committee of the Law Society and the Northern Ireland Young Solicitors Group. The Scottish Young Lawyers Association and The Young Solicitors Group of England and Wales are also participating. In addition, many delegates from Europe are expected.

The Slieve Donard Hotel is a top Northern Irish hotel situated on the coast in very scenic surroundings at the foot of the Mourne Mountains. The Weekend Programme will cover a wide range of educational, social and leisure activities including a Black Tie Banquet on Saturday evening.

The all-inclusive cost per delegate is £90.00 stg. Further details are available from *James McCourt* (SYS) at 760901 and from *Robert Hennessy* (YMC) at 717277 and will be announced soon. Places at the Hotel will be limited to approximately 230 and you are encouraged to register your interest now.

Put this date in your diary now!



Windward Of The Law

Second Edition by Rex Mackey. The Round Hall Press, 200pp. Hardback £19.95

The law and stories about the legal profession have long been fertile ground for authors with a legal background. Rex Mackey's Windward of the Law, second edition, is a history of the Irish Bar and legal profession from the early days of Anglo-Norman Dublin.

Rex Mackey is a well known Senior Counsel practising at the Irish Bar and published the first edition of this book in 1965. The second edition has been published with an epilogue which reviews developments in the legal profession since then.

The book has been described as a witty account of how the Irish have shaped the law and has also been referred to as light hearted revelations, by various reviewers, but I would suggest that these comments are misleading. This book which contains some light hearted moments is a well written, interesting and serious history.

I enjoyed the book, and found it informative and sometimes amusing, but Mr. Mackey's accounts of many injustices visited upon the ordinary people by an alien law imposed by a foreign administration filled me with sadness. The many occasions when the death penalty was handed out for minor offences which were more often than not proved, by an incompetent judiciary, and often against innocent people, must make us very thankful for the more benign times that we live in today and the abolition of the death penalty.

The judiciary and their appointment have come in for severe comment by Mr. Mackey but there are good accounts of ingenious legal dialogue between judges and barristers such as Daniel O'Connell which do bring a smile. There are funny stories about the demeanour of and evidence given by witnesses in cases in days gone by, and while in his epilogue, Mr. Mackey regrets the passing of the jury system, his many stories about the perversity of juries long ago does cause some amusement.

There is a most interesting chapter on the building of Kings Inns and if one ever wondered why the Bar in Ireland does not have a chamber system, the answer is in this book. It appears that plans to this effect were prepared by Gandon, but in 1806 he resigned ''as the work was not advancing as rapidly as desired owing to lack of funds''. Do many things change?

I enjoyed the book and would universally recommend it.

Elma Lynch

Summing It Up:- Memoirs of an Irishman at Law in England

By James Comyn. The Round Hall Press (1991), 232pp. £19.95

This is another book from the prolific hand of Irishman, *James Comyn* QC., who, after a long career at the English Bar (including chairmanship of the Bar Council of England and Wales), was a High Court Judge for some ten years, until his recent retirement. This book is light and succeeds in being both entertaining and, in places, memorable, in the way that, for many, Maurice Healy's *Old Munster Circuit,* even after more than fifty years, still remains entertaining and memorable. The author's father (James Comyn K.C.) had in fact been 'father' of the old Munster Circuit, and his uncle, Senator/ Judge Michael Comyn KC, had been a legal adviser to De Valera during the 1920s. The author spent a short time in 1938 working with *The Irish Times* before proceeding to Oxford and a legal career in England. Throughout his working life, he continued to maintain a house in Ireland and to come here regularly. He is now living in retirement in Co. Meath, engaging in farming and writing.

His short sojourn in *The Irish Times* clearly developed his humorous insights, enjoyed particularly by lawyers, where the seriousness of the occasion or topic highlights the (often unintended) humour. He describes an occasion of being ticked-off by R.M. Smyllie, the then inimitable editor, after writing an 'advanced obituary' of a still living cardinal, for including the information that:''His Eminence was unmarried''.

This is a book that one feels might have had its genesis in front of a blazing fire, with the author recounting to a group of port-drinking legal friends anecdote after anecdote, coming to mind in a random way. Mr. Comyn is able to effectively set the scene for each anecdote, a most important skill because legal humour critically depends on first creating the solemn and serious occasion.

Even though intended to be light, the book is also interesting and informative, not least in conveying some of what it is like to be a 'cab-rank' barrister in chambers as well as the views of the author on the personalities of some of the judges of his time who are household names to readers of the English law reports.

This is the sort of book that one can readily read and still feel inclined to dip into at regular intervals - like books by A.P. Herbert and John Mortimer. It is uncondition-

ally recommended to practising lawyers, who will particularly appreciate the enjoyment given by an injection of humour into an otherwise boring case; but non-lawyers will also be entertained - even if their image of the law in action has been created by Rumpole (alias, Leo McKern) on television.

The reviewer must introduce a note of criticism as to the number of 'typos' in the text (about twenty), regrettable when the author, as lawyers tend to do, has fine-tuned his words. The trouble with typographical errors is that when one is found, the reader is inclined to be distracted, anticipating the next one. One 'typo' the author himself probably enjoyed was in the course of the reference to a 'supergrass' trial in the Old Bailey at which he was the presiding judge. Part of the text reads (p.204): ''So that the accused could not be seen by the public, wooden shutters were placed around the deck [sic]''. Perhaps it was in reality an admiralty case where ''the dock'' becomes ''the deck''!

Mr. Comyn's undoubted skills as an advocate, judge and writer (including his previously successful books *Their Friends at Court* and *Irish at Law)* also extend to the writing of light verse, with a selection of which the book concludes. Included is the following, entitled *"The River of Goodness":*

See the sober River Liffey
Saunter on in solemn state
Through the pleasant lands of Wicklow
Till it gets to James's Gate.

See it then, agush with Guinness,
Stagger forward on its way
Till it passes out completely
When it gets to Dublin Bay.

Michael V. O'Mahony

The Trade Union and Industrial Relations Acts of Ireland

By Anthony Kerr, Sweet & Maxwell, 250pp, Paperback, IR£36.60

The Industrial Relations Act, 1990 came into effect in July, 1990 with one of its main aims to 'make further and better provision for promoting harmonious relations between workers and employers'. This Act, which repealed the much criticised Edwardian Trade Disputes Act of 1906, was hardly 'a child of political expediency, hastily conceived' or 'prematurely delivered' using Parke, J's words in his criticism of the 1906 Act in his judgment in *Goulding Chemicals - v- Bolger and Others* (1977) IR 211. Mr. Kerr provides a very useful and interesting summary of the gestation of the new Act.

Tony Kerr has rightly taken the opportunity of the passing of the new Act to provide us with a full text and commentary on all relevant trade union and trade dispute legislation. The first part of the book provides the up to date text and commentary on the Trade Union Act, 1871, the Conspiracy and Protection of Property Act, 1875, the Trade Union Amendment Act, 1876, and the Trade Union Acts of 1913 to 1975. He has also provided the various statutory forms and other relevant material. It is extremely useful having all this documentation together because as correctly stated in the Preface 'this material is not readily available even to those with access to law libraries'.

The second part of the book provides us with the industrial relations legislation namely the Industrial Relations Acts of 1946 to 1990. These Acts established the voluntary framework for Irish industrial relations. Although historically less interesting that the previous section of the book, the inclusion of the Labour Court Rules, 1946, makes fascinating reading especially for the legal profession. As stated above, the Irish system is based on a code of voluntarism and therefore an applicant to the Labour Court should apply to the Court to be represented by solicitor or counsel. The Court will grant such representation where it is of the opinion that such representation is merited. The reality is that the Court will accept applicants being represented by the legal profession and recently many more employers and employees are represented by lawyers especially in equality cases where the Labour Court has a quasi-judicial role.

The Industrial Relations Act, 1990 reflects a modern Ireland. Tony Kerr has provided us with an excellent commentary on the various sections of the new Act using as source material both Irish and more recent UK case law and, of course, the Dail debates. Sadly, a number of these cases are unreported; however, Mr. Kerr has gone to a great deal of trouble to refer to valuable newspaper reports. This was no easy task as the book has been published within a year of the commencement of the Act. One may suggest that the book was printed too quickly as there is a considerable volume of useful information in the Preface. Nonetheless, an excellent commentary is provided on the new definitions of 'trade dispute', 'employer', 'industrial action' and 'strike'. In summary, the Act continues the system of immunities as under the 1906 Act to members of registered trade unions in dispute. The new requirement for secret ballots by members of trade unions (coming into effect in July, 1992), to include aggregate balloting where there is more than one union involved, and strike notice are also considered. Specific rules on one-person disputes are very well highlighted with reference to the case of *Iarnrod Eireann -v- Darby and O'Connor* - March, 1991. The new constraints on picketing are considered in some detail to include the picketing of industrial estates and ports. Secondary picketing, although unlawful under the new Act, may be allowed in certain circumstances - this is also considered.

Strikes in essential services have in recent times been problematic which is a major flaw in this legislation as was evidenced by the ESB strike some months ago - Mr. Kerr states that the proofs of the book 'were corrected largely by candlelight'. A Voluntary Code of Practice on disputes in essential services has just been launched by the Minister for Labour. The code was drawn up by the Labour Relations Commission, an industrial relations body established under the Act comprising both sides of industry.

This text is recommended to all lawyers who are involved in acting for trade unions, their members and those who represent either party in trade disputes. One looks forward to the second edition already to see what further interpretations there may be on the 1990 Act and to consider how successful it will have been in the light of experience.

Frances Meenan

Guide to Employment Legislation.

Federation of Irish Employers.
5th Edition. September, 1991.
pp 201 £25.00

As a body of law employment legislation has grown dramatically, particularly since the early 1970s. Individual statutes interact and overlap to a considerable degree in addition to which our legislators have regularly tacked on amendments in a piecemeal fashion making it extremely difficult to plot a course through many of the individual statutes and employment legislation as a body.

Back in 1979, the Federation of Irish Employers, or as it then was, the Federated Union of Employers, first produced a very useful guide to employment legislation and recently has published the fifth edition of that guide. As well as adding legislation not covered in previous editions, the latest edition contains somewhat more commentary than previously with useful references to relevant jurisprudence, albeit in very general terms. While the book is not written for lawyers it will be of considerable use to lawyers seeking easy reference to particular statutory provisions. I am sure many practitioners have, like me, little areas of blanks in their minds where particular items or details are impossible to retain. As long as I have been practising in the area of employment law I cannot remember the sliding scale of service related notice entitlement in the Minimum Notice and Terms of Employment Act, 1973, hence the great value of an easy to use reference work such as this guide.

The Guide covers everything from conditions of employment through health and safety, and industrial relations to such diverse statutes relevant to employment law as the Juries Act, 1976, the Data Protection Act, 1988 and the Companies Act, 1990 insofar as it relates to contracts of service. For a book of its size and modest pretensions it also has an admirable index. While we have had a very welcome growth in the publication of native Irish legal works in recent years I have always found the standard of indexation to be less than impressive. Maybe I am alone in this but I do not tend to read legal text books from cover to cover but rather to dip into them as I need to. The contents and index sections are therefore vital to the proper use of any such publication and this one is particularly well served in that regard. While the cover of the Guide is pleasing to the eye, the printer or designer overlooked printing the title on the spine. A blank white spine on one's bookshelf does not help in finding this easy to use reference work unless it happens to be the only blank spine in view.

The Guide has improved with each successive edition. While this edition refers from time to time to the current state of interpretation of specific statutory provisions, it does not refer to case law nor give any assistance towards further research. That is not the purpose of the Guide and if it were to adopt a practice of citing relevant case law, it would probably become impractical for the publishers to keep up to date given the modest pretensions of the publication. Nonetheless, it is an excellent guide and will be of great assistance to all practitioners for quick and easy reference to the main provisions of employment legislation in Ireland.

I have noticed other FIE publications appearing on the shelves of legal booksellers but I have not seen this one or its predecessors. I have no doubt in time it will so appear but in the meantime can be obtained from the FIE office in Dublin, contact *Audrey Beasley* 601011. □

Gary Byrne

SYS Conference

(Continued from page 16)

Our thanks to our eminent speakers and to our generous sponsors – The Investment Bank of Ireland Limited (our main sponsor), Butterworths, Sweet & Maxwell and Douglas Llambias and Associates.

Copies of the lectures are available from *Delphine Kelly* of A. & L. Goodbody, Solicitors.

The next SYS conference is a joint one with the Younger Members Committee of the Law Society and the Northern Ireland Young Solicitors Group and will be held in Newcastle, Co. Down from the 8th to the 10th May, 1992. See p. 16 of this *Gazette* for details. □

Jennifer Blunden,
Public Relations Officer, SYS.

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Earnings on Solicitors Financial Services Reach £1 Million

The company, Solicitors Financial Services (SFS), formed by the Law Society in 1989 has now finished its second year of operations. As stated in the Annual Report (copies available on request) 276 firms joined the service for the year ending 30 September, 1991. Total earnings to 30 September have almost reached £1 million! No mean achievement in a trying and difficult economic climate.

If the current rate of renewal of membership is maintained this figure will be surpassed for the coming year.

It is worth noting that in these days of rising costs, SFS has kept its membership fees at the levels to which they were reduced last year (see table).

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During 1991, Part IV of the Insurance Act came into effect. The principal aim of this legislation is to regulate insurance intermediaries and thus protect the interest of the client. The necessity for this legislation has been highlighted by a number of well publicised cases during the last year. As a member of SFS you will automatically comply with the requirements of the Act through the company's association with Sedgwick Dineen.

In order for the scheme to achieve optimum results individual solicitors in each firm must generate enquiries and Sedgwick Dineen will be glad to advise where and how these enquiries may be generated.

There are a large number of solicitors' clients who will have surplus funds, whether large or small, who will be only too delighted to learn that their solicitor, through the SFS, can provide expert advice on investment. Solicitor members need to inform clients, if necessary in a circular, that the service is available. Even a small amount of marketing will yield surprising results. It may surprise solicitors to know that two winners of substantial amounts in the National Lottery have been advised by SFS.

Clients receive a very comprehensive investment report and Sedgwick Dineen will meet him/her and their solicitors to discuss the various options available. Remember that Sedgwick Dineen is completely independent of any bank, financial institution or insurance company and can give advice on the most suitable products available to the client.

There are many other examples such as providing advice to clients on inheritance tax planning or implications which the budget has on Section 60 Policies and Section 119 Policies.

Members of the profession are urged to seriously consider membership of the service, as it has proved to be a substantial source of additional income for its members. It is a system which is very simple to operate and enables a solicitor to provide an expert service in an area of client business where the solicitor does not have to be expert himself. ☐

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Law Society Annual Conference 1992

BERLIN

"Lawyers in Business in Europe"

Berlin – The Brandenburg Gate

23 - 26 April, 1992

Book now for this exciting event!

All Lawyers Welcome

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Introduction

The Wall is gone and the Brandenberg Gate is opened to the "New World" of Europe! Berlin, intersection between East and West, North and South is once again the economic as well as the cultural and intellectual capital of Germany. It is therefore the ideal venue for the Law Society's first Annual Conference to be held outside Ireland which has as its theme "Lawyers in Business in Europe".

The conference is designed to give delegates an opportunity to meet and work with internationally known businessmen and lawyers and to forge links with German colleagues. However, there will also be time to see the historic sights and to enjoy the vast range of cultural and social activities that Berlin has to offer.

Berlin has 27 theatres, 3 opera houses and leading museums. It is also home to the world renowned Berlin Philharmonic Orchestra.

Berlin's nightlife is superb, with restaurants, bars, cabarets and nightclubs to suit every taste.

Shopping is excellent. There are numerous international designer boutiques and department stores including Ka De We - the largest department store in the World!

Why Berlin?
Because this year, more than ever, the international spotlight in on Europe. Germany itself is economically the strongest country in the EC and one with which Ireland already has a growing level of economic, social and political contact. For lawyers, therefore, Germany **has to be** a country of increasing relevance. Moreover, the proximity of closer economic and political union in Europe – which begins in earnest at the end of this year – must make **all lawyers** acutely aware that they are members of the larger European family and that they ought now to be focusing on the opportunities that will present themselves for developing their businesses into Europe and the business opportunities that will come from Europe to Irish law firms.

Schloss Charlottenberg

The Conference itself
We have assembled an array of internationally recognised speakers who will deal with many aspects of the issues that confront lawyers, and the business community generally, doing business in Europe in 1992. The conference will, therefore, examine in detail what is happening on the ground in Germany today, as seen from both an Irish and a German perspective, focusing on both the business and legal dimensions.

Free Draw for Young Lawyers

In order to encourage young lawyers to attend there is a draw for two free tickets. The draw, sponsored by Prudential Life of Ireland Ltd., is open to those who have qualified within the last 10 years.

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Conference Programme

THURSDAY 23 APRIL
Depart Dublin, Arrive Berlin (direct flight 2½ hours)
Evening free for social activities.

FRIDAY 24 APRIL
7.30-10.15 a.m. Traditional German Breakfast.

10.30-1.00 p.m. Conference.

- Opening Address by *Eberhard Diepgen*, Governing Mayor of Berlin.
- *Dr. Gerd Wächter*, Director, Treuhandanstalt (the organisation charged with the privatisation and development of state-owned business in the former East Germany).
- *Peter Sutherland* SC, former EC Commissioner

1.00 p.m. Reception.

Afternoon free/optional tours.

SATURDAY, 25TH APRIL.
7.30-10.15 a.m. Traditional German Breakfast.

10.30-noon Conference.

- Opening address by His Excellency, *Padraig Murphy*, Irish Ambassador to Germany.
- *Dr. Peter Weichhardt*, Chief Executive, Commission for Economic Development of the City of Berlin.
- Closing address, *Dr. Klaus Kinkel*, German Federal Minister for Justice.

Afternoon free/optional tours.

SUNDAY, 26 APRIL
7.30-10.30 Traditional German Breakfast.

Return to Dublin.

(Programme subject to confirmation).

View of the Gedächtniskirche Wertheim

Travel/ Accommodation

A number of packages are available depending on which of the three top class quality hotels participants choose to stay in. All hotels are within close proximity of each other and the Kurfürstendamm. The price includes return air fare, transfer to and from hotel, accommodation for 3 nights in the chosen hotel (sharing a twin room), buffet breakfast, hotel service charge and airport taxes, travel insurance, subject to customary international travel booking conditions and currency surcharges (available on request).

1. **Steigenberger Hotel** (main conference hotel), 1 Los Angeles Platz. Lying in the heart of the city. Luxurious rooms, all with bathroom, colour tv, video, minibar, direct dial phone. Facilities: restaurant, cocktail bar, swimming pool, sauna, solarium.

   Price: £650 per person sharing.

2. **Penta**, 65 Nurnbergerstrasse. Centre city. All rooms with bath/shower, tv, video, minibar, telephone. Bar and restaurants, swimming pool, sauna, solarium, fitness centre.

   Price: £575 per person sharing.

3. **Sylterhof**, 114 Kurfürstenstrasse. Within the city centre. All rooms with bath, tv, telephone, minibar, 3 restaurants, cabaret bar.

   Price: £475 per person sharing.

Timing: Please note that Thursday, 23rd April is the Thursday following Easter Monday. Trinity term commences Monday, 27th April.

Remember: These costs are tax deductible.

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Booking arrangements

Please fill in the booking form below and return with your cheque for the appropriate amount, (£100 per person deposit) payable to the Incorporated Law Society of Ireland. Deposits are not refundable. Please indicate the number of persons intending to travel.

Alternatively, if you would like further information, contact members of the Organising Committee: Geraldine Clarke - 718048, Richard Bennett - 6269029, Gerry Griffin - 901185, or telephone Sandra Fisher at the Law Society - 710711.

N.B. the closing date for bookings is Monday, 10 February, 1992. Don't forget to fill in your year of qualification on the booking form.

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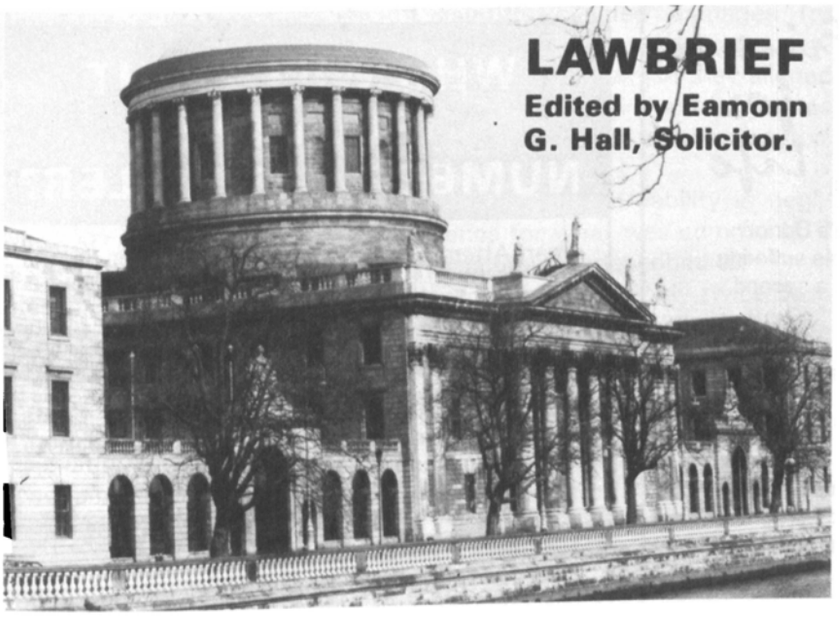

Conference on Competition Policy

A Conference on Competition Policy was organised in University College Galway recently, hosted by the newly-founded Centre in Economics & Law (CIEL). The Centre is a joint venture between members of the Economics Department and the Law Faculty at the University, with the purpose of conducting research into areas of mutual interest to the two disciplines. The Director of the Centre, *Patrick McNutt,* is an economist who realised the need for such a facility while on sabbatical at Georgetown University in Washington DC. In the US, economists are routinely appointed to law faculties, where their training is considered vital in giving law students an understanding of issues in business law, tort and anti-trust.

A particular interest of the Centre is competition policy, which is a subject which demands both legal and economic insights. With this in mind, and in the light of the recently enacted Irish Competition Act, it was decided to launch the Centre by hosting a one-day Conference on Competition Policy, which was held on November 23 last.

The organisers were highly fortunate in persuading two of the leading international experts on competition policy to participate at the conference. They were Professor *Barry Hawk,* of Fordham University, New York and the international law firm Skadden, Arps, Slate, Meagher & Flom and Professor *Valentine Korah* of University College, London. Professor Hawk has written the definitive textbook on mergers law and has an extensive practical experience of the subject. Professor Korah is the author of the leading textbook on competition law. Both speakers gave highly informative, thought-provoking and entertaining talks.

Photographed at a conference on competition law organised by the Centre in Economics and Law, University College, Galway were L-R: Dr. Patrick McNutt, Director, CIEL, UCG; John Meade, Arthur Cox; Patrick Massey, Competition Authority, and Professor Liam O'Malley, Smurfit Professor of Business Law, UCG.

The Irish dimension to the speaking panel was equally distinguished. The Director of Consumer Affairs and Fair Trade, *William Fagan*, gave a fascinating description of the enforcement procedure of the Competition Act, including provisions for so-called 'dawn raids', which must be highly organised and secret in advance, as the element of surprise is vital. *Patrick Massey,* one of the new three-member Competition Authority, outlined the prospective role of the Authority over the next few years, while *John Meade* of Arthur Cox gave an account of some of the pitfalls and inconsistencies of current Irish merger law.

Each session included an extensive question and answer period, which was taken full advantage of by the delegates. Indeed, the speakers remarked more than once on the quality of the questions. The Conference was attended by a wide variety of delegates, including practising lawyers, economists, academics and representatives of semi-state bodies. All agreed that it was a highly useful, informative and enjoyable occasion.

The proceedings of the Conference will be published and sent to each delegate. Copies will also be made available at a small charge to those who were unable to attend. The CIEL also publishes a quarterly newsletter which will keep readers up-to-date on issues in business law, tort and competition law. If you are interested in subscribing to the CIEL newsletter and/or receiving the proceedings of the Conference, you may contact *Maeve Doherty* at the Centre in Economics & Law, SSRC, University College, Galway.

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Psychiatric claims by plaintiff; nervous shock; proximity test for liability

In *Alcock and Others -v- Chief Constable of South Yorkshire Police,* [1991] 4 All ER 907, the House of Lords held that liability for psychiatric illness depended on foreseeability and a relationship of proximity between the claimant and the defendant.

The House of Lords stated that psychiatric claims by plaintiffs in close family relationships with the victims of the Hillsborough disaster were recognisable. They were based on the rebuttable presumption of love and affection normally associated with that relationship. But such claims were not to be confined to those relationships.

The Court held that it was not reasonable to regard viewing scenes of a disaster on live television broadcasts as giving rise to shock, in the sense of a sudden assault on the nervous system.

Lord Keith said that the litigation arose out of the disaster at Hillsborough Stadium, Sheffield, on April 15, 1989 when 95 people died in the crush and more than 400 were injured. South Yorkshire Police were responsible for crowd control and the chief constable had admitted liability in negligence in respect of the deaths and physical injuries.

Sixteen separate actions were brought against the chief constable by persons none of whom was present in the area where the disaster occurred, although four of them were elsewhere in the ground. All of them were connected in various ways with persons who were in that area, being related to such persons or, in one case, being a fiancé.

In most cases, the person with whom the plaintiff was concerned was killed, in other cases that person was injured, and in one case turned out to be uninjured. All the plaintiffs claimed damages for nervous shock resulting in psychiatric illness which they alleged was caused by the experiences inflicted on them by the disaster.

The question of liability in negligence for what was commonly, if inaccurately, described as "nervous shock" has only twice been considered by the House of Lords, in *Bourhill -v- Young* [1943] AC 92, and in *McLoughlin -v- O'Brian,* [1983] 1 AC 410, 421-423 where Lord Wilberforce expressed the opinion that foreseeability did not of itself and automatically give rise to a duty of care owed to a person or class of persons and that considerations of policy entered into the conclusion that such a duty existed.

In addition to reasonable foreseeability, Lord Keith considered that liability for injury in the particular form of psychiatric illness must depend also on a relationship of proximity between the claimant and the party said to owe the duty.

As regards the class of persons to whom a duty might be owed to take reasonable care to avoid inflicting psychiatric illness through nervous shock sustained by reason of physical injury or peril to another, it was sufficient that reasonable foreseeability should be the guide. However, the class would not be limited by reference to particular relationships such as husband and wife or parent and child.

The kinds of relationship which might involve close ties of love and affection were numerous, stated Lord Keith, and it was the existence of such ties which led to mental disturbance when the loved one suffered a catastrophe. They might be present in family relationships or those of close friendship, and might be stronger in the case of engaged couples than in that of persons who had been married to each other for many years.

It was common knowledge that such ties existed and reasonably foreseeable that those bound by them might in certain circumstances be at real risk of psychiatric illness if the loved one was injured or put in peril. The closeness of the tie would, however, be required to be proved by a plaintiff, although no doubt would be capable of being presumed in appropriate cases.

As regards the means by which the shock was suffered, Lord Wilberforce had said in *McLoughlin -v- O'Brian* (at p434) that it must come through sight or hearing of the event or of its immediate aftermath. He also said that it was surely right that the law should not compensate shock brought about by communication by a third party.

Of the present plaintiffs, Lord Keith said that Brian Harrison and Robert Alcock were present at the Hillsborough ground, both of them in the West Stand, from which they witnessed the scenes in pens 3 and 4. Brian Harrison lost two brothers, while Robert Alcock lost a brother-in-law and identified the body at the mortuary at midnight.

In neither of those cases was there any evidence of particularly close ties of love or affection with the brothers or brother-in-law. The mere fact of the particular relationship was insufficient to place the plaintiff within the class of persons to whom a duty of care could be owed by defendant as being foreseeably at risk of psychiatric illness by reason of injury or peril to the individual concerned.

Lord Keith said the same was true of other plaintiffs who were not present at the ground and who lost brothers, or in one case a grandson.

However, Mr and Mrs Copoc, whose son was killed, would be placed in the category of members of which risk of psychiatric illness was reasonably foreseeable. Alexandra Perk, who lost her fiancé, would be in the same category.

In each of those cases the closest ties of love and affection fell to be presumed from the fact of the particular relationship, and there

was no suggestion of anything which might tend to rebut that presumption.

Those three all watched scenes from Hillsborough on television, but none of those depicted suffering of recognisable individuals, such being excluded by the broadcasting code of ethics, a position known to the defendant.

Lord Keith stated that the viewing of those scenes could not be equated with the viewer being within sight or hearing of the event or of its immediate aftermath, to use the words of Lord Wilberforce, nor could the scenes reasonably be regarded as giving rise to shock, in the sense of a sudden assault on the nervous system.

They were capable of giving rise to anxiety for the safety of relatives known or believed to be present in the area affected by the crush, and undoubtedly did so, but Lord Keith said that was very different from seeing the fate of the relative or his condition shortly after the event. The viewing of the television scenes did not create the necessary degree of proximity.

Lord Ackner, Lord Oliver and Lord Jauncey delivered concurring opinions and Lord Lowry agreed.

Facts Faxed Too Fast

The advent of electronic transmission of information has enabled us to communicate expediently and efficiently. Unfortunately, occasionally speedy replies are accidently sent to the wrong person or party. In response to this possibility, many lawyers include a disclaimer on each electronic document transmission.

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Keeping Client Files

Lawyers often ask "how long do we need to keep our clients' files"? Some recommend that all files be kept for a minimum of ten years before they are destroyed. Each file should be reviewed to determine if the file should be kept longer. Files should be kept more than ten years if (1) the case involves a minor who is still a minor at the end of the ten years; (2) the file contains estate planning information of a client who is still alive ten years after the work is performed; (3) the file pertains to a contract or other agreement which is still being paid off at the end of ten years; or (4) the file includes a judgment which needs to be renewed.

The above notes entitled "Facts Faxed Too Fast" and "Keeping Client Files" were published in the *Newsletter of the Oregon State Bar Professional Liability Fund* for May 1991 and August 1991 respectively. *Lawbrief* is grateful to James J Ivers, Executive Director of the Solicitors' Mutual Defence Fund Ltd., in drawing the matters to our attention, and to the Newsletter for kind permission to reproduce. □

Eamonn G Hall

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Practice Notes

Arrears of Ground Rent

In relation to the question of arrears of ground rent the following provisions are relevant:—

1. **Statute of Limitations, 1957**

   Under Section 28 of the Statute of Limitations 'No action shall be brought or distress made to recover arrears of a conventional rent or damages in respect thereof after the expiration of six years from the date on which the arrears became due'.

   'Conventional Rent' is defined in the Statute of Limitations as 'A rent payable under a lease or other contract of tenancy (whether in writing or not and whether express or implied) . . . but does not include a fee farm rent . . . .'

   It should be noted that this Section does not bar the landlord from collecting arrears of rent which are less than six years in arrear or from enforcing other covenants in the lease etc. It does not affect the landlord's title and only affects his ability to collect the arrears of rent.

2. **Law Society's General Conditions of Sale**

   Under General Condition 10 (c) it is provided that 'The production of the receipt for the last gale of rent reserved by the lease or agreement therefor, under which the whole or any part of the subject property is held (without proof of the title or authority of the person giving such receipt) shall (unless the contrary appears) be accepted as conclusive evidence that all rent accrued due has been paid and all covenants and conditions in such lease or agreement and in every (if any) superior lease have been duly performed and observed or any breaches thereof (past or continuing) effectively waived or sanctioned up to the actual completion of the sale, whether or not it shall appear that the lessor or reversioner was aware of such breaches'.

3. **Landlord and Tenant Law Amendment Act Ireland, 1860 (Deasy's Act)**

   Most leases contain an express covenant by the lessee or tenant to pay the rent when due. Where it does not, however, Section 42 of Deasy's Act implies in every lease an agreement for the tenant and his successors in title to pay the rent when due.

   Under Section 52 of Deasy's Act a landlord is entitled to bring ejectment proceedings once rent is more than one year in arrear. This is now subject to 4. below.

4. **Landlord and Tenant (Ground Rents) (No. 2) Act, 1978**

   Under Section 27 of this Act the right to re-enter and take possession of premises or to sue for ejectment under Section 52 of Deasy's Act no longer applies in the case of a dwellinghouse held under a lease where the lessee is entitled to acquire the fee simple.

   Conclusion: While a landlord is not entitled to recover rent which is more than six years in arrear, the tenant who does not pay such rent is still technically in breach of his lease and even if he were able to obtain a receipt for the latest gale of rent, this might not satisfy General Condition 10 (c) in that it might still be quite apparent that there were other arrears outstanding.

   However, since a landlord's remedies for collecting rent which is in arrears for more than six years are non existent, purchasers should accept either a receipt for the latest gale of rent or else a declaration that the rent has not been demanded coupled with a sum to cover six years of rent.

   If a landlord is sent a cheque to cover six years arrears of rent, he is entitled to allocate the money received to the earlier arrears and to refuse to issue a receipt for the latest gale of rent. When acting for a tenant it is therefore important to specify that the arrears which are being paid are in respect of the rent which has accrued within the past six years.

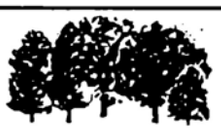
Conveyancing Committee

Automatic Renewal of Intoxicating Liquor Licence

It is the view of this Committee that if you had been in the habit of attending to the renewal of your client's publicans' licences prior to the introduction of Section 41 (2) of the Courts (No. 2) Act, 1986 it would be prudent, even at this late stage, to write and advise your client of the consequences of failing to renew his licence. It should be pointed out to the client that he must renew his licence on an annual basis, otherwise he runs the risk of incurring the expense of applying to the Circuit Court for a new licence if he adverts to the fact that he has actually lost his licence through non-renewal provided that he does so within a period of five years. If he fails to apply to the Circuit Court for a new licence within a period of five years after the date when he last renewed it then he forfeits the right to a new licence absolutely.

Conveyancing Committee

□



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Optical Imaging Technology and the Legal Profession

Technology Notebook

by *John Furlong,* Solicitor

Most lawyers are acquainted with the concept of micro filming which preserves reduced copies of documents in their original format. Micro filming has not been a technology to which lawyers have taken with any great enthusiasm. Yet, the legal profession is being noticeably targeted at present with regard to optical imaging technology. This technology provides a means to store, on a computer system, a photographic image or graphical content of a document. Whereas micro filming retains a copy image in a physical medium, optical imaging allows for storage of copy images within the logical medium of a computer system. Nonetheless, optical imaging is essentially another (if more sophisticated) method of storing copy images.

It is clearly of benefit where a lawyer requires to store vast amounts of graphical detail such as site plans, signatures, stamp duty detail on deeds etc. It is also of benefit where the storage of and access to copies of original documents are required on an instantaneous basis by a number of persons.

The technology stores such detail on an optical disk. Optical disks are physically similar to CDs and the entry and storage of data is effected by scanning the relevant document or item, logging it to a specific physical disk; checking the quality of the capured image and indexing it for future access.

The principal benefits of optical imaging technology to the legal profession are:

- safe and secure archival storage of copies of original documents
- substantial reduction in storage space. 15,000 A4 pages can be stored on one 5.25 inch disk. 12 inch disks can store over 120,000 A4 pages depending on the quality of the image required
- multi-user access to a copy of the same document
- portability between locations. This is of significant benefit where large volume copies of documents are required out of office (e.g. in court) or are required in a number of locations at the same time.

Certainly, these advantages combined with the ease of access which optical technology seems to offer can make it seem an attractive option in the development of legal office technology. However, the technology suffers from a number of drawbacks. The following issues should be addressed when considering the implementation of the technology:

- What are your business requirements of such a system? Would they be adequately satisfied by the improved indexing of the original documents or by use of a micro filming system?
- Can you justify the investment cost which will include not alone the software and necessary hardware (including a scanner) but also the cost of staff resources to scan the documents, control the quality and to index them.
- What are the indexing capabilities of the sytem? How does it provide for access to individual documents? Some systems provide limited indexing facilities. Others rely on a parallel system based on optical character recognition. Consider how documents will be accessed or located. The proper indexing of optical images is a fundamental requirement if the system is to return any benefit.
- Most systems are Write Once and Read Many (Worm) which means that data once stored cannot be amended. While this is of benefit from a security or archival point of view, it can severely limit the applicability of the technology to "working documents".
- What quality of materials do you intend to input? Optical storage requires control on the standard of the input material both in their original paper format and their captured optical image. Check the capabilities of the system in respect of double sided documents; deed paper; pencil drawings; different coloured paper; old or mutilated documents etc.
- What format disk is used by the system? Discs come in 5.25" and 12" formats. Clearly the larger the disk the more data can be stored on it. Problems arise if all of the data cannot be stored on one disk. Where there are a large number of disks they will have to be identified, tagged and stored securely. They will have to be loaded manually or stored in an automatic or robotic feed system which involves considerable extra expense.
- What are the back-up capabilities of the optical disk technology? Clearly if the documents are worth the original investment in the technology, secure second copies will be required in the event of damage or loss to the original disks.

(Continued on page 34)

Stamp Duty - No Amnesty for Interest

Section 100 Finance Act 1991: Penalties and Interest.

Many commentators on s 100 Finance Act, 1991 took the view that there was a lacuna in the Act because the new penalty and interest provisions did not take effect until 1 November, 1991 and that the old provision in s 15 Stamp Act, 1891 was repealed on 29 May, 1991 the date of passing of the Act. On that interpretation no penalties or interest were leviable on instruments presented for stamping between 29 May, 1991 and 1 November, 1991. The Revenue response was to state that the interpretation of statutes is confined to the actual words used. To determine the sense and meaning of s 100, the section must be construed as a whole. Given the use of the word 'substitute' in the section and given the ordinary meaning of that word, the correct interpretation of the section is that the old provisions cease to have effect only when new provisions become operative. To contend that s 100 created a legislative void would be to strain the plain meaning of the words of the Act and the intention of the Oireachtas beyond what is reasonable and acceptable.

Both views appear to have overlooked Section 19 (1) of the Interpretation Act, 1937 which provides:

:''Where an Act of the Oireachtas repeals the whole or a portion of a previous statute and substitutes other provisions for the statute or portion of a statute so repealed, the statute or portion of a statute so repealed shall, unless the contrary is expressly provided in the repealing Act, continue in force until the said substituted provisions come into operation''.

A recent application *(O'Leary -v- Revenue Commissioners)* to the High Court seeking liberty for judicial review of a decision of the Revenue Commissioners to charge a penalty on an instrument presented for stamping during the period 29 May, 1991 and 1 November, 1991 was refused. An appeal against that decision was unsuccessful in the Supreme Court (21 November, 1991) where Mr. Justice O'Flaherty pointed out that s 19(1) gave the complete answer to the application.

While November 1 has gone by, the above may be of interest to a number of taxpayers who paid under protest in the hope that the Revenue ruling might be set aside by the Courts.

B.H. Giblin B.L.

The then Chairman, of the Taxation Committee, Brian Bohan, wrote to the Revenue Commissioners last November about this issue and received the following reply:

Dear Mr. Bohan,
I refer to your letter of 4 November concerning the statement of practice on stamp duty and in particular the provisions in the Finance Act, 1991, relating to the charging of interest. Although your letter does not outline the aspects of our interpretation of section 100 with which you disagree I assume that the disagreement revolves around the treatment, for penalty purposes, of instruments presented for stamping between the passage of the Act and 1 November, 1991. An argument has been advanced that there were no provisions for the charging of interest during that period.

Apart from the fact there was certainly no intention to create a legislative void for the charging of interest it is the view of the Revenue Commissioners that even the most literal reading of section 100 does not support the contention that one was created. In the interpretation of statutes one is, in general, confined to a consideration of the actual words used. Section 100 refers to the substitution of a new section for the then existing section 15 of the Stamp Act, 1891. At the end of the revised section 15 it is stated that the effective date of the revised provisions is 1 November. To determine the sense and intention of section 100 the section must be construed as a whole. A dictionary definition of ''substitution'' is ''change of one thing for another''. The Act changes the then existing section 15 for the revised version. That change can only take place on the coming into effect of the revised section 15 i.e. 1 November, 1991. Any other interpretation would lead to the conclusion that the then existing section 15 was substituted for by a legislative blank. This would be to strain the plain meaning of the words of the Act and the intention of the Oireachtas beyond what is reasonable and acceptable.

Given this technical background to the interpretation of the section its practical effect is to provide that instruments executed prior to 1 November are liable to the then prescribed interest charges up to 31 October. Thereafter they are liable to the new charges. A comparable situation has arisen many times in other taxes where interest charges have been varied. Stamp duty is unique only in that the charges were not varied for over a century.

There remains then the question of the further interest charges of 10%, 20% and 30% of the duty provided for in section 100 of the Finance Act, 1991. These further charges will apply to pre 1 November, 1991 documents as if, for the purpose of these charges, the documents were executed on 1 November, 1991. This avoids

(Continued on page 34)

Law School Fees to Increase

The Law School is into its thirteenth year. In that time we have run 29 professional courses and to date approximately 1,700 have come through the system and are practising as solicitors. This represents almost 50% of the practising profession.

In the next two years 700 new solicitors will enter the market place. This represents a growth in the profession of 8.3% per year and compares with our neighbouring jurisdictions as follows:-

England	8.1%
Northern Ireland	5.8%
Scotland	5.7%

Admissions policy a success
When the Society introduced its new admissions policy in 1989 by allowing all university law graduates to enter, the Law School had to gear up to meet the increased demand. This had two immediate consequences:

1. The number of courses was increased to cope with the initial bulge of students;

2. A formal examination system was put in place to ensure consistency of standards.

Both these measures have placed a strain on the administration of the school. As a direct result, there is a bigger staff, more paper, more contributors.

We have coped extremely well. The profession at large has been enthusiastic in its support of the School. Without the full co-operation of practitioners, the sytem simply could not function.

Examination system to stay
The exam system at Professional Course level has proven to be a success and will remain a feature of the school.

The initial bulge has passed and we are delighted to be able to restore a more normal level of courses from 1992 onwards. This will ease the strain and improve operations at the school.

Counting the cost
The exam system, however, comes at a price. Papers must be set, sat, marked, assessed and reviewed. The numbers sitting these exams are always increasing because of repeat candidates.

The heavy throughput of students in the recent past covered the increased cost. It is unfortunate that in self-financing operations such as this, any increase in costs must be borne by the students for it is they who will one day reap the rewards the school has to offer. The last fee increase took place three years ago. An increase now in all the school fees is inevitable.

I will table a proposal to the Council

Justin McKenna

of the Law Society at its next meeting and a decision will be made. That decision will be laid before the Houses of the Oireachtas for adoption under a statutory instrument. It will become effective as of the operative date contained within it.

It is hoped to introduce an incremental device so that fee increases will not come in fits and starts.

A cautionary note
A career in law still appears as an attractive proposition to school leavers. 420 candidates have applied for this year's first Irish examination. The Law Society has coped with the bulge with difficulty. One must question whether the profession or the marketplace can continue to absorb the numbers. □

Justin McKenna,
Chairman, Education Committee

News from the Law School

Repeat examination/ attendance fees

The attention of all apprentices – and of their offices – is drawn to a repeat examination fee and a repeat attendance fee which will – with effect from 3rd February, 1992 – respectively, apply to all examinations repeated on either the Professional Course or the Advanced Course and to all repeat days which have to be attended on the Professional Course.

The repeat fees are:

Each paper in the Final Examination – Second Part £25.00

Each paper in the Final Examination – Third Part £25.00

Each day or part of a day on the Professional Course . . . £25.00

A repeat day on the Professional Course includes any day which an apprentice has not attended on his or her actual Professional Course and is obliged to attend on a later one.

Final Examination – First Part No exemption after five years

The attention of practitioners and of students is directed to Regulation 16 of the Solicitors Acts, 1954 and 1960 (Apprenticeship and Education) Regulations, 1991. Regulation 16 (a) provides that a law degree has a limited life for the purpose of exemption from the Society's Final Examination – First Part. The holder of such a degree is no longer entitled to an exemption from the Final Examination – First Part if more than five years have elapsed from the 1st October in the year in which that person obtained the law degree.

Regulation 16 (b) reads as follows:

> "If a person who has been declared by the Education Committee to have passed the Final Examination – First Part does not commence the Professional Course within a period of five years from the date of such declaration, such person shall cease, upon the expiration of that period of five years, to be entitled to commence the Professional Course unless he shall first again sit and be declared by the Committee to have passed all the subjects comprising the Final Examination – First Part."

Regulation 16 goes on to provide in Clause (d) that a person who has an exempting law degree and lacks one or two subjects in the Society's Final Examination – First Part must pass the outstanding subject or two subjects within a period of five years from the 1st October in the year in which that person obtained his or her law degree.

These provisions came into effect on 1 January, 1992. □

Optical Imaging Technology

(Continued from page 31)

Optical disk technology is very exciting. Dangers may lie in its allure. Legal practitioners must question their basic requirements for such a system if they are to make the right decision.

For further reading see:

Issues in Implementing Image Management System in Law Firms: Rosemary Gray, The Law Librarian, Vol. 22, No. 2, August 1991.

A new Image for Law Firms: John Matthews, Computers and Law, Vol. 2 No. 4, September 1991.

Document Image Processing: Who Needs It? Neville Ash, Accountancy (August) 1991.

This column is contributed by members of the Technology Advisory Group, an informal grouping of solicitors who, with the approval of the Technology Committee of the Law Society, seek to promote awareness and use of technology within the profession. Further details from the Honorary Secretary, John Furlong, c/o William Fry, Solicitors, Fitzwilton House, Wilton Place, Dublin 2.

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Stamp Duty – No Amnesty on Interest

(Continued from page 32)

retrospection but allows for the change in the interest regime.

The Revenue Commissioners appreciated that the changes to the administration of stamp duty were substantial and would take some time to be fully disseminated to practitioners. By deferring implementation for five months and issuing a detailed statement of practice we had hoped to bring the changes to the attention of as wide a public as possible. We are always prepared however to consider any problems that may arise now that the provisions have been brought into practice and to discuss them with individual solicitors or with the Law Society.

Yours sincerely,

Don Thornhill,
Assistant Secretary,
VAT & Capital Taxes.

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Technology on Trial and Trial by Technology

This article is a synopsis of a paper given by *D. R. Meagher* Q.C. of the Victorian Bar in Australia to the 9th Commonwealth Law Conference in New Zealand. This synopsis has been prepared by *David Beattie*, solicitor, a partner in Rory O'Donnell & Company and is reproduced with the kind consent of the Commonwealth Law Conference.

Application to the judicial system

The computerisation of court records, and court administration, has been addressed in several places in the Western world, not always with success. On some occasions it has not been seen in the broader view of the overall administration of justice, but rather in the narrower view of administration of a particular court. Thus court administrators have looked to computerisation of some records thought to have special significance in court administration, leaving the remainder to be recorded by older means. This limits the usefulness of the system severely, for it relies upon only one of the advantages of computerisation, that of storage and retrieval of information.

In other places, a broader view is prevailing. This sees the use of computers as assisting in the general administration of justice in which many members of the community play a part, the legal profession not least of all. It looks beyond the needs of the judge and the court administrators. To that end the proponents of this view seek to exploit another advantage of computerisation, that of communication. They call for the storage of all court documents on computer, and then allowing electronic access and dissemination by all who have an interest in judicial administration. The practitioner is to be encouraged to lodge process electronically; the court to store it making it available, electronically, to all who are interested in it; and upon a decision being made, the court disseminating the order electronically to all with an interest in it.

Such systems are being developed in Victoria, Australia. They are seen as being to the advantage of all involved in the judicial system, increasing its efficiency, reducing the cost to the community, and, indeed, in some ways, assisting in the enforcement of the rule of law.

Criminal jurisdiction

Such a system has been introduced by Victoria into the criminal jurisdiction exercised by the Magistrates Courts. The police prepare the informations or charges on their own computer system, and transmit them electronically to the court, the defendant getting a printed copy. The court stores it on its computer system, and the matter is automatically scheduled by the computer for hearing. At the hearing the magistrate has a terminal on the bench. He records his decision and a printer immediately produces the order of the court. At the same time, it sends, electronically, a record of the decision to appropriate agencies, such as the Department of Correction (prisons), the motor vehicle licensing agency, and so on.

Access to this system will be expanded, so that the lawyer seeking to represent a defendant will be able to register his interest and then have direct access from his office computer, thus being able to see the history of the matter and dates for future hearings.

Eventually it is planned that the police station will have a terminal so that on arrest and charge there will be immediate transmission of the matter to the court's computer, allocation of date for first hearing, and production in the station for the prisoner of the charge laid against him, with the return date fixed by the court's computer. Thus at the moment of the charge being laid, wherever in Victoria, the court (and so the Law) will be able to exercise judicial control over the disposition of the defendant. Where a summons is issued, there being no arrest, a similar procedure will apply so that on issue, a summons will be recorded automatically in the court computer and thereafter brought on for hearing at a court appointed time.

"Eventually . . . on arrest and charge there will be immediate transmission of the matter to the Court's computer, allocation of date for the first hearing and production . . . for the prisoner of the charge laid against him, with the return date fixed by the court's computer."

Where the matter requires trial in a superior court, the system accommodates commital and referral for trial. It is planned to include a transcript of the commital and electronic storage of documentary exhibits. The file will be referred electronically to the computer system of the Director of Public Prosecutions. The presentment or indictment will be filed by the Director on the court system, and thus become available instantaneously to the court and defence alike.

A computerised system such as this should be operational in Victoria within the next five years,

and it is indicative of the progress likely to be found throughout the Commonwealth of Australia. There has been some resistance from the police, who have found it necessary to expend money on the acquisition of computers for purposes lower on their priorities, and in respect of which they foresaw lower gains in efficiency.

Similar opposition occurred in respect of the placement of regulatory offences on computer some years ago. Major initiators of such prosecutions were municipalities, most of whom resisted the acquisition of the necessary computers to allow electronic transmission. The manual system was retained to operate concurrently with the electronic system. The city of Melbourne had no such inhibitions, and very soon after it was installed, many of the opponents engaged the Melbourne City Council to process their prosecutions, that being far cheaper to them than continuing to operate the older manual system. The result has been the rapid disuse of the manual system – a firm indicator of the real saving in costs.

Civil System

Such is the importance of the criminal jurisdiction that it was decided to give it the advantages of computerisation first. However, at the same time a pilot study was introduced in one area of civil litigation, that of default recovery of civil debt. The area was dominated by four debt collecting firms who accounted for 90% of all process issued. A fully computerised system was introduced, with the four firms supplying the summonses by electronic means. The Magistrates Court undertook the entry of defences and of the orders disposing of the matters. Terminals were supplied at the counter for the public. The system has worked well, producing a more efficient administration by the courts, and a reduction of costs by the debt collecting firms.

A system embracing all civil actions in the Magistrates Courts is being released at the moment. Once tested in the courts, the profession will be allowed access, and in the not too distant future, all process will be able to be lodged electronically. Decisions will be recorded electronically and disseminated similarly.

Work is under way on the preparation of similar systems for the superior courts. The period of time requested to be considered in the preparation of this paper is ten years. Within ten years, lawyers in Victoria will be lodging all court process by computer, and simultaneously transmitting it to their opponents. Judges will be examining that process by having access to a computer screen, or if they prefer, by a printed document produced by the court computer. Orders of the Court will be recorded electronically, be available for inspection electronically and will be transmitted electronically.

"Within ten years, lawyers in Victoria will be lodging all court process by computer, and simultaneously transmitting it to their opponents."

Where there is an appeal, the file will be transmitted electronically to the appellate court. Notices of appeal will be lodged in the same fashion and it may well be that the combersome appeal books will be a forgotten relic of the past.

The trial

It is with the background of this statement of the present and forecast of the future that the impact of computers on the trial must be examined. It can be seen that the presence of a computer on the Bench is not merely inevitable, but in Victoria has happened. It has also happened on the Bar table. In a trial in which the author has been engaged for many months, the prosecution has two and sometimes three computers on the Bar table. The defence also has a computer, it being linked by telephone line to the minicomputer in the solicitor's office. The computers are unobtrusive in appearance, but not in their impact on the trial.

Court process

If the whole of the court process is recorded on a computer, and is being examined by the judge referring to a computer terminal, it is far more sensible for the lawyer appearing in the matter to likewise employ a computer than it is to carry in printed copies. Of course, it is not necessarily a matter of deciding between the two. Many will always prefer to have a printed copy of important documents, even if on computer. There tends to be a mix between the two. This does not, however, deny the advantage of seeing what the judge is seeing as he is addressed.

That brings the discussion, then, to a question of whether this does not detract from an open hearing – that is, open to the public. It may be said, with some force, that a debate between Judge and counsel that centres upon what each sees on a computer terminal necessarily excludes the public from meaningful observation of what is taking place. That is contrary to the concept of an open court.

Such a problem arises at present with the use of written documents. Unless they are read in full in open court, the observer is exlcuded from knowledge of what is in them. With computers, it can be the same, but need not be. The written document may be portrayed on a screen by use of an overhead projector; the computer image may, likewise, be so portrayed. Indeed, if the court is appropriately equipped, the computer image may be seen on a screen by the flick of a switch, whereas to do the same with a document necessitates first preparing an overhead transparency. Hence the computer poses no greater difficulty than that at present encountered with documents, but may pose fewer problems in ensuring the hearing is conducted openly.

Oral evidence

The common law system is based upon a tradition of oral evidence, and it is not to be supposed that the introduction of computers will force a change in that tradition. The use of computers by the general public may make it unlikely that oral evidence will continue its dominance, but the impact and effect of the change in the way the public conducts its affairs is beyond the scope of this paper.

Computers are affecting the manner in which oral evidence is recorded. A transcript is more efficient if aided by a computer, and there are systems available which recognise speech sufficiently to allow a faster transcription service. Even if the computer does not recognise speech, it can be of significant assistance to the recording of evidence, and it produces the transcript in electronic form as well as in a printed form.

In the author's current trial, the transcript service provides a disk containing the day's transcript within 90 minutes of the end of the day. It is placed on the author's computer and fully indexed within seven minutes of receipt. It provides an excellent means of retrieving evidence relating to matters where sufficiently unique expressions are employed to identify the matter.

It is expected that within the next ten years (indeed, within the next two years) the service will be directly connected to the court and computers in the court will produce the transcript of what the witness said within twenty minutes or less of the spoken word.

The author has found that the availability of transcript on computer has facilitated the conduct of examination, cross-examination and re-examination of witnesses. It allows the retrieval of the exact passage of evidence far more quickly than is possible with printed transcript, and therefore greater exactitude in putting matters of evidence.

The computer and associated equipment such as telephone-video are also changing the manner of taking evidence, and hearing submissions. With greater movement in today's population, and commercial matters taking place that often span vast areas within a country, if not the world, it is becoming commonplace for evidence to be required from distant parts. At present this has required arrangements to bring witnesses to the court, with disruption and inconvenience to their lives, and sometimes to the court's schedule. This has been mitigated to some extent by allowing evidence to be taken on commission, thus producing a transcript for use in court. A far better course has been pioneered in New South Wales, where a witness in the United States was examined by the court in Sydney employing a telephone video service. The oath was administered, and the witness examined and cross-examined in the course of the trial in Sydney without the witness departing New York. The judge was able to not only hear what the witness said, but also observe his demeanour. This is a most attractive development, not only for witnesses who are on the other side of the world, but also distant within a country. There seems little reason why a witness should be required to disrupt his life for 2-3 days to travel to a city to give evidence where his evidence could be taken by this means without him leaving his home town. Within the next ten years it is likely this will become commonplace.

The High Court, which sits in Canberra, has commenced hearing submissions for leave to appeal from applicants in places distant from Canberra by employing such a service. Few difficulties appear to have been encountered, and it has saved litigants the very substantial costs involved in sending their counsel to Canberra overnight.

Documentary evidence

Evidence based on documents has increased markedly in the past fifty years. This is a product of technology, being the doubtful fruits of the photocopying machines, the word processors and now the facsimile machine. It is not uncommon to find commercial cases in both the criminal and civil jurisdictions involving hundreds if not thousands of documents. There is a problem in coping with this mass of evidence.

Two particular problems may be first examined. One is the task of giving discovery. This is necessary in all jurisdictions, be they criminal or civil, and much the same technique may be applied whichever it is. The second is to provide access to the documents in a meaningful manner.

Discovery requires a systematic listing of documents, determination of relevance and discoverability, and communication to the other party or parties. When being done it is a time for also recording the source of the document, nature of it, a summary of its purport, and dates to which it relates. These tasks are well facilitated by computer systems. In Australia there have been developed specific programs for lawyers which allow this to be done efficiently, and for the discoverable results to be sent electronically to the opposing lawyers who also have the same programs. The significant efficiencies in all having the same program has led to one program being the preferred tool of major firms of solicitors.

In the criminal jurisdiction the same approach is being taken. In the author's current trial, which involves hundreds of documents, the prosecution gave to the defence a disk containing the data base of all document material to the case, as well as a printed list of the documents. The court was given the same, and invited to give to each document, on tender, the same description. This saved a great deal of time at the trial, and provided a working index of documents capable of being catalogued instantly by exhibit number, or by date, or by any indexing word that

the prosecution (on its data base) or the defence (on its data base) cared to allocate to documents.

Such systems are attractive, and in New South Wales the Supreme Court is considering whether it should adopt a particular data base program as the standard program so that such listings may be provided to the court in a manner that would allow immediate access and use.

The second problem is that of providing copies of the document. The photocopier has met this problem in the past, but is unlikely to maintain its dominance. At present computers have difficulties because of the need to capture the precise image of the document (so that one may see not only the printed word but also signatures and handwritten notations). Such facsimilies take a great deal of storage space in a computer, and prove beyond the capacity of the computers likely to be employed in litigation. The solution is at hand and lies in the use of optical compact disks. These are capable of holding massive quantities of documents in this form.

It may be expected that within the next five years, it will become a practice to convey copies of large quantities of documents by handing to one's opponent an optical disk. Indeed, the documents themselves, in their original form, will probably have been recorded by the client on optical disk and the hard copy destroyed. At present banks in Australia retain banking vouchers on micro-film, but it would be far more efficient to do it on optical disks and no doubt they, together with many others, will do so.

The lodgement with a court of documents recorded in facsimile form on optical disks may cause disquiet to those experienced in identifying from the face of the written document erasures and alterations, and thus exposing the dishonest claim. On the other hand, the provision of such documents in electronic form will facilitate hearing at trial, for such documents may be displayed on a large screen directly from the computer for all to see without any further processing.

Evidence from computers

The third and final problem to be addressed is not so much the difficulty of dealing with documentary evidence, but with dealing with computer evidence. That is a most difficult subject, for the problems are real and intransigent, but cannot be ignored or avoided. The courts do not have the option of saying that they will reject evidence based on computer records, for much of industry and commerce is irretrievably committed to it. It follows that the courts are compelled to accept the evidence of computers, imposing such limits as are tolerable and do not have the effect of making such evidence impossible to be led. Those limits, unfortunately, provide little protection from the erroneously programmed computer, be the error accidental or deliberate.

"It follows that the courts are compelled to accept the evidence of computers, imposing such limits as are tolerable . . . Those limits, unfortunately, provide little protection from the erroneously programmed computer, be the error accidental or deliberate."

On the other hand, the reliance on computer data bases by the public is extensive. As described at the beginning of this paper, there is and will be considerable reliance in Victoria on computer data bases relating to title to land; to the existence or otherwise of charges on land; to company details; to taxation records; in stock exchange transactions, and in all manner of other things. It would not be acceptable for the law to eschew such reliance and require other proof, when perhaps it is no longer available, or even if it was, no sensible member of the public would seek it. In such circumstances, whatever risks may be inherent in the matter, the courts will be compelled to accept the evidence.

Analysis and submission

It is appropriate to conclude with a brief statement of the effect of computers on the analysis of evidence and the preparation of submissions. There are available systems which facilitate this task and more readily permit the preparation of far more impressive submissions on evidence and law than was previously the case.

One such system is basically a data base program on which the evidence, be it oral or written, may be summarised. The summaries may be linked electronically to the precise passage in the transcript or in the document upon which they are based. This allows the lawyer to check instantly on the accuracy of the summary. The summaries are indexed by both the subject and date, allowing the production of sorted lists by either or both criteria. From this, in turn, there is linkage to a word processing package in which the submission is developed.

The existence of information retrieval systems to retrieve case law and statutes theoretically allows the same to be done to the law. In the author's experience, however, the theoretical link does not work well in practice. It is usually more efficient to resort to the printed reports. Perhaps the next generation of lawyers will be better trained in the use of those systems. However, notwithstanding the limitations found by the author in case law retrieval, no such limitation has been experienced in retrieving evidence given at a trial. In the latter case, the computer based analysis has worked well, and far more efficiently than any manual system.

Conclusion

The rapid acceptance of computer technology by the whole community means that the jury has

voted in its favour, and the only question that remains is how it can best be used. That it will be used is already accepted.

"The rapid acceptance of computer technology by the whole community means that the jury has voted in its favour. . . ."

The changes it effects on the trial process are not changes in the judical philosophy of the common law trial. There is no change in the adversarial process, though there is an undoubted advantage to the person with the technology as opposed to the person without it. There is no change in the onus or standard of proof, nor of the legal process by which the court determines the matter. Witnesses will still be examined and their credibility determined.

What the changes do effect is the efficiency with which the judicial system as a whole and the trial in particular, is administered. "Efficiency" should not be confused with speed of disposal of a matter. The trial process is more efficient because lawyers are able to attend to their tasks with fewer staff, and each task that involves communication may be completed more expeditiously. But when it comes to the trial, the technology is unlikely to shorten the process. To the contrary, it is more likely to allow deeper analysis of the evidentiary issues and greater concentration of argument in support of a particular view of the facts. It assists in comprehending all matters, not in reducing the issues, or allowing their more rapid disposal.

Consequently, it is argued that the new technology benefits the trial process in attaining justice, and permits it to be achieved at lesser cost (at least in the interlocutory stages). The benefits to the lawyer are not illusory, but real. The savings in costs in the employment of staff, and in the mechanics of litigation, are substantial. Equally, it allows the lawyer to do a better job, with the result that the court is likely to be presented with a more formidable matter to adjudicate than would be the case otherwise.

There are many ways in which this may be illustrated. One example is provision to take evidence by telephone-video. If that is not permitted, then many will not call the evidence at all, not being willing to incur the cost. If it is allowed, it will save costs where the party was willing to bring that witness to the court, but at the same time, in other cases it will produce evidence to the court which otherwise would have been absent. Thus it will not lead to more expedition in disposal of cases, but will be more likely to lead to the attainment of justice.

So too will the more general computerisation of the judicial process. That makes the issue of process more efficient and saves costs where there is a major litigation firm concerned. At the same time, it allows the small country firm, well away from any city where the court is found, to issue process and attend to the litigation from that distant place. The result may well be more litigation, rather than less.

A final example lies in the use of the technology for storing, summarising and analysing evidence. Without the technology, time constraints inherent in a trial may and often do prevent an exhaustive study of the evidence without the provision of a substantial team of lawyers. With the technology, a lesser team is able to handle the task. The result is that more is done. Once again, the court's time will not be saved; but every issue will be canvassed in greater depth.

There are those who will find this unsatisfactory, and will say that the present process serves us well. Perfection cannot be attained in any process of dispute resolution, and if under the present system there is a concentration on what are described (hopefully!) as the "main issues", then there is nothing wrong with that. To that the answer is that it acts upon the supposition that there is a concentration on the main issue without all issues being known – a sort of chance which may be right in some cases but would be wrong in others. It also gives an added weapon to the litigant with the means to ensure adequate numbers of lawyers in his team against the litigant who has not such means. If the computer evens up such a match, then it has much to commend it. If the computer allows more comprehensive examination of matters than is otherwise the case, then the lawyer does his work better, and justice is enhanced.

Finally, there is nothing in this technology that renders it more suitable for one part of the world rather than another. It does depend, of course, on there being a workable telephone system capable of handling computer data transmission. It depends on judicial systems having the money to invest in main frame computers. It depends on lawyers being able to afford a personal computer, or a lap top computer. It needs little else save for a willingness to join the rest of the commercial and industrial world in its acceptance of computers.

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TURKS AND CAICOS ISLANDS AND
THE ISLE OF MAN
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Correspondence

Mr. Noel Ryan,
Director General,
The Law Society.

Dear Mr. Ryan

Two years ago, the then president of The Law Society, Mr. Ernest Margetson, wrote in the *Gazette* that the Society was considering bringing a constitutional action in view of the escalating burden the Compensation Fund was for solicitors.

Since 1988 the fee for a Practising Certificate has risen from £545.00 to £976.00, almost double.

I have read much in the meantime in the *Gazette* about many matters, some while interesting have little relevance to me, but little or nothing about the Compensation Fund contribution and I am quite sure nothing about the constitutional action.

That I should have to pay so much money to practise as a solicitor makes me angry and annoyed (and I am sure I am not alone): angry that I am getting so little for my money; annoyed that the Society which represents solicitors seems to be unwilling or unable to do anything to reduce this burden and, if it is, I do not know what is being done as I am not being kept informed. There is some merit in taking an action and failing but there is no merit in being subjected to the ever increasing tyranny of the Compensation Fund contribution and doing nothing.

The Law Society seems quite content to make greater demands on solicitors each year for the fees for the Practising Certificate. The Society does not even give details to solicitors of how the figures for the Practising Certificate are arrived at.

While solicitors are required to maintain this fund, financial advisers of every description operate without any such obligation and swindle their clients with increasing regularity. In the meantime, solicitors are lambasted in the media: witness the recent article in *The Sunday Independent* (I did read your letter in reply).

The Law Society seems to place a very low premium on Public Relations generally. It is not making the case demonstrating the injustice of the Compensation Fund as at present constituted. In the area of conveyancing, legislation is ballooning out of control with the result that it is farcical now the amount of enquiries a solicitor has to make in residential conveyancing, but all the public perception is of the final fee at the end of a solicitor's bill. I understand an upcoming programme on *Look-Here* on RTE TV will deal with solicitors. This is an opportunity to put some of these glaring misconceptions to right.

It seems to me that many inaccurate, misleading and biased remarks affecting solicitors in the media go unchallenged which should not be the case. Some weeks ago *Shane Kenny* on the News At One stated that conveyancing was relatively simple. I rang the Law Society that day and suggested that he be contacted and invited to Blackhall Place where a conveyancing solicitor could give him a full briefing on the subject. In similar instances in future an approach such as this could be adopted and the solicitor could then go back on air with the broadcaster concerned and the broadcaster could give an account of what he or she had learned.

A leaf could usefully be taken out of Margaret Thatcher's book who, according to a recent article in *The Sunday Times,* listened every day to the Today programme on Radio 4 and on occasion rang in to comment on matters on the programme. But you do not have to cross the water. The IFA and other farmers' organisations use every area of the media to full advantage to put their case across on an almost daily basis and when they receive adverse criticism on air they are regularly back with their reply before the programme is finished.

The Law Society could do well to follow their approach.

The Law Society could regularly give up-to-date briefings to journalists on matters affecting solicitors. The more responsible ones then might be better informed and give a more balanced and favourable view of the profession to the public.

The Registration Fee is now £431.00 which is not far off what the entire fee for the Practising Certificate was three years ago. I am at a loss as to why this figure should be so high. It has risen almost 50% in three years.

Reading the Annual Report does not give me much in the line of an answer. It seems to me to be far higher than what other professions have to pay. Why are administration costs so high and what is being done to keep them in check? I would be interested to know how the Registration fee compares with our colleagues in other jurisdictions. Perhaps an article in the *Gazette* or a circular could be devoted to this topic which would also help relations between solicitors and the Society.

In the May 1985 *Gazette* an article appeared by a midland firm whose solicitors used their own word processors to reduce costs. They had a ratio of one secretary to four fee earners. This seems to me to be what cost cutting is about.

Yours faithfully,

Michael Moore
Michael Moore & Co., Solicitors

Professional Information

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.
31st day of January.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

Lost Land Certificates

John and **Elizabeth McKeown,** Folio: 101L; Land: West of William Street town of Bailieborough, County: **CAVAN.**

Kathleen Murphy, Folio: 2411; Land: Coppanagh; Area: 243a 0r 2p. County: **KILKENNY.**

John Joseph Cruise, Knockbrack, Ballyhaunis, Co. Mayo. Folio: 709; Land: Knockbrack (Parish of Armagh); Area: 21a 3r 8p. County: **MAYO.**

James and **Elizabeth Connolly,** 7 Curryhills, Prosperous, Naas, Co. Kildare. Folio: 2296L; Lands: Curryhills; Area: 0a 0r 20p. County: **KILDARE.**

Martina and **Patrick Flannery,** Folio: 6112F; Land: Cloosmore; Area: 0.269 acres. County: **KERRY.**

Padraic S. Conroy, 9 Fr. Griffin Place, Galway. Folio: 55775; Land: Prospect Hill; Area: 1a 0r 16p. County: **GALWAY.**

John Kenny, 147 Collins Avenue, Dublin. Folio: DN002767L; Lands: Property known as 147 Collins Avenue situate on the south side of the said avenue in the Parish of Artane and District of Clontarf. County: **DUBLIN.**

Thomas Murray, Corrantaton, Kiltoom, Athlone, Co. Westmeath. Folio: 31830; Land: Corrantotan; Area: 5a 0r 33p. County: **ROSCOMMON.**

Bridget and **Mary Devaney,** Lower Rosses, Rosses Point, Sligo. Folio: 17030; Land: Rosses Upper; Area: 19a 0r 30p. County: **SLIGO.**

Martin and **Norah Coleman,** Ballaghaderreen, Co. Roscommon. Folio: 19112; Land: 1. Kilcolman (parts), 2. Ballaghaderreen (parts) with buildings thereon in the town of Ballaghaderreen, 3. Lung (part), 4. Aghalustia (part); Area: 1. 4a 2r 35p, 2. 0a 0r 17p, 3. 0a 2r 7p, 4. 1a 1r 22p. County: **ROSCOMMON.**

Eileen McDonagh, 39 Sycamore Drive, Highfield Park, Galway. Folio: 31314; Land: Dooniver; Area: 1.238 acres. County: **MAYO.**

Jeremiah and **Nora Purcell,** Folio: 4825; Land: Carrigeen; Area: 106a 3r 16p. County: **KERRY.**

Farrell Tormey, Folio: 19171; Land: Legland; Area: 1a 0r 0p. County: **CAVAN.**

Patrick Frost, The Bleach, Six-Mile-Bridge, Co. Clare. Folio: 6121; Land: Carrownerribul; Area: 46a 1r 34p. County: **CLARE.**

Cavan County Council, Folio: 3032R; Land: Drumbannan, County: **CAVAN.**

Edward McCall, Folio: 4938F; Land: Cullies; Area: 4.080 acres. County: **LEITRIM.**

Edmund Boyle, Folio: 39912; Land: Rinnaraw; Area: 1a 3r 13p. County: **DONEGAL.**

John Joseph Healy, Folio: 9381; Land: Glannakilleenagh; Area: 45a 3r 3p. County: **CORK.**

Denys Cuthbert Johnson Davies, Folio: 44937; Land: Ardbrack; Area: 0a 1r 18p. County: **CORK.**

Patrick Clarke, Folio: 27933; Land: Cappamore; Area: 2a 0r 30p. County: **LIMERICK.**

Patrick Condon, Folio: 11628; Land: Cloonyscrehane (part); Area: 96a 2r 24p. County: **LIMERICK.**

Christina Martin, Folio: 15404; Land: Darkley; Area: 30a 0r 33p. County: **CAVAN.**

Michael Hastings, Carrowrevagh, Liscarney, Westport, Co. Mayo. Folio: 3537F; Land: Carrowrevagh; Area: 35.799 acres. County: **MAYO.**

Michael O'Malley, Folio: 342L; Land: Kilmacuagh (Cooke); Area: 0a 0r 15p. County: **WESTMEATH.**

Kate Evans, Grallagh, Straide, Ballyvary, Co. Mayo. Folio: 1791; Land: Grallagh; Area: 1a 2r 27p. County: **MAYO.**

Judith Rooney and **Mary Teresa Rooney,** Land: 82 Merton Drive, Ranelagh, Dublin 6. County: **DUBLIN.**

O'SULLIVAN, ROCHE, Mary, of 43 Offington Park, Sutton. Would anyone having knowledge of the existence of the original title documents to 43 Offington Park, Sutton, Dublin, the property of Mary O'Sullivan Roche please contact Margaret Roche, Solicitor, The Bridge, Enniskerry, Co. Wicklow. Telephone: 2864044.

Lost Wills

TAYLOR (NEE CULLEN), Mary Ellen, deceased. Please contact us if you know of the whereabouts of a will of the above named deceased who died on 1st December, 1991. She died at the Shanna Bay (formerly Fitzwilliam) Nursing Home, Bray having previously resided for 2-3 years at the Ardeevin Nursing Home, Meath Road, Bray. Prior to that she lived for circa 30 years at 26 Maitland Street, off Greenpark Road, Bray, having originally lived at 31 Leinster Avenue, North Strand, Dublin. Russell & O'Brien, Solicitors, 9 Prince of Wales Terrace, Quinsboro' Road, Bray, Co. Wicklow (telephone 01-2861799; fax 01-2861157).

BOLGER, Patrick, deceased, late of 19 Geraldine Street, Dublin 7, formerly of 5, Blythe Road, Hillfields, Coventry. Would any party having knowledge of the whereabouts of a will of the above named deceased who died on the 14th day of December, 1989, please contact L.B. McMahon & Co., Solicitors, 5/6 Upper O'Connell Street, Dublin 1. Telephone: 788000.

KINSELLA, Frederick, deceased, late of 19 Ravensdale Drive, Kimmage, Dublin. Would anybody having knowledge of the whereabouts of the will of the above named deceased who died on the 22nd June, 1989, please contact Messrs, O'Connor & Bergin, Solicitors, 30 Bachelors Walk, Dublin 1. Telephone: 732411.

DELANEY, Elizabeth, deceased, late of 8 Upper Beechwood Avenue, Ranelagh, Dublin 6. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on the 23rd November, 1990 contact Mary Roche, Solicitor, The Bridge, Enniskerry, Co. Wicklow. Telephone: 2864044.

HAMILL, John, deceased, late of 21, Fairbrook Lawn, Rathfarnham, Dublin 14. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on the 23rd day of April, 1990, please contact Frank Ward & Co., Solicitors, 16 Upper Ormond Quay, Dublin 7. Telephone: 01-732499.

McGOLDRICK, Thomas, deceased, late of Ballincar, Sligo, Co. Sligo. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on the 16th day of December, 1990 at St. John's Hospital, Sligo, please contact Messrs. Howley Carter & Co., Solicitors, Wine Street, Sligo. Telephone: (071) 62211.

DOHENY, Daniel, deceased late of Patrick Street (otherwise Coote Street), Mountrath, Co. Laois, retired farmer. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on the 29th September, 1991, please contact Tom O'Grady, B.C.L., Solicitor, Ballyfin Road, Mountrath, Co. Laois. Tel: (0502) 32214.

Miscellaneous

SOLICITORS PRACTICE FOR SALE: Dublin Southside. Box No: 10.

CHANGE OF ADDRESS: As and from February 2nd, 1992, Mary Cashin and Associates will have moved to a new address at No. 3 Francis Street, The Causeway, Ennis, Co. Clare. Telephone: (065) 40060/ 40040. Fax: (065) 40034.

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Experienced Librarian seeks position in law firm or elsewhere. Box No. 14

Solicitor seeks probate position. Box No. 15

NOTICE TO ADVERTISERS

Please note that the deadline for insertions in the Professional Information Section in the next issue of the Gazette (March, 1992) is Thursday, 20 February, 1992. Advertisements, clearly typed, should be submitted to *Catherine Kearney,* Law Society, Blackhall Place, Dublin 7.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

A NEW LAW FOR CHARITIES?

SUBMISSION ON SOLICITORS BILL

CONCERN OVER COMPENSATION FUND

JOINT OWNERSHIP OF THE FAMILY HOME

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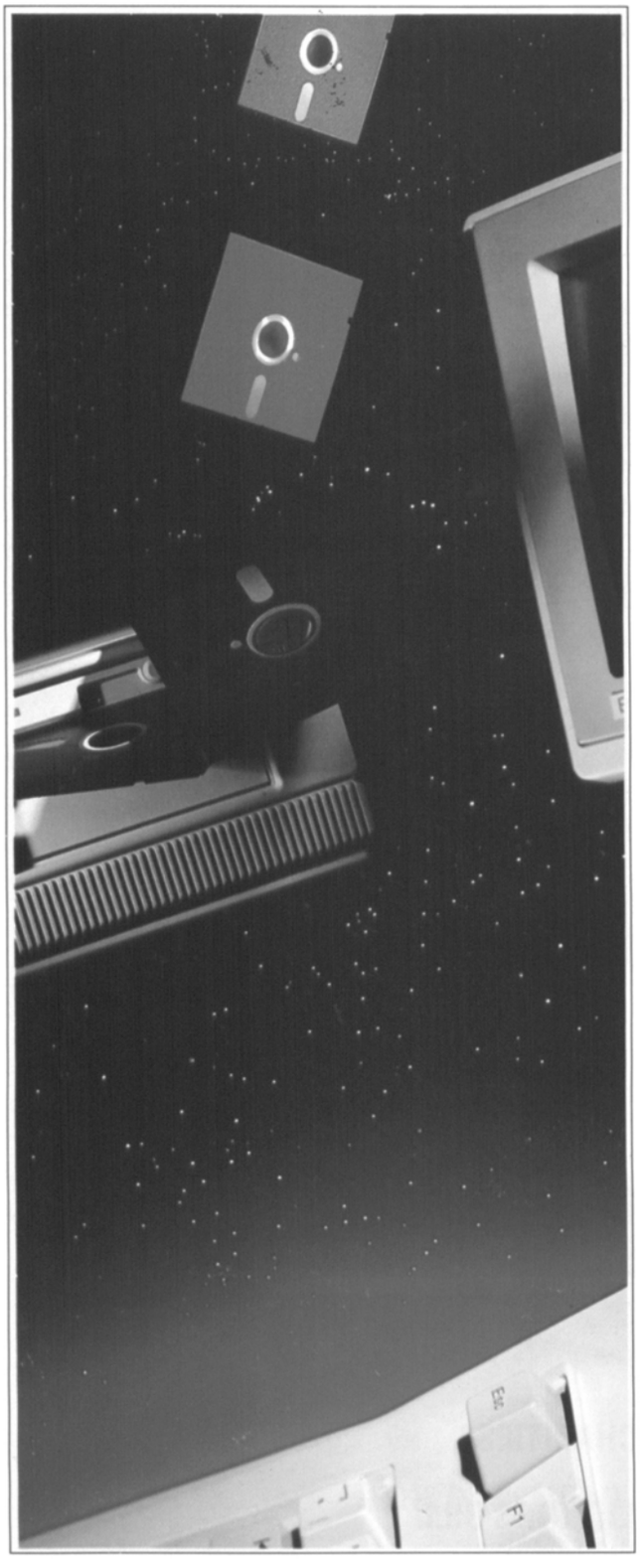

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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Front Cover:
The front cover photograph shows Mr. *Padraig Flynn,* T.D., who was appointed Minister for Justice on Tuesday, 11 February, 1992.

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VIEWPOINT

A New Beginning for Charities?

In 1990 a Committee headed by Mr. Justice Costello presented a Report on Fund-Raising Activities for Charitable and Other Purposes. The report of the Committee did not attract any great comment in the media but the recent announcement that the Government proposes to implement these proposals has thrown a new spotlight on its contents.

Much of the report contains most welcome recommendations. We do not have sufficient control over charities. The fact that 90% of our charities are run with scrupulous honesty does not avoid the need to prevent abuse by those whose interest in a charity is merely as a means to gain personal profit. There is a need to know precisely what part of the contributions apparently made for the benefit of a charity actually reach that charity. There have been disturbing suggestions recently that the main charities have not benefited as significantly from some spectacularly successful fund-raising activities as the donors might have believed. A secondary question is as to whether when funds reach the charity how much of these funds may be gobbled up in administration expenses.

There has also been abuse of the law in relation to lotteries of property though the Law Society can pride itself that its warning to members not to get involved in lotteries of houses or pubs seems to have pretty well killed off that craze.

The Committee recommended an increase in the scope and powers of the Commissioners of Charitable Donations & Bequests. It must be doubted whether, given the nature and scope of its activities since its inception, the Commission will be capable of turning itself into the active monitoring body that clearly will be required in the future.

A particularly interesting aspect of the report is the attention which it devoted to the activities of professional fund raisers; its recommendation that fund raisers should be registered and that the form of their contracts of engagement should be subject to ministerial control. This is welcome.

If there is an aspect of the report which gives some cause for concern, it is the danger that it may be seen to be recommending too bureaucratic a system of control over charity fund-raising at the lower end of the spectrum. The requirement that organisations (which in itself poses the question of what constitutes an organisation under Irish Law) should be exempt from registration may not be broad enough. The basic requirement that they do not solicit or receive funds in excess of £10,000 should surely be sufficient to exempt them from registration rather than limiting their activities to "local areas" as well. It is to be hoped that the guidelines for the records which such exempted organisations are to maintain will not be too stringent. There is a danger that if the Report were to be implemented too strictly, any new legislation could limit spontaneity which is an essential element of many small fund-raising ventures.

Individual or small groups of individuals should be allowed to organise small to medium scale collection for urgently needed funds. The recent Romanian Orphans Appeals where groups got together to arrange collections of goods, monies, visits of medical personnel and other social workers might well not have been permitted under the sort of legislation envisaged by the Report.

Perhaps there were too many representatives of the major charitable organisations and members of the public service on the Committee. Donors might not have wanted to impose quite such strict controls over the methods of operation, as distinct from the financial controls, as the Committee appears to require. The public may be more tolerant of house to house collections and open bucket collections than the Committee believed. The public has a simple method of disapproving of such collections and, unless and until they do, perhaps their view should carry the day. □

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PRESIDENT'S MESSAGE

Compensation for Claims or Licence to Steal?

The issue of the Compensation Fund, in financial and administrative terms, is reaching serious proportions. Concern has been expressed by every solicitor and this is reflected within the Society, as we strive to come to grips with and control a deepening problem.

It may be helpful to reflect on the existing situation and explore future options under a number of headings.

The Law
The Solicitors Act, 1954 requires the Society to maintain a Fund, at a level of £25,000 (net of liabilities), from which compensation would be paid to persons who have suffered loss through the dishonesty of solicitors. The Society is obliged to provide an indemnity, but has a complete discretion on when this is paid. We have an opinion from counsel which indicates that, should the Fund become exhausted, the membership of the profession and the assets of the Society are immune from claims by unsatisfied claimants. There is not, in the existing law, any requirement that we should "reinsure" the Fund in order to provide that, on substantial defalcation, there would be monies available to meet a claim.

Each solicitor, every January, pays the same contribution to the Fund. In this current year, 1992, it is £475.

The Facts
In the year ended 31 December, 1990 solicitors contributed £1.39M to the Fund.

In the same year, almost £800,000 was paid out in claims. The level of claims has been increasing steadily from about £240,000 in 1986 to a point where it is now veering towards £1M a year.

The Annual Report to November 1991, which was sent to each solicitor, gives the full facts and figures. The Society voluntarily reinsures the Fund over the excess of £1M which we ourselves carry, to a sum of £4M, at an annual premium of £135,000. In previous years it was insured to a level of £6M. We had to bring down the level to reduce costs.

Because of the fact that very large claims have been notified in the last two years but not yet considered, our insurers have had to make reserves and this has had a substantial impact on our re-insurance premium.

The reinsurance of this Fund on 1 May, 1992 may be difficult to negotiate, or require a much higher excess, or be very expensive.

The overall costs of keeping this system in place are only too well known to solicitors and I would detail them as follows:-

- £475 paid by each solicitor
- A huge commitment in manpower by the Finance Department, the Director of Finance, the Accountant, the five Investigating Accountants, and support staff.
- A massive volume of voluntary work done by the Chairman and members of the Compensation Fund Committee (this Committee generally sits from 12 noon until very late evening). These talents could be better employed to the benefit of the Society
- Administration costs within the Law Society come to £421,466, including salaries, legal costs of intervention in a practice etc.

The Options
The Solicitors (Amendment) Bill, 1991 changes the definition of the word "person" to "client" and we thank the Minister and the Department for effecting this change.

The Bill requires that the Fund be maintained, at a given time in the year, at £1M. That is already being achieved and can be complied with.

The Bill contains many procedures to strengthen the hand of the Compensation Fund Committee, the Investigating Accountants, and the Court generally, in dealing with relevant cases.

The Society has been unable to identify any other profession which has an "open-ended" Compensation Fund procedure:-

- Stockbrokers have a Fund which is limited or capped to £48,000 Stg. in each case.
- In New York, Lawyers pay in $360 per annum, their Fund has $2M in assets and claims (verified) of $30M.

For many reasons we will be insisting that Government recognise the extreme dangers of a complete collapse of the Fund and that they will agree to a cap of £50,000 in the Bill. If this is not done there is a real danger that the Fund could be burst and the profession virtually bankrupt.

The Society can go on employing more Investigating Accountants at additional cost to the profession. This service is useful, not merely in detecting defalcators, but in assisting genuine solicitors in the establishment of correct procedures and practices for the management of their clients' accounts.

The Society is considering publishing the names of solicitors against whom claims are paid and the Bill will make it obligatory on the Society to publish the outcome of disciplinary cases.

(Continued on page 52)

Adrian Bourke, President of the Law Society, Bruce Millan, EC Commissioner for Regional Policy, and Walter Beatty, Vincent and Beatty, at a meeting of the Inter-Professional Group that took place on Friday, 21 February last.

Compensation Fund or Licence to Steal

(Continued from page 51)

The Society is seeking from Government and has itself put forward a draft of new serious criminal offences to be placed in the Solicitors Bill, so that our former colleagues are not just apprehended within the existing disciplinary procedures, but can more readily be made subject to proper fraud prosecutions under the criminal law.

Conclusions

As President of the Law Society I intend to give this whole issue priority attention during the year of my office. I intend to discuss the matter seriously at every Bar Association meeting, and I would welcome suggestions from members of the profession as to what further steps we can take.

In the final analysis . . . . if we do not get the reasonable changes we are seeking . . . . we may have to take sterner action. There is a body of opinion within the profession that the Compensation Fund as structured at present is unconstitutional. This may ultimately have to be put to the test, even though we have always prided ourselves, as a profession, on providing an indemnity for loss suffered by persons at the hands of dishonest solicitors. I think that every right thinking member of the profession would wish that to continue, but only on a reasonable and workable basis. □

Adrian P. Bourke,
President

Gazette Indexes

Indexes to Volme 84 (1990) and Volume 85 (1991) of the Gazette are now available at a cost of £3.00 per index.

To order copies of the indexes, please write stating the quantity of each index required and enclosing a cheque for the appropriate amount payable to the Incorporated Law Society of Ireland. Orders should be forwarded to Ms. Catherine Kearney, The Law Society, Blackhall Place, Dublin 7. □

IBA 24th Biennial Conference

Scholarship for Young Lawyer

The International Bar Association (IBA) will be holding its 24th Biennial Conference in Cannes from 20-25 September 1992.

The IBA's Section on Business Law (SBL) has established a fund from which scholarships may be awarded to young lawyers from the region in which the Conference is being held who wish to participate in the Conference, but are unable to do so owing to financial constraints. The Section invites interested persons to apply for a scholarship which will cover the conference registration fees, return travel costs, hotel accommodation during the conference and a *per diem* allowance. The scholarship will also include two years' free membership of the IBA and SBL, and reduced IBA and SBL Conference registration fees for three years. All applications will be submitted to the Section's Scholarship Committee. Each candidate must meet the requirements set out in the criteria below.

Criteria

1. Candidates must be 35 years or under at the time of the conference.

   NOTE: Candidates who are over 35 may be considered by the Scholarship Committee depending on individual circumstances

2. Candidates must be admitted to practise as a lawyer.

3. Each application must be accompanied by a supporting letter from the candidate's local or national Bar Association or equivalent.

To request an application form please write to *Rachel Youngman*, International Bar Association, 2 Harewood Place, Hanover Square, London W1R 9HB, England. Tel: 071 629 1206; Fax: 071 409 0456. □

Society Makes Submission on Solicitors Bill

The Law Society has made a detailed submission to the Minister for Justice, *Padraig Flynn*, on the Solicitors (Amendment) Bill, 1991.

In an accompanying letter, sent with the submission at the end of January, Law Society President, *Adrian P. Bourke,* said "as you are aware in the course of its preparation, the Bill was only seen by a special committee established by the Council to handle it and the remainder of the profession, including the Council of the Law Society, were not consulted about the Bill until it was published. Since its publication, the Society has subjected the Bill to detailed examination across the profession, and the views we are now putting forward represent the conclusions of the Council following this consultation process."

The main features of the submission are summarised below.

Sections 8 and 9 – Inadequate Services and Overcharging
The submission notes that there is considerable disquiet in the profession about how these sections would operate. Among the changes proposed in the submission are:-

1. only clients of solicitors should be able to complain under these provisions and the Society should be able to screen frivolous or vexatious complaints;
2. the inclusion of a provision which would impose a sanction for making a malicious complaint against a solicitor;
3. a provision which would ensure that, in exercising powers under Section 8, the Society would have to have regard to the existence of any remedy that could be reasonably expected to be available to the client in civil proceedings and whether the client ought to have availed of such a remedy;
4. a provision which would ensure that, where a bill of costs is taxed, notwithstanding any determination by the Society that the bill should be reduced, the bill to be submitted for taxation should be the bill as originally presented by the solicitor.

Section 15 – Independent Adjudicator
The submission seeks the following changes:-

1. the deletion of the provision imposing an obligation on the Society to pay for the ombudsman;
2. the widening of the terms of reference of the ombudsman to bring in all legal services;
3. the ombudsman should be under a strict duty of confidentiality in relation to his work and there should be a right of action for breach of this;
4. any regulations made by the Minister under this section should have to be made in consultation with the Society.

Section 27 – Control of Banking Accounts
The Society wants a provision to enable it to seek, when necessary, a Mareva injunction against a solicitor to whom Section 20 of the 1960 Act is being applied, to prevent the dissipation of the assets of the solicitor or their removal from the jurisdiction.

Section 28 – Compensation Fund
The change in the Bill that confines claims under the Compensation Fund to a *client of a solicitor* is welcomed, but the submission argues that more far reaching changes are needed. Principally, a limit or cap of £50,000 should be placed on the level of individual claims under the Compensation Fund. The Society is also seeking an amendment to Section 19 of the 1960 Act to give the Society discretion to refuse to make a grant from the Fund in a case in which the loss sustained was otherwise than as a result of the misappropriation or misapplication of funds *entrusted* to the solicitor.

The submission proposes that the term "dishonesty" should be narrowed to exclude the possibility of claims being brought by clients who have suffered as a result of the *negligence of solicitors* and who have been misled by the action taken by the solicitor on their behalf.

The creation of a new criminal offence where a solicitor intentionally takes monies from a client account or otherwise converts or applies a client's property to his own use is proposed. Such a new offence is essential, the submission argues, to enable criminal charges to be brought against solicitors who defalcate and would also act as a useful deterrent.

Finally, the Society has sought the deletion of a provision which would have enabled it to specify a different rate or rates of annual contribution to the Compensation Fund in relation to a class of solicitor. The submission notes that this provision has been strongly opposed by the profession.

Section 34 – Three Year Rule
Again, reflecting feedback from the profession, the submission proposes an amendment to provide that "the three year rule" requirement would only come into operation on foot of regulations to be made by the Society.

Section 43 – Education
The Society has asked for a provision to enable it to specify a qualifying standard in the university degree of a person seeking admission to the Law School.

Practising Certificates
The submission seeks a provision that will put an end to the present rule that where the Society has refused to issue a practising certificate, once an appeal has been lodged the Society must issue the Certificate pending the outcome of the appeal. This has been criticised by some members of the profession.

Section 62 – Costs
There is serious concern in the profession that Section 62 as drafted is unworkable, according to the submission. There is a lack of clarity in relation to the requirement to furnish a client in advance with particulars in writing of the *basis* on which charges are to be made for work.

Moreover, the Society believes that this particular obligation should not arise where the work in question is not likely to cost more than a specified amount, for example, £100. The Society is strongly opposed to the general prohibition on the charging of percentage fees by solicitors in contentious business and argues strongly for the dropping of this provision.

The submission notes that as a general principle, there is nothing inherently wrong with the charging of percentage fees. It is a practice widely engaged in by other professions. There are many cases, the Society argues, where the charging of a percentage fee, on top of the party and party costs, is entirely justified having regard to the work performed for the client, the importance of the case and its outcome.

End Legal Controls on Fees
The submission urges the introduction of an amendment to the Bill which would have the effect of removing all legal controls on solicitors' remuneration. The Society makes the point that given the general philosophy underpinning the recent Competition Act, the provisions in the Solicitors Bill which will effectively prevent the Society from prohibiting a solicitor from charging less than the statutory scale for any particular service and the provision which would allow fee advertising, there is no longer any justification for the existing framework of legislation which controls solicitors' remuneration.

Section 63 – Fee Advertising
The provision permitting solicitors to advertise fees has been widely condemned in the profession according to the submission. Noting that the vast majority of solicitors, who provide a good service at reasonable cost have no interest in engaging in fee advertising, the Society concludes that this measure would only encourage that small minority of members who resort to cutting corners and who are more concerned with earning money than the quality of the service they provide.

Section 55 – Fee Sharing by Solicitors
The submision says that, following debate, the Council of the Law Society decided that on balance it was opposed to the introduction of multi-disciplinary practices (MDPs) and the submission therefore requests that the paragraph of Section 65 which would permit the establishment of MDPs should be deleted.

Section 69– Restriction on the Withdrawal of a Solicitor From a Case
The submission notes that both the profession as a whole and the Council of the Law Society reacted strongly to this particular section and seeks its removal from the Bill. It is a provision that reflects badly on the profession as a whole and is totally unwarranted. The existing rules of professional conduct of the profession do not permit a solicitor to withdraw from a case when a client is in custody without making adequate arrangements to ensure that the client's interests are fully protected.

Section 73 – Probate by Banks and Trust Corporations
The submission sets out in detail the strong opposition of the profession to this section and likewise to Section 74 that permits conveyancing services to be provided by banks, as articulated in earlier statements.

Abolition of Compulsory Irish
The submission suggests that the provisions in the Solicitors Act, 1954 which make it mandatory for intending solicitors to pass two examinations in the Irish language should be repealed. The Society is prepared to accept, in its place, a provision in the Bill which will impose upon it an obligation to maintain a panel of solicitors who are competent in the language and willing to provide legal services through the medium of Irish.

Data Protection Act
The Submission also deals with the implications of the Data Protection Act for the confidentiality of the solicitor/client relationship and requests the Minister to include a provision in the Bill which will remove the solicitor's profession from scope of the Data Protection Act, 1988.

The above is merely an outline summary of the contents of the submission which was discussed and approved by the Council of the Law Society at its meetings on 17 January and 14 February. Considerable work has been done on preparing detailed drafting amendments. These amendments have also been submitted to the Department of Justice and discussions on these and the terms of the submission are envisaged. A copy of the full text of the submission is available to any member of the profession on request to the Law Society. The Solicitor's Amendment Bill is currently at Second Stage in Dáil Eireann and it is expected to go to Committee Stage at the time of going to press. □

Criminal Law in the 1990s – a European Perspective

On the 16 November, 1991 the Criminal Law Committee of the Law Society organised a one-day Seminar under the above title. The theme was chosen for two reasons. First, it was felt that any discussion of our criminal justice system should take account of developments in other European countries, including those with a Civil Law tradition. Inadequacies in our own system have frequently been attributed to the inherent weaknesses in the adversarial system. It was hoped that the Seminar would examine whether these criticisms were fair and discover what the alternative system had to offer.

The second reason for the choice of theme was the increasing importance of criminal law in the context of the European Communities. This was touched on by the Attorney General, *Harold A. Whelehan* SC in his opening address. He explained that the substantial and worrying level of fraud against community funds, (sometimes estimated as being as high as 10% – 15% of the community budget), had led to a fresh examination of the criminal law of the Member States from a community perspective to see whether a contribution could be made to combating fraud by revising the law.

The Attorney General also referred to the draft Treaty of 1976 which permitted the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the Treaties. The 1976 proposals finally ran to ground 10 years later. The Attorney mentioned the 1989 judgment of the European Court of Justice in the *Greek Maize* case. Depending on how the jurisprudence develops in this area, this case could in years to come be considered to be of crucial importance in the criminal law sphere. For the first time, the Court has ruled that the EC Treaties impose duties on the Member States in the area of criminal law. Despite its importance, this case would not necessarily be widely known by criminal law practitioners.

Protection of Rights – English Law

Michael Mansfield QC spoke about the protection of rights, with particular reference to English Law. He referred to certain basic rights which he claimed had been eroded in the United Kingdom in the last 10 years. He called for the inclusion of these basic rights in a Bill of Rights. Much of what he said was commonplace for Irish lawyers. Indeed, his proposals in relation to the right to bail were not as "radical" as the principles laid down by the Supreme Court in the *O'Callaghan* case in the 1960s, and which have recently been reaffirmed. For example, Mr. Mansfield was willing to accept that bail could be refused where there was a likelihood that further offences would be committed on bail. Another proposal that would be familiar to Irish lawyers was that confession evidence should be automatically excluded if an accused is denied access to his lawyer.

Mr. Mansfield adopted a somewhat more radical approach on the right to trial by jury. He proposed that such a right should exist for 90% of cases. He suggested, for example, that a person charged with drunk driving or failing to pay an underground fare should have the right to jury trial.

Doubts in France about Civil Law System

Antoine Comte, a prominent French defence lawyer, gave a lucid exposition of the French legal system. It is interesting to note that the French are having doubts about their own Civil Law system at a time when many in the Common Law world wonder whether such a system might provide a panacea to all our difficulties. He said that certain questions have been raised as to whether French judges are sufficiently independent of government. As a number of cases in recent years have shown, the Irish judiciary is resolutely independent of the other branches of government in the discharge of its duties.

A number of features of the French system are noteworthy from a civil liberties point of view. For example, most suspects are held in police custody for 48 hours; this is extended to 4 days in drugs and terrorist cases. During his period of custody the suspect has no access to a lawyer. Furthermore, if he is remanded in custody by the Examining Magistrate, the latter can control who visits him in prison – if even to the point of excluding members of his immediate family. The accused has no right of appeal against the magistrate's decision. It is also interesting to note that the role of the jury is very limited. Drugs offences and conspiracy offences (attracting a maximum penalty of 20 years and 10 years respectively), are examples of a wide range of offences which are tried without a jury by a panel of three judges.

The third speaker was the Director of Public Prosecutions Mr. *Eamonn Barnes.* He delivered a closely argued address on the right to silence with particular reference to fraud prosecutions. His speech was given wide publicity at the time and led to a very useful debate on this part of our criminal justice system; it has already been the subject of an article by *Michael Staines,* solicitor, in last month's *Gazette.*

(Cont'd on page 56)

AMERICAN BAR ASSOCIATION ANNUAL MEETING AND EXPO 1992

SAN FRANCISCO, CALIFORNIA 6 – 12 AUGUST

The Law Society is organising an exhibition stand at the 1992 American Bar Association Annual Meeting and Expo in order to promote Irish solicitors as suppliers of services in European, commercial, litigation, arbitration and general law to the American market. This follows successful participation in the 1991 meeting. Over 15,000 American lawyers attend the Expo.

There are 25 hours of exhibition time:-

Thursday, 6 August	–	11 a.m.	–	5 p.m.
Friday, 7 August	–	9 a.m.	–	5 p.m.
Saturday, 8 August	–	10 a.m.	–	4 p.m.
Sunday, 9 August	–	12 noon	–	5 p.m.

Slots are available on the stand at a cost of £500 per hour.

This is a valuable opportunity to promote your firm. As well as manning the stand, solicitors will have the opportunity of attending other activities during the ABA Meeting in order to make further contacts with American firms.

Firms wishing to book time on the stand should contact:-

Barbara Cahalane,
Public Relations Executive
The Law Society,
Blackhall Place,
Dublin 7.
Tel: 710711 Fax: 710704.

before Tuesday, 31 March.

As exhibition time is limited, it will be alloted on a first come – first served basis.

Opportunity to Woo U.S. Business Renewed

The Law Society is taking a stand in the Expo at the American Bar Association meeting in San Francisco in August. This will be the Society's second visit to the ABA. In 1991 the Society had a stand at Atlanta. Atlanta was one of the less well-attended ABA meetings – there were only about 9,000 lawyers present. Over 15,000 American lawyers are expected to attend the meeting and Expo in San Francisco.

The Expo is a great trade fair with over 200 stands in the registration area of the Conference. The exhibitions included in these are financial, insurance, publishing, office equipment, computers, legal services and other services including accountants. The Law Society and the Council of the Bar of England & Wales had a major stand at Atlanta.

Our stand was manned both by representatives of the Society and on a rota basis by members of a number of Irish law firms.

The purpose of the venture is to make American lawyers aware of the services which can be provided by Irish lawyers in general and by the firms manning the stand in particular. Efforts were concentrated on persuading US lawyers that Irish lawyers were capable of handling US business in the EC.

The following firms were represented in 1991:-

Beauchamps
Bell Branigan O'Donnell & O'Brien
Ivor Fitzpatrick & Co.
Gerrard Scallan & O'Brien
Gleeson McGrath Baldwin
Gore & Grimes
Hanby Wallace
V P McMullin & Son
Whitney Moore & Keller

The general reaction of the firms who participated was that it was a worthwhile venture but one which needed to be run for several years before its value could be properly evaluated. It is pleasing to note that four of the firms which participated in Atlanta have already agreed to participate in San Francisco.

Those who participated in 1991 were pleasantly surprised not to be continually approached only by those claiming Irish grandmothers but by people who were interested, and perhaps surprised, to find Irish lawyers offering themselves as the gateway to Europe for their American colleagues. A very successful reception for the guests of the Society and the participating firms was held in Atlanta and it is proposed to repeat this reception in San Francisco and to arrange a lunch at which a prominent speaker will be featured.

The Society has produced brochures outlining the services which Irish lawyers can provide to their US counterparts and these together with badges and other "give aways" will be distributed at the stand. As in 1991, the Law Society will have two representatives at the Expo to man the stand for periods not booked by firms, and to assist the members participating.

Applications are invited from firms who wish to participate on this occasion. The contribution required for each firm is £500 for each hour on the stand. Modules of 2 hours will be the norm and applications will be dealt with on a first come-first served basis.

Applications should be addressed to *Barbara Cahalane* at The Law Society.

(See also advertisement on facing page.) □

John Buckley

Criminal Law in the 1990s

(Cont'd from page 55)

Reform and codification of Criminal Law

The final speaker was Mr. Justice *Ronan Keane,* President of the Law Reform Commission, who spoke on the issue of law reform. He placed this issue in the European context. He pointed out that any reform of the criminal law should have regard to the twin requirements of the European Convention on Human Rights, namely, that the law be both easily accessible and formulated with precision and clarity. He then detailed the impressive range of criminal law topics which had been the subject of reports by the Commission in recent years.

He stated that in considering reform we should be open minded and accept into our law elements of the Civil Law system which ensure the more effective attainment of the objectives we consider desirable. However, he could see no reason why this should be a one-way process. If we are going to have a Pan-European legal system in the future, it should so far as possible preserve the best in both systems. He particularly commended one aspect of the Civil Law system in any consideration of the reform of the criminal law, namely, the concept of a code.

He thought that we should not surrender such valuable aspects of our criminal law system as the presumption of innocence and the right to silence. We should try to convert the Civil Law countries to some of the virtues of our system rather than flirting with some aspects of their system which in the end may be destructive of values we cherish. In the end, we have to test everything by a fundamental "litmus paper": our criminal law should have two objects and two objects alone, the punishment of the guilty and the vindication of the innocent. □

THE LAW SOCIETY
BLACKHALL PLACE DUBLIN 7

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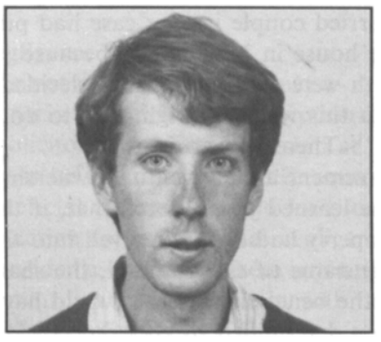
Joint Ownership of the Family Home

Danger lurks everywhere for the practitioner who must wander in the minefield of the beneficial ownership of the family home. The two recent Supreme Court decisions on the area[1] raise the suspicion that even those who originally set the mines have forgotten where it is safe to walk. In the hope of providing some modest assistance, this article aims at a controlled explosion of just one deeply buried misconception.



by John Mee B.C.L., LL.M. (N.U.I.), LL.M. (Osgoode), B.L., Lecturer in Property and Equity Law, University College, Cork.

It appears to be commonly assumed that "putting the home into joint names" is an infallible method of guaranteeing equal beneficial ownership. This is a dangerous over-simplification since, even if the property is held in joint names at law, the doctrine of resulting trusts may still operate to make the beneficial ownership of the property depend on the respective financial contributions to the acquisition of the home. The problem is most significant in relation to the increasing number of couples living together outside marriage, since the Judicial Separation Act will normally (but not invariably) provide a remedy for a married claimant.

The purchase money resulting trust

Equity will impose a resulting trust in favour of a person who contributes to the purchase price of property with the intention of gaining a share in the ownership. The extent of the share will be proportionate to the fraction of the purchase price they have provided. Thus a wife who contributes[2] one-third of the cost of a family home which is held in the sole name of her husband will normally be entitled to a one-third share in the equitable ownership.

It should be noted that two elements are required – the making of a contribution *and* the appropriate intention. In a family situation, realistically neither party is likely to have had any particular intention as regards the separate property entitlements. Therefore of crucial importance are the presumptions that the law makes in the absence of evidence as to the intentions of the parties. The "presumption of resulting trust" allows the courts to assume, unless there is evidence to rebut the presumption, that a person making a contribution did have the necessary intention to generate a resulting trust.

However, if a husband contributes to the acquisition of property in the name of his wife, the anachronistic "presumption of advancement" applies. This requires the courts to assume, again in the absence of rebutting evidence, that he intended to make a gift to his wife. The presumption, which historically was based on the perceived duty of a husband to provide for his dependent wife, does not apply to contributions from a wife to a husband, nor does it apply in relation to unmarried couples.

The key point for present purposes is that the resulting trust doctrine applies irrespective of whether the property is held in the sole name of one party, or in both their names (whether as joint tenants or tenants in common at law) or in the name of some third party. The overriding principle is that, provided that the appropriate intention may be presumed or otherwise established, the beneficial interest will be owned in the proportion of the contributions to the acquisition of the home.

Legislation affecting married couples

The Judicial Separation Act, 1989 allows the courts to make a wide variety of orders adjusting the property entitlements of the spouses in the event of a judicial separation. The factors which the Act requires the courts to consider are wide-ranging[3] and appear entirely to subsume the common law rules.[4]

However, the 1989 Act applies only in the context of marital breakdown. The separate property entitlements of the spouses may become important for other reasons, most notably in the event of the death[4a] or bankruptcy of either spouse. In such circumstances the common law doctrine of resulting trusts determines whether or not the equitable ownership will follow the legal title.[5]

Claims by a husband where the Judicial Separation Act does not apply.

If a husband pays more than half the purchase price of a house, then in theory he may claim a proportionate share based on the extent of his contribution, even if the home is in joint names. However the presumption of advancement provides a formidable obstacle to the success of such a claim. It would be necessary for the husband to introduce some evidence suggesting that his intention in making the contributions had been to gain an increased share for himself over and above the one-half suggested by the

legal ownership. This would be very difficult, since in reality he probably had not contemplated a separation at the time and was most likely regrettably unaware of the difference between legal and equitable ownership. In one High Court example, *P -v- P*,[6] where the husband had made the greater contribution but the property was held in joint names, Barrington J. decided that the beneficial ownership was held equally.

Claims by a wife where the Judicial Separation Act does not apply

The claim of a wife to more than half of the beneficial ownership has a greater likelihood of success and it is in the context of such claims that the relevant Irish caselaw has arisen. Since the introduction of the Judicial Separation Act, the principles established by these cases are of most practical significance in relation to a claim by either party in an extra-marital cohabitation, in which context the presumption of advancement is similarly irrelevant. In all these cases, the presumption of resulting trust operates in favour of the claimant. It is up to the legal owner to produce evidence to show that in paying more than half the purchase price, the claimant intended to make a gift to him.[7]

In *O'K -v- O'K*,[8] the wife's father had paid all of the purchase money for a house which was conveyed into the joint names of his daughter and her husband. Barron J. observed that the husband's reason for wanting his name on the title deeds was probably a belief that this would give him a share in the beneficial ownership. The learned judge proceeded to demonstrate the falsity of such a belief by holding that the husband had not shown that his wife had made him a gift of half the house and that therefore he was not entitled to any of the beneficial ownership in that house. Barron J. took the same approach to the determination of the ownership of a house which was subsequently purchased, also in joint names, by the couple in that case. The wife had initially contributed three-quarters of the purchase price and Barron J. held that the beneficial interest was owned in the proportions in which the couple had contributed.[9]

A different approach was taken in *Containercare (Ireland) Ltd. -v- Wycherly*.[10] Carroll J. felt that the married couple in that case had put the house in joint names because both were earning and had decided that this was "the right way to do it."[11] There was no further agreement about eventual ownership. The learned judge stated that, if the property had been conveyed into the sole name of the husband, the shares in the beneficial interest would have been determined by the respective contributions to the purchase price. However, in the present case, a decision had been made that the premises would be taken in joint names. This was evidence of an "agreement or arrangement" which was inconsistent with their contributions being appropriated to a proportionate share in the house for their respective benefits. Therefore, if no other complications had intervened, Carroll J. would have held that the parties were equally entitled to the beneficial ownership, notwithstanding the greater contribution made by the wife.

It is submitted that this suggestion that the existence of a joint tenancy at law is sufficient evidence to rebut the presumption of resulting trust is unsupportable. It contradicts the whole essence of the doctrine of resulting trusts and is tantamount to the proposition that X cannot establish a resulting trust over property in Y's name, simply because the property *is* in Y's name. Furthermore, Carroll J.'s distinction between the case where property is held in the sole name of the husband and where it is held jointly would lead to an absurdity. Consider the situation where the wife contributes all of the purchase money. Under Carroll J.'s analysis, if the property were held in the husband's sole name, he would get nothing,[12] but if his wife's name accompanied his on the legal title, he would, in the same circumstances, be entitled to a half share in the beneficial ownership.

The two cases discussed above indicate clearly the extent to which the individual facts of a case influence the approach of a judge to the highly subjective inquiry as to the intention of the parties. Although the reasoning in *Containercare* cannot be accepted, it seems that relatively slight evidence should suffice to rebut the presumption of resulting trust where the property is held in joint names. It will certainly be enough if it can be shown that a joint tenancy was created in order to benefit one spouse on the death of the other, since such a benefit would not accrue unless the beneficial ownership followed the legal title.[13] In such cases, it is not the existence of the joint tenancy, but the evidence as to the reason for its creation, which would serve to rebut the presumption of resulting trust.

"Unmarried"[14] claimants

The principles discussed in relation to a claim by a wife apply equally where the claimant is not married to the legal owner. It should be remembered that there are many possible family arrangements e.g. a parent and child (or a number of unmarried brothers or sisters) living together. The most obvious situation involves a couple living together outside of marriage. Given that the Judicial Separation Act contains the property adjustment aspects of divorce, there remains only the prohibition on remarriage. It seems reasonable to expect that separated partners will wish to begin a new life, and any new relationship will of necessity take place outside the legal institution of marriage. Therefore, practitioners may expect to be faced more often with the special problems of cohabitation outside marriage, a situation where the familiar legislative framework which governs relations between married couples is irrelevant.

In theory, the same rules (with the notable exception of the presumption of advancement) apply to unmarried couples, although some English

commentators have identified an unspoken judicial bias against the claims of an unmarried woman.[15] Of course, some couples may have avoided marriage to reduce their commitment to the relationship and this may have certain implications for their likely intentions as to the sharing of property. It may be that in such cases joint ownership at law is explicable by reference to the dictates of the Building Society granting a mortgage, rather than to any real desire to share the ownership regardless of the extent of the respective contributions.

In a number of English cases involving extra-marital cohabitation, the courts have imposed a resulting trust based on the financial contributions despite the joint ownership at law.[16] In *Walker -v- Hall*,[17] for example, a couple who were not married to each other purchased a home in joint names. Three-quarters of the price was provided by Mr. Hall and one-quarter by Mrs. Walker. Dillon L.J. (and his colleagues in the English Court of Appeal) felt that it was not open to the court to hold that the property belonged to the couple in equal shares. In the absence of specific evidence as to their intention, their shares would be determined by their respective contributions to the purchase price.

It would appear that a woman living in an extra-marital relationship in this country also is particularly vulnerable,[18] given that she might (not unreasonably) assume that having her name on the title would protect her joint ownership. It should also be noted that it is most unlikely that any legislative intervention in this area will deal with the problems of unmarried claimants.

An express declaration as to beneficial ownership

In England it is normal practice for a conveyance into joint names to include a simple declaration that the property is to be held equally in law *and in equity*. It has been held in a number of English cases that the courts will not look beyond such a declaration unless fraud or mistake at the time of the conveyance can be proven.[19] Strangely, it seems that the normal Irish practice does not involve this elementary precaution, thus leading to the problems discussed in this article.

Negligence

It is not difficult to construct a scenario in which the assumption by a solicitor that joint ownership at law is sufficient to guarantee equal beneficial ownership could lead to an action for professional negligence. Consider a situation where a young woman is about to move in with her boyfriend. On the urging of her parents she goes to see her family solicitor to find out how to safeguard her property rights. The solicitor advises the woman that, irrespective of financial contributions, she will be entitled to equal ownership if the property is conveyed into joint names (without mentioning the possibility of an express declaration as to the beneficial interests). If her relationship subsequently breaks up and she finds herself with nothing to show for a number of years of unpaid work in the home, she could be forgiven for looking for compensation from the solicitor who misled her.[20]

Conclusion

In a case arising outside the context of marital break-up, there is a possibility that one of the spouses (particularly a wife), who has paid more than half of the purchase money, may establish a resulting trust based on the extent of her contribution, despite the property being held in joint names. The problem is more acute in relation to unmarried claimants of either sex, since there has been no legislative intervention.

Where a conveyance is intended to produce joint ownership, there seems to be no reason for the failure of Irish conveyancers to include the standard English device of an express declaration as to the equitable ownership. It should be remembered that until comparatively recently it was standard practice to convey the family home into the sole name of the husband, with disastrous consequences for wives. Perhaps it should also be remembered that a practice may be negligent, even though it is standard in the profession.

□

References

1. *L. -v- L.* and *E.N. -v- R.N.* Judgement in both cases was delivered on December 5, 1991.
2. The Irish Courts have extended the notion of a "contribution" to encompass direct payments towards mortgage instalments (see *C. -v- C.* [1976] I.R. 252) and "indirect contributions" towards the repayment of a mortgage made by a working claimant who pays other household expenses (see *Mc.C -v- McC.* [1986] I.L.R.M. 1). However, in the recent decision in *L. -v- L.*, the Supreme Court refused to recognise work in the home as sufficient to generate a beneficial interest in the home.
3. The relevant factors are listed in s.20 and include such matters as the duration of the marriage and the conduct of the spouses, as well as the contributions which each spouse has made to the welfare of the family, including "any contribution by looking after the home or caring for the family."
4. Under the Act, the Court does not begin with a clean sheet but operates its assessment of the appropriate adjustments on the basis of the pre-existing property entitlements of the spouses. Therefore it might seem worthwhile for a spouse to establish, prior to the adjustment process, that under the common law rules she was already entitled to a share in the home. However, it seems that this exercise would be pointless since the statutory criteria are easily broad enough to encompass the narrow common law concept of a contribution to the purchase price. On the other hand, the proposed legislation providing for automatic equal ownership of the family home would operate quite independently of the considerations listed in the Act and so would be of real significance in the event of a judicial separation.

4a. See *E.N. -v- R.N.*, note 1, above.

5. If a new legislative regime of automatic joint ownership of the family home were to be created, then the significance of the common law rules in relation to married couples would be further diminished. However, it is most unlikely that anything approaching full-blown community of property will be introduced, so that other items of family property (e.g. a car or a second house) would not be covered.
6. Unreported High Court, 12th March, 1980. Contrast the unusual case of *R.S. -v- M.S.*, unreported Supreme Court, 24 October, 1985.
7. In the context of a bankruptcy, it could, of course, be in the husband's interest to show that his wife held more than half of the beneficial interest. In such circumstances the courts should consider his evidence with some caution. See *Midland Bank Ltd. -v- Dobson* [1986] 1 F.L.R. 171.

8. Unreported High Court, 6th November, 1982.
9. Sometimes the evidence will show that equal ownership was intended. In *G.K. -v- E.K.*, (unreported High Court, 6th November, 1985), the wife had made a much greater contribution to the purchase money than her husband. However O'Hanlon J. noted (at p.4 of his judgement) that "the wife very fairly said in the course of her evidence that the parties intended the house to be in joint ownership with equal rights to both of them. . . ." This evidence allowed the learned judge to hold that there should be equal beneficial ownership, rather than a resulting trust in favour of the wife based on her greater contribution.
10. [1982] I.R. 153.
11. Ibid, 147.
12. Carroll J. made it clear that no presumption of advancement applied in favour of a husband. (Ibid at 152).
13. See, for example, *J.C. -v- J.H.C.*, unreported High Court, 4th August, 1982, Keane J.
14. The parties could quite possibly be married, but not to each other.
15. See e.g. Oliver, "The Mistress in Law", [1978] C.L.P. 81.
16. See *Crisp -v- Mullings* (1975) 239 E.G. 119; *Lawrence -v- McFarlane* The Times, 19 May 1976; *Young -v- Young* [1984] Fam. Law 21 and *Walker -v- Hall* [1984] Fam. Law. 126.
17. [1984] Fam. Law 126.
18. Although the point under discussion does not seem to have been litigated yet, there have been a number of Irish cases applying the rules concerning resulting trusts to unmarried couples. See e.g. *McGill -v- Snodgrass* [1979] I.R. 283 (where the woman's claim was unsuccessful) and *Power -v- Conroy* [1980] I.R.L.M. 31 (where the woman did succeed).
19. See e.g. *Goodman -v- Gallant* [1986] 1 All E.R. 311. A theoretical argument could be raised to the effect that the English practice would not be entirely effective in Ireland, given our highly idiosyncratic theoretical approach to the whole area of trusts of the family home. Briefly, our approach allows matters subsequent to the date of purchase (e.g. the making of mortgage repayments) to govern, in a rather crude mathematical fashion, the beneficial ownership, whereas the more complex English analysis takes great pains to relate such matters to a common intention *existing at the time of the purchase.* (See e.g. *Grant -v- Edwards* [1986] 2 All E.R. 426). The point is that an express declaration in the conveyance would reveal the intention as to the equitable ownership at the time of the purchase (the crucial time in England), whereas in Ireland the intention of the parties at the time of a subsequent contribution may instead be determinative.
20. It seems that if the couple consulted the solicitor together and expressed their desire to share equally in the ownership of the home, this expression of intention could amount to sufficient evidence to rebut the presumption of resulting trust which would arise in favour of the partner who made the larger contribution.

European Lawyers Union Annual Conference

Biarritz – June 1992

The UAE (European Lawyers Union) is holding its next Annual Congress in the beautiful town of Biarritz from the 11th/14th June, 1992. The theme of the conference will be a Progress Report on the developments towards a Single Market 6 months before the Single Market comes into being on the 1 January, 1993.

Anyone interested in information concerning the conference should contact: *Gerald Moloney,* 27/29 Washington Street, Cork.

Phone 021 275261;
Fax 021 271586

□

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Society Seeks Substantial Increase in Criminal Aid Fees

The Criminal Law Committee of the Law Society has made a submission to the Department of Justice seeking a substantial increase in fees payable to solicitors operating the Criminal Legal Aid Scheme.

The submission notes widespread concern amongst the legal profession that the Scheme is at present paying a rate of remuneration for criminal defence work far below the true worth of the work undertaken to such an extent that participating lawyers are incurring substantial losses on cases undertaken. The submission makes several fundamental criticisms of how the Scheme is operating and says that these must be addressed. "In order to ensure that the Scheme can meet its statutory and constitutional obligations, the level of payment for work must be adjusted to bring it into line with the true cost of the work and thereby ensure that a legally-aided accused is not disadvantaged in the preparation of his defence by his lack of means."

Comparisons

The submission draws a number of comparisons which show that the fees currently payable under the Criminal Legal Aid Scheme are far short of the mark. The submission argues that in a number of cases (mainly involving retrials), which were dealt with on the basis of costs being awarded against the State and taxed (or agreed) on that basis, in general the Criminal Legal Aid fee would have been less than one third of the fee actually paid and independently assessed. Secondly, an assessment of the fees payable for other civil work, also on the basis of independent taxation of costs in the Circuit Court, High Court and Supreme Court, shows that the fees payable under the Criminal Legal Aid Scheme are totally out of line, varying in some cases between a factor of four and eight times too low.

The Criminal Law Committee says in its submission: "in assessing what we consider to be a reasonable remuneration in the average case, we have taken into account the pressure on State funding, and the positive factors from an accused's point of view of having a system of criminal legal aid available. However, we have also had regard to the increasingly complex nature of the practice of Criminal Law due to the combination of scientific and investigative advances and the complexity of legislation both domestic and EC. We conclude that all the objective evidence suggests that, on a case by case analysis, the practice of Criminal Law is more time consuming, specialist and carries a greater level of responsibility than other types of work. For the Criminal Legal Aid System to function effectively, this must be recognised in the rates of remuneration."

Trials on Indictment

The submission says that the current provision of the Scheme linking a solicitor's instructions fee to counsel's brief fee is totally unrealistic. In every comparable type of civil case that is referred to taxation, as well as cases where costs are agreed with the State authorities, it is invariably accepted that the bulk of the expense in preparing a case for trial is borne by the solicitor and this is reflected in the instructions fee which is generally four to six times counsel's brief fee. Therefore, the submission proposes that the instructions fees must be increased substantially and the existing linkage with counsel's fee ended. The submission goes on to suggest a level of fee for the average trial on indictment. In more complex cases, a scheme could be agreed along the lines of that agreed between the Bar Council and the Director of Public Prosecutions.

District Court Fees

The simplest way to arrive at a fair scale of fees for criminal District Court work, the submission argues, would be to relate the fees to the present statutory scale of fees for that Court (which are due for immediate increase), taking into account that in every instance, the costs of a successful defence are the same as the costs of a successful prosecution. The submission then goes on to detail appropriate levels of payment for pleas, defences, adjournments and refresher fees.

The submission also states that provision should be made urgently for payment for attendances at Garda stations.

Members of the Criminal Law Committee presented the submission to officials of the Department of Justice at a meeting on 19 February last. The submission is now being considered by the Department and further discussions are due to take place in the near future. □

Conveyancing Handbook

Please note that copies of the Conveyancing Handbook are still available at the introductory price of £10 up until 31 March, 1992. As and from 1 April, 1992 the price of the Handbook will be £25.

Any enquiries should be directed to *Linda Kirwan,* Solicitor, The Law Society, Blackhall Place, Dublin 7. □

Solicitors Benevolent Association

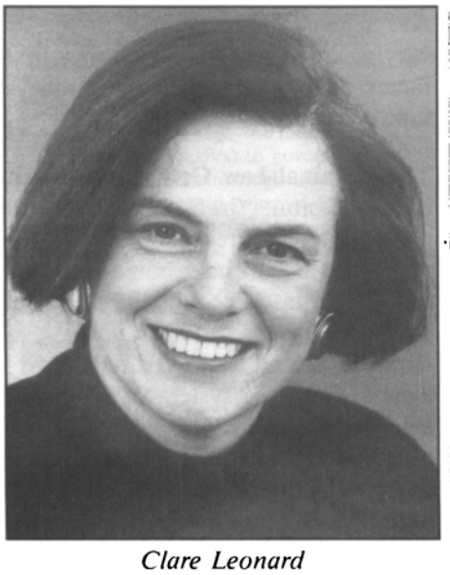
In this article *Clare Leonard*, secretary of the Solicitors Benevolent Association, describes the vital work done by the Association to help members of the profession, or their dependants, who are in need through illness, desertion, unemployment, alcoholism or other reasons.

It sometimes occurs to me that while members of the profession are aware that funds are collected, if only because members pay an annual subscription with their practising certificates, they have no very clear idea of what role the Association plays within the profession. This is partly because assistance to beneficiaries is provided on a confidential basis.

The object of the Solicitors Benevolent Association, which was instituted in 1863, is to help needy members of the profession and their dependants throughout the entire island of Ireland. It is funded by voluntary contribution and functions as a completely separate entity from both Law Societies.

The directors, who give generously of their time, meet on a monthly basis to assess applicants, review existing grants and monitor financial resources. In order to ensure that the Association is representative of the profession at large, attention has been given over the past couple of years to appointing a number of additional directors throughout the country. At a recent meeting in Dublin there were directors present from Donegal, Mayo, Leitrim, Tipperary, Cork, Belfast as well as from Dublin. At least one or two meetings every year are held at a venue other than Dublin. There have been several meetings over the past number of years in Belfast, also in Killarney, Kilkenny and Cork.

Traditionally, the profile of those



Clare Leonard

helped by the Association was that of "distressed gentlefolk". This may have been valid at some time in the past but is no longer the case. We still help elderly members of the profession and dependants living on fixed incomes but there is a growing number of younger beneficiaries, many with dependent children, who are in need through illness, desertion, unemployment, alcoholism or for some other reason. We pay out on average about £9,500 to £10,000 every month and send out 55 to 60 cheques. We help different people in different ways and great care and attention is given to establishing what the need of each individual is. The Association also employs the assistance of a social worker on a part-time basis.

I am constantly heartened by the courage of those we help some of whom deal with very adverse circumstances. As secretary, I get some wonderful letters. I particularly liked the one where we had been helping a young wife, deserted with two dependent children, who got herself a job and managed her affairs to the point where she no longer needed our help although her budget remained restricted. The Association sent her a grant at Christmas and her acknowledging letter began "There is a Santa Claus after all."

(Continued on page 70)

Golf Outings

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Proceeds in aid of the Solicitors Benevolent Association

DATE	VENUE	ORGANISER
Friday 1st May 1992	Newlands Golf Club, Dublin	*Oonagh Sheridan,* John Glynn & Co., Tel: 515099 Fax: 515120
Saturday 9th May 1992	Connemara Golf Course	*Michael Keane* Michael Keane & Company, Tel: 094-71208 Fax: 094-71977
Friday 22nd May 1992	Waterford Golf Course	*Neil Breheny* Kenny Stephenson & Chapman Tel: 051-75855 Fax: 051-77620
Friday 12th June 1992	Dundalk Golf Course	*Cyril Coyle* Corrigan Coyle & Kennedy, Tel: 042-40010 Fax: 042-40329

Council of the Law Society 1991-1992

Members of Council of the Law Society 1991/92, pictured before their meeting on 3 December, 1991. (Back row): Liam Irwin, John Fish, James MacGuill, Cormac O'Hanlon, Bruce St. J. Blake, Richard Bennett, Laurence Shields, Anthony Ensor, Edward McEllin, Peter Murphy, Thomas Shaw, Brian Mahon, Michael Irvine, Walter Beatty, John Harte, Owen Binchy, Ken Murphy, James V. Long, Pat O'Connor. (Second row): John Shaw, Ernest Cantillon, Patrick Glynn, Philip Joyce, Geraldine Clarke, Michael O'Mahony, Maeve Hayes, Gerry Griffin, Elma Lynch, Andrew Smyth, Mary O'Halloran, James Long, Justin McKenna, Niall Casey, Justin Condon, Barry St. J. Galvin. (Front row): Ernest Margetson, Maurice Curran, Gerald Hickey, Eva Tobin, Noel C. Ryan, Director General; Raymond Monahan, Senior Vice President; Adrian Bourke, President; Frank Daly, Junior Vice President; Donal Binchy, Moya Quinlan, John Maher, Brendan Allen and Brian Sheridan.

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PEOPLE AND PLACES

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At the presentation of the Law Society's Scholarships to former students of the King's Hospital School were: (Back row, l-r) Eva Tobin, Chairman, Public Relations Committee; Mr. Crawford; Mr. Wagstaff; Harald Meyer, Headmaster, King's Hospital School; Noel C. Ryan, Director General, Law Society; Ray Monahan, Senior Vice President, Law Society. (Front row, l-r) Mrs. Crawford, Susan Crawford (1991 Scholarship winner); Mrs. Wagstaff; and Fiona Wagstaff (1990 Scholarship winner).

The Dublin Solicitors Bar Association recently made a donation to the Lord Mayor's Coal Fund. The photo shows l-r: David Walley, President, DSBA, presenting the cheque to the Lord Mayor of Dublin, Councillor Sean Kenny.

At the Annual Law Ball of the Co. Galway Solicitors Bar Association, held on 14 December, 1991 were (Back row, l-r):Noel Ryan, Director of the Law Society; Adrian Bourke, President of the Law Society; Leonard Silke, President of the Co. Galway Solicitors Bar Association; Dr. Colm O hEocha, President of University College Galway and Chairman of the Arts Council; Enda Emerson, celebrating 57 years in practice and Judge John Caravan, Galway District Court. (Front row): Gerry Silke; Mary Sherlock, Treasurer of the Co. Galway Solicitors Bar Association; Ruth Bourke; Eva Tobin, Council Member; Daiden Uí Eochaí; and Teresa Emerson.

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Some of the apprentices who attended a special information meeting for apprentices on the Solicitors (Amendment) Bill, 1991 that was held in the Law Society on 13 February last.

Mr. Gerry Murphy, who has been associated with the Society's Law School for the past ten years in his role as a video producer and audio visual consultant.

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TECHNOLOGY NOTES

Towards the User Friendly PC?

Towards the User Friendly PC?

By far the most prevalent operating systems used in personal computers will be a proprietary version of the Disk Operating System (DOS) and many practitioners will be familiar with the difficulties encountered with the terminology of Command Processing and Task Execution. DOS requires a knowledge of its own structures, syntax requirements and task acronyms in order to set up and run appropriate applications such as word processing, accounts systems etc. While it is not unduly complex, it is a cumbersome system which can require frustrating re-examination and testing of tasks and commands which fail to do what they are required to. Yet, what is called the Character User Interface (CUI) of DOS remains the preference of most legal offices.

A Graphical User Interface (GUI) as its name implies, allows for the execution of tasks and commands through a much more user-friendly environment of symbols and graphics. Thus, by using a hand-held device called a Mouse, it allows for the movement of a pointer around the screen and the execution of tasks by the press of a button. In turn, the screen itself identifies the tasks by means of graphical symbols. For example, a waste paper basket is frequently used to indicate a delete function; an hour glass is used to indicate a task executing in background.

Allied to the use of GUIs, and a component part of many systems, is a windowing facility which allows for segmentation of the screen into a number of units and the calling down of screens from within the same application (or from other applications). This replicates the use of, or reference to, a number of different physical files or books on a desk-top at the same time. Thus a letter to a client held in word processing can be viewed at the same time as the client account entry is displayed on the screen.

The benefits of GUIs are clear cut and may be summarized as:

- the replacement of difficult to master command lines and character driven commands with a user friendly "point and execute" feature,
- a reduction in the amount of keyboard activity that is required to operate the system and applications running on it,
- the use of a windowing feature which allows for display of multiple files or records at the same time.

While Apple Mac launched its version of GUI technology back in 1984 it has not proven popular in law offices. However, a number of commercial forces are now operating to encourage the take up of this technology. Specifically, Microsoft the developers of MSDOS, have launched Windows 3.0 and products suitable to the legal markets are now becoming available in a range of applications, notably word processing systems (see **Technology Notes,** December 1991).

Finally, a word of caution about Graphical User Interfaces. For all their benefits, there are a number of limitations and requirements which should be borne in mind:

- the display of information in graphical form and the use of windows to switch between different applications requires substantial PC capacity. Some windows applications may require upwards of 5 Mb and it is recommended that PCs operating GUI should have a 80386 chip with 60 + Mb of memory.
- GUI and windowing requires its own version of the relevant applications software. Hence the launch of new tailored versions of popular word processing systems. Similar tailored versions would be required of account systems, document management systems etc. to allow them to operate in this environment.
- While the traditional character driven commands may be initially difficult to master, once this is done they can easily be hidden in the background of the operating system and need not be as user unfriendly as they first appear.
- The rapid growth in power of the PC and reduction in its cost, will almost inevitably lead to further refinements over the coming years. It is not improbable that the GUIs will be overtaken by the Speech Driven Computer. There are already applications which can translate text on screen into voice and can accept voice driven commands.

In the right environment, GUI saves time, reduces keyboard requirements and improves accessibility to a multiplicity of different applications. It may require upgrading of hardware; replacement of current applications software and return costs only where a number of different applications require to be accessed concurrently. There is an argument to be made that a solicitor running word processing and an accounts system on a single PC would be best to master the old before embarking on the new.

(Cont'd on page 70)

Technology News

(Cont'd from page 69)

Further Reading

Show down at the WP Corral: Charles Christian **New Law Journal** 12th July 1991.

The Windows of Opportunity: Julian Patterson **The Independent (London)** 23 April, 1991.

Is this a Gooey Wimp I see before me?: Charles Christian **New Law Journal** 8 February, 1991.

Windows are opened on a Wider World: Brian Trench **Sunday Business Post** 12 January, 1992.

This column is contributed by members of the Technology Advisory Group, an informal grouping of solicitors who, with the approval of the Technology Committee of the Law Society, seek to promote awareness and use of technology within the profession. Further details from the Honorary Secretary, John Furlong, c/o William Fry, Solicitors, Fitzwilton House, Wilton Place, Dublin 2. □

Solicitors Benevolent Association

(Continued from page 64)

We are always grateful for donations and are on the receiving end of the proceeds of many functions organised by various societies within the profession without which we would run into a serious deficit. Last year *Pat Treacy* ran a pilot golf outing in Nenagh and *Cathy O'Donnell* and *Oonagh Sheridan* organised a "scramble" in Newlands both of which were successful and enormously enjoyable. There are four outings being organised this year, in Waterford, the Connemara Golf Course, Dundalk and Dublin (Newlands), the idea being that solicitors' clients, friends or relatives would be included.

Keep up the support.

Clare Leonard, BCL, LLB, solicitor, is principal of the firm of Leonard Solicitors, 40 Fitzwilliam Square, Dublin 2. □

Implement Martin Report – Law Society

The Criminal Law Committee of the Law Society has requested the new Minister for Justice, Mr. *Padraig Flynn,* to implement without delay the main recommendations of the Report of the Martin Committee of Enquiry into certain aspects of Criminal Procedure.

In a statement to the press the committee said:-

"The "Martin Report" published in March 1990, – almost two years ago – concluded that there was a real need to introduce a procedure for the review of cases where new evidence raised questions about an earlier verdict. While noting that such cases were rare, the Martin Report concluded that the use of normal court procedure was not appropriate for any such review. The Martin Committee, therefore, recommended the establishment of an enquiry body to which cases could be referred by the Attorney General in circumstances where fresh evidence was available that merited consideration.

"The Law Society supports this recommendation as it considers that it is an essential feature of the fair administration of justice that there is a procedure to correct miscarriages of justice, however rare these might be. It is unsatisfactory that, at present, if normal appeals procedures have been exhausted there is no mechanism by which a case can be re-opened if fresh evidence comes to light.

"The Law Society suggests that in addition to the Attorney General, the Houses of Oireachtas, acting on a joint resolution, should also have the power to refer a case to the proposed enquiry body.

"The Law Society also fully supports the second main recommendation of the Martin Committee i.e., that the questioning of suspects by the Gardaí should be audio-visually recorded. The Law Society believes that such procedures would allay the fears of innocent persons on their first experience of being questioned by the Gardaí. It would also lessen the opportunities for experienced members of the criminal fraternity to successfully challenge at the subsequent trial statements made by them to the Gardaí during questioning.

The Society therefore urges the Minister to introduce a pilot scheme of audio-visual recording without delay." □

At a Presentation to William A. Crowley, Solicitor, Killorglin, Co. Kerry to mark his 50 years in practice were: - Standing L-R: Michael Connell, Chairman, Kerry Law Society; Angela Condon, Solicitor, Killorglin, (daughter of Mr. Crowley); and Joseph B. Mannix, Honorary Secretary and Treasurer, Kerry Law Society. Seated L-R: Louise McDonagh, County Registrar; William A. Crowley; Donal E. Browne, President, Kerry Law Society.

The Doctrine of Caveat Emptor with Regard to the Structure of a Property

It is the view of the Conveyancing Committee that every purchaser of a property should be advised in writing to have the structure of the building checked out either by a qualified engineer or architect. It would be prudent for solicitors not to recommend any one particular architect or engineer but rather that clients should find for themselves the person with the necessary qualifications to give them a satisfactory report. If solicitors fail to give clients such advice and it subsequently transpires that it costs the clients a lot of money to carry out work to the structure that they did not take into account when they decided to buy the house, they may issue proceedings for negligence.

Furthermore, if clients query the advice of solicitors to have the house checked out by an engineer or architect and make the point that the house will be inspected in any case on behalf of the Building Society, solicitors have an obligation to point out to them that Building Societies send out their valuers mainly to establish the value of the property in relation to the security which they are taking on it. The Building Societies' surveyors are contractually bound to the Building Society and not to the house purchasers. On the basis of existing Irish court decisions purchasers have no privity of contract with the Building Societies' surveyors and therefore cannot sue them.

There is no point in solicitors just verbally advising clients to get such a report done; it is important that it should be put in writing. Obviously, other areas of concern arise i.e. dry rot, dampness etc, but an architect or engineer who is properly qualified will advise that further experts be retained to advise on these areas should they become evident from an inspection. In addition to the actual structure any services relating to the house and, in particular, where there is a septic tank, should also be examined by the expert.

Conveyancing Committee

Statement of Payment of Compensation

Local Government (Planning & Development) Act, 1990

The attention of practitioners is drawn to the provisions of Section 9 of this Act which provides that where compensation exceeding £100,000 has become payable "the Planning Authority shall prepare and retain a statement of that fact, specifying the refusal of permission or grant of permission subject to conditions, or the revocation or modification of permission, the land to which the claim for compensation relates and the amount of the compensation". It then goes on to provide that the planning authority shall enter these particulars on the register kept in pursuance of section 8 of the Principal Act and that every such entry shall be made within fourteen days beginning on the day of preparation of the statement.

Section 10 of the Act then provides that no person shall carry out any development to which this section applies on land in respect of which a statement stands registered, whether under S.72 of the Principal Act or under Section 9, until such amount as is recoverable under the section in respect of compensation specified in a statement has been paid or secured to the satisfaction of the planning authority.

In the light of the foregoing sections practitioners are advised to raise the following requisition:

"Has a statement that compensation has become payable in respect of the property been registered under Section 9 of the Local Authority (Planning and Development) Act, 1990 in the planning register maintained by the planning authority resulting in development of the property being prohibited under Section 10 of the 1990 Act?".

Conveyancing Committee

Finance Act 1991, Sections 80 to 111 – Stamp Duties

The Finance Act, 1991 by sections 88 to 111 introduced very far reaching changes to Stamp Duty Regulations. The majority of the sections came into effect on 1 November, 1991 and members should take very careful note of the result of these sections. This memorandum is not to be regarded as comprehensive, but merely draws attention to the more important aspects of the sections, and each member should read the sections carefully.

The more important items are as follows:-

1. Stamp Duty is now no longer a voluntary tax. Prior to the passing of the Act, the parties to an instrument were free to decide not to stamp an instrument and there was generally no mechanism available for the Revenue Commissioners to institute legal proceedings against either party to enforce payment. This procedure is now radically changed and Stamp Duty is now compulsory. Section 94 (4) of the Act states that where an instrument chargeable with Stamp Duty is not stamped, or is insufficiently stamped, the accountable person shall be liable for the payment of the Stamp Duty, or where the instrument is insufficiently stamped, then the additional Stamp Duty and the amount of

Duty and any penalties may be sued for by the Revenue Commissioners.

2. Prior to the 1991 Act if a person was not satisfied with the amount of Stamp Duty payable on a document, they were entitled to withdraw it. The 1991 Act now provides that after presenting a document for stamping it may not be withdrawn if the assessment of Stamp Duty is higher than anticipated and it is important, therefore, before lodging a document to ascertain as accurately as possible the exact amount of Stamp Duty payable on it.

3. There are now new penalties for insufficient or late stamping of any document whereever executed which is presented for stamping after 1 November, 1991, which are as follows:-

   (a) increase of presentation penalty from £10 to £20, and

   (b) increase of interest rate on outstanding duty from 5% per annum to 1.25% per month or part of a month, and

   (c) penalties for late stamping of:-
   (i) 10% of the Duty where the delay is under 6 months
   (ii) 20% of the Duty where the delay is between 6 months and 12 months
   (iii) 30% of the Duty where the delay is over 12 months

4. One of the most important changes is the introduction of very severe surcharges for under valuation of property for Capital Acquisitions Tax or Stamp Duty. These charges are now draconian, and very careful note should be taken of them. They are as follows:-

   (a) where the submitted value is less then the ascertained value by greater than 10%, but under 30%, a surcharge of 50% of the Duty payable provided, however, that an understatement by less than £5,000 will attract no surcharge,

   (b) where the submitted value is less than the ascertained value by greater than 30%, but less than 50%, the surcharge is equal to the amount of the Duty,

   (c) where the submitted value is less then the ascertained value by an amount greater then 50%, the surcharge is double the amount of the Duty.

With particular reference to this paragraph No. 4, members would be advised to write to clients informing them of these extra surcharges, and informing them of the danger of undervalues. It is now more important than ever that a solicitor should not submit a valuation of his own, but should get an auctioneer/valuer to do the valuation. It is desirable to point out to the client that it is important for the auctioneer/valuer to do a proper valuation and not to undervalue the property. It would be also desirable to notify the auctioneer when writing for the valuation of the possible consequences of an undervaluation.

5. Section 97 of the Finance Act, 1991 now seeks to impose a duty of care between the Revenue Commissioners and solicitors. This is in addition to the duty of care that already exists between the solicitor and his client. This section appears to imply that a solicitor is now obliged to see that an instrument is properly and fully stamped, and if he knowingly and wilfully is employed in the preparation of such an instrument, then he could be liable for fraud. This duty imposed on a solicitor appears to be outrageous, but unfortunately is now law. The effects of subsections 3 and 6 of this section appear to be:-

   (a) If the solicitor fails in his statutory duty of care to the Revenue he will be liable for a substantial fine, and

   (b) irrespective of that, if he has any doubt or question relating to the transaction he should bring this to the attention of the Revenue Commissioners. If he fails to do so he will be liable for a substantial fine, and this can even relate to matters of valuation etc. if the solicitor/professional does not exercise reasonable care.

Again, as stated above, this memorandum is not an exhaustive summary of all changes in Stamp Duty under the Finance Act, 1991 and it is essential that each member should familiarize himself with the provisions of the relevant sections.

Taxation Committee

CORT

The Conveyancing Committee of the Law Society is pleased to recommend to the profession the computerised requisitions on title software package – CORT – recently launched by the Dublin Solicitors Bar Association.

This software package will enable computerised solicitors acting for vendors to reply to the standard requisitions on title without the necessity to utilise the printed forms, carbon paper and typewriters.

To establish the introduction of the software package into the mainstream of conveyancing, the following recommendation is made by the Committee viz:-

The vendor's solicitor who intends using the CORT package should notify the purchaser's solicitor of this fact when submitting contracts, also advising the purchaser's solicitor that he proposes giving to the purchaser's solicitor a set of standard requisitions on title with replies thereto at the time of returning to the purchaser's solicitor his client's part of the

contract for sale duly executed by the vendor.

When the purchaser's solicitor receives the requisitions on title with replies he can adopt such requisitions and replies and raise any other requisitions and/or objections which he considers necessary and appropriate to the transaction. The additional requisitions and/or objections should be raised by letter and, of course, will be replied to by letter.

The Committee believes that the advantage of the system will be to speed up the process of conveyancing, reduce the bulk of documentation sent between offices with a resulting reduction in postal and other charges and ease of production of documentation.

The CORT software package is available from £95.00 by contacting *David Walley*, President, Dublin Solicitors Bar Association, 87, Amiens Street, Dublin 1. Tel: (01) 363655.

Conveyancing Committee □

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New Land Registry Fees

The Land Registry has notified the Law Society that there will be an increase in fees charged for services provided by the Registry. The Land Registration (Fees) Order, 1991 (S.I. 363 of 1991) will be effective from 1 April, 1992.

The principal fee changes are set out hereunder:-

Service	Present fee	New fee
Transfer (Sale))	£50 (minimum)	£65 (minimum)
Judgment Mortgage)	£200 (maximum)	£250 (maximum)

New Fee Scale for Transfers (Sale)/Burdens/Charges

VALUE	FEES
£1 – £5000	£65
£5001 – £10000	£95
£10001 – £15000	£125
£15001 – £20000	£155
£20001 – £25000	£185
£25001 – £30000	£215
£30001 – upwards	£250

Service	Present fee	New fee
Application for First Registration (including Leases)	£25	£30
Voluntary Transfer	£30	£40
Transmission	£30	£40
Section 49 Application	£30	£40
Registration of Transfer Order	£4	£5
All other Registrations	£10	£12
Requisition for Land Certificate	£10	£13
Application to write up Land Certificate	£3	£4
Application for Copy Folio	£3	£4
Application for Copy Map (Filed Plan)	£6	£9
Application for Copy Instrument	£3	£10
Map Search	£3	£4
Priority Search	£6	£8
Inspection Search (Folio/Index/Map) Printout	£0.30	£1

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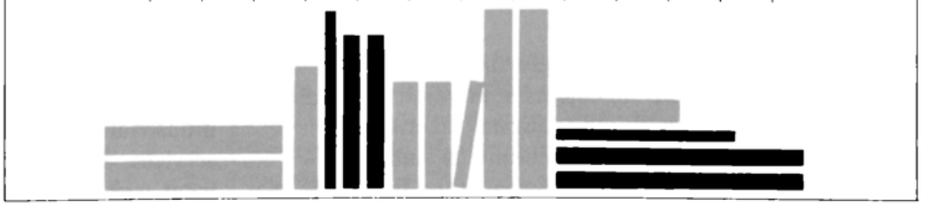

Report on the Indexation of Fines (Law Reform Commission, 1991), LRC 37-1991, 92pp, £6.50

Everyone who practises in the District Court will be aware of serious anomalies in the monetary penalties that can be imposed on summary conviction. To take some random samples: dropping litter £800, pollution £250, common assault £50, assault on a Garda (summary) £20, violent behaviour in a Garda station £2, dangerous driving £1,000, forcible entry £50, unlicensed firearm £50, breach of food hygiene £100, breach of food labelling regulations £800, failure to show a pedlar's certificate on demand 25p, casual trading £800, contempt of court £2, indecent behaviour £5, trespass on an airport £1,000.

The Law Reform Commission has addressed this problem in its Report on the Indexation of Fines and recommends that the law should:

(a) ensure equal fines for offences of equal gravity,
(b) take account of the past and future effect of inflation on the real value of fines, and
(c) have the flexibility to adjust for the differing means of those on whom fines are imposed.

The Commission considered the choice between a standard fine system which maintains values by reference to an index, and variable fine systems which are means-related. The Report comes down in favour of the former; rightly, in the opinion of this reviewer.

The variable fine system imposes fines in units of gravity whose monetary value is in each case dictated by the means of the offender. Most fines in Sweden are of this nature. The calculation is based on the gross income for the year prior to conviction less income tax, living costs and the costs involved in earning the income. The amount left over is used to calculate a day fine which is fixed at one thousandth part of it.

This system appears to work well in Sweden and in Germany. It has also been introduced in Denmark, Austria, Hungary, Costa Rica, El Salvador, Bolivia and France. A similar system has been introduced in the United Kingdom by the Criminal Justice Act, 1991. The Commission however, referring to "peculiar circumstances of this jurisdiction", conclude that two difficulties present themselves: one, the practical one of ascertaining offenders' means, the other whether such a scheme may not be unconstitutional. It is the first of these that would seem to this reviewer to be the crucial objection.

The Commission recommends:-

1. That a standard fine system be introduced by legislation. They suggest that offences be divided into three (or more) categories say (A) up to £100 (B) Up to £500 and (C) up to £1,500. There should then be a table that equates category A (£100) with fines of £2 in pre-1914 statutes, £5 or less from 1915-1944, £10 or less 1945-1964, £25 or less 1965-1974, £50 or less 1975-1979 and £100 or less 1980 onwards.
2. That in the interests of clarity all existing fine levels be allocated to their proper categories in a statute with long schedules.
3. That category levels be periodically updated by statutory instrument with specific reference to the Consumer Price Index.
4. To deal with large scale and profitable offences that provision be made for the confiscation of criminal proceeds and the imposition on legal persons of a certain size of fines of the category immediately above that ordinarily applicable to the offence in question.

This last recommendation will doubtless be the subject of much detailed discussion. The principle is a sound one. Regard might also be had to the comparative privilege any limited company has of immunity to imprisonment, community service or disqualification from driving.

The other recommendations are a vast improvement on the present jungle of incongruous fines. This reviewer would suggest, however, that updating should be in round figures not precise fractions, and that the updating be done by quinquennial statute not by Ministerial Order.

This Report has been produced with admirable clarity and deserves swift implementation.

Peter Smithwick
President of the District Court.

Copinger And Skone James on Copyright
13th Edition. Sweet and Maxwell, 1598pp, £160 Stg, hardback.

The latest edition of Copinger and Skone James on Copyright, the textbook which is regarded by many as the leading text on copyright law in these islands, comes over ten years after the previous edition which was published in 1980. The main prompting for the 13th edition was the passage in the UK of the Copyright Designs and Patents Act, 1988 which came into force on 1 August, 1989 and brought about major amendments and a substantial codification of the law on copyright in the UK. This is reflected in a completely changed chapter

arrangement to that prevailing in the 12th edition, the result of which is, in effect, that the book has been rewritten.

Prior to the passage of the 1988 Act the law in the UK was covered by the Copyright Act, 1956. As the 13th edition rather acidly remarks of our own Copyright Act, 1963: "It has *considerable* resemblances to the 1956 Act." In fact the Irish Act has been referred to with tongue in cheek as a good example in itself of breach of copyright. The only substantial difference between the 1963 Act and the UK 1956 Act was that the Irish government declined to create a Performing Rights Tribunal but instead vested the arbitration arrangements in relation to the statutory licences and the licensing schemes with the Controller of Industrial and Commercial Property whose main occupation was to look after the Patents Office. This was an obvious cost cutting measure in the expectation (until recently proved correct) that the services of a copyright tribunal would not be much called upon in Ireland.

As a result, the law was very much the same in Ireland as in the UK until the passage of the 1988 Act in the UK and the 12th edition is therefore still vitally relevant to the practitioner in Ireland today. The 13th edition does refer back to the 1956 Act for comparative purposes but it is harder to read a textbook to deduce the Irish position from references to a position which no longer prevails.

However, the new edition does provide an excellent section on the impact of the EC and the decisions of the Court of Justice particularly dealing with the cases involving copyright collection societies. The section on the copyright position in the US is also extremely useful. It gives to the practitioner as concise an exposition as he is likely to come across of the extraordinarily complicated copyright position in that jurisdiction which is the only system where an effective copyright registry is operated. The changes brought about in the US in the mid 1970s brought the US copyright arrangements somewhat more in line with international practice and various amendments since have allowed for what must be one of the most historic events in international copyright protection viz the accession of the US to the Berne Convention in 1989 more than 100 years after the original Convention was originally entered into.

The 13th edition has an excellent appendix dealing with UK legislation, US legislation and international conventions. It has a short schedule of precedents which would be of more use to counsel rather than solicitors, even in the UK as it is primarily directed towards the drafting of pleadings. Solicitors dealing with copyright and entertainment law contracts would be more inclined to use the now very detailed precedents in circulation amongst that relatively small community in London and even smaller community in Dublin with a nod to Butterworths excellent precedents.

The new edition is obviously to be welcomed overall in anticipation of the likely reform of the copyright law in Ireland over the next few years. As with many other areas of law, law reform in this area in Ireland is being driven by the very rapid developments taking place in Brussels. It is believed that a text book on Irish copyright law is in the offing from a member of the inner bar, the only difficulty being the prospect of almost immediate obsolescence with the passage of a new Act.

It is likely that a new Irish Act may substantially diverge from the 1988 Act not only in recognition of some of the difficulties which have arisen in relation to it, but also in response to the pressure from elements both in the entertainment industry and the EC in relation to such issues as the blank audio tape levy which was not introduced in the UK. There are already a number of references pending, or about to be filed, with the Controller in Ireland, as well as the very busy anti-piracy activity, an increasing volume of work in the areas of films, television and music and the uses of copyright in industrial and computer related services. There is little doubt that what was previously a much neglected area will receive considerably more attention in the future.

James Hickey

Annual Review of Irish Law, 1990. By R. Byrne and W. Binchy [Dublin, The Round Hall Press, 1991, hardback, IR £65]

The writer of this notice was recently pleased to write a brief recension of the *Annual Review.* He wrote that the multiplicity of laws (including case law) would make Malthus stand aghast. More than ever the law has become an exacting profession demanding of her devotees ever increasing knowledge. The writer concluded by stating that the *Annual Review* provided a rich analysis on a wide spectrum of law and should be a treasured part of every lawyers's library.

Sometimes the flexibility of language is stretched by certain reviewers; some reviewers have a facility for euphemisms, optimistic cliches and skilful literary camouflage which must be read with some care. This writer can state categorically that his (humble) recommendation that the *Annual Review* should be a treasured part of every lawyer's library was no empty shibboleth.

This short notice is addressed to two sets of readers. Those who possess a copy of previous *Annual Reviews* should note that the present *Annual Review* exceeds expectations. To those who have never purchased a copy of a previous review, the writer will explain what the *Annual Review* attempts to achieve. The 1990 volume is the fourth in the series and provides practitioners, academics and students with an analytical and perceptive account of the legal output of the courts, the Oireachtas, scholars and practitioners during the year in question. Every decision of the High Court, Court of Criminal Appeal and Supreme Court is

discussed. Significant Circuit Court decisions are also considered. Every Act of the Oireachtas for the year is outlined and, where relevant, detailed discussion is provided.

The writer of this notice submits that one role of the teacher in the Law School is to provide a critical evaluation of the law. Practitioners of the old school regarded the judgments of the Bench in awe as if they were written in tablets of stone; those of the old school never questioned an authority. It is not in any sense disrespectful for a lawyer to reason in public that a judgment is patently flawed. In a limited sense, it is a function of the law teacher to challenge (within the bounds of propriety, of course) the decision of the law-giver and the law-maker. In a representative democracy, a democratic opposition is essential. The judges, are in part, the rulers; the law teacher represents part of a legitimate opposition who is in a unique position to evaluate critically the law. One should take care not to forget one's Kipling:

"I keep six honest serving-men
(They taught me all I knew);
Their names are What and Why
and When
and How and Where and Who."

Raymond Byrne and William Binchy exercise a critical judgement on appropriate cases on the *Annual Review.* This is welcome.

The *Annual Review* is a matchless and unequalled thesaurus. For the experienced practitioner and scholar, it is an invaluable reference source.

Eamonn G. Hall

The New Competition Legislation Edited by *Jantien Findlater,* Irish Centre for European Law Ltd., 1991, 135pp, £20.00 (£16.00 to ICEL members), paperback.

The European Commission regards undistorted competition as a prerequisite for the proper functioning of the common market. The Court of Justice in the *Continental Can* case [1973] ECR 215 remarked that the EC competition rules are intended to be instrumental in attaining the objectives laid down in the EEC Treaty. *Gerard Hogan,* barrister, who has written the foreword and contributed a paper to the *New Competition Legislation* has stated that the Competition Act, 1991 probably represents the single biggest experiment in the area of public economic regulation of business which Ireland has undertaken. Accordingly, the timely arrival of *The New Competition Legislation,* published by the Irish Centre for European Law, is to be welcomed.

The book represents a collection of the papers of a day-long conference held at Trinity College, Dublin, on May 11, 1991. *Gerard Hogan,* barrister, in a perceptive and comprehensive paper writes on the *Competition Act, 1991.* "The Function of Competition and Its Impact on Business in Ireland" is the title of Dr. *Patrick Lyons's* paper. Dr. Lyons is chairman of the Competition Authority and formerly chairman of the Fair Trade Commission. Dr. Lyons concludes his paper by expressing his confidence that business and its legal advisers will ensure an adequate, but hopefully not excessive, flow of notifications for certificates and licences.

Donald L Holley's paper covers the implementation of competition legislation in the light of EC and US experiences. *John D Cooke,* Senior Counsel, deals with the important issues of the virtual introduction into Irish law by the Competition Act, 1991 of the corpus of EC jurisprudence relating to competition law. *Alex Schuster,* barrister, deals with the legal effects of the dual system of enforcement – involving both the EC Commission and the national courts, which he argues will help secure effective competition in the Community. The UK experience is dealt with by Professor *Richard Whish,* the well known authority on competition law.

The choice of remedies and the form of action is dealt with by *Peter Shanley,* Senior Counsel. *Brian Cregan,* Director of Competition Policy, Confederation of Irish Industry, provides insights into the legislation from the business perspective.

The submission of the Company and Commercial Law Committe of the Law Society is included in the book. The Committee's detailed comments on the legislation will be of assistance to practitioners. *The Competition Act, 1991,* together with an Explanatory Memorandum, and the relevant Articles of the EEC Treaty on competition are reproduced.

The formal regulation of business combinations in the United States dates from the Sherman Antitrust Act of 1890. The broad language of the Sherman Act raised problems of interpretation and, for some time, left businessmen and government officials uncertain as to which commercial practices were prohibited. *The Competition Act, 1991* (partly based on the Sherman Act) will cause practitioners difficulties of interpretation. *The New Competition Legislation,* published by the Irish Centre for European Law, will assist those who must apply the *Competition Act 1991.* This book should be warmly welcomed.

Eamonn G. Hall

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Parliamentary Committee

The Law Society's Parliamentary Committee has been reconvened under the chairmanship of Mr. *Patrick Glynn,* solicitor, and it is meeting monthly. The Committee's main function is to monitor draft legislation and to make representations, where appropriate, on proposed measures which affect the profession or the administration of justice.

The Committee would welcome submissions from members on Bills before the Oireachtas.
Correspondence should be addressed to:- *Margaret Byrne,* Secretary to the Parliamentary Committee, Law Society, Blackhall Place, Dublin 7. □

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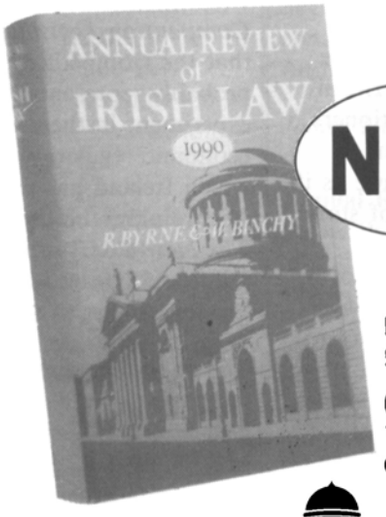
'The multiplicity of laws (including case law) would make Malthus stand aghast. More than ever before, the law is becoming an exacting profession, demanding of her devotees ever increasing knowledge. The *Annual Review* provides a rich analysis on a wide spectrum of law and should be a treasured part of every lawyer's library' *Eamonn Hall, Solicitor.*

'This is a comprehensive review of exceptional quality which is well written. This book, together with its predecessors, is an invaluable *vademecum* for all modern practitioners' *Gerard Hogan, Barrister-at-Law.*



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LAWBRIEF

by Eamonn G. Hall, Solicitor

The Future of Legal Practice

The future of legal practice was considered at the Corporate Counsel 1991 Fall meeting of the New York Bar State Association. Lawyers gazed into their crystal balls, found some elements of the future both murky and mysterious on some trends, but crystal clear on others. Mr. *John S. Luckstone,* the Vice Chairperson of the Corporate Counsel Section and General Attorney of Bell Communications Research, Inc., summarised the issues in the newsletter of the Corporate Counsel Section of the New York State Bar Association in January, 1992.

The New York lawyers started with the grim economic realities of the present day – the decline in legal business after the boom years of the 1980s. They confronted such matters as the future size and structure of law firms and legal departments, the structure of the firms and the relationship between inside and outside lawyers, the relative importance of the profit motive in outside practice, the use of paralegals and part-time professionals, the litigious nature of our society and possible legislative backlashes to it and growth and decline areas of legal practice. Many of the issues discussed are relevant to lawyers in Ireland.

The panellists agreed that there would be belt-tightening both in firms and in-house law departments. Big firms would pull back, and there would be a trend towards more small "boutique" firms that would specialise in particular areas of the law such as computers and environmental control. Corporate law departments would remain at almost their present size, and there would still be substantial work given to outside lawyers. The bigger law firms would accelerate the "up-or-out" process with associates, but there would be more lifetime senior associate positions offered. Partnerships would be at two levels – voting privileges with risk-taking and non-voting with indemnification.

In law departments of corporate undertakings, the focus of legal practice may shift away from reactive advice-giving towards more active involvement in the planning of business activities to prevent incurring significant legal liability, to be more helpful and to be part of the management team.

The New York lawyers considered that more and more law-school graduates and admitted lawyers would go into business positions; the glut of lawyers would drive them in this direction. Firms would continue to expand their overseas practices, probably through affiliations with existing foreign firms.

There was likely to be even more litigation as a result of the ever increasing amount of governmental regulation in an increasingly complex society. The New York lawyers considered that litigation would increase – perhaps not in the tort and malpractice areas where legislative restraints may be imposed, but certainly in the administrative and regulatory arenas.

The panellists agreed that environmental law compliance, intellectual property associated with computers and software systems, health care and international commercial transactions would be growing areas of legal practice. Unfriendly mergers and buy-outs would diminish, but friendly mergers and acquisitions may well increase. Also the availability of rapid telecommunications for voice, data and video-conferencing would allow law firms to practise successfully in small towns across the country, where costs were lower.

The lawyers concluded that the boom years of rapid growth in law firms and in-house legal departments were over, but the need for legal advice and work would remain strong. Lawyers in the future would be less detached legal oracles and more involved participants in the business decisions of their clients. This may create a challenge to the practising lawyer to maintain one's professional objectivity and integrity, but would provide exciting opportunities for personal growth and satisfaction in providing legal services of high quality and value to the client.

New Barristers' Complaints Body

The first meeting of the Barristers' Professional Conduct Tribunal was held on 30 January, 1992. The Tribunal, which has lay members nominated by the Federation of Irish Employers and the Irish Congress of Trade Unions, will deal with complaints from the public, solicitors and others concerning the professional conduct of barristers.

The members of the Tribunal are *Diarmuid O'Donovan SC* (Chairman), *Gerard Dempsey* (FIE), *Kevin Duffy* (ICTU), *Peter Kelly SC, Kevin Feeney SC, Harvey Kenny BL* and *Peter Somers BL.*

The setting up of this new Tribunal follows the adoption of a new Code of Conduct, Constitution and Disciplinary Code by the Bar last year. Where either party to a complaint is dissatisfied with the Tribunal's decision an appeal may be made to an Appeals Board chaired by the former President of the Circuit Court, The Hon. Mr. Justice *Peter O'Malley.*

Pictured at the first meeting of the Barristers Professional Conduct Tribunal were (Back Row – L to R) Peter Somers BL, Peter Kelly SC, Kevin Feeney SC, and Harvey Kenny BL. (Front Row – L to R) Gerard Dempsey (FIE) and Diarmuid O'Donovan SC (Chairman). (Absent from photograph: Kevin Duffy (ICTU).

Information about the new complaints procedures is available from the Tribunal's Secretary, *John Dowling,* at the Bar Council, Four Courts (Phone: (01) 735689). It is hoped that further details in relation to the new Tribunal will be published in next month's *Gazette.*

Stress and Pressure in the Law Office

For the majority of lawyers, pressure is a fact of life. The small victories i.e. completing paper work, meeting deadlines, answering 'phone calls, meeting quotas for billable hours are routine events rarely heroic and certainly without merit or national acclaim. The weight of responsibility for clients' money, property, family and even life and death add to the strain. There is usually no place for "team spirit" or camaraderie to dispel the setbacks and celebrate the glories, and the long days "in the field" leave little time for personal and family life. And in these economic times, there is an additional stress: the "players" may be laid off from their "teams" altogether. So how do lawyers withstand the pressure?

Dr. *Ellen Carni,* a clinical psychologist in private practice in Manhattan, specialising in stress management and counselling for lawyers, has written a note on the matter in the Newsletter of the General Practice section of the New York Bar Association Fall/Winter 1991. She referred to several surveys on the issue. According to a 1990 survey conducted by the American Bar Association, lawyers of all types and levels of practice are experiencing fatigue, marital unhappiness and are drinking alcohol in excess. Seventy-one percent of respondents felt "worn out" at the end of the workday, up from 61 percent found in a similar study conducted in 1984. The rate of marital dissatisfaction rose from 11 to 17 percent between 1984 and 1990, which is probably an underestimation commonly found in self-reports. In 1988, the Washington State Bar Association surveyed job-related impairments among lawyers, reporting an 18 percent rate of alcohol dependency.

In a 1989 survey of 34 managing partners in Denver based firms, the overwhelming majority of respondents reported having worked with a partner whose personal problems (usually alcoholism or marital difficulties) impaired his performance. Among the performance measures, billable hours and the ability to withstand pressure were most affected (79%), with quality of work coming in third (75%). Within the firm, teamwork and morale suffered the most.

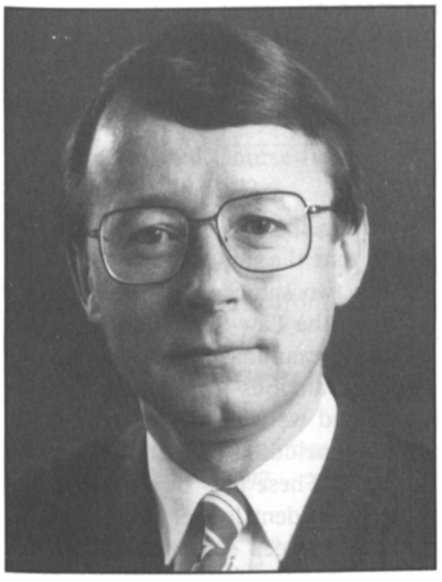
Dr. Carni stated that both research and practical experience show that nervousness, self-doubt, self-condemnation and negative judgment about one's situation lead to lapses in attention and concentration and inhibit the flow of mental processes necessary to generate viable and optimal solutions. The result is that performance falters and, if mental stress is prolonged, the lawyer may suffer symptoms such as headaches and backaches, insomnia, anxiety, depression and interpersonal conflict. In contrast, top performance is found among lawyers who take a non-judgmental attitude towards themselves and the challenges they face. Moreover, lawyers who are able to adopt a win-or-lose approach in their law practice experience greater clarity of mind and are able to deal with challenges in realistic and appropriate ways.

Are there other remedies? There are no easy solutions. *Lawbrief* may revisit this matter in a subsequent *Gazette.*

Setting up an Accounts Department in a Small Practice

Mr. *Frank Lanigan,* Solicitor, Carlow conducted a seminar entitled *Setting Up an Accounts Department in a Small Practice* late last year for the Institute of Legal Accountants of Ireland. Extracts from Mr. Lanigan's paper have been published in *Legal Abacus,* January, 1992. Mr. Lanigan's paper will be of considerable interest to members of the profession.

In his paper, Mr. Lanigan deals with the issue of the establishment of an accounts department in a small



Frank Lanigan

practice under the following headings: How to Start? Form a Committee, Method of Naming, Matters for Each Client, Audit, Nominal Ledger, New Files, Keeping up the Momentum, Cheques, Receipts, Transfers, Bills, Posting, Cash Flow Control, Credit and Bank Reconciliation Balance.

In the same edition of *Legal Abacus* for January, 1992, *Delia Venables,* an independent computer consultant, deals with the issue of *Client Data Bases.* Again, this article is of considerable practical interest to many practitioners.

Subject to Contract

Many lawyers will welcome the recent decision of the Supreme Court in *Boyle -v- Lee* (Irish Times Law Report, February 10, 1992). The Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty & Egan, JJ.) dealt, inter alia, with the issue of the meaning of the phrase "subject to contract."

The Supreme Court held that the law applicable to the formation of contracts for the sale of land should be as certain as it is possible to make it and to that end certainty in the question of what constitutes a sufficient note or memorandum of agreement for the purposes of satisfying the requirements of section 2 of the *Statute of Frauds (Ireland), 1695* was a desirable aim. The statement that a note or memorandum of a contract made orally was not sufficient to satisfy the Statute of Frauds unless it directly or by very necessary implication recognised not only the terms to be enforced, but also the existence of a concluded contract between the parties, and the corresponding principle that no such note or memorandum which contains any term or expression, such as "subject to contract" can be sufficient, even if it can be established by oral evidence that such a term or expression did not form part of the originally concluded oral contract, achieved the desired degree of certainty.

The Supreme Court so held in allowing the appeal of the defendants against the decision of Barrington J that there had been a concluded oral contract for the sale of land between the parties and a sufficient note or memorandum thereof to satisfy the requirements of Section 2 of the *Statute of Frauds (Ireland) 1695* and in holding that there was no contract for the sale of land between the parties which could be specifically enforced by the Court. □

Eamonn G Hall

Acts of the Oireachtas, 1991

No.

1. European Bank for Reconstruction and Development Act, 1991.
2. Marine Institute Act, 1991.
3. Sugar Act, 1991.
4. Destructive Insects and Pests (Amendment) Act, 1991.
5. Worker Participation (Regular Part-time Employees) Act, 1991.
6. Child Abduction and Enforcement of Custody Orders Act, 1991.
7. Social Welfare Act, 1991
8. Contractual Obligations (Applicable Law) Act, 1991
9. Radiological Protection Act, 1991
10. Presidential Establishment (Amendment) Act, 1991
11. Local Government Act, 1991
12. Educational Exchange (Ireland and the United States of America) Act, 1991
13. Finance Act, 1991
14. Adoption Act, 1991
15. Health (Amendment) Act, 1991
16. University of Limerick (Dissolution of Thomond College) Act, 1991
17. Child Care Act, 1991
18. Statute of Limitations (Amendment) Act, 1991
19. Temple Bar Area Renewal and Development Act, 1991
20. Courts Act, 1991
21. Courts (No. 2) Act, 1991
22. Trade and Marketing Promotion Act, 1991
23. Courts (Supplemental Provisions) (Amendment) Act, 1991
24. Competition Act, 1991
25. Payment of Wages Act, 1991
26. Fisheries (Amendment) Act, 1991
27. Sea Pollution Act, 1991
28. Liability for Defective Products Act, 1991
29. B & I Line Act, 1991
30. Industrial Development (Amendment) Act, 1991
31. Criminal Damage Act, 1991
32. Appropriation Act, 1991

New Preparatory Course for Entrance Examination

The Law School is proposing a new preparatory course for the Final Examination – First Part (FE-1) from next Autumn. According to the Chairman of the Education Committee, *Justin McKenna,* the examination has created an industry of grind schools over the years. "I believe that the Law School can provide as good a service if not better. We have recently upgraded our facilities in the Gym. This has enhanced the existing teaching facility and will enable us to make night courses available." Further details of the new preparatory course will be published later in the year.

Introduction of New Core Subjects
The Education Committee is discussing the introduction of two new core subjects, Equity and European Community Law, to be added to the six core subjects that form the Entrance Examination for admission to the Law School. Applicants to the Law School who are not law graduates will now have to sit examinations in these subjects in addition to the traditional six core subjects: Property, Contract, Tort, Company, Criminal and Constitutional Law. The new subjects may be examined as separate subjects making an eight subject Final Examination – First Part, or they may be included within the existing six subjects by having trusts and other equitable aspects of land law treated within the Law of Property. This might be examined in two papers rather than the present one, while EC Law may have its overall structure examined within the Constitutional Law paper. Other aspects may be covered in the other subject areas where EC Law must be considered in tandem with domestic law.

Justin McKenna explained that while the core subjects had not changed for over a decade, the relevance of other subjects had come to the fore in recent years. "Knowledge of equity and the law of trusts is a prerequisite to the understanding of tax and how it works. The correct and proper avoidance of tax and the schemes relating to it is an essential part of law students' training. Equity, as every practitioner knows, has a fundamental effect on the practice of law in its many aspects. It is important that non-law graduate entrants would also establish a basic level of knowledge of European Community Law since European law permeates through a variety of different modules now on both the professional and advanced courses."

Law Graduates now exempt from FE-1 must anticipate that they will need to cover E.C. Law and Equity as well as the full Law of Property syllabus. This is an area where consultations with the universities must now be put in place.

According to Justin McKenna, the Education Committee is acutely aware that the imposition of a further two subjects at the entrance point to the Law School will create a strain on examination candidates. "We are anxious to minimise this strain and we will explore various options including the timing of exam sittings." These may be spread to give the student longer time to prepare between each examination. A new preparatory course which would be run by the Law School from next Autumn would also be a help, he said.

New Law School Fees
A new schedule of fees has come into operation with effect from 1 February, 1992. This is the first increase in fees since 1989. The increases have been kept to a minimum, but are necessary if the Law School is to continue to operate on a break-even basis.

The new schedule is set out below: –

SCHEDULE

	£
1. On each application to attend the First Irish examination or Second Irish examination	50.00
2. On each application to attend the Preliminary Examination	100.00
3. On each application for entry on the Register of Apprentices by the Registrar of Indentures of Apprenticeship, other than supplemental Indentures	350.00
4. On application (whether for the first or any subsequent time) to take each subject of the Final Examination – First Part	25.00
5. On each application to attend the Professional Course	2,407.00
6. On each application to attend the Advanced Course	965.00
7. On each application for permission to give late notice of intention to attend any examination	25.00
8. For each day or part of a day re-attending the Professional Course or the Advanced Course (including re-taking any individual part of the Final Examination – Second Part or the Final Examination – Third part)	25.00
9. On application for entry of a name on the Roll of Solicitors	100.00

Course Timetable 1992
The following courses will take place in the Law School during the remainder of 1992.

30th Professional Course from 23/3/92 – 10/7/92

31st Professional Course from 24/8/92 – 11/12/92

24th Advanced Course from 18/3/92 – 8/5/92

25th Advanced Course from 15/6/92 – 31/7/92

26th Advanced Course from 27/10/92 – 11/12/92

The Society reserves the right to vary dates and duration of courses.

Professional Course Requirements
It should be noted that a student may not enter on a Professional Course unless his/her indentures of apprenticeship have been properly executed following issue of the Society's letter of consent. Furthermore, the intending student must have spent three months in a solicitor's office before embarking upon the course.

Payments to Apprentices
The Council of the Law Society has recommended as a guideline that apprentices should be paid £85.00 per week gross for the three month period spent in an office before they embark on the Professional Course. For the eighteen month period from the end of the Professional Course to the beginning of the Advanced Course, the Council of the Law Society has recommended the following salary structures for apprentices:

first six months £105 per week gross,

second six months £115 per week gross and

final six months £125.00 per week gross.

Payment by the office of all or part of the Professional or Advanced Course fees may be taken into account. In 1990, the Council of the Law Society also recommended that a newly-admitted solicitor should be paid a salary of not less than £10,000 to £11,000 per annum in his or her first year of practice.

□

Pocket Diaries 1993

The Law Society will be publishing a 1993 edition of its highly popular legal pocket diary.

The diaries are published in a handy week-to-view format with an appointments section and contain a range of useful information. The diaries are a must for every solicitor and an ideal presentation gift to clients. An order form for the diaries has been distributed with this issue of the Gazette.

□

Notice

In the matter of Vincent O'Donoghue solicitor and in the matter of the Solicitors Acts, 1954 and 1960.

Record No. 2SA/1988

By order of Mr. Justice Costello made in the above entitled proceedings on 24th day of February, 1992, it was ordered pursuant to Section 20 (1) (a) of the Solicitors (Amendment) Act, 1960 that no banking company shall without leave of the High Court make any payment out of a banking account in the name of the solicitor Vincent O'Donoghue or in the name of his firm Jefferson Lloyd Solicitors, 95 St. Stephen's Green, Dublin 2.

28th February, 1992.

Patrick Joseph Connolly,
Registrar of Solicitors.

DUBLIN 2 OFFICES
Ideal for young Solicitors starting up
Heating and telephone system installed
Very reasonable rent
Contact: Anthony O'Neill at 682588 or Fax 682991

Mary O'Sullivan

Doyle Court Reporters

Congratulations to one of our reporters. Mary O'Sullivan, who has become the first person in Ireland or Britain to be awarded the Certificate of Merit by the National Court Reporters Association of America, C.M.. In order to obtain the certificate, the highest standard set by the NCRA, Mary had to write shorthand at 260 words per minute. She is currently a member of our team of reporters providing a daily transcript of the evidence to the Beef Tribunal at Dublin Castle.

Practitioners please note that the Michaelmas, 1991, personal injury judgements are now available.

2, Arran Quay, Dublin 7.
Telephone 722833 and 2862097 (after hours). Fax: 724486.

Lost Land Certificates

Land Registry — Issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

Peter Warde Quinn, Derrynaneane, Kilmactranny, Boyle, Co. Sligo. Folio: 23385; Lands: Derrynaneane; Area: 0 (a) 3 (r) 25 (p). **Co. Sligo.**

Wilhelm Bartmann (deceased), Folio: 7390; Land: Ballynagran (E.D. Dunganstown East); Area: 1.182 acres. **Co. Wicklow.**

William Hughes, 59 Kennelsfort Road, Palmerstown Upper, Co. Dublin. Folio: 4103L; Townland: Palmerstown Upper, Barony: Uppercross; property situate on the west side of Kennelsfort Road (Upper) in the Village of Palmerstown. **Co. Dublin.**

Ellen Cecilia O'Neill. Folio: 15223; Land: Dundrean (E.D. Birdstown); Area: 0.238 acres. **Co. Donegal.**

Thomas McGlynn, Deerpark, Boyle, Co. Roscommon. Folio: 33269; Land: Townland: Deerpark. **Co. Roscommon.**

John Commons, Clybawn, Barna, Co. Galway. Folio: 54020; Townland: Clybaun; Area: 0a 1r 0p. **Co. Galway.**

Roadstone Limited, Folio: 11967; Land: Clonmagaddan; Area: 6a 3r 24p. **Co. Meath.**

Mary Ann Madden, Woodford, Co. Galway. Folio: 55022; Townland: (1) Bolag, (2) Woodford; Area: (1) 21a 2r 36p, (2) 1a 1r 37p. **Co. Galway.**

James (Orse John James) Ryan of Laragh, Attymon, Athenry, Co. Galway. Folio: 52800; Land: (1) Laragh, (2) Knockatogher, (3) Cappanasruhaun; Area: (1) 25a 3r 10p, (2) 17a 1r 15p, (3) 1a 1r 23p. **Co. Galway.**

Andrew Kavanagh, Thomastown, Skerries, Co. Dublin. Folio: DN007492; Land: Thomastown; Barony: Balrothery East. **Co. Dublin.**

Joseph Drennan, Folio: 5572; Land: Ballymaslee; Area: 53 a 0 r 28 p. **Co. Kilkenny.**

John J Higgins, Lustia, Leitrim. Folio: 14795; Townland: Cootehall; Area: 18a 0r 14p. **Co. Roscommon.**

Nora Frances Cogan. Folio: 36335; Land: Carrigaline; Area: 7.211 acres. **Co. Cork.**

Eugene and **Pauline Travers,** Folio: 851F; Land: Aghwater; Area: 0a 0r 11p. **Co. Carlow.**

Cecilia Mairlot O'Connor, Folio: 79F; Land: (1) Gneeves (E.D. Cape), (2) Gneeves (E.D. Cape), (3) Kilmoon, (4) Kilmoon, (5) Clodagh, (6) Farrancoush, (7) Farrancoush, (8) Farrancoush; Area: (1) 26a 2r 4p, (2) 18a 2r 17P, (3) 29a 1r 1p, (4) 17a 0r 2p, (5) 8a 3r 31p, (6) 4a 0r 5p, (7) 17a 2r 0p, (8) 15a 2r 34p. **Co. Cork.**

Charles Herman, Folio: 7834; Land: Part of the lands of Carrowtrasna in the Electoral Division of Greencastle Barony of Inishowen East and County of Donegal. Area: (1) 19a 2r 2p. **Co. Donegal.**

Loughman's Garage Limited, Folio: 7004; Land: Bennetsbridge; Area: 0a 2r 0p. **Co. Kildare.**

Thomas Kelly, Curraghroe, Lanesboro, Co. Roscommon. Folio: 307R; Land: Granaghen (Dillon); Area: 12a 0r 17p. **Co. Roscommon.**

Mary Brady, Folio: 23224; Land: Walsheslough; Area: 0a 2r 14p. **Co. Wexford.**

Dawson Builders Ltd. Folio: 11668; Land: Newtown. **Co. Wicklow.**

Laurence and **Bridget (Carroll),** 5 Fairway Flats, Lifford, Ennis, Co. Clare. Folio: 6431F; Land: Cloghleagh. **Co. Clare.**

Oliver C. Waldron, Folio: 12224F; Land: (1) Leenane, (2) Leenane; Area: (1) 1.550 acres, (2) 2.038 acres. **Co. Cork.**

Connell Gillespie, Folio: 16473; Land: Malinmore (part); Area: 52a 2r 28p. **Co. Donegal.**

Michael Cooney and **Catherine Cooney,** Folio: 386F; Land: Tonduff; Area: 0a 1r 0p. **Co. Laois.**

Helen M. & Alexander B. Kenny, Slievemore Cottage, Dugart, Achill Island, Co. Mayo. Folio: 52525; Land: Slievemore; Area: 2a 1r 20p. **Co. Mayo.**

Timothy Cronin, Folio: 18204; Land: Part of the lands of Gurteenroe; Area: 40a 1r 19p. **Co. Cork.**

The Dublin General Warehousing Ltd. 91-94 North Wall, Dublin 1. Folio: 72210L; Land: Property situate to the north of Upper Mayor Street in the Parish of St. Thomas and district of North Central. **Co. Dublin.**

Nicholas Cullen, Folio: 6360F; Land: Ballysax Little. **Co. Kildare.**

James A. Kennedy, Folio: 3542F; Land: Part of townland of Lagavooren in the Borough of Drogheda. **Co. Louth.**

Daniel Colgan, Folio: 25306 and 25305; Land: (1) Greenan, (1) Greenan, (2) Greenan on Folio 25305, (2) Grennan on Folio 25306; Area: (1) 12a 3r 0p, (2) 321a 0r 10p (7 undivided 29th parts) on Folio 25305, (1) 10a 1r 30p, (2) 321a 0r 10p (5 undivided 29th parts) on Folio 25306. **Co. Donegal.**

Glenview Motors Ltd. Folio: 57176; Land: (1) Gurteenroe, (2) Gurteenroe; Area: (1) 0a 1r 3p, (2) 0a 0r 38p. **Co. Cork.**

Michael King Maguire and **Anne Marie Maguire,** Folio: 6848F; Land: Parts of lands of (1) Powerfield and (2) Kilderry. **Co. Limerick.**

James Joseph O'Hanlon, 24 Larkfield Grove, Kimmage, Dublin. Folio: DN014552L; Land: property known as 24 Larkfield Grove, situate on the West side of Larkfield Grove in the Parish of St. Peter and District of Rathmines. **Co. Dublin.**

Andrew Mary Frances McEntee and **Anna Marie McEntee.** Folio: 44351; Land: Townland of Templeogue and Barony of Uppercross; Area: 0a 0r 9p. **Co. Dublin.**

Michael McHale, Gortnadeen, Crossmolina, Co. Mayo. Folio: 20437; Land: Gortanden; Area: 56a 0r 19p. **Co. Mayo.**

James Crosse (deceased). Folio: 7514R; Land: Ballaghboy; Area: 95a 0r 9p. **Co. Tipperary.**

Osborne Trading Ltd. Folio: 10540F; Land: (1) and (2) Dromderrig; Area: (1) 0a 1r 1p, (2) 0a 1r 10p. **Co. Cork.**

Kathleen O'Donovan, Folio: 41705F; Land: No. 53 Doyle Road situated in the Parish of St. Nicholas, Cork. **Co. Cork.**

Patrick and **Margaret Joyce,** 75 Cill Cais, Old Bawn, Tallaght, Co. Dublin. Folio: 32145L; Land: property situate on the north side of Cill Cais in the parish and town of Tallaght. Townland: Oldbawn Barony: Uppercross. **Co. Dublin.**

John Mulrooney, Folio: 6710; Land: (1) Gorteen (part) (2) Knockloughlin (part); Area: (1) 13a 1r 32p, (2) 19a 2r 28p. **Co. Kings.**

John O'Connor, Folio: 1432; Land: Part of lands at Kilgory; Area: 34a 1r 11p. **Co. Queens.**

Daniel Joseph Madden and **Mary Madden.** Folio: 1251F; Land: Magheracar; Area: 0a 0r 32p. **Co. Donegal.**

Bernard White (deceased), Folio: 6375; Land: Part of the lands of Garvagh Glebe; Area: 21 acres. **Co. Leitrim.**

Michael J. Mitchell, Ballagh, Bushypark, Co. Galway. Folio: 53753; Land: (1) Ballagh, (2) Ballagh: Area: (1) 1a 1r 5p, (2) 1a 2r 24p. **Co. Galway.**

James Mollaghan, Folio: 286; Land: part of the lands of Cartrongolan; Area: 8a 1r 0p. **Co. Longford.**

Noel Keating, Folio: 26870. Land: (1) Townland: Clonee, Barony: Dunboyne Plan 94 0.S No 51/13, (2) Townland: Clonee Barony: Dunboyne Plan 95 0.S No 51/13, (3) Townland: Clonee Barony: Dunboyne Plan 96 0.S No 51/3; Area: (1) 0a 0r 33p, (2) 0a 0r 3p, (3) 0a 1r 4p. **Co. Meath.**

John Fitzpatrick, Folio: 4529 (now closed to 16427); Land: (a) Castlegannon, (b) Crowbally; Area: (a) 210a 0r 34p, (b) 43a 2r 15p. **Co. Kilkenny.**

Mary Valarasan, Folio: 683L; Land: Part of the Townland of Marshes Upper. **Co. Louth.**

Sean Grimes, Lodge, Carrick-on-Shannon, Co. Roscommon. Folio: 20268; Land: (1) Lodge, (2) Drumercool, (3) Deerpark (E.D. Danesfort); Area: (1) 8a 2r 15p, (2) 0a 2r 10p, (3) 12a 2r 36p. **Co. Roscommon.**

Wills

Gubbins, Joseph, deceased, late of Shanaclough, Oola, Co. Limerick. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on the 3rd day of January, 1991, please contact Richard R. O'Hanrahan & Co., Solicitors, 7 William Street, Limerick, telephone: (061) 416469.

Gubbins, Patrick, deceased, late of Shanaclough, Oola, Co. Limerick. Would any person having knowledge of the whereabouts of a will of the above named deceased who died on the 7th day of November, 1991, please contact Richard R. O'Hanrahan & Co., Solicitors, 7 William Street, Limerick, telephone: (061) 416469.

Dolan, Mary J., deceased, late of 7 Main Street, Athlone, Co. Westmeath. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on the 7th November, 1991, please contact Messrs. Timothy J.C. O'Keeffe & Co., Solicitors, Abbey Street, Roscommon. Telephone: 0903-26239.

Newell, Thomas, late of Curracuggeen, Headford in the County of Galway (farmer). Will any person having knowledge of the whereabouts of a will of the above named deceased who died on the 17 day of March, 1969, please contact Messrs. MacDermot and Allen, Solicitors, 10 St. Francis Street, Galway. Tel: 091-67071.

Miley, James, deceased late of 45C, Harty Place, Dublin 8. Would anyone having knowledge of the existence or whereabouts of the last will and testament of the above named deceased who died on the 11th December, 1991, please contact Yvonne R. Gilmer & Co, Solicitors, 129 Cromwellsfort Road, Walkinstown, Dublin 12. Tel: 551227.

O'Shaughnessy, Nora, late of "Ard Mhuire", Oughterard, in the County of Galway – retired military nurse. Will any person having knowledge of the whereabouts of the will of the above named deceased who died on the 24th day of July, 1990 please contact Messrs. MacDermot & Allen, Solicitors, 10 St. Francis Street, Galway. Tel: 091-67071.

Waters, Michael, deceased, late of Inismurray Island, Grange, Co. Sligo. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on or about the 1st January, 1951, please contact Horan Monahan & Co., Solicitors, O'Connell Street, Sligo.

Waters, Mary Ann, deceased, late of Inismurray Island, Grange, Co. Sligo. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on or about the 2nd September, 1970, please contact Horan, Monahan & Co., Solicitors, O'Connell Street, Sligo.

Wunder, Isaac, deceased, late of 77 Parnell Street, Dublin 1. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on 3 December, 1989, please contact Messrs. Anne B. Rowland & Co., Solicitors, 16 Upper Ormond Quay, Dublin 7. Tel: 787934 Fax: 774731.

Davey, Robert James, deceased, late of 13, Beechwood Road, Ranelagh formerly of 9, Cullenswood Park, Ranelagh, Dublin and Portmarnock, Co. Dublin. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on the 2nd day of December, 1991, please contact Messrs. Moore Kiely and Lloyd, Solicitors, 31 Molesworth Street, Dublin 2. Telephone: 767485.

McNicholl, Marie-Therese, deceased, late of Hazardstown, Naul, Co. Dublin, medical doctor. Would any person having knowledge of the whereabouts of a will of the above named deceased who died on 18th day of December, 1991, contact M.C. Dolan & Co., Ridge House, 1 Conyngham Road, Dublin 8. Telephone: 6797133/6792807. Fax: 6793264.

Egan, William, deceased, c/o Herbert and Jean Harper, Avoca Manor, Avoca, Co. Wicklow and formerly of 85 Larkfield Grove, Harolds Cross, Dublin 6. Would any party having knowledge of the whereabouts of a will of the above named deceased who died on the 23rd day of November, 1991 please contact Mason Hayes & Curran, Solicitors, 6 Fitzwilliam Square, Dublin 2. Telephone: (01) 766961.

Fenton, John, deceased late of Knockalisheen, Ballymacarbry, Co. Waterford. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on the 19th day of December, 1991, please contact Messrs. J.J. O'Shee, Murphy & Co., Solicitors, New Quay, Clonmel. Telephone: (052) 22411.

Baker, William A., deceased late of 26 New Street, Skerries, Co. Dublin (formerly of 59 Collrua Drive, Beaumont, Dublin 9). Will any person having knowledge of the whereabouts of a will of the above named deceased who died on the 26th day of July, 1991, please contact Michael E. Hanohoe & Co., Solicitors, 21 Parliament Street, Dublin 2.

O'Connor, Patrick Joseph, deceased. Would anyone having knowledge of the whereabouts of a will of the late Patrick Joseph O'Connor, late of 77 Pearse Brothers Park, Ballyboden, Dublin 16, who died on the 13th February, 1991 please contact the undersigned solicitors as soon as possible. Andrew Davidson & Co., Solicitors, Ely House, 1 Nutgrove Avenue, Rathfarnham, Dublin 14. Telephone: 931622/931820. Fax: 964104.

Lost Title Deeds

Premises: 60 Grosvenor Road, Rathmines, Dublin 6.
Catherine E. Levie (deceased)
Wilhelmina Sarah Organ (deceased)
Would anybody having knowledge of the whereabouts of the above Title Deeds which are stated to be lost or mislaid, please contact: M.P. O'Donoghue & Co., Solicitors, 55 Adelaide Road, Dublin 2. Tel: 768284.

Would any solicitor being in possession of title deeds or wills for the under mentioned deceased persons kindly contact Messrs. Hayes Breen McCarthy and Shee, Solicitors, ICC House, Charlotte Quay, Limerick. Ref: MG/CF, which said firm of solicitors are acting in the administration of the estates of the under mentioned deceased persons as follows:

1. **James Collins** late of Ballytrasna, Old Pallas, Co. Limerick, who died on the 14th day of January, 1992.
2. **Thomas Collins** late of Ballytrasna, Old Pallas, Co. Limerick who died on the 21st day of March, 1965.
3. **John Collins** late of Ballytrasna, Old Pallas, Co. Limerick, who died on or about the 23rd day of April, 1972.

Maurice Gubbins and Mary Gubbins of 10 Magenta Place, Sandycove, Co. Dublin.
Would anybody having knowledge of the existence of the whereabouts of the original title documents of 10 Magenta Place, Sandycove, Co. Dublin the property of the late Maurice Gubbins and Mary Gubbins, please contact Daly Galvin, Solicitors, 76 Lower Leeson Street, Dublin 2. Tel: 614655/ 614906.

Miscellaneous

Established South City Solicitors Practice For Sale
Principals only need apply.
Reply in strictest confidence to Box No: 20

Myodil Syndrome: Are any of your clients suffering from chronic back pain which may have been caused by a dye called Myodil which apparently is administered for the purpose of taking X-Rays? If so, please contact the undersigned with a view to forming a Myodil Solicitors Group to process these claims. Richard R. O'Hanrahan, Solicitors, Limerick Law Chambers, 7 William Street, Limerick. Tel: (061) 416469, 416695, 416177. Fax: (061) 416053.

FOR SALE: Busy practice in North-East. For details, contact McDwyer Lennon & Co., Chartered Accountants, Cavan. 049-31088.

Dublin Solicitors Practice for Sale: Work in progress 50K. Suitable arrangements can be made concerning consultancy, premises and other matters if required. Replies in strictest confidence to Sean Cleary & Co., Auditors and Accountants, 52 Pine Valley Avenue, Rathfarnham, Dublin 14. Tel: 945581/943121.

Solicitors acting for uninsured cargo holders on M.V. Kilkenny wish to contact other firms in a similiar position to pool information and resources and if necessary investigate the possibilities of taking a class action in relation to the losses sustained. Please contact Messrs. William F. Semple & Co., Solicitors, Lough Corrib House, Waterside, Galway. (Reference PC). Telephone: (091) 67373.

Files Unscrambled. Have you files in the office that you just cannot reach because of temporary pressure of work? An experienced solicitor has the time and patience to help you clear arrears and process the subject matter in whatever area, to a conclusion. It matters not whether it comes in single files or in battalions! Reply to Box No: 21.

Two Rural Seven-Day Publicans Licences Required: Enquiries to: Matthew Molloy & Co., Solicitors, 63 Prospect Hill, Galway. Tel: (091) 67545.

Change of Address: M&B Ceillier, Solicitors, have moved offices to 12 Whitefriars, Peter's Row, Aungier Street., Dublin 2. Tel: 780700. Fax: 780978.

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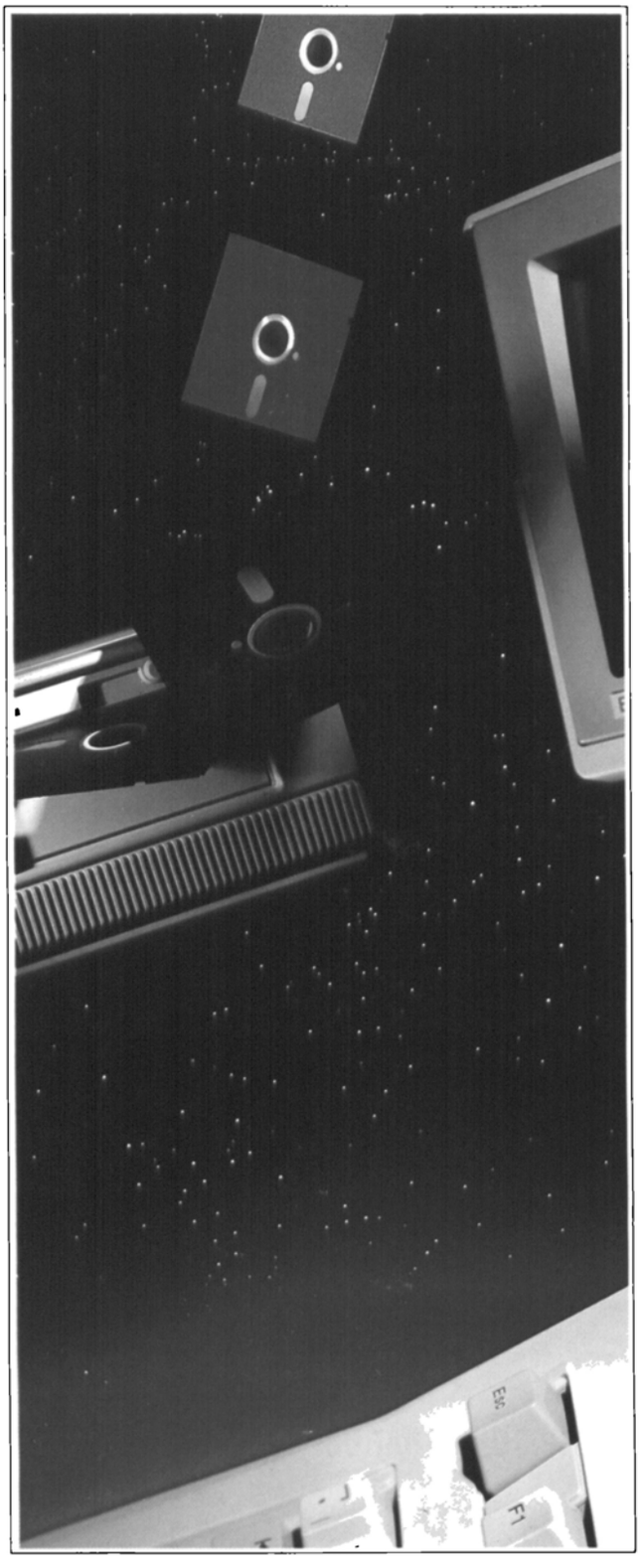

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Front Cover: At a reception in Áras an Uachtaráin for the Joint Councils of the Dublin Solicitors Bar Association and the Belfast Solicitors Association were l-r *David Walley,* President, DSBA; *Mary Robinson,* President of Ireland; *Rowan McM. White,* Chairman, BSA.

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VIEWPOINT

Corporate Guardians

Recent corporate difficulties have focused attention on aspects of corporate governance in Ireland. The roles of the chairmen and non executive directors have come under scrutiny, particularly in the Greencore situation. Without wishing to add to the comment on that particular matter, it does appear that there are unrealistic expectations of the power and influence which non-executive directors can exert.

As things stand, it may be too much to expect that non-executive directors – effectively chosen by the board – exercise firm control over a thrusting chief and other senior executives in a prospering company. The sort of person who is likely to be chosen as a non-executive director, will probably be the holder of several similar positions in other companies, is likely to be a semi-retired businessman or an accountant, lawyer or banker, or an executive of another company. The atmosphere of the board is likely to be too "clubbable" and an autocratic chief executive supported by other executive directors is likely to be able to make life extremely uncomfortable for any non-executive director who wishes to "blow the whistle" on any aspect of the company's affairs. Supervising one's peers is an unenviable task at the best of times and may be virtually impossible in a board room situation.

Committees of non-executive directors are of course asked from time to time to take on particular duties – perhaps in the area of recruitment of senior executives – but to ask them to be the regular guardians of the interest of the company, its shareholders or its employees is to impose a herculean task on them.

A particular problem arises for the "worker directors" in our semi-State sector. In a number of such companies the clash between their duties as directors under our company law and the loyalty which they naturally feel for the interests of the workers they represent has given rise to considerable difficulties on several occasions.

When the concept of the worker director was being introduced, some consideration was apparently given to introducing the German two tier system of corporate governance. Perhaps it was time it was looked at again.

German public companies have both a board of directors and a supervisory board or committee. The supervisory board appoints the board of directors, supervises its activities and may enquire into the directors' conduct and the state of the company's affairs. Two-thirds of the members of the superior board are elected by the shareholders and the other one-third by the employees by secret ballot. The supervisory board therefore operates independently of the board of directors which carries on the day to day management of the company. The supervisory board meets several times a year to receive reports from the board of directors and apparently exercises significant influence on the conduct of the company.

This German system has been in operation throughout the years of Germany's economic progress in the post 1945 period. It has clearly not inhibited the success of Germany's great trading companies. Perhaps it is time we thought of including in our company legislation some of the practices which have worked well in countries which are economically prosperous and not continue to depend largely on those which have recently proved so horrendously inadequate in Great Britain.

□

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Independent Advice on the Line

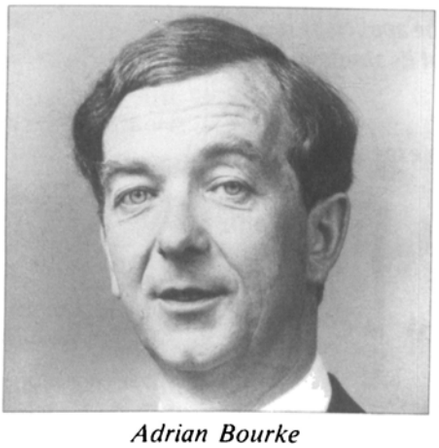
In his address to the parchment ceremony on 10 April, Law Society President, *Adrian Bourke*, strongly attacked provisions in the Solicitors (Amendment) Bill, 1991 on conveyancing and probate questioning the Government's motivation and whether there was any public demand for these services to be provided by financial institutions.

"The Solicitors Bill, 1991, now being debated in the Oireachtas, causes me a degree of sadness. I can celebrate the good points, which the Society first sought when it asked the Government to bring in the Solicitors Bill and indeed presented Government with the bones of that Bill on which flesh was to be put.

"But it is my duty, as President of this Society, to draw to your attention some of the more difficult and worrying issues that loom over your legal lives, even as you start them today.

"There has been nothing, of which I am aware, since I first entered legal life in 1965, which has indicated to Government that, in the areas of conveyancing and probate lawyers are anything other than competent. There have been no outrageous prices charged, there have been no scandals, the countryside is not littered with bad titles and from my researches I am unaware of any public demand for these services to be provided by any persons other than lawyers.

"I would remind you at this point that we do not sell money, we do not run credit cards, or building societies, or life assurance, or travel agencies, nor do we seek to extract teeth, do veterinary medicine on small animals or take out your appendix!



Adrian Bourke

Law Reform

"But we are good at conveyancing and probate. We have been trained, well trained, at great expense. There are fine legal offices throughout this State, carefully honed to look after our clients' interests in those areas. We have available to us, within the Bar Library, able barristers, junior and senior alike, capable of rendering expert advice to us in these matters, or assisting us should we come to a court situation in either conveyancing or in probate. Many of the laws of Ireland, in these areas, have been developed within those very courts, while our legislators and Governments have failed to provide the reforms really needed, especially in land law.

"Then, the Fair Trade Commission sat, first with a membership of three, then the participation of two, and finally a report. This report, in which there was disagreement on key issues, says that conveyancing and probate should be more competitive, reflecting the trend in England. Must we always slavishly follow as John Bull's Other Island the failed Thatcher policies? Government, in its wisdom, has resolved to hand these services on a plate to banks, building societies and trust corporations.

Employment

"These particular provisions of the Bill have been debated by two general meetings of the Society, held in November and December, 1991. The Council has debated the provisions. Bar Associations, all 26 of them throughout the country, have considered these sections. They are universally viewed as detrimental to the legal profession which you are joining today. They are unnecessary, they are an intrusion, and they are unwanted, because they seek to assuage a public demand which is not evident. They hand over to banks and building societies an area where citizens require great privacy, skilled assistance and independent advice. Can the financial conglomerates be trusted now to do a day's work, not to go on strike – something which lawyers have never done in the history of the State? These provisions have the potential to leave the industry and business of solicitors' practices devastated throughout the land, with unemployment likely for solicitors and for their worthwhile and loyal staff in their offices in every parish. This is not an alarmist view, it is an inevitable fact.

"The Law Society calls on all its members to use their combined influence to make it clear to members of the Oireachtas that these provisions are unjust and unnecessary and should be dropped from the Bill. For its part, the Society continues to lobby strenuously on your behalf and on behalf of the public's right to independent legal advice".

□

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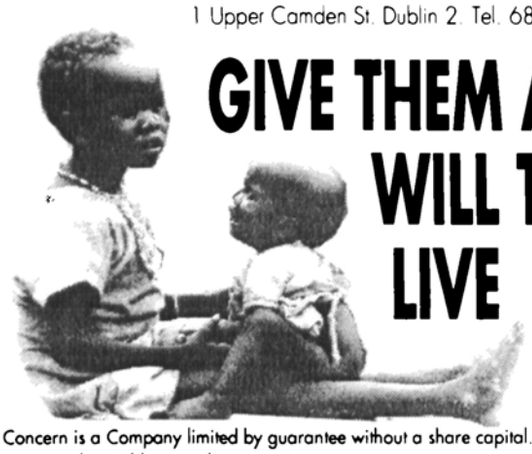

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Transfers Between Associated Companies

The Revenue Commissioners have prepared a form of draft statutory declaration in order to obtain relief under Section 19 of the Finance Act, 1952, as amended, for transfers between associated companies. This draft statutory declaration is available from the Stamps Adjudication Office of the Revenue Commissioners, Dublin Castle or from *Eileen Brazil,* Secretary of the Taxation Committee of the Law Society.

Taxation Committee

Attorney General's Scheme

The Attorney General's Scheme was first referred to in the case of *Application of Michael Woods* [1970] IR154. Counsel for the AG confirmed to the Court that in certain circumstances the AG would defray the legal costs of a person who could not afford to pay fees.

The Office of the Attorney General has now sent to the Criminal Law Committee of the Law Society a copy of the scheme and we publish same below. We would draw practitioners' attention in particular to clause 2.

The Committee are at present consulting with the Attorney General's Office in relation to the adequacy of fees payable under the scheme. At the moment fees payable are running at approximately one-third of the fees that solicitors would be paid if costs were awarded to them.

The Attorney General's Scheme

The provisions of the Attorney General's Scheme in the High Court and Supreme Court are as follows:

"1. The Scheme applies to the following forms of litigation (which are not covered by Civil or Criminal Legal Aid):

(i) *Habeas corpus* applications.
(ii) Bail Motions.
(iii) Such Judicial Reviews as consist of or include Certiorari, Mandamus or Prohibition.
(iv) Applications under section 50 of the Extradition Act, 1965.

2. The purpose of the Scheme is to provide legal representation for persons who need it but cannot afford it. *It is not an alternative to costs.* Accordingly, a person wishing to obtain from the court a recommendation to the Attorney General that the Scheme be applied must make his application (personally or through his lawyer) at the *commencement* of the proceedings.

3. The applicant must satisfy the court that he is not in a position to retain a solicitor (or, where appropriate, counsel) unless he receives the benefit of the Scheme. To this end the applicant must provide such information about his means as the court deems appropriate.

4. The court must be satisfied that the case warrants the assignment of counsel and/or solicitor.

5. If the court considers that the complexity or importance of the case requires it, the recommendation for counsel may also include one senior counsel.

6. The costs payable to the solicitor, and the fees payable to counsel, under the Scheme are those which would be payable in a case governed by the Criminal Justice (Legal Aid) Regulations current for the time being, applied *mutatis mutandis.*

7. Where there is more than one applicant, but only one matter is at issue before the court, the solicitor and counsel assigned shall represent all the applicants."

Criminal Law Committee

Family Home Protection Act, Powers of Attorney

The Conveyancing Committee receives many queries as to whether it is safe to accept the completion of a consent under the Family Home Protection Act executed by an agent on foot of a Power of Attorney. The committee is satisfied that a person can execute any document on foot of an appropriate Power of Attorney as fully and effectively as the grantor of the Power of Attorney could execute it himself. This clearly includes the execution of a consent under the Family Home Protection Act. Ideally the form of Power of Attorney should be specifically drafted to include reference to the giving of a consent for a specific transaction although, clearly, a properly drafted general Power of Attorney would be adequate. As in relation to all Powers of Attorney the Committee repeats its warning to make the giving of the consent a principal power under the Power of Attorney and not an ancillary one.

Solicitors should also think twice before agreeing to accept an appointment under a Power of Attorney to give a consent unless they have the clearest possible instructions – preferably in writing. Again, solicitors should take care lest

(Continued on page 100)

by Eamonn G. Hall, Solicitor

Barristers' Professional Conduct Tribunal

Brief details of the new Barristers' Professional Conduct Tribunal were published in the March *Gazette,* in order to update the complaints procedure and take account of recent judicial decisions in regard to the procedures of professional bodies in disciplinary matters, the Bar Council set up the new body with lay representation to consider complaints against barristers, whether from solicitors, members of the public or others.

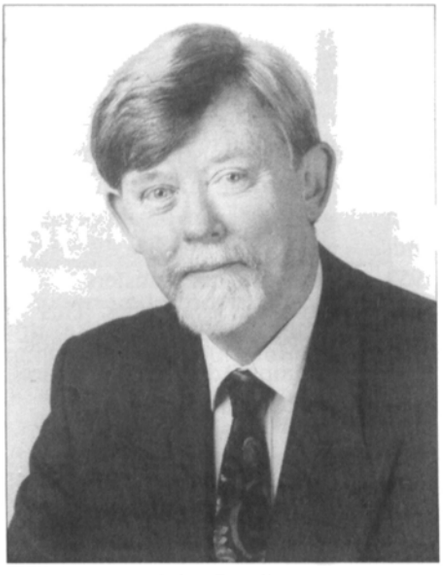
The Bar Council itself, through its Professional Practices Committee, may act as a complainant to the Tribunal.

The new Professional Conduct Tribunal has wide-ranging powers and sanctions. It sets down a procedure with time limits for complaints to be dealt with. Solicitors or others making complaints against a barrister in respect of his professional conduct, must do so on a complaint form which will be furnished to the barrister against whom the allegation has been made. The barrister will have a period of fourteen working days from the date of receipt by him of the complaint to reply to it. The complainant or barrister may request an oral hearing, but it is a matter for the Tribunal to decide whether to hold such hearing or not. In the event of a barrister refusing or failing to provide any further information within a time specified by the Tribunal, the Tribunal shall be entitled to proceed with the hearing of the complaint in the absence of such barrister.

The new procedure provides that the Tribunal shall decide whether to uphold or reject a complaint and, if a complaint is upheld, to find whether the barrister has been guilty of a breach of the Code of Conduct or of a breach of proper professional standards. Decisions of the Tribunal shall contain a summary of the complaint and the reply thereto and should also contain a summary of the evidence considered by the Tribunal. A decision will also set out the findings of fact reached by the Tribunal and the Tribunal shall also set out the reasons why it has reached its decision together with the penalty, if any, to be imposed. Under the terms of the Disciplinary Code, the Tribunal is entitled to make a disclosure with its decisions or any part thereof in such manner as it thinks fit.

The Code allows the Tribunal to impose penalties in a case where it has upheld a complaint that a barrister has been guilty of conduct constituting a breach of the Code of Conduct or constituting a breach of proper professional standards. These are as follows:-

- take no action save to record the result of the complaint;
- admonish the barrister;
- impose a fine:
- require the payment of specified fees by the barrister, or order the barrister to forego the payment to him of specified fees;
- to suspend the barrister from membership of the Law Library and/or to remove him from the Register of Practising Barristers either for a specified period or until a particular specified act has been carried out;
- to exclude the barrister from membership of the Law Library;



John Dowling

- to remove the barrister from the Register of Practising Barristers;
- to recommend to the Benchers of King's Inns that the barrister should be disbarred.

A barrister in respect of whom a complaint has been dismissed shall be entitled to require that the fact of the complaint was not sustained shall be disclosed.

The membership of the Conduct Tribunal consists of five barristers nominated by the Bar Council and two non-lawyers one of whom is nominated by the Federation of Irish Employers and the other nominated by the Executive Council of the Irish Congress of Trade Unions.

The complainant or the barrister shall be entitled to appeal any decision of the Tribunal to a body known as the Barristers' Professional Conduct Appeals Board. This board comprises three members, one of whom is a retired Judge nominated by the Bar Council; the second member is a non-lawyer nominated by the Attorney General and the third is the Chairman for the time being of the Bar Council.

Copies of the complaint form may be obtained from the Bar Council Office, P.O. Box 2424, Law Library, Four Courts, Dublin 7.

Lawbrief is grateful to Mr. *John Dowling,* Director of the Bar Council for information relating to the Barristers' Professional Conduct Tribunal.

Solicitors Arranging Investments through Advisers or Brokers

Maurice R. Curran, Chairman of the Solicitors' Mutual Defence Fund Ltd., has written to members pointing out that solicitors may be at risk in certain circumstances where they assist clients in arranging investments through certain advisers or brokers.

With a view to improving the risk management among members, the Solicitors' Mutual Defence Fund Limited suggests the following precautions which should be taken by solicitors:

1. It is highly inadvisable to recommend any particular broker or agent to a client unless the solicitor has the most up-to-date and firm information as to the solvency and reliability of the agent in question. If a solicitor recommends a particular agent to a client, it is important to advise the client to take all necessary measures to satisfy himself as to the standing of the agent and to check with the appropriate association with regard to his registration with the association and his bonding.

2. If a solicitor is instructed to invest monies directly, always make sure that the cheque, marked "A/C Payee only", is payable to the primary institution or insurance company directly and not to the broker. This, of course, does not apply to direct investment in shares in public companies quoted on the Stock Exchange where they can only be bought through a stockbroker.

3. If an investment has been made through a solicitor's office and even

Maurice Curran

if the solicitor has made the cheque payable directly to the primary institution or insurance company, a solicitor should make sure that the investment is followed up and that the client receives his certificate of deposit, stock certificate, insurance policy or whatever.

Liability For a Client's Fraud

The decision of the Court of Appeal in *Agip (Africa) Ltd. -v- Jackson* [1991] 3 WLR 116 suggests that a professional adviser, such as a solicitor or banker, who assists in a client's financial transactions and who later discovers that the assets involved had been acquired by fraud, may be liable as a constructive trustee of the money for "knowing assistance". *Steven Fennell* in an article "Professional Liability" in *Professional Negligence,* September 1991, 151-156, states that, in appropriate cases, the adviser may have to take steps to verify his client's account of the purpose of the transaction or even reveal information acquired from the client to an injured third party.

In *Agip (Africa) Ltd. -v- Jackson,* the plaintiff company was engaged in oil exploration in North Africa. Over a period of years its chief accountant, a Mr. Zdiri, had been defrauding it of substantial sums of money by substituting the names of companies in the United Kingdom for the name of the rightful payees on the company's payment orders. The defendants set up companies, received the payments and passed them on, acted as directors of the companies and authorised payment of the assets on to a subsequent nominee of Mr. Zdiri. Finally they put the dummy companies into liquidation. The defendants did not act directly on behalf of the chief accountant, and they do not appear to have known of his existence or the precise nature of the fraud; rather they took instructions from a French lawyer who was acting as an intermediary.

When Agip finally discovered the fraud it sued the defendant accountants in respect of a payment of half a million dollars which had been received and then passed on to a dummy company called "Baker Oil Services Ltd". The defendants were the only party involved with sufficient funds to satisfy a judgment in the plaintiff's favour.

Millet J held that the defendants were not liable at common law for money had and received, and neither were they liable in equity for "knowing receipt and dealing," but that they were liable as constructive trustees for knowing assistance in a breach of trust (i.e. the fiduciary relationship between the plaintiff company and its chief accountant). The Court of Appeal unanimously upheld this decision. Fox LJ gave the only full judgment, with which Butler-Sloss and Beldam LJJ agreed.

For further discussion on this issue, see the article by Steven Fennell, "Professional Liability" in *Professional Negligence*, September 1991, 151-156. *Lawbrief* is grateful to Mr. *David R. Pigot,* solicitor, a former President of the Society and a director of the Solicitors' Mutual Defence Fund Limited for drawing this issue to our attention.

Corpus Juris Humorous

Readers may be interested in light reading and may well be planning their summer reading! *Lawbrief*

refers you to **Corpus Juris Humorous** – subtitled – a *Compilation of Humorous, Extraordinary, Outrageous, Unusual, Colorful, Infamous, Clever and Witty Reported Judicial Opinions and Related Materials Dating From 1256 A.D. to the Present.* The book was compiled and edited by *John B. McClay* and *Wendy L. Matthews,* Attorneys-at-Law, Santa Ana, California, contains 724 pages and was published in December, 1991.

Corpus Juris Humorous is a comprehensive, entertaining volume containing over 280 hilarious and authentic judicial opinions extracted verbatim from the official reports. Each of the opinions is an original and unique expression of inspired judicial wit, creative humour and literary acumen, which is made all the more humorous because of its authenticity, containing genuine expositions of fact and law, and reflecting the court's actual analysis and rulings. The humour appears in forms as varied as the fact patterns of the cases presented: incisive wit, dry sarcasm, obstreperous bombast, jocular exaggeration, doggerel verse, philosophic rumination, and more!

The opinions are drawn from a variety of judicial forums and from diverse historical and geographic locales, each having its origin in the English Common Law tradition, including the United States, Canada and England. The cases span a period of more than 700 years, from the ancient English transcripts of the Northumberland County Assize proceedings of 1256 A.D. to the present day. The unifying constant in each of the opinions is the presence of humour in one form or another. from the stern "frontier" justice meted out by Richard C. Barry, Justice of the Peace for Tuolumne County, California, during the 1850-1851 gold rush era (replete with his notorious mis-spellings, grammatical anomalies and legally-questionable "roolings") to the subtle, articulate wit of Sir Charles John Darling on the King's Bench Division of England's Supreme Court of Judicature; from the strident, piercing rhetoric of Justice Michael A. Musmanno (the infamous "dissenting" judge) of the Pennsylvania Supreme Court during the 1950s and 1960s to the Southern-rural, common-sense humour of Justice Logan E. Bleckley of the Georgia Supreme Court during the 1880s and 1890s.

Painstakingly researched and assembled over the last decade and a half, these opinions are indeed "gems" to be savoured and enjoyed. The cases are presented in an accurate and comprehensible form (with appropriate editing) to enable the reader to appreciate the fabric of judicial humour within a meaningful factual and legal context. The original language, grammar and spelling in the opinions have all been retained, notwithstanding any lexicographic improprieties; and in many of the older cases, the grammatical errors and arcane usages constitute an integral part of the humour of the writing.

Corpus Juris Humorous has been well received by the legal community in the United States and will appeal to many judges and lawyers. The price is $28.95 (which includes tax, shipping and handling). The book is available from MAC-MAT, P.O. Box 2025 – 131, Tustin, California 92680, U.S.A.

Eamonn G. Hall

TURKS AND CAICOS ISLANDS AND THE ISLE OF MAN
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Practice Notes

(Continued from page 97)

they owe a duty of care to a consenting spouse to advise on the general wisdom of appointing the agent which is something that would need to be carefully considered in any case. It is really no different from appointing any agent under a Power of Attorney to execute a deed and it is obviously a particular type of agency that should not be given lightly.

People sometimes believe that an agent acting on foot of a Power of Attorney who clearly has power to execute the consent can also complete a declaration to verify the facts regarding a marriage etc. under the Family Home Protection Act. Such evidence would be worthless being hearsay. An agent cannot give evidence on behalf of another either in court or by way of declaration. The agent could only execute the declaration if he is doing so of his or her own knowledge and in such event is not doing so on foot of the Power of Attorney.

Conveyancing Committee

Settlement Negotiations with Insurance Companies

Practitioners should note the ruling of the Bar Council which precludes their members from negotiating directly with insurance company representatives in personal injury claims.

Where plaintiffs' solicitors arrange meetings with insurance companies, for the purpose of discussing settlement of personal injury claims, they should, where they intend briefing counsel, ensure that there is a solicitor instructed by the defendant.

If a solicitor has not been instructed by the defendant this will lead to a situation where the barrister, acting on behalf of the plaintiff, will be precluded from negotiating on behalf of the plaintiff with an insurance company representative. □

Auditing Company Accounts – Watchdog or Bloodhound?

In this article *Muiris Ó Céidigh* reviews recent case law in the UK on the liability of auditors that has introduced new, narrower limits of liability in respect of financial misstatements. He argues that, given the perception of the public as to the role of the auditor, the duty of care should be set at a high level.

by ***Muiris Ó Céidigh, B.A., LL.B, M.B.A.***

The function of auditors re company accounts[1]

By section 163 of the Companies Act, 1963, auditors are under a statutory duty to report to the shareholders on the accounts which they have examined, and on every balance sheet, profit and loss account and all group accounts laid before the company in general meeting during their term of office. There are essentially five elements to the statements required of an auditor:

(a) whether they have obtained all the information and explanations which to the best of their knowledge and belief were necessary for the purposes of the audit;

(b) whether, in their opinion, proper books of account have been kept by the company, so far as appears from their examination of those books, and proper returns adequate for the purposes of their audit have been received from the branches visited by them.

(c) whether the company's balance sheet and (unless it takes the form of a consolidated profit and loss account) profit and loss account dealt with by the report are in agreement with the books of account and returns.

(d) whether, in their opinion and to the best of their information and according to the explanations given to them, the accounts give the information required by the Acts in the manner required and give a true and fair view, in the case of the balance sheet, of the state of the company's affairs as at the end of the financial year and, in the case of the profit and loss account, of the profit and loss for the relevant financial year.

(e) where the company is a holding company submitting group accounts whether, in their opinion, the group accounts have been prepared in accordance with the Acts so as to give a true and fair view of the state of affairs and profit and loss of the company and its subsidiaries dealt with thereby, so far as concerns members of the company, or as the case may be.

In the case of issues (d) and (e) the assessment may be subject to the non-disclosure (which must be indicated in the report) of any matters which are not required to be disclosed in the case of banking and discount companies, assurance companies and other companies prescribed by the Minister.

In addition the auditors will assess whether the information given by the directors in their report is consistent with the accounts for the relevant year.[2]

The report of the auditors should be based on their own judgement and express their own opinion. If they are not satisfied with any of the matters set out above, they are under a duty to make a qualified statement. Where they make such a qualification, they will be held to have discharged their statutory duty, if in the making of the qualification, they use the skill and care which might reasonably be expected of them as careful and competent auditors.

The subjectivity of accounts and the responsibility of the auditor

Although many SSAPs[3] (Statements of Standard Accounting Practice) are in existence, all accounts are inherently subjective in that they reflect the perspective of the accountant, be it conservative or liberal. The assessment of items such as inventory, bad debts, and depreciation are still highly dependent on the, to some extent, subjective approach of the accountant. In this context the task of the auditor is a difficult one. The degree to which he will be able to make in-depth assessments of primary information will be limited.

In reality the auditor will try to identify errors in the accounts and ensure that they are not misleading. There is no starting assumption that the accounts reflect dishonesty.

In *Re Kingston Cotton Mill Co (No. 2)*[4] the position of an auditor was said to be as follows:

> "An auditor is not bound to be a detective, or . . . to approach his work . . . with a foregone conclusion that there is something wrong. He is a watch-dog not a bloodhound".[5]

"An auditor is not bound to be a detective, or . . . to approach his work . . . with a foregone conclusion that there is something wrong. He is a watch-dog not a bloodhound".[5]

This was also the approach adopted in *Re London and General Bank (No. 2)*[6] where it was stated that an auditor could not be equated with an insurer.[7] Thus he will not be held liable for failing to uncover frauds or defalcations which the company's accounting records do not make apparent, or which are not discoverable by the exercise of reasonable care and skill. This was the position in *Re City Equitable Fire Insurance Co Ltd.*[8] where an auditor was held not to be liable for failing to notice from the company's accounting records that it had regularly bought investments shortly before successive annual audits and had disposed of them shortly afterwards and for failing to enquire what had been done with the money representing the investments during the greater part of the year. These enquiries would have shown that the managing director has used the funds received from these annual sales for his own purposes.

However an auditor must consider the possibility that errors have been made somewhere.[9] If the contents of the accounts are such that the suspicions of a competent accountant would be raised, then he must increase his investigation of the affairs of the company so that these suspicions are put to rest.[10]

Debtors, investments and the auditor
Where a company is listed on the stock exchange, its accounts will be used for the valuation of the company. Therefore, it is of particular importance that an accurate representation of its assets be shown in its accounts.

If investments have been made by a company (public or private) the auditors should seek certificates in relation to them or confirmation from the holder that such certificates have been lodged with a bank or stockbroker.[11] Where money has been advanced by the company the auditor must consider whether they are realisable, whether the security for them is adequate and what the cost of realisation is. The question of the value of debtors is a matter of considerable subjectivity, as is the decision as to the method of depreciation of company assets.[12]

Auditors liability in relation to stock valuation
in *Thomas Gerrard & Sons Ltd.*,[13] the auditors were held liable where a managing director had falsified the accounts by altering invoices and the auditors, having come across the altered invoices, failed to make sufficiently exhaustive inquiries. They had accepted the assurances of the managing director that the dates on the invoices for stock purchased by the company during the financial year in question had been altered by him to dates in the following year because the stock had not been delivered. In fact delivery had taken place and the managing director's alterations were part of a system to hide the fact that the company had been suffering losses by showing current assets at the end of the financial year at an inflated figure and a reduced figure for its current indebtedness.

In the Irish case of *Kelly -v- Haughey Boland & Co*[14] the plaintiffs were the directors of a company making crystal glass and they entered into an agreement in 1977 to purchase a company making bone china, Royal Tara China Ltd. Prior to concluding the agreement they were furnished with audited accounts of Royal Tara for 1973 to 1976, which had been prepared by a member of the defendant firm of accountants, acting as auditor for Royal Tara China. The plaintiffs held a number of meetings with the defendants prior to the sale during which the figures as to the stock were explained. Having taken over Royal Tara China, the plaintiffs became aware of production difficulties in the company and wrote to the vendors claiming that the figures for stock in 1973 and 1974 had been understated, and that these had been brought forward to 1976 to produce an exaggerated view of Royal Tara's trading position at the date of purchase. The plaintiffs subsequently commenced proceedings against the defendant auditors, claiming damages for breach of the duty of care owed to them.

Lardner J held in the High Court that the defendants did owe a duty of care to the plaintiffs in respect of those accounts prepared at the time when they knew or ought reasonably to have known that they would be used by a third party who they knew would rely on the accounts in taking a decision as to whether to invest in Royal Tara. This would include the accounts prepared for 1975, when there was a reasonable possibility of a sale, and 1976, in respect of which accounts were prepared from the plaintiffs. However it would not include the accounts for earlier years.

The court held that members of the defendant firm which had prepared the Royal Tara accounts had been negligent in relation to the stock-taking in failing to attend physically any stock-taking made by Royal Tara, since although the relevant accounting standards did not specify attendance as necessary, it was regarded as good practice and a reasonable method of ascertaining a true and fair view of accounts as an auditor; and while failure to attend physically at some stock-taking might not have amounted to a lack of care, the evidence was that for 20 years there had never been any attendance. However, since the plaintiffs had not made out the allegation that the defendants had failed to verify the information on which the accounts for 1975 and 1976 were based and since it was not established that the stock figures for 1973 and 1974 were understated or had been brought forward to 1975 and 1976, the plaintiffs had not established that the figures for these years were false or misleading. The claim was therefore dismissed.

It is therefore apparent that in Irish courts the standard of care required from auditors extends to such matters as attendance at stock-takings and is not restricted to the limits of SSAPs.

The English courts have taken the view that an auditor need not check that a company owns or possesses the stock in trade stated in its accounting or stock records, nor need he value its stock in trade, work-in progress or finished products.[15] He should, however, ensure that he is furnished with a certificate showing the amount and value of stock in trade, work in progress or finished goods. If the certificate agrees with the accounts he need investigate no further. This position is to be contrasted with American law where an auditor is required to check stock or to qualify his report indicating that he had not done so.[16]

The liability of an auditor in respect of the system used to keep records of stock has also been considered by English courts. He is not expected to have an expert understanding of the handling of the company and therefore is not required to investigate the stock just because the company's accounts or stock records show it as worth more than a person experienced in that kind of business might expect. However where it was very excessive he would be required to investigate.[17]

It can be argued however that an auditor's duty in relation to stock is and should be greater than this. This is particularly the case given that the area of stock is an area of notorious subjectivity in accounts. It is increasingly the practice that auditors make a number of random checks of items of stock to establish that they are valued correctly. This verification can be cross checked with the cost accounts of the company. Such a practice will continue to establish a duty to investigate stock.

SSAP 9 requires that stock should be shown in the financial accounts at ". . . the lower of cost or net realisable value". There can be significant differences between these two valuations and the decision as to which valuation to take will vary between classes of stock. Net relalisable value by nature is an estimate and this introduces a large amount of subjectivity in itself. The definition of the appropriate cost figure is also to some extent a subjective matter as to timing. Thus not only does subjectivity arise as to the type of valuation but also in relation to the valuation itself. Thus the role of the auditor is of great significance as a balance to such inherent subjectivity.

Reliance on company records

An auditor need only examine the records and vouchers kept by the company which a company of its type would normally be expected to keep, together with such other documents as the directors or officers of the company produce to him. He will not be guilty of a breach of duty if he fails to discover an irregularity which can only be traced from other unusual or informal records kept by the company which are not produced to him.[18] However, he must compare the company's cash records with its bank paying-in books and cheque counterfoils and undertake a reconciliation with a bank statement.[19] He cannot rely on the officers or employees of the company in relation to such records. The auditor is also under a duty to examine the invoices received by the company to determine whether there are debts due from the company which have not been represented in the accounts. In addition where there are invoices which are normally received at regular intervals the auditor should investigate to establish if there are any outstanding amounts due.[20]

Liability to parties other than shareholders

An increasing problem for the auditor in recent years is the multi-purpose usage of audited financial statements by persons other than shareholders and their advisers – for example lenders and bankers, creditors, employees and union representatives, and government agencies. Each of these groups has specific financial interests in the reporting company, and the major question facing an auditor is whether or not he has any duty or responsibility to protect these interests with respect to the audited financial statements.

"An increasing problem for the auditor . . . is the multi purpose usage of audited financial statements by persons other than shareholders and their advisers . . . . the major question facing an auditor is whether or not he has any duty or responsibility to protect these interests . . . ."

In addition, the position of a company is dynamic in terms of its attractiveness as an investment and its positioning in relation to other players in the industry is central to the issue. This results in many other parties having an interest in the accuracy of accounts and the liability of auditors in this context must be considered.

If the auditor fails in his duty of performing his statutory duty with reasonable care and skill he will be liable to the company for any damages which it may sustain as a result of his negligence. He will also be liable in the tort of negligent misstatement to persons to whom he owes a duty of care when performing his statutory duties.[21] There is no necessity for a contract or a fiduciary relationship to exist in order for such liability to attach.

Liability will arise in tort for an auditor or an accountant if he knowingly provides false information about the company's financial position to a member, creditor, debenture or loan security holder or to a prospective investor.[22] Where false information or unsound advice is tendered by an auditor or an accountant regarding the company's position, knowing that it will be relied upon, liability will also arise.[23] Auditors will be held liable where

they knew at all relevant times that their employer required the accounts to show to a third party such as an intending investor or intending creditor, who proceeded to act on them to his detriment (as in *Kelly -v- Haughey Boland & Co.* above.)[24]

The development of liability for negligent statements as a broad genre of liability evolved due to an expansion of the liability of local authorities for certificates issued in relation to the safety of foundations.[25] Liability in negligence was at that time based on Lord Wilberforce's two stage test for negligence which tended to be expansionary in nature. However, this test has recently been looked on unfavourably and a period of contraction of areas of liability has begun to appear in the English judgements. The Supreme Court in *Ward -v- McMaster* considered the substitution of another test for that of Lord Wilberforce but decided to continue with the latter.[26]

In line with the general English trend, the House of Lords recently rejected an extension of the liability of auditors. In *Caparo Industries plc -v- Dickman*[27] the plaintiffs, who already owned shares in a public company, launched a successful take-over bid shortly after the publication of the company's audited accounts. The plaintiffs said that they had made their take-over bid in reliance on the accounts which, they claimed, were seriously misleading. On the trial of a preliminary issue as to whether the auditors would be liable in the event of the plaintiffs establishing their allegation, Lawson J held they would not be liable. His decision was overturned by the Court of Appeal but approved by the House of Lords. It was held that auditors did not owe a duty of care to all prospective investors or indeed to individual shareholders. (The plaintiff was both of these). In their decision the Lords noted that the company audit was part of a general legislative scheme designed to protect the company itself and provide necessary information to those parties interested in the financial progress and stability of the company. The auditors were held not to have a duty of care to persons receiving the statement through general circulation. The fact that such strangers relied on the statement of the auditors would not result in liability attaching because it would be indeterminate in amount, time, and class. In addition, the auditors were held not to have a duty of care to individual shareholders, and that the proper plaintiff in relation to a breach of auditor's duty was an action by the company itself. This decision is of major importance given the necessity for accurate information for the proper workings of the market system. The limitations placed on liability could be regarded as narrow.

The *Caparo case* has been followed by similar judgements in related areas. In *James McNaughton Papers Group plc -v- Hicks Anderson & Co (a firm),*[28] a case relating to accounts, the Court of Appeal held that the accountants of a company which was the subject of a take-over bid, owed no duty of care to a company which made a bid in reliance upon the draft accounts of the company. The chairman of the target company had asked the defendants to prepare draft accounts as quickly as possible so that they could be used in the negotiations for the takeover. The plaintiffs also alleged that they had relied upon a statement made by a representative of the defendants at a meeting with the plaintiffs to the effect that, as a result of rationalisation, the target company was breaking even or doing a little worse.

In deciding whether or not to impose a duty of care in a case in which a plaintiff has suffered economic loss as a result of reliance upon a negligent statement, Neill LJ identified some relevant factors:

- the precise purpose for which the statement was made,
- the purpose for which the statement was communicated,
- the relationship between the adviser, advisee and any relevant third party,
- the size of any class to which the advisee belongs,
- the state of knowledge of the adviser, and
- the reliance of the advisee (including whether the advisee was entitled to rely on the statement, whether he did so rely, whether he should have sought and obtained independent legal advice).

On the facts the Court of Appeal held that no duty of care was owed because the accounts were produced only for the vendor, they were in draft form, the defendants were not participants in the negotiating process, the target company was, to the knowledge of the plaintiff, in poor financial health; the parties were experienced businessmen and in particular the plaintiffs had their own independent advisers and the statement of the representative of the defendants at the meeting with the plaintiffs was a general one and the defendants could not have known that the plaintiffs would rely on the statement without making further inquiry or seeking further advice. The case serves to underline the unwillingness of the courts in that jurisdiction to expand the scope of liability beyond the person directly intended by the maker of the statement to act upon it.

In *Morgan Crucible plc -v- Hill Samuel Bank Ltd*[29] a takeover bid was again at issue, in this instance a contested one. The plaintiffs' action was brought against the directors of the target company and the bank and accountants of the target company. The plaintiffs made a takeover bid for a company. The directors responded by issuing circulars to the shareholders advising them to reject the offer and stating, inter alia, that the profits of the company were forecast to increase by 38 per cent. The latter circular was accompanied by a statement by the company accountants that the forecast had been prepared in

accordance with the company's accounting procedures and a statement by their bank stating that, in their opinion, the forecast had been made with due and careful inquiry. As a result of such circulars the plaintiffs increased their bid for the company and it was accepted. The plaintiffs subsequently alleged that the pre-bid financial statement and profit forecast were negligently misleading and that, had they known the true situation, they would never have bid for the company. The Court of Appeal held that a duty of care did arise. The point of distinction between this case and *Caparo* was held to be that the statements relied upon were made *after* the plaintiffs had made their initial bid and not before (it was conceded that no duty was owed before the initial bid was made). The directors were aware that the plaintiffs would rely upon the circulars and they intended that they should rely upon them. It was held to be arguable that for the same reasons, the bank and the accountants owed a duty of care to the plaintiffs. The fact that there was a conflict of interest between the plaintiffs and the target company was not, of itself, enough to justify the proposition that neither the bank nor the accountants owed to the plaintiffs a duty of care.

It can be argued that such a degree of proximity should not be required where auditors are involved, given the verification aspect of such a role.[30]

Conclusion

Caparo and the cases following it, have introduced new limits on liability in respect of financial misstatements. This contraction of liability is taking place in the context of a narrower test for negligence being accepted in that jurisdiction. It is not clear that this line will be followed in Irish courts.[31]

The position of an auditor is that he is fulfilling a role that is important to the statutory system of corporations and must be distinguished from person making financial statements in general. This is particularly so where public companies are involved. It can be argued that, given the perception of the public as to the role of the auditor, that the duty of care required should be set at a high level and that the decision in *Caparo* should not be followed in its entirety. □

Notes

1. (General) *Current Issues in Accounting,* Edited by B. Carsberg & T. Hope, Phillip Allen Publishers Limited Second Edition 1984 at page 94.
2. Section 15 of the 1986 Act.
3. Statements of Standard Accounting Practice. In *Lloyd Cheyham & Co. Ltd. -v- Littlejohn & Co.* [1985] 2 PN 154, Woolf J accepted that SSAPs were very strong evidence of what was the proper standard to be adopted, that a departure from them would be regarded as a breach of duty unless there was some justification, and that third parties in reading the accounts were entitled to assume that they had been drawn up in accordance with the approved practice unless they had some indication to the contrary.
4. [1896] 2 Ch 279.
5. *per* Lopes LJ, at page 288.
6. [1895] 2 Ch. 673 (C.A.)
7. *Per* Lindley L.J. at page 683.
8. [1924] All ER Rep 138.
9. In *Fomento (Sterling Area) Ltd. -v- Selsdon Fountain Co* [1958] 1 All ER 11, Lord Denning stated: "His vital task is to take care to see that errors be not made, be they errors of computation, or errors of omission or commission, or downright untruths. To perform this task properly he must come to it with an inquiring mind – not suspicious of dishonesty, I agree – but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none".
10. *Henry Squire Cash Chemist Ltd. -v- Ball, Baker & Co.* (1911) 106 LT 197. In the Australian case of *Pacific Acceptance Corpn Ltd. -v- Forsyth* (1970) 92 WN (NSW) 29 Moffitt J. considered the level of inquiry that should be made by an auditor. Holding an auditor negligent in failing to check the security for the company's loans he stated that the process of investigation could not be properly carried out except by a procedure that takes into account the possibility that the affairs examined may not be true, due to errors, innocent or fraudulent, appearing in the records. He stated that the auditor should make his own inquiries rather than relying on the company management. The auditor should seek confirmation of the authority claimed by the manager, he should examine any document material to the audit unless it is reasonable for him to accept indirect proof of its existence, and above all he should not rely on the management's internal accounting control system unless there has been a proper inquiry to ascertain the nature of the system, and appraisal of the extent to which reliance can be placed on it and a testing of its operation.
11. *Re City Equitable Fire Insurance Co. Ltd.* [1925] Ch 407 at 514, *per* Pollock MR.
12. See for example the history of Xtra-Vision.
13. [1968] Ch 455.
14. [1989] ILRM.
15. *Re Kingston Cotton Mills Co. (No. 2) (1896) 2 Ch 279.*
16. *Stanley L Block Inc -v- Klien* 258 NYS 2d 501 (1965).
17. *Henry Squire Cash Chemist Ltd. -v- Ball & Baker & Co.* (1911) 106 LT 197 at page 204.
18. Ibid.
19. *Fox & Son -v- Morrish Grant & Co.* (1918) 35 TLR 126.
20. *Re Westminister Road Construction and Engineering Co.* (1932) 76 Acct LR 38; *Re Thomas Gerrard and Son Ltd.* [1968] Ch 455, [1967] 2 All ER 525.
21. *Hedley Byrne & Co. -v- Heller and Partners* [1964] AC 456.
22. *Derry -v- Peek* (1889) 14 App Case 337.
23. *Arehson -v- Casson Beckman Rutley & Co.* [1977] AC 405 [1975] 3 All ER 901.
24. *JEB Fastners Ltd. -v- Marks, Bloom & Co. (a firm)* [1983] 1 All ER 583.
25. *Dutton -v- Bognor Regis Building Co.* [1972] 1 QB 373, *and Anns -v- Merton London Borough Council* [1978] AC 728.
26. For a consideration of this test and its eventual rejection in England see *"The Existence of Duty – No Just and Reasonable Test for Ireland?"*, Muiris Ó Céidigh *Irish Law Times* May 1990 page 122.
27. [1990] 1 All ER 568.
28. [1991] 1 All ER 134.
29. [1991] 1 All ER 148.
30. For a general consideration of the auditing function see for example *'Current Issues in Accounting'* 2nd Edition edited by Bryan Carsberg & Tony Hope, Chapters 6 & 7 – Phillip Allen, 1984.
31. The judgement in *Ward -v- McMaster* suggests that the Irish courts may continue with the broader Wilberforce test. However, they have not considered matter directly. □

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IRISH WHEELCHAIR ASSOCIATION

At the Annual Joint Seminar of the Law Society and the Institute of Chartered Accountants were L-R: Alvin Price, Chairman, Law Society Company and Commercial Law Committee, Laura MacDermott, Gerrard Scallan & O'Brien; Ray Monahan, Senior Vice-President, Law Society; Mary Broughan, Managing Director, Woodchester Bank; Brian J. O'Connor, McCann Fitzgerald and Maurice Curran, Mason Hayes & Curran. The seminar, "Companies – The New Complexities", was sponsored by Woodchester Bank.

The Minister for Justice, Padraig Flynn, T.D visit to the Law Society on 4 March last, Adrian Bourke.

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accordance with the company's accounting procedures and a statement by their bank stating that, in their opinion, the forecast had been made with due and careful inquiry. As a result of such circulars the plaintiffs increased their bid for the company and it was accepted. The plaintiffs subsequently alleged that the pre-bid financial statement and profit forecast were negligently misleading and that, had they known the true situation, they would never have bid for the company. The Court of Appeal held that a duty of care did arise. The point of distinction between this case and *Caparo* was held to be that the statements relied upon were made *after* the plaintiffs had made their initial bid and not before (it was conceded that no duty was owed before the initial bid was made). The directors were aware that the plaintiffs would rely upon the circulars and they intended that they should rely upon them. It was held to be arguable that for the same reasons, the bank and the accountants owed a duty of care to the plaintiffs. The fact that there was a conflict of interest between the plaintiffs and the target company was not, of itself, enough to justify the proposition that neither the bank nor the accountants owed to the plaintiffs a duty of care.

It can be argued that such a degree of proximity should not be required where auditors are involved, given the verification aspect of such a role.[30]

Conclusion

Caparo and the cases following it, have introduced new limits on liability in respect of financial misstatements. This contraction of liability is taking place in the context of a narrower test for negligence being accepted in that jurisdiction. It is not clear that this line will be followed in Irish courts.[31]

The position of an auditor is that he is fulfilling a role that is important to the statutory system of corporations and must be distinguished from person making financial statements in general. This is particularly so where public companies are involved. It can be argued that, given the perception of the public as to the role of the auditor, that the duty of care required should be set at a high level and that the decision in *Caparo* should not be followed in its entirety. □

Notes

1. (General) *Current Issues in Accounting,* Edited by B. Carsberg & T. Hope, Phillip Allen Publishers Limited Second Edition 1984 at page 94.
2. Section 15 of the 1986 Act.
3. Statements of Standard Accounting Practice. In *Lloyd Cheyham & Co. Ltd. -v- Littlejohn & Co.* [1985] 2 PN 154, Woolf J accepted that SSAPs were very strong evidence of what was the proper standard to be adopted, that a departure from them would be regarded as a breach of duty unless there was some justification, and that third parties in reading the accounts were entitled to assume that they had been drawn up in accordance with the approved practice unless they had some indication to the contrary.
4. [1896] 2 Ch 279.
5. *per* Lopes LJ, at page 288.
6. [1895] 2 Ch. 673 (C.A.)
7. *Per* Lindley L.J. at page 683.
8. [1924] All ER Rep 138.
9. In *Fomento (Sterling Area) Ltd. -v- Selsdon Fountain Co* [1958] 1 All ER 11, Lord Denning stated: "His vital task is to take care to see that errors be not made, be they errors of computation, or errors of omission or commission, or downright untruths. To perform this task properly he must come to it with an inquiring mind – not suspicious of dishonesty, I agree – but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none".
10. *Henry Squire Cash Chemist Ltd. -v- Ball, Baker & Co.* (1911) 106 LT 197. In the Australian case of *Pacific Acceptance Corpn Ltd. -v- Forsyth* (1970) 92 WN (NSW) 29 Moffitt J. considered the level of inquiry that should be made by an auditor. Holding an auditor negligent in failing to check the security for the company's loans he stated that the process of investigation could not be properly carried out except by a procedure that takes into account the possibility that the affairs examined may not be true, due to errors, innocent or fraudulent, appearing in the records. He stated that the auditor should make his own inquiries rather than relying on the company management. The auditor should seek confirmation of the authority claimed by the manager, he should examine any document material to the audit unless it is reasonable for him to accept indirect proof of its existence, and above all he should not rely on the management's internal accounting control system unless there has been a proper inquiry to ascertain the nature of the system, and appraisal of the extent to which reliance can be placed on it and a testing of its operation.
11. *Re City Equitable Fire Insurance Co. Ltd.* [1925] Ch 407 at 514, *per* Pollock MR.
12. See for example the history of Xtra-Vision.
13. [1968] Ch 455.
14. [1989] ILRM.
15. *Re Kingston Cotton Mills Co. (No. 2) (1896) 2 Ch 279.*
16. *Stanley L Block Inc -v- Klien* 258 NYS 2d 501 (1965).
17. *Henry Squire Cash Chemist Ltd. -v- Ball & Baker & Co.* (1911) 106 LT 197 at page 204.
18. Ibid.
19. *Fox & Son -v- Morrish Grant & Co.* (1918) 35 TLR 126.
20. *Re Westminister Road Construction and Engineering Co.* (1932) 76 Acct LR 38; *Re Thomas Gerrard and Son Ltd.* [1968] Ch 455, [1967] 2 All ER 525.
21. *Hedley Byrne & Co. -v- Heller and Partners* [1964] AC 456.
22. *Derry -v- Peek* (1889) 14 App Case 337.
23. *Arehson -v- Casson Beckman Rutley & Co.* [1977] AC 405 [1975] 3 All ER 901.
24. *JEB Fastners Ltd. -v- Marks, Bloom & Co. (a firm)* [1983] 1 All ER 583.
25. *Dutton -v- Bognor Regis Building Co. [1972]* 1 QB 373, *and Anns -v- Merton London Borough Council* [1978] AC 728.
26. For a consideration of this test and its eventual rejection in England see *"The Existence of Duty – No Just and Reasonable Test for Ireland?"*, Muiris Ó Céidigh *Irish Law Times* May 1990 page 122.
27. [1990] 1 All ER 568.
28. [1991] 1 All ER 134.
29. [1991] 1 All ER 148.
30. For a general consideration of the auditing function see for example *'Current Issues in Accounting'* 2nd Edition edited by Bryan Carsberg & Tony Hope, Chapters 6 & 7 – Phillip Allen, 1984.
31. The judgement in *Ward -v- McMaster* suggests that the Irish courts may continue with the broader Wilberforce test. However, they have not considered matter directly. □

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TECHNOLOGY NOTES

Document, Case and Client Management Systems

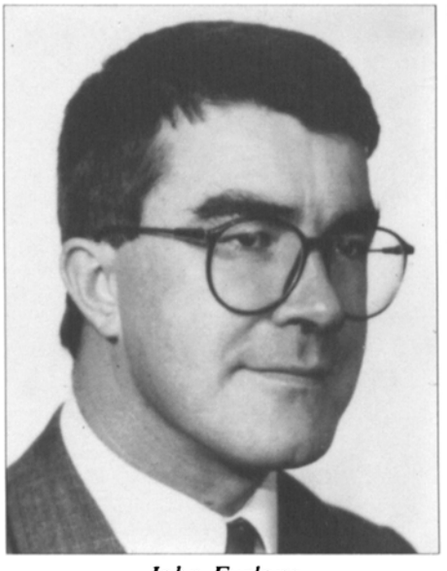
Difficulties arise out of substantial use of word processing documents. While some systems are equipped with basic document indices, large volumes of documents require proper, structured management. In effect, what is required is an automated filing and retrieval system for word processed documents.

Document or Case Management systems provide classification and diary management routines to control the flow of documents through the life of a case and to link the documents, as appropriate, with relevant client details and with other aspects of the practice.

Such systems have three principal requirements:

- the planning of the steps undertaken in a particular transaction (e.g. acting for purchaser of a new house) and the identification of the documents used in that transaction,
- determination of the type of client details and matter detail required for the successful processing of the case,
- the identification of the chronological routine from the start of the case to its conclusion and the diarying of the documentation relevant to each particular stage.

The systems link the glossary and merge type features of word processing systems with a structured management routine. Proprietary systems, if properly planned for and if used correctly, are a significant way of minimising document processing costs and reducing the risk of error, or omission in standard transactions. Fundamental to the success of such systems are:



John Furlong

- a strict and enforced use of conventions to complete the necessary client and matter details,
- consistency in the content and updating of relevant documents with a continuing quality control check,
- a recognition that the systems are best suited to standard procedures and applications,
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If the system is planned properly, the client details which are input at the start of a transaction may also be used to construct personalised letters to the client; to record specific information (about a will or title deed etc.); to update clients on changes in the law and to provide a limited link with details held in the firm's accounting system. The details may also provide a means to collate information about clients for information, marketing and promotion. Alternatively and allied to document and client management, larger firms may consider the development of a separate and parallel client and contacts database which will contain all of the necessary information for mail-shots, promotional literature or legal updates to particular individuals. There are strong arguments against the construction of such a database given the resources required both to initiate and to update the detail held on it. The unnoticed death of a client; a change of address or position within a client firm; changes in marital status etc. may all go unnoticed on the database resulting in the outputting of embarrassing letters and mailshots.

Where client details are collated and stored for document or case management or for a client database, regard should be had to the provisions of the **Data Protection Act, 1988** which imposes statutory duties in respect of automated storage of personal data. Where sensitive personal data (as defined in the Act) is held on any system, registration must be made with the Data Protection Commissioner.

Further Reading

The Right Client Database: *Irving Watson* **The Law Society Gazette (London)** 30th January, 1991.

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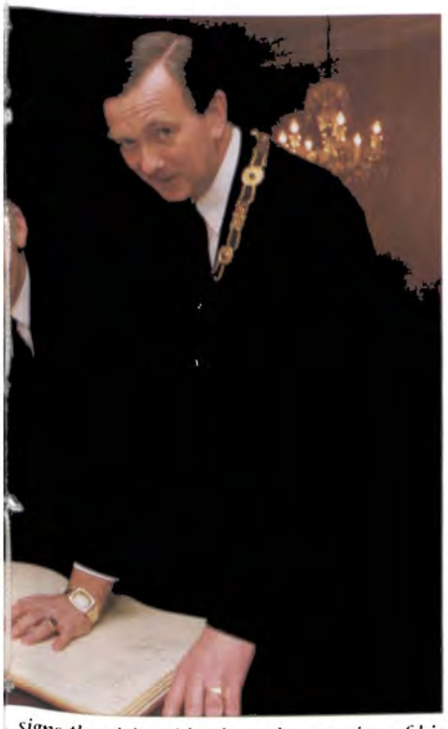

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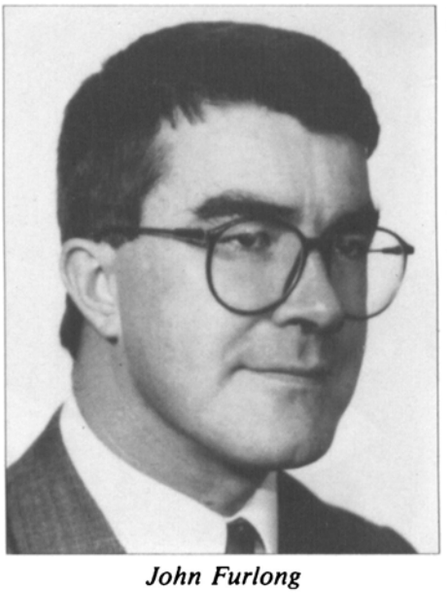

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BOOK REVIEWS

Cross Border Practice Compendium – CCBE – Law Books in Europe by Donal Little, (Kluwer) – US$79.00.

This compendium prepared by the European Lawyers Institute for the CCBE – The Council of European Bars and Law Societies – is intended to provide a handy guide to the legal structures and professions of EC countries and other countries with observer status with the CCBE.

The general section of the work includes chapters on:-

> the Legal Landscape of Europe, the CCBE itself, Legal Ethics in Europe, the CCBE Code of Conduct, Freedom of Movement of Lawyers, Mutual Recognition of Professional Qualifications and the Single European Act.

Detailed sections covering Belgium, Denmark, France, Germany, the Netherlands and Austria then follow, each section dealing with the nature of the basic law of the State, the structure and organisation of the legal profession and the courts and rights of audience.

The sources of law in the legal profession, financial protection of clients, regulation of fees and professional ethics and discipline are then dealt with. Finally topics such as legal aid and advice schemes, arbitration, cross border activities, further reading and addresses of appropriate professional bodies and local bars follow.

There is no doubt that even in its present incomplete version with the contributions from Greece, Ireland, Italy, Luxembourg, Portugal, Spain and the United Kingdom of the EC countries still awaited, it does provide within one volume a significant amount of information which would otherwise require significant research in numerous authorities.

John Buckley

Laying Down the Law – A Practical Guide
by Olive Brennan. Oak Tree Press
165 pp £5.99

The title to this guide is very apt.

It is written by *Olive Brennan* BA Barrister-at-Law who is a qualified teacher and therefore is eminently suitable to pen such a guide.

The book contains a forward by Judge *Liam Devally,* a judge of the Circuit Court, who refers to it as essential reading, not only for a prospective litigant but also for practitioners. Much in the book will be familiar to practitioners, but reading this book made me realize that the courts and the courts system may be totally awesome for a non-lawyer. The client may be in court only once in his lifetime and reading the guide has certainly made me more conscious of explaining procedures to my client and I think I will end up with a happier and more satisfied client.

There are some factual areas where I might disagree with the author which are not worth mentioning. However, I am concerned about her reference to the National Register of Wills and Testaments which I feel is misleading as it suggests that this is a government/statutory body, which it is not, and therefore, it has no statutory function. As this organisation has no status, I think the reference to it in relation to wills is misleading.

The chapter on Probate and Wills, otherwise is extremely informative and it deals very extensively with

Olive Brennan

taking out a grant of letters of administration or probate and also deals with inheritance tax and its calculations.

The topics chosen by the author for the Guide are interesting and up to the minute and while there is a chapter on going to court with much practical advice, the book also contains chapters on dealing with the ruined holiday and its subsequent arbitration and has very good practical advice for people who might be in a "lotto syndicate".

The author goes into quite a lot of detail in relation to planning permission and building bye-law approval and gives dire warnings to the readers against putting up the "little extension" which, as we all know, can in the long term cause endless problems in the event of a sale.

There is a long and detailed chapter on family affairs which basically deals with separation and marriage break up, barring orders and recognition of foreign divorce, all contained in the one chapter which is most useful and informative.

What else can one say about a guide! One reads it and one then leaves it on one's bookshelf for future reference. I think anyone who purchases this guide, will be delighted to have it and to refer to it whenever the need arises.

The book has illustrations by *Michael Moriarty* and, as I am a particular lover of cartoons myself, I found them very funny. As we know, every picture is worth a thousand words and for the cartoons alone, I would recommend buying this book.

Elma Lynch

Butterworth Ireland Tax Acts 1991-92
Edited by Alan Moore, Consultant Editor, J.M. O'Callaghan [Dublin, Butterworth (Ireland) Ltd, 1992 IR£49.50]

Mr. Justice Franfurter said of his spiritual brother, Mr. Justice Holmes, that he (Holmes) did not have a curmudgeon's feelings about paying taxes. A law clerk who exclaimed, "Don't you hate to pay taxes!" was rebuked with hot response, "No, young man, I like to pay taxes. With them I buy civilisation." (Felix Franfurter, *Mr. Justice Holmes and the Supreme Court,* Cambridge, Massachusetts; Harvard University Press, 1939). Some of us consider that the payment of taxes is a charitable payment which includes support for the unemployed and old-age pensioners. These feelings take the sting out of the enforced parting with our money. But we are concerned that the money is spent wisely.

Butterworth Ireland Tax Acts 1991-1992 represents an important handbook of Irish tax legislation which contains in one volume the *Income Tax Act, 1967,* the *Capital Gains Tax Act, 1975,* and the *Corporation Tax Act, 1976* (all amended to the *Finance Act, 1991)* together with the non-amending sections of the *Finance Acts 1967 to 1991,* and the major statutory instruments for each tax. The statutory instruments in connection with the three taxes are considered with cross-references. The notes on the interpretation of complex sections represent a significant feature of the book. There are also references to, and a short summary of, any Revenue statement of practice under the relevant section. Under appropriate sections, the reader is referred to definitions of relevant terms.

A how-to-use section, a detailed index and a comprehensive table of statutes are further welcome additions to this book.

Lawyers will be familiar with the dicta of the House of Lords in the famous case of *IRC -v- Duke of Westminster* (1936) 19 T.C. 490. The general approach to tax avoidance was stated by Lord Tomlin as follows:-

> "Every man is entitled, if he can, to order his affairs so that the tax attracted under the appropriate Act is less than it otherwise would be. If he succeeds in ordering them so as to secure this result then however unappreciative the Commissioners of Inland Revenue or his fellow tax payers may be of his ingenuity, he cannot be compelled to pay an increased tax".

Butterworth Ireland has produced a pathbreaking book on Irish taxation laws. Lawyers should welcome this new publication.

Eamonn Hall

Reorganising Failing Business – The Legal Framework
[by Michael Forde, The Mercier Press] 215pp

Dr. Forde's latest work on commercial law is the first Irish text book dedicated exclusively to the legal aspects of restructuring businesses encountering financial difficulties. The work has been prompted by the enactment of the Companies (Amendment) Act, 1990, but encompasses a study of the legal structures available prior to the introduction of this legislation, many of which are still available to businesses and individuals.

The book comprises nine chapters in all. Four are dedicated to the law and practice relating to unincorporated individuals and partnerships, four relate to structures affecting limited companies and the final chapter describes the rules and principles relating to the administration of insurance companies.

Court protection has been available to unincorporated persons since the Bankruptcy (Ireland) Act, 1857, and is re-enacted in the Bankruptcy Act, 1988. Dr. Forde describes the procedure and the objective of such schemes in detail and this background is helpful to an understanding of the principles underlying the Companies (Amendment) Act, 1990.

Most text books on company law treat the subject of receiverships within their commentaries on securities and with particular reference to floating charges. This approach is quite proper in that receivership is essentially a means of enforcing such charges. However, this book describes the law and practice relating to receiverships from a more positive perspective with particular emphasis on the constructive aspects of a receivership from the point of view both of the debenture holder and the company, its creditors and employees. In particular the author describes a number of what could be described as "management" aspects of a receivership and systematically describes the legal effects of receivership on the company, its shareholders, directors, contracts, company property and on creditors. The liability of a receiver is examined in relation to each of these aspects. As there is no Irish textbook dedicated exclusively to receivership law, the comprehensive treatment of the subject within this book will be a welcome point of reference for practitioners.

The book contains a chapter devoted to schemes of arrangement under

Section 201 of the Companies Act, 1963. This chapter is helpful largely because it highlights the difficulties which have prevented that Section being used with any frequency and to this extent is a useful introduction to the objectives of the Companies (Amendment) Act, 1990.

The author's treatment of the Companies (Amendment) Act, 1990 opens with an explanation of the objectives and the principal features of the Act and compares the scheme of the Act with similar legislation in the United Kingdom, the United States and in New Zealand.

Detailed consideration is given to the issues taken into account when the Court is asked to confirm proposals for a scheme of arrangement. The decisions of the High Court in the cases of *Goodman International Limited* and *Re: Coombe Importers Limited* are cited. However, the author has not had the advantage of the several cases which have been decided during 1991, and in particular those in which the position of secured creditors has been considered.

As the number of cases decided under the Companies (Amendment) Act, 1990 is obviously limited, the book is particularly helpful in its numerous references to decided cases in other jurisdictions on comparable provisions. Although case law is developing in this jurisdiction, it will inevitably be some time before our jurisprudence on this Act is comprehensive. In the meantime, precedents from other jurisdictions will be of persuasive value, and to that extent this feature of the book will be useful.

The concluding chapter describes the law and practice relating to the administration of non-life insurance companies under the Insurance (No. 2) Act, 1983. This chapter contains a helpful identification of the features which distinguish administrators from liquidators and examiners.

The Companies (Amendment) Act, 1990 fundamentally alters the structures available to ailing businesses, and this publication will therefore be of value both to experienced insolvency practitioners and to those who need for the first time to acquaint themselves with these radical developments.

Alvin Price

The Irish Student Law Review
Edited by Oisín Quinn, [Dublin, 1992, £10.00 (£1.00 p&p)]

Thackeray described a great lawyer as a man who had laboriously brought down a great intellect to the comprehension of a mean object. Thackeray claimed that the lawyer resolutely excluded from his mind all higher thoughts, all better things; all the wisdom and philosophy of historians; all the thoughts of poets; all wit and reflection; all art, love, truth, so that the lawyer could master that enormous legend of the law. Thackeray concluded that the lawyer could not admire a work of genius or kindle at the sight of love. This was, of course, a libel on a nobel profession. Lawyers are not confined to narrow issues. Dare we say it? No horizon is too large for our gaze!

The *Irish Student Law Review* is now in its second year. It is pleasant to record that Thackeray's indictment of lawyers confining themselves to mean objects does not apply to the contents of the review. *Sora O'Doherty* writes on the difficult case of *L -v- L,* (Supreme Court unreported 5 December, 1991). Medical negligence, in the wake of the Dunne decision, is the focus of *Joan Donnelly's* article. *Eoin O'Dell* writes on issues relating to the case of *Cotter and McDermott (No. 2)* and, inter alia, the principle against unjust enrichment. *Dariona Conlon* writes on contempt of court. *Anthony Whelan,* the assistant editor, deals with Article 29.4.3 and the meaning of "necessity". Historical issues are considered by *Barry Doherty* under the title of "Dissection as Punishment". The editor, *Oisín Quinn,* considers whether the issue of tort as a compensation system is ripe for reform. Other material is also included.

Edward Henry Warren noted that before he finished a law review article, he sweated blood for a month. [58 *Harvard Law Review* 1115 (1945)]. Great credit it due to the editor, Oisín Quinn, the assistant editor, Anthony Whelan, and Eoin O'Dell, member of the editorial board. Has the time arrived when the word 'Student' should be dropped from the title of the review? Readers expect little from a student review. This Review however, is filled with keen judgment, shrewd common sense and great erudition.

Eamonn G Hall

□

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JAMES O'REILLY (EDITOR)

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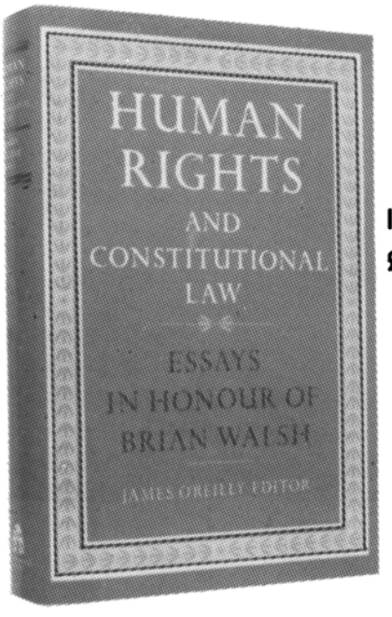

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The Law Society library has a large European Community law collection and the volume of requests for this material is increasing all the time – for textbooks, journal articles, regulations, directives and other secondary legislation, decisions of the European Court and the Court of First Instance.

In this article, *Margaret Byrne,* Librarian, gives an outline of the material held and the services available.

Members are welcome to consult the library in person or to phone, fax or post their enquiries to us. While most material requested is located using our own resources, when necessary, we also seek information from other agencies, such as the Dublin Office of the European Commission, the information service of the European Court, and Government Departments. In some cases, we may advise members to contact these agencies directly.

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The library holds copies of all the primary legislation, comprising treaties and accession documents, the secondary legislation which includes, among other material, the regulations, directives, Commission decisions, recommendations and opinions under the EEC Treaty.

Legislation is published in the *Official Journal* L series which we have from 1973 to date, together with the retrospectively published special English language edition covering the period 1952-72. We also hold the *Official Journal* C series from 1973 which contains selected proposed legislation, opinions of the Economic and Social Committee, summaries of Court cases, written parliamentary questions and answers and other official information. A number of indexes are available to locate this material – the Official Journal's own Indexes, the annual *Directory of Community Legislation in Force* and Butterworths *European Communities Legislation: Current Status* – which enable the following kinds of everday requests to be dealt with –

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Margaret Byrne

Secondary Legislation Implemented in Ireland

Directives are implemented either by statute or, more usually, by statutory instrument, all of which are available in the library.

Case law of the ECJ and the Court of First Instance

The European Court Reports, which is the official series, *the Common Market Law Reports* and *European Community Cases* are held in the library. We also subcribe to the transcripts of the judgments of the Court and the opinions of the Advocates General which are usually available 6–8 weeks after a decision or opinion is given. Examples of requests received for case law are –

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- Where can I find a list of all cases on the Lomé Conventions?"

Various indexes and other sources are used to locate this material –

the indexes published with the volumes of Reports, indexes published by the Court, our own in-house index to the transcripts, the Gazetteer of European Law and the Common Market Reporter encyclopaedia which contains the *European Community Cases* series.

Computerised Databases
The library has access to CELEX, the Commission's official computerised on-line database which contains all the legislation (other than measures of short duration), mostly in full text form though some by short reference only, and all the case law as published in the *European Court Reports,* as well as a good deal of other official material.

The library subscribes to the LEXIS database which contains the full text of the *European Court Reports,* the *Common Market Law Reports* and the legislation section of CELEX from 1980 to date.

Some queries are more suited to computer than to manual searching. For example, the request mentioned above for a list of all the cases on the Lomé Conventions was answered by doing a search for the term "Lomé" in the Reports section of CELEX. If this term had located too large a number of case reports, it could have been modified by linking it with another appropriate search term. As it happened, 24 cases were found by the first search and titles, summaries and citations were printed out.

Another recent example of the use of CELEX was a search for the term "spring water" in the legislation section. Two occurrences of the term were found and the titles of the documents and the references were printed out and checked. The enquirer wanted to know if there was a definition of "spring water" as distinct from "natural water" in any regulation or directive.

The information on a particular regulation or directive on CELEX includes a section listing earlier measures which it modifies and later measures which have in turn modified it. Information on amending measures is also contained in Butterworths *European Communities Legislation: Current Status.*

(A fuller description of these computerised databases will be given in a later article).

Textbooks, Encyclopaedias, Journals
Commentaries on the law are the starting point for research on a subject. The library has CCH's *Common Market Reporter,* referred to above, Vaughan's *Encyclopaedia of European Community Law* and Myles' *EC Brief.* Copies of the main textbooks on the institutions and on the substantive law are held and also the leading journals on EC law. Of course, many textbooks and journal articles on UK and Irish law also include references to EC law and its application. Journal articles are located using *Legal Journals Index* and *European Access.*

Current awareness
The daily news bulletin *Agence Europe* is received and is scanned by the editor of *Eurlegal News.* It is available for consultation in the library. The *Bulletin of the European Communities* published by the Commission is a useful source for recent legislative developments.

Margaret Byrne,
Librarian.

(This is the first in a series of articles on the library and its services). □

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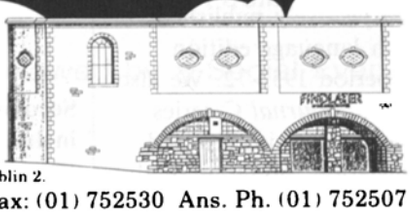
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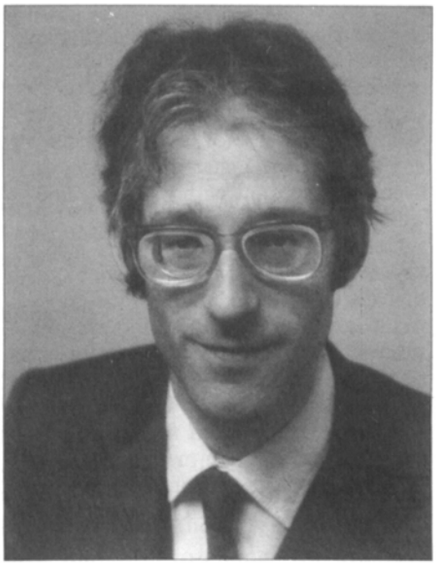
Statutory Interpretation of the Rule in Clayton's Case

If an established rule of Common Law undermines a statutory clause, but the statute does not explicitly alter the Common Law, how should the courts read the statute? Should they accept that the statute has been thwarted, or is it allowable to find that there has been a "silent" change in the law? This question was posed recently in *Smurfit Paribas Bank Ltd. -v- A.A.B. Export Finance Ltd.*[1]



By Christopher Doyle, BL

Rule in Clayton's Case

For nearly two centuries the Rule in *Clayton's case*[2] i.e. that on a running account in the absence of special agreement the creditor may treat the earliest credit as being in repayment of the earliest debit – has been accepted without question. Yet, if invoked in a case under Section 288 of the Companies Act, 1963 or its UK equivalent, the rule effectively makes the Section useless. In the UK it has been settled since the 1920s that the Rule must apply;[3] in 1964 the Court of Appeal[4] accepted that the result was "puzzling" but it could see no other solution. In Ireland also it has long been settled that the Rule applies to a Section 288 case;[5] however in *Smurfit Paribas* Barron J. indicated that had the matter required a decision on the facts before him (which it did not) he would have refused to apply the Rule and hold that Section 288 effectively excluded it.

In *Smurtif Paribas* the plaintiff and defendant were both creditors of a company called Peter Simms Group Ltd. which went into receivership; the plaintiff held a floating charge over the company's assets. The plaintiff claimed that the defendant had agreed that the plaintiff would be paid £300,000 plus interest out of monies recovered from the company in priority to any claim of the defendant. The principal defence was that the charge was invalid under Section 288 (1) of the Companies Act, 1963 (now re-enacted in a somewhat different form by Section 136 of the 1990 Act[6]) which provides:-

> "Where a company is being wound up, a floating charge on the undertaking or property of the company created within 12 months before the commencement of the winding up shall unless it is proved that the company immediately after the creation of the charge was solvent be invalid except to the amount of any cash paid to the company at the time of or subsequently to the creation of and in consideration for the charge . . . "

A winding up order had been made and it does not appear to have been disputed that the floating charge was created within the preceding 12 months. The plaintiff however claimed the benefit of the proviso on the ground that the money, the subject matter of the claim, was advanced "to the company at the time of or subsequent to the creation of and in consideration for the charge". The ancillary claim, the concern of this article, was that the Rule in *Clayton's case* should be applied so that lodgments made after the charge was created should be deemed to pay off the pre-charge overdraft; thus, it was argued, only the excess of the repayment should be deemed to reduce the amount of borrowing secured by the charge. It is not clear from the judgment the precise difference this would make to the amount recoverable but in previous cases[7] the difference has been substantial.

Barron J found: (i) that the company was not solvent when the charge was created: (ii) that in view of the gap of two years between the making of the first advance and the execution of the charge, it could not be said that the money was advanced "at the time of or subsequently to the creation of and in consideration for the charge". Since the plaintiff was not entitled to the benefit of the proviso it was unnecessary to decide whether the Rule in *Clayton's case* applied; however Barron J. added:-

> "It seems to me that the application of the Rule defeats the intention of the legislation and that the proviso would be better construed where there is an unbroken account between the company and the debenture holder by deeming that it has been broken and a new account opened".[8]

The objections to this view are formidable. They may be summarised: (i) Irish and English authority is unanimously in favour of the Rule being applied; (ii) It is settled that the Rule applies to other aspects of a winding up e.g. under Section 285 of the 1963 Act;[9] (iii) In the absence of clear words it is assumed that a statute does not alter the Common Law,[10] or any established principle of law,[11] nor remove private rights.[12]

Earlier case law

As to authority, Barron J was not bound by any of the decisions in point i.e. that of Kenny J in *Re Daniel Murphy*,[13] following the

English High Court in *Re Thomas Mortimer,*[14] later approved by the Court of Appeal in *Re Yeovil Glove Company.*[15] However, a High Court judge will not lightly refuse to follow a decision of the same court which has stood unchallenged for 30 years; and while the willingness of Irish judges to uncritically apply English authority has been justly criticised[16] the fact that the same question has twice received the same answer from English courts strengthens the Irish decision.

These decisions, it is true, are not impressively reasoned. Kenny J in *Re Daniel Murphy* did no more than quote at length from *Re Thomas Mortimer,* note that the English High Court had just reached a similar decision in *Re Yeovil Glove Company,* and then say:

> "I do not see any reason why the Rule in *Clayton's case* should not apply".[17]

In *Thomas Mortimer* Romer J set out the Rule in *Clayton's case* as he understood it[18] but he did not address the point which worried Barron J i.e. that applying the Rule simply nullifies the aim of the statute.

In *Yeovil Glove Company* Plowman J in the High Court[19] dealt with the Rule at slightly greater length. Having referred to *Thomas Mortimer* he quoted authority[20] which suggested that the Rule is not an inflexible rule of law but a presumption of fact to be applied where neither creditor nor debtor has exercised his right to appropriate. He stated that since there was no evidence that either party had appropriated, he must apply the Rule, rejecting an argument that it did not apply where as in the instant case, there were several accounts. Again Plowman J did not seem to be concerned about the effects of the Rule on the statute. The Court of Appeal on the other hand were just as aware as Barron J of the unfortunate result of applying the Rule; Harman LJ grumbled:-

> "The result is startling for thus the Bank pays itself out of monies received subsequent to the charge for the whole of the Company's indebtedness to it prior to the charge, and which was admittedly not covered by it. The result is that the whole of the pre-charge indebtedness is treated as paid off and the Bank is left bound to set off against its post charge advances only the excess received after satisfying the company's pre-charge indebtedness. This would seem largely to nullify the effect of the Section in the case of a company having at the date of the charge a largely overdrawn account with its Bank, and which continues to trade subsequently . . . it was however held by Romer J in *Re Thomas Mortimer Ltd* that *Clayton's case* applied with the result stated, and I can see no escape from it, nor in spite of frequent pressing by the Court did the appellant's counsel forward any alternative. He did indeed argue that the fact that there were three accounts and not one made some difference, but he was quite unable to explain to my satisfaction what it was."[21]

The reason given, therefore, both in Ireland and the UK for applying the Rule is that there is no reason not to apply it.

"The reason given, therefore, both in Ireland and the UK for applying the Rule is that there is no reason not to apply it."

Application to a winding up

To this however it may be added that the Rule does apply to other aspects of a winding up. In *Station Motors Ltd. -v- A.I.B.*[22] the defendant argued that it had a preferential claim on money paid by the plaintiff for wages out of its overdrawn account with the defendant, relying on Section 285 (6) of the 1963 Act which inter alia provides that where money has been advanced to pay wages of the company's employees:-

> "The person by whom the money was advanced shall in a winding up have a right of priority in respect of the money so advanced and paid".

Carroll J with some hesitation found that the Bank had advanced money for the purpose of paying wages. During the relevant period however substantial lodgments had been made to the account: the liquidator argued that the Rule in *Clayton's case* applied and that these must be deemed to clear the earlier cheque drawn for wages. Carroll J accepted that the Rule applied, following the English High Court in *Re Primrose (Builders) Ltd.*[23] In both cases, according to Carroll J:-

> "There was no evidence at all on which a Court could come to the conclusion that the Rule was to any extent by agreement between the parties not to apply in any particular instance".[24]

Accordingly having disregarded a number of lodgments which she had found to amount to fraudulent preference, she found that the cheques which the remaining lodgments would suffice to repay had been cleared and no subrogation could be claimed for them.

The obvious difference between Section 285 and Section 288 in this respect is that if the Rule is applied in a Section 285 case it reduces the amount for which the creditor can claim subrogation, whereas if applied in a Section 288 case it may increase the amount which the creditor can claim under the proviso. The particular difficulty faced by Barron J in *Smurfit Paribas* therefore did not face Carroll J in *Station Motors.* Nonetheless all the cases under discussion, except *Smurfit Paribas* were decided on the same ground i.e. that the normal rules of appropriation apply in a winding up, because the relevant legislation has not stated that any other rules should apply.

Statutory interpretation

This brings one to the question of statutory intrepretation. As noted above, it has been stated that the Rule in *Clayton's case* is strictly a presumption of evidence, rather than a rule of law. This, it is submitted, is largely a matter of semantics. In the absence of any evidence of what the parties intended, the rule in *Clayton's case* governs the method by which payments are appropriated, and this can properly be regarded

as part of the Common Law. Further it will be recalled that Barron J's approach would involve deeming:

> "Where there is an unbroken account between the company and the Debenture holder . . . that it has been broken and a new account opened".

No doubt the obvious way to avert the Rule is to open a new account:[25] this, however, is a matter for the parties to agree. One must question the artificiality of "deeming" an unbroken account to be broken, especially as Section 288 says nothing on the matter. Further, appropriation involves contractual rights: the right in the first case of the payor or by default the payer to determine which lodgement shall repay which debit. Clearly Barron J's intrepretation must defeat the creditor's right to appropriate.

Is his reading allowable? There is of course no presumption, or at most a very weak one,[26] that a statute is not intended to change the Common Law; but there is a presumption that any such change will be specified in the clearest possible terms[27] and it has been suggested[28] that the greater the proposed change, the clearer the words must be. Therefore Section 288 can be held to have changed the law on appropriation of payments if this is the plain meaning of the words used or the inevitable consequence of those words.[29] What then are the words which clearly indicate the change in the law? The proviso reads:-

> "Except to the amount of any cash paid to the company at the time of or subsequently to the creation of and in consideration for the charge".

What strikes one is not the clear intention to change the Common Law, but the failure to refer to any Common Law provision at all. The words "cash paid" can no doubt refer to a running account to which lodgments are made: but in what way does the clause affect the existing law governing such accounts? So far from showing a clear intention to change the existing law there appears to be no such intention at all. In the writer's view the proviso cannot be called ambiguous, because the words are clear, and clearly make no change in the law. Assuming that they are ambiguous, it is settled that ambiguity is not enough to effect such a change. This would seem an excellent place to use the maxim of Byles J in *R -v- Morris:*[31]

> "It is a sound rule to construe a statute in conformity with the Common Law rather than against it except where or so far as the statute is plainly intended to alter the course of the Common Law."[32]

Clayton's case is a part of the Common law, and it is entirely possible to read Section 288 in conformity with it, even if such a reading cuts down the operation of the Section. In the absence of a clear intention to change the law, normal rules of construction suggest that the rule in *Clayton's case* must apply.

***"Clayton's case* is a part of the Common law, and it is entirely possible to read Section 288 in conformity with it, even if such a reading cuts down the operation of the Section. In the absence of a clear intention to change the law, normal rules of construction suggest that the rule in *Clayton's case* must apply."**

Applying the Mischief Rule

There are however certain rules of construction which might support Barron J's reading. The most obvious is the ancient mischief rule. The classic statement was in *Heydon's case:*[33]

"Four things are to be discerned and considered:

> What was the Common Law before the making of the Act?
>
> What was the mischief and defect for which the Common Law did not provide.
>
> What remedy the Parliament hath resolved and appointed. . . .;
>
> The true reason of the remedy; . . . always to make such construction as shall supress the mischief and advance the remedy."[34]

The language used by Barron J suggests that he had in mind the mischief aimed at by Section 288. But what precisely is this mischief? Presumably it is the preferring of one creditor of a company to the others and the risk of diminishing the fund available generally in a winding up. In such case why is there a proviso? The explanation given in numerous cases[35] and apparently accepted by Barron J for a proviso of this kind is to protect bona fide transactions entered into in the usual course of business: but Barron J was satisfied that the transactions before him were bona fide.[36] Therefore Section 288 has two aims which if not directly in conflict may pull in different directions, and to apply the Rule in *Clayton's case* is consistent with one of these aims but not the other. On its own, it appears that the mischief rule would not solve anyting, since it cannot be said that Section 288 has a single clear aim of curing mischief.

Can the proviso be cut down so as to make the Section operate effectively? It is true that special rules are sometimes applied to a proviso: for example where powers are conferred by statute and a proviso appears to cut them down, the proviso will be intrepreted as restrictively as possible.[37] It has further been said that a proviso must not be read literally but merely as one clause in a general enactment. In *R -v- Dibdin*[38] Fletcher Moulton LJ referred to:-

> "The fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso . . . the Courts . . . have refused to be led astray by arguments such as those which have been addressed to us which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso'..[39]

An argument can be made that the proviso "cash paid to the company" should be narrowed as far as possible. Unfortunately Barron J's reading would not so much narrow the proviso as change its meaning and also change the law. As suggested above "cash paid" implies the normal rules of loan and repayment; to alter that meaning goes far beyond any restrictions previously imposed on the meaning of a proviso. If as Barron J suggests the proviso in its ordinary meaning undermines the overall effect of Section 288, it must be taken that the legislature intended this. It is a very old rule of construction that if the general words and the proviso conflict, the proviso must prevail, as it, so to speak, has the last word.[40]

Rule against futility

Finally, Barron J might have invoked what may be called the rule against futility. His view that the proviso read in its natural meaning would thwart the intention of the legislature was shared by Harman LJ in *Yeovil Glove Company.* Was he then entitled to find that the proviso must be given a meaning other than the usual, to make Section 288 workable? The limits of the "Rule against Futility" were set out by Lord Shaw in *Shannon Realities Ltd. -v- Ville de St. Michel*[14]:

> "Where the words of a statute are clear they must of course be followed; but in their Lordships opinion where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty friction or confusion into the working of the system".[42]

Two difficulties arise in applying this rule to Section 288. In the first place, in the writer's view, the words of the proviso are clear, which as the passage above shows, excludes any rule except that of literal intrepretation. Secondly, even if the proviso is ambiguous, so that a rule of "smooth working" would normally be allowable, there is no precedent for applying such a rule in a manner which would change the Common Law. Although it has been suggested[43] that a court chosing between alternatives may choose a meaning which alters the law, it is suggested that it should be very slow to do so.

Conclusion

One must conclude, however reluctantly, that the earlier decisions were right and that there is no ground for reading the Section 288 proviso in a way which excludes the rule in *Clayton's case.* It is understood that Barron J's judgement is under appeal. Should the Supreme Court reverse him on the plaintiff's entitlement to the benefit of the proviso, it will be forced to construe it. One would suggest that however undesirable the literal reading of the proviso may be, there are insufficient grounds for applying any other rule of intrepretation and any reform must be left to legislation.

"One must conclude, however reluctantly, that the earlier decisions were right and that there is no ground for reading the Section 288 proviso in a way which excludes the rule in *Clayton's case.*"

NOTES

1. Barron J. 1 February, 1991, Unreported.
2. *Devaynes -v- Noble, Clayton's case* (1816) 1 Mer 572.
3. *Re Thomas Mortimer* (1925) 4 Legal Decisions Affecting Bankers p.3, [1965] 1 Ch.186 (Note).
4. *Re Yeovil Glove Company* (1965) 1 Ch. 148.
5. *Re Daniel Murphy* [1965] I.R. 1.
6. It is unlikely that the altered wording affects the point at issue here however.
7. *In Re Daniel Murphy* the difference was about £4,700; in Re *Thomas Mortimer* it appears that about £51,000 was at stake.
8. At page 12 of his unreported judgment.
9. See *Station Motors Ltd. -v- A.I.B.* [1985] I.R. 756; *Re Primrose Builders Ltd.* [1950] Ch. 561.
10. *Leach -v- R* [1912] A.C. 305;
11. Including Rules of Procedure – see In *Re East London Railway Company* (1890) 24 Q.B.D. 507.
12. *Re Fitzgerald* supra.
13. [1964] I.R. 1.
14. (1925) 4 Legal Decisions Affecting Bankers p.3, [1965] 1 Ch 186 (Note).
15. [1965] 1 Ch. 148.
16. See the remarks of McCarthy J in *Irish Shell -v- Elm Motors* [1984] I.R. 200 at 225 to 227 on the view of Costello J. in the Court below (page 212).
17. [1964] I.R. 1 at 13 to 14.
18. His grasp of the relevant law seems to have been rather shaky but this may be explained by the judgment apparently being ex tempore.
19. Reported at [1963] Ch 528.
20. *In Re Sherry* (1884) 25 Ch. D 692; *Deeley -v- Lloyds Bank Ltd.* [1912] A.C. 756.
21. [1965] 1 Ch. 148 at 172 to 173.
22. [1985] I.R. 756.
23. [1950] Ch. 561.
24. [1985] I.R. 756 at 765.
25. See Paget on Banking (10th Edition) at pages 242 to 243.
26. See *In Re Fitzgerald* [1925] 1 I.R. 39, 42.
27. See in particular *Leach -v- R.* [1912] A.C. 305.
28. See *Burge -v- Ashley and Smith Ltd.* [1900] 1 Q.B. 744.
29. As to necessary implications, see *In Re East London Railway Company* (1890) 24 Q.B.D. 507.
30. The amended wording inserted by Section 136 of the 1990 Act reads "Money actually advanced or paid or the actual price or value of goods or services sold or supplied".
31. (1867) L.R. 1 C.C.R. 90.
32. (1867) L.R. 1 C.C.R. 90 at 95.
33. (1584) 3 Co. Rep. 7A.
34. Ibid.
35. Notably *Re Columbian Fire Proofing Company* [1910] 2 Ch. 120.
36. See page 15 of his Judgement.
37. *Re Tabrisky, ex parte the Board of Trade* [1947] Ch.565.
38. [1910] P. 57.
39. [1910] P. 57 at 125.
40. See *Attorney General -v- Chelsea Water Works Co. (1731)* 1 Fitzg 195.
41. [1924] A.C. 185.
42. [1924] A.C. 185 at 192/193.
43. See *Nokes -v- Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014 at 1022 per Viscount Simon L.C.

Christopher Doyle, BL.

CORRESPONDENCE

The Editor,
Gazette

Sexist Forms of Address

Dear Editor,

I write to the *Gazette* as the forum of last resort concerning a certain phenomenon which I encounter from time to time in dealing with some of my professional colleagues. I am a solicitor practising in the Dublin area and occasionally, in the day to day contact with some of my male colleagues, I find that I am often addressed by them as "love", "dear", even "good girl" in the course of mutual professional dealings. In my experience these terms of reference are used exclusively as a form of deliberate diminution of my equal professional status. This is quite apparent from the manner in which these terms are inserted, either in consultation (sometimes in the presence of clients), or in telephone conversation. I stress that these terms of reference are employed by both young and not so young alike.

Through the good offices of the *Gazette*, I would like to bring to the attention of these offending solicitors and to the members of the profession as a whole that such offensive and objectionable attitudes in the conduct of professional affairs are wholly inadequate and totally unacceptable and as such require immediate elimination. They are damaging not only to the much maligned image of the profession itself, but more importantly they have the propensity to interfere in clients' affairs to the detriment of the general public seeking a professional service. I therefore take this opportunity in exhorting your readers to guard against such prevailing and, at times, deeply ingrained, sexist attitudes and not to dismiss my contribution as one of exaggerated hysteria.

I should add that this concern is one which is shared by a number of my colleagues and is not born of an isolated incident.

I supply you herewith with my name and address. I would rather that you withold these as I fear that a certain section of the profession has not realised sufficient maturity to accept what I say in the spirit in which it is intended, namely, for improved professional relations and respect for all colleagues irrespective of their sex.

Yours etc.,

(Name and address with editor).

Re: Proposed abolition of Irish language requirement for solicitors.

The Editor,
The Gazette

Sir,

I was rather surprised to note in the *Gazette* (Viewpoint, Jan/Feb 1992) that the Law Society has been urging the Government to alter the law relating to the requirement that those seeking admission as solicitors or barristers should as a matter of law pass an examination in the Irish language before they can be admitted.

I have not been aware of any great pressure in the profession relating to a change concerning this situation nor indeed have I been aware of the fact that the Society has decided to make a decision to go on record as being opposed to the present legal situation.

I would of course agree with the general tenor of the article which is to the effect that only lip service has been paid to the Irish language by Government etc. but I do feel the following points should be borne in mind.

Firstly, the standard of Irish required for the Society exams is not an exacting standard and I do think that it would be a very unsatisfactory situation if learned members of our profession are going to be incapable of pronouncing or understanding even the local place names in their own country!

It is true to say that the legal requirement is discriminatory and no doubt if Government were serious about the Irish language they would provide adequate services at every level in the language and all persons dealing with the public would be required to have a knowledge of the language.

At a time when we are drawing closer to our European partners where almost all countries in the EC have bilingual situations it seems in my view to be a retrograde step for the Society to adopt the position which it is adopting in this case.

Yours etc.,

Tom O'Donnell
15 Mary St., Galway

The Editor,
Gazette

Sir,

I refer to your recent editorial in relation to the necessity of sitting the first and second Irish examinations. I would like to make the following points:-

a) I presume that the purpose of the Irish examinations is to test the

applicant's oral and written skills in that language. From memory, I recall that both examinations were very similiar as to content and difficulty. I think it is both a waste of time and money especially on the applicant's behalf, to have to sit almost two identical examinations. It is very well known, that the failure rate is very, very low. The threshold of both written and oral skills required does not seem to be very high. Therefore, it would seem a farce that these examinations are seen as a measurement of an applicant's ability. In fact it makes a mockery of the whole system.

b) Rather than have two (almost identical) examinations, I would suggest that a day be set aside either on the Professional or Advanced Course (or both) where students are taught a basic legal vocabulary in Irish. I am sure a student would rather learn the Irish for District Court, instalment order, consent, adjournment, conveyance, contract, etc., rather than for a currach being rowed over rough seas off the Kerry coast!

It would, therefore, seem to me that the purpose of the Irish examinations is self-defeating and has now been rendered meaningless. However, I would not see any objection to the proposal as outlined above.

Finally, in case any reader would think that this is an anti-Irish letter, I am a fluent speaker and this letter has been written in an attempt to defend the abuse of our native language.

Yours etc.,

Feargal O'Dulaing
Solicitor
Roslevan,
Ennis,
Co. Clare.

Croatia Appeal

President, Incorporated Law Society of Ireland,
Blackhall Place

Dear Colleague,

We are deeply grateful that you responded to our appeal of 30.8.1991 and expressed your solidarity and support with the Croatian people in this bloody and dramatic struggle for freedom.

The Republic of Croatia has been an internationally recognised State since 15 January, 1992. We cannot thank you enough for your contribution to the realization of the centuries-old dream of the Croatian nation and Croatian lawyers through your action, support and influence.

Unfortunately, Croatia has had to pay very dearly for its freedom: tens of thousands dead and wounded, hundreds of thousands dislocated, cities destroyed, levelled and more than 1/3 of Croatian farms destroyed . . . You most likely have already received information about this.

However, I want, in particular, to inform you about the huge damage suffered by Croatian lawyers in this barbaric war against Croatia. The war has struck around forty cities since June, 1991. We mention only some of these: Osijek, Vinkovci, Vukovar, Ilok, Karlovac, Dubrovnik, Sibenik, Zadar. Since this time, lawyers in these towns and regions have been unable to work. They are left without any kind of income. Some have been killed or wounded and many of them have seen their homes, apartments and offices destroyed. We are speaking of about 400 lawyers and law clerks which is 1/3 of all lawyers in the Republic.

The Croatian Bar Association has begun an action to help our colleagues and in this aim, we have founded the Croatian Lawyers Trust to collect and distribute aid.

We are therefore appealing to you and asking your bar associations and members to join in this action of collecting money for the above-mentioned purpose. A special bank account has been opened at the Bank of Zagreb. Contributions can be sent to: The Bank of Zagreb. Foreign Currency Account Number: 30101-620-16-012101/2421717793 Croatian Lawyers Trust.

The Croatian Bar Association is supervising the entire action.

Your inclusion in this action would not mean only material help but more support to the Croatian Bar Association in its battle to establish a legal state in our homeland after this terrible war.

We thank you and express our sincere and friendly greetings!

Mario Kos
President
Croatian Bar Association
41000 Zagreb,
Zrinjevac 15/11
Croatia. □

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Taxation Committee 1991/92

Back Row: L-R Walter Beatty, Paul Smyth, David Donegan, Peter Maher, John O'Connor, Paul McNally and Ciaran Keys. Front Row: L-R Eileen Brazil, Committee Secretary, Desmond Rooney, Vice Chairman, Laurence Shields, Chairman, Caroline Devlin, Michael O'Connor. Absent from photograph: Donal Binchy, Brian Bohan, Padraig Burke, Eugene O'Connor.

Work of the Committee

The Taxation Committee is primarily involved in taxation matters as they affect a solicitor in practice. It meets at least monthly. The Committee responds to members' requests or queries in relation to taxation matters and in particular queries in relation to Capital Acquisitions Tax, Capital Gains Tax and Stamp Duty, Corporation Tax and Income Tax. There are also certain major events each year which the Committee spends some considerable time assessing and summarising for the benefit of the members of the profession. Firstly, there is the consideration of the Budget and the production of the Budget highlights for use by members of the profession. Secondly, there is an annual meeting with the Revenue Commissioners which considers difficulties which have arisen in practice for solicitors and/or difficulties with the operation of provisions of the sections of certain Acts. There is a useful exchange of information at this meeting and the Committee welcomes members' comments and suggestions in this regard. Thirdly, the Committee considers the terms of the Finance Bill or Bills each year and summarises the provisions and circulates them to the members. Fourthly, the Committee through its representative participates in the Tax Administration Liaison Committee (TALC) with the Revenue Commissioners and again on certain of its sub-committees. The purpose of TALC and the Law Society's representation on this Committee is to assist in the smooth running and operation in practice of the tax system.

Benefit to the Profession of Committee

The Committee works closely with other committees in the Law Society and assists them in coming to conclusions in respect of certain matters. Its principal benefit to the profession is that the profession is seen to have an active and competent committee in this area which can assist the Law School in the setting of its syllabus, in responding to members queries and in informing the profession from time to time of important matters and the provisions of the Budget and the Finance Bill.

□

Laurence Shields
Chairman

Bar Council Notice

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FLANAGAN, Doirbhile, B.C.L., (T 1977), 24 St. Kevin's Park, Dartry, Dublin 6, **978918,** *Dub,* 479.

GLEESON, John, B.A., MesL Dip.Eur.Law, (T1989), 73, Cowper Road, Dublin 6, **978310** G.P., RSVP **721113 Ext. 989, 482.**

MARTIN, Francis Joseph, B.C.L., (T 1985), Moynalvey House, Summerhill, Co. Meath, **0405-57016,** Ardeevin, Clones, Co. Monaghan, **047-51076,** *Nor,* G.P., CH, **231.**

O'DONOVAN, Diarmuid B., B.C.L. S.C., (M 1959) (SC M 1974) (Eng 1975) (N.I. 1976) "Argyle", 23 Park Drive, Rathmines, Dublin 6, 979615, *Mid, Gly & Dlk,* G.P., RSVP **735268 Ext. 234,** DPA **234.**

O'TOOLE, Mary, B.C.L. (T 1980), 319B Sutton Park, Dublin 13, **324283, 373.**

QUINN, Anthony P., M.A., B.Comm, F.C.I. Arb, FIIS, D.P.A., Dip Arb. Law, Dip. Int. Arb. Law (M 1984) (Eng 1990), "Rosenbeg", Saval Park Road, Dalkey, Co. Dublin, **2854811,** *Dub, Est & Wkl,* G.P. 2,4,5,6,9,10, DPA, **534.**

Please refer to page 369 of the Law Directory for the key to the abbreviations.

Law Directory 1992

Please note the correct telephone numbers for *Cathal O'Donohoe & Co. Solicitors,* 12 Rafter St., Enniscorthy is 054-34044 and not 054 34033 as published on page 10 of the late entry/errata sheet.

Please insert an entry for Val W. Stone solicitor into the Wexford section as follows: Val W. Stone & Co., Solicitors, 14 North Main St, Wexford. Tel: (053) 46144 (3 lines) Fax (053) 46099.

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.
18 April, 1992

Lost Land Certificates

Thomas O'Keeffe, Folio: 38202; Land: Ballynahina; Area: 1(a) 0(r) 39(p). **Co. Cork.**

Thomas Stafford, Folio: 9903; Land: Ballyhealy or Ballinure; Area: 52(a) 1(r) 1(p). **Co. Westmeath.**

Sean Thomas Fitzmaurice, Folio: 6920; Land: Ballinastoe; Area: 10(a) 0(r) 11(p). **Co. Wicklow.**

Patrick J. O. McGarry, Woodville Road, Sligo. Folio: 681F; Land: Rathonoragh; Area: 0(a) 1(r) 27(p). **Co. Sligo.**

Laurence Howard, Claggan, Bunnahowen, Ballina, Co. Mayo. Folio: 38088; Land: Srah; Area: 70(a) 0(r) 12(p). **Co. Mayo.**

William Nally, Folio: 845F; Land: Part of townland of Garrycastle. **Co. Westmeath.**

Patrick Sheehan, Folio: 1886; Land: Tarmon East; Area: 2(a) 3(r) 29(p). **Co. Kerry.**

Robin and Evelyn Taylor, Derreen, Leitrim, Co. Roscommon. Folio: 16241; Land: Derreen (Parts); Area: 34(a) 2(r) 16(p). **Co. Roscommon.**

Mary E. Logan, Main Street, Mohill, Co. Leitrim. Folio: 21968; Lands: (1) Lackagh, (2) Cloonblasny Beg, (3) Cloonteem. Area: (1) 10a 0r 0p, (2) 1a 2r 10p, (3) 16a 1r 8p. **Co. Leitrim.**

Kevin McEntee and Kathleen McEntee; Folio 14761; Land: Drumillard; Area: 24(a) 1(r) 0(p). **Co. Monaghan.**

Mary McGrath and Patrick McGrath; Folio: 18835; Land: Townparks; Area: 0(a) 1(r) 32(p). **Co. Westmeath.**

Laurence Richard Weldon, Folio: 790; Land: Part of lands of Kilmore; Area: 33(a) 3(r) 31(p). **Co. Meath.**

John O'Sullivan, Folio: 1223F; Land: Part of the Townland of Crooke. **Co. Waterford.**

P.J. Foley and Patrick Doyle, Folio: 6892 closed to 1184F closed 11159; Land: (1) Ballycrogue, (2) Moyle Big, (3) Moyle Big, (4) Moyle Big; Area: (1) 7.900 acres, (2) 26.700 acres, (3) 28.263 acres, (4) 18.100 acres. **Co. Carlow.**

Gerard Boylan, 19 Sallymount Avenue, Dublin. Folio: 21435L; Land: Townland: Newbrook, Barony: Coolock. **Co. Dublin.**

Calaroga Limited, Folio: 2600; Land: Part of the lands of Common and Piercetown. **Co. Kildare.**

Edmond E. Scanlon, Folio: 6399; Land: Part of the lands of Knockafreaghaun; Area: 56 acres. **Co. Kerry.**

James Brennan, Folio: 10467 and 10304; land: (1) Tullycoora (part) Folio 10467, (2) Tullycoora (part) Folio 10304; Area: (1) 13(a) 3(r) 24(p), (2) 8(a) 1(r) 36(p). **Co. Monaghan.**

John Gerard Faulkner, Folio: 2006F; Land: Betaghstown; Area: 0(a) 1(r) 30(p). **Co. Meath.**

John Desmond Foley, Folio: 3F; Land: Mullaghsallagh, Newbrook, Lisconor. **Co. Leitrim.**

Jeremiah O'Sullivan, Folio: 16275F; Land: Part of townland of Carrigrohane. **Co. Cork.**

Matthew Fitzpatrick, Folio: 19704; Land: Part of land at Bawnboy; Area: 0(a) 1(r) 2(p). **Co. Cavan.**

Thomas Coffey, deceased, Folio: 659; Land: Part of lands at Leabeg; Area: 14a 1r 39p. **Co. Kings.**

Peter Feeney, Mullacaltra, Claregalway, Co. Galway. Folio: 25996F; Land: Kilgill; Area: 3.994 acres. **Co. Galway.**

James Morris, Purts, Kiltoom, Athlone, Co. Roscommon. Folio: 808F; Land: (1) Carrowmurragh, (2) Carrowmurragh, (3) Carrowmurragh; Area: (1) 58(a) 0(r) 37(p), (2) 3(a) 1(r) 28(p), (3) 16(a) 3(r) 15(p) and others. **Co. Roscommon.**

Joseph Thomas Kenneally, Folio: 472; Land: Part of lands at Kilquade; Area: 85(a) 39(p). **Co. Wicklow.**

Lost Wills

O'Malley, Martin J, deceased, late of the Square, Headford in the County of Galway, farmer. Would anybody having knowledge of the whereabouts of the original of the deceased's will which is dated 27 January, 1984, please contact W.B. Gavin & Co., Solicitors, 4 Devon Place, The Crescent, Galway.

Coughlan, Michael, of Killahunna, Killimore, Co. Galway, date of death 18 February, 1984. Would any person having knowledge of the whereabouts of a will of the above named deceased, please contact: Charles J. Flanagan of Bolger White Egan & Flanagan, Solicitors, Portlaoise (0502) 21468/20232.

Phelan, Patrick, deceased, late of Woodview, Donaghamore, Co. Laois. Would any person having knowledge of the whereabouts of a will of the above named deceased who died on 21 July, 1991, please contact: Robert Walsh & Co., Solicitors, 2 Herbert Street, Dublin 2. Telephone: 766490. Reference: CE/AC.

Duffy, Bernard (Brian), deceased, late of 18 Fairview Green, Fairview, Dublin 2. Died on 10 February, 1992. Pre-deceased by his wife, Josephine Duffy, formerly Vaughan (nee Shiels), on 30 November, 1991. Would anybody having knowledge of the whereabouts of a will of the above named Bernard Duffy or Josephine Duffy, please contact: C.E. Callan & Co., Solicitors, Boyle, Co. Roscommon. Telephone: 079-62019.

Kelly, John, deceased late of 22 Deerpark Avenue, Castleknock, Dublin (formerly of Silversprings, Clonmel, Co. Tipperary) who died on 21 January, 1992. Anyone having knowledge of the whereabouts of a will of the above named deceased, please contact: John Shee & Co., Solicitors, Parnell Street, Clonmel, Co. Tipperary. Telephone: 052-22900.

Flynn, Michael, deceased late of 14, Dalmeny Road, London N7 and Springfield or Moneenbraddagh, Castlebar, Co. Mayo. Would any party with knowledge of the whereabouts of any will, or concerning the affairs of the above named deceased who died on 22 November, 1991, please contact: Michael Moran and Co., Solicitors, Castlebar, Co. Mayo. Telephone: (094) 21688 Fax: (094) 22356.

Colgan, Gerald, deceased, late of Knocktemple, Virginia, Co. Cavan and formerly of Woodlands, Navan, Co. Meath, retired miner and farmer. Would any person having knowledge of the whereabouts of a will of the above named deceased, who died on 21 December, 1991, please contact: Steen & McGovern, Solicitors, Tara House, Trimgate Street, Navan, Co. Meath. Telephone: (046) 27505/6 Fax: (046) 27506.

Kiernan, Richard, deceased, late of 9 Barclay Court, Temple Road, Blackrock, Co. Dublin (formerly of 10 Stella Gardens, Irishtown, Dublin 4). Would any party having knowledge of the whereabouts of a will of the above named deceased, who died on 23 December, 1991, please contact: Marren & Co., 2/4 Lower O'Connell Street, Dublin 1. Reference BC, Tel: 746616/745610.

Coakley, Catherine, (otherwise Katherine) (otherwise Kit), late of Lissaniskey, Upton, (otherwise Lissaniskey, Innishannon) Co. Cork. Will anyone having knowledge of the whereabouts of a will of the above named deceased who died in May, 1990, please contact Murphy & Long, Solicitors, Lower Kilbrogan Hill, Bandon, Co. Cork. (023) 44420.

Coleman, Patrick J., deceased late of 26 Chelmsford Road, Ranelagh, Dublin 6 and formerly of Kilkee, Co. Clare. Would anybody having knowledge of the whereabouts of a will of the above named deceased, who died on 18 January, 1992, please contact Eugene O'Kelly, Solicitor, Market Square, Kilrush, Co. Clare. Tel: 065/51089.

Kennedy, Thomas, late of 18 Upper Rathmines Road, in the City of Dublin. Will any party having knowledge of the whereabouts of the will of the above named deceased who died on 8 February, 1988, please contact: Eamonn Greene and Company, Solicitors, 7 Northumberland Road, Dublin 4.

If any party has knowledge of Daniel A. White, Solicitor who practised at 1 Lower Ormond Quay, Dublin 1 and/or his Secretary Olive V. Lucas, please contact: Messrs. Eamonn Greene and Co., Solicitors of 7 Northumberland Road, Dublin 4. Tel: 682355.

Costello, James, late of Furry Hill, Kilmessan, Co. Meath. If anybody knows of the whereabouts of a will of the above named deceased who died on 24 February, 1992, please contact: Margaret McCann, Solicitor, Main Street, Dunshaughlin, Co. Meath. Tel: (01) 250299-250290.

McKenna, James, deceased, late of Aughris, Templeboy in the County of Sligo, farmer. Will any person knowing of a will of the above named deceased who died on 1 December, 1991, please contact: Rochford, Gallagher & Co., Solicitors, John Street, Sligo. Tel: (071) 45503.

Brady, Patrick, deceased late of Kilcock Road, Maynooth Co. Kildare. Would any party have the knowledge of the whereabouts of the will of the above named deceased, who died on 30 October, 1991. Please contact Coughlan & Co., Solicitors, Main Street, Newbridge, Co. Kildare. Telephone: 045-33332.

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Lost Title Deeds, Patrick Treacy, deceased, late of 4 Caulderwood Avenue, Drumcondra, Dublin 9. If any person having knowledge of the whereabouts of any title deeds to the above property, please contact Padraig Turley & Co., Solicitors, 27 Bridge Street Lower, City Gate, Dublin 8.

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VOL. 86 NO. 4 MAY 1992

INCORPORATED LAW SOCIETY OF IRELAND

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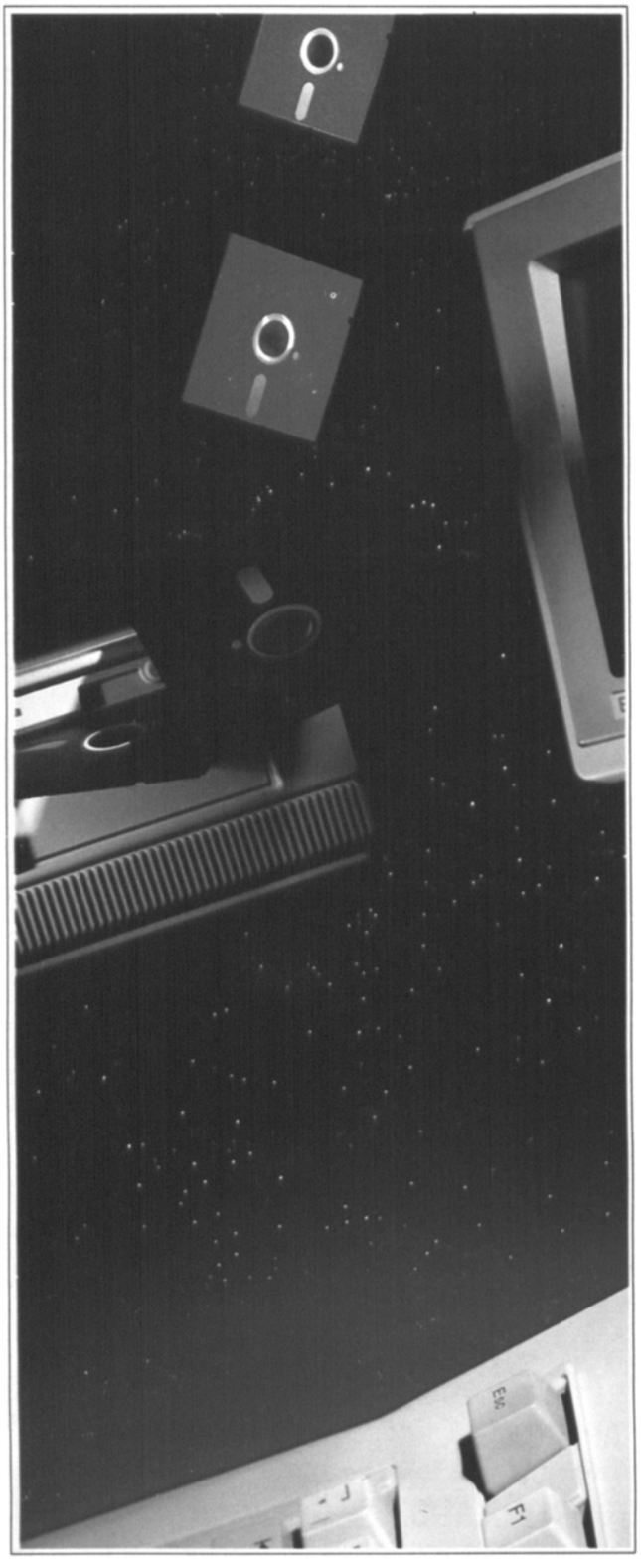

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INCORPORATED LAW SOCIETY OF IRELAND

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Front Cover: At the Law Society Annual Conference in Berlin were l-r: *Harold Whelehan* SC, Attorney General; *Dr. Ingo Kober,* State Secretary, Federal Ministry of Justice Germany; and *Adrian P. Bourke,* President, Law Society.

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VIEWPOINT

Personal Injuries – issues to be reconciled

Personal injury claims have continued to attract significant media attention during recent weeks. While Minister O'Malley's proposed reforms are still awaited, there are clearly significant conflicts between various interests which will be difficult to reconcile.

The announcement by various local authorities and insurers that they are to pool their information in order to identify plaintiffs who have brought spurious claims against various defendants in respect of identical injuries is to be welcomed. The length of time that it has taken these defendants to arrange some form of co-operation in order to identify the makers of these spurious claims does not suggest that efficiency and co-operation had previously reached a high level among these defendants. It has been suggested, though so far as we are aware without any firm evidence, that firms of solicitors and perhaps counsel have colluded in these spurious claims. If this be so then the Law Society, Bar Council or the Courts should deal firmly with such lawyers.

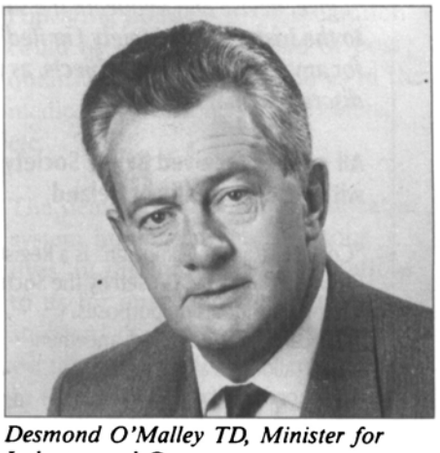
Among the more curious of the recent complaints has been that of Deputy Bernard Allen that solicitors by operating on a "no foal no fee" basis are encouraging the growth of claims. There appears to be some confused thinking behind this comment. If the claims are spurious then the question of whether the solicitor operates "on a no foal no fee" basis is irrelevant. The claim should not have been brought in any case. If the claims are not spurious then is it suggested that solicitors and counsel should not take them unless they are paid in advance or paid at various stages of the proceedings? Irish solicitors and barristers have a long standing tradition of assisting persons with statéable claims to get their cases into court without the expenditure of significant sums of money. In the absence of any proper civil legal aid scheme only persons of considerable financial strength would be able to bring personal injury claims if Irish lawyers did not operate on a no foal no fee basis.

Perhaps the most amusing of the recent comments was that emanating from the Irish Medical Organisation general meeting where we were solemnly assured that American lawyers were being brought over to Ireland to teach Irish lawyers how to improve their skills in bringing medical negligence cases. While we are not aware of any great influx of American lawyers offering their skills to Irish lawyers, it does occur to us that it has not been unusual in the past for Irish medical practitioners to bring distinguished American medical practitioners to Ireland to assist them in their professional post-qualification learning and development.

The medical profession have been late comers to the position of defendants in professional negligence cases and seem to be having difficulty in adjusting to that status. For many years considerable difficulties were presented to plaintiffs in genuine cases of medical negligence because of the difficulty of getting doctors to act as expert witnesses for plaintiffs.

Fortunately, the various branches of the medical profession have seen that such a situation is inappropriate and have arranged for panels of expert witnesses to be formed. There may still be difficulties in plaintiffs getting access to their medical records at early stages of proceedings. Difficulties of this sort only encourage plaintiffs and their legal advisers to be more determined in their efforts.

While acknowledging that we are in an era when perfection is expected of all professionals and that plaintiffs are determined to impose liability on some third party for any ill fortune they may suffer, it may well be that doctors, as other professionals, are



Desmond O'Malley TD, Minister for Industry and Commerce

still not communicating with patients sufficiently, and explaining that many forms of medical treatment involve an inherent risk which cannot be eliminated even with the greatest skill and care and should prepare patients for a less than 100% success rate in treatments or operations.

We have suggested before in these columns that there may be a case for looking at some form of "no fault" scheme for medical negligence such as that in place in Sweden and that which has been proposed by the British Medical Association. Perhaps doctors' representatives would be wise to engage in constructive consideration of such proposals.

The Minister's comprehensive proposals are awaited with interest. If he can achieve a system in which injured parties who have genuine claims can be compensated to a level which is acceptable to the public, while limiting insurance premiums to a reasonable level, he will have achieved much. □

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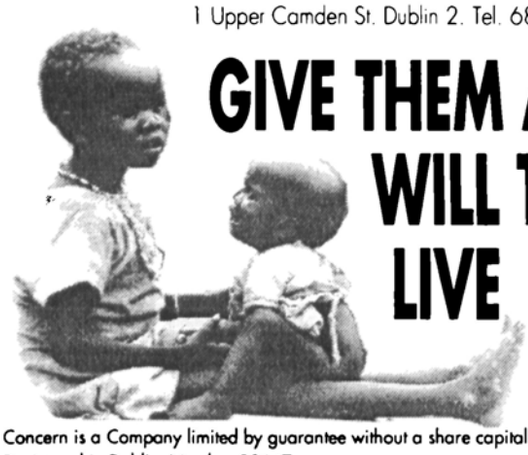

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PRESIDENT'S MESSAGE

Education – A New Approach?

The Issues

The solicitor's profession, and the Society, must ask themselves if the numbers being admitted annually as solicitors are more than the profession itself, or other employment outlets, can be expected to absorb in a time of recession?

Should the Law Society and the profession continue the immense struggle to provide scarce resources to meet demand, irrespective of standards, remuneration, apprenticeship prospects and job opportunities?

We are going to have to address the honesty of the present system, because it would be very wrong of us to lead young people, and their parents or others who pay their bills, to believe that there is utopia at the end of a law degree, or qualification as a solicitor.

It is healthy that the Society should analyse the current position, with a strong emphasis towards planning for the future, in consultation with its education partners, the Government and student representatives.

The Facts

We are currently running 2½ to 3 professional courses in any one calendar year. This means that, for the most part, Blackhall Place is a 365 day a year educational institution. This is placing a huge strain on the voluntary consultants and tutors, on the professors and administrators, on the limited space, and on the general resources of the Society.

There are simply not enough apprenticeships available to meet the demand for them. The shortage of places and the pressure building up on the Society to help to secure apprenticeships, inevitably raises the question whether the apprenticeship in the *present form* is in fact a necessary vehicle to train young solicitors.

A more logical approach might be to examine a restructured scheme of training, under which the student, under normal circumstances, would attend at university, and would then take part in a single continuous course in Blackhall Place, probably for one academic year. During this time the student would receive all of the practical training currently taking place here, but the course would also include exposure to a simulation of a well developed solicitor's practice within Blackhall Place. Correct procedures for running an office, the administrative and financial aspects of practice, client care, and general good conduct as a solicitor, would be dealt with.

Following admission, consideration could be given to a period of post qualification training, such as in the medical profession, for barristers, etc.

The demands of our legal educaton system impinge upon all of our lives, in the number of applications to us for apprenticeships, in the standard of apprentices which we take on and in their training, in the every day running of the Law Society, and most importantly, in the lives of those who wish to enter this profession and who currently have high expectations the fulfillment of which cannot be guaranteed.

Adrian P. Bourke,
President

□

Southern Law Association Annual Dinner

At the Southern Law Association Annual Dinner were L-R: Michael Davey, Secretary, Law Society of Northern Ireland; Noel C. Ryan, Director General, Law Society; Ray Monahan, Senior Vice-President Law Society; Barry St. John Galvin, President, Southern Law Association; Frank Daly, Junior Vice-President and Brian Walker, Senior Vice-President, Law Society of Northern Ireland.

by Eamonn G. Hall, Solicitor

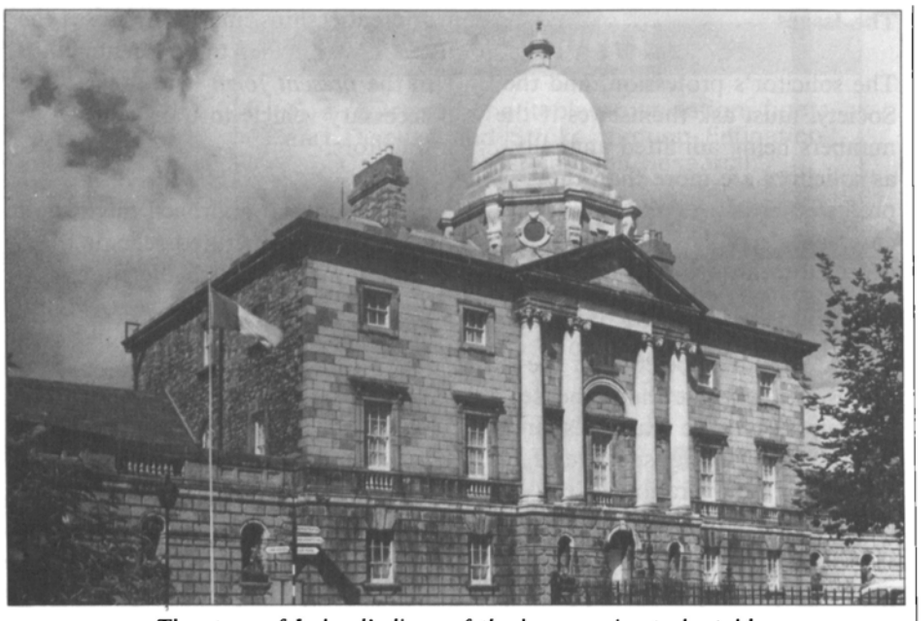
The Lions of the Law

The title above takes its name from a book written by *Paul Hoffman* (New York) in 1973 called *Lions of The Street*. Hoffman opened the doors onto the powerful and protected world of US corporate law and introduced the power brokers who influence the decisions of the nation's top businessmen and politicians. In *Lions of the Eighties* Hoffman took an updated look at the members of the legal profession and observed how nearly a decade of social and economic turmoil had affected what he described as this most secretive and starchy of white-collar professions.

Hoffman noted that the "old guard' was gradually being replaced by a new breed of lawyers who scrambled for business in areas the old guard "law factories" once shunned. The author noted that the women who once reigned only in the reception areas and secretarial pools were then becoming associates and partners at even the most exclusive firms.

Lions of the Eighties took readers behind the scenes at more than 40 of the top law firms in New York and around the United States, providing in-depth profiles of the nation's top lawyers as well as the inside stories of the pivotal (and most often unheralded) role the "Lions of the Eighties" played in the major news events of the day. The story of Ireland's lions of the law remains to be told.

The Irish Magazine, *Finance,* in its February 1992 edition (vol. 6 no. 2) contained a guide entitled "Corporate and Financial Law". The magazine listed 28 firms of solicitors which, it stated, constituted a snapshot of the solicitors' profession in Ireland in early 1992. All the firms involved were stated to derive a major part of their fees from corporate and financial law.



The story of Ireland's lions of the law remains to be told.

Finance noted that information and negotiation were the core services provided by a law firm. Some of the best legal and corporate information libraries in Ireland were maintained by law firms. The top firms were stated to have made big financial investments in the further development of their information databases which go far beyond the maintenance of volumes of case law to a wide range of financial information including on-line databases.

Readers may be interested in the ranking of the top Irish corporate law firms ranked in order of staff as computed by the magazine *Finance.* (See table 1) (Lawbrief cannot vouch for the accuracy of the data).

Meanwhile in England the magazine *Legal Business,* (March 1992) revealed that there were a few senior partners in London firms of solicitors who earned more than £1 million per year. However, in general earnings per partner in the top firms range from about £200,000 for junior partners to £500,000 for senior partners. The magazine ranked the top ten UK firms of solicitors by profit per partner in 1991. (See table 2).

Categorical denials of co-operation were given by several of the London firms involved in the survey. The survey emphasised that the average profit per partner was not the same as take-home pay as partners were often expected to reinvest in the firm.

One reaction to the UK survey was summed up by *Geoffrey Howe,* senior partner of Clifford Chance in the UK *Law Society* Gazette of 18 March, 1992:

> "We were asked for assistance but we did not give it. Any figure for us represents guesswork. Something like this which calls for guesswork is bound to have inaccuracies, but we regard it as a bit of fun – light reading which is not to be taken too seriously".

Table 1 Source: *Finance* February, 1992

Ireland – The Top Corporate Law Firms
(Ranked in order of staff numbers)

NAME	Total No.	Partners	Other fee Earners	Other staff
1. McCann FitzGerald	224	43	79	102
2. A&L Goodbody	223	28	93	102
3. Arthur Cox	140	21	39	80
4. Matheson Ormsby Prentice	118	15	44	59
5. Willam Fry	112	16	47	49
6. Mason Hayes & Curran	75	10	20	45
7. Eugene F Collins	64	8	32	24
8. Gerrard Scallan & O'Brien	63	9	28	26
9. Ivor Fitzpatrick & Co.	62	5	27	30
10. Beauchamps	56	8	18	30
11. Cawley Sheerin Wynne	55	9	21	25
12. Murray Sweeney (Limerick)	49	8	19	22
13. Rory O'Donnell & Co.	48	4	24	20
14. Whitney Moore & Keller	42	10	10	22
15. Holmes O'Malley & Sexton (Limerick)	41	7	5	29
16. Kenny Stephenson & Chapman (Waterford)	33	5	11	17
16. Binchys	33	3	16	14
17. JG O'Connor & Co.	30	7	nd	nd
18. Patrick F O'Reilly	27	3	10	14
19. Gore & Crimes	26	5	4	17
20. M.J. Horgan & Sons (Cork)	25	3	8	14
20. Orpen Franks	25	6	7	12
21. LK Shields & Partners	24	3	9	12
22. Dockrell Farrell	22	6	6	16
23. McKeever & Son	20	4	3	13
23. JW O'Donovan & Co. (Cork)	20	5	4	11
24. Reddy Charlton McKnight	19	9	7	3
25. Kevans	18	3	11	4

Table 2 Source: *Legal Business,* March 1992

UK – The Top Ten Law Firms Ranked by Profits per Partner 1991

Firm	Gross Fees £ million	Fees per fee-earner £000	Average profits per equity partner £000	Profits per fee-earner £000
	£	£	£	£
Clifford Chance	232	207	278	56
Linklaters & Paines	144	208	349	69
Freshfields	115	207	293	60
Slaughter and May	113	208	377	65
Lovell White Durrant	111	185	321	54
Allen & Overy	94	181	344	54
Herbert Smith	89	199	312	56
Simmons & Simmons	84	190	281	57
Norton Rose	72	167	265	47
Nabarro Nathanson	63	155	178	43

The table gives a figure for the average net profit generated per equity partner within a firm. Average profits per equity partner are not the same as take home pay.

Drunk Driving: Failure to Give a Specimen: Shock can be a Reasonable Excuse

The Queen's Bench (Divisional Court) had held in *DPP -v- Pearman, The Times,* Law Report, March 27, 1992 that justices were entitled, without having heard any medical evidence, to find that shock combined with inebriation which rendered a defendant physically incapable of providing a breath specimen for analysis, could amount to a reasonable excuse for failing to provide a specimen under section 7(6) of the (UK) *Road Traffic, Act, 1988.*

The Queen's Bench Divisional Court so held in dismissing an appeal by the prosecution against a decision of mid-Hertfordshire Justices to acquit Susan Elizabeth Pearman of failing to provide a breath specimen without reasonable excuse.

Lloyd LJ said that the justices had found that the defendant had provided one specimen of breath but when it came to providing a second specimen she began to lose her composure. She blew into the intoximeter but was unable to provide a sufficient breath for a second specimen.

The defendant sobbed continuously and felt short of breath and unable to breathe properly. Her condition prevented the supply of further breath specimens.

Lloyd LJ said it was clear the justices had the test in *R -v- Lennard* [1973] 1 WLR 483 well in mind. It was open to the justices to conclude that the defendant was physically incapable of providing a second specimen, although the fact that she had succeeded in providing the first specimen meant the case was very close to the borderline.

The second submission for the prosecutor was that the justices should not have reached that conclusion without medical evidence. The Court was unwilling to accept the proposition in those absolute terms.

Glidewell LJ in *Grady -v- Pollard* [1988] RTR 316, 323 had said: "Such evidence will normally be the evidence of a medical practitioner, but it need not be, and one can envisage situations in which there is other evidence; indeed in some circumstances, the evidence of the defendant himself, would suffice. . . ".

It was true that since *Grady* the attitude of the court had hardened but his Lordship was not prepared to say that the dictum of Glidewell LJ was wrong. In the instant case there was evidence, albeit of the defendant herself rather than a doctor, which justified a conclusion of physical inability to provide a specimen.

That was not to say, (stated Lloyd LJ) that justices should be gullible. The fact that a defendant was drunk, under stress or trying his hardest was not sufficient to found a reasonable excuse. Here the facts went further. The defendant's state of shock was the major factor in the justices' decision. They had been impressed by the quality of her evidence in court. It was not for the Divisional Court to interfere.

Waterhouse J agreed.

Rights of the Unborn

In the case of *Attorney General -v- X and others,* (Supreme Court March 5, 1992, published in book form by the Law Reporting Council, March, 1992) O'Flaherty J referred, inter alia, to section 58 of the *Civil Liability Act, 1961.* Section 58 of the 1961 Act provides as follows:

"For the avoidance of doubt it is hereby declared that the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the chid were born, provided the child is subsequently born alive."

O'Flaherty J gave an example of a pregnant woman who was involved in a car accident and the child in the womb sustained injuries through someone's negligence. The judge stated that the child, on birth, would be entitled to have proceedings brought on his behalf to recover damages for such injuries. The judge stated that there were many in other jurisdictions who in times past would have wished to have such enlightened legislation in force putting beyond doubt the entitlements of the unborn child. He believed that we could have pride in the measures taken in our statute and case law to affirm and protect the rights of the child in the womb.

Thirteen days after O'Flaherty J delivered his judgment, the issue of the right to sue for pre-birth harm was considered by the Court of Appeal (England and Wales) in *B -v- Islington Health Authority* and *De Martell -v- Merton and Sutton Health Authority.* Judgment was given by the Court of Appeal on March 18, 1992. (See *The Times,* Law Report, March 25, 1992.) The Court of Appeal held that children with disabilities caused by alleged negligent medical treatment *before* they were born had a cause of action against the health authorities.

In *B,* the alleged negligence was the carrying out of a dilation and curettage when the plaintiff was an embryo in her mother's womb, which operation it was alleged should not have been performed on a pregnant woman.

Dillon LJ said that the question was whether a child born alive and who suffered disabilities as a result of alleged medical negligence while he was en ventre sa mère could maintain an action for negligence.

The defendants submitted that a child en ventre sa mère was not a person in the eyes of the law. Dillon LJ said that there was no doubt that there were authorities which supported the general proposition that a foetus enjoyed no independent legal personality. See for example *Paton -v- British Pregnancy Advisory Service Trustees* [1979] QB 276), *In re F (in utero)* [1988] Fam 122 and *C -v- S* [1988] QB 135.

Dillon LJ stated that there were other contexts in which the English courts adopted as part of the common law the maxim Qui in utero est, pro jam habetur, quotis de ejus commodo quaeritur (2 Bla Com) that an unborn child was deemed to be born whenever its interests required it. The Court of Appeal considered it that it was open to the English courts to apply the maxim directly to the present cases.

Counsel for the health authorities referred to an Irish case and submitted that the common law had crystallised in the case of *Walker -v- Great Northern Railway Co. of Ireland* (1890) 28 LR Ir 69, in which a pregnant mother fell in a train as a result of the negligence of the railway company and the child was born deformed. The court held that the statement of claim disclosed no cause of action. Dillon LJ in his judgment said that the decision in *Walker* was profoundly unsatisfactory not least because two if not all three members of the court attached weight to the fact that the railway company sold one ticket and not two. If valid today, stated the judge, a child under three who travelled free on the railways would have no cause of action for negligence.

Balcombe LJ agreed with Dillon LJ and Legatt LJ delivered a concurring judgment.

Note: *While* ***Walker*** *was decided on the contractual basis stated, Palles CB acknowledged the right of the unborn to judicial protection.*

Eamonn G. Hall.

□

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The Law Society Annual Conference – Berlin

Berlin:- the euphoria is over and the hangover has set in – not a comment on the condition of delegates returning from the Law Society's Annual Conference in Berlin but, rather, a theme running through the various speakers' presentations to the conference about the problems and challenges posed by the unification of Germany.

The Annual Conference, the first ever to be held outside Ireland, had as its theme "Lawyers in Business in Europe" and was attended by 280 delegates including 21 members of the Irish Bar, lawyers from Australia, England, Wales, Scotland and Northern Ireland, and, of course, Germany.

The conference speakers addressed the position of the unified Germany on the world stage, the problems posed by unification, the structure of the legal profession in Germany and the prospects for foreign lawyers and investors wishing to do business there.

Unity a Psychological Process

Opening the conference, Doctor Jutta Limbach, Senator for Justice in the Berlin Senate, stated that: "the joy about borders being open has given way to anxieties about an uncertain future. The constitutional unity of Germany has been brought about, but the process of growing together is turning out to be more difficult than at first thought." She continued: "we are now comprehending that German unity poses not only legal and economic problems but psychological problems at the same time. After all, we experienced post war history differently in the two parts of Germany. We cannot demand that we lay our own past to rest without difficulty. In fact, the post war history of Germany is now only coming to an end."

Doctor Limbach said that the process of German unity was above all burdened by the difficult economic and social circumstances of people in the new Federal States of Germany. She said that the harmonising of conditions between the former East Berlin and West Berlin was, therefore, the overriding political goal of the Berlin Senate.

The speakers at the first session of the conference on Friday, 24 April, 1992 L-R Dr. Gunter Schardey, President Deutscher Anwalt Verein; Peter Sutherland S.C.; Adrian Bourke, President Law Society; Prof. Dr. Jutta Limbach, Senator for Justice, Berlin and Dr. Helmut Wolf, Director, Berlin Economic Development Corporation.

Berlin Ripe for Investors

Helmut Wolf, Director of the Berlin Economic Development Corporation (BEDC), gave a profile of Berlin, a city with a population of 3.5 million, an area of 350 square miles, generating a "gross domestic product" annually of about DM 120 billion. With the unification of Germany, Berlin was once again the German capital and continued to be the major intellectual, cultural and industrial centre of Germany.

Interest in investment in Berlin was growing continuously he said. The BEDC, a non-profit organisation, was available to assist investment-seeking firms and individuals by supplying advice on finance, taxes, land, buildings, labour and services and in establishing business plans and contracts. Staff of the BEDC assist prospective investors in negotiations with city officials, banks etc by providing, if required, a complete interface between the investor and Berlin.

Privatising Business

Gerd Wachter a director of the Treuhandanstalt, the organisation charged with the privatisation of state owned industry in the former East Germany, described the work of his organisation, known colloquially as the "Treuhand". He outlined the difficulties that arose in transferring ownership of businesses and property since all property in the former East Germany was State owned. In addition, the function of the Treuhand was not primarily to make money in the market place by obtaining the maximum price for the industries on sale, but rather to achieve certain so called "soft goals" such as the maintenance of employment.

The Legal Framework

The President of the Deutscher Anwalt Verein (German Lawyers

Association), Doctor Gunter Shardey, described the structure of the legal profession in Germany and the problems and challenges that had been posed by unification.

Before unification, said Doctor Shardey, there were only 600 lawyers in East Germany, Now in Germany as a whole there were about 65,000 practising lawyers of which approximately 3,500 were established in the former East Germany. The number of lawyers from West Germany who were establishing in the new East German States was increasing all the time, he said. While former GDR lawyers had dealt mainly with family and criminal law, commercial law was now the crucial area.

The Deutscher Anwalt Verein had assisted its new colleagues from the former GDR by providing training including opportunities for those lawyers to undergo practical periods of work experience in West German law firms in order to help them to adapt to the new legal system.

Doctor Shardey said that unification had created a greater demand than ever for lawyers in Germany and, of course, there were opportunities for Irish lawyers to get into business in Germany.

Opportunities for Foreign Lawyers

Doctor Ingo Kober, State Secretary in the Federal Ministry for Justice, said that, despite the considerable differences that had existed at the time of unification, the legal profession had consistently come out in favour of mutual intergration and the means to achieve this had been set out in the Unification Treaty. "The basic arrangement takes the line that all lawyers should retain their admission to the profession, should enjoy the same rights and obligations, and be permitted also to be active professionally in the territory of what used to be the 'other' Germany."

Frank Murphy, Gleeson McGrath Baldwin and former President of the Law Society, Moya Quinlan, at the reception before the Conference Dinner and Dance.

Doctor Kober then turned towards the opportunities for foreign lawyers. "Upon creation of German unity, the entire territority of the Federal Republic of Germany became a member of the European Community. For lawyers from the EC Members States that means that the freedom of movement under Community law applies now to the whole of Germany.

"German law itself is also, I feel, generous in the options it affords European lawyers wishing to set up in business in Germany. Lawyers from other EC Member States have the right to become members of the Lawyers Professional Association so that they – as their German colleagues – are subject only to supervision from their own profession. They work under the professional title applicable in their home country and are restricted to giving legal advice and providing legal representation based on their own domestic law, European Community law and other international law. They are free to co-operate professionally with German lawyers or with colleagues of the same status from other States."

The Conference was also addressed by former EC Commissioner, Peter Sutherland SC and the Irish Ambassador to Germany, His Excellency Padraic Murphy. Summaries of their presentations will be published in a future issue of the *Gazette*.

Commenting on the Conference, Adrian Bourke, President of the Law Society, said: "The presence in Berlin of Irish lawyers from North and South, barristers and solicitors, was very much appreciated by German legal bodies, and by the German Government. The quality of the speakers, and the depth of their content, on the eve of European union, was a source of constant comment, and was a signal to a major European partner of our interest in those areas, and of our anxiety to be seen to take a real role in the work of the Community and in the business which is to be done during and after the coming into effect of the Maastricht Treaty. It would be my personal hope that there is a directional force indicated by the success of this Conference, which should be followed by the Law Society from time to time. I express deep appreciation to the speakers, to the Organising Committee and to the fantastic participants from the Bar and from the solicitors profession, who made it all possible." □

The Building Control Act, 1990 and the New Building Control Regulations

by Joan Fagan, Solicitor, William Fry and John Furlong, Solicitor, William Fry.

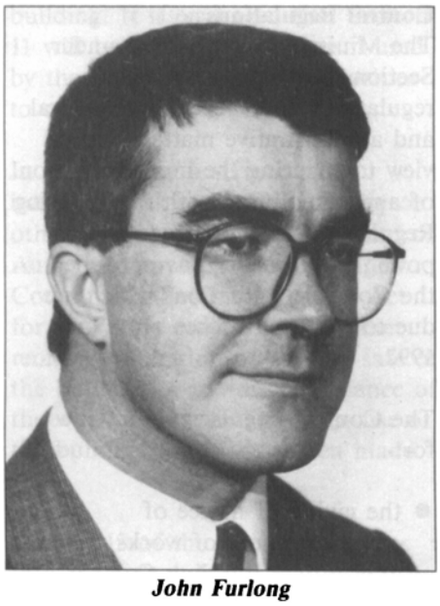
The current system of building bye-laws, enforced by only a number of sanitary authorities, was established by the Public Health (Ireland) Act, 1878. The Local Government (Planning and Development) Act, 1963 provided for the making of regulations for a variety of purposes which would establish a comprehensive code of building standards throughout the State. However, while draft building regulations were circulated by the Minister for the Environment in 1981, the necessary orders were never made. Until now, there has not been a substantive code, statutorily enforced and on a national level to regulate building and construction requirements.

The Building Control Act, 1990 was originally introduced as the Building Control Bill, 1984. Its urgent implementation was recommended in the Report of the Task Force on Multi Storey Buildings in 1988. After substantial revision during its passage through the Oireachtas, the Bill was signed into law in March, 1990.

Commencement
Sections 1, 2, 3, 4, 6, 7, 14, 15, 18, 19, 20, 21 and 25 became operative on 4 December, 1991. The rest of the Act is to become operative on 1 June, 1992.

Purpose of the Act
The Building Control Act, 1990 has three main purposes:

- to replace the existing system of building bye laws (applicable in particular areas) with a national building control system,



John Furlong

- to improve the regulation of building standards by providing for additional matters including energy conservation, the needs of the disabled, the efficient use of resources and the encouragement of good building practice. In particular, the Act enables the Minister to make fire safety a central feature of Building Regulations,

- the designation of a range of Local Authorities as Building Control Authorities providing for the alignment of existing Fire Authorities (under the Fire Services Act, 1981) with Building Control Authorities.

Building Control Authorities
Section 2 of the Act designates certain Local Authorities as Building Control Authorities. With effect from 4 December, 1991, the following are deemed to be Building Control Authorities:-

- County Councils

- The Corporation of a County Borough

- The Corporation of Dunlaoghaire

- The Corporation of any other Borough and the Council of any Urban District which is, on 4 December, 1991, a Fire Authority.

Ministerial Regulations
The Act enables the Minister for the Environment to make a wide range of regulations concerning the construction of buildings. Section 3 of the Act empowers the Minister to make regulations concerning the:-

- design and construction of buildings;

- material alteration or extension of buildings; and

- provision of services and material change of use of buildings;

Such regulations are to be directed towards health, safety and welfare; the special needs of disabled persons; energy conservation; efficient use of resources; and the promotion of good building practice. To date, two sets of regulations have issued being:-

- the Building Control Regulations 1991 (S.I. No. 305 of 1991) (the "Control Regulations"),

- the Building Regulations 1991 (S.I. No. 306 of 1991) (the "Building Regulations").

Building Regulations
The Building Regulations specify the requirements to be observed in the design and construction of certain buildings.

The Building Regulations establish basic requirements under the following headings:-

Structure	Fire
Site Preparation and Resistance to Moisture	Materials and Workmanship
Sound	Ventilation
Hygiene	Drainage and Waste Disposal
Heat Producing Appliances	Stairways, Ramps and Guards
Conservation of Fuel and Energy	Access for Disabled People.

The Building Regulations which come into effect on 1 June, 1992, will not apply to works commenced before the operative date or to works to which existing bye-laws apply under the transitional arrangements of the Act. In addition, they will not apply to certain specified buildings including certain buildings erected in connection with mines or quarries; buildings subject to the Explosives Act, 1875; buildings subject to the National Monuments Acts, 1930 to 1987; ESB sub-stations; certain temporary dwellings and certain single storey buildings (e.g. domestic garages, conservatories, garden sheds and certain glasshouses).

Subject to the above specified exclusions the Building Regulations are intended to apply:

- to all works in connection with the design and construction of every new building;
- to all works in connection with the material alteration or extension of an existing building or part of a building, whether or not the building was constructed before the operative date;
- to all works in connection with the provision of certain services, fittings and equipment in any building whether or not the building itself was constructed before or after the operative date;
- where a material change of use takes place in the purposes for which a building is used.

The Department of the Environment has published a series of "Technical Guidance Documents" which provide guidance on compliance with the requirements set out in the Building Regulations.

Control Regulations

The Minister is empowered under Section 6 of the Act to make regulations in respect of procedural and administrative matters with a view to ensuring the implementation of and compliance with the Building Regulations. In pursuance of this power, the Minister has published the Control Regulations which are due to come into force on 1 June, 1992.

The Control Regulations provide for:-

- the giving of notice of commencement of works to the appropriate Building Control Authority;
- the procedures for obtaining a fire safety certificate;
- the maintenance of a register of applications for fire safety certificates and of decisions on such applications.

Commencement Notices

Any person who intends to carry out the construction or material alteration of a building or make a material change in the use of a building to which the Control Regulations apply must give the Building Control Authority in whose functional area the building or proposed building is or will be situate, written notice of such intention (a commencement notice) not less than 7 days and not more than 21 days before the commencement of the works or the making of the material change of use as the case may be.

Notice is not required where the development is an "exempted development" for the purpose of the Local Government (Planning and Development) Acts, 1963 to 1990 (save developments which require a Fire Safety Certificate under Article 8 of the Control Regulations).

The Control Regulations require the commencement notice to include details of location and use; a description of the proposed works or material change; details of the owner of the building or works and of the person who is to carry out the works; details of the availability of relevant plans, documents and other information on the proposed works and details on the availability of information on the pouring of foundations and covering up of any drainage system.

Fire Safety Certificates

The Building Regulations set out the fire safety requirements that must be adhered to in construction of works or material change of use. The Control Regulations then specify that before any such works or material change can be commenced a fire safety certificate must be obtained from the relevant Building Control Authority. This certificate will certify that the building works or material change will, if carried out in accordance with the plans, documents and information submitted to the Building Control Authority, comply with the fire safety requirements set out in the Building Regulations.

The obligation to obtain a fire safety certificate does not apply to buildings which are specifically excluded from the Building Regulations nor does it apply to buildings which are dwellings (save flats). In addition, the requirement does not apply to works or material change commenced before 1 August, 1992.

The format of the application for a fire safety certificate is set out in the Control Regulations together with guidelines in respect of same. A Building Control Authority may refuse an application or attach conditions to a fire safety certificate.

Each Building Control Authority is required to keep a register of all

applications for fire safety certificates. This register is to be available for public inspection.

Section 7 of the Act grants a right of appeal to An Bord Pleanála in respect of applications made under the Act.

Supervision and Certification
Once the necessary commencement notice is served, Building Control Authorities are empowered to supervise the Regulations by inspection and enforcement on a random basis using the powers conferred on them by Section 11 of the Act.

Section 6 of the Act empowers the Minister to make regulations concerning the submission to the relevant Building Control Authority of certificates of compliance with the Building Regulations and also requiring certificates of approval to be obtained from the relevant Building Control Authority in respect of works or material changes being carried out. It is not intended to operate these procedures and no regulations thereon are contemplated.

Enforcement
Section 8 of the Act which comes into force on the 1 June, 1992 provides that a Building Control Authority may serve an enforcement notice where a building or construction contravenes the Building Regulations. Such notice must be served within a specified time period (generally, 5 years after completion of the relevant works or the material change).

The notice may require compliance with the Building Regulations and may direct removal, alteration or discontinuance of any works or prohibit the use of a building until specified precautions are taken.

A right of appeal is granted to the District Court in respect of such enforcement orders. Failure to comply with an order will empower the Building Control Authority to enter into the building or works and to take any action or do anything required by the notice.

Section 11 of the Act empowers certain authorised persons to enter, inspect, request information and take samples of any construction work or building. It is envisaged that Section 11 will be the main mechanism used by the Building Control Authorities to enforce the Regulations.

In the event of a serious and imminent risk to health or safety or other serious risk a Building Control Authority may apply to the High Court under Section 12 of the Act for a suitable order, requiring the removal, alteration or making safe of the building or the discontinuance of the works and prohibiting the use of the building until it has been made safe.

Section 13 of the Act which comes into force on 1 June, 1992 empowers the Minister to prohibit the use of such materials or classes of materials or such form of construction, equipment, fittings or services if he is satisfied that such use would be a danger to public health or safety or that such use would contravene any provision of Building Regulations.

Sections 4 and 5 of the Act entitle Building Control Authorities and the Minister respectively to grant dispensations from the requirements of the Regulations, in certain circumstances.

The Act provides for penalties in respect of offences arising from contravention of its provisions.

Building Regulations Advisory Body
Section 14 of the Act allows for the appointment by the Minister of an Advisory Body to advise on matters relating to the Regulations and such other advisory services as he may from time to time specify.

Limitation and Civil Proceedings
Section 21 of the Act provides that a person shall not be entitled to bring any civil proceedings pursuant to the Act by reason only of the contravention of any provision of the Act or of any Order or Regulation made thereunder.

The Section does not alter any present law allowing liability to be determined by the courts having regard to the law of contract and the law of torts.

Local Government (Multi-Storey Buildings) Act, 1988
Section 23 of the Act provides that Section 4 of the Local Government (Multi-Storey Buildings) Act, 1988 shall cease to apply to multi-storey buildings the construction of which is commenced on or after 1 June, 1992. Buildings constructed after 1 June, 1992 are to be taken out of the ambit of the 1988 Act and are instead to be controlled by the Building Regulations.

In respect of multi-storey buildings, the construction of which is commenced after 1 June, 1992, the Control Regulations will apply. Paragraph A(3) of the 1st Schedule to the Building Regulations requires that a multi-storey building shall be so designed and constructed that in the event of an accident the structure will not be damaged to an extent disproportionate to the cause of the damage. The Technical Guidelines published by the Department of the Environment contain further detail on this point.

Transitional Provisions
Section 22 of the Act provides essentially that no further bye-laws shall be made relating to matters dealt with in the Act. However, if the plans for a building, works or material change are deposited with the relevant Building Control Authority before the operative date (the date upon which the Regulations became effective in the particular area) then they will continue to be governed by the existing bye-laws rather than by the Regulations.

Conveyancing Points Arising From The New Regulations
In respect of works or material change carried out after 1 August, 1992, a Fire Safety Certificate must

first be obtained. A Fire Safety Certificate will not be required where a building is proposed to be used as a dwelling (other than a flat).

Any works or material change of use carried out after 1 June, 1992 will require to be effected in compliance with the Regulations. Notice of such works or material change of use must be given to the relevant Building Control Authority in advance. Thereafter, enforcement and supervision will be on a random basis under Section 11 of the Act. The Control Regulations will not apply to exempted developments save where such developments require a Fire Safety Certificate.

When purchasing or taking security over a new building ensure that:-

- the architect's Certificate of Compliance deals with the Building Regulations and either confirms that they do not apply to the particular building or that the building has been constructed in accordance with same;
- where necessary a fire safety certificate has been obtained and that any conditions have been complied with;
- that no enforcement notice has been served or if it has that it has been complied with.

When acting for a builder or developer note;

- the requirement to serve a commencement notice on the relevant Building Control Authority within the prescribed time periods;
- the requirement to obtain, where necessary, a fire safety certificate;
- that the Building Control Authorities have powers of inspection and can serve enforcement notices;
- that any breach of the Act or the Regulations is an offence and the penalties for same;
- that multi-storey buildings constructed after 1 June, 1992 will be governed by the Building Control Act rather than the Multi-Storey Building Act.

In the new building control environment contemplated by the Act, it will be essential when acting for either a purchaser, developer or financier of property to ensure the Regulations and in particular that the central provisions concerning the Fire Safety Certificates have been complied with. □

Setting up Practice in the 90s

The Younger Members Committee of the Law Society recently held a seminar in the House of Lords, College Green, Dublin, jointly hosted by the Bank of Ireland.

The theme of the Seminar, *Setting up Practice in the 90s* attracted a capacity audience of newly qualified solicitors and apprentices to the august surroundings of the House of Lords. Speakers included *Brian O'Reilly,* solicitor, *Michael Garrigan,* Commercial Division, Bank of Ireland and *Harry Cassidy,* Associate Director, IBI.

The Younger Members Committee intends to hold similar seminars around the country within the coming months. Newly-qualified solicitors and current apprentices are invited to suggest topics of particular interest to them so that further seminars can be organised later in the year.

Our thanks go to *Moya Quinlan,* former President of the Law Society who agreed to chair the seminar at short notice and to *Pat Dunleavy,* Manager, Bank of Ireland, College Green, for his generous hospitality.

Patricia Boyd □

IBA 24th Biennial Conference

Cannes 20-25 September 1992

The International Bar Association will hold its 24th Biennial Conference in Cannes, 20-25 September, 1992.

The Conference, the most important international event in the legal world calendar, is expected to be attended by over 3,000 international lawyers, and their guests.

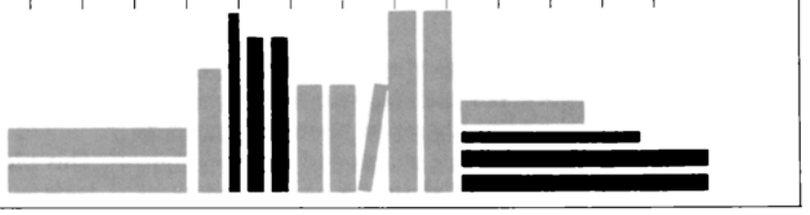
Topics scheduled for discusion include:

- The Environment and Crime
- Invasion of Privacy: How Far the Press Can and Should Go
- The Accusatory versus the Inquisitorial systems
- Cameras in the Courtroom
- Human Rights and Ethnic Conflicts in Eastern Europe
- Discrimination in Employment
- Money and Crime
- Compelling by Court Order in Common and Civil Law Discontinuance of Life Support Systems and Testing for AIDS
- The Independence of the Judiciary

The IBA is the world's foremost association of lawyers, comprising over 14,000 individual lawyer members in 130 countries and 137 Law Societies and Bar Associations together representing more than 2.5 million lawyers. The IBA Biennial Conference fulfills one of the Association's most important objectives – the promotion of useful contact and interchange between lawyers throughout the world – as well as providing a forum for the dissemination of specialist information on all areas of the law.

For further information please contact: Lorna Macleod, Press Office, International Bar Association, 2 Harewood Place, Hanover Square, London W1R 9HB, England. Tel + 0044 71 629 1206 Fax +0044 71 409 0456. □

BOOK REVIEWS



Religion, Education and the Constitution
Edited by Dermot A Lane. (Dublin, The Columba Press, 1992 IR£6.99, 119pp, paperback.)

Article 42 of Bunreacht na hÉireann provides that the State acknowledges that the primary and natural educator of the child is the family. For two short years, your reviewer experienced the privilege of educating students in two secondary schools. The philosophy that appealed most to your reviewer at that time was that expounded in *The School and Society* written by *John Dewey* and first published in 1899. Dewey argued that what the best and wisest parent wanted for his or her own child, that must the community want for all of its children. Any other ideal for our schools was narrow and unlovely: acted upon, it destroyed democracy.

This book is introduced and edited by *Dermot A Lane,* Director of Studies at the Mater Dei Institute of Education in Dublin. The book comprises four papers given on the occasion of the Mater Dei Institute celebrating its Silver Jubilee of involvement in teacher education. The Institute also wished to provide a forum for the public discussion on education in the context of the Government's forthcoming White paper relating to a proposed Education Act.

The first essay is by Professor *John M Hull* and is entitled "Religion and Education in a Pluralist Society". In one section of his paper, Professor Hull focuses on the role of religious education as an emancipatory discipline, with a capacity to liberate adults and children from oppressive aspects of religion. What a truly magnificent and Christian concept!

"Usefulness and Liberal Learning" is the title of the paper delivered by *Kevin Williams.* The writer argues that it is through the curriculum of liberal learning that we best serve the human and potential needs of our young people. Some of our Government Ministers may not agree. Your reviewer, however, submits that liberal learning should co-exist with appropriate subjects relating to vocational skills.

In "Irish Education Policy in a Philosophical Perspective: The Legacy of Liberalism", *Eoin Cassidy* considers the relative neglect of an explicit philosophy of education.

Gerry Whyte, a law lecturer and fellow of Trinity College, Dublin, in the final paper, "Education and the Constitution", examines several issues relating to education including the possible constitutional implications for State financing of denominational education. He considers the possible conflict in constitutional terms between a policy of support for denominational education and a policy of neutrality towards the financing of religion generally.

Lawyers will find in *Religion, Education and the Constitution* much food for debate and reflection. Gerry Whyte's contribution, in particular, is rich in perceptive observations. The critiques developed by Gerry Whyte are likely to prod many readers into reflecting afresh about some of their long-held views on education and the Constitution.

Eamonn G Hall

Family Finance by Colm Rapple (Squirrel Press, £4.50, 252pp, paperback)

Solicitors frequently find themselves acting for successful clients who have problems coping with personal finance. The solicitor finds himself or herself cast in the role of debt counsellor.

For practical down to earth advice this book has got to be number one on the recommended reading list. It contains all the knowledge and information necessary in this area. The application of advice given is the only step needed to be taken after reading it. This is made all the more easy by a simple device used by the author. He had illustrated various money making or practical hints by putting little squirrels in the margin to highlight the relevant passages.

For fourteen years now *Colm Rapple* has been producing this publication, each year updating it with fresh information on developments on such topics as the Budget, PAYE, income tax, covenants, inheritance and gift taxes, capital gains and tax saving investment schemes. He also covers such subjects as redundancy entitlements, social welfare, consumer and worker rights. . . the list goes on and on.

The book itself is well laid out and easy to read. As a reference book it is invaluable and at £4.50 you cannot go wrong.

Mr. Rapple can expect this book to continue to sell year after year after year.

Justin McKenna

A Company Purchasing its Own Shares
by Frank Brennan (Brilton Publications, £34.75, 290pp, hardback).

Legal rules for the maintenance of the issued share capital of a limited liability company can be traced back more than one hundred years to the decision of the House of Lords in the case of *Trevor -v- Whitworth.* The primary objection to the depletion of issued share capital is that it constitutes the ultimate recourse for the creditors of a limited liability company.

However, other jurisdictions enable companies to purchase their own shares subject to safeguards. Capital may be returned to a shareholder who wishes to leave the business. At the same time existing shareholders need not buy the shares (they may not have the money or inclination to increase their stake) or run the risk of a sale to a third party.

In the area of the quoted company, buyback schemes are relatively common in the USA where they enable companies to reduce the number of shares in issue, thereby increasing the asset value per share ratio and (hopefully) increasing the share price.

The EC Second Directive on Company Law contemplates corporate entities being allowed to purchase their own shares. In England the Companies Act, 1981 enabled limited liability companies to purchase or redeem their own shares. Part XI of our own Companies Act, 1990 which was brought into force on 1 July, 1991 now allows for acquisition of own shares and shares in one's holding company. The provisions are somewhat intricate and, while similar, are not the same as those contained in the English legislation.

In this book Frank Brennan seeks to provide a comprehensive guide to not only Part XI of the Companies Act, 1991, but also provides suitable references to English law, in particular, where it differs from Part XI. For example, our law enables existing shares to be re-designated as redeemable shares and allows redeemed shares to be retained as treasury shares. English law has no equivalent provisions.

Mr. Brennan endeavours to outline the legislative, accountancy, tax and company secretarial requirements in detail. To illuminate what is a technical but very practical subject he gives examples throughout the text and rounds off his discussion with two case studies. There are also very useful checklists at the end of the book.

Whilst only affecting quoted companies, it might be useful in the next edition of this book to make reference to guidelines of investor protection bodies such as the Irish Association of Investment Managers and to interrelate these guidelines with the requirements of the Stock Exchange.

The legal practitioner might be tempted to limit his or her reading to the chapter dealing with the legislative position and company secretarial requirements. However, this would be a mistake because much relevant information is to be found in the other chapters. The second case study shows how Part XI might be used to fund Capital Acquisitions Tax liabilities on a death while minimising adverse tax consequences of the funding procedure.

The author emphasises that redemption and purchase of shares are two distinct procedures with different legal and tax consequences. For example, a company may purchase any shares provided the issued share capital after purchase consists of at least 10% non-redeemable shares. A company may only redeem shares designated as redeemable. A purchase by a company may be regarded by the Revenue Commissioners as a stampable transaction subject to 1% duty whereas a redemption would not. The treatment for Corporation Tax purposes of the payment made may differ depending on whether a redemption or purchase has occurred.

This pioneering work combining legal, accounting and tax learning with practical hints and precedents will be very valuable to any practitioner engaged in advising on any aspect of corporate law.

Kevin Hoy □

Report on the Reform of the Civil Law of Defamation
(Dublin, The Law Reform Commission, £7.00, 143pp, paperback).

The road to law reform in Ireland is long and tortuous. Reform of the law of defamation has reached an important halting post on this journey. Following a request in January 1988 from the Attorney General, the Law Reform Commission in 1991 published *Consultation Papers* outlining the present law of civil defamation, criminal defamation, and contempt of court, tentatively suggesting reform and inviting comments. The *Consultation Paper on the Civil Law of Defamation* was widely welcomed, and occasioned much discussion. On the basis of its own tentative proposals in the *Consultation Paper* and of the submissions which were made upon it, the Law Reform Commission has now published its *Report on the Reform of the Civil Law of Defamation (the Report).*

It is a well thought out and compelling document. Irish law of defamation will be changed radically if its proposals become law. They ably meet the requirements of constitutional consistency and practical coherence. They are shaped by an appreciation of the protection of the various aspects of the rights to free speech, communication and good name in the Irish Constitution and under the European Convention on Human Rights. This appreciation is a welcome development in the *Report* as it was markedly absent from the *Paper.*

On the issue of the Constitutional protection of expression, the *Report* analyses the protection given to speech by Art. 40.6.1 (i) of Bunreacht na h-Éireann and by the right to communicate identified as an unenumerated right in Art. 40.3 in *A.G. -v- Paperlink* [1984] ILRM 374. It concludes that the former primarily concerns speech in the nature of criticism and comment. It considers that this would not seem to include speech the primary aim of which is to convey factual information, which is protected instead under the more nebulous right to communicate. However, the *Report* is of the opinion that when these rights conflict with the right to good name, the State's duty to protect it from "unjust attack" leaves a wide margin to the Oireachtas to resolve any conflict. In this regard, there is a parallel to be drawn with the margin of appreciation granted to States by the European Convention on Human Rights to consider whether in fact any restriction on rights is "necessary". As a result, the *Report* is confident that the balance it strikes as between the competing rights is one which does not fall foul of any of the provisions of the Constitution or of the European Convention. Whilst one might disagree with the interpretations presented and upon which the analysis for reform is grounded, it is indeed welcome that this methodology was adopted.

On this constitutional foundation, the *Report* suggests the building of a fascinating edifice. Construction work would begin with the repeal of the unsatisfactory Defamation Act, 1961. In its stead, there would be a new Act, embodying the *Report's* recommendations. It would abolish the distinction between libel and slander and replace it with a statutory definition of a single unified tort of defamation, in essence the publication of untrue matter which tends to injure the plaintiff's reputation.

The *Report* recommends two very important practical changes. First, the rules in relation to pleading the innuendo would be radically simplified. Second, the making of an apology and payment into Court would no longer constitute admissions of liability.

The law on privilege would be clarified, and the effect of *Hynes-O'Sullivan -v- O'Driscoll* [1989] ILRM 349 would be reversed. Such liberalisation (and the changes in remedies discussed below) meet most of the media's concerns. Thus, although the earlier *Paper* had discussed and canvassed views on a general (but media sensitive) defence of Fair Report, the *Report* itself does not recommend its introduction. In terms of defences, the *Report* recommends the cosmetic, but psychologically important, changes in the names of the defences of fair comment and justification to, respectively, "comment based on fact" and the defence of "truth" since the changed names better reflect their essences. Further, the effects of ss.22 and 23 of the Defamation Act, 1961 on the need to prove only substantial truth would be retained and refined. Much of this is predictable tidying up of the frayed and ragged ends of the law as it now stands. Other provisions in the *Report* are more radical.

For example, although the function of deciding whether the words complained of are defamatory would remain with a jury, the *Report* recommends that it be for the judge to decide the quantum of damages (if any) to be awarded. Furthermore, the *Report* proposes a fundamental move away from damages as the sole remedy for defamation. Where the defendant has published matter which is defamatory, but he can show that he has taken reasonable care, then he will not be liable to the plaintiff in damages. The plaintiff instead would be able to secure a correction order or a declaratory order, in effect, clearing the good name of the plaintiff without penalising the defendant in damages.

This recommendation provoked a dissent from one of the Commissioners, and in an area as emotive and complex as defamation law dissent is not surprising. Indeed, there were two other significant dissents. The *Report* proposes that the burden of proving falsity be on the plaintiff, and that it should be possible for relatives of a deceased to bring an action for defamation of the dead person's reputation. Both of these are majority recommendations, and the dissents and the reasons for them are recorded. This is all to the good. It would be strange indeed if there were perfect unanimity on all issues. That the *Report* records the dissent is one of its strengths, it brings other arguments to the fore and lends balance to the result.

The Law Reform Commission *Report on the Reform of the Civil Law of Defamation* is indeed a welcome document, and one which does not deserve the fate of most Law Reform documents; it does not deserve to be left unimplemented. The next step on the road to reform ought to be taken: it ought to be implemented.

Eoin O'Dell
Lecturer in Law,
Trinity College, Dublin. □

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L-R: At afternoon tea in the German Embassy to brief the German Ambassador to Ireland about the Law Society's Annual Conference in Berlin were L-R: Harry Cassidy, Associate Director, Investment Bank of Ireland (one of the major sponsors of the conference); His Excellency, Dr. Martin Elsasser, German Ambassador to Ireland and Adrian P. Bourke, President, Law Society.

At a reception before the Law Society Annual Conference Dinner and Dance were L-R: Margaret Bodley; Pat Dunleavy, Manager, Bank of Ireland, College Green; Louise Dunleavy and Laurence Cullen, Law Society Council Member and former President of the Society.

At a dinner hosted recently by the President of the Law Society were L-R: Anthony Ensor, Law Society Council; Chryss O'Reilly and Ernest Margetson, Council member and former President of the Law Society.

David O'Donnell being presented with his parchment by his father Frank O'Donnell, Council member and former President of the Law Society, at the parchment ceremony on 10 April, 1992.

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At the launch of "Company Law on Computer" written by Brian B. Dempsey SC held in Blackhall Place on 8 April were L-R: James Heney, Chairman Law Society Technology Committee; Michael Gilmartin, Managing Director, Legal & General Office Supplies; Brian P. Dempsey SC; Eamonn Barnes, Director of Public Prosecutions and Nial Fennelly SC.

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PRACTICE NOTES

Milk Quota Leases

The Department of Agriculture and Food has circularised the dairy co-operatives in relation to quota leasing and a copy of their circular is produced hereunder.

From now on both the lessor and the lessor's co-operative will have to complete forms (known as Forms (1) and (2) respectively) giving full details of the quota and the land on which it was produced. The co-operative requesting approval for the quota transfer must retain these forms for inspection by the Department.

Land transactions milk quota transfers

Notice to each Register purchaser.

3 April 1992;

I refer to this Department's circular of 9 December 1991 on the arrangements for the transfer of milk quota as a result of land transactions.

It was specified in the above circular that the revised system for processing quota transfer applications was introduced in the first instance to deal with the large number of cases which were on hand in relation to 1991/92. It was however also indicated that the system for processing land/quota arrangements as from 1 April, 1992 would be along the same lines.

I can now confirm that the system to apply from 1/4/1992 will be similar to that set out in the above-mentioned circular. For all land leasing transactions, *whether internal* (i.e. between producers within the same Co-op/dairy) *or external* (i.e. between producers attached to different Co-ops/dairies), paragraph 2 of the Circular of 9 Dec 1991 is the main determining factor for the transfer of quota.

Milk quota attaching to land will transfer on the basis of a lease of that land provided the lessee has taken over the operation of these leased lands for a minimum period of three years. *In this context it will be a requirement for quota transfers effective from 1 April, 1992, and future years, that the lessee submit a written statement that he/she has actually taken possessioin of the leased land and that he/she (the lessee) is the sole operator of the leased land.* This statement should be forwarded to the Department along with all other documentation or, in the case of internal leases, must be retained at the Co-op/dairy for inspection by Department Officials.

It will continue to be a requirement that all requests for quota transfer on the basis of a leasing transaction be accompanied by a statement by the lessor that the land being leased is land which was used by the lessor for dairying in 1983 and that the amount of quota being transferred is a genuine reflection of the contribution of the leased land to the establishment of the quota.

The Department must stress again that where a supplier wishes to transfer *all* of his/her quota, *all* the land used for dairying in 1983 must transfer. Where only a portion of that 1983 dairying land is being transferred, a proportionate amount of the quota will transfer. Producers should be made aware of the importance of the proper identification of their lands to which milk quota attaches. In this context, *a Land Registry map of the lessor's entire holding must be submitted in every case. This map should be clearly marked to identify (1) the total area which was used for dairying in 1983 and (2) the area which is being leased.* The map is essential for the Dairy Produce Inspectors who will be inspecting the leased lands during the term of the lease.

Form 2 attached must also be completed and forwarded with all applications to Head Office for quota transfers. Forms 1 and 2 must also be completed in respect of land/quota transfers between suppliers to the same co-op/ dairy and *must be retained for inspection by the Department's Officials.*

Form 3 which was necessary in 1991/92 to enable the Clawback position to be assessed is of course no longer required as the Clawback arrangements ended with effect from 31 March, 1992.

Milk purchasers are reminded that in accordance with the recording requirements set out in the Department's circular No.1/92 it is necessary to maintain a separate listing of certain specified quota transactions carried out during a super levy year (item No. 6).

In summary therefore the minimum supporting documentation required for the transfer of quota on the basis of a land lease, whether an internal transaction within a co-operative or an external transaction, is as follows:-

(1) Legal land leasing agreement between both parties;

(2) Land Commission consent to subdivision;

(3) Forms 1 and 2 fully completed;

(4) Statement by lessee that he/she is the sole operator of the leased land;

(5) Map of holding, marked clearly as requested.

You are requested to read this circular in conjunction with the circular of 9 December, 1991. Where all the requirements are met, and the necessary completed documentation in the case of inter-purchasers transactions is received in the Department, every effort will be made to deal with requests as efficiently as possible.

Patrick Evans
Milk Policy Division
Department of Agriculture and Food,

The *Gazette* is grateful to *Oliver Ryan-Purcell* for supplying the above item.

Registry of Deeds (Fees) Order 1991

Practitioners should note that as and from the 1 April, 1992 the following fees apply in the Registry of Deeds.

Registration of Memorials
Upon every memorial registered £26.00

Certificates of Registration
For every certificate of registration beyond the first or special certificate of registration £10.00

Common Search upon Names made by Office under a Requisition
(a) For each different name for any period not exceeding ten years £2.00
(b) For each different name for every additional period of ten years or part thereof. £2.00

Continuation of a Common Search
For each different name £2.00

Negative Search upon Names made by Office under a Requisition
(a) For each different name for any period not exceeding ten years £4.00
(b) For each different name for every additional period of ten year or part thereof £4.00

Continuation and/or Closing of Negative Search
For each different name £4.00

Search by Members of the Public
General search without limitation, each day by every person £10.00

Copies
Memorial
For every certified copy of a memorial £4.00

Entry of Satisfaction of Mortgage £6.00

Inspection of Original Memorial or Affidavit
For every original memorial or affidavit produced for inspection in the office £1.00

Note: The attention of members is drawn to a Newsletter on the *Building Control Act,* published by the Conveyancing Committee, which is being distributed as an insert with this issue of the *Gazette.*
See also article on Page 137.

Stamp Duty Amnesty

In his Budget Speech the Minister for Finance announced the introduction of an interest and penalty amnesty for certain documents liable to stamp duty. The purpose of the amnesty is to encourage the payment of duty on old, unstamped documents. The Finance Bill, 1992, has provisions in section 181 giving a statutory framework to the amnesty.

Significant Features
The significant features of the amnesty are:

- only documents executed before 1 November, 1991 which were unstamped on 30 January, 1992 qualify for the amnesty.
- under the terms of the amnesty the interest and penalties payable on these instruments will be waived in whole or in part, depending on the date of payment.
- where payment of duty is made before 1 July, 1992, there will be no interest or penalties charged.
- where payment of duty is made between 1 July, 1992, and 30 September, 1992 (inclusive), interest and penalties will be charged, but they shall be calculated as if the instrument was executed on 1 June, 1992.
- as from 30 September, 1992, the amnesty will cease to have effect and any instruments to which the amnesty would have applied will be stamped thereafter only on payment of full penalties.

In summary, these provisions mean that if a relevant document is stamped before 1 July, 1992 it escapes all interest and penalties for late payment. However interest and penalties are payable on any later payments. Up to 30 September, interest and penalties will be calculated on the basis that the document should have been stamped by 30 June, 1992 – thus the date of execution will be deemed to be 1

June, 1992. Any documents stamped after 30 September will be charged interest and penalties from the actual date of execution.

Revised Stamp Duty Regime

The Finance Act, 1991 substantially amended the collection, enforcement and penalty provisions in stamp duty. As a result stamp duty must be paid within 30 days of the execution of a document. Failure to pay the duty within time can lead to proceedings by the Revenue Commissioners to compel payment. In addition late payment of duty is penalised as follows:-

- a fixed sum penalty of £20, plus
- interest at 1.25 per cent per month or part of a month from the date of execution, plus
- a penalty of 10 per cent of the duty where a document is stamped between 1 and 6 months late;
- a penalty of 20 per cent of the duty where a document is stamped between 6 and 12 months late, and
- a penalty of 30 per cent of the duty where a document is stamped at any later time.

Application of revised regime to pre-1 November, 1991, documents

In general the revised stamp duty regime applies only to documents executed on or after 1 November, 1991. However, in the case of documents executed before that date, the interest and penalties for late payment do apply from 1 November, 1991. The duty payable on these documents, therefore, will be charged interest at 5 per cent per annum up to 31 October, 1991, and the revised provisions will apply thereafter. All of these documents which are now unstamped are already liable to the 10 per cent of duty penalty plus interest charges. After 1 May this penalty will increase to 20 per cent and to 30 per cent on 1 November, 1992.

Example of operation of penalties and amnesty

This example of a document executed prior to 1 November, 1991 will help to illustrate the effect of these penalty provisions and how the amnesty would apply:

Date of execution of document: 1 November, 1990.
Duty payable: £3,000

(a) If the document is presented for stamping on 5 May, 1992 the following interest and penalties would be payable:

	£
Fixed sum penalty	10.00
Interest at 5 per cent per annum from 1 November 1990 to 31 October, 1991:	150.00
Interest at 1.25 per cent per month from 1 November, 1991 to 5 May, 1992:	262.50
Additional penalty – 10 per cent of duty;	300.00
Total penalties	722.50

All penalties would be waived under the amnesty.

(b) If the document is presented for stamping on 2 September, 1992 the following interest and penalties would be payable:

	£
Fixed sum penalty	10.00
Interest at 5 per cent per annum from 1 November 1990 to 31 October, 1991:	150.00
Interest at 1.25 per cent per month from 1 November, 1991 to 2 September, 1992:	412.50
Additional penalty – 20 per cent of duty:	600.00
Total penalties	1,172.50

In this case the amnesty will remit the interest and penalties as follows:

	£
Interest from 1 November 1990 to 31 May, 1992 – remitted in full.	
Interest at 1.25 per cent per month from 1 June, 1992 to 2 September – payable:	180.00
fixed sum penalty	20.00
Additional penalty of 20 per cent of duty **remitted to a penalty of 10 per cent of duty:**	300.00
Total penalties	500.00
Amount of penalties remitted by amnesty:	£1,172.50 – £500.00 = £672.50.

(c) If the document is presented for stamping on 1 November, 1992 the following interest and penalties would be payable:

	£
Fixed sum penalty	10.00
Interest at 5 per cent per annum from 1 November, 1990 to 31 October, 1991:	150.00
Interest at 1.25 per cent per month from 1 November, 1991 to 1 November, 1992:	487.50
Additional penalty of 30 per cent of duty:	900.00
Total penalties	1,547.50

Amnesty does not apply.

Amnesty in the case of additional duty

Where duty is paid on a document and subsequently it is found that further duty is payable the amnesty will apply only if this additional duty is paid by 1 July, 1992 (in the case of full waiver) and by 1 October, 1992 (in the case of partial wavier). This situation is most likely to arise in the case of stamp duty on gifts where duty is paid on the basis of a valuation of property. If the valuation is not agreed additional duty will be payable.

Conclusion

The figures in the example demonstrate how penalties for late payment of duty can now be very substantial. Many taxpayers availed of the delay of 5 months in 1991 between the passing into law of the penalty provisions and their coming into force. The amnesty will give any remaining taxpayers, with a long-outstanding stamp duty liability, a once-off opportunity to settle it without payment of penalties.

A statement of practice and further information on the amnesty is available from Capital Taxes Branch, Dublin Castle, (01) 6792777 or Government Buildings, Cork (021) 968783. □

Conveyancing Committee

A cross section of the Conveyancing Committee in session. L-R: Kieran Murphy, Patrick Fagan, Maeve Hayes, John Buckley, Owen Binchy (Chairman), Linda Kirwan (Committee Secretary); Not shown in the photograph: Eric Brunker, Vivienne Bradley, Eugene Cush, Richard Joyce, Colm Price (Vice-Chairman), Brendan McDonnell, Rory O'Donnell and Robert Potter-Cogan.

Our function is to deal with your conveyancing problems. The combined wisdom of the Conveyancing Committee is at the disposal of practitioners where they are in difficulty either in relation to conveyancing law or practice.

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On your behalf we negotiate with such bodies as the Land Registry. The Architects Institute, The Department of the Environment, The Auctioneer's Associations, the Construction Industry Federation, The Department of Justice, Planning Authorities and other bodies.

As well as this we issue Practice Notes in the *Gazette* on various conveyancing matters which the Committee feels should be brought to the attention of practitioners.

The Standard Law Society Contract and their Requisitions always remain on the agenda. They are updated on a regular basis by a Sub-Committee.

We meet once a month 6.15 p.m. in the Council Chamber, in Blackhall Place.

Owen Binchy
Chairman □

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Registration of Charges: Foreign Companies and the *Slavenburg* File

by Thomas B. Courtney B.A., LL.B. of Hanby Wallace, Solicitors

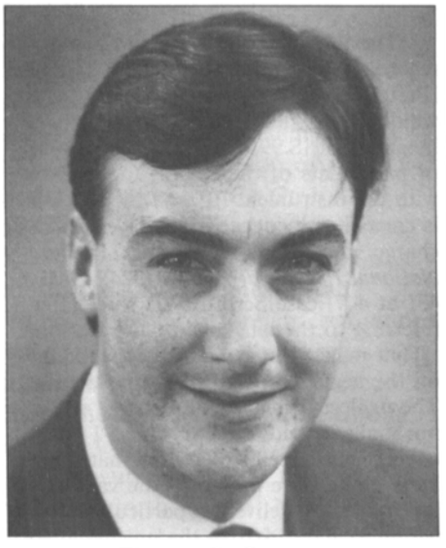
1. Introduction[1]

S.99 (1) Companies Act, 1963 provides that particulars of certain charges which are enumerated in S.99 (2) must, within a period of 21 days from the creation of the charge, be delivered to the Registrar of Companies. Failure to register what is a registrable charge means that that charge, while remaining enforceable against the company which created it, is void against the liquidator and any creditor of the company.

Non-registration of a registrable charge, enumerated in S.99 (2) does not vitiate that charge, but makes it void against a liquidator or creditor of the company. That it remains enforceable is evidenced by the fact that where a registrable charge is not registered, the money secured thereby becomes immediately due and payable. Essentially, non-registration means that the charge holder loses priority to other creditors, both secured and unsecured. Where the company creating the charge is Irish, the pitfalls are readily appreciated. However, where the company creating the charge is a foreign company i.e. one which is registered under the laws of another country, and the property comprised in the charge is situate in Ireland, extreme care must be taken to ensure that the requirements of S.111 of Part IV of the Companies Act, 1963 are complied with.

The Law Summarised

Charges created by foreign companies, concerning foreign property are of no concern to Irish law. Their validity will be determined by the *lex situs.*



Thomas B. Courtney

Charges created by foreign companies over property in the State require to be registered under Part IV Companies Act, 1963 where such companies have an established place of business in the State. Furthermore, this remains the case even though such foreign companies have not registered on the Irish external register of companies, as they should if they have an established place of business in the State. Where charges are created by that company or property is acquired by that company which is subject to a charge, and they are not registered then they will be void against a liquidator or creditor of the company. In the case of judgement mortgages obtained against that company but not registered, then the holder of the judgement mortgage will be liable to a fine not exceeding £500.[2] S.111 Companies Act, 1963 provides

> "The provisions of [Part IV] shall extend to charges on property in the State which are created. . . and to charges on property in the State which is acquired. . . by a company incorporated outside the State which has an established place of business within the State, and to judgement mortgages created. . . and affecting property in the State of such a company and to receivers, appointed. . . of property in the State of such a company, and for the purposes of those provisions, the principal place of business of such a company in the State shall be deemed to be its registered office."

Companies Registered on the External Register

Foreign, or "external" companies which establish a place of business in the State are **obliged** to register with the Registrar of Companies by S.352 (1) Companies Act, 1963, which provides as follows:

> "Companies incorporated outside the State, which, after the operative date, establish a place of business within the State, shall, within one month of the establishment of the place of business, deliver to the registrar of companies for registration –
>
> (a) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English or Irish language, a certified translation thereof;
>
> (b) a list of the directors and secretary of the company containing the particulars mentioned in subsection (2);[3]
>
> (c) the names and addresses of some one or more persons resident in the State authorised to accept on behalf of the company service of process and any notices required to be served on the company and also the address of the company's principal place of business in the State."

The mechanics of **registration** are as follows. Three forms must be completed specifying the foregoing information.[4] These must be accompanied by the company's Memorandum and Articles of Association. All such documentation must be **certified** by, for example a Notary Public or the Registrar of Companies in that country etc. In addition, such documents must also

be **authenticated,** a procedure usually involving the Irish Embassy in the company's country of origin. If necessary, documentation must be translated.

Where a registered company creates a registrable charge, then the requisite particulars must be registered with the Registrar of Companies on a Form No. 8E. Such charges are then noted on the regular Companies Registration Office (CRO) register of charges, by reference to the number assigned to it on its registration as an external company.

The "Slavenburg File": Unregistered Foreign Companies

A foreign company which has an established place of business in the State, but does not register as it is required to do under S.352 (1) Companies Act, 1963 is **obliged** to forward particulars of the charge which it creates to the CRO in the same way (by using a Form No. 8E) as a company which has registered. This was first decided in England in *NV Slavenburg's Bank -v- Intercontinental Natural Resources Ltd. et al* [1980]. 1 All ER 955. Here a company which was incorporated in Bermuda had an established place of business in England and created charges over its assets which were subsequently came to be reposited in England. The company was not registered in England nor were the particulars of the charges registered with the CRO. The property in England was later sold, and the proceeds of sale paid into a joint account in the names of the parties' solicitors. Sometime after, a Bermudian court wound up the company. Inter alia, it was argued that the charges over the property situated in England were void for non-registration. It was held by Lloyd J that although there was no **formal** method for registering such charges, because the foreign company did not have a company number which it would have were it registered on the external register, **particulars** of such charges were required to be delivered to the Companies Registration Office and where such were not delivered, they would be void as against a liquidator or creditor. Because they could not be formally **registered** was not a sufficient reason for failing to deliver particulars to the Registrar. In the words of Lloyd J:

> "The fallacy in the argument lies in regarding registration of the charge under [Part IV] as a condition precedent to its validity. It is clear both from the language of [S.99] . . . that it is delivery of particulars of the charge, together with the instrument (if any) by which it is created or evidenced that saves that charge, and not its registration. In the *National Provincial Bank* [(1924) 1 KB 431 at 447] case Scrutton LJ said, after referring to the language of the section: "That makes the avoidance dependant on the neglect to send in the particulars. The neglect to register the charge will not make it void". . . So far as I am concerned, it seems to follow that the bank could have preserved the validity of its charges by delivering particulars within 21 days, despite the unwillingness of the registrar to register the charge without prior registration by the company under [Part IV]. In those circumstances. . . . [t]here is nothing certainly in [S.111] to suggest that the operation of that section is dependent in any way on the company having registered under [Part XI i.e. as an external company], and I am unwilling to imply any such limitation."

So, it was thus the law in England, and continues to be the accepted practice in Ireland, that where a foreign company which has an established place of business in the State, but which has not registered as an external company under Part XI of the Companies Act, 1963 creates a charge over property, real or personal, situate in Ireland, the company, or the holder of that charge, must deliver particulars of that charge of the Irish Registrar of Companies. Failure to do so will render that charge invalid.[6]

Slavenburg Reversed in England

Ironically, it should be noted that the decision in *Slavenburg* has now been reversed by the British parliament enacting Schedule 15 to the Companies Act, 1989, which inserted new Sections 703A to 703N into the Companies Act, 1985. The effect of these changes is that a foreign company which has **not** applied to be a "registered overseas company" is not obliged to register charges on its property in Great Britain, notwithstanding that it may have established a place of business there.[7]

. . . Notwithstanding that the parliament of the country which gave birth to *Slavenburg* has seen fit to reverse its implications, they would appear to continue to be law . . . in Ireland.

Companies Registration Office Practice in Ireland

Notwithstanding that the parliament of the country which gave birth to *Slavenburg* has seen fit to reverse its implications, they would appear to continue to be the law, and certainly the practice, in Ireland. Thus, charges created in such circumstances must still be delivered to the Irish CRO.[8] However, what is the Registrar and his staff to do in such circumstances? After all, the Registrar does not have any way of **registering** such charges in that he does not have an Irish reference number for the company. The plight of the Registrar was addressed in *Slavenburg* where Lloyd J said:

> "Before leaving the point, I should say that counsel for the defendants expressly disclaimed any criticism of the registrar's current practice. Nor would I, myself, wish to criticise it in any way. His reasons for insisting on the company first registering under [Part XI] are clear enough. But they cannot affect the outcome of this case."

So what is the Registrar to do? The answer is that following the lead set by the English Registrar, the Irish Registrar has opened, a so-called, *"Slavenburg File"*, in which he notes that he has received delivery of the required particulars.[9] As was the case in England, a letter will issue to the effect that delivery of the particulars has been received, but because the company has not been registered as having an established place of business in the State and is thus not registered as an external company, registration of any charge created by

it cannot be effected. Such a letter is a sufficient safeguard for any lender who takes a charge in such circumstances, and this letter should be treated as is if were a Certificate of Registration. Indeed, in that the common parlance of the Irish CRO is that delivery of such particulars have been noted on the *"Slavenburg File"*, in indicative of the "Hibernisation" of this decision and its implications.

The Meaning of "Established Place of Business"

It is vital to appreciate that unless a company has an established place of business in the State (Republic of Ireland), full registration on the ordinary Register of Charges, or informal "notation" on the *"Slavenburg File"* is **not** required. What then is meant by an "established place of business"?

The definition of "established place of business" has not fallen for discussion in the Irish courts. Note though that in *Donovan -v- North German Lloyd Steamship Co* (1933) IR 33 it was held that service of proceedings on a foreign company was not satisfied by serving the summons on an address in Ireland, because the defendant company, while having an "office", did not have a place of business in the Irish State. Despite the facts that

> "Apparently the defendant company is a foreign corporation, whose ships from time to time, make calls of port in this country, particularly at Cobh. At Cobh there is, and has been for some time, an office bearing the name of the defendant company in large letters, and this fact and several others were relied upon for the purpose of showing that the defendant company resided in this country in the sense in which a corporation can be said to reside in any country. Reliance was also placed on the fact that the name of the defendant company appeared in the telephone directory, and on the fact, as alleged, that they were the rated occupiers of the premises in which the aforesaid office is situate."

However, the lease of the premises was held by another company, which acted as "agent" for not only the defendant company, but also other foreign companies. Here it was held that the defendant company could not have proceedings served upon it.

However, whether the facts of this case would today justify an Irish court to hold that it did not have an established place of business in the context under consideration is debatable.

As such, we must confine our consideration to those decisions of the English courts which addressed the issue. Regarded as "the most apposite case in the present context"[10] is the decision of the Court of Appeal in *Re Oriel Ltd.* [1985] 3 All ER 216 where the issue of established place of business was considered in the context of the requirement that a foreign company deliver particulars of the charges it creates where it has **not** registered under the English equivalent to our Part XI Companies Act, 1963. Here, the company concerned was registered in the Isle of Man. Its objects were the acquisition, mortgaging and management of a company which was controlled by a husband and wife who lived in England. Subsequently, the company acquired three garage sites in England and upon entering a solus agreement, charged them to the petrol supplier. Expansion turned to boom and three more sites were acquired, and charged. The management of the company was conducted by the husband-director, who gave as an address the registered office of the company and his own personal address. However, the company was never registered on the UK companies external register. As these things happen, the company was wound up, and the question arose were the charges valid in that they had never been registered? Essential to the argument of the liquidator was that the company had an **established place of business** in England, and as such the charges ought to have been registered, or, at least, particulars delivered in that the company had never registered on the external register. Faced with these facts, the Court of Appeal decided two particularly contentious issues.

Firstly, it was decided that the relevant date for determining whether or not a company had an established place of business was the date when it actually created the charge in question.

Secondly, as to what was meant by "an established place of business", was said by Oliver LJ to suggest[11]

> ". . . that it is essential to an 'established place of business' that there should be some visible sign of physical indication that the company has a connection with particular premises. . .
>
> Speaking for myself, I think also that when the word 'established' is used adjectively, as it is in [S.111], it connotes not only the setting-up of a place of business at a specific location, but a degree of permanence or recognisability as being a location of the company's business. If, for instance, agents of an overseas company conduct business from time to time by meeting clients or potential customers in the public rooms of an hotel in London, they have, no doubt, 'carried on business' in England, but I would for my part find it very difficult to pursuade myself that the hotel lounge was 'an established place of business'. The concept, as it seems to me, is of some more or less permanent location,not necessarily owned or even leased by the company, but at least associated with the company and from which habitually or with some degree of regularity business is conducted."

On the facts of the present case, it was held that in respect of the first three charges, particulars of these were **not** required to be delivered to the CRO because the company **then** did not have an established place of business. However, in respect of the three further charges, particulars of these ought to have been delivered to the CRO because at **that time** the company **had** an established place of business.

The use of the word **"established"** connotes some ensconced or settled place of business so, to be an established place of business, that place must have some degree of permanence, and must not be merely transitory or 'happenstantial' on, say, a representative of the company concerned meeting a person in a particular place. Indeed, the very words in S.111 support such a view, in that it implicitly requires a company to which it applies to have a "principal place of business" which is deemed to equate with an Irish registered company's registered office. Indeed, a further test for

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determining whether or not a company has an established place of business in Ireland could be, does it make sense to serve documents on the company at that place?

In summary, some of the factors which will go towards the finding by a court that a foreign company has an established place of business include:

- having a specified or identifiable place at which it carries on business although the company does not necessarily have to own or lease a premises,
- having a visible sign or physical indication that the company is connected to a place,
- that the company's physical connections are more than merely fleeting or transitory,
- that there is a degree of permanence and ensconcement about that place of business,
- a regularity of business being conducted there by the company.

Clearly, any precise definition of what is meant by established place of business is fraught with difficulty, the problem being analagous to attempting the perennial definition of an elephant. However, occasions arise when the courts must decide this question, and the only way this can be done is by weighing all the evidence and circumstances of the individual case.

The mere fact that a foreign company has an agent who is present in Ireland does not mean that it will be deemed to have a "place of business" in the State: *Donovan -v- North German Lloyd Steamship Co* [1933] IR 33.[12]

Where the Irish Business is Only Incidental to its Main Business

It has also been decided that a company will be deemed to have an established place of business even if the business carried on there is only incidental to its main business. This was decided in the case of *South India Shipping Corp Ltd -v- Export-Import Bank of Korea* [1985] 2 All ER 219 where Ackner J said of the facts

> "The defendant bank are an export-import bank, not a high street bank. They have both premises and staff within the jurisdiction. They conduct external relations with other banks and financial institutions. They carry out preliminary work in relation to granting or obtaining loans. They seek to give publicity to the foreign bank and encourage trade between Korea and the United Kingdom, and they consult with other banks and financial institutions on the usual operating matters. They have therefore an established place of business within Great Britain and it matters not that they do not conclude within the jurisdiction any banking dealings with the general public as opposed to other banks or financial institutions".

This has been recently restated in the case of *Rome -v- Punjab National Bank (No 2)* [1989] BCLC 328 where Hirst J noted that the Court of Appeal had held in the *South India* case

> ". . . that it was sufficient to show the establishment of an office in Great Britain where activities incidental to the main business of the company were carried on, and that it was unnecessary to show that a substantial part of its business was conducted within the jurisdiction."

In the *Punjab National Bank* case a bank which was registered on the external register ceased to do business in the UK. A hiving down operation began and while the company did no new business in the UK, two employees remained to tie up "loose ends". These two persons were registered as persons upon whom proceedings could be served, satisfying the requirements of the English equivalent to our Part XI. However, notice was served on the registrar of companies that after a certain date the company would cease to have a place of business in the UK. He responded by closing the company file. Even though this had been done proceedings were served on one of the employees, and this was held to be a valid service. Incidental to this it was also held that at the time of service of the writ, the company did not have an established place of business. As to the determination of this question, Hirst J said:

> "In my judgement, the correct approach is that adopted in the *South India* case, namely to examine the actual activities which are revealed on the evidence in order to decide whether or not they qualify.
>
> Examining those described above, I have no hesitation whatsoever in concluding that all but the last are no more than loose ends which needed to be tied up after the cessation of business; and the last, which . . . involves no more than maintaining a point of contact with English solicitors, does not in my judgement constitute a business activity being carried out here by the defendants at the relevant date."

To Register or Not to Register?

A particular problem arises for the solicitor acting for a lending institution where a foreign company, without any property or established place of business in Ireland, borrows money for the express purpose of acquiring a business premises in Ireland, which may well become in the future its established place of business. Is one to insist upon registration of the charge, if indeed the operative date for determining whether a company has an established place of business is the date on which the charge is created? This point was considered in *Re Oriel Ltd* where Oliver LJ said

> ". . . It is difficult to see how, when premises are acquired for the first time and immediately charged, the established place of business which the company has can be the premises charged. There is, in fact, no evidence that the company had any connection with those premises prior to the charge beyond being designated, prior to its incorporation, as the intended owner."

It is submitted that where there is any doubt, it is best to insist upon registration rather than leave oneself open to a court finding that an unregistered charge ought to have been registered, and is consequently void.

Proposals for Reform

It should be noted that at present, an "established place of business" is a basic prerequisite to the requirement that the particulars of a charge created by a foreign company must be delivered to the Companies Registration Office. So, only where a

foreign company has an established place of business in Ireland, will the Irish Registrar of Companies **register** (in the case of foreign companies registered on the external register), and **file** on the *Slavenburg* file, (in the case of unregistered foreign companies) particulars of a charge created. It is thought that while this is the present law and practice in Ireland, that it should at least be asked, ought reform be contemplated? At least two possible alternative reforms are open to be adopted by the Oireachtas.

On the one hand, reform could follow the lead set by Britain as mentioned above. This, it is submitted, has the effect of narrowing the possible scope of the system for the registration of charges, by turning its face to the reality of many foreign companies being in breach of their obligation to register under the equivalent to our S.352 (1) Companies Act, 1963. Such is a curious development in that the same statute which reversed *Slavenburg* also extended those charges which require to be registered in Britain, thus making the British Register of Charges more informative in another respect.[13]

On the other hand, reform could be achieved by the introduction of a new requirement for registration of all charges (at present registrable under S.99 (2) Companies Act, 1963 in the case of Irish registered companies) created over property situate in Ireland, **whether or not** the foreign company creating that charge has an established place of business in Ireland. This would have the effect of accepting the realities seen in the *Slavenburg* decision, and putting them on a formal footing. Such a requirement would only enhance the usefulness of the Register of Charges by making it more complete. Indeed, as with the *Slavenburg* file itself, such would also cater for the elusive solicitor's letter of undertaking in respect of title documents, which if given in respect of an unregistered foreign company, could not otherwise be discovered by searching any of the other registration systems, such as the Land Registry or the Registry of Deeds. It is submitted that if and when the Irish legislature embarks upon a further reform of Company Law, that the latter reform option would be the most desirable.

The above article is an extract from the forthcoming book *"The Law of Private Companies (& Other Business Associations)"* by Thomas B. Courtney and Prof. Liam O'Malley which is scheduled for publication by Butterworth (Ireland) Ltd in November 1992.

(Copyright 1992 Courtney & O'Malley and Butterworth (Ireland) Ltd.)

NOTES

1. For registration of company charges generally, see Keane, *"Company Law in the Republic of Ireland"*, (1991) Butterworths, Chapter 23, Ussher, *"Company Law in Ireland"*, (1986) Sweet & Maxwell 451-471, Forde, *"Company Law"* (1985), Mercier 445-449, McCormack, *"Registration of Company Charges"*, (1984) ILT 67 and Gough, *"Company Charges"*, Butterworths.
2. See S.102 (1) and (2) which provides that judgement mortgages should be registered in the CRO. It has been suggested by Judge Keane, *op. cit.* that non-registration ought to render the judgement mortgage void, but it is respectfully submitted that in that since a judgement mortgage is not "created" by the company concerned, it ought not to be void in that the S.99 (1) consequence of being void is dependent upon a company "creating" a charge.
3. S. 352 (2) Companies Act 1963 provides that various particulars should be included in the list referred to in S. 352 (1) (b), for example, names, address, nationality, business occupation, particulars of other directorships of Irish companies of directors, etc.
4. Form No. 1E, 2E, and 3E. See the Companies Registration Office Information Manual.
5. [1980] 1 All ER 955.
6. cf the case of a judgement mortgage registered against a foreign company which has an established place of business in Ireland and which is not registered on the external register. It is submitted that the comments referred to above in the case of judgement mortgages against Irish registered companies applies here, and that the only sanction is a fine, the charge itself remaining valid.
7. See generally, Dine, *"Registration of Company Charges"*, (1991) Business Law Review 31 and Ferran & Mayo, *"Registration of Company Charges – The New Regime"*, (1990) Journal of Business Law 152.
8. See also *Re Oriel Ltd* [1985] BCLC 343 per Oliver LJ at 346 and see *Re Alton Corporation* [1985] BCLC 27.
9. See S.103 (1) (a) and (b) for those particulars which the Registrar of Companies is obliged to enter in the register.
10. per Hirst J. in *Cleverland Museum of Art -v- Capricorn Art International SA* [1990] BCLC 546 at 550i.
11. On the authority of *Derverall -v- Grant Advertising Inc* [1954] 3 All ER 389.
12. See also *Re F.G. (Films) Ltd* [1953] 1 All ER 615 and *The World Harmony* [1965] 2 All ER 139;
13. See, for example, the "new" S.395 (2) Companies Act, 1985 (UK). □

CLASP Concert

CLASP (Concerned Lawyers Association for the Alleviation of Social Problems) are having a charity concert at the Gaiety Theatre, Dublin on Sunday 24 May, 1992.

Music will be provided by "Chris Meehan and his Red Neck Friends". Special guest appearance, Mary Black.

Tickets are £8.00, £10.00, £12.00, £15.00 available from Box Office, Gaiety Theatre, Dublin 2 or CLASP members, Law Library, Four Courts, Dublin 7, Telephone 720622.

All welcome – please support this worthy event. □

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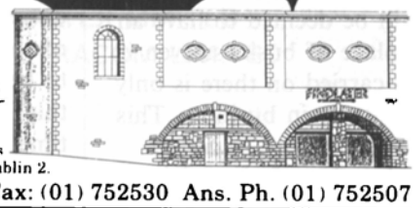
The Harcourt Street Vaults
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Tel: (01) 751699 Fax: (01) 752530 Ans. Ph. (01) 752507
VISIT OUR MUSEUM IN THE VAULTS
AND SAMPLE OUR WINE OF THE WEEK

Waterford Solicitor Sails Atlantic In Aid of Charity

Colin Chapman, senior partner of Kenny Stephenson and Chapman, Waterford, Dublin and London, on 7th June next will join an international fleet at Plymouth for the start of the 1992 "Europe 1" Singlehanded Transatlantic Yacht Race in his 50' Bermudan Ketch "Deerhound". This endeavour which represents the fulfilment of a lifelong ambition for Colin is also to be used as a fund raising project in association with the Irish Cancer Society to be known as the "Deerhound Lifeline for Cancer".

Despite the tremendous courage and determination necessary to even contemplate entry to this event, Colin regards it as slightly self-indulgent and was, therefore, very keen that his participation be used to raise money for charity. He has lost a number of close friends to cancer and so what better worthy cause as his first choice. The Irish Cancer Society responded with enthusiasm and the Deerhound Lifeline for Cancer was conceived.

Colin Chapman was born in May 1936. He was educated at Bishop Foy School, Waterford and Trinity College, Dublin, (BA LLB Michealmas 1962). He commenced his legal career in England with the firm Gregory Rowcliffe only to return to Ireland after a short time when his father died suddenly. He joined his late fathers practice W.E. Chapman which shortly thereafter amalgamated with Kenny Stephenson to form Kenny Stephenson and Chapman the firm of which Colin is today the senior partner.

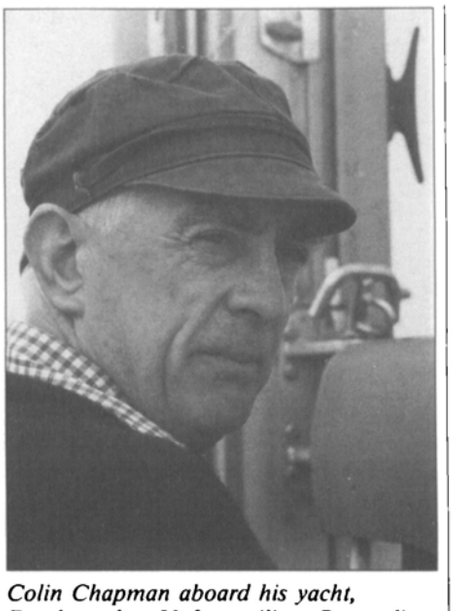
Colin specialises in tax law and is also a consultant with the London firm Charles Russell, Lincolns Inn. He was admitted to the English Law Society in January 1991.

Ever since he can remember, Colin has been involved with boats of some kind. From the first boat he built himself using orange boxes and canvas through various dinghys and yachts to his purchase of "Deerhound" in 1988.

"Deerhound" is a 50' Auxillary Bermudian Ketch built in 1970 to the design of Ted Hood. Since owning her Colin has had considerable adventure with her. In 1988 he was dismasted in a storm in the Bay of Biscay with the family on board. He returned under jury rig. For this feat of exceptional seamanship he was awarded the Rockabil Trophy by the Irish Cruising Club.

The 1989 "Deerhound", with Colin, his wife, Jeanne, and crew of three crossed the Atlantic arriving in Barbados on Christmas Day. After some time cruising the Carribean "Deerhound" again faced the rigours of the Atlantic returning to Ireland via the Azores. The final leg of this trip from the Azores home was completed by Colin alone thereby fulfilling his qualification of a singlehanded trip of over 500 miles necessary for entry into Europe 1 Single Handed Transatlantic Race. This trip was not without its excitement starting with the log getting caught in the rudder and then the weather getting colder and the sea rougher as progress was made north.

Again showing exceptional navigation and seamanship Colin arrived safely back at Castlehaven on 23 June, 1990. He was subsequently awarded for the second consecutive time the Rockabil Trophy by the Irish Cruising Club.



Colin Chapman aboard his yacht, Deerhound, a 50 ft. auxiliary Bermudian Ketch.

All Colin's experiences will equip him well for the race across the Atlantic which starts on 7 June, 1992 from the Royal Western Yacht Club, Plymouth and we wish him well. He expects to get to the finish at Newport, Rhode Island some 30 days later.

A full programme of fund raising activities is being arranged by the Deerhound Lifeline for Cancer Fund Committee of which more will be heard in due course.

As the entire costs of race participation are being fully met by Colin himself every pound raised will go to the Fund. It you would like to support the project you can do so by either sending a donation or by running an event, (coffee morning, lunch, dinner, barbecue or what you will).

Donations or further information: *James Cassidy,* Esq., Deerhound Lifeline for Cancer, Irish Cancer Society, Northumberland Road, Ballsbridge, Dublin 4. Tel: 01-681855.

(Cheques payable to: Deerhound Fund-Irish Cancer Society). □

Murray Sweeney/Sunday Business Post Law Awards

Shaun O'Shea Killarney, an LLM student at University College Cork, winner of The Sunday Business Post Law Awards competition, sponsored by Murray Sweeney, Solicitors, Limerick and Dublin, pictured receiving a cheque for £1,500 from Joe Sweeney (r), Managing Partner, Murray Sweeney Solicitors. Also pictured (l) is Dr. Michael Forde, College Lecturer in Law at UCD, who was one of the judges of the competition.

Roscommon Bar Association News

The following were elected officers of the Roscommon Bar Association for the year 1992/93.

President: Brian Neilan, Roscommon
Vice-President: John Kelly, Boyle
Secretary: Brian O'Connor, Ballaghaderreen
Treasurer: Marie Connellan, Strokestown

The Annual Dress Dance of the Roscommon Bar Assocation will be held at the Abbey Hotel, Roscommon on Friday, 22 May. Details are available from Brian O'Connor, P. Desmond O'Connor & Co., Ballaghaderreen (0907) 60025.

The Annual Golf outing will be held at Ballaghaderreen Golf Club on Wednesday, 27 May. Details are available from Dermot Neilan, Neilan & Co., Ballaghaderreen, (0907) 26115. □

Younger Members Committee

7-A-SIDE SOCCER MIXED COMPETITION

Saturday, 23rd May, 1992

in aid of The Solicitors Benevolent Association

Sponsored by
The Educational Building Society

Venue: The Law Society, Blackhall Place, Dublin 7.

★ Live Music throughout the day ★

Creche Facilities.

The Soccer Blitz will be followed by a social evening.

For registration form please write to: *Younger Members Committee, Blackhall Place, Dublin 7.*

"Trial by Jury"

Volunteers Wanted

to take part in the performance of Trial by Jury (Gilbert & Sullivan) in aid of The Solicitors Benevolent Fund.

Soloists and chorus members required.

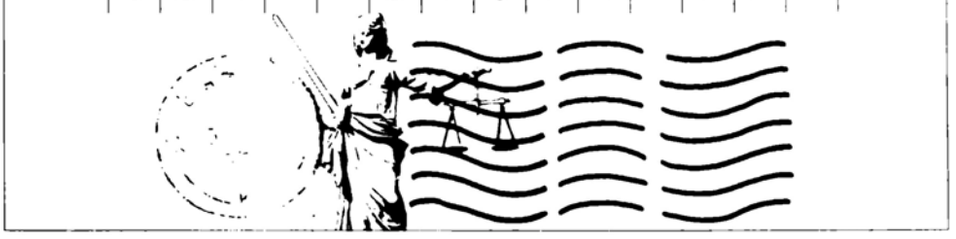
Please reply to:

Geraldine Clarke, 29 Anglesea Street.
Tel: 718048, Fax: 711240

or

Patricia Doolan, Law Society.
Tel: 710711

CORRESPONDENCE



Re: Review of *Copinger and Skone James on Copyright,* Gazette, March 1992

Dear Editor,

I wish to disagree with James Hickey who reviewed the 13th edition of *Copinger and Skone James on Copyright* in the March 1992 issue of the Gazette where he stated that "the law was very much the same in Ireland as in the UK" until the passage of the Copyright, Designs and Patents Act, 1988. I disagree also with his statement that "the only substantial difference between the Irish 1963 Act and the UK 1956 Act was that the Irish government declined to create a Performing Rights Tribunal".

I shall confine my remarks to what is, in my view, a very important difference, from a librarian's viewpoint. Section 7 of the UK Copyright Act, 1956 (repealed) permitted special exceptions from infringement of copyright for libraries which were elaborated upon in the UK Copyright (Libraries) Regulations 1957 (S.I. 1957 No. 868) (revoked). The Irish Copyright Act 1963 does not grant any special exceptions to libraries other than in section 12 (6) as elucidated by the Copyright (Publication of Certain Works) Regulations 1964 (S.I. No. 180 of 1964). These regulations relate to unpublished manuscripts as specified therein and are, therefore, more the concern of the archivist.

The uncertainty which the said omission causes in relation to the copying of works by libraries (photocopying, especially) in the Republic of Ireland means that these institutions need to pay particular attention to this matter when providing access to their collections notwithstanding the general exceptions to infringement concerning copyright material common to both the Irish 1963 Act and the UK 1956 Act (repealed). (See Whale, R.F. and Phillips, Jeremy J. *Whale on copyright.* 3rd. ed. Oxford: ESC Publishing, 1983, in support).

Yours faithfully,
Hugh M. Fitzpatrick
BCL, MLIS, (NUI), M.Phil. (Cantab.),
Solicitor, Dip. Lib., ALAI,
St. Edmunds College,
Cambridge.

Dear Editor,

Thank you for your letter of the 2nd April 1992 enclosing a copy of letter dated 25th March 1992 from Mr. Hugh M. Fitzpatrick of St. Edmund's College, Cambridge.

I do of course stand over my own views as to the only substantial difference between the Copyright Act, 1963 of the Republic of Ireland and the Copyright Act, 1956 of the United Kingdom, though taking Mr. Fitzpatrick's point into account, I think the word 'substantive' rather than 'substantial' might have made my point clearer.

It is true to say that Section 7 of the UK Copyright Act, 1956 (with the exception of subsection (6)) was not reproduced in the Copyright Act, 1963. Following the different section numbering in the 1963 Act it should have fallen between Sections 12 and 13. It is interesting to note that Section 12 (6) of the 1963 Act does in fact reproduce the substance of Section 7 (6) of the 1956 Act and no equivalent of Section 12 (6) of the 1963 Act appears in the equivalent Section 6 of the 1956 Act.

What I believe happened in the 1963 Act was that the Irish parliamentary draftsman took the view that Section 7 of the 1956 Act was too detailed and complex for the Irish context and that the matter was sufficiently covered by Section 12 (1) which allows for fair dealing with a literary dramatic or musical work for the purposes of research or private study or criticism or review. They did of course preserve Section 7 (6) as Section 12 (6) as indicated above as this was clearly regarded as important to include in the 1963 Act.

I have to confess that as a practitioner in Ireland in the areas of copyright law I have not come across any great concern on the part of libraries and educational institutions in Ireland on the question of breaches of copyright arising from the photocopying of literary dramatic or musical works in their collections. Unlike the United Kingdom there is no system in place for the protection of literary works in this regard though I understand that efforts are now being made to establish a literary copyright collection society in Ireland which would be similar in its operation to the Irish Music Rights Organisation the local equivalent of the Performing Rights Society in the United Kingdom.

What such a literary copyright collection society would do would be, of course, to charge libraries and other institutions where such photocopying of literary works went on, on the basis of a blanket annual fee to allow photocopying to be conducted of all works which the literary copyright collection society controlled without reference to the specific owners of that copyright. This would be in the same way that IMRO/PRS charge places of public resort for the use of so-called piped music as part of their service to customers.

I would welcome such a development in Ireland as my experience of libraries and educational institutions in Ireland is of widespread, if unintentional, disregard of the laws of copyright. Photocopying of literary dramatic and musical work is common and off air recordings of radio and television a regular occurrence. I would hasten to add that these are personal impressions of the position in Ireland and I have no doubt that Mr. Fitzpatrick and his fellow librarians in the United Kingdom are scrupulous in their adherence to the rules of copyright. Mr. Fitzpatrick would be right in my view to deduce a more lax attitude in Ireland than in the United Kingdom from the deletion of most of Section 7 of the 1956 Act from the 1963 Act and to that extent I acknowledge with gratitude the point he makes. However, the position as to the photocopying for research, private study, criticism and review was covered generally by the fair dealings provisions of Section 12 of the 1963 Act. I would not regard the difference between the two Acts as "substantial".

On a personal note Hugh and I were at school together and it was good to hear from him albeit in this circuitous way.

Yours etc.,

James J. Hickey,
Amorys,
1 Fitzwilliam Square.

Compensation Fund

Dear Editor,

I refer to the President's message "Compensation for Claims or Licence to Steal" in *Gazette* Volume 86 No. 2 March, 1992.

I specifically refer to the comparison in that article between the current Compensation Fund contribution of £475.00 for an Irish solicitor and the New York equivalent of $360.00, which figure I assume is correct.

Given the difference in salaries and earning potential between the two jurisdictions referred to, it is clear that an Irish solicitor is paying proportionately a much higher figure than his New York counterpart, probably in excess of 400% more.

It is, I feel, a sad reflection on both the Law Society and the members of the profession that the contribution of each solicitor to the Compensation Fund has been allowed reach its current level, a level which in the context of the above example is clearly far too high.

I would be obliged to know whether the detailed submissions made by the Law Society to the Minister for Justice, Padraig Flynn, on the Solicitors (Amendment) Bill, 1991, seek to reduce the annual Compensation Fund contribution for each Solicitor. While there may be an argument in favour of maintaining the Compensation Fund in that it may be good for the image of the profession, the current annual contribution of £475.00 per solicitor is grossly excessive and far too high a price to pay for the very limited credibility the Compensation Fund in itself gives to the profession.

I would also like to place on record my own view which is this: if the annual contribution to the Compensation Fund cannot be reduced to a reasonable level of say £150.00, the Law Society should seek legislative change to bring about the entire abolition of the Fund.

I do not know if this is the attitude of other members of the profession, but I would certainly be interested to know.

Meanwhile, the Solicitors Bill seeks to extend the provision of probate and conveyancing services to banks, and to prohibit charging of percentage fees by Solicitors.

Yours etc.,

Philip Smith,
W.J. Shannon & Co.,
19 Upper Ormond Quay.

Drunken Driving Penalties

Dear Editor,

Enclosed is a copy of a report of drunken driving which appeared in the Nenagh Guardian newspaper 100 year ago. Perhaps the penalties for drunken driving today are not as severe as we had thought!

I thought the report might be of interest to your members.

Yours etc.,

Brendan F. Hyland
B. Hyland & Company

"Jailed for being drunk

Sgt. McGann of Timoney, at Roscrea Petty Sessions, charged William Maher, a respectable farmer from Ballykelly, with being drunk on the public road at Knock, on the 24th while in charge of an ass and cart.

Mr. Anthony Nolan, solr., Nenagh appeared for the defence.

The sergeant stated that on the day in question, he and Constable Hennessy were on duty and that he found Maher drunk in charge of the ass and cart.

Mr. Quinlan, licenced publican, Knock, stated that Maher was in the house, he had a couple of pints of beer, but he was not drunk, although he did not give him any more.

The magistrates sentenced defendant to one month's imprisonment in Clonmel Jail with hard labour."

YOUR WILL
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For donations and further particulars contact:
Miriam McNally
Irish Wheelchair Association
Áras Chuchulain, Blackheath Drive,
Clontarf, Dublin 3. Tel: 338241
IRISH WHEELCHAIR ASSOCIATION

TECHNOLOGY NOTES

Computerisation in the Patents Office

A number of government departments and public service agencies are undertaking substantial investment in technology which will have a direct impact on the work of practitioners. From time to time, this column will examine such developments in the public sector and this month we begin with a look at the computerisation of the Patents Office.

by Michael M Moran, Solicitor,
Registered Trademark Agent

Coincidentally, the Patents Act, 1992 was signed into law on 27 February last. The Act replaces the Patents Act, 1964 and brings Irish patent law into line with international patent law enabling the State to ratify the European Patent Convention and the Patent Cooperation Treaty. The Act substantially amends the procedures in respect of examination of applications and provides for the protection of smaller type inventions by introducing provisions for the grant of short term patents.

The Patents Office is currently in the third year of a five year computerisation programme.

The development is based on PC LAN hardware. The system comprises three 386/33 file servers with over 2Gbytes of disk storage together with an ethernet LAN with Novell Netware. There are currently approx. 40 workstations mainly 386SX processors from various manufacturers, Dell, Wang, AST and Compaq. An imaging system for trademarks has also been installed, which consists of a scanner, a laser printer and three 19 inch 300 DPI monitors.

The Patents Office has standardised on a database management system (DBMS) called Advanced Revelation for applications developments.

Systems have been developed to process patent, trademark, design and registered user applications.

Trademarks
All the in-house application processing activities for trademarks e.g. renewals, production of filing receipts etc. have been computerised. The trademark database has over 85,000 records giving up-to-date details of registered and pending trademarks. Renewal notices can be printed out as of a certain date and on receipt of payment and recording on the accounts system, the trademark is automatically renewed.

At present trademark devices i.e. trademarks with a graphic element are being scanned into the system and when the backfile has been completely scanned, all trademark details will be available on computer. Trademark information has been available on computer to the public in the library in the Patents Office for over twelve months. Three computer terminals are available for public use and the systems have been designed to enable easy use by the non expert user. The public system enables users to do searches based on classifications, words and applicant name. It is hoped to have the trademark device (images) available to the public by Autumn 1992.

Patents
On the patent side, information on applications and registrations since 1988 are held on the system. Recently the Patents Office started a data capture of all patent bibliographic search material which it is hoped to have available to the public by Autumn 1992.

Design and Registered User
Design and registered user information is available on the system since 1988. It is planned to make this available to the public within the next twelve months.

Library
In the library, there are available CD-ROM's containing complete European Patents Office applications from 1 January, 1991 and complete PCT applications from 1 January, 1991.

Future Developments
Within the next year, it is planned to have a full patent database available to the public. It is also hoped to have a dial-in service, where users can dial into the Patents Office to do patent and trademark searches and to track the progress of applications. The possibility of submitting applications in an electronic format e.g. on floppy disc or by electronic mail/file transfer is currently being examined.

Further information:
Mr. Fred Bradley, Patents Office, 45, Merrion Square, Dublin 2.
Tel: 614144. □

Land Registry — issue of New Land Certificate

Registration of Title Act, 1964

An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.
22 May, 1992

Land Certificate

John McGough, Snugboro, Castlebar, Co. Mayo. Folio: 6985F and 6986F; Land: (1) Carrowbrinoge, (2) Carrowbrinoge; Area: (1) .943 acres, (2) .189 acres. **Co. Mayo.**

Terence McEntee, Folio: 18314; Land: Drumaclan; Area: 1(a) 0(r) 0(p). **Co. Monaghan.**

Thomas Bennett, Folio: 11968; Land: Derrycricket; Area: 5(a) 0(r) 33(p). **Co. Kings.**

Mary O'Connor, Folio: 5720 closed to 16214; Land: (1) Old Kilcullen, (2) Old Kilcullen; Area: (1) 4(a) 3(r) 32(p), (2) 7(a) 3(r) 10(p). **Co. Kildare.**

Mary Colbert, (deceased); Folio: 26170; Land: Property on the west side of Strand Street in the town of Youghal. **Co. Cork.**

John Scott Marshall, Folio: 8120R; Land: Grange; Area: 64(a) 2(r) 39(p). **Co. Donegal.**

Annie Bourke, Massbrook, Bofeenaun, Ballina, Co. Mayo. Folio: 2917F; Land: Massbrook Upper; Area: 1(a) 1(r) 22(p). **Co. Mayo.**

Patrick Bourke, Folio: 3049; Land: Part of lands of Ballycasey; Area: 36(a) 3(r) 17(p). **Co. Limerick.**

James Farrell, Folio: 3904; Land: Trillickatemple; Area: 170(a) 2(r) 22(p). **Co. Longford.**

William Aylward, Folio: 4226; Land: Ballygreek; Area: 1(a) 3(r) 13(p). **Co. Kilkenny.**

Jeremiah McCarthy, (deceased); Folio: 13886; Land: Part of the land of Ballaghadown South; Area: 99(a) 3(r) 15(p). **Co. Cork.**

Thomas Egan, Folio: 3170; Land: Part of the land of Townparks; Area: 0(a) 2(r) 10(p). **Co. Westmeath.**

Philip Fogarty, Folio: 10459; Land: Part of the land of Ballyduagh; Area: 133(a) 1(r) 11(p). **Co. Tipperary.**

Cyril Meegan, Folio: 20692; Land: Drumgoan; Area: 0(a) 1(r) 0(p). **Co. Monaghan.**

Andrew and **John O'Donnell,** Folio: 34643; Land: Dunglow; Area: 0(a) 2(r) 24(p). **Co. Donegal.**

Enda Burns and **Marie Burns,** Barnavara Hill, Glanmire, Co. Cork. Folio: 9342F; Land: Poulacurry North, Barony of Cork. **Co. Cork.**

John J. Natin, Oughterard, Co. Galway. Folio: 27080; Land: Knockkillaree; Area: 10(a) 3(r) 38(p). **Co. Galway.**

John J. Carey, (deceased); Folio: 3160; Land: Moneyteigue North; Area: 4(a) 1(r) 16(p). **Co. Wicklow.**

Eileen Power, 9 St. Mary's Terrace, Galway. Folio: 54901; Land: Rinnaknock; Area: 0(a) 0(r) 37(p). **Co. Galway.**

Mary E. Logan, Main Street, Mohill, Co. Leitrim. Folio: 21968; Land: (1) Lackagh, (2) Cloonblasny Beg, (3) Cloonteem; Area: (1) 10(a) 0(r) 0(p), (2) 1(a) 2(r) 10(p), (3) 16(a) 1(r) 8(p). **Co. Roscommon.**

Thomas Murphy, Folio: 401; Land: Part of the lands of Corbally; Area: 11(a) 0(r) 10(p). **Co. Kildare.**

John Duggan, Folio: 3823; Land: Arywee; Area: 1(a) 2(r) 12(p). **Co. Limerick.**

Josephine Mulvihill, Folio: 20824F; Land: Leanamore; Area: 0.194 hectares. **Co. Kerry.**

Frances O'Donnell, Folio: 5095L; Land: Part of the Townland of Tooreen and Barony of Coshma. **Co. Limerick.**

Anne Patricia Farrell, Folio: 9129; Land: Gigginstown (part); Area: 202(a) 3(r) 25(p). **Co. Westmeath.**

Wills

McBride, Bridget, (aka Maisie), late of 7 Pearse Square, Dublin 2. Please contact us if you are aware of the existence of a will made by the above person who died on 16 January, 1991. McCann FitzGerald, Solicitors, 2 Harbourmaster Place, Custom House Dock, Dublin 1. (Ref: MW/JK/OB).

Jacob, Patrick and Mary, both deceased, late of 33 Pearse Park, Waterford. Would any party having knowledge of the whereabouts of a will of either of the above named deceased who died on 13 October, 1991 and 29 November, 1988,

respectively, please contact Messrs. Nolan Farrell & Goff, Solicitors, Newtown, Waterford, Ref: JG. Telephone: (051) 72934.

Chambers, George, deceased, late of Carrobeg, Newport, Co. Mayo. Would any person having knowledge of the whereabouts of a will of the above named deceased who died on 23 March, 1991 contact Tim Shannon, Solicitor, Shannons, 29 Main Street, Swords, Co. Dublin. Telephone: 401780.

O'Conaill, Daithi, (otherwise David O'Connell), deceased, late of 75, Ennafort Park, Raheny, Dublin 5. Vocational Teacher. Would any person having knowledge of the whereabouts of a will of the above named deceased who died on 1 January, 1991, please contact Ciaran Mac an Aili, Solicitor, of 31, Waltham Terrace, Blackrock, Co. Dublin. Telephone: 01-963214. Fax: 01-963405.

Byrne, Matthew, deceased, late of 12 Gullistan Place, Rathmines, Dublin 6. The above named deceased died on 14 March, 1992. Would any person aware of the existence or whereabouts of any will executed by the deceased or claiming to be a next-of-kin of the deceased please contact: Felix Mc Tiernan, Felix Mc Tiernan & Co., Solicitors, 46 Fitzwilliam Square, Dublin 2. Telephone: 762833, Fax: 768031.

McQuaid, Mary, deceased, late of 13, Blarney Park, Sundrive Road, Kimmage, Dublin 12. Would any person having knowledge of the whereabouts of a will of the above name deceased who died on 17 December, 1991, please contact Mannion, Solicitors, Usher House, Main Street, Dundrum, Dublin 14. Tel. No. 2989344, Fax: 2989846.

Daly, Gertrude, deceased, late of 92, Biscayne Estate, Coast Road, Malahide, Co. Dublin and formerly of Dominic Street, Mullingar, Co. Westmeath. Would any person having knowledge of the whereabouts of the will of the above named deceased who died on 22 January, 1991 please contact Christopher Owens, Chartered Accountant, Grant Thornton, Kinnear Court, Dublin Road, Mullingar, County Westmeath whom it is proposed will act in obtaining Letters of Administration under a Power of Attorney for the beneficiaries and who will be responsible for referring said will to the solicitors handling the administration of this estate.

Cassidy, Ellen, deceased, late of 2 Wolfe Tone Villas, Bray, Co. Wicklow. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on 22 November, 1986 and in particular a will dated 2 March, 1977, please contact Neville Murphy and Company, Solicitors, Dargle House, Bray, Co. Wicklow. Telephone: 2868819.

McTighe, Margaret, (Rita), deceased, late of 145 Braemor Road, Churchtown, Dublin 14. Would anybody having knowledge of the whereabouts of a will of the above named deceased, who died on 26 March, 1992, please contact Francis G. Costello & Co., Solicitors, of 51, Donnybrook Road, Dublin 4. Telephone: 2698031/2839484.

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Miscellaneous

Northern Ireland Agents, for all contentious and non-contentious matters. Consultation in Dublin if required. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry. Telephone: (080693) 61616, Fax: 67712.

Wanted Six or Seven Day Intoxicating Liquor Licence. Rural. Contact Messrs. Garavan & O'Connor, Solicitors, Main Street, Castlebar. Telephone: (094) 24600. Ref: Fintan Murphy.

Lost Title Deeds Estate of Albert Edward Ruttle, 59 Blackheath Park, Clontarf, Dublin 3. Would anybody having knowledge of the whereabouts of the original title documents for 59 Blackheath Park, Clontarf, Dublin 3 the property of the late Albert Edward Ruttle, please contact Messrs. Mason Hayes & Curran, Solicitors, 6 Fitzwilliam Square, Dublin 2. Telephone No. 766961, reference DC/MC.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

PROSECUTING FRAUD

DIRECTIVES AND DAMAGES IN DOMESTIC COURTS

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INCORPORATED LAW SOCIETY OF IRELAND

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Front Cover: An Taoiseach, Albert Reynolds TD and his daughter, Miriam Fogarty, a solicitor, who, along with other members of the Reynolds family, visited the Law Society recently.

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VIEWPOINT

Prosecuting Fraud

The prosecution of serious fraud in this country seems to pose particular difficulties for the Garda and prosecuting authorities. Various reasons have been advanced for this, including the current state of the criminal law, which makes it difficult in some cases to obtain the necessary proofs to sustain prosecutions in court especially where persons have been in positions of trust and have had access to and control over funds. Questions have also been raised about whether the Garda authorities have available to them the requisite skills to investigate complicated areas of commercial activity in the corporate sphere often involving complex transactions the understanding of which would test the skills of specialists in the field.

In England, the authorities addressed this matter by establishing a special office to deal with serious fraud. This was put under the direction of a top-notch lawyer, Ms. Barbara Mills QC, who is now the Director of Public Prosecutions. That office is staffed by specialists, including lawyers and accountants, who are experts in company law and financial matters, including information technology. It works under the general aegis of the office of the Director of Public Prosecutions. The former Taoiseach, Mr. Charles Haughey, TD, mooted the idea of establishing a similar office here some time ago. This idea did not, apparently, find favour with some of the Garda representative bodies and seems not to have been pursued. The Director of Public Prosecutions has also expressed strong views on the need for action in this area. He favours changes which would include a move away from the adversarial system in our courts to an inquisitorial-type approach. Recently, the Minister for Justice announced the establishment of a working party to examine the issues involved and to bring forward recommendations. Side by side with this development, the Law Reform Commission are currently working on the modernisation of the law of dishonesty and they have published a very detailed and comprehensive working paper.

We would say that this is an area that requires serious and urgent attention and it is to be hoped that, through a combination of reform of the law and a new approach to the investigation of fraud – involving the establishment of a special unit staffed with the requisite skills, whether located in the Garda or directly under the DPP – the prosecution of fraud, and white collar crime generally, will be significantly improved. The Law Society has made it clear that, in relation to its own role of policing the solicitors' profession, there have been serious problems in ensuring that solicitors who misappropriate clients' funds are brought to book in the criminal courts. The Society believes that there is an urgent need to create new criminal offences which will allow prosecutions, in appropriate cases, to be taken more easily. There are difficulties in sustaining prosecutions for larceny or embezzlement which are the main criminal offences applicable in this area. New offences, which will address the realities of the day-to-day practice of solicitors, in particular the handling by solicitors of clients' funds, are needed. The Law Society has urged the Government to create new offences in the Solicitors (Amendment) Bill, and it is to be hoped that the Government will accede to this request and bring forward amendments at the committee stage to achieve this.

It is clearly right that the sanction of the criminal law should be applied to solicitors who betray the trust placed in them by the community. Criminal sanctions are entirely appropriate because of the seriousness of these offences and also because of the need to provide deterrence and to bring home to the public at large that the profession itself is determined to take every step open to it to rid the profession of miscreants of this kind. Dishonesty in the profession in recent times has been a matter of some concern and although the incidence of individual wrongdoing is small and the vast majority of solicitors do not offend in this regard, from recent statements made by the President of the Society, *(See also page 171)* it is clear that the Society is determined to tackle this problem in a resolute way. The public, of course, do not suffer when a solicitor offends in this way because of the availability of compensation from the fund maintained by the Society. We believe that reform of our laws and procedures in relation to the prosecution of fraud would be a step forward in this regard. □

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Taxation Committee attacks Draconian Measures in Finance Bill

In a recent press statement the Taxation Committee criticised measures in the Finance Bill 1992 and called on the Minister for Finance to reconsider them.

The text of the statement was as follows:

"The Taxation Committee of the Law Society welcomes the decision by the Minister for Finance, Bertie Ahern TD, to defer for one year the provision in the Finance Bill which would require companies and professionals to give information to the Revenue Commissioners about the transactions of third parties, but calls on him to reconsider this and other provisions in the Bill which give swingeing and sweeping powers to the Revenue Commissioners.

"The self-assessment system was introduced with the cooperation of professional bodies with the intention of alleviating the burden and cost to the compliant taxpayer in accordance with the Taxpayers Charter. It is clear that without this cooperation the system would not operate and it has been admitted that over 90% of personal taxpayers have submitted their returns and paid their due tax.

"The Law Society is in favour of measures aimed at eliminating tax evasion. It is clear, however, that the compliant taxpayer and his advisers will bear the brunt of this legislation. This makes nonsense of the self-assessment system and places an insurmountable obstacle in the path of professional cooperation.

"It was noted in the newspapers of the weekend of 9/10 May that multinational and foreign companies which had set up business in Ireland were beginning to view with alarm recent developments in revenue law and practice in this State. Professional advisers must now warn their business clients that the business climate in this country is becoming oppressive and anti-enterprise. Responsibility for this lies solely with the Government as they appear to accept, without question, Department of Finance and Revenue authority initiatives, in spite of the warnings by responsible business and professional people.

"As identified in the Culliton report, it is small business on which much of the future economic development of this country depends. It has come to the attention of the Law Society that many small businesses may be intimidated into increasing their tax liability following a Revenue audit. The Law Society views this development with alarm. The businessman may be forced to make a commercial decision balancing the additional amount "claimed" by the Inspector against the loss of profits and other costs involved in defending his position. The Revenue Commissioners are aware of this and, in some instances, use it to their advantage as they are not subject to the same commercial constraints.

"Against this background, the Finance Bill introduces swingeing and sweeping new powers for the Revenue Commissioners. Due to the unprecedented scale and severity of these measures, the Government has been requested to postpone their implementation, encompassing as they do:

1. Powers reserved to an authorised officer of the Revenue Commissioners to arrest without warrant in relation to VAT. (S. 189)

2. Powers reserved to a member of the Garda Siochana accompanied by an authorised officer, to arrest any person without warrant for obstructing the authorised officer. (S. 236)

3. Powers reserved to an authorised officer to enter business premises and to search for and seize documents, without warrant. (S. 232)

4. Powers reserved to an authorised officer, on a warrant, or in certain circumstances without warrant, to enter the home of the taxpayer and to search for and seize documents. (S. 232)

5. Requirements on professional advisers to voluntarily surrender confidential information relating to clients (now deferred for one year). (S. 226)

6. Many other powers of physical and legal enforcement unacceptable in a democratic society.

"The Law Society and other bodies have offered assistance and cooperation to the Minister, the Department of Finance, and the Revenue Commissioners in considering these provisions. This offer received no response.

"These provisions in the Finance Bill are incompatible with an orderly and democratic society. The Minister should think again." □

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Remove Controls on Solicitors' Remuneration

In his address to the half-yearly meeting of the Society on 11 May, Law Society President, Adrian Bourke, said there was no justification for the maintenance of controls on the level of fees that solicitors may charge clients.

Legal Costs

"The area of legal costs is one that has been occupying my attention very much since I became President. As some of you may know, I re-established a Costs Committee of the Society this year (in recent times costs had been dealt with as part of the functions of the Litigation Committee) and that Committee have been given the remit of examining urgently the whole area of legal costs with a view to ensuring that the remuneration levels of this profession keep pace with the very high cost of practising law nowadays and that solicitors are properly and adequately remunerated for their work.

"In the context of the Solicitors (Amendment) Bill, 1991, we have called on the Government to remove all legal controls on solicitors' remuneration. In an age of increasing competitiveness, which has recently witnessed the passing of a Competition Act designed to ensure the elimination of all restrictive practices and barriers and the introduction of open and free competition in trade and industry as well as in the professions, we see no justification for the maintenance of controls on the level of fees that solicitors may charge their clients for their work. The Minister for Industry and Commerce, Mr. O'Malley, in the context of his Competition Act, has expressed a view that it may not be lawful for the Law Society or Bar Associations to recommend levels of fees to their members. He sees such practices as being anti-competitive and, therefore, in restraint of free competition. In addition, the Solicitors Bill provides that it will not be lawful for the Society to prevent solicitors from charging less than any recommended level of fees for particular areas of legal work. How, therefore, might I ask, can it be maintained by the Government that there should be legal controls on the *maximum* levels of fees that solicitors can charge for their work? I ask also, in this context, whether, if the Government succeeds in enacting the provisions of the Solicitors Bill which will allow banks and trust corporations to do probate and conveyancing work it is proposed to introduce similar controls on the level of fees that they may charge for this work? I am afraid that the Government cannot have it both ways. We intend to continue to press for an open and free market in relation to solicitors' remuneration. The Fair Trade Commission and Mr. O'Malley are the purveyors of the dogma of competition. We will accept no deviation from that principle in a matter so vital to this profession.

Shoddy Work and Overcharging

"Before I leave the Solicitors Bill, let me make it very clear – and here I am speaking personally – that I welcome very much the new powers that the Bill will give the Law Society to deal with shoddy work and overcharging in the profession. I make no apology for that. This Society is a Society that has always been concerned with maintaining the highest standards of professional practice and ethical behaviour. We will not countenance poor standards of work or overcharging on the part of anybody and we will take all steps open to us to eradicate such behaviour from the profession.

"I believe that the provisions of sections 8 and 9 of the Solicitors Bill will greatly help and will strengthen the position of the Law Society in this regard. It is time that this profession demonstrated clearly to the public that it accepts fully that, in an age of increasing consumerism, it must be accountable – and be seen to be accountable – for what it does. That, to my mind, is a fundamental principle of good professional practice. I know that there are many firms of solicitors who are genuinely concerned about good solicitor/client relationships and genuinely believe in the concept of 'client care'. But we must work harder as a Society to ensure that this message is got across to everyone in the profession and that the public also see that, when the Law Society says that it is concerned about the way in which complaints are dealt with, it *means* what it says. I intend to devote a considerable amount of my energies, during my presidency, to the promotion of this concept in the profession. I am determined to have it demonstrated clearly that the Law Society is concerned about those who have complaints against solicitors and that, when complaints are made, they will be thoroughly and fairly investigated and, where wrongdoing is evident, this will be put right and, in appropriate cases, compensation offered. In this regard, of course, the maintenance of a compensation fund is very important to the profession but, it must be a fund that operates fairly and that is reasonable both to the public and to the profession.

"The appointment of a legal ombudsman, when the Bill is enacted, will, in my view, be a considerable step forward and will help to give much greater acceptability to the work of the Law Society in relation to the handling of complaints. I welcome that. I believe, of course, that it is absurd that we should be expected to bear the cost of this office and the Society will continue to campaign strongly with the Government on this." □

TECHNOLOGY NOTES

Computers in the Courtroom in Support of Litigation

by John Furlong, Solicitor

The progress of a court case from a client's first instructions to completion generates a vast amount of documentation within any office, some of which will be created internally on word processing systems and some of which is received from external sources. These external sources may include the firm's clients and legal counsel and representatives for the other party or parties in the case.

All of the documentation must be constantly referred to, classified, collated and copied. Distinctions must be drawn between documents which are available to representatives of the other side and documents which are not; documents which may be produced in court and documents which may not; documents which are of primary importance and those which are not.

A large litigation matter makes substantial inroads on the resources of any law firm whether large or small. In order to present a successful case, the management and production of documentation must match the pressurised and constantly changing requirements of the case from commencement to completion. These include:

- the need to identify and retrieve specific documents or pages of documents,
- the need to generate a variety of reports for different participants in the case,
- the need to retrieve rapidly documentation in Court,
- the need to impose security requirements on documentation,
- the requirement to illustrate salient points in graphical form during the court proceedings,
- the need to reclassify documentation according to the dynamics of the case.

Automated systems which can provide the necessary classification and indexing routines have become popular in the United States. These have generically become known as litigation support systems. A basic litigation support system is one which allows for the building of a distinct reference and retrieval system for an individual litigation matter. In more sophisticated systems, reference and indexing is supplemented by optical image storage of each individual document. A further development of the litigation support concept is the ability to display relevant documents on screen in the courtroom.[1]

Even the proponents of litigation support systems will emphasise the need to do cost benefit studies of its practical application in any firm.[2] The skeletal framework which is suitable for one case may require to be totally rewritten for another. In addition to the capital investment required (which can be substantial for a sophisticated system), there are also on-going costs in respect of data entry; the establishment of indexing routines and the operation of quality controls and review.

At its most effective, litigation support must be viewed as part of a comprehensive automated courtroom process in which the courts themselves will make full use of technology.[3]

In Ireland, there has been some limited use of technology in certain court cases and tribunals. Court administration has benefited from the automated case tracking and document generation systems in use for a number of years in the Dublin Metropolitan Courts and Limerick District Court and which allow for the speedier issue of fines and warrants and the listing of court dates. Similar systems will soon be extended to other areas. Case tracking systems are being installed at present in the Cork, Dublin and Kildare Circuit Courts.

A growing area in the use of technology in the United States is that of video display or recording, in some cases linked to the transcription service allowing for instant retrieval of recorded evidence on screen. **The Criminal Evidence Bill 1992,** currently before the Oireachtas, will allow for the use of similar technology in certain cases in this jurisdiction. In anticipation of the new legislation a video system is being installed in at least three courtrooms in the Four Courts, Dublin. The technology will allow for the handling of evidence in child abuse cases etc. In time it may also be used (as is the case in the United States) for the hearing of expert witness evidence from remote locations or for the hearing of evidence of prisoners from a secure location.

Further reading:

(1) See the excellent review of potential uses in "A future for Courtroom Technology" Tina Bondy, **Computer and Law** Vol. 2 No. 5 November, 1991. See also "Information Technology in Litigation" Timothy Bovey, **Law Society Gazette** (London) 17 February 1988. "Technology and the Courtroom" Nicholas Purnell, **New Law Journal** 27 July, 1990. "Managing the Paper Mountain" David Cornwell, **The Lawyer** 28 May, 1991.

(2) "Weighing the Benefits" David Cornwell, **The Lawyer** 11 February, 1992.

(3) "A Computer on the Bench" Patrick Stevens, **Law Society Gazette** (London) 5 February, 1992.

The Appointment of Judges

by Eamonn G. Hall

The Importance of the Judge

The judiciary in Ireland is a branch of Government. The centrality of the office of judge in Ireland is emphasised by the declaration made by the newly appointed judge. In the presence of Almighty God, the new judge states that he or she will duly and faithfully to the best of his or her knowledge execute the office of judge "without fear or favour, affection or ill will towards any man," and that he or she will uphold the Constitution and the laws. God is asked to direct and sustain the newly appointed judge.[1] The writer argues that the method of appointing judges in Ireland needs to be reviewed.

The manner of selection

Article 35 of the Constitution declares that the judges of the Supreme Court, the High Court and all other courts established pursuant to Article 34 shall be appointed by the President. Having regard to Article 13 of the Constitution, such function is exercisable by the President only on the advice of the Government.

The party or parties in power, in essence, have the final say in the appointment of judges. There are no defined criteria publicly available in Ireland in relation to the appointment of judges. Many judges who have been appointed have had definite associations with political parties. It is a sad reflection on the system of Government in Ireland if it were to be perceived that party membership and active support was a necessary pre-condition for appointment as a judge.

Policy of patronage

In a perceptive memorandum to the Government on legal appointments,

appointment of judges – no publicly defined criteria

in October 1950, the Minister for External Affairs, the late Sean MacBride, argued that the practice of reserving a number of appointments such as sheriffs, county registrars and others to the Government was a survival of the policy of patronage upon which the British authorities relied for the Government and domination of Ireland.[2] The Minister for External Affairs stated that he felt very strongly that political patronage in the making of appointments from the perspective of public administration was unsatisfactory and that it exposed members of the Government to serious charges. The Minister argued that unless each member of the Government was in a position to obtain and sift personally through all the information concerning the applicants for such posts, and in addition to be in a position to interview each of the applicants, there was a grave danger of committing an injustice. It was not part of the Government's function to act as a selection board: the Government had not the time nor was it equipped to discharge such a function. Furthermore, the Minister argued that because these functions were at present vested in the Government, the individual members of the Government were subjected to a personal and political canvas whenever certain legal appointments became vacant.[3]

Judicial appointments in England

In 1986 in England the Lord Chancellor published a booklet dealing with the criteria concerning the appointment of judges.[4] The Lord Chancellor noted that the quality of justice was largely determined by the quality of the judges who presided. He therefore regarded the selection and appointment of the judiciary as one of his most important responsibilities.

The Lord Chancellor noted that the growth of the legal profession and the increasing number of judges had brought changes in the methods by which Lord Chancellors discharge their duties in relation to the appointment of judges. The days were gone when the Lord Chancellor could personally assess the field of candidates for every post. Nowadays, with the help of a small team of senior officials, he systematically enlisted the help and advice of numerous serving judges and senior lawyers. He wished to dispel any lingering sense of mystery or obscurity that there may be about how this work was done. Consultations about individuals must obviously be confidential, but, he noted, there was no secret about the general policy or procedure. The arrangements depended on a working relationship between the Lord Chancellor's department, the judiciary and both branches of the legal profession. Great care was taken as to the selection of candidates, according to the Lord Chancellor, and his department continually sought to improve the system. There was always room for further improvements; the Lord Chancellor stated that he was always ready to consider suggestions from any quarter. His aspiration was to

ensure that the methods of selection of appointment as judges were as efficient, fair and open as they could be and to maintain the highest possible standards of ability and integrity on the Bench.

The Lord Chancellor's stated policy was to appoint to every judicial post the candidate who appeared to him to be the best qualified to fill it and to perform its duties, regardless of party, sex, religion or ethnic origin.[5] Professional ability, experience, standing and integrity alone were the criteria, with the requirements that the candidate must be physically capable of carrying out the duties of the post, and not disqualified by any personal unsuitability. The overriding consideration in the Lord Chancellor's approach was always the public interest in maintaining the quality of the Bench and confidence in its competence and independence. In any conflict, this consideration had to take precedence over all else. Subject however to that overriding consideration, the Lord Chancellor stated that he would do his utmost to deal fairly and openly with individual candidates.

Suggestions for improving the system in Ireland

The Minister for External Affairs in his memorandum for the Government in 1950 stated that he would like to see the Government relieved of the responsibility of making judicial appointments.[6] He recognised however that in the case of the appointment of judges, certain considerations may apply which may render it necessary for the Government of the day to have some power of selection. The Minister had in mind the difficulties which arose in the United States between President Roosevelt's administration and the American Supreme Court. However, the Minister suggested that it should be possible to devise as a matter of practice a procedure which would enable the Government to seek and obtain advice before making appointments to the judiciary.

The Minister suggested two alternative methods. First of all he suggested the appointment of a board of say five members who could be drawn from the judiciary and senior members of the legal profession who are not themselves potential candidates. Such a board would have the responsibility of furnishing to the Government three names from which the Government would then be at liberty to choose. An alternative would be that whenever a vacancy arose the Taoiseach or the Minister for Justice and the Attorney General should, as a matter of practice, ask each of the following to suggest three names for the filling of the vacancy: the Chief Justice, the President of the High Court, the President of the Circuit Court, the President of the District Court and the President of the Incorporated Law Society. Again as a matter of practice it was suggested that the Government would then choose from the names that had occurred most frequently in the suggestions made. The Minister concluded by stating that he would like to emphasise that in the propositions made above, the intention was that the ultimate responsibility and choice would rest on the Government who would be at liberty to disregard all or any of the names suggested. However, he forcefully concluded that no Government would however, be likely to disregard the names suggested lightly or without some strong reason based on public policy.[7]

Appointment to the Bench

The writer calls on the Government to publish the criteria for appointment to the Bench. Such criteria should include the statement to the effect that the candidates are appointed to the Bench solely on the basis that a candidate is the best qualified to fill the post and perform judicial duties regardless of party, sex, religion or ethnic origin. Secondly, the writer suggests that there is merit in some form of Judicial Appointments Board which would advise the Government on candidates suitable for judicial office. Above all else, there should be no mystery about the criteria for appointment to the Bench.

NOTES

* An earlier version of this article was published in *Industry and Commerce*, April 1992.

1. Article 34.5 of the Constitution of Ireland.
2. File S. 14418 A, Department of the Taoiseach, National Archives, Dublin.
3. Ibid.
4. *Judicial Appointments: The Lord Chancellor's Policies and Procedures*, May 1986.
5. Ibid.
6. See note 2 supra.
7. Ibid. It is of interest that the Secretary of the Government specifically informed the Taoiseach that the submission of the memorandum by the Minister for External Affairs, Sean MacBride, was a contravention of the cabinet procedure instructions as the memorandum dealt with matters for which the Minister for External Affairs was not the responsible Minister. The Taoiseach directed that the memorandum was to be circulated for information, at a subsequent meeting of the government. See file S. 14418 A, D/T, National Archives, Dublin.

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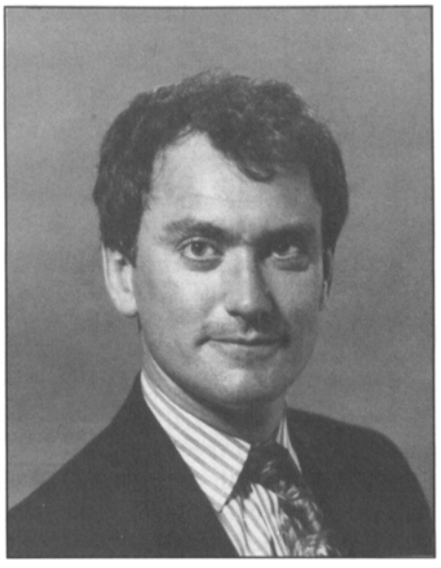
Directives and Damages in Domestic Courts

by Anthony M. Collins, B.A. (Mod.), Barrister-at-law, Référendaire at the Court of Justice of the European Communities.*

Persons with interests as diverse as businessmen, bankers, part-time workers and social welfare recipients will find themselves confronted with a brave new world of opportunities and perils upon the establishment of the 'Internal Market' by 31 December 1992[1] and the creation of a 'Social Europe'.[2] Many of these latest steps towards the "ever closer union among the peoples of Europe" mentioned in the preamble of the EEC Treaty have been and will be taken on the basis of directives.[3]

Member States are required to incorporate directives into national law by a given date although they are free to choose how they will be implemented.[4] Where a Member State fails to fulfil this obligation it may be brought before the Court of Justice and condemned on account of that failure.[5] If it inaccurately implements a measure or flouts the Court's judgment, the Commission can only commence fresh proceedings against the recalcitrant Member State which may lead to a second judgment condemning the failure to comply with the first.[6] This can not only lead to different rules for the 'compliant' and the 'evader' Member States but must also lend an air of unreality to discussions in the Council where agreements are reached which some Member States have little intention of heeding.[7] The number of infringements brought before the Court indicates that this is a real problem.[8]

Although Member States may now be prepared to submit to monetary sanctions where they have failed to comply with their obligations,[9] this approach would have been rejected in an era when Member States were more conscious of their sovereignty. Other solutions had thus to be found to ensure that the rule of law was observed.



Anthony M. Collins

Direct Effect

In *Van Gend en Loos*[10] and *Costa -v- ENEL,*[11] the Court of Justice declared Community law to be an integral part of the legal systems of the Member States, As such it binds both Member States and their nationals and can impose duties and confer rights upon individual persons independently of national legislation. It was but a short step for the Court of Justice to apply this reasoning to Community secondary legislation. Provided these provisions were unconditional and sufficiently clear and precise to be capable of producing direct effects in legal relationships between individuals and Member States, the Court was prepared to find that they had what was described as 'direct effect' in national legal systems.[12]

This principle had its limits. Only a certain number of directives or provisions thereof could give rise to direct effect. Neither did it appear that unimplemented provisions of directives could be enforced against private individuals, denying what is known as horizontal direct effect.[13] Since one must have prior knowledge of a right before one can seek to enforce it, Member States retained great scope to avoid the obligation to implement directives into domestic law.

Enforcing Community Law against Member States

Over the years the Court of Justice appears to have altered the basis upon which it affords direct effect to directives. Instead of the need to ensure the effectiveness of Community law, it now seems the purpose of direct effect is to prevent Member States from evading their obligations.[14] Enforcement from the centre is thus replaced by reliance upon private persons to ensure that Member States comply with Community law. This has been dramatically exemplified by the Court's judgments requiring national courts to grant interlocutory relief to private persons wishing to suspend the application of national and Community legislation which arguably infringes their Community law rights.[15]

"Enforcement from the centre is thus replaced by reliance upon private persons to ensure that Member States comply with Community law."

This process has been taken considerably further by two recent decisions of the Court.

As long as a Member State fails to apply a directive having direct effect,

* *This article is written in a personal capacity.*

it may not plead limitation periods or time limits as a bar to an action for damages arising from that failure. Thus Ireland may neither plead delay nor the Statute of Limitations where an individual seeks compensation for injury arising out of its failure to implement directly effective provisions of a directive.[16]

Furthermore, where a private person can prove he suffered loss as a result of Ireland's failure to implement *any* directive, whether directly applicable or not, that person is entitled to be compensated for that loss from the State.[17] It seems unlikely Ireland could plead that time had begun to run against a plaintiff until the measure had been incorporated into Irish law.

"where a private person can prove he suffered loss as a result of Ireland's failure to implement *any* directive, whether directly applicable or not, that person is entitled to be compensated for that loss from the State.[17]

Emmott

Article 4(1) of Council Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security prohibits all discrimination on grounds of sex, in particular as regards the calculation of social welfare benefits. This was to have been implemented in Ireland by 23 December, 1984.[18] In *McDermott & Cotter I* the Court of Justice held that, as of that date, Article 4(1) had direct effect. In the absence of national measures implementing the directive, women were entitled to be treated on the same basis as men. Any national provision inconsistent therewith was henceforth inapplicable.[19] *McDermott & Cotter II* interpreted Article 4(1) to mean that married women were entitled to the same increases in benefits and compensatory payments as those paid to married men in identical circumstances, even where this led to double payment. The Court also held that the directive did not provide any derogation from the principle of equal treatment which would allow the discriminatory effects of national law to be perpetuated.[20]

In December 1983, Mrs Emmott began to receive disability benefit under the relevant provisions of the Social Welfare Acts. Starting with the purported implementation of Directive 79/7 by the Social Welfare (No. 2) Act 1985[21] in May 1986, her benefit was adjusted on three occasions. After the judgment in *McDermott & Cotter I*, Mrs. Emmott wrote to the Minister for Social Welfare with a view to retrospectively obtaining the same amount of benefit as that paid to a married man in identical circumstances. By letter of 26 June 1987, she was informed that her claim would be examined as soon as the High Court had disposed of *McDermott & Cotter I.*

On 22 July 1988 the High Court granted Mrs. Emmott leave to institute proceedings for judicial review for the purpose of recovering the benefits which had not been paid to her since 23 December 1984 in breach of Article 4(1) of the Directive. When the matter came on for hearing, the respondents sought to rely upon her delay in initiating proceedings as a ground for refusing the application. Before proceeding further, the trial judge referred a question to the Court of Justice which, in substance, asked whether it was contrary to the general principles of Community law for a Member State to rely upon national procedural rules, in particular those relating to time-limits, to defend a claim arising out of its alleged failure to apply the directly effective provisions of a directive.

In the light of the facts it is somewhat surprising that the respondent argued that Mrs. Emmott was disbarred from obtaining relief by reason of a delay on her part. Given the nature and extent of the discretion vested in the High Court,[22] it is equally surprising that it did not itself rule on the matter. From the viewpoint of the Member States, this reference to Luxembourg opened Pandora's Box.

Advocate General Mischo suggested that whilst national procedural rules should be left intact, where Community law rights were at stake a certain minimum standard should prevail in all national courts. Whilst Member States could rely upon procedural rules and time limits governing similar actions at domestic law, those time limits would have to be

> "of reasonable length and should begin to run only from the time when the person concerned should reasonably have been aware of his rights and his exercise of those rights must not have been made impossible in practice by the attitude of the competent authorities."[23]

In its judgment the Court went considerably further. After citing *Rewe*[24] and *San Giorgio*[25] in support of the proposition that, in the absence of common rules, it is for the Member States to determine the procedural conditions under which Community law rights may be asserted, provided those conditions neither discriminate against the latter nor render the exercise of such rights virtually impossible,[26] it went on to examine "the particular nature of directives."[27]

Although Member States are free to choose how directives are to be implemented, they must adopt all measures necessary to ensure that directives are fully effective in the light of their objectives. Where individuals are granted rights thereunder, Member States are thus required to implement directives sufficiently clearly and precisely so as to enable the beneficiaries of rights granted thereunder to know their rights.[28] While providing a "minimum guarantee", direct effect does not release Member States from their obligations in this regard.

For as long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights, notwithstanding a judgment of the Court of Justice that the Member State has failed in its obligations or that the provisions of the directive have direct effect. Since only the proper transposition of a directive will bring that state of uncertainty to an end, until such time as a directive has been properly incorporated a defaulting Member State may not rely on an individual's delay in initiating proceedings to protect rights conferred thereon by a directive. Time will not begin to run against a plaintiff until the Member State has effectively implemented the directive in question.[29]

Francovich

> "Rarely has our Court had to judge a matter in which the negative consequences of the non-transposition of a directive were, for the individuals in question, as serious as they were in this case."[30]

The objective of Council Directive 80/987 of 20 October 1980[31] is to protect employees in the event of an employer's insolvency, in particular as regards the recovery of unpaid earnings. To this end Member States are required to take such measures as are necessary to ensure that guarantee institutions, as created or designated thereby, can ensure the payment of outstanding claims for earnings prior to an employer's insolvency. What constitutes an act of insolvency for the purposes of the directive is to be chosen by each Member State from among three options.

On 2 February, 1989, the Court condemned Italy for its failure to transpose Directive 80/987 into its domestic law by 23 October, 1983.[32]

Having only received part of his salary during 15 months employment, Mr. Francovich obtained judgment for 6 million Italian Lire (c. IR£3,000) but was unable to recover this amount from his employer. He commenced proceedings against Italy seeking either to obtain the benefit of the guarantees provided for by Directive 80/987 or an award of an equivalent sum in damages.

Mrs. Bonifaci's employers went into receivership on 5 April, 1985, owing 253 million Lire (c. IR£126,500) to some 34 employees. After four years of fruitless waiting, they took the same road as Mr. Francovich.

Two issues of Community law arose. Could the rights created by Directive 80/987 be invoked by the plaintiffs in an Italian court notwithstanding Italy's failure to transpose the directive into Italian law? If not, could the plaintiffs recover damages for the losses they sustained by reason of Italy's failure to implement the directive?

To see whether the rights established by Directive 80/987 satisfied the Requirements for direct effect,[33] Advocate General Mischo and the Court attempted to first determine their content before going on to identify to whom the rights were given and upon whom duties were imposed under the directive.[34] Since the latter group could not be divined from the text of the directive, the Court had to consider the second question.[35]

Advocate General Mischo argued that Member States are required to give full effect to Community law, although it is up to national law to determine how this duty is to be discharged. This obligation extends to all provisions having the aim of conferring rights upon, or protecting the interests of, individual persons, even where those measures do not give rise to direct effect.

Member States which fail to, or inaccurately, implement a directive are in breach of both the general obligation to ensure the full effect of Community law and the specific obligation laid down in Articles 5[36] and 189(3)[37] of the EEC Treaty. Where, as a result of an action taken against a Member State, the Court of Justice finds there has been a breach of this obligation, the Member State is obliged to take all appropriate measures to put its house in order. This may require payment of compensation for damage sustained by private persons arising from the failure to implement Community legislation. Such claims for compensation may be

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commenced at national law, provided relief is available on a non-discriminatory basis.[38]

"Where, as a result of an action taken against a Member State, the Court of Justice finds there has been a breach of this obligation, the Member State is obliged to take all appropriate measures to put its house in order. This may require payment of compensation for damage sustained by private persons arising from the failure to implement Community legislation."

In its judgment the Court first recalled that national courts had a positive duty to apply Community law, to ensure it be given full effect and to uphold rights granted to individuals thereunder.[39]

The full effect of Community law would be brought into question and the protection of rights thereunder seriously weakened if individuals were unable to obtain compensation where those rights were infringed by a violation of Community law imputable to a Member State.[40] The availability of compensation from a Member State is particularly important where, as in the case of directives, the full effect of Community law is conditional upon action by the State. Without such action individuals cannot obtain their rights at Community law before national courts. It is thus inherent in the Treaties that a Member State is responsible for damage caused to individuals flowing from its violation of Community law.[41]

Article 5 of the Treaty, by virtue of which Member States are obliged to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from Community law, also imposes an obligation upon Member States to pay compensation for such damage since among these appropriate measures is the obligation to eliminate the consequences of a breach of Community law.[42]

As state responsibility flows from the requirement of Community law, in particular Article 189 of the EEC Treaty, that Member States take all necessary measures to attain the result prescribed by a directive, the conditions under which damages may be obtained must also depend upon the nature of the breach of Community law giving rise to the damage.[43]

Community law affords a right to compensation when three conditions are satisfied. Firstly, the aim of the directive must be to create rights for the benefit of individuals. Secondly, the content of those rights must be identifiable from the provisions of the directive. Thirdly, there must be a link between the Member State's breach of its obligations and the damage sustained by the injured party.[44]

In the absence of Community rules, it is for national law to designate procedures whereby individuals can protect their rights at Community law, provided neither the substantive nor the formal conditions are less favourable than those governing similar claims at national law nor make it practically impossible or excessively difficult to obtain such compensation.[45]

Here Italy had failed to implement a directive which prescribes that employees are to be guaranteed payment of amounts due as unpaid wages. Since this right can be identified from the provisions of the directive, national courts must ensure compensation is available for damage flowing from a failure to incorporate the provision into national law. Thus, Italy had to pay compensation for damages sustained by individuals arising from its failure to implement Directive 80/987.[46]

Consequences of Francovich and Emmott

Under the Defective Products Directive[47] no-fault liability is imposed upon producers of defective products. Although Member States were obliged to implement this directive by 30 July, 1988, Ireland only did so on 16 December, 1991.[48]

Assume a plaintiff claimed damages for injuries allegedly caused by a defective product in January, 1989. He adduced proof of every aspect of his case save that the defendant, another private person, was at fault. He lost his action, appealed this decision unsuccessfully and was twice condemned in costs. If the directive had been implemented when the action was heard, his claim would have succeeded. Assuming the directive did not give rise to direct effect, had our hero any recompense?

Prior to *Francovich,* as a matter of Community law, the answer would have been no. Apart from the perceived lack of state responsibility, 'horizontal' directives, *i.e.* those which impose rights and duties upon all persons, including the State, in their dealings with one another, could only be directly enforced against the State or an emanation thereof and only where they gave rise to direct effect.[49]

Since the three conditions for liability set out in *Francovich* would appear to have been satisfied, it now seems that a litigant could contemplate the successful prosecution of an action against Ireland for compensation for the loss he sustained as a result of the failure to implement the Product Liability Directive into Irish law. In deciding when to commence proceedings, the plaintiff could also rely on *Emmott* to argue that time does not begin to run against him until the implementation of the directive *i.e.* 16 December, 1991. These decisions greatly enhance the means given to private persons to enforce and

uphold their rights at Community law.

Judge T.F. O'Higgins, writing extra judicially, has made the point that rights provided under Community law are protected by Article 29.3 of the Irish Constitution and could accordingly be protected by such remedies as the Courts deem appropriate.[50] Such an approach illustrates that the Irish system of judicial remedies is not only easily able to adapt to the additional burdens imposed by membership of the Communities, but is once again ahead of the Court of Justice in the protection it will afford to Community law rights.[51]

"the Irish system of judicial remedies is not only easily able to adapt to the additional burdens imposed by membership of the Communities, but is once again ahead of the Court of Justice in the protection it will afford to Community law rights.

Member States may only escape from the liability seemingly imposed thereon by a strict compliance with the requirements of Community law. Whilst Member States could try to harmonise national rules of procedural law so as to limit the number of claims of this nature, it might be asked whether such measures would be lawful in so far as they permitted Member States to act in breach of their obligations at, whilst simultaneously cutting down rights protected by, Community law.[52]

A consequence of both *Zuckerfabrik* and *Francovich* is that the Court seems to have abandoned its former reluctance to lay down guidelines as to the rules of procedure to be followed at national law where Community law rights are at issue.[53] This new approach may be taken a step further in a second reference from the House of Lords in *Marshall.*[54] The Court is asked whether a Member State is in breach of Council Directive 76/207 of 9 February 1976[55] by placing a celing of UK £6,250 upon awards of damages for such discrimination. [56] Should the Court decide that the directive requires that national laws must provide full compensation for all losses sustained as a result of the breach of the right created by this directive, and that private persons may obtain such compensation from the relevant Member State, another step will have been taken towards the creation of Community-wide procedural guarantees in national courts.

Cases such as these may lead to the "levelling-up" of the conditions upon which relief is available under the laws of the Member States. Whilst in theory a Member State could have one set of rules for actions governed by Community law and another for proceedings governed by national law, it is hard to see national legal systems remaining insulated from these developments, particularly as Community law extends into new areas and the Community law rule is more favourable to the individual person.[57]

A. M. Collins
Luxembourg

References

1. as provided for by Art. 8a of the EEC Treaty. For the legal effect of this deadline, see Schermers, "The Effect of the Date 31 December 1992," (1991) *28 CMLRev.* 275.
2. See Arts. 118a and 118b of the EEC Treaty, inserted by the Single European Act. Although not a Community law measure, the "Community Charter on the Fundamental Social Rights of Workers" was adopted by the Council on 9 December 1989. For a discussion of the latter document see Watson, "The Social Charter", (1991) *28 CMLRev.* 37.
3. As pointed out by Mancini, "The Making of a Constitution for Europe", (1989) *26 CMLRev.* 595 at 601, "Community authorities resort to directives when they intend to harmonise national laws on such matters as taxes, banking, equality of the sexes, protection of the environment, employment contracts and organisation of companies. . . . The hope of seeing Europe grow institutionally, in matters of social relationships and in terms of quality of life rests to a large extent on the adoption and the implementation of directives."
4. EEC Treaty, Art. 189(3).
5. EEC Treaty, Art. 169.
6. EEC Treaty, Art. 171.
7. Mancini, *supra,* (1989) *26 CMLRev.* 595 at 602.
8. The Annual Report to the European Parliament on Commission monitoring of the application of Community law – 1989, (O.J. 1990, C 232/1), indicates at Table 1 that the Commission sent 664 letters of formal notice, 180 reasoned opinions to, and commenced 96 actions against, Member States for alleged infringements of Community law. Of these 79%, 66% and 68% respectively arose from a failure to properly implement directives (see Table 8). At the end of 1989 Member States had failed to comply with 82 judgments of the Court. The Commission opened 26 proceedings against Member States under Art. 171 of the Treaty in the course of the year.
9. see Art. G. Part E(51) of the Treaty on European Union signed in Maastricht on 7 February, 1992 which proposes to amend Art. 171 of the EEC Treaty along these lines.
10. Case 26/62, *N.V. van Gend en Loos -v- Nederlandse Administratie der Belastingen,* [1963] ECR 3 at p.12.
11. Case 6/64, *Costa -v- ENEL,* [1964] ECR 585 at pp. 593-4.
12. For Community secondary legislation, see Case 9/70, *Grad -v- Finanzamt Traunstein,* [1970] ECR 825, at para. 5. This was specifically applied to directives by Case 42/74, *van Duyn -v- Home Office,* [1974] ECR 1337, at paras. 12-15; Case 148/78, *Pubblico Ministero -v- Ratti,* [1979] ECR 1629, at paras. 20-24; Case 8/81, *Becker -v- Finanzamt Münster-Innenstadt,* [1982] ECR 53, at paras. 24-25. See generally Gormley ed., Kapteyn & Verloren van Themaat, *Introduction to the Law of the European Communities,* 2nd edn, (Deventer, 1989) at paras. 2.2.1 – 2.2.2; McMahon & Murphy, *European Community Law in Ireland,* (Dublin, 1989), at paras. 13.10-13.20.

13. Case 152/84, *Marshall -v- Southampton and South-west* Hampshire Area Health Authority [1986] ECR 723 at para 48.
14. See Case 190/87, *Oberkreisdirektor des Kreises Borken -v- Handelsonderneming Moormann BV,* [1988] ECR 4689, at paras. 21-24.
15. Case C-213/89, *Regina -v- Secretary of State for Transport ex parte Factortame Ltd,* [1990] ECR I - 2433; Joined Cases 143/88 & 92/89, *Zuckerfabrik Süderdithmarschen AG -v- Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH -v- Hauptzollamt Paderborn,* [1991] ECR I-415. For discussion of these cases see Collins, "The Availability of Interim Relief in National Courts to Uphold Community Law Rights", [1992] IJEL50.
16. Case C-208/90, *Emmott -v- Minister for Social Welfare,* 25 July 1991, not yet reported.
17. Joined Cases C-6 & 9/90, *Francovich & Bonifaci -v- Italy,* 19 November 1991, not yet reported.
18. Council Directive 79/7 of 19 December 1978 (OJ 1979, L 6/24). Art. 8(1) gave Member States the relatively generous time limit of six years to comply with the directive.
19. Case 286/85. *McDermott & Cotter -v- Minister for Social Welfare & the Attorney General,* [1987] ECR 1453, at paras. 10-16.
20. Case C-377/89, *McDermott & Cotter -v- Minister for Social Welfare & the Attorney General,* [1991[ECR I-1155 at paras. 18-22, 24.
21. No. 14 of 1985.
22. Rules of the Superior Courts, 1986, O. 84, r. 21 (1). See Collins & O'Reilly, *Civil Proceedings and the State in Ireland: a Practitioner's Guide,* (Dublin, 1990), at paras. 4.32-4.34.
23. Opinion of Mischo AG, delivered 23 April 1991, at para. 38.
24. Case 33/76, *Rewe -v- Landwirtschaftskammer Saarland,* [1976] ECR 1989, at para. 5. See also Case 45/76, *Comet -v- Produktschap voor Siergewassen,* [1976] ECR 2043, at para. 12.
25. Case 199/82, *Amministrazione delle Finanze dello Stato -v- San Giorgio SpA,* [1983] ECR 3595, at para. 12.
26. See Case 45/76, *Comet, op. cit.,* at paras. 13 and 16; Case 130/79 *Express Dairy Foods Ltd -v- Intervention Board for Agricultural Products* [1980] ECR 1887, at para. 12; Case 826/79 *Amministrazione delle Finanze dello Stato -v- MIRECO* [1980] ECR 2559, at para. 13; Case 811/79 *Amministrazione delle Finanze dello Stato -v- Ariete* [1980] ECR 2545, at para. 12; Case 158/80 *Rewe -v- Hauptzollamt Kiel* [1981] ECR 1805, at para. 44.
27. Judgment of the Court, at paras. 16-17.'
28. Judgment of the Court, at paras. 18-19.
29. Judgment of the Court, at paras. 21-23.
30. Opinion of Mischo AG, delivered 28 May 1991, at para. 1.
31. on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ, L 283/23) see, in particular, recital 5 thereof.
32. Case 22/87, *Commission -v- Italy,* [1989] ECR 143, where the Court referred to Art. 11 of the directive. Italy took no subsequent steps to comply with its obligations. See Opinion of Mischo AG, at para. 3.
33. Case 148/78, *Pubblico Ministero -v- Ratti,* at para. 23; Case 8/81, *Becker -v- Finanzamt Münster-Innenstadt,* at para. 25; Case C-221/88, *European Coal & Steel Community -v- Faillite Acciaierie e ferriere Busseni SpA,* [1990] ECR I - 495, at para. 22.
34. Opinion of Mischo AG, at para. 8; judgment of the Court, at para. 12.
35. Opinion of Mischo AG, at paras. 27-31; judgment of the Court, at paras. 23-26.
36. which, *inter alia,* obliges Member States to "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community."
37. "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."
38. Opinion of Mischo AG, at para. 33.
39. Judgment of the Court, at paras. 31 & 32.
40. Judgment of the Court, at para. 33.
41. Judgment of the Court, at paras. 34-35.
42. Judgment of the Court, at paras. 36-37.
43. Judgment of the Court, at para. 38.
44. Judgment of the Court, at paras. 39-40.
45. Judgment of the Court, at paras. 42-44.
46. Judgment of the Court, at paras. 45-47.
47. Council Directive 85/374 of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ, L 210/29).
48. The Commission commenced Art. 169 proceedings against Ireland; case 1C-192/91, *Commission -v- Ireland.*
49. Case 152/84, *Marshall -v- Southampton & South-West Hampshire Area Health Authority,* [1986] ECR 723, at paras. 46-48; Case c-188/89, *Foster -v- British Gas plc,* [1990] ECR I - 3313, at paras. 16-20. For commentary on these cases see Curtin, "The province of government; delimiting the direct effect of directives in the common law context" (1990) *15 ELRev.* 195; Prechal, "Remedies after *Marshall,*" (1990) *27 CMLRev.* 451.
50. see the foreword to Curtin, *Irish Employment Equality Law,* (Dublin, 1989), at pp. xviii-xix. "The Constitution and the Communities – scope for Stress?" in O'Reilly ed. *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh,* (Dublin, 1992) at pp 233-4.
51. In *Pesca Valentia -v- Minister for Fisheries & Forestry,* [1985] IR 193, the Supreme Court granted an interlocutory order to suspend the application of Irish law on the ground that its provisions might conflict with Community law. This was about five years before the Court of Justice gave judgment in *Factortame I.*
52. It was pointed out in Case 45/76, *Comet,* at paras. 13-15, that Arts. 100 to 102 and 235 of the EEC Treaty enable appropriate steps to be taken to eliminate differences in the laws of the Member States which would impede the exercise of rights at Community law. In general, the Treaties will not bear an interpretation which might encourage the non-observance of Community law; see Case 173/73, *Italy -v- Commission,* [1974] ECR 709, at para. 8.
53. Contrast the approach of the Court in these two cases with that adopted in *Factortame I.*
54. Case C-271/91, *Marshall -v- Southampton & South West Hampshire Area Health Authority,* reference from the House of Lords, 14 October, 1991.
55. Council Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (OJ, L 39/40).
56. The provision of the directive at issue, Art. 6, does not have direct effect: Case 14/83, *Von Colson & Kamann -v- Land Nordrhein Westfalen.* [1984] ECR 1891, at para. 27.
57. On this topic see also Schwarze, "Tendencies Towards a Common Administrative Law in Europe," (1991) *16 ELRev. 3.*

Law Society Library

Law Reports, Legislation and other materials.

(Holdings in EC law were described in the April 1992 Gazette at page 113).

The Law Society library provides a wide range of services to members enabling them to carry out effective legal research which in turn enhances the service they can give to their clients. In addition to readers who call personally to the library, the staff handle approx. 300 queries per month. (See charges for this service overleaf). These range from straightforward requests for a copy of a specific law report e.g. "Have you got a copy of *P & F Sharpe Ltd. -v- Dublin County Council* [1989] I.R. 712" to the more complicated subject search which necessitates devising a search strategy spanning the various source materials available in the library. e.g. "I need all statutory and case law, articles and textbooks on medical negligence."

A brief outline of the library's holdings in the area of law reports and legislation, and how these are accessed by the use of indices follows.

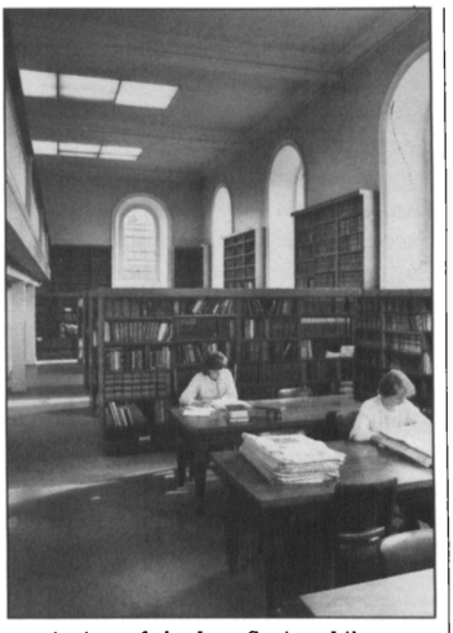
Case Law – Ireland
The library receives transcripts of all *written* judgments delivered by the High Court, Supreme Court and Court of Criminal Appeal. Supreme Court judgments are generally available within 2 weeks of date of delivery; High Court judgments are circulated by the Central Office usually within 6-8 weeks of delivery, but it can be longer.

The library staff maintain an index of judgments which is arranged alphabetically by plaintiff's name. A comprehensive subject index is jointly produced by the Bar Council and the Law Society and this is published twice yearly with annual consolidations. This index, commonly known as the "Pink Pages"* (1) includes a short keyword summary of each case and is circulated to every member of the Society through the *Gazette*. It is one of the most important bibliographical tools available to the case researcher and is worth keeping for permanent reference. As well as the published *Pink Pages* the library staff have access to as yet unpublished summaries which include very current material. These summaries can be inspected by members at any time.

A number of judgments are selected by the Law Reporting Council for inclusion in the *Irish Reports*. The library also subscribes to the other main series, the *Irish Law Reports Monthly* and holds the latter's predecessor, the *Irish Law Times Reports* from their origin in 1871. *The Irish Times* is bought on a daily basis and its Law Report is kept for reference purposes. The various other older series of Irish Law Reports dating back to 1827 are also stocked.

The key to finding reported cases is the *Irish Digest*, a multi-volume work now covering the period 1867-1988. A substantial number of queries on Irish case law received by the library can be solved by use of the Digests in tandem with the "Pink Pages".

In the Labour Law area the library receives the decisions of the **Employment Appeals Tribunal.** Unfortunately as yet no master index of these decisions has been published, so the library can only trace a decision where the reference number assigned to the case by the EAT is known. A new series of Law Reports, the *Employment Law Reports* has been published by Round Hall Press, and in this selected decisions of the EAT are reported. The Federation of Irish Employers has recently published a casebook on unfair dismissal law which is a most useful reference work in this field.*(2)



A view of the Law Society Library

Case Law – UK
Apart from the official Law Reports produced by the Incorporated Council of Law Reporting for England & Wales there is a range of commercially produced series of law reports, many subject-oriented, which provide very good coverage. The library subscribes to most of these and in the rare case where a member requires an unreported English decision this can be ordered from a UK agency. *Current Law*, which is published by Sweet & Maxwell is a monthly index of UK cases, containing both a case citator, a subject list and a very useful list of current articles and books published. It complements the official *Index to the Law Reports*, (Red Index).

Northern Ireland
The Northern Ireland Judgments Bulletin, containing unreported Northern Ireland judgments and the *Northern Ireland Law Reports* are also available. *The Bulletin of N.I. Law* provides an index to recent developments in the areas of statute and case law.

Legislation – Ireland
The library receives many queries on legislation e.g. "Has the Solicitors (Amendment) Bill, 1991 passed its Second Stage?" "When did the Statute of Limitations (Amendment) Act, 1991 become law?" Members need to know what stage a Bill is at, when an Act came into force, if any statutory instruments have been made under a specific section of an Act, and these are questions which can usually be answered over the telephone. A subscription is taken out annually to all Bills, Dail Debates, and the library receives copies of all Statutory Instruments under the S.I. Act, 1947. A chart of the progress of Bills through the Houses of the Oireachtas is maintained and is updated monthly. The loose-leaf *"Irish Current Law Statutes Annotated"* is also subscribed to. The official indexing of Irish legislation is unfortunately not up to date, the most recent Index to the Statutes only goes up to 1985, so queries which involve checking if Acts have been amended can only be pursued accurately up to 1985. Statutory Instruments are indexed up to 1986, both in the official series produced by the Stationery Office, and in Butterworths' *Index to Irish Statutory Instruments* compiled by R. Humphreys. The library staff maintain an index to post 1986 Statutory Instruments, numerically by S.I. number, and alphabetically by enabling Act.

Older Irish Acts
The library has a set of *The Statutes at large passed in the Parliaments held in Ireland 1310-1800* and *Oulton's Index to the Statutes in Force 1310-1835.* If a member needs the Statute of Frauds, 1695, or the Dublin Theatres Act, 1786, these can readily be photocopied. Another source of early Irish Legislation, *"The Green Book",* contains an account of the principal reported decisions on the Irish Statutes, Rules and Orders of Court from 1224-1860. The library does not hold pre 1922 Local and Personal Acts, but can order such documents through its inter-library arrangements.

Legislation – UK
The current series of *UK Law Reports Statutes* is purchased. The library can supply any public English Statute back to 1800. Pre 1800 English Statutes can be ordered and are usually made available within 24 hours. UK Statutory Instruments are not subscribed to, but again should a member require one an order can be left with the library staff and the item is usually ready for collection or faxing by the following day.

General Materials
(1) Textbooks and Periodicals
The library purchases multiple copies of all Irish legal textbooks, at least one copy of the principal UK textbooks and loose-leaf encyclopedias and subscribes to approximately 120 law reports and journals. Textbooks can be borrowed for periods of three weeks at a time. Periodicals are not lent, but there is a self service photocopying machine in the library. Irish periodicals are indexed in O'Higgins *"Bibliography of Periodical Literature Relating to Irish Law"* which covers the period 1966-1983. If a member wishes to do subject research in English periodicals he/she can scan through the *Legal Journals Index,* which is published monthly and indexes all legal journals published in the United Kingdom.

(2) Forms and Precedents
The library has a wide range of forms and precedents available for consultation. We can supply objects clauses for companies, shareholders agreements, computer contracts, etc.

Recently, a member contacted the library with what he considered a far-fetched request – "had we got a precedent joint venture agreement for growing crops?" In the event the 5th edition of Butterworths Encyclopaedia of Forms and Precedents provided a form which with a little re-drafting would fit the bill! As well as the 4th and 5th editions of Butterworths, the library staff can search for precedent forms in a number of other source books which include:

NATIONWIDE Investigations
Nationwide Group Olympia House, Dame Street, Dublin 2.
Republic of Ireland
Tel: 773080 Fax: 777825 Telex: 328320 DX 90 Dublin
A 24 Hour Confidential Investigation Service
Local, National and International
Established 1963

Encyclopedia of Forms and Precedents (4th and 5th editions) (Butterworths)
Irish Forms and Precedents (1910) (Butterworths)
Warren's Forms of Agreements (4 vols.) (Matthew Bender)
Longmans Commercials Precedents (4 vols.)
Palmers Company Precedents. (Sweet & Maxwell)
Practical Will Precedents. (Longmans)
Practical Trust Precedents. (Longmans)
Practical Lease Precedents. (Longmans)
Precedents for the Conveyancer. (Sweet & Maxwell)
Kelly's Draftsman
Melville. Forms & Agreements on Intellectual Property & International Licensing. (Sweet & Maxwell)
Computer Contracts: Negotiating & Drafting (Matthew Bender)

Reference Works
A range of legal, language and medical dictionaries, are available for speedy answering of reference queries and the Encyclopaedia Britannica is stocked for general information requests. If a member needs to track down the address of a lawyer in Belize, a summons server in Portugal or the phone number of an attorney in Arkansas the library has a selection of national and international law directories available for consultation.

Inter Library Loans
Although the vast majority of queries can be satisfied from the library's own stock, in some cases it is necessary to borrow material or order photocopies from other libraries and institutions.
The library has formal arrangements established with Trinity College library and the British Library Document Supply Service. There is also an informal network arrangement between law libraries in the country which co-operate by supplying material to one another.

Law Society Library

Blackhall Place, Dublin 7. DDE 79
Tel: (01) 710711. Fax: (01) 770511

Opening Hours: 9.00a.m. – 5.00p.m.

Textbooks – borrowing period: 3 weeks

Charges for document supply

Self-service photocopying in the library:	10p per sheet
Requests received by telephone/fax/post for copies of law reports, judgments, legislation, articles, precedent forms, etc., are subject to a **handling charge:**	£7.50
plus	
photocopying:	15p per sheet
packing & postage:	£1.00
fax transmission:	£1.00 per sheet

VAT is charged on all orders.

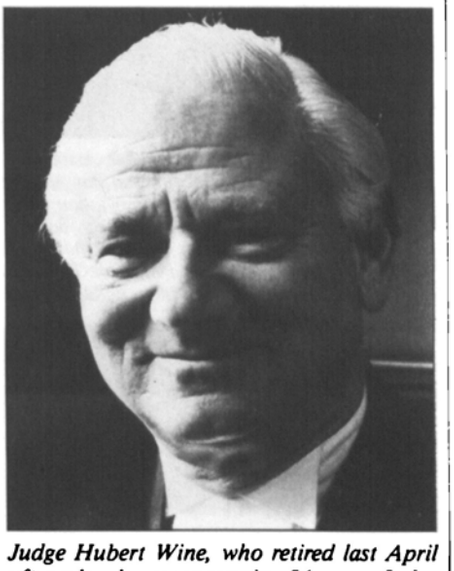
Conclusion
The library facilities are available to all members and apprentices. Personal callers are always welcome and otherwise queries are taken by telephone, letter and fax. The library staff attempt to process all queries and supply necessary documents within 24 hours. Urgent materials can be collected by courier as required.

*(1) The Pink Pages were first published in 1976 and there are now two consolidated sets available covering the periods 1976-82, and 1983-89, published by the Irish Association of Law Teachers and the General Council of the Bar respectively. The IALT has also recently published an Index to cover the period 1966-75, which is based on the holdings of Law Libraries in legal institutions and Universities.

* (2) *Madden & Kerr,* Unfair Dismissal Cases and Commentary, FIE 1990.

Mary Gaynor
Assistant Librarian □

Judge Wine retires



Judge Hubert Wine, who retired last April after a legal career spanning 54 years. Judge Wine became an apprentice in law in 1938 and qualified as a solicitor in 1943. He was the first solicitor ever to appear in the Court of Criminal Appeal. He was appointed a District Judge in 1976.

FORENSIC HANDWRITING EXPERT
Dr Keith W Snape
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Highfield, Billinge End Road, Pleasington, Blackburn, Lancs, England BB2 6QY
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Fax: 0044 254 581556

Legal & General
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PEOPLE AND PLACES

Legal & General
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Pictured at the Roscommon Bar Association AGM held on 1 April, 1992, front row l-r: Brian O'Connor, Secretary, Roscommon Bar Association; Marie McManus, Marie Connellan, Brian Neilan, President, Roscommon Bar Association; Elizabeth Walsh, Lorainne Scully, Rebecca Finnerty, Noel Ryan, Director General, Law Society. Second row l-r: Padraig Kelly, John Kelly, Joe Caulfield, John Naughton, Harry Wynne, Adrian P. Bourke, President, Law Society; Vincent Harrington, Con Harlow, William Lyster and Gerard Gannon. Third row l-r: Christopher Callan, Kevin Knightly, John Sweeney, Dermot Neilan, Liam Brandon, Roddy McCrann, Brian Leahy, Kieran Madigan and Peter Jones.

At the presentation to the Law Society by Ann Woulfe Flanagan of 3 portraits by S. Catterson Smith were l-r: Peter Prentice, Past President, Law Society; Adrian P. Bourke, President, Law Society; Ann Woulfe Flanagan, Michael Green and Angela McCann. (The portraits are on permanent loan to the Law Society).

At the Acquisitions and Mergers seminar held in the Law Society on 11 May, 1992, were seated l-r: Ian Dunbar, Council Member, Law Society of Scotland; Dominic Dowling, Seminar Chairman; Mike Graham, Scotland. Standing l-r: Terry McGowan, Thomas Banahan, Pat Colgan, Laurence Shields, Chairman, Taxation Committee, Law Society; Pat O'Keeffe, USA; Colin O'Brien.

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Pictured at the visit to the Law Society, of the Chief Justice of the U.S. Supreme Court, on 6 May, were The Honorable William H. Rehnquist, Chief Justice, United States Supreme Court; Richard Moore, U.S. Ambassador to Ireland and Elma Lynch, Law Society Council.

Speakers at the seminar on Shopping Centre Leases held at the Law Society on 6 May, 1992. Back row l-r: Ian A. Scott, Arthur Cox; John F. Buckley, Beauchamps; P. J. Bannon, Harrington Bannon; Thomas O'Connor, A & L Goodbody; Colin O. Keane, McCann FitzGerald; Ernest B. Farrell, Dockrell Farrell. Front row l-r: Clare T. Connellan, ICC plc; Deirdre Morris, A & L Goodbody; Patrick Fagan, solicitor.

WHERE THERE'S A WILL THIS IS THE WAY...

When a client makes a will in favour of the Society, it would be appreciated if the bequest were stated in the following words:

"I give, devise and bequeath the sum of Pounds to the Irish Cancer Society Limited to be applied by it for any of its charitable objects, as it, at its absolute discretion, may decide."

All monies received by the Society are expended within the Republic of Ireland.

"Conquer Cancer Campaign" is a Registered Business Name and is used by the Society for some fund raising purposes.
The "Cancer Research Advancement Board" allocates all Research Grants on behalf of the Society.

IRISH CANCER SOCIETY

IRISH CANCER SOCIETY
5 Northumberland Road, Dublin 4, Ireland. Tel: 681855

WHO WILL FIGHT IRELAND'S NUMBER ONE KILLER?

Heart Attack and Stroke cause 50% of all deaths in Ireland.

WE WILL

IHF, a registered charitable organisation, fights Heart Disease and Stroke through Education, Community Service and Research.

IF YOU WILL

Remember the IHF when you are making your will – you can contribute to our work without losing capital or income during your lifetime.

IRISH HEART FOUNDATION

4 Clyde Road, Dublin 4.
Telephone: 01-685001.

Concern is a non denominational voluntary organisiation devoted to the relief, assistance and advancement of peoples in need in less developed areas of the world.

If your client wishes to make a will in favour of Concern, further information on our work is available from Concern Development Department.

CONCERN

1 Upper Camden St. Dublin 2. Tel. 681237

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Concern is a Company limited by guarantee without a share capital.
Registered in Dublin, Number 39647.

'Organ failure affects people of every age and from all walks of life - it could happen to someone in your family.'
BIBI BASKIN

Friends for Life

During 1990 the Irish Kidney Association's Donor Awareness Programme helped 200 people suffering Kidney, Heart and Liver failure to receive a second chance for life.

The Irish Kidney Association could not carry this life-saving work without the help of informed caring members of the community - such as the legal profession.

Finance received through bequests/donations has enabled not only educational and research programmes but also the purchase of life-saving equipment for hospitals nationwide.

The Irish Kidney Association is proud of its record of treating people from all walks of life and from all parts of the country as equal beneficiaries of its services.

IRISH KIDNEY ASSOCIATION
Donor House, Ballsbridge, Dublin 4.
Ph: 01-689788/9
Fax: 01-683820
Registered in Ireland, No: 66109
Chy No: 6327

PRACTICE NOTES

Registration of Rights Appurtenant to Registered Land

Practitioners are advised that if they require appurtenant rights to be registered on a folio this can be done by including a request for same when lodging their dealings. The Land Registry would prefer the request to go on a separate Form 17. The fee is £10.00.

The Land Registry have recommended that this procedure is *not* followed in the case of registration of appurtenant rights in respect of houses on housing estates (as huge delays would be caused in registering same).

For the convenience of practitioners and colleagues, and to avoid the subsequent necessity of obtaining certified copy instruments, practitioners are advised when making an application for registration of appurtenant rights to lodge a certified copy of the instrument creating the right with the request that it be date stamped and returned by the Land Registry when the dealing is completed, to be placed with the title deeds. This suggestion has been put to the Land Registry and has met with a favourable response.

General Conditions of Sale

Many practitioners now issue General Conditions of Sale or parts thereof which have been produced by a word processor. The Conveyancing Committee recommends that contracts produced in this way should indicate the edition from which the general conditions are taken so that practitioners who receive these contracts are assured that the most up to date edition is being utilised. A previous recommendation was made by the Committee that these contracts should bear a caveat which is reproduced hereunder. The Committee wishes to remind practitioners that all contracts produced by a word processor should bear this warning.

This contract shall be read as if it contained unamended the Incorporated Law Society General Conditions of Sale ( ) Edition. Permission to reproduce these conditions has been obtained from the Incorporated Law Society whose copyright in these conditions is acknowledged.*

* insert date of appropriate edition.

Conveyancing Committee

Freedom for President to choose Arbitrators

It has come to the notice of the Society that in a number of cases, particularly in commercial leases, arbitration clauses are being included which, while providing that the President of the Law Society is to be the appointor of the arbitrator, restrict significantly his powers of choice of arbitrator.

A particular example in current use provides "the parties in dispute may stipulate that the arbitrator shall be appointed from:—

1. fellows of the Institute of Chartered Accountants in Ireland; or
2. members of the Irish Auctioneers & Valuers Institute; or
3. members of the Society of Chartered Surveyors in the Republic of Ireland

as may seem appropriate and if the parties shall by agreement so stipulate then the appointment shall be in accordance with such stipulation. In default of such stipulation the arbitrator shall be appointed from among counsel of the Senior Bar of the Republic of Ireland".

The Arbitration Committee of the Society has recommended to the Council of the Law Society that members should be asked not to include such forms of arbitration clause in documents prepared by them. It will be noted that the clause in question does not authorise the President to appoint a solicitor as arbitrator. While the Society is anxious to encourage the selection of the President of the Law Society as the appointor of arbitrators, since the Society has administrative procedures in place for the ready appointment of arbitrators, it is felt inappropriate that the President of the Law Society should be precluded, when making an appointment, from appointing a solicitor to act as arbitrator. It is emphasised that the Society is not seeking to have solicitors exclusively appointed as arbitrators but merely that the President should have an option when exercising his discretion to appoint a solicitor where he believes a solicitor to be the appropriate person.

General form of Arbitration Clause

The Society's recommended form of general arbitration clause is as follows:—

All disputes which arise between the parties in connection with this agreement, or the subject matter of this agreement, shall be decided by an arbitrator agreed by the parties or, in default of agreement, appointed by the President for the

time being or the Incorporated Law Society of Ireland or in the event of his being unwilling or unable to do so by the next senior officer of the Society who is willing and able to make the appointment provided always that these provisions shall apply also to the appointment (whether by agreement or otherwise) of any replacement arbitrator where the original arbitrator (or any replacement) has been removed by order of the High Court, or refuses to act, or is incapable of acting or dies. □

Arbitration Committee

Solicitors' Advertising Regulations 1988

Members who are considering advertising in any form are advised that if they are unsure whether their proposed advertisement complies with the Solicitors Advertising Regulations (SI No. 344 of 1988), they may submit details and the proposed format of their advertisement to the Registrars Committee. The Committee will vet the advertisement and advise the member of its suitability or otherwise.

Registrars Committee

Finance Act, 1992

The Taxation Committee has prepared a summary of the Finance Act, 1992. It is available on request to the Committee Secretary, *Eileen Brazil.*

Taxation Committee

Practice Note Correction

Readers are asked to kindly note that there was a typographical error in the Practice Note on the Local Government (Planning and Development) Act, 1990 that was published on Page 71 of the March, 1992 *Gazette.* The reference to £100,000 in the fifth line should read £100.00.

Irish Society for European Law

Officers and Council 1992

President:
The Hon. Mr. Justice Brian Walsh

Vice-Presidents:
The Hon. Mr. Justice T.F. O'Higgins,
The Hon. Mr. Justice A. O'Keeffe,
The Hon. Mr. Justice D. Barrington,
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Mr. Finbarr Murphy, Barrister,
Mr. Eamonn Hall, Solicitor.

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The Chairman of the Bar Council *(Ex Officio).*

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Aindrias O Caoimh, Barrister,
James O'Reilly, Senior Counsel (co-editor of Journal),
Bryan Sheridan, Solicitor

Details of membership, the Society's programme and the Society's journal, *The Irish Journal of European Law*, are available from the Registrar, Jean Fitzpatrick, Solicitors Office, Telecom Eireann, 52, Harcourt Street, Dublin 2. Tel. (01) 714444 Ext. 5929, Fax; (01) 679-3980. □

Finance Act, 1992

WARNING

Part VII of the Finance Act, 1992 increases and extends the powers of the Revenue Commissioners.

It is now obligatory to furnish Third Party Returns for years commencing 6 April, 1992 onwards for payments over £500.

Solicitors are warned to retain receipts etc. received since 6 April, 1992 both in respect of their practice and in respect of their clients.

Full details are in the Finance Act, 1992 and in the Taxation Committee's Summary of the Act.

Taxation Committee

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BOOK REVIEWS

Church State Morality and Law by Patrick Hannon (Gill and MacMillan 1992, 159 pp, £10.99 paperback).

The Hart-Devlin debate will be known to most lawyers. The approach of these two can speak to readers of any moral tradition: neither, certainly, can be described as particularly "Catholic". Yet Catholics, as Catholics, will want to make sense of their experience in the debate on law and morality, and it is their right and responsibility to do so. Hitherto there has been no systematic analysis of law and morality from within the Catholic tradition, faithful to Roman Catholicism.

Now, fortunately, there is.

Church State Morality and Law by Patrick Hannon is not only a text which intrinsically deserves to stand alongside Hart and Devlin on the shelves of lawyers, philosophers, lawmakers and others, but it is also a text which is timely. The book is lucidly written, and richly researched (the many years of work evidently behind it suggest its timeliness is coincidental rather than contrived) and it provides the reader with references to much material relevant to its complex theme.

The debate on morality is not confined to sexual morality. At the present time Ireland is sagging with unemployment, with gender discrimination and other ills in employment; principles and behaviour in certain businesses are being investigated; there is a recurrent debate on divorce, on homosexuality, and now, it seems, on abortion. Vigorous groups intone their special interests, relentlessly trying to influence consensus. It can be difficult for the principled dissenter. The media all too often reflects these intonations with predictability.

The book's objective is to sketch an approach within Catholic theology which would offer the possibility of a coherent and consistent framework of response to the question, how is a Catholic expected to vote on certain types of issues involving morality and law? The spotlight is directed at the Catholic, not least because it is often perceived (erroneously as it happens) that the Church's *magisterium* (the teaching role and competence of hierarchy) makes a claim on the consciences of members.

In order to arrive at a framework of response to this important question, Professor Hannon introduces, of necessity, several related themes. Morality and the Christian Faith; the Church in the Modern World; The Church Teaches; and Teaching in the Local Church are some of his chapter headings.

Can an individual who is now aware of having made a moral decision in his or her own life, contribute in an informed way to the debate on law and morality? An individual who is so aware will know how often a moral decision is either related or transcends his or her own interests. That is a valuable experience. Professor Hannon explores a theme central to any understanding of his topic, namely, what does it mean to be moral? Two characteristics of the human being, awareness and a capacity for choice, are the foundation of morality. Morality, according to the author, may be described "as the art of right relationship with each other and with the world around us". The language here makes explicit that there is a right and a wrong way of relating.

In a style which appears effortless (also an art) Professor Hannon introduces his reader to the centre of the book's enterprise. He contends that the *Declaration on Religious Freedom* of the Second Vatican Council provides the framework and the fundamental principles concerning the enforcement of morality by the law. The application of the *Declaration* to morality is convincingly argued for. In moral as in religious matters people should not be made to act against their conscience nor restrained from acting according to conscience – subject to the requirements of the common good. "The requirements of the common good" refer, in Catholic usage, to "the ensemble of conditions of social living which make for the fullest possible flourishing of each member of the community". And law and public policy can be instruments of shaping a public consensus, "they are not simply the product of consensus". The law is educative.

In the chapter "How is a Catholic to Vote?" the author offers some valuable insights on personal conscience and public office showing how confused it can be to state (as has been done in recent times, indeed) that a loyal Catholic can not hold public office.

The book draws to an end by supposing two types of reader, one a believer and the other a critic, who may be uneasy about the freedom for which the book argues. Professor Hannon tries to allay their fears by exploring some of the requirements of an effective presence of the Church in today's world. He refers, for example, to Bernardin's concept of a "consistent life ethic" which links the several items of the Catholic ethic concerning life, from conception to death, and in all circumstances.

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The scope, sensitivity and subtlety of Patrick Hannon's text cannot be captured in a review. Apart from those who will be professionally interested, I would like to think his book could be read by everyone of voting age in Ireland. It is certainly a must for all involved in decision-making in this country, however remotely. Christians cherish a feeling of deep solidarity with the human race and its history (*Gaudium et Spes*): [the Christian voter] has his own assignment in this mission of the whole People of God (*Decree on the Apostolate of Lay People)*. This book will be invaluable, above all, in helping the voter to shape that assignment.

Mary Redmond

Industrial Relations Law
by Michael Forde (The Round Hall Press, 1991. 326 pp, £39.00 hardback.)

Lawyers will not be surprised to receive another book from Dr. Forde; nor will they be disappointed by its contents. This time the topic is Industrial Relations Law.

The book is about collective labour law as distinct from individual employment protection (a future volume on the last mentioned is promised). It provides some insight into Irish industrial relations law from a comparative point of view although the reader will know to tread carefully when using comparative analogies in this area.

Following an introductory chapter, the author maps out the following topics: Employers and Workers' Associations; Underpinning Bargaining; Collective Agreements; the Right to take Industrial Action; Liability for Industrial Action; the Public Sector; other Methods in Industrial Relations; Internal Union Affairs; and in an Appendix he details provisions in twelve statutes relevant to his topic. The index, a vital part of any law book for the practitioner, runs to two pages. Too short: it does not do justice to the text.

A merit of the work is that the law is stated as it stands after the new Act of 1990 (according to the preface, as at 1 July, 1991). The reader might have been referred to decisions on the Industrial Relations Act, 1990 given before publication. Section 9(2) was invoked in *Iarnrod Eireann -v- Darby and O'Connor* (High Court, 22 March, 1991); *Michael McNamara & Co Ltd. -v- Lacken* (High Court, 12 January, 1991) and in the important *Westman Holdings Ltd. -v- McCormack* (High Court, 19 April, 1991; Supreme Court, 14 May, 1991, see [1991] ILRM 833.

A book like this will enjoy a wide audience including trade unionists, personnel managers, and the like. A common misconception (among non-lawyers in particular) is that once industrial action is "in contemplation or furtherance of a trade dispute", the action, no matter what form it takes, is immune from civil proceedings. The statute is seen as a definitive statement of what is permissible; the immunities as rights. To correct this perspective, I believe it is crucial, when strike and industrial action are being analysed, to deal with the growing jurisprudence on liability for industrial action first. Then, as a sub-set, the statutory immunities. Dr. Forde arranges his material in the reverse way.

The book will be a useful addition to the growing literature on Irish collective labour law.

Mary Redmond

Constitutional Adjudication in European Community and National Law (Essays for The Hon. Mr Justice T F O'Higgins). Edited by Deirdre Curtin and David O'Keeffe. [Dublin, Butterworth (Ireland) Ltd, 1992 xxxi + 307 pp, IR£30 hardback.]

Judges determining constitutional issues must be thinkers, and more particularly, legal philosophers. Judge Learned Hand believed that it was as important for a judge called upon to pass judgment on a question of constitutional law to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the legal literature which had been specifically written on the subject. Sometimes we expect too much from our judges.

In their introduction, the editors write that the ideas for this book came from a desire to pay tribute to a remarkable person, Mr Justice T F O'Higgins, who has held office in the highest Irish and European Community judicial forums, on the occasion of his retirement from the Bench in October, 1991.

The editors are distinguished legal academics. Professor Deirdre Curtin is professor of the law of International Organisations in the University of Utrecht and a former Legal Secretary to Mr Justice O'Higgins. Professor David O'Keeffe is Allen and Overy Professor of European Law, Head of the Law School in the University of Durham, and is also a former Legal Secretary to Mr Justice O'Higgins.

The book is graced with a preface by Her Excellency, Mrs Robinson, President of Ireland. She notes that Mr Justice O'Higgins brought a treasury of insight and practical expression of the common law and Irish constitutional law to a forum of European law where academic training and legal specialisation are more often the norm. President Robinson is joined by a distinguished array of scholars who have contributed essays on the theme of constitutional adjudication.

It would be difficult in this short notice to do justice to the contributions in this book. The contributors include Judge Ole Due, President of the Court of Justice of the European Communities, who writes on the issue of a constitutional court for the European Communities, Judge David Edward who considers the public/private law distinction in

Administrative Law in Scotland and Judge G. Federico Mancini, (Court of Justice), who writes on the free movement of workers in the case law of the European Court of Justice.

Irish judges consider various aspects of constitutional law in Ireland. Chief Justice Finlay writes on the Constitution of Ireland in a changing society. Mr Justice McCarthy provides observations on the protection of fundamental rights in the Irish Constitution. Mr Justice Brian Walsh's topic is entitled "The Judicial Power, Justice and the Constitution of Ireland". The judge as law-maker is considered by Mr Justice Declan Costello. The problems of constitutional interpretation are reviewed by Mr Justice Donal Barrington. Nial Fennelly, SC, Professor James Casey and Anthony M. Collins, Legal Secretary, (Court of Justice) write on other aspects of constitutional law.

Other contributors include James O'Reilly, SC, on the Common Fisheries Policy in Community law, Professor Deirdre Curtin on the decentralised enforcement of Community law rights, Professor David O'Keeffe on the public service exception to free movement of workers, Karen Banks on Community sex equality law, Dr John Temple Lang on the widening scope of constitutional law and Mary Finlay-Geoghegan, SC, on the status of non-implemented Directives before the Irish courts.

This is a book by leading judges and scholars who themselves have made a significant contribution to constitutional jurisprudence. This book contains timely commentaries on, and insightful contributions to, the current debate on constitutional interpretation. Thoughtful lawyers will welcome this publication. In fact, as books of this nature are rarely reprinted, this book will become a collector's item.

Eamonn G. Hall

A Case Book on Company Law by Lyndon MacCann (Butterworth (Ireland) Ltd. 1992, 644pp £29.50 paperback)

This is a most welcome addition to recent textbooks on company law in Ireland and is a suitable companion to Keane (second edition) to which the author regularly refers.

The book contains twenty one chapters with excellent indices of statute law and case law (some 500 cases) together with an overall reference index. Given the breadth of the subject Mr MacCann is to be congratulated in choosing, in addition to what may be termed standard reference cases, virtually all Irish reported cases since 1922 and a considerable number of unreported cases. For that alone the book ought to be purchased by all practising lawyers.

Mr MacCann has included in each chapter a concise informative treatment of the chosen topic and the references and notes contain a wealth of source material. Seminal decisions are placed alongside more recent authorities assisting in a better understanding of general principles and comprehension of trends in judicial thinking. Undoubtedly, a better understanding of leading judgments is achieved when these cases are read alongside more modern decisions which apply those principles in disputes familiar to practising lawyers.

The book deals with areas of "fringe" interest to the subject such as retention of title (problems of which arise in virtually every insolvency), criminal liability and civil liability of auditors including the recent cases of *Sisk -v- Flinn; Kelly -v- Haughey Boland;* and *Caparo -v- Dickman* i.e. can an investor recover against the auditor where he establishes that the auditor was negligent in the preparation of the final accounts and thus the "prize" is more tarnished than appreciated at the time of the takeover?

Given the recent enactment of both the 1990 Companies (Amendment) Act and the 1990 Act it is not surprising that Mr MacCann had few cases to include in a case book dealing with the same. He has, however, incorporated the provisions of the legislation throughout the text and has dealt with the Amendment Act in Chapter 21 setting out the legislative framework and including the decisions of the High Court in both *Goodman* and *Jetmara.* The substantive changes in company law brought about by both Acts are far reaching and the willingness of litigants to test the legislation encouraging. This may well justify a second edition sooner than Mr MacCann may have wished.

Cormac O'Hanlon □

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Unified Germany's Role in Europe

At the Law Society's Annual Conference in Berlin, two speakers, the former Attorney General and EC Commissioner, Peter Sutherland SC, and the Irish Ambassador to Germany, His Excellency Padraig Murphy, offered insights to the role Germany had played in the development of the EC and what the unified Germany's role would be in Europe. Extracts from their addresses are published below.

"All we have is the law"

In his address to the conference, *Peter Sutherland* traced the significant contribution that Germany had made to the development of the European Community. "It was Conrad Adenauer who had pursued the issue of the sharing of national sovereignty – and the generosity that that involved in terms of people's attitudes to other people – which gave birth to the coal and steel community and later the Treaty of Rome and the development of the EC. It was President Halstein, a German who was the first president of the European Commission, who made the comment "we do not have divisions, all we have is the law". This concept of the rule of law has underpinned and created the structure which has allowed the European Community to develop. Its evolution was based on a perspective that did not envisage nationhood or nationality as causes to be aggressively propounded. Rather the founders saw the Community as being based on a certain sense of self respect and also respect for the identity of others combined with a recognition of the possibility of creating a supra national fusion. The German contribution to the development of the Community was therefore significantly based on law. Indeed it is the principle of the supremacy of Community law which is the essence of what the EC is about.

Mr. Sutherland said the fundamental issue facing the Community – and it was a political issue – was the sharing of sovereignty and the right of the Community to override national legislation in the common good and in the context of agreed objectives. The fundamental objective therefore was to bring about a more integrated Community. An example of the history of this process and of the practical implications of it could be seen in terms of the relationship between Ireland and Germany. "The fact is that we have 155 German manufacturing companies in Ireland, our exports to are double that of our imports from Germany. Additionally we have had an enormous increase in terms of the numbers of German people who visit Ireland; some 200,000 German people visited Ireland during the course of the last year. I do not attribute all of this to the fact that we are part of the same Community but I do say that the Community is an essential part of a process of bringing people together which is important not merely in social terms but in economic terms."

EC at turning point

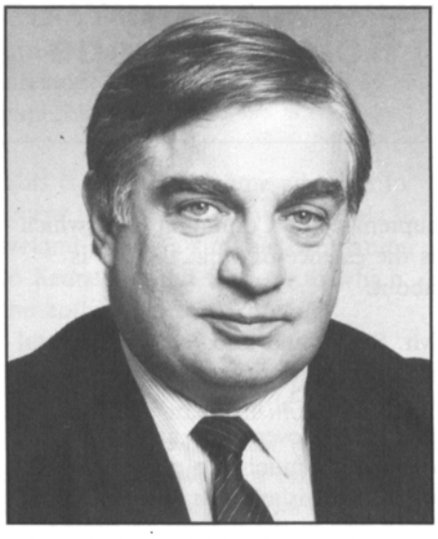
Mr. Sutherland said that he believed that the Community was at a turning point and probably at the most perilous moment in terms of its own development. "If one looks at the history of the EEC, the first period up to 1973 was the period when the basic legal principles were set down and some of the basic policies such as the Common Agricultural Policy were developed. Between 1973 and 1985 we had the two oil shocks. During this time there was not a great deal of movement in structural or constitutional terms in the development of the EC. Then in the latter half of 1984 and the launching of the 1992 process, we started into a new, very dynamic period of development. In 1986 we had the Single European Act bringing about constitutional change for the first time since the Treaty of Rome by introducing more majority voting and by increasing the competence of some Community institutions. The 1992 process therefore not only created a new economic momentum but also a legal momentum. In the economic area, in 1985 there remained 283 pieces of legislation requiring adoption to complete the internal market. Seventy-one are now in operation and another 213 are fully adopted and have yet to come into force. Many of these 213 will come into force on 1 January of next year. Taken together they will transform our economic environment. Free movement of goods, capital, services and people is a radical societal change, which by reason of ostensible gradualism of introduction is not now seen for what it is. In fact, in historic terms what has been achieved has taken place at an incredibly rapid pace.

"Why therefore, does one look to the future with some degree of concern? Events are changing so rapidly before our eyes that it is very difficult to know what is around the corner. When we had an Iron Curtain there were confines within which Europe, and the Community, had to exist. There was not the problem of large-scale enlargement with its potential to dilute what the essence of the Community is. The removal of the Iron Curtain has led to a list of countries applying for membership. Today Austria, Sweden, Finland, Malta and Cyprus are among those actually applying for membership. I think that the next country to apply will be Switzerland. This is going to lead to huge strain because it is going to require further constitutional change. Will Ireland be left with a Commissioner at the end of this, for example? Will the Community have

25 commissioners? What is going to happen to the European Parliament? Is anybody going to be prepared after the trauma of Maastricht to have another inter-Governmental conference in the next year or two to change the structure to accommodate new membership? As Jacques Delors has recently said enlargement is objectively a force for disintegration not consolidation. This is not to suggest that it be resisted but equally it must be achieved in an orderly way."

Mr. Sutherland continued "where is Germany, where does its heart lie? As we have seen, Germany has provided much of the stability for the development of the Community. It has been the fulcrum of so much of what has happened. In recent times in 1988 the Community doubled the structural funds under Chancellor Kohl's presidency indicating a generosity of approach to countries, such as Ireland, that has not always been appreciated." Mr. Sutherland said that now with one hundred billion Ecu per annum being transferred from West Germany to East Germany, some who were engaged in debate about Maastricht in Germany were saying that Germany's responsibilities were now at home. However, he said, he did not believe for one instant in the theory that Germany was turning East. It would not make economic sense and it would deny the genuine commitment of Chancellor Kohl and the German people to an integrated Europe. Kohl's commitment was to a united Germany and then a united Europe. "He has achieved a united Germany. He must now move on to a united Europe" said Mr. Sutherland.

The challenge now was whether we were going to go into a period when Europeans would look inward and become nationalistic rather than living up to the profound ideal – so fundamental to what the Community is about. It was a challenge to us in Ireland as much as to anybody else. Mr. Sutherland concluded by saying that it would be an utter tragedy and an act of stupidity if Ireland were to contemplate, even remotely, the possibility of voting against the Maastricht Treaty.



Peter Sutherland SC "Community at a turning point"

Germany's place in the new Europe

In his address to the conference the Irish Ambassador to Germany, His Excellency Padraig Murphy, said that the united Germany was a new factor in world affairs. It was the third strongest economy in the world. It was the largest country and the most important economic power in the European Community.

A key concern was what the attitude of the new Germany would be to the European Community. "The Maastricht Treaty was agreed in the perspective of German unification" he said. "There was a coinciding objective on the part of Germany and its partners to situate unification in the framework of increasing integration of the Community. I have talked of a 'hangover' after unification. There is, it must be said, something of a hangover feeling noticeable after Maastricht too. The voices calling for improvement and denouncing certain aspects of the agreement at Maastricht are more noticeable and more insistent than they have ever been previously on a comparable occasion.

The calls are for greater powers for the European Parliament, more safeguards for the rights of the Länder, greater German representation in the European Parliament, more rights for German as a language in the Community". These calls inevitably raised questions about the German commitment to the European Community said the Ambassador. "The commitment to European integration has been a central plank in German foreign policy under all Governments for decades. In fact, German enthusiasm for Europe over the past 40 years was remarkable.

"One is forced to the conclusion that something has now changed here. It seems apparent that German enthusiasm for Europe over decades, served as an Ersatz, to use a good German word, for devotion to a national cause which was taboo after the experience of 1933 to 1945. It is striking that, even today, sophisticated and well educated Germans will tell you quite honestly that there is no such thing as German national feeling. For my part while I know why they say it, I beg leave to doubt it. What is true is that for many decades Germans have not wanted or felt entitled to acknowledge it. This is changing and "Euro-fatigue" is one manifestation of it."

The Ambassador went on to say, however, that what was not changing was the continuing commitment of Chancellor Kohl and others to European integration. "They are of a generation which is acutely conscious of recent history and therefore intimately aware of the hazards of a free floating great power at the heart of the European continent and know that "German unity and European unity are two sides of the one coin". I think the leadership of the other main party, the SPD also knows what is at stake. There seems no real danger for the ratification of Maastricht therefore and in the shorter term the German commitment can be depended on." Germany's position in the world was now more weighty than it had been at any time in the past 45 years, said Padraig Murphy. "Closer attention to events and opportunities here will be well worth the effort. I commend you for coming here to see for yourselves." □

The Obligation to Give Reasons for Administrative Decisions

Part I

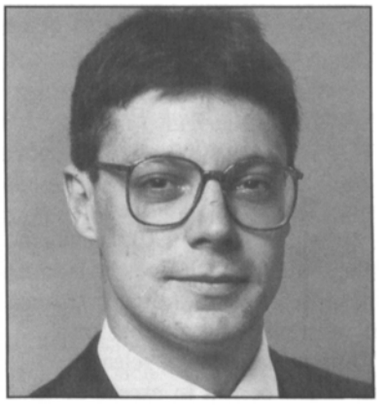
By Maurice Collins BL

For some time there has been a paradox of considerable significance at the heart of Irish administrative law. On the one hand, the Irish courts have long asserted and exercised the right to quash administrative decisions, inter alia, on the grounds that irrelevant matters were taken into consideration or that there had been a failure to consider relevant matters. On the other hand, the decision-making process remained opaque because the courts did not insist that the decision-makers gave reasons for the decisions they made.[1]

Thus a theoretically valuable protection was in practice rendered less useful and, not infrequently, applications for judicial review failed to establish invalidity in the face of the decision-makers' silence. In the last decade, judicial attitudes have changed generally and in particular with regard to the obligation to give reasons.[2] That such an obligation exists can no longer be doubted, though its scope remains unclear.[3] Uncertainty surrounds the extent of the obligation, i.e. what level of explanation the obligation involves and also what are the consequences of failure to give reasons. The purpose of this article is to examine these uncertainties and to suggest answers to some of them.

General principles

Until recently, the Irish courts have refused to recognise any general obligation to give reasons, a position mirroring that still current in the United Kingdom. In the decided English cases, a number of grounds have been advanced in support of



Maurice Collins

this position including the fact that the decision complained of was grounded on a purely subjective opinion,[4] that what the applicant was seeking was a privilege not a right,[5] that giving reasons would be contrary to the public interest,[6] or that there was no right of appeal.[7] However, it would be wrong to suggest that even in English law, the failure/refusal to give reasons could never lead to the quashing of a decision. The House of Lords in *Padfield -v- The Minister of Agriculture* (1968) quashed a decision of the defendant, who had failed to give an explanation for deciding as he did, stating:

"If he does not give any reason for his decision, it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and directing a perogative order to issue accordingly".[8]

The logic of this judgment (if not the judgment itself, which was not cited) was accepted here by Barron J. in *State (Daly) -v- Minister for Agriculture* (1987) where the same inference of no reason/bad reason was made in the face of the respondent's silence when his exercise of statutory power to terminate the prosecutor's services was challenged:

". . .once his decision was challenged, he was obliged to disclose to the prosecutor the material on which he acted and his reasons for so doing, the Minister has failed to show that he acted intra vires".[9]

Broader principles were established in *State (Creedon) -v- Criminal Injuries Compensation Tribunal* (1988), where the respondent's unexplained refusal to award an 'ex gratia' payment to the prosecutor under a non-statutory scheme was challenged.

Quashing the refusal, the Supreme Court per Finlay CJ stated:

"Once the courts have a jurisdiction and if that jurisdiction is invoked, an obligation to enquire into and, if necessary, correct the decisions and activities of a tribunal of this description, it would appear necessary for the proper carrying out of that jurisdiction that the courts should be able to ascertain the reasons by which the tribunal came to its determination. Apart from that, I am satisfied that the requirement which applies to this tribunal, as it would to a court, that justice should appear to be done, necessitates that the unsuccessful applicant before it should be made aware in general and broad terms of the grounds on which he or she has failed. Merely, as was done in this case, to reject the application and when that rejection was challenged subsequently to maintain a silence as to the reason for it, does not appear to me to be consistent with the proper administration of functions which are of a quasi-judicial nature."[10]

Both *Daly* and *Creedon* were opened to the High Court in *International Fishing Vessels Ltd. -v- Minister for the Marine* (1989) and, in a comprehensive judgment, the principles of law contained in them were approved and expanded. The action concerned the refusal of a sea fishing boat licence under section 222 (b) of the Fisheries (Amendment) Act, 1959 (as inserted by section 2 of the Fisheries (Amendment) Act, 1983) for which

no reasons were given, despite a written request from the applicant's solicitor. Blayney J rejected the respondent's contention that the decision to grant a licence was purely discretionary[11] and went on to hold that the duty to act fairly and judicially necessarily involved an obligation to give reasons. Once the decision was reviewable, a refusal to give reasons:

> "deprives the applicant of the material it needs in order to be able to form a view as to whether grounds exist on which the Minister's decision might be quashed. As a result, the applicant is at a great disadvantage, firstly, in reaching a decision as to whether to challenge the Minister's decision or not, and, secondly, if he does decide to challenge it, in actually doing so, since the absence of reasons would make it very much more difficult to succeed."[12]

Furthermore, Blayney J held that, the flaw in the application might be remediable but, if kept in ignorance of what that flaw was, the applicant would not be in a position to mend its hand and reapply.

The duty to give reasons has recently been judicially extended into areas where it previously had been denied, albeit in quite particular circumstances. Thus in *Fajujonu -v- Minister for Justice,* (1990), the Supreme Court held that the defendant could exercise his powers of deportation against the plaintiffs (who were illegal aliens but who were members of an Article 41 family, the children of which were Irish citizens) only "for good and sufficient reasons" (per Finlay CJ) or if "satisfied for stated reasons" that the common good required it (per Walsh J).[13] The approach in *Fajujonu* contrasts strongly with the High Court decision of Costello J in *Pok Sun Shum -v- Ireland,* (1986), where it was held that the powers of the State to control immigration, being exercised once again against an alien who was part of an Article 41 family, were unfettered by a duty to give reasons.[14] The status of *Pok Sun Shum* in the light of *Daly, Creedon* and *International Fishing Vessels Ltd.,* and particularly in the light of *Fajujonu,* must now be considered suspect.

Similarly, it would appear that the general statement of law to the effect that the non-renewal of a prisoner's temporary release (as opposed to the revocation of a current release) does not attract the rules of natural justice and 'ipso facto' does not require the giving of reasons, which is to be found in the High Court judgment of Murphy J in *Ryan -v- The Governor of Limerick Prison,* (1988),[15] is too broad. In a subsequent decision of the High Court, *Sherlock -v- Governor of Mountjoy Prison,* (1990) (in which, unfortunately, *Ryan* does not appear to have been cited) Johnson J held that where a large number of continuous temporary releases, spanning a period in excess of 12 years, had been granted to the applicant, he had acquired a "legitimate expectation" that either his release would be renewed or, if not, that reasons for the non-renewal would be furnished to him, to which he could then respond.[16] In this respect, the High Court was following the judgment of the Supreme Court in The *State (Murphy) -v- Kielt,* (1984) and it may be that the point really at issue was the right to a hearing *before* the decision not to renew was made rather than (or as well as) the right to be told the reasons for the non-renewal. In either event, the decision represents a step forward from *Ryan* which, it is submitted, places too much emphasis on the application/ forfeiture (or, put another way, privilege/right) distinction that it is of such great importance in English administrative law.[17] It is not being suggested, however, that there do not still remain areas of administrative decision-making on which the courts will not impose a duty to give reasons. Certainly, it would appear from the case law to date that only in very limited circumstances, if at all, would the Director of Public Prosecutions be obliged to give reasons for his decisions.[18]

Statutory duty to give reasons

It should be noted that, quite apart from the common law, a duty to give reasons may be imposed by Statute or by Statutory Instrument. Numerous examples may be given of which the most recent are section 14[4] of the Competition Act, 1991 (under which the Minister for Industry and Commerce shall state reasons for the making of orders dealing with the abuse of dominant positions) and section 4(a)[13] of the Health (Nursing Homes) Act, 1991 (which requires a Health Board proposing to make decisions adverse to an applicant to give reasons for its proposed decision and to take into account any representations made in response). *Contra* the application/ forfeiture distinction manifested in *Ryan,* the requirement in respect of nursing homes applies equally to refusals of initial application for registration and to revocations of existing registrations. Another example of a statutory duty in this regard is the Trade Mark Rules, 1963 (see Rule 43 which refers to "grounds of a decision") which rules were considered and applied by Barron J in *Anheuser Busch Inc. -v- The Controller of Patents, Designs and Trade Marks,* (1987). Enforcement notices under section 10 and prohibition notices under section 11 of the Data Protection Act, 1988 must state reasons and grounds, respectively, and reasons must also be given for prohibition notices under section 37 of the Safety, Health and Welfare at Work Act, 1989.

It would appear to be the clear policy of the Oireachtas that administrative notices, to have immediate legal effect (even though appealable), should be accompanied by an explanation for their issue and an outline of the complaint being made.

In practical terms, perhaps the most important of the statutory provisions is that in the planning code, specifically section 26[8] (a) of the Local Government (Planning and Development) Act, 1963, supplemented in respect of An Bord Pleanála by Article 48 of the Local Government (Planning and Development) Regulations, 1977. (S.I. No. 65)/1977). In respect of decisions on appeal, Article 48 requires that all notifications of appeal decisions be accompanied by "a statement of the reasons for the decision (including in the case of any decision to grant permission or approval subject to

conditions, the reason for the imposition of the conditions)."[20] Of course, in cases to which these provisions apply, as with the other statutory provisions mentioned above, the existence of the duty to give reasons cannot be doubted and the common law principles are relevant "only as to a consideration of the reasons why the statutory obligation exists", as has been authoritatively stated by the Supreme Court in *O'Keefe -v- An Bord Pleanála,* (1991)[21] Therefore, when a statutory obligation is at issue, the terms of the statute or regulation must first be considered. The extent of the obligation imposed by the planning code in relation to appeals was a crucial issue in *O'Keefe* and is considered below.

Finally, it should be noted that Ireland is one of the few common law jurisdictions not to have created a general right to be given reasons for administrative decisions. Such a right has existed in the United States in relation to federal administrative agencies since 1945[22] in the United Kingdom since 1958[23] and in Australia (again in respect of federal agencies) since 1975[24]. The only generally applicable statutory provision in Ireland relating to reasons is section 6[3] of The Ombudsman Act, 1980, which, inter alia, confers on the Ombudsman the power to recommend that reasons be given by an agency for any decision he has investigated. This is of course a long way from the statutory provisions mentioned above.

"Ireland is one of the few common law jurisdictions not to have created a general right to be given reasons for administrative decisions."

When the obligation arises

As has been pointed out by Hogan and Morgan,[25] most of the reported cases suggest that the obligation to give reasons arises only if and when a decision complained of is challenged, whether by way of appeal or by judicial review. The facilitation of appeals has been proffered as a rationale for imposing the obligation to give reasons in *Daly, Creedon, International Fishing Vessels Ltd.* and in *Anheuser Busch Inc.* (where the appeal was unusual in that it was by way of full re-hearing). This emphasis on compelling reasons to be given so that courts may correct the errors of inferior tribunals has also been accepted in other jurisdictions and by academic writers.[26] It clearly is an important element of the obligation but equally clearly is not the only element and on its own, it is submitted, represents a far too limited approach.

Firstly, it would appear perverse to require a complainant to issue proceedings challenging a decision in order to be furnished with reasons for the decision, when such reasons may well satisfy him that the decision was properly taken. This point was recognised by Blayney J in *International Fishing Vessels* and is well put in a 1983 Australian decision.

> "[Section 13[1] of the Administrative Decisions (Judicial Review) Act] requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say in effect "even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact or an error of law, which is worth challenging"[27].

Secondly, and more fundamentally, the strict facilitation of appeals/rule of law approach fails to recognise the right of the citizen to know why an adverse decision has been made. The argument for a more generally based right to reasons focuses on the reaction of the "consumer" of the decision and stresses the importance of fairness and comprehension. This approach is discernible in *Creedon* and in the judgment of the Supreme Court in *Breen -v- The Minister for Defence,* (1990), in which the court unanimously held that the respondent had failed to properly consider the effect of a damages award on the applicant's army pension. Having criticised the Minister for failing to explain his assessment, O'Flaherty J went on:

> "I am far from saying that every administrative decision must be accompanied by elaborate reasons such as would be appropriate to a judgment but the citizen's sense of resentment and frustration can be readily understood in circumstances where he has presented what he thinks is a viable case and has been met simply by a blanket refusal to change by the adminstrative decision-maker."[28]

A similar point was made in the High Court by Murphy J in *O'Donoghue -v- An Bord Pleanála,* (1991) where he stated:

> "It is clear that the reason furnished by the Board (or any other tribunal) must be sufficient, first, to enable the courts to review it and, secondly, to satisfy the persons having recourse to the tribunal that it has directed its mind adequately to the issue before it.[29]

This second rationale places a value on allowing the user of administration to discover where he went wrong and to modify his position accordingly – in short, it encourages active participation in the administrative structure rather than merely passive acceptance of administrative decisions, whether positive or negative.[30] This rationale is entirely consistent with, and vindicative of, the important role of "the people" in Irish constitutional law[31] and with the role of the administrative and judicial systems in seeing not just that justice is done but is also *seen* to be done.

Recent Irish decisions accepting the obligation to give reasons are also supported by reference to the discipline imposed thereby on decision-makers. The obligation to give reasons structures the exercise of discretion, compelling administrators to consider both parties' points of view and to weigh one up against the other in a considered fashion. This was the rationale for the Supreme Court's requirement for reasons to be given in *Fajujonu.*[32]

It is clear from the decided cases that, as far as the common law is

concerned, no obligation to give reasons arises until they are sought. Thus in *International Fishing Vessels,* the applicant's solicitor had sought reasons for the respondent's refusal as soon as it was notified to the applicant. Reasons were also sought in other decided cases.[33] Even where the obligation to give reasons is a statutory one, the extent of the duty may be greater if further reasons are sought, a point considered later. In any event, once an unfavourable decision has been made in respect of an applicant, he/she would be well advised to immediately seek reasons for the decision and if reasons are given which appear to inadequate, further clarification should be sought.

The Extent of the Obligation to give Reasons

What then is meant by obliging a decision maker to give "reasons" for a decision taken by him? Is there a difference between reasons and findings? Does the obligation to give reasons require more than the recital of a statutory conclusion?

In the US the Federal legislation already mentioned[34] requires that decisions to which it applies (which include "initial, recommended and tentative decisions") include a "statement of .. findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." This comprehensive requirement has been described as "essentially a codification of the law the courts had made which was mostly common law".[35] A distinction is drawn between "findings" on the one hand and "reasons" on the other, a distinction explained by a leading commentator thus: "reasons differ from findings in that reasons relate to law, policy and discretion rather than to facts". The equivalent Australian provision draws a similar distinction in requiring "a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decisions."[36] By contrast, the equivalent UK provision merely requires that a "statement, either written or oral, of the reasons for the decision" must be provided on request and does not refer to findings of fact at all.[37]

A further distinction has been drawn by the US Courts between findings of "basic" and "ultimate" facts. The ultimate fact (or "ultimate finding" as it is sometimes referred to) is the determining conclusion to the decision-making process, often expressed in the terms of the governing statute, reached by the application of the relevant principles of law to the basic findings of fact already made. It is therefore the product of reasons and facts. A paradigm is provided by the planning process, where the ultimate fact reached in every planning application is that the proposed development is, or is not, contrary to the proper planning and development of the functional area of the deciding authority concerned. US Federal case-law strongly suggests that, while ultimate facts may be expressed as reasons, that expression will not satisfy the obligation to give reasons, i.e. something more is required. Thus, where a tribunal could make a particular order only where it found that such an order would effectuate the policies of its governing statute, the mere recital of such a finding was held not to be a statement of reasons for making the order.[38]

On the other hand, requiring a decision-maker to recite the relevant ultimate fact, to make a finding within the terms of the statute, is not without value particularly where the decision in dispute may be grounded on any one of a number of such facts. For example, in a series of cases concerning the Wine and Beerhouse Act, 1869 (32 & 33 Victoria, c.27), decisions to refuse licences for beerhouses were quashed for failure to state which one of four available grounds was being relied on: "the Justices ... ought to state on which of the grounds it was that they refused the licence, in order to justify their decision and show that they were acting within their jurisdiction."[39] Similarly, as was authoritatively decided by the Supreme Court in *In re XJS Investments Ltd.* (1986) a failure to recite precisely the terms of particular reasons for refusing planning permissions which, by virtue of the relevant statute, do not attract a liability to pay compensation to the disappointed developers, meant that this statutory protection did not apply and compensation was payable.[40] Of course, the more grounds there are available to ground the decision complained of, the more useful it will be to have stated the ground actually relied upon. Nonetheless, such statement does not constitute a statement of reasons in the true sense.

The distinction between the ultimate fact on the one hand and reasons properly so called on the other is an important one and the two ought not to be confused. Although the terminology used is not the same, this confusion is evident in the decision of the Court of Appeal in *R. -v- Secretary of State for Home Affairs ex parte Swati* (1986) where a distinction was drawn by the Court between on the one hand "a statement of reasons" which merely recited the relevant terms of an immigration rule requiring leave to enter to be refused in certain circumstances (described by the applicant's Counsel as a "ritual incantation") and, on the other, a "written statement of facts" for which the applicant was entitled to apply or appeal (from outside the jurisdiction) which would, according to the Court, express a "process of reasoning applied to evidence", the conclusion of which was the immigration officer's declared "reason". It is not easy to justify such a narrow interpretation of a requirement to give "reasons",[41] focusing solely on the ultimate and formal product of the rational process and excluding all examination of the process itself and the material relied on. While the distinction may be justified in *Swati* itself by reference to the bipartite statutory structure involved, a generalised construction of the obligation to give reasons as requiring only a statement

of ultimate fact, undermines the value of the obligation and fulfils none of the functions the giving of reasons is intended to serve as described above. Unfortunately, as will be seen in part 2 of this article, existing Irish authorities appear equally confused as to what is required by a "statement of reasons".

(continued in the next issue)

References

1. See e.g. *Kiely -v- Minister for Social Welfare* (No. 2) [1977] I.R. 267 at 274.
2. The scope of judicial review has been steadily expanding; see e.g. *State (Lynch) -v- Cooney* [1982] I.R. 337 and *State (Keegan and Lysaght) -v- Stardust Victims' Compensation Tribunal* [1986] I.R. 642. The cases dealing with the obligation to give reasons are cited in extenso below. See also Hogan and Morgan, Administrative Law in Ireland (2nd ed., London, 1991) at pages 457 to 463.
3. Contrast the very different conclusions reached in the High and Supreme Courts in *O'Keefe -v- An Bord Pleanála* [1992] ILRM 237, 256.
4. *Reg. -v- Gaming Board of Great Britain ex parte Benaim and Khaida* [1969] 1 All E.R. 904.
5. *Schmidt -v- Secretary for Home Affairs* [1969] 2 Ch 149; [1969] 1 All ER 904. Similar reasoning has manifested itself in *McInnes -v- Onslow-Fane* [1978] 3 All E.R. 211 (refusal of boxing manager's licence) and in *Reg -v- Secretary of State for Home Affairs ex. parte Harrison* [1988] 3 All E.R. 86 (refusal of ex-gratia award to person imprisoned and subsequently acquitted). This reasoning, and the privilege/right distinction, recommended itself to Costello J. in *Pok Sun Shum -v- Ireland* [1986] I.L.R.M. 593 at page 599 where deportation was ordered after the expiration of leave to remain in the State.
6. See e.g. *Reg -v- Secretary of State for Home Affairs ex parte Hosenball* [1977] 1 W.L.R. 766 cited with approval in *Reg -v- Secretary for Home Affairs ex. parte Cheblak* [1991] 2 All E.R. 319 at pages 321 and 322.
7. This was one of the grounds for Costello J.'s decision in *Shum* (at pages 600).
8. [1968] A.C. 997 per Lord Upjohn at pages 1061 and 1062; see also the more recent decision of the House of Lords, *Reg -v- Secretary of State for Trade and Industry ex. parte Lonrho plc* [1989] 1 W.L.R. 525 which re-affirms both the non-existence of any general common-law duty to give reasons and the continuing survival of the principle propounded in *Padfield;* see per Lord Keith at pages 539 and 540. See however *R -v- Independent Television Commission, ex parte Television South West Broadcasting Ltd.* (Not yet reported, Court of Appeal, 5th February, 1992).
9. [1987] I.R. 165 at page 172.
10. [1988] I.R. 51 at page 55.
11. In the light of the decisions of the Supreme Court in *East Donegal Co-Operative LIvestock Marts Ltd. -v- Attorney-General* [1970] I.R. 317 and *State (Lynch) -v- Cooney,* loc. cit., fn. 2 above, this contention was unsustainable.
12. *International Fishing Vessels Ltd. -v- Minister for the Marine* [1989] I.R. 149.
13. [1990] 2 I.R. 151, 160 per Finlay C.J. at page 163 and per Walsh J. at page 167. For a consideration of *Fajujonu* see Costello, "The Irish Deportation Power" (1990) 12 D.U.L.J. 81 in which reference is also made (at note 4) to an unreported decision, *State (Touray) -v- Governor of Mountjoy* (Irish Times, 14th December, 1985) in which McWilliam J. is reported as having quashed a refusal of leave to land for failure to give reasons. This faillure may have consisted of a breach of the duty imposed by Article 5, paragraph (2) of the Aliens Order, 1946 (S.R. & O., No. 395 of 1946) (inserted by Article 3 of the Aliens (Amendment) Order, 1975 (S.I. No. 128 of 1975). Article 5, paragraph (2) requires that the particular ground in paragraph (1) invoked to justify refusal of leave to land be notified to the applicant in writing.
14. loc. cit. see fn. 5 above.
15. [1988] I.R. 198.
16. *Sherlock -v- Governor of Mountjoy* [1991] 1 I.R. 451.
17. *State (Murphy) -v- Kielt* [1984] I.R. 458; for the privelege/right distinction see fn. 5 above and supporting text.
18. See *Savage -v- D.P.P.* [1982] I.L.R.M. 385 and *Judge -v- D.P.P.* [1984] I.L.R.M. 224. The decisions and their reasoning have not been universally applauded; see Hogan and Morgan, op. cit. at pages 558 to 563 and the footnotes thereto. It appears that certain decisions of the D.P.P. may be reviewable in certain circumstances: see *State (McCormack) -v- Curran* [1987] I.L.R.M. 225.
19. [1987] I.R. 329.
20. A similar obligation is placed on local planning authorities by the same section, supplemented by Article 31 (g) of the 1977 Regulations.
21. loc. cit. see fn. 3.
22. Administrative Procedure Act (5 USC s557(c)); on the Act and on the parallel common-law duty to give reasons see Davis, *Administrative Law Treatise* (5 vols., 1980-1984), chap. 14 at page 99 forward.
23. Tribunals and Inquiries Act, 1958, s.12. The 1958 Act was replaced by the Tribunals and Inquiries Act, 1971, the relevant section of which is again s.12.
24. See Administrative Appeals Tribunal Act, 1975, s.43 and Administrative Decisions (Judicial Review) Act, 1977 s.13. In each case the right to reasons upon request applies to decisions appealable under the particular statute but the right is not dependent on the bringing of an appeal. There is considerable overlap between the two provisions. The High Court of Australia, in *Osmond -v- Public Service Board of N.S.W.* (1986) 159 C.L.R. 656, following British precedent, has ruled that there is no common-law duty to give reasons, overruling the New South Wales Court of Appeal whose majority decision, including the powerfully expressed leading judgment of Kirby P. is reported at [1984] 3 N.S.W.L.R. 447 and also at [1985]L.R.C. (Const.) 1041; see per Kirby P. at page 467 and at pages 1063 and 1064 respectively.
25. op. cit. at 460 to 462.
26. See Flick, "Administrative Adjudications and the Duty to Give Reasons – A Search for Criteria", [1978] Public Law 16 at pages 17 and 18; Richardson, "The Duty to Give Reasons: Potential and Practice" [1986] Public Law 437; both writers believe that there are other rationales.
27. *Ansett Transport Industries (Operations) Pty. Ltd. -v- Wraith* (1983) 48 A.L.T. 500.
28. (Unreported, Supreme Court, 20th July, 1990).
29. [1991] I.L.R.M. 750 at page 757.
30. See Richardson op. cit. at fn. 24 pages 444 and 445 and the footnotes thereto. For judicial recognition of the value of public participation in one area of the administrative process see *State (Haverty) -v- An Bord Pleanála* [1987] I.R. 485 and the cases cited therein.
31. as exemplified in *Byrne -v- Ireland* [1972] I.R. 241.
32. For the arguments historically advanced for not giving reasons see Flick, op. cit. at fn. 26 at page 19 and the footnotes thereto.
33. See e.g. *C.W. Shipping Co. Ltd. -v- Limerick Harbour Commissioners* [1989] I.L.R.M. 416 at page 419.
34. *supra.* fn. 22 above.
35. Both this comment and the next ("reasons differ..") are made by Davis *op. cit.* at fn. 22 at volume 2, pps. 99 and 103 respectively.
36. *supra.* fn. 24.
37. *supra.* fn. 23
38. See *Saginaw Broadcasing Co. -v- F.C.C.* 96 F. 2d. 554 (D.C. Cir. 1938) and *Phelps Dodge Corporation -v- N.L.R.B.* (1941) 313 U.S. 177, both of which were decided on common-law/ constitutional principles. The idealised decision-making process described in *Saginaw* is summarised in Flick *op. cit.* at fn. 26 at p.20.
39. *R. -v- Sykes* (1875) 1 Q.B.D. 52.
40. [1986] I.R. 750; [1987] I.L.R.M. 659.
41. [1986] 1 W.L.R. 477 at pps. 482 – 483.

□

Young Lawyers Joint Conference

The Spring Conference of the Society of Young Solicitors was this year replaced by a highly successful International Conference of Young Lawyers held in Newcastle, Co. Down on 8-10 May, 1991. The conference was organised by the Northern Ireland Young Solicitors Group with participation from the Society of Young Solicitors of Ireland, The Younger Members Committee of the Law Society, The Scottish Young Lawyers Association and The Young Solicitors Group of England and Wales. The conference marked a "first" in many respects. It was the first time that an SYS conference was held in Northern Ireland. It was also the first time that a Joint Conference could boast attendance by 400 delegates from nearly 20 countries. No fewer than 150 travelled from South of the border while the Northern Irish delegates numbered 123. Forty came from England and Wales, 19 from Scotland and the rest from as far away as Australia, Belgium, Denmark, France, Germany, Ghana, Greece, India, Italy, Malaysia, The Netherlands, Nigeria, Norway and Spain.

With such a large contingent, it was not surprising that the entertainment and social events were many and varied. Ranging from helicopter tours of the Mourne Mountains, hill-climbing, coach tours, golf, mini-golf, pony trekking, tennis and cycling to the many attractions of the excellent leisure centre in the hotel itself. Some of those attending also witnessed a phenomenon peculiar to one part of the Mourne mountains where it was possible for a car to roll uphill! (Contrary to common belief, this was due to the effects of gravity on this particular mountain and not on those who witnessed it).

On Friday evening, folk music was provided in Chaplin's Bar in the hotel followed by a disco into the small hours. On Saturday night, an excellent Black Tie Banquet was enjoyed by all delegates with live music preceding another disco for those able to last the pace.

The weekend programme of lectures was of a very high standard and delegates were addressed by speakers from several jurisdictions on topics ranging from enforcement of judgements to a panel on libel. Professor *Robert Black* QC opened the conference by exploring the philosophy and structure of the 1968 Brussels Convention and the later Conventions of Luxembourg, Lugano and San Sebastian in 1978, 1988 and 1989 respectively. The underlying objective was to secure free movement of judgements throughout the EC in Civil and Commercial matters. Eight signatories including Ireland have undertaken to take all appropriate measures to implement the San Sebastian Convention by the end of this year while all countries (bar four) have yet to implement the Lugano Convention which deals with the allocation of jurisdiction and enforcement of judgements between EC Member States on the one hand and Members of the European Free Trade Association (EFTA) on the other.

Forum Shopping presented by *Marjorie Holmes,* former barrister and now practising as a partner in the London Law firm of Davies Arnold Cooper, dealt with the practical considerations involved in choosing the jurisdiction in which to commence or process one's claim. Factors which influence one's choice are the divergences from one country to another of personal injury awards, court fees, time limits, limits of liability, time to obtain an award, costs and availability of legal aid. This lecture highlighted the need for harmonisation among Member States in these areas.

The Sunday morning panel on libel was presented by *Michael Lavery QC, Michael O'Mahony,* solicitor, McCann FitzGerald and *Richard Ingrams,* former editor of Private Eye and former columnist with the Observer newspaper. The panel, representing the perspectives from the plaintiff's, defendant's and journalist's point of view, dealt admirably with the individual's right to privacy versus freedom of speech. Public benefit was examined as well as the proportionality of the plaintiff's award vis a vis the "injury" suffered. Privileged documents and statements, the individual's reputation and defences to libel actions were all explored. It was generally felt that juries should be given very clear direction on the question of damages.

The SYS would like to express sincere thanks to our generous main sponsors – Investment Bank of Ireland – who have consistently supported our events and also to Butterworths. Mention must also be made of those responsible for the SYS and YMC input to this conference and our thanks extended to them for their hard work in helping to organise the weekend – *James McCourt* (SYS) and *Robert Hennessy* (YMC).

Details of the Autumn Conference of the SYS will be provided in the next issue of the *Gazette.*

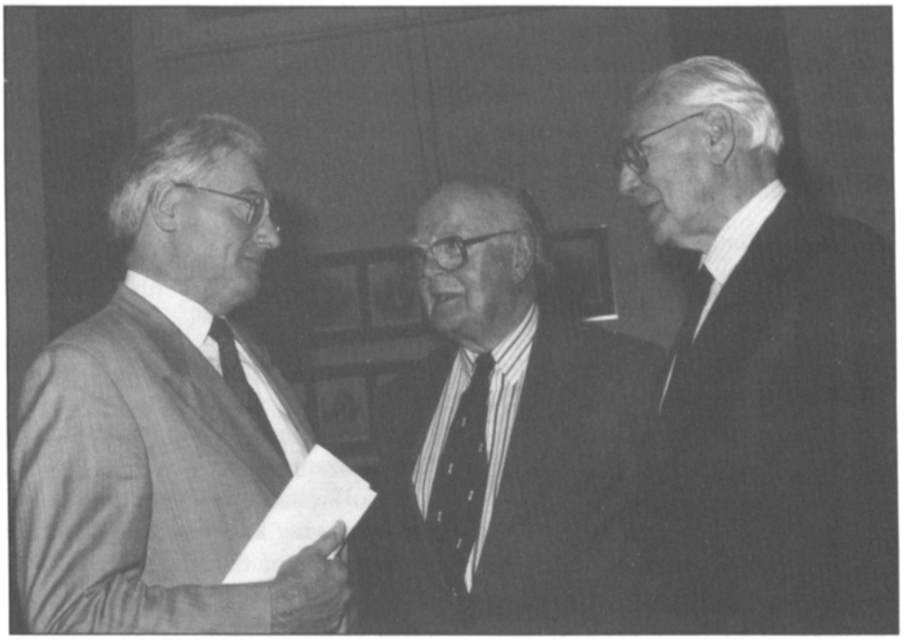
Jennifer Blunden,
Public Relations Officer,
SYS.

English Agents: Agency work undertaken for Irish solicitors in both litigation and non-contentious matters – including legal aid. Fearon & Co., Solicitors, 12 The Broadway, Woking, Surrey GU21 5 AU. Tel: 0044-483-726272. Fax: 0044-483-725897.

Society Reviewing Advertising Regulations

Report of the half-yearly meeting of the Society held on 11 May, 1992.

The half-yearly meeting of the Law Society that took place on 11 May last was told that the Society is currently reviewing the Solicitors Advertising Regulations as there is a view in the profession that the regulations need to be tightened up. The meeting also heard reports on the current state of the Retirement Fund, the Solicitors' Benevolent Association and discussed the Compensation Fund and the promulgation of new scale fees in the District Court.



At the half-yearly meeting of the Law Society held on 11 May were l-r: Tom Menton, O'Keeffe & Lynch; F.X. Burke, and Peter Prentice, Past President, Law Society.

Advertising

In response to a question from F.X. Burke about whether it was permissible for Solicitors to advertise on the backs of buses, the Director General of the Law Society, Noel Ryan, said that there was no prohibition on advertising in any particular place so long as the form of the advertisement conformed with the Solicitors (Advertising) Regulations. However, there had been some disquiet during the past few months about certain forms of advertising engaged in by a small number of solicitors and some solicitors had been brought before the Registrars Committee and had given undertakings about their future conduct in this regard. The Society was currently reviewing the advertising regulations, he said, but the review would have to take account of the provision of Section 63 of the Solicitors Bill, which would make certain changes including legalising fee advertising. Therefore, the review could not be completed until the Solicitors Bill was enacted.

Gerard Griffin, Chairman of the Registrars Committee, said that the Committee would like to see a general tightening-up and greater clarity in the regulations. He encouraged solicitors who are in any doubt about the content of a proposed advertisement to submit the text to the Registrars Committee for clearance in advance.

Compensation Fund

Mr. Frank MacGabhann said it was a matter of extreme urgency that a ceiling should be placed on the level of claims payable under the Compensation Fund. He asked what the Society proposed to do if the Government refused to impose a ceiling and whether the Society would take a case to the courts to have the fund declared unconstitutional. Replying, the Law Society President, Adrian P. Bourke, said that the Society was making every effort to persuade the Government to introduce an appropriate amendment to the Solicitors Bill. It was clear that the profession was unwilling to continue to tolerate an open-ended unlimited fund. Adrian Bourke also referred to the fact that the Society was seeking to have new criminal offences created in the Solicitors Amendment Bill, 1991, which would enable solicitors who misappropriate clients' funds to be prosecuted more readily. He also confirmed that a constitutional action was being considered by a number of solicitors.

District Court Scale Fees

Michael D Murphy enquired what the position was in relation to the promulgation of new scale fees to deal with the increased jurisdiction of the District Court. Gerard Griffin said that it was hoped that the District Court Rules Committee would shortly promulgate new scale fees to deal with the increased jurisdiction. The scales originally proposed by the Department of Justice were totally unacceptable to the Costs Committee of the Society. The President of the District Court had now agreed on a level of fees that was acceptable to the Insurance Federation and the draft rules would be shortly submitted to the Minister for Justice for approval.

(Continued on page 203)

PROFESSIONAL INFORMATION

Land Certificates

Patrick Fanning, Folio: 4736; Land: Togher More; Area: 63a 1r 0p. **Co. Wicklow.**

Thomas Spellman, Folio: 19747F; Land: Cahergowan or Summerfield; Area: .395 acres. **Co. Galway.**

Thomas McDermott, Folio: 838R; Land: Piedmont; Area: 5.016 hectares. **Co. Louth.**

Michael Columba Normoyle, Edward Daniel Creed, Thomas Cosmos Moloney, William Ambrose O'Hanlon, Folio: 12028; Land: North of Clinton's Lane in Town of Drogheda; Area: 0a 1r 30p. **Co. Louth.**

Alexander McCutcheon, 162 Home Farm Road, Glasnevin, Dublin 9. Folio: 446L; Land: property known as 162 Home Farm Road situate on the south side of the said road in Drumcondra, parish and district of Glasnevin. **Co. Dublin.**

Brendan Balfe and Rose Balfe, Folio: 147L; Townland: Cummeen; Area: 0a 0r 36p. **Co. Sligo.**

William (orse Liam) Maher, Folios: 2601, 2602, 2774, 9730. Area: (1) 15a 0r 2p, (2) 54a 2r 22p, (3) 30a 3r 20p, (4) 55a 2r 34p. Lands: (1) Ballaghanoher, (2) Ballyatty, (3) Ballyatty, (4) Ballyatty. **Co. Kings.**

Theresa O'Dwyer, Folio: 10813; Land: Part of the lands of Glenbane; Area: 45a 0r 38p. **Co. Tipperary.**

Arthur Dagg (Distributors) Ltd, Fitzwilton House, Wilton Place, Dublin 2. Folio: 23967F; Lands: Townland Kilnamanagh, Barony Uppercross. **Co. Dublin.**

John Andrews Jnr. Farmer. Tobergregan, Garristown, Co. Dublin. Folio: 1036; Lands: Tobergregan, Barony of Balrothery West. **Co. Dublin.**

Wills

Ferguson, Ronald, deceased, late of 40 Rosendale Gardens, Corbally, Limerick. Will anyone having knowledge of the whereabouts of a will of the above named deceased who died on 20 April, 1992, please contact Patrick J D'Alton, Solicitor, 119, O'Connell Street, Limerick.

Collins, Richard (Dick), deceased, late of Tramway Terrace, Douglas, Co. Cork, storeman. Would any person having knowledge of the whereabouts of the will of the above deceased who died on 27 April, 1992, please contact Messrs Coakley Moloney, Solicitors, 44/49, South Mall, Cork, telephone 021-273133.

Flannery, John late of 10, Bastion Street, Athlone, Co. Westmeath. Would anyone having knowledge of the whereabouts of the will or the title documents relating to the dwelling house at No. 10, Bastion Street, Athlone, of the above named deceased, who died on the 20 March, 1992, please contact Thomas W Enright, Solicitor, John's Place, Birr, Co. Offaly.

Smullen, Herbert Ralph, deceased, late of 4 Greenlands, Sunbury Court, Dartry, Dublin 6, retired businessman. Would any person having knowledge of the whereabouts of the will of the above named deceased who died on 17 April, 1992 please contact Hugh J O'Hagan Ward & Co., Solicitors, 94 Lower Baggot Street, Dublin 2, telephone: 01-764496, Fax: 01-682317.

McNicholl, Henry (Harry), deceased late of Knock, Inverin, Galway. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on 27 December, 1991 please contact Matheson Ormsby Prentice, Solicitors, 3 Burlington Road, Dublin 4.

McNicholl (nee O'Toole), Bridget, deceased late of Knock, Inverin, Galway. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on 13 September, 1987 please contact Matheson Ormsby Prentice, Solicitors, 3 Burlington Road, Dublin 4.

Mulhall, Thomas, deceased, late of Leapstown, Ballyfoyle, Co. Kilkenny. Would any party have knowledge of the whereabouts of a will of the above named deceased who died on 15 May, 1992, please contact Lanigan O'Mahony, Solicitors, 5 John's Bridge, Kilkenny. Telephone: 056-61733. Fax: 056-65762.

Glennon, Christopher, late of 12 Violet Hill Road, Glasnevin, Dublin 11 and formerly of 9 Nottingham Street in the City of Dublin, retired journalist. Will anyone having knowledge of the whereabouts of a will of the above named deceased who died on 25 October, 1991, please contact J. F. Proctor & Co., Solicitors 230 Swords Road, Santry, Dublin 9.

Employment

Dublin Solicitor, 6 years qualified, with considerable litigation experience in all courts, seeks new challenging position with genuine partnership prospects. First class references, CV available upon request. Box No. 50

Miscellaneous

Law Books Dublin solicitor interested in purchasing second hand statutes, law reports, law book collection. Phone 769455.

For Sale ordinary seven day Publican's Licence (no endorsements) – Contact Charles J Flanagan, Bolger White Egan & Flanagan, Solicitors, Portlaoise.

For Sale 7-Day Ordinary Publicans Licence, contact Johnson & Johnson, Solicitors, Ballymote, Co. Sligo, Reference – KJ, Telephone: (071) 83304/83486.

Refusal of Publicans' Licences
Would any practitioners who have encountered clients, the renewal of whose licences have been refused by Customs & Excise on the basis that same were hotel licences and the premises is not registered as a hotel, please contact the undersigned. O'Flynn Exhams & Partners, Solicitors, 58 South Mall, Cork. Reference: FOD.

For Sale Law Practice (Sole Practitioner) County Tipperary. Enquiries to Box No. 51

Connemara Lakeside coach-house on Louth Mask. 1 mile Corrib. Superb self-catering accommodaton. Sleeps 5/6. Fishing, boats, gillies. Evening meal available. Tel: (01) 8215724.

Rural Seven day publican's licence for sale. Enquiries to M/s Lee's Solicitors, Kilfinane, Co. Limerick. Tel (063) 91116.

For Sale, Ordinary Seven-day publican's licence. No endorsements or convictions. County Limerick area. Enquiries to Lee's Solicitors, Lord Edward St., Killmallock, Co. Limerick. Tel: (063) 98003. Fax: (063) 98582 or Lower Main Street, Kilfinane, Co. Limerick. Tel: (063) 91116. Fax: (063) 91289.

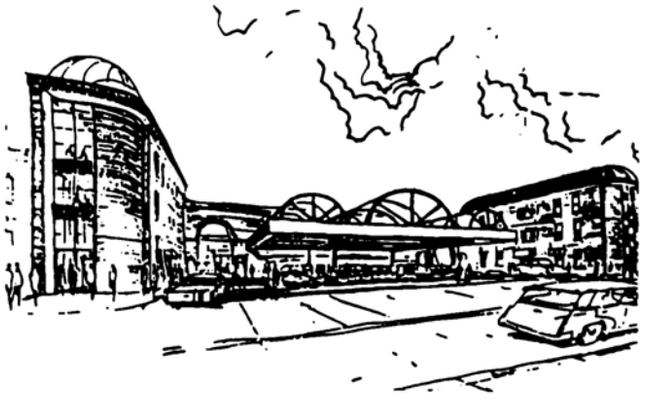
Society Reviewing Advertising Regulations

(Continued from page 201)

Solicitors Retirement Fund
The Chairman of the Solicitors Retirement Fund, Gerald Hickey, reported that the current value of the fund stood at £17,014,233. The unit value of the fund at 1 January, 1991 had been 245p. It had increased to 285p at 1 January, 1992 and stood at 302p at 1 March, 1992. This was a satisfactory growth rate. He said the fund had been making steady progress and that he could recommend it to investors. He expressed disappointment that there were currently only 430 members of the profession participating in the Fund and expressed a desire to see greater involvement by members of the profession. The more people that participated, the greater would be the investment level and the chances of an improved growth rate.

Solicitors Benevolent Association
The past year had seen greater support than ever before for the Solicitors Benevolent Association, according to its chairman, Andrew Smyth. In his report to the meeting he said the Association has received tremendous support from members during 1991. The various golf outings that had been arranged around the country had been particularly successful. The Association was in a good position financially but calls on its resources were continuing to increase. He called on members of the profession to keep up their excellent support of the Association's work.

Scrutineers for Council Elections
The meeting appointed the following as scrutineers for the Law Society Council elections for 1992-/93: Walter Beatty, Laurence F. Brannigan, Terence Dixon, Andrew Donnelly, Eamonn Hall, Clare Leonard, John Maher, Donal O'Hagan, Hugh O'Neill, Peter Prentice, John C. Reidy, William Young and Noel C. Ryan (Director General). □



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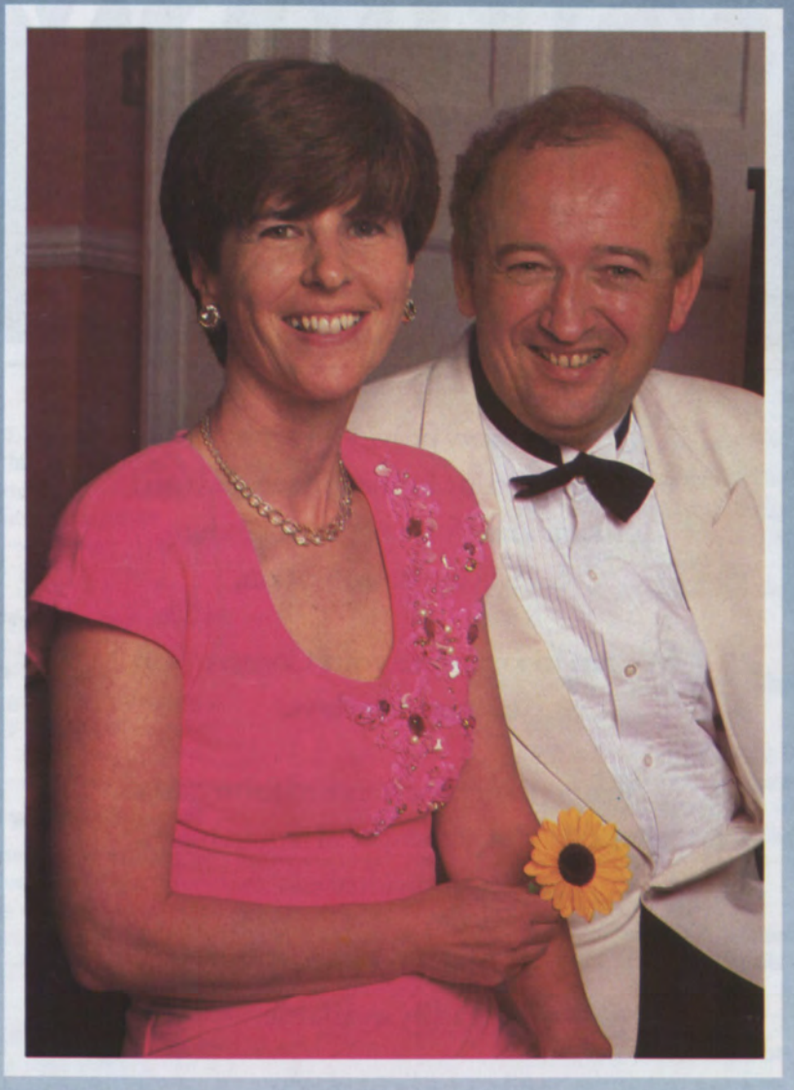
GAZETTE



EXAMINERSHIP: TOO MANY DIFFICULTIES

CRIMINAL EVIDENCE BILL BECOMES LAW

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INCORPORATED LAW SOCIETY OF IRELAND

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Front Cover:
Mrs. Ruth Bourke and the Pianist, John O'Conor, at a Piano Recital in the Law Society that took place on 18 June last and raised over £10,000 for the Irish Hospice Foundation.

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Examinership: Too many Difficult Questions

The concept of Examinership, first introduced in the Companies (Amendment) Act, 1990 has been in operation for a sufficient time to enable its operation to be reviewed. It cannot be said that the experience has been entirely satisfactory and it is far from clear that teething troubles are the sole cause of concern.

Various Common Law jurisdictions have introduced provisions whereby companies which may be temporarily insolvent can be put into some form of curatorship during which their prospects of long term survival can be examined without the danger of creditors putting them into liquidation or receivership. These arrangements fall broadly into two types. The first, and best known, the US Chapter 11 System provides for the freezing of the creditors' rights to move for a specified period while the directors of the company, perhaps assisted by outside experts, endeavour to get the company back on the rails again. The other method exemplified by the UK Administrator and our Examiner system provides for the introduction into the company of an outside financial expert, almost invariably an accountant, whose brief is to produce, within a relatively short period of time, a report on the financial prospects of the company and a plan for its survival.

It is not too unkind to say that the drafters of our companies legislation do not seem to have given sufficient consideration to the position of the banks or other major lenders to the company in question. There is no obligation on a creditor bank to offer facilities by way of working capital for the business when it is in examinership. Given that most Irish banks and lending institutions will have fixed charges over the assets of the company, the lender may well take a view that its security, which cannot be enforced during the examinership, may not be improved if the examinership is permitted to proceed. In such circumstances the lender may refuse working capital. The Examiner may not be able to raise capital elsewhere having no security to offer.

At first sight the answer to this difficulty is not obvious. It may not be reasonable to expect a bank which has already extended significant credit to a company and which is facing losses on that lending, to do anything other than try to cut its losses and freeze the company's obligations to it at the known level. What perhaps needs to be looked at, as has been suggested in these pages before, is the methods of operation of Irish lenders and indeed the whole concept of the floating charge and the power to appoint a receiver. The power to appoint a receiver gives a lending institution an unfair advantage over all unsecured creditors.

This creation of English law does not exist in the United States or Canada which may explain why their curatorship procedures can operate more satisfactorily than appears to be the case either in the UK or in our recent history here.

The ability to appoint a receiver enables lenders to take too relaxed a view of their creditor companies. Secure in the knowledge that they can at any time appoint a person to realise the assets of the company almost exclusively in their own interests, Irish banks, in contrast to their European counterparts, as a general rule, take no equity investment in the companies they lend to, do not appoint directors to the boards of significant borrowers and, most tellingly of all, do not review the financial accounts of their creditor companies on a regular and satisfactory basis. Too often the lender only discovers the true financial state of a borrower company when it is in grave difficulty.

The concept of a curatorship is a good one but there must be grave doubts as to whether it can operate satisfactorily in the interest of the creditors or companies that may be temporarily insolvent, or their employees, so long as the Damoclean sword of receivership hangs over Irish companies.

□

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Legal Aid and Courts Need More Resources

Recently, the Society has sought through press publicity to highlight the fact that we live in a community where *legal aid in civil cases* is there in name only. Last November, the Law Society published a comprehensive report on the civil legal aid system in this country, drawing attention to its many inadequacies. This was submitted to the Minister for Justice. So far, we have had no response from the Minister on it. Only last month FLAC drew attention to the lengthening delays for services in many of the legal aid centres around the country. The plain fact is that ordinary people, who cannot themselves afford to pay for legal services, are being treated very shabbily by the State. I have no doubt, personally, that we are in breach of our obligations under the EC Treaties in this respect and that, sooner or later, a case will be taken that will compel the government to provide adequate funding for civil legal aid. In our report, we have made it clear that we believe that, as a minimum, the original recommendations of the Pringle Committee – going back to 1977 – should be implemented in full. If that were done, it would mean that we would have a service which would combine both the private practitioner and State-run law centres. In our view, it is imperative, if there is to be reasonable choice and reasonable access to services and if conflict cases in the family law area are to be dealt with adequately, that the private practitioner is brought into the scheme.

Criminal Legal Aid Fees are Unrealistic

That we have as good a scheme of *criminal legal aid* as we have in this country is due mainly to the judges – and not to the Government. It was their insistence that persons charged with serious offences should be given the services of defence lawyers – at State expense where they could not afford it – that led to the development of the present scheme. For some reason that I find hard to comprehend, the Government takes the view that a lawyer's services on criminal work are worth but a fraction – varying from one-fifth to one-eighth – of what they command on equivalent civil work. For that reason, the Society has submitted a claim for a substantial increase in the fees payable to solicitors who perform criminal legal aid work. By any standard, the fees payable at the moment are totally unrealistic and, unless the Government meets the reasonable demands that are being made of them at present, it is likely that, within the next few months, many solicitors will seriously reconsider their participation on the Criminal Legal Aid Panel. That's how bad the situation is.

At the International Young Lawyers Conference organised by the Northern Ireland Young Solicitors Group, the Society of Young Solicitors and the Young Members Committee of the Law Society, were l-r: Stewart Murray, President Scottish Young Lawyers' Association; Hilary Wells, Northern Ireland Young Solicitors Group; Adrian P. Bourke, President, Incorporated Law Society of Ireland; Lord Justice O'Donnell, and Paddy Duffy, President of the Northern Ireland Law Society.

Legal Aid System Worst in Europe

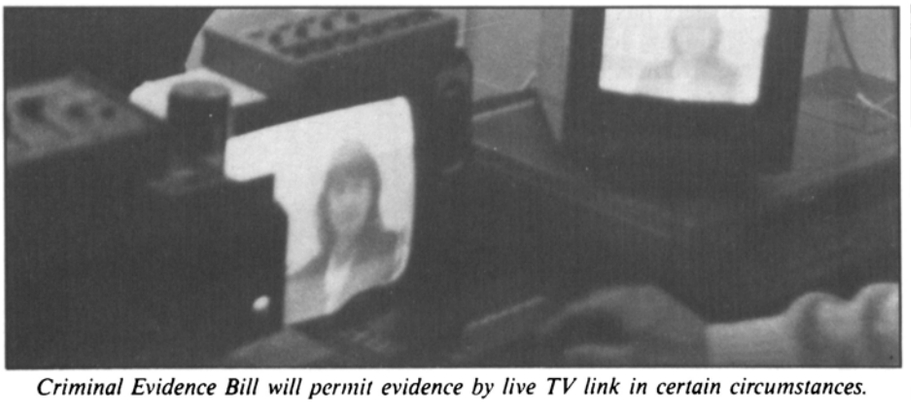
The total budget for legal aid in this country is about £4.5m. Approximately £2.5m of this is spent on civil legal aid and about £2m on criminal legal aid. In England, by contrast, the total legal aid budget is close to £1 billion. When due allowance is made for population difference, it emerges that the British are spending about *ten times* the amount that we spend on legal aid. In other European countries the picture is much the same. I have no hesitation in saying that, in all probability, we have the worst legal aid system in Europe and, if the Minister for Justice wishes to dispute that, let him do so.

Courts Services need more Resources

As well as substantial improvements in our legal aid system, our courts service and court administration badly need additional resources. Delays in civil cases in some Circuit Court areas are now very serious and there seems very little prospect that they will improve in the short-term. The position in the High Court is also quite unacceptable at present. Delays in civil cases now run to two years or longer. Moreover, the system of listing cases itself is in urgent need of overhaul. The problems in the Courts can only be solved by the appointment of more judges and extra back-up staff. We would like to see more judges appointed and we have in the past made some suggestions – and will again in the near future – about widening the pool from which they are chosen. I think that increased use of technology would also be of enormous benefit and I would urge the Department of Justice to provide the necessary resources to enable these changes to be effected quickly. □

Criminal Evidence Bill Becomes Law this Month

The Criminal Evidence Bill, 1992, at present being considered by the Oireachtas, is one of the most radical pieces of legislation in the area of criminal procedure and evidence to be introduced since the foundation of the State. The Bill has been given a high priority by the Government and is expected to become law by the end of July.



Criminal Evidence Bill will permit evidence by live TV link in certain circumstances.

The Criminal Law Committee prepared a detailed submission on the Bill to the Department of Justice. The Committee also met officials of the Department, when all aspects of the Bill were discussed. The Department has accepted some of the points made by the Committee and these have been reflected in amendments moved in Dáil Éireann by the Minister of State at the Department of Justice, *Willie O'Dea.* However, a number of objections raised by the Committee have not been accepted. The purpose of this article is to make members of the profession aware of the major changes envisaged by the Bill, and of the position adopted by the Committee.

The Bill itself runs to some 29 Sections. Accordingly, it would not be appropriate to cover every aspect of the Bill in this article. Indeed, many aspects of the Bill are quite uncontroversial and are to be greatly welcomed. For example, Part IV of the Bill reforms the law in relation to the competence and compellability of spouses and former spouses in a way that strikes a fair and correct balance between the interest of ensuring that available evidence can be offered in criminal proceedings and the requirement that marital privacy should be maintained. Another welcome reform is contained in Section 26 of the Bill, which allows the evidence of a child under the age of 14 years to be received otherwise than on oath or affirmation, if the Court is satisfied that the child is capable of giving an intelligible account of events which he has observed.

The two main areas covered by the Bill concern the admissibility of business records and the evidence of young persons in cases of sexual or violent assault.

Evidence by Young Persons

The Bill's provisions in this latter category may be summarised as follows:

(1) If an accused is charged with a relevant offence (sexual offence, offence involving violence or a threat of violence etc.), a witness under the age of 17 years, not necessarily the injured party, may give evidence by live TV link, unless the Court sees good reason to the contrary; in which event, the judge, barrister or solicitor may not wear a wig or gown while the witness is giving evidence.

(2) The examination, cross-examination or re-examination of such witness may be conducted through an intermediary, if the Court, on application to it, is satisfied that the interests of justice so require, having regard to the age or mental condition of the witness.

(3) If the injured party is under the age of 17 years and his/her evidence is taken on deposition at the preliminary examination by means of a live TV link, the video recording of the deposition may be used in evidence at the accused's trial.

(4) If the injured party is under the age of 14 years and has made a video recorded statement to an "appropriately qualified" person, the video recording of this statement may be considered by a judge of the District Court at a preliminary examination and may be used in evidence in any subsequent trial.

(5) As the technical facilities to allow for live TV link and video recording may only be available in some courthouses, there is a provision allowing for proceedings to be transferred to another Circuit or District Court District.

(6) An injured party under the age of 17 years is not required to identify the accused at a trial, where evidence has been given that the accused was known to the witness before the date of the alleged offence or that the accused has been identified by the witness on a prior occasion.

(7) All of these provisions apply where the injured party/witness suffers from a mental handicap.

(8) The requirement that there be corroboration of the unsworn evidence of a child is abolished. It will now be a matter for the discretion of the trial judge as to

whether any warning should be given and, if so, in what terms.

It is worthy of note that these provisions are not confined to cases of child sexual abuse. They apply to all cases where an injured party/ witness is under 17 years of age and the offence involves violence or threats of violence. Thus, an injured party may give evidence on live TV link in a case of common assault where the defendant is a parent, teacher, member of the Garda Siochana or indeed any member of the public, unless the court sees good reason to the contrary.

Increase in wrongful convictions
In its submission to the Department of Justice the Criminal Law Committee accepted that the area of child sexual abuse was a matter of great public concern, which could not be dealt with adequately at present by our criminal justice system. However, the principal reason for this is that our system demands exacting standards in the presentation of any prosecution case. This is to ensure, so far as is practicable, against wrongful convictions. The combined effect of the above provisions would be to make it difficult, if not impossible, for lawyers representing persons charged with offences to which the Part applies to test adequately the evidence offered by the State. This will undoubtedly result in an increase in the number of such cases being presented to the Courts and, possibly, an increase in the number of convictions. However, it may also result in wrongful convictions.

"The combined effect of . . . the provisions would make it difficult if not impossible for [defence] lawyers . . . to adequately test the evidence offered by the State."

Unlike the inquisitorial system, where the evidence is tested in a lengthy and exhaustive pre-trial enquiry by an independent investigating magistrate, the common-law system relies on the trial process, in particular cross-examination by the defence and prosecution lawyers, to ascertain where the truth lies. This is why the Committee is concerned about any attempt to negate or diminish the right of cross-examination.

Examination through Intermediary
It is worth highlighting two aspects of these provisions. First, there is the proposal that the examination, cross-examination or re-examiantion should be through an intermediary. No other European or common law country has introduced such a concept into its criminal justice system. The Committee is not convinced of the need for an intermediary, nor is it clear what function such a person would perform. It is presumed that such a person would not be entitled to rephrase any questions put to the witness in which case the only effect of the provision would be to prevent the witness from hearing the *tone* in which the question is asked. To achieve this end, the witness would have to be prevented from hearing what was being said in the courtroom. As the witness would be aware that he/she was being seen and heard on a live television link, the overall effect might be to isolate and intimidate the witness and would therefore be counter-productive. Furthermore, if the witness is not capable of giving evidence except through an intermediary, this may simply suggest that such evidence is not sufficiently coherent or reliable to found a conviction.

Secondly, the Bill would allow a person to be convicted where the injured party had not given any evidence before the court of trial. If the witness is under 17 years of age and has given evidence on deposition at a preliminary examination, the video recording of such evidence may be admitted at the trial. This is a revolutionary provision, which completely alters the nature of the trial process. Its only effect will be to confine the cross-examination to the District Court. But is cross-examination during a preliminary examination any less traumatic for a witness, than at the actual trial? If the injured party is under 14 years and has made a statement to an "appropriately qualified" person, the video recording of this statement may be used at the trial, even if the injured party is not available for cross-examination, provided that the video recording was considered by a Judge of the District Court at the preliminary examination. Of course, there is a "safety clause" written into the section which prevents the evidence being admitted if the court is of the opinion that in the interests of justice it ought not to be admitted. However, the Committee is of the view that a provision that would allow a person to be convicted of a serious offence without any opportunity of cross-examining the principal witness at the actual trial has failed to strike the correct balance between the prosecution and the defence.

". . . a provision that would allow a person to be convicted of a serious offence without any opportunity of cross examining the principal witness . . . has failed to strike the correct balance."

Thirdly, some of the provisions of the Bill will have a retrospective effect. Thus, an accused who is charged at present with a relevant offence would be subject to the provisions concerning "video recorded statements" of an injured party under 14 years of age, once the Bill becomes law. The Committe accepts that procedural amendments in the field of criminal law can have this retrospective effect. However, it is suggested that the sections dealing with "video recorded statements" introduce very substantial changes having an adverse effect on the position of an accused and should therefore not apply retrospectively.

Business Records
The provisions of the Bill in relation to the admission of business records are also quite complex. In outline, what is suggested is that information contained in a business record may be admitted, without oral testimony, if it meets certain statutory requirements. These requirements may be proven by a certificate from the manager or other person associated with the business. The opposing party (usually the accused) may serve a notice of objection not later than seven days before the commencment of the trial in which event, he is entitled to object to the admissibility of the evidence without

the leave of the court. In addition, the certificate can no longer be relied upon and oral testimony of the matters set out in the certificate is required. Although the Bill deals primarily with business records, it also extends to the evidence of a Garda photographer or mapper, medical evidence in relation to the examination of a living or dead person and statements made by non-residents in the presence of a judge of the District Court. These last statements are considered to be made in the "ordinary course of the business" of the judge.

The Committee is of the view that this concept might be seen to be an affront to the position of the judiciary. In addition, it is to be doubted whether it is part of the ordinary business of a judge to be present when a statement is taken *ex parte* from a witness in a prospective criminal trial. However, assuming the provision can be operated, it could allow for quite contentious evidence of non-residents to be introduced without any right of cross-examination.

Many of the points made by the Committee in relation this Part were of a technical nature. Indeed, a criticism could be made that some of the provisions are overly technical and complicated. It remains to be seen how they will work in practice. Thus, it is not clear whether the provisions are confined to cases where the person who supplied or compiled the original business record cannot now be located or cannot recall his involvement in the supply or compilation of the record. However, a particular criticism was that some of the safeguards did not extend to trials in the District Court. There is no statutory requirement to serve advance notice of the relevant documents at such trials, nor is there a provision for the service of a notice of objection. The Explanatory Memorandum states that in summary proceedings any prejudice to either party by lack of notice or inadequate notice can be avoided by an adjournment. This is a very large assumption indeed. Furthermore, it ignores the practice that has built up since the *Cowzer* cases of the prosecution serving statements in advance on the defence. Unless, as a matter of practice, copy documents and certificates are served on the defence in advance, trials in the District Court will inevitably be adjourned, at great cost and expense.

Nonetheless, there is much to applaud in the Bill. That practitioners have been involved in the legislative process, and that such involvement has been welcomed, is a new and encouraging development. That criminal procedure and evidence is being looked at in a comprehensive way and that reforms are taking account of the changes in technology and in the social sciences is to be welcomed. However, no one needs reminding that, as the recent history in our neighbouring jurisdiction shows, some developments in science and technology in the forensic field may, with the passage of time, be seen to be of questionable worth. □

Criminal Law Committee

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Building Contract For "Once-off" Houses

The Conveyancing Committee had considered preparing a standard building contract for "once-off" houses but decided that the existing building contract with amendments is sufficient to deal with the "once-off" house.

The Committee suggests that the contract be amended by attaching a separate page to the existing document in the following form:-

1. The provisions of Condition 6 herein and Condition 10 herein shall not apply to this contract.

2. If notice has been served on the Contractor by the employer pursuant to Condition 5 hereof, then and in any such case, the following provisions shall take effect, without prejudice to any other remedies the employer may have against the Contractor pursuant to the terms of this agreement, at Common Law, or by statute:-

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Care should be taken by solicitors acting for the employer to ensure that the matters here have been carefully considered before the contract is entered into.

1. **Plans and Specification**

Plans in this context mean at least a house plan and a site layout plan. They should include sections and elevations as well. The specification should set out in writing in exact detail what materials, fittings and standards the builder is to use in the construction of the house. Plans and specification of a very general nature are not suitable for a once-off house. The sort of items that require to be detailed include:-

(a) finishes;

(b) allowances for wallpaper, sanitary ware and fireplaces;

(c) extent of tiling in bathroom and kitchen;

(d) boundary wall, fences, site works;

(e) central heating or back boiler;

(f) immersion heater;

(g) insulation;

(h) septic tank/soak pit.

The plans and specification should be in duplicate. Both should be dated, signed and initialled by both parties for the purposes of identification. One copy of each is then retained by each party. If plans and/or specification are not in order and the facilities to have the plans revised or the specification redone are not readily available then the best way of dealing with the matter is to add a list of the points giving as clear and accurate a description of the corrections as is possible and this note should be signed or initialled by both parties.

2. It must be clearly specified who is responsible for seeing that the site layout and the position of the dwelling and septic tank are in accordance with the plans approved by the Planning Authority. A standard requirement on any mortgage or site is a certificate from an architect or engineer that the house has been built in accordance with the planning permission. Some banks and building societies also have special requirements that a suitably qualified architect or engineer must check the house in the course of construction at certain crucial stages. For example they require that the foundations be checked before the concrete is poured etc. It must not be assumed that all architects or engineers will automatically give these certificates. The form the building society requires should be obtained and a copy given to the architect or engineer before work starts to make sure he or she is willing to undertake this commitment.

3. If the builder is arranging for the planning permission (and if relevant the building bye laws approval) then it would be normal for him to procure a certificate of compliance with the planning permission and to furnish the necessary certificate after completion.

4. **Possession**

Condition 1 of the agreement provides that the employer will give the contractor possession of the site. It is vitally important that an employer should not commit himself in an agreement to do this unless he is already the owner of the property.

5. **Site Conditions**

It must be clear what site works the contract price includes. If a lot of earth removal has to take place before building can commence is this included in the price? If the contractor encounters unexpectedly difficult ground conditions such as a soft spot and has to go down seven foot into the ground for foundations it should be clear who is to pay for the extra cost of this work.

Contractors, particularly those who construct a large portion of the building off site, frequently give a quotation without inspecting the site on the basis of a site being reasonably level and soil conditions being normal. Both parties to a building agreement should take great care that the position in relation to the costs of such works is clearly set out in writing.

6. It frequently arises in relation to once-off houses that the parties agree that the employer will arrange to have certain parts of the completion of the house, such as the wiring or plumbing carried out by himself or some other contractor on his behalf. If such an arrangement is made the terms of it should be confirmed either in the agreement or by letter. In particular, it should provide that the contractor shall be entitled to give the employer written notice if the failure to complete any work is causing delay and should provide who is to be responsible for any loss as a result of any such delay.

7. **Payment**

Practices vary as to how payment for the contract is to be made. All that is essential is that whatever payment schedule is agreed between the parties be clearly set out in the schedule of the agreement. Provisions should be made for interest on late payments and for a retention to cover defects appearing after completion.

Please photocopy this practice note and file for reference.

Conveyancing Committee

Standard Form Bank Debentures

Solicitors acting for borrowers are frequently presented with forms of debenture or mortgage debenture which are intended to secure their clients' liabilities to the lending bank. The solicitors should advise the client on the nature of the commitment to follow from the client's execution of the debenture.

In many cases these debentures are pre-printed and include provisions which are not appropriate to the particular loan.

In considering whether the debenture is in an appropriate form, the solicitor should have sight of the bank's loan to the client. The debenture should not do any more than enable the bank to take security in the form agreed to by the client. In certain forms of debenture the bank in addition to taking a floating charge will also seek to take a fixed charge over future acquired assets. Apart from the consideration of the validity of such specific provisions, particularly relating to future acquired registered land, the facility offered to the client by the bank may not in the first instance have provided for such a charge. The solicitor should protect his client from executing a debenture which reserves to the bank security over and above what was provided for by the bank in the loan offer letter and accepted by the client.

Conveyancing Committee

VAT on Property Transactions – A Word of Warning

The Conveyancing Committee has been contacted by a number of practitioners who have encountered difficulties in the area of Value Added Tax on property transactions.

One such difficulty arose where a vendor's solicitor inserted into a contract for sale the usual clause which provided that the purchaser would pay to the vendor any Value

Property transactions – practitioners have encountered difficulties with VAT.

Added Tax which would be chargeable upon the transaction. The purchaser's solicitor, acting in good faith and upon production of what appeared to be a valid VAT invoice, paid to the vendor's solicitor at closing the amount of VAT sought only to have his claim for a refund of this VAT disallowed by the Inspector of Taxes later on the grounds that VAT should not have been charged on the transaction in that particular case because it related to the sale of a business as a going concern.

Quite clearly, it is not safe to assume that if one pays VAT on foot of an invoice bearing all the usual characteristics that a refund of such VAT will automatically issue. A claim for a refund might well be refused on the grounds that the particular transaction, for any one of a number of reasons, might be one which does not give rise to a VAT charge.

The Committee recognises that the question of whether VAT should or should not be chargeable on a particular transaction is a complex one and often depends on factors which a purchaser will not be able to ascertain. In the light of this, the Committee has made representations to the Inspector of Taxes and the Inspector, in recognising the difficulties, has suggested that purchasers' solicitors might contact the Inspector and show him the particular invoice on foot of which payment is sought so as:-

(a) to get a direction as to whether the particular transaction gives rise to a charge for VAT, and

(b) to ascertain whether a refund will be forthcoming without problems if payment is made on foot of that invoice.

Accordingly, the Committee recommends that practitioners should, in a situation where they are in any way doubtful, contact the Inspector of Taxes as outlined. The Committee has been assured of prompt attention on all such enquiries.

Conveyancing Committee

Derelict Sites Act, 1990

The Professional Purposes Committee wishes to bring to the notice of the profession the provisions of Section 29 of the above Act.

Sub-section (1) provides that any person who is the occupier of any structure or land receiving rent (whether for himself or for another) must give particulars to the Local Authority including the name and address of every person who to his knowledge has any estate or interest in the property.

Sub-Section (2) provides that where property has been entered on the Register of Derelict Sites then, in the case of a sale, it is the duty of both vendor and purchaser to notify the Local Authority of the transfer not later than four weeks after the date of the transfer.

Under Sub-Section (3) where a person obtains a derelict site by will or on intestacy the obligation is placed both on the personal representative and the beneficiary to notify the local Authority as to the ownership, not later than six months after the date of the transfer.

Section (8) of the Act provides that the Local Authority shall keep a register at their office of land in their area designated as Derelict Sites and this register shall be opened for inspection at the Local Authority Offices during office hours.

Professional Purposes Committee

Retention Tax Deduction from Gross Fees inclusive of VAT

An exchange of correspondence has taken place between the Law Society Taxation Committee and the Revenue Commissioners on the retention tax deduction from gross fees inclusive of VAT.

The chairman of the Law Society Taxation Committee, *Laurence Shields,* wrote on 28 April, 1992 to *Dr. Don Thornhill,* Assistant Secretary, Capital Taxes Branch, as follows:

"I refer to our recent meeting when we discussed a number of matters including the Retention Tax on Professional Fees. You will recall that at the meeting we expressed concern that no allowance was given until the following tax year for the deduction which places practitioners at a considerable disadvantage. You indicated that in the present tight financial circumstances there was unlikely to be any change in the current situation.

There is, however, one matter which is of concern in relation to the present operation of Retention Tax. The Law Society is concerned about the practice whereby Retention Tax is deducted from the gross fees inclusive of all outlays and VAT. It is submitted that the original intention was for the Retention Tax to be deducted from the fee element only of all costs and outlays due to solicitors in respect of work done for and on behalf of those bodies or institutions who are obliged to apply the Retention Tax.

We would be grateful, accordingly, if you would give serious consideration to amending the current practice."

The following response (dated 29 May) was received from Dr. Thornhill:

"I refer to your letter of 28 April, 1992 regarding the retention tax deducation from gross fees inclusive of VAT. I apologise for the delay in replying but I have been heavily involved with the 1992 Finance Bill.

The practice in relation to the retention tax is that VAT charged by a solicitor on his or her own fee should not be included in the total on which the retention tax is calculated and clear instructions have issued to accountable persons on that point.

The question of outlay is not within my area. This aspect of your letter is being dealt with by Mr. Eddie Dwyer, Taxes Secretariat, Dublin Castle, who will be in touch with you shortly."

Taxation Committee

Gifts and Inheritances Between Spouses

Since publication of the Practice Note in the June 1991 issue of the *Gazette* it has come to the attention of the Taxation and Conveyancing Committees that the Revenue Commissioners take the view that notwithstanding the provisions of Section 127 of the Finance Act, 1990 there are circumstances where a charge to CAT may arise in a gift between spouses, or as a result of a prior gift between spouses.

Section 8 of the Capital Acquisitions Tax Act, 1976 provides where a donee takes a gift from a disponer and within three years a further disposal of the gift takes place the beneficiary of the second gift is deemed to take the gift from the original disponer.

For example, if a parent gives

property to his son who subsequently transfers the property into joint names of himself and his spouse within three years of the first gift, the Revenue Commissioners have made it clear that they may regard this latter transaction as a gift between parent-in-law and daughter-in-law, to the extent of half the property.

Furthermore, if a wife gives property to her husband, who subsequently transfers the property into the name of his parents within three years of the first gift this latter transaction would be deemed to be a gift between daughter-in-law and parents-in-law.

Section 8 only applies to gifts and is an anti-avoidance provision.

In the context of family settlements one must be wary of any inter vivos disposals within three years of the proposed disposal, as these may be caught by the provisions of Section 8 of the Capital Acquisitions Tax Act, 1976.

To avoid the provisions of Section 8 one must either await the elapse of the three year period or in the alternative dispose of the property by will.

This anti-avoidance provision also relates to gifts made within three years before the date of the gift. It may be possible that the Revenue Commissioners may accept that the subsequent gift does not come within the provision when the subsequent gift was not connected with the first gift.

Taxation Committee

Statutory Instruments: Public Procurement

Statutory Instruments No. 36-38 of 1992 implement European Community rules on public works contracts, public supply contracts, and the review procedures applicable to the award of such contracts. The Community rules in question are designed to end discrimination by public bodies in favour of domestic suppliers and thus to allow open competition in public procurement markets among suppliers from any part of the EEC.

1. Statutory Instrument No. 36 (Public works contracts)

This gives effect to the Council Directives concerning (i) the co-ordination of procedures for the award of public works contracts to which the Directives apply, and (ii) the abolition of restrictions on freedom to provide services in respect of public works contracts.

Contracting authorities must comply with the Council Directives which set out the tendering procedures to be followed for public works contracts, and the criteria to be followed by the authority when awarding the contracts on the basis of the tenders received. Any provision laid down by law, regulation or administrative action, which imposes or permits discrimination on the basis of nationality is now abolished. The use of technical specifications in advertisements to tender which have the effect of favouring or eliminating certain undertakings or products is prohibited.

The SI also stipulates that contracting authorities must state in their contract the source from which the tenderer may obtain information as to the applicable employment protection provisions.

Professional advisers may be asked about the procedures to be followed in respect of public works contracts, either by Irish clients who wish to tender abroad, or by foreign clients who wish to tender for such a works contract here.

2. Statutory Instrument No. 37 (Public Supply Contracts)

This gives effect to the Council Directives concerning the co-ordination of procedures for the award of public supply contracts to which the Directives apply. It provides that contracting authorities must follow the procedures for awarding such contracts set out by the Directives and may not discriminate against non-national suppliers. They must also ensure that technical specifications are not used so as to discriminate against particular undertakings or products.

3. Statutory Instrument No. 38 (Review procedure for the award of public supply and public works contracts).

This implements Directive 89/665 which aims to oblige Member States to provide sufficient remedies under national law to those who have suffered as a result of a breach of the public procurement rules set out in the other Directives. The Directive emphasises that decisions taken by bodies responsible for review of procedures must be capable of being effectively enforced.

To this end, the body responsible for reviewing procedures in this jurisdiction is to be the High Court. The High Court may order interim measures to correct the alleged infringement or to prevent further damage, where such measures would have a beneficial effect.

The High Court may also, where appropriate, set aside unlawful decisions, by declaring a contract, or a provision of it, to be void, or by declaring that the contract shall have effect only subject to such variation as the court shall think fit.

It may also award damages to any person harmed by an infringement, where it considers this appropriate.

This review procedure seeks to maximise the effectiveness of the Community rules on public procurement with respect to public works contracts and public supply contracts. Any aggrieved client who feels that he has been deprived of a contract through an incorrect application of these rules should be advised of the possibilities offered by this procedure.

It should be remembered that clients also have the option of a direct complaint to the European Commission which may decide to initiate proceedings against the Member State if it considers that the state in question has failed in its duty to ensure the full application of Community rules on public procurement.

EC/International Affairs Committee

A Profession . . . If We Can Keep It

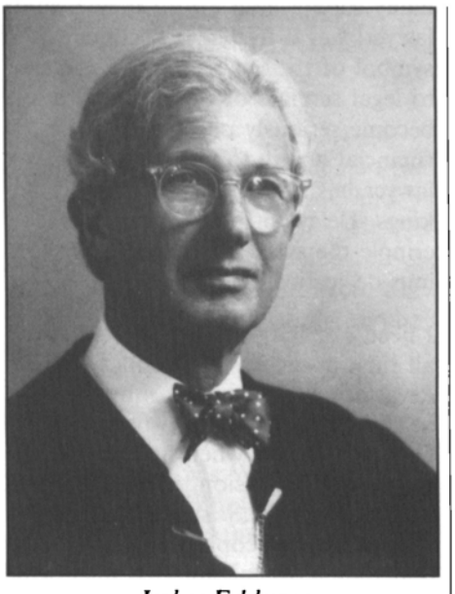
The Honorable Martin L.C. Feldman, United States District Judge, was a member of a delegation from New Orleans which visited Ireland as guests of the Dublin Solicitors Bar Association. In the course of a speech to the DSBA he raised some pertinent questions about the future of the profession.

You have no doubt received some of the finest education on this planet. You belong to an ancient and honoured profession and I assume you view that profession as having a high social purpose. For it is the Law which is the centerpiece of western civilization.

And so I write here about a subject which has long been simmering within me over the years I have been a Federal Judge . . . the incipient peril, as I view it, that our profession, in America and perhaps in Ireland too, is becoming something else. A business. That lawyers in America are gradually but steadily paying more attention to bottom lines, billable hours, and marketing techniques, than to their public responsibilities, to how their work enhances social institutions and our quality of life and to their obligations as officers of the court and of loyalty to the client. It is important that you consider these comments if the same environment exists in your country. But it is even more important that you consider them, if you have thus far escaped the recent American experience, to guard against its occurrence.

What, exactly, is it that makes a profession different from other endeavours?

The famous Dean Pound of Harvard Law School once defined "profession" as "the practice of a learned art in the public interest".



Judge Feldman

Recently, another famous American lawyer, Dean Griswold, intoned a clairvoyant admonition when the Dean told a group of lawyers, "We have a profession – if we can keep it." Like Dean Griswold, I believe that our profession is losing sight of its purpose, losing the identity of its soul, ignoring its higher sense of calling. Lawyers, it seems to me, are forgetting that the Law is not any less a profession simply because lawyers must earn a living. It is appropriate, therefore, that you as my professional colleagues should be asked to never ignore the fact that you pursue a Learned Art, in Dean Pound's famous words, and that you are not managers of a commercial company; that you act daily in the Public Interest, not out of personal gratification but in the interest of strengthening the very foundation of orderly societies. Those are not hollow words, unless you let cynicism contaminate their meaning. You see, you are not just mere profit centres for law firms who are competing to record the most billable hours for a given month in order to receive two tickets to the next local soccer match; you are lawyers, obliged to resolve (some in court, some out) conflicts for clients; often implicating issues that bind the very core of the hope for civilised existence; and in the process you and only you keep those conflicts off the streets and from the battlefields. You are why we no longer rely on trial by battle, or trial by ordeal, or wager of law with all its archaic mechanisms.

We lawyers are different. In Ireland and in America. Maybe that's why we always seem to be under the higher scrutiny of others. Lawyers have given nations more presidents, public servants, statesmen, philanthropists, charitable and community leaders, than any other calling on Earth. I think we have done so because of an implicit understanding of the importance and meaning of the professional oath. Although currently fashionable aggressive marketing techniques in my country used by some lawyers would take the contrary view, I can assure you that you need not become the head of a charity board, for example, to get clients . . . you need to be a good lawyer and a good person. It is just as simple as that.

Not terribly long ago, the spectre of Bhopal, with hordes of lawyers literally swarming all across a country soliciting cases on the backs of those miserable victims, sadly painted for the public worldwide a vivid and ugly picture of lawyers as parasites, not as leaders and role models. From my vantage point, the symptoms I see are widespread. Solicitation, of the Bhopal strain, is only one malady which has infected our profession. Another, in America, is advertising, which in my judgment creates hucksters, not lawyers. The American system is under attack with some in respectable quarters arguing that the attack is deserved, including the Vice President of the United States, himself a lawyer. Who can deny that too many lawyers bring too many disputes into too

many courts when those disputes have no place in court whatsoever? The cost in terms of money, and more seriously, emotion, is too high to litigants and to society.

"Solicitation, of the Bhopal strain, is only one malady which has infected our profession. Another . . . is advertising, which . . . creates hucksters, not lawyers."

Access to legal services in my country has become too costly, partly as a direct result of the timesheet mind-set, and diminishing attention to the quality of one's work. In America, many law firms assign annual mandatory quotas for hours billed. Lawyers who do not meet such quotas face reduced careers, at best. How often do senior lawyers take the time to tutor a firm's young associate? To nurture their sense of professional pride? To recall that law firms were once and should still be institutions of continued learning and scholarship? To look upon themselves as mentors, not bosses?

The sceptic's predictable reaction to these comments is going to be to feel uncomfortable; to want to disregard them and say to yourselves, "It won't happen here" or "Well, all he is is a former lawyer who is now a Federal Judge in America telling us not to do those very things which he himself did before he was appointed by the President of the United States". But, before you reject these comments, let me ask you to measure them by a simple test: How many of you could actually afford your own services, if you ever needed a lawyer and were on the losing side of the case? I have a hunch that secretly most of you know that you could not. In America many cannot even afford their own lawyer! Legal fees have become a symbol of the lawyer's greed. Access to legal services of our citizens, has become seriously obstructed; the financial ability to afford today's lawyer has largely become a sport of kings. Delays in resolving disputes cripple the system and serve only to impede justice.

I need not tell you that the effect of all this on professional ethics can be devastating. All lawyers must agree to that. I think that is what Dean Griswold meant when he said that we have a profession, if we can keep it. In a recent U.S. survey, 86% of the American people questioned said that they have encountered unethical lawyers. Now, the accuracy of that statistic is not what is significant in my mind. What is significant is the fact that 86% of people surveyed *believe* and *have the perception* that they have encountered unethical lawyers. 88% said that they encountered unqualified lawyers. I am concerned about the erosion of the professional status of lawyers in the public mind, and about our own professionalism toward our work ethic. I would remind you that this occurs, ironically, at a time when our profession is getting new importance and dignity in Eastern Europe, where the focus on freedom is now intense.

Simply stated, we are not keeping our profession. We are becoming just another variety of business. The Law should be a market place for ideas, in all countries, not an assembly line for the disposition of client files to meet some annual arbitrarily established income expectation.

"The Law should be a market-place for ideas in all conutries, not an assembly line for the disposition of client files. . . ."

It looks to me as though the focus of our profession has shifted away from client concerns and has moved more to profit motives. The fire of our zeal for the client's welfare is out.

Worse, really worse, I find that today more and more lawyers, in my country at least, have let themselves become the combatants in the dispute, not the clients (whose problems then get lost in the personal turbulence between their advocates). Let me stress that I can think of nothing more demeaning to the profession or diminishing of our precious system, whose only goal is the search for truth and the administration of fairness to all. Lawyers, in short, must be problem solvers . . . not problem creators. The deterioration of our sense of professional self has contributed largely to the growing surliness among lawyers, in court and at the conference table.

(Continued on page 223)

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DDE No. 98

by Eamonn G. Hall

Non-disclosure by Prosecution Resulted in Miscarriage of Justice

The case of *Regina -v- Ward,* Court of Appeal (England and Wales), (*The Independent,* London, Law Report, June 5, 1992) (*The Times*, Law Report, June 8, 1992) will go down in history as an important case for many reasons. One reason why the case will be remembered is for the celebrated dictum of the judges: "Our law does not tolerate a conviction to be secured by ambush." That dictum applies equally to Irish law.

The Court of Appeal (Glidewell, Nolan and Steyn, LJJ) held that non-disclosure of material evidence by the West Yorkshire Police, by staff of the DPP and counsel who advised them, by the psychiatrists who prepared the medical reports on the appellant, and by the forensic scientists who gave evidence for the prosecution at the trial constituted material irregularities at the appellant's trial.

The Court of Appeal quashed the convictions of Judith Teresa Ward, of 4 November, 1974, for 15 counts relating to bomb explosions in 1973 at Euston station, and in 1974 on a coach on the M62 and at the National Defence College, Latimer, Buckinghamshire.

The prosecution case had been based on voluntary admissions made by Ms Ward to the police and scientific evidence that traces of nitro-glycerine were found on her and her property. The defence had challenged the scientific evidence and its case was that Ms Ward was a pathological liar, a female "Walter Mitty."

On the Home Secretary's reference under section 17(1) (a) of the UK *Criminal Appeal Act, 1968,* three main grounds of appeal were argued:

(1) non-disclosure of material evidence to the defence which amounted to a material irregularity;

(2) evidence which cast doubt on the scientific evidence at trial; and

(3) fresh evidence establishing that Ms Ward was suffering from a severe personality disorder at the time of the trial.

After hearing the fresh medical evidence, the Court of Appeal concluded that Ms Ward's admissions could not be relied on as being true and on that ground alone her convictions were unsafe and unsatisfactory.

The Court of Appeal read the 139 page judgment in turn and stated that the failure of the prosecution to disclose to the defence evidence which ought to have been disclosed was an "irregularity in the course of the trial" within section 2(1) (a) of the UK *Criminal Appeal Act, 1968.* Non-disclosure was a potent source of injustice. The duty to disclose all relevant evidence of help to the accused was not limited to evidence which would obviously advance the accused's case.

The Court stated that where public interest immunity was raised the court and not the litigant must be the ultimate judge of where the balance of public interest lay. If, exceptionally, the prosecution were not prepared to have that issue determined by a court, the prosecution would have to be abandoned.

In their judgment, the judges stated that the West Yorkshire Police took statements from more than 1,700 people. Only 225 were forwarded to the DPP. The court concluded that this was wrong. The relevance of the West Yorkshire Police statements, including interviews with Ms Ward, lay in their bearing on Ms Ward's proclivities for attention seeking, fantasy and the making and withdrawal of untrue confessions.

Certain police interviews with Ms Ward were not disclosed by the DPP to the defence on the advice of counsel. Their non-disclosure and that of medical reports amounted to material irregularities.

Three senior government forensic scientists, stated the court, deliberately withheld experimental data on the ground that it might damage the prosecution case.

An incident of a defendant's right to a fair trial was a right to timely disclosure by the prosecution of all material matters which affected the scientific case relied on by the prosecution, that is, whether such matters strengthened or weakened the prosecution case or assisted the defence case. That duty existed whether or not a specific request for disclosure was made by the defence.

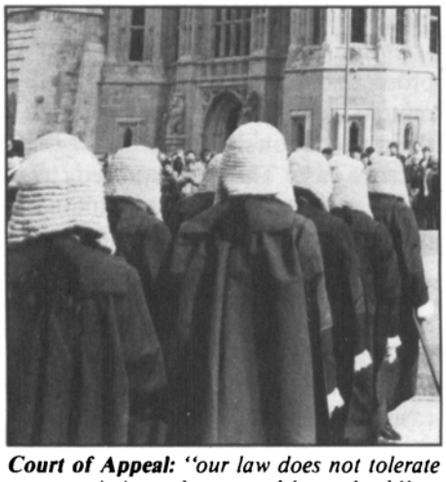
The Court stated that that duty was continuous: it applied not only in the pre-trial evidence but also throughout the trial. In Ms Ward's case, the disclosure of scientific evidence was woefully deficient. Senior government forensic scientists knowingly placed a false and distorted scientific picture before the jury, according to the judges. That irregularity would have required the court to quash Ms Ward's conviction. The judges then stated that the law did not tolerate a conviction to be secured by ambush.

The Court of Appeal stated the cause of injustice on the scientific side of the case stemmed from the three government forensic scientists becoming partisan. It was the clear duty of government forensic scientists to assist in a neutral and impartial way in criminal investigations.

There must be proper understanding of the nature and scope of the prosecution's duty of disclosure. The Court referred to the *Crown Court (Advance Notice of Expert Evidence) Rules 1987* which were not exhaustive: they did not supplant or detract from the prosecution's general duty of disclosure of scientific evidence. That duty extended to anything which might arguably assist the defence. It was wider in scope than the rules.

The Court stated that given the undoubted inequality as between prosecution and defence in access to forensic scientists, it was of paramount importance that the common law duty of disclosure should be appreciated by those who prosecuted and defended in criminal trials.

Summarising the principles which at present governed the disclosure of evidence by the prosecution before the trial, the Court of Appeal stated



Court of Appeal: *"our law does not tolerate a conviction tobe secured by ambush".*

that, inter alia, the duty to disclose should normally be performed by supplying copies of witness statements to the defence. All relevant experiments and tests must be disclosed. Nothing in the *Attorney General's Guidelines* (1982) 74 Cr App R 302 derogated from those legal rules.

The Court concluded that those responsible for the prosecution failed to carry out their basic duty to seek to ensure a trial which was fair both to the prosecution, representing the Crown, and to the accused. The court greatly regretted that, as a result, a grave miscarriage of justice had occurred.

Domestic "Skivvy": Liability of Employers in Tort for Intimidation

The tort of intimidation has been employed in a unique set of facts in the case of *Godwin -v- Uzoigwe, (The Times,* Law Report, June 18, 1992). In *Godwin*, the Court of Appeal (England and Wales) (Dillon, Stuart-Smith and Steyn, LJJ), held that a couple who brought the respondent aged 16 from Nigeria to England and used her as a domestic drudge or skivvy for two and half years, requiring her to work excessively long hours without money and without allowing her proper food, clothing and social intercourse were liable in tort for intimidation.

The Court of Appeal held that the couple were in loco parentis to the respondent and their duty of care included a duty not to require her to work excessive hours so that her health did not suffer. Dillon LJ said that Dr Uzoigwe was registrar anaesthetist at Pontefract General Hospital and his wife was the holder of a post-graduate diploma in education and was preparing a thesis on the education of women and girls in Nigeria. They had five children.

In December, 1985 or January, 1986 the respondent's father had agreed that she should accompany them to England in return for payment of medical expenses to her mother and she had entered in 1986 as a visitor for three months. The Court stated that Dr Uzoigwe had later applied for an extension of her stay, describing her to the Home Office as his niece. He had described his object in bringing her to England as charitable.

The respondent had remained with the family until 1988. In August and September of that year the appellants and their family had gone away on holiday, leaving the respondent at their home in Sheffield. Two neighbours had befriended her while they were away and because of what they found had called in an officer of the National Society for the Prevention of Cruelty of Children.

Dillon LJ stated that the basis of the respondent's claim was that for two and a half years in the defendants' house she was a household drudge and virtually a slave. She was beaten if she did anything that displeased the Uzoigwes and lived in constant fear of upsetting them. She had no more than the minimum of clothing for comfort, was given no money and the defendants knew she had no financial resources. When the defendants found she had misbehaved she was beaten or made to kneel in the bathroom and not move until she was told to do so. In general, stated Dillon LJ, the respondent had stayed within the house. There was no suggestion that at any stage the appellants had made any attempt to allow her to meet other people. The appellants had made it clear they would not tolerate her acquiring friendships and gave her no opportunity to do so. They had deliberately used their dominant authority over the plaintiff so as effectively to control her.

Intimidation was intentional unlawful coercion, according to Dillon LJ. The appellants had intimidated the respondent into working excessive hours, going without personal freedom and without the training in domestic science they had contracted with her father to provide. Being in loco parentis the appellants had unlawfully abused their parental control and exerted their authority to prevent the respondent from having any contact with people outside their house and in particular any social intercourse with her peers.

Stuart-Smith LJ agreeing, said that the trial judge had found that on many occasions the respondent was beaten with a stick and slapped. Those assaults were sufficient in themselves to justify the conclusion that the tort was made out. The whole situation in which the respondent found herself was an intimidatory one. The relationship

was such, according to Stuart-Smith LJ, that the appellants owed her a duty of care including a duty not to require her to work excessive hours so that her health did not suffer. The actual tort of negligence was not made out as there was no evidence that her health did in fact suffer. But on the facts found by the trial judge there were breaches of those duties.

There were implied terms in the contract that the respondent should not be required to work excessive hours, should be provided with adequate food and clothing and should have reasonable opportunities for social development, including the study of domestic science.

In addition to the actual physical assaults, which were not serious but must have been painful and humiliating (according to Stuart-Smith LJ), the respondent was treated as a drudge and skivvy, inadequately fed and clothed and required to sleep on the floor. She was deprived of normal social intercourse and effectively through fear confined to the house and garden for two and a half years.

The Court of Appeal reduced damages for breach of contract, assault and intimidation from £25,000 to £20,000 but ordered the appellant to pay the costs of the appeal from the County Court.

Steyn LJ agreed.

The Voice Typewriter

At the ninth annual Solicitors' and Legal Office Exhibition held recently in London, ASA-VoiceWriter Limited (Knightsbridge, London), introduced its system called DragonDictate which turns a personal computer into a voice-driven word-processor. Personal computer users who cannot or do not want to type can create letters, memoranda, reports, documents and free text by speaking instead of typing.

The system is operated by speaking into a microphone instead of typing at the keyboard.

The question was asked – what if I say a word that the system doesn't know – like unusual names, rare words and invented words. The system apparently would think you said something else, so one has to type in the correct word and the system, i.e. DragonDictate, adds it to its vocabulary. The next time one says the word, it will be there. If you do not want it typed, you spell the new word by voice.

A question often posed is what if the speaker has a strong accent. The answer was that as long as you speak consistently, the system will learn your accent and manner of speaking. You don't have to speak "RTE English" to use the system. It was said that one DragonDictate user was a lawyer with cerebral palsy. Previously he had been dependent on secretaries to transcribe his dictation. Now he uses DragonDictate. For the first time in over fifteen years of practice he is able to work on his own, to complete work from start to finish.

Other persons can use the system. Each speaker has a personal speech file. When you identify yourself to the computer, it knows who is talking.

Lawbrief cannot vouch for this latest system of technology: we live in exciting technological times. □

A profession . . . if we can keep it

(Cont'd from page 220)

I do not set down these thoughts today to merely catalogue a litany of gloom. Hopefully, you do not suffer my dilemma. And it is not my purpose to say that lawyers should sacrifice personal goals of financial success or that there is even something unworthy about such goals. There is not. For it is financial success which can give each of us the freedom and time to address the public dimension of our profession, and the needs of our communities. But a new balance must be struck; a renewal of the centrality of some of our profession's traditional values must be awakened.

So I do ask you to ever remember to instill and recall always within yourselves those high standards of our precious craft and the endemic vitality of the public trust impressed upon lawyers of all free nations which for centuries have ennobled our ancient calling and which will be remembered long after our word processors and time sheets are relegated to history's junk pile.

Lawyers must reach for decision, not delay; we must strive for comity, not contentiousness; we must build for usefulness and public service, not triviality or mean pettiness; we must maintain a proportion and balance between means and ends, and between the service we render and the fee we charge. During your successes you must be vigilant to the uncertain morality triggered by advertising and solicitation (if you don't now have it, be vigilant against it); to the cost of litigation to client and society; to speedy and fair alternatives to dispute resolution; to the access to lawyers' services by all components of your community; and, pivotal to all else, to personal ethics and self discipline.

Lawyers belong to a select group. In a sense, because your art requires confidence and unquestioned trust, your calling is close to being a holy one. People rely on you; cities, institutions, sometimes nations rely on you. That is what makes lawyers different.

But you must earn that responsibility and the right to discharge it well.

How does one go about achieveing this awesome goal? With ideals.

□

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PEOPLE AND PLACES

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At the Roscommon Bar Association Dinner Dance held on 22 May, 1992, l-r: Anthony McCormack, County Registrar; Judge Bernard Brennan; Brian Neilan, President, Roscommon Bar Association; Adrian P. Bourke, President, Law Society; Judge Peter A. Connellan, Judge Oliver McGuinness and Brian O'Connor, Secretary, Roscommon Bar Association.

At the presentation of a cheque of the proceeds of solicitors' voluntary contributions to the Free Legal Advice Centres were l-r: Adrian P. Bourke, President, Law Society; Moya Quinlan, Council Member, Law Society; Iseult O'Malley, Chairperson, FLAC and Sabha Green, Information Officer, FLAC.

At the presentation of parchments on 19 June, 1992: l-r: Sinead Glasgow, winner of the Guinness & Mahon Prize (Capital Tax) 28th Professional Course; Martin Lanigan-O'Keeffe, Director, Guinness & Mahon; Brenda Agnew, Education Officer, Law Society, who will be leaving the Society at the end of July; Paula Mullooly, winner of the Guinness & Mahon Prize (Capital Tax) 27th Professional Course.

The cup winners (Kent Carty & Co.) at the Younger Members Soccer Blitz held on 23 May, 1992 l-r: Desiree Foster, George Roche, Adrian Taheny, Marketing Manager, Educational Building Society; Emmet Carty, Gavan Carty, Breege Ginty, Mary Doherty, John Gilligan and Cathy Doyle.

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At a dinner held by the North and East Cork Bar Association on 12 June to mark the appointment of Terence Finn as a Judge of the District Court were, front row l-r: Neil Corbett, Deirdre Lucey, Donna O'Meara, Patricia Harney, President North and East Cork Bar Association; Breda Molan, Judge Terence Finn, Frances Finn, John Molan, Regina Nagle, Matt Nagle, Rita McCarthy and Miriam O'Keeffe. Back l-r: Geraldine Prendeville, Tim Lucey, Law Society Council Member; Michael Prendeville, Owen Binchy, Law Society Council Member; Conor O'Callaghan, Sandra Nyhan, Eimear Binchy, Donal Crowley, Frank Nyhan, Charlie O'Connor, Kevin O'Meara, Michael Shinnick, Jerry Healy, Ruth Condon, Denis Linehan, Eamonn O'Brien, David Keane, Eleanor O'Brien, Ann Dunphy, Mary Cronin, Paul Bradford TD.

34 Teams Compete in YMC Soccer Blitz

The mixed 7-a-side Soccer Blitz, organised by the Younger Members Committee of the Law Society, took place in Blackhall Place on Saturday 23 May last. The main aim of the Blitz is not only to encourage the participation of soccer teams from different offices but also to provide an occasion when a number of solicitors who might not encounter each other outisde office hours meet on a different playing pitch. A further benefit is the raising of funds for The Solicitor's Benevolent Society. This year was a great success in that 34 teams entered and it was also decided to run not only a Cup Competition but also a Plate Competition for the losers.

The day got off to a great start in that the weather was superb – unfortunately the same could not be said for some of the soccer exploits on the pitches! Play started at 10.15a.m. and continued until the final at 6.00p.m. There was great competition amongst the teams involved but the sense of fun was never lost.

A Tennis Tournament took place simultaneously and there were some 20 entries, the ultimate winners being Ruth Shipsey and Tony O'Grady with Laura Booth and Patrick Molloy as runners-up.

Throughout the afternoon superb rock and roll music was provided by Paddy Goodwin and his band. Creche facilities and refreshments were available all day and the players and spectators if they were not engaged in watching or participating in the football matches could sit down at their leisure and listen to the fine music, while soaking up the sun.

The two teams in the Final of the Cup – Dublin Corporation and Kent Carty – played a very close game, so close that it went to penalties, with Kent Carty emerging as eventual winners. In the final of the Plate, Reddy Charlton & McKnight played City Law, who were the victors in that game. Dermot Boyle and Adrian Taheny presented the prizes, both representing the Educational Building Society who were the very kind and generous sponsors of this tournament. We would hope for the repetition of this successful sponsorship venture by the EBS next year!

After the final whistle, the activities were not yet over – a disco was held in the President's Hall later that evening. It too was a great success, with hot music, and even hotter action on the dance floor (no names mentioned – you know who you are yourselves!). One excuse offered was the highly charged atmosphere which resulted in that night's thunder and lightning.

Finally, a word of thanks must be given to the great effort and the hard work which was put into the whole event, both in the organising and the running of the competition, by the members of the Younger Members Committee especially *Orla Coyne, Robert Hennessy* and *Joan Doran* (the secretary of the YMC) without whose help the event would not have been the success that it was. Also thanks must be conveyed to the number of referees who were roped into refereeing the matches at different stages during the day but who did so with great humour and without hesitation.

Roll on YMC Blitz 1993 – Olé, Olé, Olé!

□

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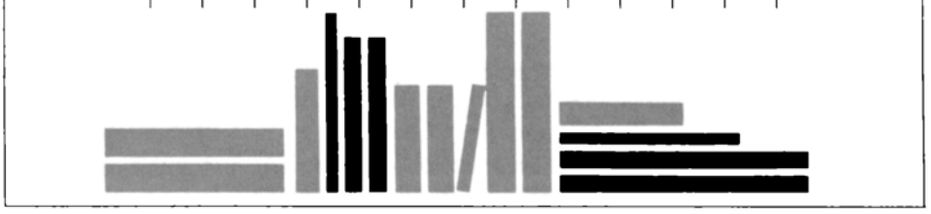
BOOK REVIEWS



Law Reform Commission Reports on Land Law and Conveyancing Law (LCR 39, 40 -1991) £6.00

As part of the Law Reform Commission's ongoing formulation of proposals for reform in conveyancing law and practice two further Reports have now been submitted to the Attorney General and have been published.

1. Passing of Risk from Vendor to Purchaser

The first report deals with the passing of risk from vendor to purchaser. As a lawyer one never felt comfortable advising a purchaser that if the property was destroyed between contract and completion the law was that he was bound to buy the charred remains. As the Commission states in its report "it is unsatisfactory that the law as to the passing of risk does not accord with the reasonable expectations of the ordinary person."

A few years ago the Conveyancing Committee of the Law Society did attempt to address the issue by providing in general condition 43 of the Incorporated Law Society Conditions of Sale that the vendor would be liable for any loss or damage to property between the date of sale and actual completion save where the purchaser had gone into possession prior to actual completion.

While the Commission applauds the general thrust of these provisions in the Law Society's Contract it recognises that all sales of land are not governed by clause 43 of the Law Society's Contract and that the law should be changed by legislation.

Briefly the Commission recommends that:-

(i) the risk will pass to the purchaser in all situations where the purchaser goes into possession of the premises or on completion of the purchase whichever is the earlier;

(ii) where the purchaser does not go into possession prior to completion the risk will remain with the vendor:
  (a) in the case of substantial damage the vendor must give notice of the damage to the purchaser whereupon the purchaser will have the right to rescind the contract within 10 days. If the purchaser elects not to rescind, or fails to do so, he will be entitled to an abatement of the purchase price to be assessed on the basis of the reduction in the value of the property. If the purchaser elects not to rescind, or fails to do so, the vendor will still be entitled to seek specific performance with an abatement of the purchase price;

  (b) where the purchaser accepts that the damage is substantial, or it is found on arbitration to be such, and agrees to complete or where it is agreed or held that the damage is non-substantial the purchaser is to pay interest to the vendor on the balance of the abated purchase price from the date of the damage or the agreed completion date, whichever is the later, up to the date of actual completion at a rate equivalent to the yield on the latest long dated government security ("the lower rate");

  (c) in the case of non-substantial damage to the property the purchaser will be bound to complete but shall be entitled to damages only on the basis of reduction in value;

  (d) where the purchaser claims that the damage is substantial and it is subsequently agreed or determined on arbitration to be non-substantial the purchaser shall pay interest at 4% above the lower rate;

(iii) the vendor would not be liable for consequential damage arising from reasonable wear and tear not materially affecting value;

(iv) there would also be special provisions for charging of interest in the event of damage occurring after a valid completion notice had been served by the vendor;

(v) parties would not be entitled to contract out of the legislation in the case of any sale of residential property where vacant possession is to be given on closing.

These proposals are to be welcomed and will hopefully be speedily implemented. They go further than the Law Society Contract in that they spell out the circumstances in which a purchaser may rescind. At present one cannot clearly advise a client as to his rights under contract in the event of damage. Is he still bound to complete after the vendor has made good the damage, complete subject to abatement of price or is the contract frustrated allowing him to rescind? These are questions which are never easy to answer. Under the Commission's proposals there would still be room for argument as to whether the damage is substantial or insubstantial. However, the provisions regarding interest may compel the parties to reach a fair and quick settlement of the matter on the hopefully rare occasion damage is caused to the property between contract and completion.

2. Service of Completion Notices

The second Report reviews at some length the law in England and Ireland on the question of completion notices. Because, as a general rule, equity did not regard time as being of the essence in contracts for the sale of land it has become common practice to provide in contracts for the service of 28 day completion notices. In respect of this 28 day period time is of the essence and failure to complete on that day amounts to a breach of contract.

It is long established that in order to serve a valid and effective completion notice the party serving it much have been "able ready and willing to complete the sale".

The Commission's Report primarily sets out to resolve the impractical consequences that may arise as a result of the Supreme Court decision in *Viscount Securities Limited -v- Kennedy* [Unreported 6 May, 1986 Decision of Walsh, Griffin and McCarthy JJ]. In that case, based on the Law Society's General Conditions of Sale 1978 Edition, the vendor served a 28 day completion notice. The purchaser failed to complete within that period and later contended that the completion notice was not a valid notice since at the time when the notice was served the vendor was not able ready and willing to complete the sale. On the date on which the completion notice was served and for some weeks previous to that date there was a large quantity of spoil on the lands which had been dumped, unknown to the vendor's solicitors, by Dublin County Council in the course of construction of a dual carriageway. The spoil had been removed in full 10 days after the completion notice was served and some 24 hours after the vendor's solicitors learned of its existence. The Supreme Court held that the completion notice was not valid as at the date of the service of the completion notice the vendor was unable to complete as the existence of the spoil on the land prevented him from giving vacant possession of the property on the date of the service of the notice.

This strict interpretation of what is meant by "able ready and willing" to complete the sale could cause a lot of practical difficulties for a vendor who may not have discharged mortgages or vacated the property on the date the notice is served. This problem has already been dealt with in sub-clause 40(g) of the Law Society's General Conditions of Sale (1991 Edition).

Basically the Commission's recommendation is that a statutory provision should be enacted to provide what is now contained in the Law Society's General Conditions of Sale. It goes slightly further in providing that the vendor, having served the notice, must himself be bound to complete within 10 days of being requested so to do by the purchaser. This is in order to avoid a situation where a vendor, wishing to delay a closing, serves a 28 day notice.

In its review of the law the Commission appears to recognise a divergence in the position between England and Ireland in that in Ireland a closing date is still generally regarded as a target date. This may no longer be the position in England, as a result of the decision in *Raineri -v- Miles* [1982] 2 All ER 145 where a purchaser succeeded in claiming damages for breach of contract when, in a chain transaction, the vendor failed to complete on the specified closing date.

While hinting that it might be better if the Irish law were more akin to that laid down in *Raineri -v- Miles,* the Commission's Report does not go so far as to recommend any legislative change. Although interest may be collectable by a vendor on a delayed completion, the remedies available to a purchaser are minimal unless the Courts do choose to follow the decision in *Raineri -v- Miles.*

Colin Keane

The Attorney General -v- X and Others Edited by Sunniva McDonagh BL, (Incorporated Council of Law Reporting for Ireland, 103pp, £7.95)

X marks the spot – the spot being the point in our history when a decision of our highest court has generated more public controversy and discussion than any other decision of that court. This fact adds to the importance of this concise publication of the full judgments of each of the five judges of the Supreme Court delivered on 5 March, 1992 as well as the earlier High Court judgment of Costello J delivered on 17 February, 1992. Of equal importance to an understanding of how and why the Supreme Court arrived at the decision it did (particularly as the appeal hearing itself was held 'in camera') this book also contains a very full summary of the submissions made to the Court both by counsel for the 14-year-old pregnant girl (and her parents) and by counsel for the Attorney General.

As has been exhaustively parsed and analysed by this time, the 'ratio' of the X decision is (per Finlay CJ):-

> ". . . that the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40.3.3. of the Constitution."

It is clear from counsels' submissions that the main focus in argument was on the issue of the balancing of the constitutional right to life of the 'unborn' with the equal constitutional right to life of the mother and the circumstances in which the balance should come down in favour of the mother; and not on the more peripheral issues of the right to travel abroad and the right to information.

This book is worth having as a 'bedrock' reference source, particularly as the ongoing

emotionally charged debate on abortion throws up varying interpretations of what the Supreme Court did or did not decide in the X case.

Michael V. O'Mahony

A Casebook on the Irish Law of Torts (second edition), by Brian McMahon and William Binchy; (Butterworth Ireland Limited. 761pp, £36.00 paperback).

The productivity of Messrs. McMahon and Binchy continues unabated. Having in effect consolidated the 'corpus' of the Irish Law of Torts in their textbook first published in 1981, they quickly followed with the first edition of their casebook in 1983. Then came the second edition of the textbook in 1989 and now in 1992 comes the second edition of the casebook (as at 1 August, 1991). The second edition of the casebook is conveniently 'dovetailed' into the chapter lay-out of the textbook, making it very useful for students and practitioners alike. The "Notes and Questions" which follow each judgment more realistically bring home the obvious – that the sources of the principles of the law of torts are to be found in decided cases. The American law student, who learns his law through the 'Socratic' case method, comes face to face with that reality on day one, but the Irish law student now has for torts, thanks to McMahon and Binchy, the advantage of having the synthesis of both the deductive textbook and the original source casebook.

When McMahon and Binchy published the first edition of their textbook in 1981, a substantial benefit of it was their identification of a large number of relevant unreported written judgments resurrected from the archives of the Four Courts, which otherwise would have been forgotten and functionally useless. A perusal of the second edition of the casebook shows that during the last decade all or virtually all of the developmental cases in the Irish Law of Torts have been reported either in the Irish Reports or in the Irish Law Reports Monthly. If the learned authors have helped to encourage that development, they deserve an additional vote of thanks.

Michael V. O'Mahony

Essentials of Irish Business Law by Niall Sheeran, B. Comm, (Gill and MacMillan, 294pp, £8.99 paperback).

To be is to do – Sartre,
to do is to be – Rousseau,
do be do be do – Sinatra.

Strangers in the night, is an apt description of a layman's first encounter with the law.

This book is aimed primarily at students taking an introductory law course. The author, Niall Sheeran, B. Comm., teaches Irish Law at Senior College, Dun Laoghaire and would be more equipped than most to understand the difficulty that students may encounter when trying to come to grips, for the first time, with the vast body of law that exists in Ireland today.

This book contains thirty-two chapters in all and is split into seven sections covering an introduction to the study of law, elements of the law of tort, the law of contract, commercial law, European law, employment law and the law of persons.

The purpose of this book is to give an exposition of the principles of Irish business law and is designed to give students of commerce or business studies sufficient legal knowledge and analytical skills to enable them to cope with and make decisions regarding the routine legal problems which they will encounter in their future employment.

The material is presented in a clear and concise manner which is readily understandable. Each chapter contains a list of the topics to be covered, a summary of the purpose of the chapter, a presentation of the related rules of law, a list of the important cases and/or statutes and a progress test enabling students to evaluate the level of knowledge that has been assimilated.

The section entitled "An introduction to the study of law", provides an informative insight into how the law has developed to its present day state. It provides the reader with the basic insight into how the law works and by virtue of the author's interesting treatment of the topic, encourages the reader to approach the different sections of law covered in the book.

Each aspect of the law discussed is dealt with in a satisfactory manner. Over half the book is devoted to discussion of the law of contract and commercial law and the exposition of these topics is, therefore, more thorough.

Relevant case law is provided throughout the book and a brief summary of the facts is given along with the decision of the court. The reader loses nothing by not having a full detail of the facts of each case and, in fact, this layout may help students by providing them with necessary, rather than superfluous, information.

A slight drawback with this book is the brief treatment given to company law. Most of the important aspects of company law are mentioned, but without ever attempting to investigate any aspect in depth. However this book is aimed at providing an introduction to business law and there are many fine texts available elsewhere on company law that would enable the student to ascertain all he/she wishes to know on this subject.

This book provides a good introduction to business law for the non-legal student. Furthermore, from the diverse aspects of law that are covered it could also be a good starting point for those who are considering law as a career and have not studied law at a third level institution.

Ronan Baird

Report of the Public Inquiry into the Killing of Fergal Caraher and the Wounding of Michael Caraher (Published by the Irish National Congress and the Cullyhanna Justice Group, 1991, £3.50).

This report provides the preliminary findings of four of the five international jurists who presided over a public inquiry into the killing of Fergal Caraher and the wounding of his brother, Michael Caraher, in Cullyhanna, Newry, County Armagh, on 30 December, 1990. Michael Mansfield QC chaired the panel of jurists. The call for an independent public inquiry came from the Caraher family, and this call gathered support from many quarters, regardless of religious or political beliefs.

The Report also contains submissions made to the inquiry by individuals (e.g. Professor Tom Hadden of Queens University) and groups (e.g., Amnesty International, the Committee for the Administration of Justice, and the Irish Council for Civil Liberties) who are concerned about human rights and the way the authorities in Northern Ireland deal with legally questionable killings by members of the security forces.

The Report's introduction reveals (at p.7) why the inquiry was established. It says that in a democratic society, "there should be no need for a community response to such killings as this inquiry and Report." Then it notes, "But because of the deep-seated fears that exist that all the facts of this incident would not be examined under public scrutiny, and because of the lengthy and limited legal process that does exist, attention must be drawn to this case to prevent further injustices." The Report raises matters which should be of concern to lawyers in this jurisdiction, not least because it addresses problems about the "rule of law" in a jurisdiction which is next door to us in the European Community.

The Report clearly shows that the killing of Mr. Caraher, and the wounding of his brother, are legally questionable. The Report recognises that its work in this regard is no substitute for a proper official investigation. Compelling analyses contained in the Report conclude that the criminal law concerning the use of lethal force by members of the security forces is inadequate for dealing with the "shoot-to-kill" incidents which have recurred with alarming frequency in Northern Ireland. The current law is encoded in Section 3 of the Criminal Law Act (NI), 1967 and requires that the use of force be reasonable in all the circumstances. The courts have interpreted these provisions in a way that leans in favour of members of the security forces who use force in disputable circumstances [See *AG for Northern Ireland's Reference (No. 1 of 1975)* [1977] AC 105, and *Farrell -v- Secretary of State for Defence* [1980] 1 All ER 166]. The question is also raised whether the legal tests in this area comply with international legal standards.

The Report expresses concern about the lack of objective, prompt, impartial and thorough, investigations into disputed killings. The RUC investigate their own members. Investigations take too long. The coroner's inquest may make "findings" only as to the cause of death; it is no longer possible to bring in an "open verdict" which indicated the inquest's view that someone other than the deceased was responsible for his or her death.

Members of the families, and their solicitors, do not have adequate access to the written statements made by members of the security forces for inquests, and they are denied access to specific forensic evidence relating to killings. The authorities often claim immunity against the disclosure of information at the inquest. Coroners cannot require members of the security forces involved in a disputed killing to attend an inquest. Inquests may be delayed for unconscionable periods of time. There is reason to fear that the authorities have deliberately sought to weaken the coroner's inquest as a truth-finding procedure in Northern Ireland.

Political conditions in Northern Ireland are fraught. Members of the security forces live under threat of terrorism, on-duty and off-duty. It is all the more important that the security forces – and especially the legal process – be impartial and be seen to be impartial. It is therefore vital that the security forces operate within the law and that where their personnel violate the law they are held accountable with due promptitude before the courts. This Report warns us that things are not as they should be.

Tom Cooney

Denis C. Guerin
New York Attorney at Law

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The Obligation to Give Reasons for Administrative Decisions Part 2

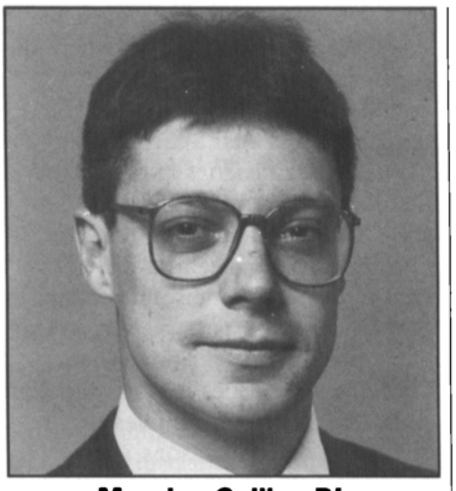
By Maurice Collins BL

The position in Ireland

In Ireland, even where an obligation to give reasons has been imposed on decision makers by statute or by statutory instrument, no attempt has been made to indicate what degree of explanation is thereby required.[42]

Most of the relevant statutory provisions refer solely to "statements of reasons" or "grounds" and most of the decided cases deal with the existence or non-existence of a common law obligation and as a result, are concerned with the refusal of administrators and decision-makers to give reasons for their decisions rather than with the question of whether or not their given explanation was adequate. However, in a number of recent cases, the Superior Courts have considered the adequacy of stated reasons in particular circumstances. Moreover, there is also a wealth of UK case law concerning similarly imprecise obligations to state reasons and the adequacy or otherwise of such statements.

The approach of the Supreme Court in *Breen -v- The Minister for Defence* (1990) has already been referred to.[43] The issue arose again in the context of a decision of An Bord Pleanála in *O'Keefe -v- An Bord Pleanála* (1991).[44] Relevantly, the action concerned a decision of the Board to grant planning permission, subject to a number of conditions, for a large and high-powered radio mast in County Meath, despite the recommendations to the contrary of the Inspector who had conducted the oral enquiry on behalf of the Board and the conclusions of the experts commissioned by the Board to consider the technical aspects of the application. The reasons stated for allowing the appeal was the Board's



Maurice Collins BL

satisfaction that the development would not be contrary to the proper planning and development of the area, provided it were carried out in accordance with the stated detailed conditions (for each of which, in accordance with the regulations, separate reasons were given).

It was argued by the plaintiff that the stated reason for granting the planning permission was not in reality a reason at all, but merely a statement of the threshold requirement for granting *any* planning permission – i.e. a statutory *sine qua non.* Expressed in the language used above, the reason provided by the Board may be said to have been the ultimate fact of the decision-making process, which required justification by reference to the factual background to the application and the relevant principles of law. The decision, the plainfiff argued, was void for non-compliance with the relevant statutory provisions requiring a statement of reasons to be given.

The Supreme Court, per Finlay CJ, accepted this submission – at least insofar as it concerned cases where the Board's decision ran contrary to the recommendation of its own inspector. However the Court held that the reason for the decision should be looked at in combination with the conditions imposed and the reasons given for their imposition, and continued:

> "Approached in that way, I am satisfied that the entire of this document sufficiently identifies the reasons by which the Board reached a decision to grant this particular planning permission subject to these particular conditions."[45]

At no point in *O'Keefe* does the Court attempt to establish by definition or description the extent of the obligation to give reasons imposed by the relevant statutory provisions. No reference is made to the rationale for imposing the obligation or to its desired function and effect. The Court, per Finlay CJ, explicitly rejected any attempt to link the content of the statutory and common law obligations, a rejection that loses much of its force when one considers the entirely vague and non-specific nature of the statutory duty at issue in *O'Keefe* itself. It is not immediately apparent why the Chief Justice's own consideration of the common-law obligation to give reasons in *Creedon* could not assist the Court in *O'Keefe,* particularly as it must be the case that the function and rationale of the obligation is the same in each case and consequentially, a similar content must be expected to follow.

The obligation on An Bord Pleanála to provide reasons for its decisions is clearly distinct from the obligation to give reasons for any conditions it may impose (in fact the former is imposed by section 26 (8) of the 1963 Act while the latter was not imposed until the adoption of the 1977 Planning and Development Regulations SI65/1977 in particular Article 48 thereof). Given the accepted inadequacy of the reasons for the decision (and the consequent non-compliance with section 26 (8)), it is difficult to understand how the reasons given for imposing the

various conditions, in compliance with a distinct obligation separately imposed, could save the decision from invalidity. The only reason actually proffered for the Board's decision in *O'Keefe* was (to adopt the words of Murphy J. in *O'Donoghue -v- An Bord Pleanála* (1991)) "a non-informative if technically correct formula."[46] One might legitimately have expected the decision to grant permission for such a large scale and controversial development as that at issue in *O'Keefe* to refer to the provisions of the relevant development plan and to the planning characteristics of the area. Equally, the failure of the Board to state why it did not accept the more apocalyptic assessment of its own experts was, at its mildest, regrettable. It is hardly satisfactory for the substantive reasons for the Board's decision to emerge (if at all) only by way of necessary inference and speculative assumption when, after all, the Board was *obliged* by section 26 (8) to *specify them.* Conditions are essentially technical matters, the fine print of planning permissions, and insofar as they are purposive, it is submitted that their purpose should be made clear in the main statement of reasons for granting permission.

On the other hand, although the learned Chief Justice does not explicitly rely on it as the basis for his decision on that aspect of the action, the failure by the respondents to seek further elaboration of the Board's reasoning obviously was significant, as the Chief Justice himself makes clear. The Chief Justice's view suggests that, even where an obligation to give reasons is placed on a decision-making tribunal by statute which is not expressed to be conditional upon request, the breadth and depth of the reasons required may be determined or at least influenced by the behaviour and attitude of the subject of the decision. In the opinion of this writter, this is undoubtedly a sensible approach, allowing a tribunal to give brief reasons for its decisions where the matter before it is relatively clear-cut (or so appears to it), thereby helping to reduce the burden of the obligation but also allowing an aggrieved applicant to seek greater detail whether orally or by letter. It may be that, in the future, such a request will be a necessary pre-condition to seeking relief from the courts. However, in the context of the *O'Keefe* decision itself, where the controversial nature of the application was evident to all and the Board was well aware of the planning complexities involved and the degree of public concern raised, such considerations seem to have little or no relevance and did not excuse the Board's absolute failure to properly explain its basic decision to grant planning permission when notifying the parties of that decision. As stated above, the applicable obligation to give reasons is unconditional and, while a certain degree of flexibility may be both justified and desirable, it would seem excessively flexible, as well as possibly unlawful, to excuse completely compliance with section 26 (8) unless and until a request for reasons is made.

The position in the UK

In the United Kingdom, a considerable jurisprudence has developed since 1958 (and the passing of the first Tribunal of Inquiries Act) on the level of detail required in a statutory statement of reasons.

The first major consideration of the obligation involved is found in *Re Poyser and Mills Arbitration* (1964) where a statement of reasons delivered pursuant to section 12 of the 1958 Act was challenged as inadequate. Megaw J., having considered the purposes for which the statutory provision was introduced, went on:

> "Parliment provided that reasons shall be given, and in my view that must be read as meaning that proper adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."[47]

In the later case of *R. -v- Immigration Appeal Tribunal ex parte Khan* (1983), which concerned a requirement to give reasons imposed by a statutory instrument, the Court of Appeal, per Lord Lane CJ, holding that the proffered reasons were inadequate, stated:

> "where one gets a decision of a tribunal which either fails to set out the issue which the tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis upon which they have reached their determination upon that issue, then that is a matter which ... in normal circumstances will result in the decision of the tribunal being quashed... A party appearing before a tribunal is entitled to know, either expressly stated by the tribunal or inferentially stated, what it is to which the tribunal is addressing its mind... Secondly, the appellant is entitled to know the basis of facts upon which the conclusion has been reached".[48]

It appears from *Khan* therefore, that an obligation to state reasons may, of itself, import an obligation to state relevant findings of fact as well in order to substantiate the reasons given. It may also be noted that the latter part of the statement of principle in *Khan* is similar to the (albeit less detailed) statement contained in the judgment of Murphy J. in *O'Donoghue -v- An Bord Pleanála* (1991), cited above.

"It appears from *Khan* therefore, that an obligation to state reasons may, of itself, import an obligation to state relevant findings of fact as well in order to substantiate the reasons given."

The most recent English case is the decision of the House of Lords in *Save Britain's Heritage -v- No. 1 Poultry Limited* (1991). The issue was the decision of the Secretary for the Environment, *following* the recommendation of his Inspector, to allow an appeal against the refusal of planning permission for an extremely controversial development involving the demolition of a large

number of listed buildings. The Secretary of State was obliged to give "reasons" for his decisions in terms almost identical to the equivalent Irish provisions and he purported to do so in a decision letter which incorporated the Inspector's report and set out the Secretary's own thinking in some detail, going on to grant the planning permission sought and imposing a number of conditions on the grant. The reasons given were challenged as being inadequate and it was argued that the decision was thereby invalidated. Having cited the Judgment of Megaw J in *Re Poyser and Mills Arbitration* (1964) and the three criteria set out therein – that reasons be proper, intelligible and adequate – Lord Bridge (delivering the leading judgment) refused to proffer a general statement of the degree of particularity required by an obligation to give reasons. He went on to reject any attempt to set an abstract standard of adequacy by the Court:

> "The alleged deficiency will only afford a ground for quashing the decison if the court is satisfied that the interests of the applicant have been substantially prejudiced by it.... the adequacy of reasons is not to be judged by reference to some abstract standard. There are in truth not two separate questions: (1) were the reasons adequate? (2) if not, were the interests of the applicant substantially prejudiced thereby? The single indivisible question, in my opinion, which the Court must ask itself whenever a planning decision is challenged on the ground of a failure to give reasons, is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given".[49]

The burden was on the applicant to establish such prejudice whether by establishing that the stated reasons did not disclose how a necessary issue of law was resolved or how a disputed issue of fact was decided. In general, continued Lord Bridge:

> "It is for the applicant to satisfy the Court that the lacuna in the stated reasons is such as to raise a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from any flaw in the decision making process which would afford a ground for quashing the decision".

In the event, the House unanimously held that the Secretary of State had adequately explained his decision, though only after examining his decision letter in great detail and closely comparing and contrasting it with the inspector's report, scrutiny notably absent from the Supreme Court's decision in *O'Keefe* where the inspector had recommended *against* the granting of planning permission for an equally controversial development.

Reasons under review

Once an obligation to give reasons is recognised in respect of any given decision – whether derived from statute or from the common law – what will be the consequences of a failure to comply or to comply adequately with that obligation? Where no reasons are given, the decision cannot stand as given. Such a complete failure to give reasons led in *The State (Creedon) -v- The Criminal Injuries Compensation Tribunal* (1988) and *State (Daly) -v- The Minister for Agriculture* (1987) to the challenged decisions being quashed. In contrast, in *International Fishing Vessels Ltd -v- The Minister for the Marine* (1989) Blayney J, though clearly of the opinion that he had jurisdiction to quash the respondent's decision for refusal to give reasons, instead gave a declaration to the effect that the Minister was obliged to give his reasons. This, Blayney J held, was in the circumstances a better alternative:

> "particularly as the Minister has indicated through his Counsel that he is prepared to give his reasons if directed by the Court to do so. If I were to quash the existing decision, the practical result would be that the Minister would have to consider the application again and would no doubt once more refuse to grant the licences, this time giving reasons for his decision, and if the applicant wished to attack that decision, new proceedings would be necessary."[50]

Similarly in *C.W. Shipping Co. Ltd. -v- Limerick Harbour Commissioners* (1989), if the matter had fallen for decision on the failure to give reasons point, it would have been referred back to the respondent for further consideration.[51] In *Anheuser Busch Inc. -v- The Controller of Patents, Designs and Trade Marks* (1987), mandamus was granted to the applicant directing the respondent to state in writing the grounds of his decision. The Court, therefore, has a number of options open to it where it finds that a decision has not been explained or adequately explained. Even where it quashes the decision in question, since the adoption of the 1986 Rules of the Superior Courts, it may remit the matter back to the deciding tribunal with a direction to reconsider it and reach a decision in accordance with the findings of the court, by virtue of 0.84 r.26 (4).

Where reasons are inadequate or where some, but not all, of the stated reasons are "bad" in law the consequences are less clear. There is a line of British authority characterising a failure to give adequate reasons as an error of law *per se*, thus leading to the quashing of the decisions concerned, see *Alexander Machinery (Dudley) Ltd. -v- Cabtree* (1974).[53] A contrary view is that inadequacy of reasoning will invalidate the decision concerned if, and only if, the inadequacy manifests such an error of law; a view finding powerful expression in *R. -v- Immigration Appeal Tribunal ex parte Khan* (1983).[54] Such an error of law will be manifested where, for example, the given reasons are so inadequate or threadbare as to suggest that the decision was irrational or where they make clear that a tribunal has considered an entirely irrelevant factor or suggest that a relevant factor has been ignored by it. The decision and reasoning of Barron J in *State (Daly) -v- The Minister for Agriculture* (1987) is closer to the second view, inferring as it does a lack of good reason from the Minister's silence and quashing his decision on that ground. The Supreme Court decision in *Creedon*

is also consistent insofar as a separate ground for decision was the irrationality of the refusal of compensation.

"Bad reasons" were at issue in *International Fishing Vessels Ltd. -v- The Minister for the Marine* (No. 2) (1991), a Supreme Court sequel to the decision of Blayney J already mentioned. As a consequence of that decision, the respondent had provided the applicant with a detailed list of the reasons for his decision. Amongst the reasons given were allegations of misconduct that had never been drawn to the attention of the applicant, in clear breach of the *audi alteram partem* rule. The applicant sought judicial review of the decision as having been reached in breach of natural and/or constitutional justice. On appeal to the Supreme Court on the dismissal of its application in the High Court by Gannon J, the applicant was again unsuccessful. The applicant's right to fair procedures was accepted by the Court as it had to be and ultimately the issue on appeal was whether or not the bad reasons could be severed from the good or in some other way be ignored. The court, per McCarthy J (Hederman J concurring) stated the problem thus:

> "If the Minister intends to take into consideration the variety of different factors in making his decision, he must notify the person... of each of the matters; if he fails to notify the applicant of a matter which, on its own, causes him to make his decision, then his decision must be quashed. If, however, there are valid reasons for his decision based upon matters of which he has notified the applicants and given them ample opportunity to make representations, the fact that there are other reasons of which he has not given them notice, does not, in my view, invalidate his decision." [55]

This decision represents an acceptance of the need for inadequate reasons themselves to manifest a quashable error of law and an implicit rejection of the "error approach". In *International Fishing Vessels Ltd.,* the Supreme court seemed to have disregarded the breaches of the audi alteram partem rule as being *de minimis* (particularly O'Flaherty J). However, it is submitted that the statement of principle made by McCarthy J may be over-broad. If the only circumstances in which a "bad" i.e. legally irrelevant, reason can invalidate a decision is where it is one which "on its own causes the decision-maker to make his decision", then as long as one or more good reasons are relied on, any number of bad reasons can be legitimately taken into account by the decision-maker. Indeed, on the face of it, these bad reasons may in fact be the primary reasons for the decision, as long as none is *on its own* the reason for the decision. This would appear to be contrary to the strict line taken where irrelevant considerations are taken into account by a decision maker, as exemplified by the Supreme Court decision in *Flanagan -v- Galway City and County Manager* (1990).[56]

Of course, it will at all times be open to an applicant to argue that the "good" reasons cumulatively do not justify the decision and the decision therefore is "irrational". However, this is an extremely onerous task and it would appear that a court will not quash a decision for irrationality where there are *any* valid reasons for the taking of the decision.[57] *International Fishing Vessels* is therefore something of a paradox. Having succeeded in obliging the Minister to give his reasons and having succeeded in exposing an error of law in these reasons, the applicant's position was ultimately not improved. The value of obtaining reasons for adverse decisions remains significant, however. If the reasons given by the Minister had rested on factual allegations disputed by the applicant, they could have been challenged on that ground. Moreover, in general, it appears that where a "bad" reason is stated by a decision-maker, the fact that the decision *could* have been taken for good reasons will be irrelevant, unless those reasons were stated at the time of the giving of reasons for the decision.[58]

Conclusion

The emergence of a general obligation to give reasons for adminstrative decisions is to be welcomed. Such an obligation enables the effective application of the long standing rules on the exercise of administrative discretion. This is one of the major reasons for imposing the obligation. Other reasons include the entitlement of the public, insofar as they are the subjects of administrative action, to understand the reasons for making certain administrative decisions that may adversely affect them. The requirement to give reasons for decisions ought also to contribute to more rational decision-making by tribunals and help to avoid *ultra vires* decision-making. It is to be hoped that it will not be necessary to take judicial review proceedings in order to obtain reasons – reasons should be stated either at the time of the making of the decision or upon subsequent reasonably prompt request. The level of detail required may vary from situation to situation and the flexibility of the common law is advantageous in this regard. Questions remain to be answered and issues resolved, as indicated above, but the developing jurisprudence of the Courts should deal with these issues.

"It is to be hoped that it will not be necessary to take judicial review proceedings in order to obtain reasons – reasons should be stated either at the time of the making of the decision or upon subsequent reasonably prompt request."

The giving of reasons may initially lead to a greater level of challenge to administrative decisions but with the improvement in decision-making and decision-explaining, which reasons may be expected to bring about, together with a realistic attitude to the statement of reasons (which "should not be parsed as if it were a statute"[59]) this should be a short

(Continued on page 240)

Performing Rights – The Price of Pleasure

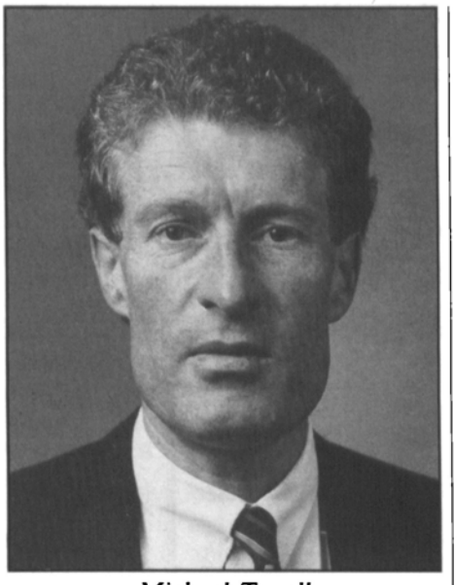
by Michael Tyrrell

Introduction

"If music be the food of love – play on" but don't forget to pay the royalties. This classic, and now cliched, line from 12th Night by Shakespeare is a reflection of the importance of music even in those days as a source of pleasure. It is generally acknowledged that music is probably the most internationally recognised language of our times. Ironically, popstars and musicians are probably better known worldwide than the majority of international statesmen.

Music – A Property Right

The average person takes music entirely for granted and considers it a part of everyday life. This concept of music appears to be broadly accepted by the ordinary listener but has also spread into the business sphere. Every day we listen to music in some shape or form on the radio, on the television, in shops and supermarkets, in the cinema, at concerts, in the hairdressers and often at places of work such as factories and canteens. What is not readily appreciated is that some person composed that music. The persons who wrote the lyrics and the music own the copyright in their work. Copyright is a property right and if that work is to be used by other people then it must be paid for. This is only logical. Radio and TV stations which will acquire a large percentage of their audience from the nature and quality of their broadcasts will be heavily dependent on being able to use musical works which they consider will be attractive to their audiences in order to enhance that audience rating. Broadcasters such as RTE, 98FM



Michael Tyrrell

and Rock 104 must pay royalties accordingly to the composers for permission to use their works in the broadcast of their programme. In the same way, if, for example, a boutique selling modern gear is looking to attract a certain type of customer it may decide to play rock music in the shop, probably by way of cassette recorder. The shop is using the music to assist in the sale of its goods. The music will attract customers who will listen to it. A royalty must be paid by the occupier of the shop i.e. the music user, to the composers of the music. A factory which broadcasts radio programmes over the floor with a musical content are utilising the work of the composers of that music to their own advantage and the factory must pay royalties to the composer. The same applies to pubs and supermarkets playing background music. There are so many examples of where royalties are dut to composers for the use of their music that it is probably not exaggerating to state that other than for circumstances in which a person listens to music privately for his or her benefit and in certain charitable instances, royalties are due. It is not only the large enterprises such as the radio and TV stations and cable operators who are liable for these charges.

Collection Societies – Performing Right Society Limited and Irish Music Rights Organisation Limited

From a practical viewpoint, it would of course be impossible for individual composers to, firstly, know where his or her works are being performed worldwide and, secondly, it would be impossible for them to visit every premises which might be playing music in order to seek a royalty. Because of this impossible situation, collection societies have been formed in most countries worldwide whose function is to administer the composers rights and to collect royalties for them. In England the organisation is called the Performing Right Society Limited (PRS) and in Ireland it is called the Irish Music Rights Organisation Limited (IMRO). Until recently, the PRS also administered composers' rights in Ireland but in 1989 it granted a licence for the administration of those rights to IMRO. IMRO employs various personnel, including licensing inspectors and agents, whose function is to tour the country on a continuous basis inspecting premises and in any premises in which music is found to be playing, other than, of course, private dwelling houses, the occupier of those premises will be advised of the requirement to pay royalties for the use of that music and they will be requested to enter into a licence agreement with IMRO under which a standard annual fee will be fixed. These fees will vary depending on the nature of the premises and the type of entertainment. There are fixed tariffs in being in respect of various types of premises. The majority of the larger users of music are aware of their obligations to the composers of the music and IMRO and will

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A licence is required in any premises where music is played to the public.

voluntarily enter into such licence agreements and pay the required annual fee. It should be pointed out that licence fees are not particularly expensive and, for example, the sort of fee which would require to be paid by a small public house in the country which would be using a television and/or a radio in the bar or lounge would be approximately £117.00 per annum.

In the event that a user of music fails or refuses to take out a licence or to pay royalties to the PRS and IMRO, the normal relief which will be sought will be an injunction to restrain the owner or occupier of the premises from playing any music whatsoever in breach of the composers copyright together with a claim for damages in a sum equivalent to royalties calculated to be due to that date. While a small publican or shop owner in a country village may not be too concerned if he or she is prevented from playing a radio in their premises, an injunction of this nature would cause very serious consequences to premises such as hotels, discotheques or clubs which would rely on music for a large part of their business generation. Indeed, a refusal by promoters of live concerts to pay a royalty fee could leave them facing an injunction restraining the concert from taking place.

The Law

The law is to be found for the most part in the Copyright Act, 1963 ("the Act") and relevant case law. The Act defines copyright as being the exclusive right to do (and to authorise other persons to do) certain acts in relation to that work. In other words, the owner of the copyright in a work has exclusive rights in it, subject to any contrary provisions in the Act. Section 8 of the Act confirms that copyright subsists in every original musical work subject to the provisions of that section and that the acts restricted by the copyright in a musical work include:-

a. reproducing the work in any material form

b. publishing the work

c. performing the work in public

d. broadcasting the work

e. causing the work to be transmitted to subscribers to a diffusion service (i.e. cable operators such as Cablelink)

f. making any adaptation of the work.

Section 10 of the Act provides that the author of an original musical work is the person entitled to the copyright in that work.

Accordingly it is to be noted that song writers and composers have exclusive rights under the Act to perform the work in public (through radio, TV, concerts etc.) the right to broadcast the work and the right to include the work in a cable programme. These rights are generally referred to as "performing rights".

"The general rule which has emerged from decisions by courts over the years is to the effect that any performance which takes place outside the domestic circle is to be regarded as "public".

Public Performance

Reference is made above to Section 8 of the Act in which it has been pointed out that it is prohibited to perform a work in public, the copyright of which is vested in the author, without the consent of that author or without the consent of IMRO and the PRS in the event that the author has assigned such right to the PRS and IMRO. Unfortunately, the Act does not define what constitutes a performance "in public." The general rule which has emerged from decisions by courts over the years is to the effect that any performance which takes place outside the domestic circle is to be regarded as "public" for this purpose, regardless of the nature of the entertainment or the kind of premises at which the peformance takes place and irrespective of whether a charge for admission is made. For example, performances in clubs at which attendance is restricted to members and performances in factories have been found to be public performances. In this regard, the dicta of Mr. Justice Kenny is *PRS -v- Rosses Point Hotel Company Limited* (unreported High Court) 1966 is of assistance where he said:

> "Owners of hotels and licensed premises in this country who intend to place television or radio sets in rooms to which the public have access should get licences from the Performing Rights Society Limited. If they do not, they will probably find themselves unsuccessful defendants in actions in the High Court".

In addition to the playing of music

(i.e. performances) by mechanical means i.e. radio and TV, record players, cassettes, background music devices etc. requiring a licence, live performances of music on stage and in concert also require a licence. In practice, licences are issued for numerous categories of premises, including cinemas, clubs, concert halls, dance halls, discotheques, bingo halls, hotels, universities, ships, aeroplanes, sports stadia, public houses, factories, shops and many others. It is the policy of IMRO to grant a licence to any user of music who needs it, provided only that the person concerned is prepared to enter into the standard form of licence contract and pay the appropriate royalties. The onus lies on a user of music who proposes to play or perform music to obtain the permission of the copyright owner before the music is played or the performance begins. As IMRO is the assignee in most instances of the copyright owner it is necessary to obtain the permission of IMRO, which is obtained by way of securing the licence contract.

IMRO's Licences

The licences issued by IMRO are in the form of contracts which run from year to year until they are cancelled by either party. These are blanket licences which authorise the public performance of any of the millions of works which IMRO controls on behalf of song writers and composers throughout the world and the royalties payable under them vary from time to time as the nature or extent of music usage changes in the premises concerned. The general nature of the licence contract is that it authorises the licensee to perform IMRO's repertoire in return for which he undertakes to pay the appropriate royalties.

Once a licence is entered into the payment of royalties becomes a contractual obligation and therefore any licensees who subsequently fail to pay royalties are liable to action in the courts by way of ordinary contract debt. It is only in the event that a music user fails or refuses to enter into a licence with IMRO that the appropriate course of action taken by IMRO will be to seek an injunction together with damages. At present, in excess of 10,000 establishments are covered by IMRO's licences in Ireland.

It should be noted that if a copyright musical work is performed in public without the consent of the owner (the composer or IMRO) then the copyright owner has a claim against not only the promoter of the performance but also against the proprietor of the premises, where the proprietor permits the premises to be used for the performance. This is provided for by Section 11 (4) of the Act which goes on to provide in sub-section 5 that the liability of the owner shall not apply in a case where he was not aware or did not have reasonable grounds for suspecting that the performance would amount to an infringement of copyright or gave the permission gratuitously or for a nominal consideration. It is the policy of IMRO where possible to grant licences to the proprietor of the premises where music is to be used or where concerts are to be held. This relieves the promoter of a concert from having to apply to IMRO for a special permit and promoters accordingly should make a point when hiring premises for a function or a concert to ensure that the proprietor holds a licence from IMRO as otherwise the promoter himself will be obliged to apply for a special permit.

Assessment and Payment of Royalties

The royalty charges payable by licensees are calculated under a series of carefully devised tariffs which take account of the different circumstances in which music is performed in the various categories of premises and types of entertainment. Some of these tariffs have been settled by negotiation with National Associations representing the classes of music user to whom they apply.

IMRO's royalties are payable annually in advance, and as it is a non-profit making body, all the royalties it collects are distributed to the authors and composers after deduction only of administration costs.

Conclusion

In conclusion, it should be pointed out that frequently the PRS and IMRO are confused with another separate body called Phonographic Performance (Ireland) Limited (PPI). This is an organisation similar to the PRS and IMRO but its purpose is to protect the owner of the copyright in sound recordings rather than the lyrics or composition of the musical work itself. In simple terms, a record producer will usually hold the copyright in the sound recording of the record. The organisation which looks after the protection of the copyright of the record producers is PPI. The separate and distinct copyright in the musical work which forms the subject matter of the record or tape is quite separate and this copyright is protected by IMRO. Users of sound recordings outside of the domestic sphere often complain about the fact that they are obliged to pay royalties not only to PRS or IMRO but also to PPI. This is probably due to their failure to understand the difference between the copyright of the composer and the copyright of the record producer, both of which are essential as both are required before the song or musical work can be listened to and enjoyed by the ordinary consumer.

Because copyright can be such a nebulous concept without physical shape and being incapable of registration, it is a common misconception that copyright works can be used without payment to the creator of a royalty. It is hoped that this article goes some way in explaining the fallacy of any such assumption and assists towards an understanding of the basis of the liability of all music users outside of the domestic sector. □

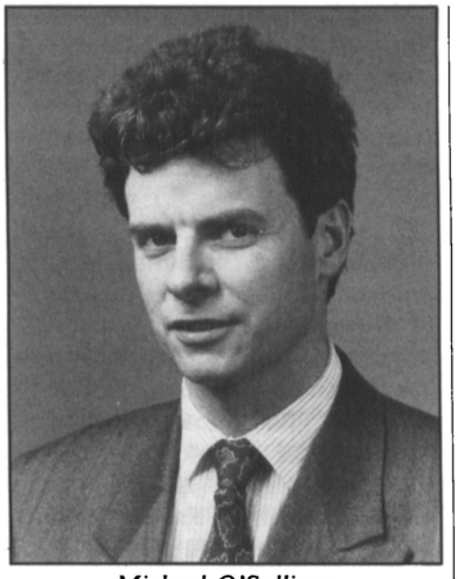
EDI – Is There Life After Fax?

by Michael O'Sullivan

The facsimile or fax machine has transformed communications between businesses and clients to an extent unseen since the telephone gained widespread use over 70 years ago. The Law Society recognised the benefits of fax transmission at an early stage, and your Technology Committee has gone to great lengths to promote its use in the profession.

The benefits of fax transmission are well known but worth repeating. Documents (including diagrams) can be reproduced worldwide simply by dialling a telephone and pressing a transmit button. Drafts can be sent, reviewed, amended and returned in a matter of minutes or hours, documentary evidence can be adduced and decisions can be taken far more quickly than post or courier services might permit, and often for much less cost. As technology advances, features such as speed dialling, memory storage of documents, password protection and multiple transmissions have improved the facilities provided by faxes. But as every harried solicitor and secretary knows, faxes have distinct shortcomings. Poor transmissions result in smudged copies. Sheet feeders jam and develop minds of their own. Telephone numbers can be misdialled with results that are at best embarrassing. The speed of fax transmissions has not improved apace with other technologies, due in part to the need to serve the lowest common denominator.

The nearly universal use of word processing has opened up the possibility of eliminating some if not all of these problems. This article considers Electronic Document Interchange (EDI), how it compares with fax transmission, and how it might be used in the profession.



Michael O'Sullivan

Computers store information such as documents and diagrams in files, EDI works on the basis that a computer file such as a word processing document can be reproduced at one or more 'remote' locations by connecting a transmitting computer – the 'local' computer – down a link such as a cable or telephone line to a remote computer. Once they have established clear communications, the two computers start a 'conversation' in which the local computer describes the file and its contents, and the remote reproduces it at the other end of the line. The result is that a replica of the document file is created on the remote system. That replica file can then be printed off or amended on the remote system like any other document.

The precise means by which this is achieved involves several stages. Firstly, both computers must be capable of communicating. This involves having a device called a *port* (which is standard on most systems today) and *communications software* on each computer which instructs them on how to create the link and conduct the conversation. Secondly, the two computers must be linked through a cable or telephone line. It will usually be impractical to have a cable from a transmitting computer in Cork directly to a receiving computer in Galway, so for present purposes we will focus on the telephone link. The telephone system will only deal with signals of certain types. An ordinary telephone converts voice sounds into electronic signals, sends them down the line, and converts signals back into voice sounds. In much the same way, a device called a *modem* converts computer-type signals from the port into telephone-type signals and vice versa. The modem will usually deal with dialling and answering other computers in the same way that faxes do with other faxes.

So far, the process is similar to fax transmission. But there are several important differences. Firstly, there is the question of speed. Modern faxes, given a clear line, can transmit single-space typed text at a rate of between 45 and 70 seconds for every A4 page. A direct EDI link on the same line could send the same page in 3 to 8 seconds. Interference on the line may cause the faxed copy to be smudged or incomplete, but the communications software and modem used by the EDI link will almost always make sure that each packet of data is compared by the two computers for errors, and re-send any that are not 'agreed'. Lastly, as many an impatient solicitor and overstretched secretary knows from experience, the faxed page may have to be read, deciphered, typed and marked up before it can be returned by fax to the sender and the process begun again. Using EDI, the document is loaded directly onto the receiving computer without having to be re-typed, and can be amended and printed off like any other document. The re-draft can then be returned by EDI in the same way it was received.

One question which will occur to

readers who have used several WP systems is how EDI deals with cases where the document file which was sent was created on, say, Word Perfect, but the receiving system uses Wang. In that case, the Word Perfect document file will not be understood by the Wang system, and cannot be printed out or amended. There are two possible solutions. The first is for the sender to convert the document file, before sending it, into a format called *ASCII* which is 'understood' by virtually all word processing systems as a sort of lingua franca. This has limitations however, because ASCII does not cover *attributes* such as underlined or italicised or bold text, which can help reading a document. The second solution is to use *conversion software.* This permits the computer to change a document file from one word processing format – such as Word Perfect or Display Write – to another such as Wang or DecWrite. The conversion software will preserve the attributes and type faces of the original document file, and if the receiving system's printer is similar to the sending computer's, the solicitor on the receiving end can have a print of the document identical to that of his or her colleague who sent it. Amendments such as insertions or deletions can be highlighted so that when the amended document file is returned a precise record of the changes is apparent on the face of the working draft as soon as it is printed out.

So what does it cost? For convenience, we will assume that a separate PC will be used for EDI work, although many offices will be able to use existing PCs or spare ports on multi-user systems such as Wang VS or the many UNIX systems. A suitable PC can be bought for between £1,200 and £3,000, depending on quality and sophistication. Communications software has become increasingly standardised, particularly in the PC market, and packages that have all the standard features can be bought for between £50 and £200. The selection is not as wide for systems such as Wang or UNIX, and users of some systems may have to ask their dealer for a quotation. Modems for use over telephone lines have dropped dramatically in price since the mid-1980s, and quite sophisticated machines which can transmit at a rate equivalent to over 1,000 characters per second can be had for less than £350. Conversion software for IBM-compatible PCs, which can convert to and from most of the commonly used word processing formats, costs between approximately £300 to £500.

EDI is not perfect. As was the case when faxes were first introduced, it can be difficult to justify the expense of adding to one's office systems when the existing arrangements work reasonably well. Further, it will not prove its worth until a substantial part of the profession or one's clients or contacts use EDI also. Moreover, there is the question of security. Great care must be taken when giving dial-up access to one's computer system to ensure that malicious or simply curious 'hackers' are not allowed access to confidential information, and to prevent innocent or deliberate spreading of computer viruses. But it is worth noting that an EDI system known at LIX has gained over 100 users in the UK, including barristers chambers, major London solicitors, and the Official Referee's Court which deals with large construction cases. LIX enables its users to exchange documents such as drafts, pleadings, diagrams and so forth without the need to send hard copy by post. The fact that the UK courts

". . . it is worth noting that an EDI system. . . has gained over 100 users in the UK . . ."

are prepared to accept documents by EDI must surely be indicative of a trend, and your Technology Committee will report to you on developments as they arise. In particular, it is hoped to invite LIX to demonstrate their product to Irish solicitors, and this should prove a most interesting illustration of the uses to which EDI might be put. □

The Obligation to Give Reasons for Administrative Decisions

(Cont'd from page 231)

term phenomenon. Indeed, in the long term, reason-giving may have the contrary effect; those who previously had no way of discovering why an unfavourable administrative decision had been made, other than by court challenge, may now see quite quickly that the decision is solid and legally unassailable. In any case, it is submitted that, as the source of all judicial and executive power in the State, "the People" who are also the users of administration, are entitled to know why civil servants, statutory tribunals and Ministers decide as they do about them.

References

42. see the statutory provisions recited above.
43. *supra fn.* 28.
44. [1992] ILRM 237, 256.
45. ibid at 266 per Finlay C.J.
46. [1991] ILRM 750 at p. 757.
47. [1964] 2 QB 467 at p. 478.
48. [1983] QB 790 at 794.
49. [1991] 1 WLR 153 at p. 167.
50. [1989] IR 149 at p. 159.
51. [1989] ILRM 416 at p. 428.
52. *op.cit. supra.* fn. 19.
53. [1974] I.C.R. 120. This view is characterised by Richardson, *op.cit.* at fn. 26 as the "error approach".
54. *supra* at fn. 48, once again at p. 794; see also *Mountview Court Properties Ltd. -v- Devlin* (1970) 21 P. & C.R. 689 and *Crake -v- Supplementary Benefits Commission* [1982] 1 AII ER 498. This is characterised by Richardson as the "no error approach".
55. [1991] 2 IR 93 at 103 per McCarthy J and 104 per O'Flaherty J.
56. [1990] 2 IR 66.
57. See *O'Keefe* per Finlay C.J. at pps. 17 – 19 of his judgement.
58. see e.g. *S.E.C. -v- Chenery Corporation* (1943) 318 U.S. 80.
59. *International Fishing Vessels Ltd -v- Minister for the Marine* (No. 2) [1991] 2 IR 93 at 103 per McCarthy J. □

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Criminal Injuries Scheme Inadequate – Law Society

The President of the Law Society, Adrian P. Bourke, said in a recent statement to the press that it was unfair that members of the public could not recover compensation from the State for pain and suffering as a result of injuries criminally inflicted. (Prison officers and members of the Garda Siochana can obtain such compensation). Mr. Bourke said that it was essential that the power to award damages for pain and suffering to persons who suffer as a result of injuries criminally inflicted should be restored to the Criminal Injury Compensation Tribunal as a matter of urgency.

In the press statement Mr. Bourke said "the Scheme of Compensation for Personal Injuries Criminally Inflicted was introduced in February, 1974. It originally provided for payment of compensation to all persons who suffered personal injuries as a result of a crime of violence provided that the injury was sustained within the State or aboard an Irish ship or aircraft. Fatal injuries were included and there was also provision to compensate people who incurred injuries while assisting or attempting to assist the prevention of crime or the saving of human life. The scheme is an ex gratia one."

Adrian Bourke continued "the scheme operated in a satisfactory manner up to 31 March, 1986, (except for considerable delays in the payments of awards by the Government). However, in April 1986 a change was made to the scheme and it was provided that after that date compensation would not be payable in respect of pain and suffering. This means that an applicant is only entitled now to recover his actual out-of-pocket expenses such as loss of wages, hospital costs etc. This has rendered the scheme of very little value. For example, the scheme would be of little assistance to a person who was unemployed or to a person who was covered by medical insurance but nonetheless suffered severe mental trauma and distress as a result of, say, a violent criminal assault or rape.

"Why did the Government deprive the public? It seems clear that the Government's motivation in changing the Scheme was to curb the number of claims made to the Criminal Injuries Compensation Tribunal. The statistics show that it was an effective strategy. In 1985, the year before the Scheme was amended, there were 1,975 claims made to the Tribunal. In 1987, the year after the change, the number of claims had dropped to 243 and in 1991 the number had dropped further to 132 claims. In 1985 the Tribunal paid out £3,977,333 in settlement of 831 claims. In 1987 the Tribunal paid out £2,606,119 in respect of 437 claims and by 1991 the expenditure had fallen to £1,572,204 in payment of 144 claims."

Adrian Bourke said: "It is only right that members of the Garda Siochana and prison officers should be properly compensated for injuries that are criminally inflicted upon them but, likewise, ordinary citizens who suffer as a result of such injuries should also be adequately compensated. Therefore, I am calling on the Minister for Justice to introduce a statutory scheme of criminal injuries compensation that would give the Criminal Injuries Compensation Tribunal the power to award damages to any citizen who suffers mental distress and trauma as a result of being the victim of a criminal injury." □

Solicitor's Golfing Society

Captain's Prize (John R. Lynch)

The Captain's Prize of the Solicitors' Golfing Society took place at Mount Juliet, Thomastown, Co. Kilkenny on 5 June, 1992.

102 Members contested the Captain's Prize and the following are the results:

1st Garret Gill (19) 37 points.
2nd Basil Hegarty (10) 36 points.
3rd Jim Brooks (11) 36 points.

St Patricks Plate –
(Handicaps 12 and under)
1st Dermot Fullam (7) 35 points.
2nd Pat Barriscale (12) 35 points.

Handicaps 13 to 28 –
1st Eugene Davy (14) 35 points.
2nd Ronnie Lynam (15) 33 points.

First Nine
Ronan O'Siochain (16) 19 points.

Second Nine
Patrick Duffy (20) 21 points.

Over 30 Miles from Mount Juliet –
John Shaw 33 points.

Richard Bennett
Hon. Secretary

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Land Registry — issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.
24 July, 1992

Lost Land Certificates

Elizabeth Murphy, Folio: 714; Land: Duffcarrick; Area: 0a 1r 6p. **Co. Waterford.**

Nicholas Donnelly and **Marie Donnelly,** Folio: 9547; Land: part of land of Rathiddy; Area: 0a 2r 0p. **Co. Louth.**

Mary Tooher, Folio: 4566F; Land: Tinlough; Area: 0.875 acres. **Co. Tipperary.**

Anthony & Teresa McGann, Rodford, Doolin, Co. Clare. Folio: 6632F; Land: Liscullaun; Area: .579 acres. **Co. Clare.**

Joseph Tobin, Folio: 11312; Land: Obertstown. **Co. Meath.**

Frank Thornton, Seamus Murray & John Gartlan, Folio: 8702F; Land: Lannat; Area: 3.057 hectares. **Co. Louth.**

John Condon, O'Brien's Bridge, Co. Clare. Folio: 23359; Lands: Ballyknavin. **Co. Clare.**

John Harrison and **Pauline Harrison,** Folio: 6404F; Land: Stradbally, **Co. Queens.**

Bernard Whelehan, Folio: 15627; Land: Part of lands at Rahincuill, **Co. Westmeath.**

Richard Cross and **Anne Cross,** Folio: 11158; Land: Blackparks; Area: 11a 2r 0p. **Co. Kildare.**

David Robert Hall and **Desmond Percy Dobbyn Hall,** Folio: 7600; Area: (1) Bleach, (2) Coolahest; Area: (1) 32.613 acres, (2) 0a 0r 26p. **Co. Waterford.**

Edmond Power, Folio: 1806; Land: Brownstown; Area: 77.481 acres. **Co. Waterford.**

Laurence O'Reilly, Folio: 2494F; Land: Uppertown; Area: 1a 2r 14p. **Co. Wicklow.**

Thomas J. Lawlor, Folio: 1930; Land: Bawnoge; Area: 118a 0r 30p. **Co. Kildare.**

Michael Joseph McGarrell, Folio: 647; Land: Lisnafinelly; Area: 7a 0r 2p. **Co. Monaghan.**

Patrick Dwyer, Folio: 19306; Land: Glenbane Lower; Area: 41.033 acres. **Co. Tipperary.**

James Patrick Ward, Folio: 15827; Land: (1) Corbally, (2) Corbally; Area: (1) 11a 3r 20p, (2) 2a 3r 10p. **Co. Westmeath.**

Patrick Hallissey, Folio: 50463; Land: Bawnagoynig; Area: 0.875 acres. **Co. Cork.**

Christopher Cunney, Folio: 14961; Land: (1) Coollagagh, (2) Coollagagh – 1 Undivided 1/46th Part of land Lettered A on the Plan; Area: (1) 48a 2r 32p, (2) 60a 1r 16p. **Co. Mayo.**

Patrick & Mary Teresa Loughlan, c/o P. O'Connor & Son, Old House, Market Street, Swinford, Co. Mayo. Folio: 16954F; Land: Ardacarha; Area: 0.479 acres. **Co. Mayo.**

Anthony D. Quinn, Folio: 1353F; Land: Lisnasaran; Area: 0a 1r 3p. **Co. Cavan.**

Daniel Joseph Foott, Folio: 42600; Land: Knocknamanagh; Area: 1a 1r 27p. **Co. Cork.**

Eugene Davis and **Mary Miller,** Folio: DNO 22979F; Land/Townland: Balally, Barony: Rathdown. **Co. Dublin.**

Patrick Carroll, Folio: 17896; Land: Milltown; Area: 3r 25p. **Co. Kildare.**

Una Patricia Lee, Breaffy House Hotel, Castlebar, Co. Mayo. Folio: 45359; Land: Barrackhill; Area: 1.019 acres. **Co. Mayo.**

Patrick Flynn, deceased, Folio: 11790; Land: Part of the lands at Greenhills; Area: 91a 0r 20p. **Co. Tipperary.**

Thomas Moloney, Folio: 27510; Land: Glancullare South; Area: 1a 0r 0p. **Co. Kerry.**

Cornelius Hayes, Folio: 1364; Land: Dromsallagh; Area: 121a 2r 5p. **Co. Limerick.**

William Alexander Stoops, Folio: 16839; Land: Alsmeed; Area: 14a 3r 25p. **Co. Monaghan.**

Brian Keaney, (deceased), Folio: 2761; Land: Ardakipmore; Area: 43a 1r 20p. **Co. Leitrim.**

Robert Alexander Anderson, Folio: 23354; Land: Tullyally; Area: 11.225 hectares. **Co. Donegal.**

Kelly Brothers Butchers Ltd. Folio: 273L; Land: Part of townland of Killegland. **Co. Meath.**

Edward McNabb, Folio: 8219; Land: Rossana Upper; Area: 2r 34p. **Co. Wicklow.**

Wills

Murphy, Peter, late of Church Street, Askeaton, Co. Limerick. Ob. 8 April, 1992. Would any person aware of the existence or whereabouts of any will executed by the above deceased, please contact Dermot G. O'Donovan & Co., Solicitors of 7 Quinlan Street, The Crescent, Limerick. Ref: B. Conway.

Gibbons, Mary Frances (nee Casey), deceased late of 1 New Street, Longford, and Glenanall, Castlegar, who died at Caiseal Geal Nursing Home, Castlegar, Galway on 26 March, 1992. Would anybody having knowledge of the whereabouts of the original of the deceased's will, please contact Burke & Co., Solicitors, 19 Eyre Street, Galway.

Walsh, Michael, late of Ballyverneen, Glenmore in the County of Kilkenny died on 25 April, 1992. We are acting in the administration in the estate of the late Michael Walsh. We are endeavouring to ascertain if the late Mr. Walsh made a last will and testament and would any person with any knowledge of same please contact the undersigned. James P. Coughlan & Co., Solicitors, New Ross, Co. Wexford.

Heslin, Rosanna, late of 34 Connolly Gardens, Inchicore, Dublin 8. Would any person having knowledge of the whereabouts of a will of the above named deceased who died on 8 June, 1990, contact Rosalind Walsh, Solicitor, Egan Cosgrave Muldowney, 1A, Lower Ormond Quay, Dublin 1. Telephone: 735255 – Fax: 735498.

Tobin, Richard Paschal, late of "St. Bernards" Magazine Road, Cork. Would any person having knowledge of the whereabouts of a will of the above named deceased who died on 2 February, 1988, contact Kieran McCarthy & Co., Solicitors, Old Fire House, 23 Sullivans Quay, Cork. Telephone: (021) 311666; Fax: (021) 311713.

Varley, Thomas, deceased, late of Ardaun, Clonbur, Co. Galway. Farmer. Would any person having knowledge of the whereabouts of a will of the above named deceased, who died on 17 October, 1988, please contact Edward Fitzgerald & Son, Solicitors, Ballinrobe, Co. Mayo. Tel: (092) 41011; Fax: (092) 41793.

Courtney, Patrick, deceased late of Home Farm, Lackabane, Killarney, Co. Kerry. Would any party having knowledge of the whereabouts of a will of the above named deceased who died on 28 November, 1991, please contact: Downing Courtney & Larkin, Solicitors, 84 New Street, Killarney, Co. Kerry. Telephone: 064-31061 or Fax: 064-33934.

Lost deeds

Cornelia, George, formerly: "Of 144 Comeragh Road, Drimnagh, Dublin, deceased, and Elizabeth Cornelia, deceased, late of 144 Comeragh Road, Drimnagh, Dublin. Will any person having knowledge of the whereabouts of any title deeds to the above property please contact Collins Crowley & Co., Solicitors, 10 Kildare Street, Dublin 2. Telephone: 767192 or 767193.

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Northern Ireland Agents, for all contentious and non-contentious matters. Consultation in Dublin if required. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry. Telephone: (080693) 61616, Fax: 67712.

Notices

Land Registry – Relocation of Counties Cork, Wicklow and Kildare

With effect from Monday, 29 June, 1992, the sections of the Land Registry dealing with applications in counties Cork, Wicklow and Kildare will be based on the 1st and 2nd floors of Block 1, Irish Life Complex, Abbey Street, Dublin 1. Telephone: (01) 732233.

***Thomas Cawley,* Civil Bill Officer**

As and from 24 April, 1992, *Thomas Cawley* has resigned as Civil Bill Officer for the City and County of Dublin. All Civil Bills for the City and County of Dublin shall be served by pre-paid registered post, in accordance with Section 7 of the Courts Act, 1964.

County Registrar □

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VOL. 86 NO. 7 SEPTEMBER 1992

INCORPORATED LAW SOCIETY OF IRELAND

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VOL. 86 NO.7 SEPTEMBER 1992

INCORPORATED LAW SOCIETY OF IRELAND

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Front Cover: L-R: The EC Commissioner for Agriculture and Rural Development, *Ray McSharry; Geraldine Clarke,* Council Member, Law Society and *Paddy Duffy,* President, Law Society of Northern Ireland, at a luncheon organised jointly by the Law Society of Ireland and the International Law and Practice Section of the American Bar Association at the ABA Annual Meeting in San Francisco. Commissioner MacSharry was guest speaker.

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This step is not merely the negative one of avoiding prosecution. By doing so they, in effect, employ IMRO to act on their behalf in determining the origin and status of any music performed publicly by them as a business aid and allocating royalties accordingly. So, as well as representing the "consumers" of music IMRO also serves the "Producers", i.e., composers, lyric writers, and music publishers.

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VIEWPOINT

Removing Barriers to Judicial Appointment

In July, 1992 the Law Society presented a submission to the Minister for Justice calling on him to amend the law to make solicitors eligible for appointment as judges in the Circuit and Superior Courts. Elsewhere in this issue, (page 251) the President of the Law Society, in a personal message to the profession, sets out the substance of the submission made to the Minister.

A reform of this kind is long overdue. It is now over 20 years since the Government gave solicitors a right of audience in all the courts (Courts Act, 1971, section 17). In that respect, Ireland was considerably ahead of the other jurisdictions in these islands who have only recently introduced changes which will allow solicitors to gain rights of audience and to act as advocates in the higher courts. However, in the matter of eligibility for judicial office, the other jurisdictions are someway ahead of us. In England and Wales, Scotland and Northern Ireland, solicitors can be appointed to the bench at Circuit Court level and, in recent years, many such appointments have been made. They are also eligible at the level of the High Court. It is now about two years since the Fair Trade Commission added its voice to those who had previously suggested that the law should be changed so that solicitors could be appointed to the bench in the higher courts here. The Government have not, so far, acted. We understand that a new Court and Court Officers Bill is at an advanced stage of preparation and this will provide a suitable legislative vehicle to the Government to enable this change to be made. We think it is time that the Minister, in responding to the Law Society's submission, should say publicly that he intends to make this change and that it will be done in the forthcoming Court and Court Officers Bill.

The widening of the pool from which candidates for judicial office can be chosen will, in our view, be entirely beneficial. It will, moreover, send a clear signal that the Government are serious about changing the legal system and that they wish to see old barriers, which have contributed so much to the maintenance of rigid lines of demarcation between solicitors and barristers, removed. Such a change, provided it is accompanied at an early date by a number of appointments, will, we believe, encourage solicitors to exercise their existing rights of audience more widely.

The submission made by the Law Society to the Government sets out the main arguments for making solicitors eligible for high judicial office. One additional and important point can be made. Many solicitors in this country act as arbitrators in the private settlement of legal disputes. These disputes are often concerned with complex transactions in the commercial field involving serious legal issues and often involve property rights running to millions of pounds. Frequently solicitors sit on their own to determine these issues; sometimes they sit as part of an international team or panel. In doing so, they must, of course, act judicially. We need hardly say that we believe it is indefensible that experienced lawyers of the calibre needed to sit in arbitrations of this kind should be excluded from consideration for appointment as judges in the Circuit and higher courts in this country.

Another aspect of this matter that should be looked at by the Government is the practice of making appointments initially on a part-time and temporary basis as happens in England and Wales and Northern Ireland. There are two main reasons for this practice. The first is to assist with the work of the courts. The other is to give possible candidates for full-time appointment the experience of sitting judicially and an opportunity to establish their suitability. The practice, in our view, has much to commend it on both counts. There is no doubt that additional manpower is often needed to deal with exceptionally heavy workloads in particular areas and such appointments could greatly speed up the hearing of cases and reduce delays. It has also much to commend it in the matter of assessing the suitability of candidates for full-time appointments.

If solicitors are to be made eligible for judicial appointments in the higher courts, a mechanism will have to be found to enable the most able and most deserving candidates to be appointed. At present, the choice is entirely in the hands of the executive and we are not aware that there is any sifting or consultation process. We believe that, when solicitors become eligible, there should be some formal consultation process with the Law Society to ensure that the most able and most suitable candidates are identified. Indeed, a reform of the law along the lines we have suggested raises the broader issue of the method of selecting and appointing candidates to be judges. In England, the Law Society published a discussion paper on judicial appointments in March, 1991 in which they suggested the establishment of a Judicial Appointments Commission to advise the Lord Chancellor on appointments. We do not necessarily say that the case for such a commission in this jurisdication has been made out but we consider that the issues involved should be examined and that, perhaps, the Law Reform Commission is the appropriate body to be asked to undertake such a task. □

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Why are 80% of Lawyers Excluded From Judicial Appointment?

At the end of July I staged a press conference to publicise details of a submission to the Minister for Justice, *Padraig Flynn,* TD, in which the Law Society called for a change in the law to make solicitors eligible to be appointed as judges in the higher courts.

Our submission also argues that it is important that solicitors should be eligible to compete for all posts in the Government service for which a legal qualification is required.

In our submission we say the exclusion of solicitors from appointment to judicial office in the higher courts means in effect that about 80% of all practising lawyers, irrespective of individual merit, their academic qualifications, experience, or standing as lawyers, are ineligible for consideration. If the Government changed the law it would have available to it a much wider range of candidates from which the choice of judges could be made. Such a change would be beneficial and would ensure that the ablest persons would be appointed as judges.

I think it is unacceptable that appointment as a judge in the Circuit Court, High Court and Supreme Court should nowadays be the preserve of only one branch of the legal profession, namely, the bar. Why should experience as an advocate be a prerequisite for eligibility for appointment as a judge? There are many other desirable qualities to be sought in suitable candidates.

Experience has shown that the best advocates do not necessarily make the best judges and, correspondingly, that some of the most able judges in the past did not have distinguished careers as advocates. The candidate's knowledge of the law, his or her standing as a lawyer, independence of mind, judgement and decisiveness as well as the perceived ability to "chair" and administer his/her court are among the qualities that are more desirable than experience as an advocate. Other personal qualities are also important such as patience, courtesy and, of course, compassion.

The appointment of solicitors to judicial office in the higher courts is essential if the Government is serious about bringing about change in the legal profession and, in particular, encouraging solicitors to exercise their existing right of audience in the higher courts. While solicitors are entitled to appear as advocates in the Circuit Court, High Court and Supreme Court, the general practice still within the profession is to brief barristers in these courts. The difficulty is that many solicitors feel inhibited from exercising their rights of audience at present because of the fact that the judiciary in the higher courts are invariably former barristers. The Fair Trade Commission acknowledged this difficulty in its report (paragraph 17.9) and put their view as follows:

> "We believe that the presence of former solicitors as judges would encourage more solicitors to engage in advocacy, since they may well be partly inhibited from exercising their rights of audience at the moment because all judges are former barristers, and the possibility of judicial appointment for solicitor-advocates also might encourage more Court appearances by solicitors."

If the Government is serious about trying to erode the present rigid lines of demarcation between solicitors and barristers and ultimately to bring to an end any restrictive practices that may exist within the legal profession, it must do what it can to eliminate barriers and divisions that contribute to the demarcation that exists. The early appointment of a number of solicitors to the Circuit and High Court would have a powerful impact on the momentum for change throughout the entire legal system.

All that is required is a relatively simple legislative change. The Minister has an ideal opportunity to do so this Autumn when he publishes a new Court and Court Officers Bill. I hope that he will make his intentions known before then, by clearly signalling that he accepts our arguments. It is heartening to note that the Minister of State at the Department of Justice, *Willie O'Dea* TD, has publicly accepted, in principle, the merits of our arguments. I have also received letters indicating support from Oireachtas members of Fine Gael, Labour, Progressive Democrats and Democratic Left.

"The early appointment of a number of solicitors to the Circuit and High Court would have a powerful impact on the momentum for change . . ."

I want to thank my predecessor, Donal Binchy, who chaired the sub-committee on judical appointments and who did a great deal of the preparatory work on the submission. I also want to thank *Alan Shatter* TD, *Max Abrahamson, Frank O'Donnell, Andy Smyth, John Fish* and *Ray Monahan* who attended the press conference and spoke tellingly of their experience of advocating in the higher courts, of acting as arbitrators and serving on tribunals such as the Criminal Injuries Compensation Tribunal and the Garda Siochana Complaints Board.

Adrian P. Bourke
President □

Society Launches Media Awards

Logo for the Justice Media Awards Competition

At the end of July, Law Society President, *Adrian Bourke*, launched the inaugural Justice Media Awards Competition at a reception in Blackhall Place attended by a substantial number of representatives of all sections of the Irish media. The competition is designed to provide recognition of public service by newspapers, magazines and book publishers which make outstanding contributions to public understanding of the Irish system of law and justice.

The introduction of the Media Awards, which was pioneered by *Ken Murphy* of the Public Relations Committee, is designed to build bridges with the media and to encourage both higher standards of reporting of legal issues and increased coverage of legal affairs generally. Ken Murphy says: "It is clearly of benefit to both the public and the profession to have accurate, well informed reporting of legal affairs in the media in order that the public is aware of legal developments generally. Very few people, other than lawyers, will ever read a law book. Accordingly the citizen's general knowledge and understanding of his or her legal rights and obligations, whether arising under existing law or new laws, will come through reporting in the media. In addition, the role of the media in highlighting miscarriages of justice, as recent years have shown, is absolutely crucial".

The first competition will cover the year from 1 May, 1992 to 30 April, 1993. Any media organisation which has produced a newspaper, magazine or book in Ireland is eligible to enter the awards competition. Ken Murphy says he hopes that solicitors throughout the country will play a role in identifying potential entrants and will liaise with their local newspapers both to make sure that they are aware of the competition and to encourage them to participate in it. "The awards are based loosely on the Gavel Awards Competition run annually since 1958 by the American Bar Association. The Gavel Awards are highly prestigious in the US. They have a reputation for integrity and have been enormously successful in encouraging more extensive and better quality coverage of legal affairs. I hope the introduction of media awards here will have a similar effect and that our awards system will grow and develop in much the same way as the Gavel Awards did".

The Justice Awards and Certificates of Merit will be made in a number of classifications including daily newspapers, non-daily newspapers with 30,000 or less circulation, non-daily newspapers with circulation of more then 30,000 magazines and books. In the first year the competition will be confined to the print media but it is hoped thereafter to include the broadcast media. In addition, there will be one overall prize which will be an expenses paid trip for two representatives of the winning media organisation to New York City in August 1993. The winners will attend the American Bar Association's Gavel Awards Annual Presentation Luncheon as guests of the ABA. The travel costs for this prize have been kindly sponsored by Aer Lingus.

At the launch of the media awards, Law Society President, *Adrian Bourke,* said the media played a vitally important role in a free society in helping to expose both the failings of the legal system and the laws and legal practices which require reform in the public interest. "There is a huge agenda of reform for the legal system, not just in terms of amending outdated statutes or introducing new legislation, but also in terms of the accessibility of our system of justice to the people it exists to serve - the public. The media has a vital role to play in describing and highlighting the reform agenda", he said.

Adrian Bourke also announced that the Council of the Law Society had decided that as and from 1 January next the final outcome of all disciplinary cases against solicitors where misconduct is found would be published in the Gazette so that the information would be available in a document of public record for any member of the public or the media who wanted access to it.

The Justice Media Awards of 1992/93 will be made at a presentation ceremony in June, 1993. The entries will be judged by solicitors who will make up the Law Society Standing Committee on the Justice Media Awards. The deadline for entries is 30 April, 1993. Entry forms and a rules booklet are available from the Law Society on request.

The launch of the awards scheme was greeted by very favourable comment and coverage in all the national daily newspapers both in news reports and editorials. Within two days of the launch of the competition the first entry was received. □

Solicitors Vow to Protect Client Confidentiality

A Special General Meeting held in the Law Society on Wednesday, 22 July, 1992 last, attended by some 300 solicitors, resolved not to co-operate with Part VII of the Finance Act, 1992 because the legislation erodes the essential confidentiality of the solicitor/client relationship, is bad for commerce, interferes with the public's right to obtain independent legal advice and is unworkable.

The following resolution was unanimously passed at the meeting: "That, with a view to preserving the independence of the legal profession and preventing it becoming an instrument of Government, this Special General Meeting opposes totally the provisions of Part VII of the Finance Act, 1992. The view of the members of the solicitors' profession is that a policy of total non co-operation in relation thereto is justified; that this view be conveyed to the Revenue Commissioners and that the Council of the Law Society take all possible steps to oppose and render inoperable the said provisions". The motion was proposed by *Seamus Brennan* (Kilkenny) and seconded by *Peter Reilly* (Tipperary).

The meeting debated strategies for opposing the legislation, with many speakers, for example, *Enya Egan* (Castlebar), *John Kelly,* (Cavan), canvassing support for an immediate constitutional class action to seek to have the legislation struck down. Other speakers, amongst them, *Barry St. J. Galvin,* (Cork) feared that a constitutional action might be too risky a strategy, while others, including *Donal Binchy,* (Tipperary) favoured a constitutional action as a last resort in the event that negotiation and persuasion failed.

Frank Gleeson (Thurles) and *Denis Larkin* (Mullingar) were among the speakers who emphasised that it was extremely important for the Society to mount an effective public relations campaign against the provisions in the Bill as support from the public would be essential. A view that the Law Society should be prepared to support – financially if necessary – any solicitor who came into conflict with the Revenue Commissioners for failing to comply with the legislation, was put forward by a number of speakers including *Dan Gormley* (Monaghan) and *Ciaran Keyes* (Galway).

Above all, it was the issue of client confidentiality which most concerned those attending the meeting. This was addressed by many speakers, including *Robert Pierse* (Listowel) who said that the legislation threatened the very core of the integrity and confidentiality of the solicitor/client relationship. Confidentiality was a central tenet of the profession and compliance with the legislation would render members of the profession "unpaid informers", he declared.

Press Statement

Following the unanimous support expressed at the Special General Meeting, the Taxation Committee of the Law Society issued a statement to the media outlining the terms of the resolution and making the following points:

"Part VII of the Finance Act, 1992 introduces mandatory reporting obligations on persons carrying on a business, profession or trade. It means that every solicitor will have to provide detailed information on a wide range of transactions including:

(a) All payments in excess of £500 in aggregate in any one year made on a solicitor's behalf or on behalf of a client of that solicitor to any provider of services.

(b) Any monies in excess of £500 in aggregate received by a solicitor on behalf of others which may or may not be taxable (including compensation payments).

(c) All payments arising from any premises.

"In objecting to these provisions, the Law Society wishes to make it clear that solicitors have no objection to making these returns on their own behalf. However, solicitors object in the strongest possible terms to the provisions which oblige them to inform the Revenue of transactions involving their clients' affairs. In the vast majority of cases the Revenue will already have received this information from clients through the self assessment system. The duplication of cost in complying with these provisions penalises the honest taxpayer. Furthermore, they erode the essential confidentiality on which the solicitor/client relationship is based. It is a constitutional right for people to obtain independent and confidential legal advice.

"Members of the Law Society also believe that the provisions of Part VII of the Finance Act are anti-business. The reporting obligations will impose a huge administrative burden on all Irish businesses who will have to install systems to cope with the volume of record-keeping and form-filling required. It should be remembered that the vast majority of businesses in Ireland are small. The administrative cost of complying with the legislation will have to be passed to the consumer resulting in higher prices and the erosion of Irish competitiveness.

"Part VII of the Finance Act, 1992 also entitles the Revenue Commissioners to enter any business premises without a warrant and to seize any file or record and any person obstructing a Revenue official may be arrested without warrant. These provisions by requiring solicitors without judicial intervention to automatically inform on their clients are in breach of the clients' contractual, constitutional and human rights. The right of a client to confidentiality in consulting a lawyer is a fundamental and inalienable right in any democracy. *The Law Society vehemently opposes these powers.*

"The Law Society wishes to make it clear that it does not support tax evasion or those who fail to make returns. The Revenue Commissioners already have extensive and sufficient powers to deal with these offences. Part VII of the Finance Act, 1992 assumes that everyone, including the honest taxpayer, is guilty until proven innocent.

"Dail deputies had less than one hour to debate the provisions of Part VII. This highlights the inadequacy of the system of dealing with finance bills. The Finance Bill, 1992, an extremely lengthy and technical document, was introduced at the end of April last with barely a month for discussion. The Taxation Committee of the Law Society requested a postponement of the enactment of Part VII and sought a meeting with the Minsiter for Finance without avail. The result of inadequate consultation and debate is unworkable legislation.

"The Law Society calls on the Minister and his department and the Revenue Commissioners to suspend the implementation of Part VII and to engage in dialogue with the profession and all others affected."

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Irish Society For European Law

Lecture Programme for Autumn/Winter 1992

1. Thursday, October 15, 1992: Peter Alexandis, Coudert Brothers, Brussels – *European Community Competition Law in Relation to Distribution.*

2. Thursday, November 12, 1992: Vincent JG Power, Director of EC and Competition Law, A & L Goodbody, Solicitors – *European Community Transport Law.*

3. Thursday, January 21, 1993: Gerald FitzGerald, Head of EC and Competition Law, McCann FitzGerald, Solicitors – *European Community State Aids Law and Ireland.*

Lectures take place at 8.15p.m. at the Kildare Street and University Club, 17 St. Stephen's Green, Dublin 2, by kind permission.

Members and their guests are invited to join the Council and guest speakers for dinner at the Club at 6.15p.m. on the evening of each lecture. Members intending to dine must communicate with the Registrar, Jean Fitzpatrick, Solicitor's Office, Telecom Eireann, 52 Harcourt Street, Dublin 2. (Tel. 01 714444 ext. 5081, Fax. 01 679 3980, Electronic Mail (Eirmail) (Dialcom) 74:EIM076) not later than two days in advance.

Membership of the Society is open to lawyers and to others interested in European Law. The current annual subscription is IR£30.00 (IR£15 for students, barristers and solicitors in the first three years of practice). The membership subscription includes the cost of the Society's journal, The Irish Journal of European Law, which is now available.

Membership forms and further details may be obtained from the Registrar.

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Cavan Bar Association Cruisers

At a Cruise on the Erne organised by the Cavan Bar Association were L-R: Niall Dolan, Solicitor, Rory Hayden, Solicitor, Paul Kelly, Solicitor, Martin Cosgrove, Solicitor, Jenny McGlade, Solicitor (seated); Judge Thomas A. Fitzpatrick; Brendan Mulhall, BL; Harry Hunt, Solicitor; Angela O'Reilly, BL; Geraldine Smith, BL; George V. Maloney, Solicitor; Dennis McDwyer, Solicitor (in cap). At the back: Kenneth Mills, SC; Michael Ryan, Solicitor; Dermot Fitzpatrick, Solicitor; and Noel O'Gorman, Solicitor (sun glasses).

ABA Debates the "A" Word

Twelve thousand plus lawyers, including a delegation from the Law Society of Ireland, descended on San Francisco for the Annual Meeting of the American Bar Association which ran from 6-12 August last. Those attending the meeting had the choice of attending more than 2,200 different meetings and programmes featuring 1,800 speakers and wading their way through the 150,000 lbs of paper produced as background documentation by the ABA for the meeting. While participants could choose between programmes such as "Wine Regulation Issues" "Challenges Facing Advocates in the 1990s", "Everything You Wanted To Know About Running a Small Practice But Were Too Busy To Ask", it was the issue of abortion rights which dominated the agenda.

Outgoing ABA President, *Talbot "Sandy" D'Alemberte,* proposed the motion: "be it resolved, that the American Bar Association opposes State or federal legislation which restricts the right of a woman to choose to terminate a pregnancy (1) before foetal viability; or (2) thereafter, if such termination is necessary to protect the life or health of the woman". The ABA President said that "the best interests of the Association lie with American lawyers entering this fray. With

ABA President ***Talbot D'Alemberte***

growing numbers of women entering the legal profession, the ABA may not, without grave results for its credibility, withdraw from important women's issues, even ones that are divisive. Some of us - and I am one of those - think the whole choice issue is a justice issue. It involves liberty issues, and to remain neutral when a liberty issue is at stake is to turn our back on a rather proud tradition of speaking out on such things". Opponents of the motion argued that abortion was a moral and religious issue for most people, and that taking a position would only polarise the ABA. Past President, John J. Curtin, Jnr., spoke in favour of remaining neutral on the issue. He said that the abortion rights resolution was an extremist one that would only further undermine the Association and undermine its credibility. "We are not cowards when we take a healing position. The resolution will not help to heal, but will add to the shouting by people who are not listening."

The motion was passed by a two-thirds majority in the ABA Assembly, and subsequently by a similar majority in the ABA House of Delegates, ensuring its adoption as ABA policy. However, this is the second time in as many years that the ABA has changed its mind on the issue. In February, 1990 the House of Delegates adopted a position favouring abortion rights. Six months later the ABA switched to a neutral stance after a campaign led by opponents of abortion rights. ●

Booth 507 Attracts the Crowds

Booth 507, occupied by the Law Society of Ireland, was among the busiest of the 197 booths at the Expo staged at the American Bar Association. Seven Irish firms booked time on the Law Society booth and all reported a steady stream of visitors to the stand, many of them claiming Irish roots and connections. Materials promoting the services of Irish law firms were snapped up, particularly green button badges extolling the virtues of Irish lawyers which were stored away by recipients to be worn next St. Patrick's Day. A constant query was about the criteria required to obtain an Irish passport, seen by many as an indirect route to availing of the benefits of freedom of movement and rights of establishment arising from the EC Internal Market. ●

ABA Awards 19 Gavels

The ABA this year celebrated the 35th Anniversary of its Gavel Awards programme. The ABA presents the Gavel Awards to media organisations for outstanding public service in increasing public understanding of the American legal system. This year's competition attracted nearly 400 entries from 262 different media organisations and 19 awards were made. Among the winners were the Akron Beacon Journal (Ohio) for "Justices for All?" a troubling series raising ethical questions and allegations of impropriety among the justices of the Ohio Supreme Court; WETA FM (Washington DC) for "We Hold These Truths", an entertaining broadcast tracing the Constitution and the Bill of Rights from their origin and ratification to modern day challenges; Salmon and Schuster Consumer Group (New York) for "Den of Thieves" by James Stewart, an exciting tale of how the biggest criminals in Wall Street's history were brought to justice. ●

MacSharry Warns US on Trade War

Some of the participants at the luncheon hosted jointly by the Law Society and the International Law and Practice Section of the ABA.

Addressing a sell-out showcase luncheon organised jointly by the Law Society of Ireland and the International Law and Practice Section of the ABA, EC Commissioner for Agriculture, *Ray MacSharry,* warned that if the US proceeded to take unilateral action against Community imports, the European Community would have to retaliate against such action. "Clearly, such a chain of events would have very serious implications for trade on both sides of the Atlantic and for a successful outcome to the Uruguay Round of the GATT negotiations. Hopefully, reason and respect for international rules will prevail over unilateralism."

Commissioner MacSharry said: "the Uruguay Round remains a very important issue to be resolved before the end of this year. Since I became Commissioner responsible for Agriculture and Rural Development, I have seen many GATT deadlines come and go. I am, however, reasonably optimistic about the possibility of a successful conclusion before the end of this year.

"The reform of the Common Agricultural Policy was welcomed by the G7 summit in Munich. It is clear that the Community is willing to play its part in bringing about a more market orientated approach in international trade in agriculture. However, it is clear that to achieve that objective there will have to be an imput from all the players on the world scene." Mr. MacSharry said that a failure of the Uruguay Round could lead to a crisis of confidence in the world trading system which would be in nobody's interest. There remained, however, several very important issues to be resolved not only in relation to agriculture but also in the fields of market access as well as commitments in the services sector.

"Clearly, we are all going to have to make a comparable effort, and not do anything which would compromise the political climate. In this regard, I would very much hope that the United States will refrain from taking unilateral action against Community imports in the context of their disagreement with the Community as regards the impact of the EC oilseeds regime on US exports of these products. The Community is at present negotiating with the US and other interested countries within the GATT on a new regime for imports of oilseeds. I hope that the US abide by the GATT rules in this matter.

"A successful and balanced outcome of the Uruguay Round would demonstrate that the developed and developing countries alike are determined to work in harmony to

(Continued overleaf)

ABA Honours Anita Hill

The ABA Commission on Women in the Profession honoured Professor *Anita Hill* by presenting her with a special Margaret Brent Women Lawyers of Achievement Award, "to recognise her profound impact on American society in general and on women lawyers in particular". Ms. Hill, who has been a Professor of Law at the University of Oklahoma since 1986, attracted world-wide publicity when she appeared before the US Senate Judiciary Committee hearings on the nomination of Clarence Thomas to the US Supreme Court and alleged that she had been sexually harassed by him. At the Awards luncheon, Professor Hill said that she was accepting the Award on behalf of more than 1,000 women lawyers "who in 1990 reported having witnessed or experienced some form of sexual harassment." She said that women have to fight the premise that no woman can be perceived to be telling the truth about harassment and abuse.

The keynote speaker at the Awards luncheon was *Hillary Rodham Clinton,* a former Chairman of the ABA Commission on Women and wife of the Democrat presidential candidate, Bill Clinton. Hillary Clinton said "as women and as lawyers, we must never again shy from raising our voices against sexual harassment - or against the persistent and often illegal discrimination that still limits opportunities for pay and promotion - and against the glass ceiling that is often translucent but never transparent." Ms Clinton said that when the ABA Commission on Women in the Profession held its first hearings five years ago, "we came away deeply disturbed to learn first hand of both the persistent discrimination and serious barriers to balancing professional demands and personal obligations that continue to confront women in the legal profession".

"Justice Deficit" says ABA President-Elect

"The Justice system in many parts of the United States is on the verge of collapse due to inadequate and unbalanced funding" said the President-elect of the American Bar Association, *J. Michael McWilliams,* at the launch of a report of an ABA Special Committee on Funding the Justice System.

The report found that the justice system was starved of resources and continuing neglect posed a very serious threat to democracy in the US. According to the report, half the States in the US were experiencing undue delay in civil cases and in their criminal courts. This has meant, for example, that indigent individuals charged with a crime in Louisiana have waited up to 70 days in jail before arraignment; that the criminal cases backlog in Baltimore increased by more that 900 cases in one year; and, in Detroit, where it used to take a few hours to remove a child from a dangerous home environment, it can now take up to three days. The report also found that half of the States in the US reported actual budget cuts in justice funding during the past year.

The ABA President-elect said that delays and lack of resources had very real consequences for the every day lives of Americans. He told the story of Robert from Atlanta who, in a case of mistaken identity, recently spent six months in jail without any form of charges being brought and without seeing a lawyer. He also mentioned the victim of a rape in New Mexico whose accused attacker was released and would not be charged because the District Attorney could not meet trial requirements due to a lack of resources. "These are only a few examples that indicate the personal tragedy created by the lack of funding for the civil and criminal justice system", he said. "Moreover, this lack of funding creates an environment in which the quantity of justice is more important than the quality of justice."

J. Michael McWilliams,
President-elect, ABA

The ABA President-elect said that lawyers must lead the way to increase publice awareness and understanding of this problem. He said, however, that "lawyers alone cannot ensure adequate and balanced funding for the justice system. Bar associations and members of the Bench must reach out and build relationships with other groups to form a 'coalition for justice'." ●

MacSharry Warns US

(Continued from page 256)

create a solid foundation in international trade rules, not only in the more traditional field of industrial products, but also in the sensitive area of agriculture, along wtih new areas such as services and intellectual property.

"The Community believes that an additional reason for a successful conclusion of the Uruguay Round lies in the need to provide a stable trading environment for the countries of Central and Eastern Europe and the independent States of the ex-Soviet Union." Mr. MacSharry said that the European Community had made it very clear that it was not and would not become a fortress Europe. "This has been demonstrated by the recent negotiations with our neighbours in Europe. Equally, the Community is commited to further liberalisation of world trade through the successful conclusion of the Uruguay Round. I believe, I hope, that the US is equally commited." ●

At the ABA They Said...

"Over the last dozen years, the US Government has too often been on the wrong side of the struggle for equal justice", New York Times columnist, Anthony Lewis, addressing the ABA opening assembly.

"The roles of lover and lawyer are potentially conflicting ones, and lawyers should avoid the conflict," American Bar Association Standing Committee on Ethics and Professional Responsibility.

"It is not enough to promote family values, we must have a Government that values families." Hillary Rodham Clinton, former Chairman of the American Bar Association Commission on Women and wife of Democrat presidential candidate, Bill Clinton, addressing a luncheon at the ABA.

"Hey, hey, ABA, vote pro-choice and vote pro gay" demonstrators chanting in a protest outside the San Francisco Hilton, the ABA Meeting Headquarters, on Saturday, 9 August.

"Our very notion of democracy and justice are threatened by a lack of adequate resources to operate the one (justice) system that has protected and extended our rights for more than two centuries". ABA President-elect, J. Michael McWilliams.

"The most important response we have to racism is to succeed". George Fraser, publisher and radio host addressing a meeting programme of the Conference of Minority Partners in Majority Law Firms.

"You've got to language your thinking in terms of end-user." Michael Kelly, Family Law Attorney, speaking at an ABA seminar on Managing Clients and Cases.

Barbara Cahalane □

WHERE THERE'S A WILL THIS IS THE WAY...

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LAWBRIEF

Eamonn G. Hall

Selected Government Acts and Bills Before the Oireachtas 1992

The following list includes selected Government Acts and Bills as at July 16, 1992. The Dail adjourned on July, 10, and the Seanad on July 16, 1992 for the summer recess.

Irish Land Commission (Dissolution) Bill, 1989 **(Bill No. 11 of 1989) (With Explanatory Memorandum)**

This Bill provides for the dissolution of the Irish Land Commission, for the winding up of the system of land purchase, for the transfer of certain functions exercisable under the Land Purchase Acts, and for other connected matters.

Presented in the Dail by the Minister of Agriculture and Food 2/3/89. Present position: at Committee stage in the Dail 11/6/92.

Environmental Protection Agency Act, 1992 **(No. 7 of 1992) (With Explanatory Memorandum as initiated)**

This Act provides for the establishment of an Environmental Protection Agency which will have the following main functions: the control and regulation of scheduled activities likely to pose a major risk to environmental quality; the general monitoring of environmental quality; the provision of support, back-up and advisory services to public authorities and the promotion and co-ordination of environmental research. The Act also provides for a number of miscellaneous matters relating to the protection of the environment and for the increase of certain penalties.

Presented 10/12/90. Present position: passed by both Houses of the Oireachtas 15/4/92. Enacted 23/4/92. Commencement date: 23 April, 1992.

Road Bill, 1991 **(Bill No. 12 of 1991) (With Explanatory and Financial Memorandum)**

This Bill provides for the construction and maintenance of public roads, establishes a national roads authority, provides for motorways, busways and protected roads, and other connected matters.

Presented by the Minister for the Environment 25/4/91. Present position: referred to a Special Committee of the Dail 7/7/92.

Dublin Institute of Technology Act, 1992 **(No. 15 of 1992) (With Explanatory Memorandum as initiated)**

This Act establishes the Dublin Institute of Technology, defines its functions and provides for connected matters.

Presented by the Minister for Education 14/6/91. Present position: passed by both Houses of the Oireachtas 10/7/92. Commencement date: expected to be 1 January, 1993.

Regional Technical Colleges Act, 1992 **(No. 16 of 1992) (With Explanatory Memorandum as initiated)**

This Act establishes statutorily as Regional Technical Colleges the existing nine such Colleges as well as the Limerick College of Art, Commerce and Technolgy; defines main functions and provides for connected matters.

Presented by the Minister for Education 14/6/91. Present position: passed by both Houses of the Oireachtas 10/7/92. Commencement date: expected to be 1 January, 1993.

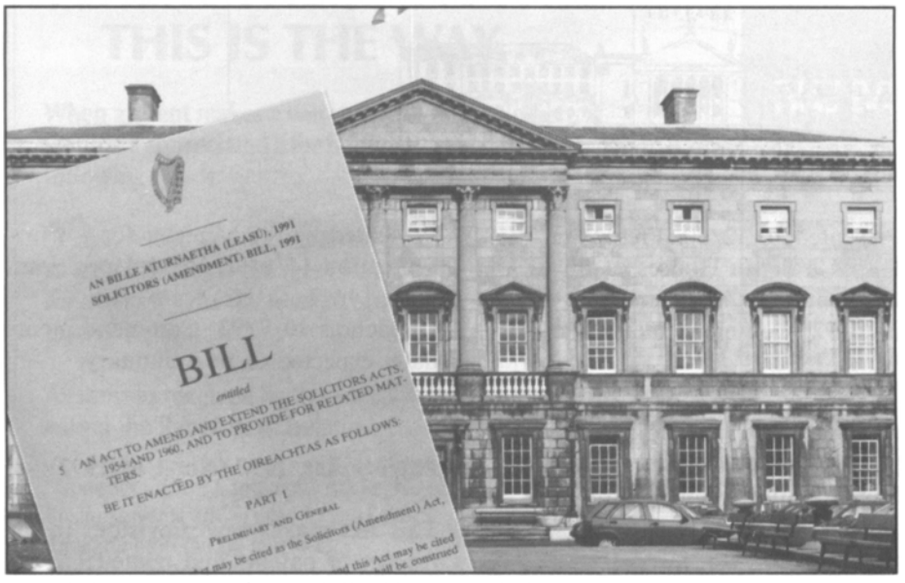
Patents Act, 1992 **(No. 1 of 1992)**

This Act makes new provisions in respect of patents and related matters in substitution for the provisions of the Patent Acts, 1964 and 1966, which are repealed subject to transitional provisions; enables effect to be given to certain international conventions on patents.

Presented by the Minister for Industry and Commerce 15/7/91. Present position: passed by both Houses of the Oireachtas 19/2/92. Enacted: 27/2/92. Commencement date: 1 August, 1992.

Solicitors' (Amendment) Bill, 1991 **(Bill No. 31 of 1991) (With Explanatory Memorandum)**

This Bill amends and extends the Solicitors' Acts 1954 and 1960. The more important provisions are as follows: increases the Law Society's powers to deal with complaints against solicitors and to intervene in solicitors' practices; provides for the appointment of a legal ombudsman with power to oversee the handling by the Society of complaints against solicitors; strengthens the powers of the Disciplinary Committee of the High Court and provides for lay membership thereof; amends the law relating to the Compensation Fund to provide that claims on the Fund may in future be made only by persons who are clients of solicitors; provides for compulsory professional indemnity insurance, updates and amends the Society's functions in relation to the education and training of solicitors; promotes competition in the provision of legal



The Solicitors (Amendment) Bill, 1991 is now before a select committee of the Dail.

services by allowing fee advertising and granting power to banks to provide conveyancing services and to banks and trust corporations to do probate work. Provides for other related matters.

Presented by the Minister for Justice 23/10/91. Present position: referred to a Special Committee of the Dail 24/6/92.

***Control of Dogs (Amendment) Act, 1992* (No. 13 of 1992) (With Explanatory Memorandum as initiated)**

This Act amends the *Control of Dogs Act, 1986,* and provides additional powers to more effectively deal with the problem of dangerous dogs.

Presented by the Minister for the Environment 29/10/91. Present position: passed by both Houses of the Oireachtas 3/7/92. Enacted 11/7/92. Commencement date: no commencement date as yet.

***Local Government (Planning and Development) Act, 1992* (No. 14 of 1992) (With Explanatory Memorandum as initiated)**

This Act amends and extends the *Local Government (Planning and Development) Acts 1963 to 1990,* in relation to appeals and other matters with which An Bord Pleanála is concerned and in relation to legal proceedings challenging the validity of decisions by planning authorities and the Bord.

Presented by the Minister for the Environment 5/11/91. Present position: passed by both Houses of the Oireachtas 9/7/92. Commencement date: not available.

***Land Bond Act, 1992* (No. 4 of 1992) (With Explanatory Memorandum as initiated)**

This Act provides principally for dissolution of the Guarantee Fund established under the *Purchase of Land (Ireland) Act, 1891,* and the Land Bond Fund established under the *Land Act, 1923,* and the transfer of moneys therein to the Exchequer. The moneys needed to pay dividends on and to redeem land bonds came from these Funds. The funds are no longer required because all outstanding land bonds were redeemed on 3 April, 1989. Amends and extends the Land Purchase Acts and provides for other related matters.

Presented by the Minister for Finance 27/11/91. Present position: passed by both Houses of the Oireachtas 11/3/92. Enacted: 18/3/92. Commencement date: 29 May, 1992.

***Merchant Shipping Act, 1992* (No. 2 of 1992)**

This Act provides further for the safety of passenger ships, passenger boats, fishing vessels and pleasure craft; amends the *Merchant Shipping Acts 1894 to 1983* and provides for related matters.

Presented by the Minister for the Marine 3/12/91. Present position: passed by both Houses of the Oireachtas 5/3/92. Enacted: 11/3/92. Commencement date: 1 August, 1992.

***Milk (Regulation of Supply) (No. 2) Bill, 1991* (Bill No. 40 of 1991) (With Explanatory and Financial Memoranda)**

This Bill provides for the dissolution of the Milk Boards system and the establishment of a National Milk Agency; repeals the *Milk (Regulation of Supply and Price) Acts, 1936 to 1967.*

Presented by Senator Sean Fallon 5/12/91. Present position: second stage in the Seanad passed 30/1/92.

***Criminal Evidence Act, 1992* (No. 12 of 1992) (With Explanatory Memorandum, as initiated and as passed by both Houses of the Oireachtas)**

This Act amends the law of evidence relating to criminal proceedings in three main respects - (a) makes admissible in evidence information contained in certain business and administrative documents, including computer printouts, (b) deals with young persons and persons with mental handicap giving evidence in cases involving physical or sexual abuse, and (c) sets out the circumstances in which the spouse or former spouse of an accused person is competent and compellable to give evidence at the instance of the prosecution, the accused or a co-accused.

Presented by the Minister for Justice 31/1/92. Present position: passed by both Houses of the Oireachtas 1/7/92. Enacted 7/7/92. Commencement date: 7 October, 1992.

***ACC Bank Act, 1992* (No. 6 of 1992) (With Explanatory Memorandum as initiated)**

This Act provides for the development of the ACC as a bank which will provide a full range of banking and associated financial services; increases the authorised share capital and borrowing limit of the ACC and provides for connected matters. Amends and extends the *Agricultural Credit Acts 1978 to 1988,* amends section 9 of the *Bankers' Books Evidence Act, 1879,* section 2 of the *Bills of Exchange Act, 1882* and section 2 of the *Insurance (Amendment) Act, 1978.*

Presented by the Minister for Finance 9/3/92. Present position: passed by both Houses of the Oireachtas 9/4/92. Enacted: 16/4/92. Commencement date: 24 April, 1992.

***Social Welfare Act, 1992* (No. 5 of 1992) (With Explanatory Memorandum as initiated)**

This Act provides for the increases from July 1992 in the rates of Social Welfare payments announced in the Budget and for other measures relating to the Social Welfare code. Amends and extends the Social Welfare Acts 1981 to 1991, amends and extends the Pensions Act, 1990.

Presented by the Minister for Social Welfare 16/3/92. Present position: passed by both Houses of the Oireachtas 15/7/92. Commencement date: 4 April, 1992 (some sections).

***Housing (Miscellaneous Provisions) Act, 1992* (No. 18 of 1992) (With Explanatory Memorandum as initiated)**

This Act provides the legislative framework for a range of measures contained in the document *A Plan for Social Housing* published by the Minister for the Environment in February, 1991. Amends and extends the *Housing Acts 1966* to *1988, the Landlord and Tenant (Ground Rents) Act, 1978,* the *Landlord and Tenant (Amendment) Act, 1980,* the *Housing Finance Agency Acts 1981 to 1988,* the *Housing (Private Rented Dwellings) Act, 1982* and the *Building Societies Act, 1989.*

Presented by the Minister for the Environment 24/3/92. Present position: passed by both Houses of the Oireachtas 15/7/92. Commencement date: 1 September 1992 (except for repeal of Sn. 70, *Housing Act, 1966).*

***Interception of Postal Packets and Telecommunications Messages (Regulation) Bill, 1992* (Bill No. 6 of 1992) (With Explanatory Memorandum)**

This Bill regulates the interception of certain postal packets and telecommunications messages; provides that the only purposes for which interceptions may be authorised will be those of criminal investigation or the security of the State; provides for related matters.

Presented: 1/4/92. Present position: passed by Seanad Eireann 9/7/92.

***Censorship of Films (Amendment) Bill, 1992* (Bill No. 7 of 1992) (With Explanatory Memorandum)**

This Bill enables the Minister for Justice to appoint Assistant Censors to assist the Official Censor of Films in the performance of his function in relation to the censorship of cinema films and video works and provides for related matters; amends the *Censorship of Films Acts 1923 to 1970* and the Video Recordings Act, 1989.

Presented: 2/4/92. Present position: passed by Seanad Eireann 25/6/92.

***Finance Act, 1992* (No. 9 of 1992) (With Explanatory Memorandum, as initiated, and as passed by Dail Eireann)**

This Act provides for the charging and imposition of certain duties of customs and inland revenues (including excise), amends the law relating to customs and inland revenue (including excise) and makes further provisions in connection with financial matters.

Introduced by the Minister for Finance; ordered by Dail Eireann to be printed 8/4/92. Present position: deemed to have been passed by both Houses of the Oireachtas 22/5/92. Enacted: 28/5/92. Commencement date: 28 May, 1992.

***Financial Transactions of Certain Companies and Other Bodies Act, 1992* (No. 11 of 1992) (With Explanatory Memorandum as initiated)**

This Act confirms the legal powers of semi-State bodies to engage in swaps and other financial transactions and provides for related matters.

Presented by the Minister for Finance 24/4/92. Present position: passed by both Houses of the Oireachtas 11/6/92. Enacted: 11/6/92. Commencement date: 17 June, 1992.

***Local Authorities (Higher Education Grants) Act, 1992* (With Explanatory Memorandum as initiated)**

This Act amends and extends the *Local Authorities (Higher Education Grants) Acts, 1968 and 1978,* so as to enable local authorities to award higher education grants to mature students and to enable school terminal examinations from outside the State to be accepted in place of the Leaving Certificate Examination for the award of grants.

Presented by the Minister for Education 25/6/92. Present position: passed by both Houses of the Oireachtas 16/7/92. Commencement date: 23 July, 1992.

***ICC Bank Act, 1992* (No. 21 of 1992) (With Explanatory Memorandum as initiated)**

This Act provides for the development of the Industrial Credit Corporation, including the change of name of the Company to "ICC Bank plc" and to enable it to provide a full range of banking and associated financial services, increases the borrowing powers of the ICC and

(Continued on page 265)

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Evaluation of Cognitive Disorders Following Head Injury

by Dr. Martina O'Connor*

The incidence of brain injury following events such as motor vehicle accidents and falls has risen drastically over the past ten years. Various emotional and social sequelae deficits may result from head injury.

The specific area of brain injury being addressed in this article is cognitive disorders, a frequent consequence of brain injury.

What Are Cognitive Disorders?

The term *cognitive* refers to the state of *knowing* or *understanding*. Brain injury often alters a person's ability to know or understand the world about him or her. Such individuals often experience difficulty with information processing or with responding appropriately to events in the environment. They may be unable to organise and use their environment in an effective way. Impairments in cognition or thinking may prevent an individual from returning to work or independent living.

Cognitive impairments can logically be described as discrete areas of disability (i.e., a memory deficit versus a visual processing impairment). It is important, however, to realise that different cognitive impairments often occur together and that they interrelate. For example, a person may present what appears to be a significant memory deficit when the underlying difficulty is actually a problem with attention and concentration. With this in mind, each of the different types of cognitive impairments will be described and the reader should remember that they are not necessarily distinct and separate disorders.

Dr. Martina O'Connor

There are six broad areas of cognition that are commonly impaired following brain injury. These include disorders of

1. *attention and concentration,*
2. *visual processing,*
3. *memory,*
4. *reasoning and judgement,*
5. *executive functions,* and
6. *communication.*

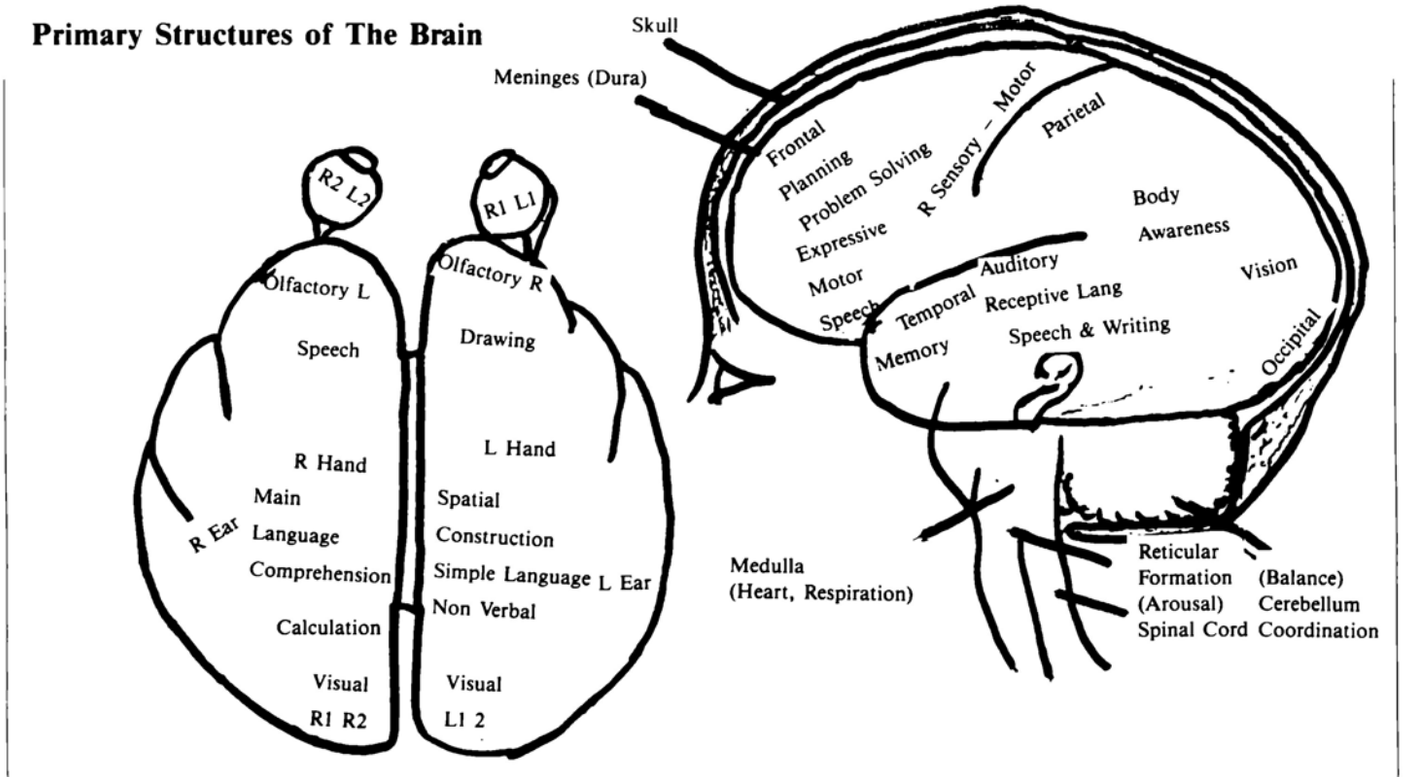
In addition, there is usually slowed mental processing such that an individual takes longer to think and respond than prior to the brain injury. Some people experience difficulty in all these areas, while others present with more focused disorders.

Attention/Concentration Deficits
An inability to sustain attention while carrying out a task is often a consequence of brain injury. Patients frequently complain of "losing track of what I'm saying" or "not being able to concentrate and follow the plot of a television programme." Attention problems may be present at an even more basic level where a person is unable to adequately attend and respond to simple stimuli, such as sounds or objects. This is more often seen in the early stages of recovery. A higher level attention problem is the inability to *shift* attention from one task to another. Attention/concentration represents a basic level of thinking and disruption of this process may preclude an individual from adequately functioning in society.

Visual Processing
Problems with visually interpreting the world are also frequently present following brain injury. Although individuals may have difficulty with visual acuity (or how well they see), in this population the primary problem is generally the *interpretation* of visual information. At the most basic level, brain injury may cause difficulty with the recognition of objects and faces. Other problems can be seen in a patient's analysis of visual stimuli. He or she may be unable to pick out visual detail or discriminate features of objects. Hand-eye coordination may also be disrupted such that a person would have trouble building a model or doing construction. Finally, space and judgement may be impaired. This difficulty may be manifested when a person misjudges the distance between a plate of food and the serving tray such that the food spills on the table. The visual problems, if not remedied, make many activities impossible or unsafe, such as reading, driving and cooking.

Memory Deficits
Memory deficits are the most common complaint of individuals who have suffered brain injury. Early on, individuals may be unable to remember events from one moment to the next. This gradually improves over time, yet most individuals with severe brain injuries suffer some sort of memory impairment.

Memory impairment requires that an individual structure his or her life in certain ways so that the impairment



Schematic of Left and Right Lateralisation

Left Lateral View

has as little negative effect on his or her ability to function as possible. This may mean using a memory book (e.g., a diary), setting up an "information centre" at the home, or having some other external cueing system. Different types of information are processed differently; thus, a person may be able to recall certain things but not others. Also, factors such as stress, fatigue, and the importance or salience of information may also affect how well something is encoded or remembered. It is possible that a person may remember something that happened last week but not be able to recall events from that morning. These memory deficits greatly impair the learning of new information and again may preclude an individual from returning to gainful employment and independent living.

Reasoning/Judgment Problems

This is a broad area including deficits in higher level thinking, where an individual experiences difficulty in analysing and synthesising information. Often individuals have disorders of thinking manifested as a decrease in abstract reasoning, poor judgement and problem solving. Individuals may be very concrete in their thought such that they interpret information literally. An example might be the literal interpretation of idioms such that the expression "green with envy" might carry the expectation of a person actually changing colour. Thinking disorders are difficult to describe because they include such a wide range of skills areas, yet they are extremely important as they affect the way a person approaches every aspect of his or her life.

Executive Functions

Executive functions refer to those cognitive components which allow an individual to carry out goal directed activity. The basic components of executive functions include the ability to create a strategy or plan for achieving a goal, as well as to initiate and follow through with steps required to complete the intended goals. This arch also includes the ability to monitor one's performance and revise behaviour as necessary. Many brain injured individuals have difficulty with the selection and execution of goal related activities and are unorganised in their approach to solving problems.

Communication Disorders

Communication disorders are another frequent deficit following brain injury. Often people have speech disorders that are motorically based, rendering their speech difficult to understand. Language problems may also be present. Early on, many individuals have problems thinking of the words they want to say, as well as difficulty in constructing complex sentences. Language is closely tied with other cognitive dimensions such as memory and attention, thus adequate communication may require the remediation of related deficits. Higher level language impairments often persist long after the injury and reflect disorders of thinking. Some examples include: decreased organisation of expressing thoughts in logical sequences, an inability to generate multiple ideas about a topic, and poor communicative behaviour such as decreased eye contact and voice inflection. Once again, loss of ability to communicate effectively may prevent an individual from adequate performance of certain job assignments and from satisfactory interaction with others.

Evaluation of Cognitive Disorders by means of Neuropsychological Assessment

In recent years, the neuropsychological assessment has become a critical part of the total evaluation of a person who suffers from head injury. Such an assessment is, however, lengthy (lasting from four to five hours and occasionally longer). The assessment has then to be analysed and interpreted, which could take a further three hours (i.e., a total of at least seven hours per patient).

Neuropsychological assessment provides an evaluation of the above mentioned cognitive functions, as well as an assessment of emotional status and possible behavioural alterations including implusivity, decreased frustration tolerance, impaired interpersonal communication and social judgement.

Findings from such an assessment, when viewed in the light of medical records and history (e.g., educational background, vocational history), allows conclusions concerning the possible effects of head injury to be formulated.

An accurate picture of cognitive abilities also provides insights into degree of impairment as well as probable effects of impairment on everyday functioning. Such an evaluation can be an integral component for directing and monitoring rehabilitation efforts, planning return to independence, and establishing the existence and extent of brain damage.

An expert comprehensive neuropsychological assessment carried out by a qualified neuropsychologist can be of major importance to brain-injured individuals, and, of course, in cases of litigation. □

Dr. Martina O'Connor is a clinical neuropsychologist who practises in Dublin.

Lawbrief

(Continued from page 261)

provides for related matters. Amends and extends the *Industrial Credit Acts, 1933 to 1990,* and for those purposes amends section 9 of the *Bankers' Books Evidence Act, 1879,* and section 2 of the *Bills of Exchange Act, 1882.*

Presented by the Minister for Finance 26/6/92. Present position: passed by both Houses of the Oireachtas 16/7/92. Commencement date: 23 July, 1992.

***Health (Family Planning) (Amendment) Act, 1992* (No. 20 of 1992) (With Explanatory Memorandum as initiated)**

This Act provides for an increase in the range of outlets permitted to sell condoms, reduces the age limit at which persons may buy condoms, without prescription, from 18 to 17 years, and provides for related matters. Amends and extends the Health (Family Planning) Act, 1979, and amends section 62 of the Health Act, 1947.

Presented by the Minister for Health 30/6/92. Present position: passed by both Houses of the Oireachtas 15/7/92. Commencement date: 23 July, 1992.

***Foreshore (Amendment) Act, 1992* (No. 17 of 1992) (With Explanatory Memorandum as initiated)**

This Bill provides for the better protection and preservation of the foreshore and the seashore by prohibiting the removal or disturbance of beach material (sand etc.,) amends and extends *the Foreshore Act, 1933.*

Presented by the Minister for the Marine 7/7/92. Present position: passed by both Houses of the Oireachtas 14/7/92. Commencement date: 20 July, 1992.

Lawbrief is grateful to Ms. Margaret Byrne, Librarian, Law Society, who assisted in the preparation of the material. □

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Rape Crisis Centre Seeks Flag Day Volunteers

The Dublin Rape Crisis Centre Limited is holding a Flag Day on Thursday, 1 October and Friday, 2 October, 1992 in order to raise £150,000 to remain open for this year. The RCC needs approximately 1,200 volunteer collectors in order to cover all areas in Dublin City and suburbs. Each volunteer would be asked to collect for 2-3 hours on the day of their choice.

If any member of the profession would be willing to give of their time, he or she should contact:-

Sally O'Neill,
Dublin Rape Crisis Centre Limited,
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Dublin 2.

Telephone: 614911/614562
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□

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At the launch of the Law Society's Inaugural Justice Media Awards Competition were l-r: Myles McWeeney, Irish Independent; Maeve Kneafsey and Grainne Healy, Attic Press Limited; and Ken Murphy, Council Member, Law Society.

At a Dinner for Solicitors organised by the Law Society, to mark the quatrocentenary of Trinity College Dublin, were l-r: David Sanfey; Jane Williams; Brian Murray; Columba O'Connor; John and Eleanor Hickson, all from Dublin.

A delegation of French Notaries visited the Law Society recently. L-r standing: Paul Keane, Reddy Charlton & McKnight; Garrett Gill, Matheson Ormsby Prentice; Kevin O'Connor, Irish Life Building Society; Maitre Francois Girard; Maitre Pierre Chaperon; Maitre Roger Richard; Michael Carrigan, Eugene F. Collins & Sons; Maitre Remy Gagnot. Sitting l-r: Frederique Duchene, Gerrard Scallan & O'Brien; Adrian Bourke, President, Law Society; Maitre Francois Duchene, President du Conseil regional des notaires de la cour d'appel d'Angers.

At a luncheon at the Annual Meeting of the American Bar Association hosted jointly by the Law Society of Ireland and the International Law and Practice Section of the ABA were l-r: Peter Murphy, Council Member Law Society and Chairman of the Law Society Delegation to the ABA; Ray MacSharry, EC Commissioner for Agriculture and Rural Development and Gerold W. Libby, Chairman of the Section of International Law and Practice, ABA.

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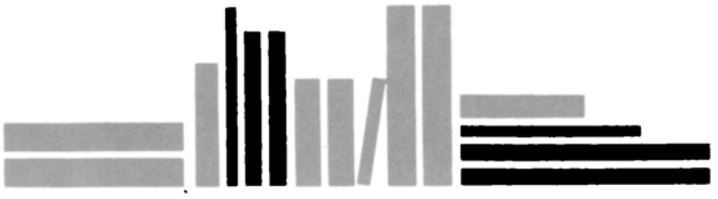
At a reception held recently for advertisers in the Gazette were l-r: Mark Rohu, Marketing Manager, Butterworths (Ireland) Ltd.; Sean O'hOisin, Oisin Publications and Hazel Balfe, Managing Director, General Binding Company Ltd.

BOOK REVIEWS



Guide to the Irish Companies Acts, 1990

By Michael P. Phelan (Gill & Macmillan, 395pp £29.99 paperback).

Michael P Phelan has produced a hardback guide to the two Company Law Acts of 1990 priced at £29.99.

The two statutes concerned, the Companies Act, 1990 and the Companies (Amendment) Act, 1990 introduced major changes into Irish law, including extending the duties and liabilities of directors, introducing the notion of insider dealings, imposing new requirements on directors to disclose interests in shares and loans and introducing court protection for companies in financial difficulties.

The Companies Act, 1990, which is the main Act, comprises 13 Parts with a total of 299 sections. Mr. Phelan uses a fairly simple formula – he devotes a chapter to each of the 13 Parts and commences each chapter with a very short summary describing the intent of the relevant Part. He reproduces the text of each section of that Part in full. He then sets out the definitions of the terms in that section by reference to definitions contained in the legislation. This is followed by a summary of each section and subsection – essentially simplifying the language of the draftsmen.

Mr. Phelan, however, writes from the perspective of a business consultant and, therefore, this is not a detailed book on company law.

I do not feel that this format is of particular use to lawyers who are used to reading legislation and do not need a simultaneous translation of the passage into plain English. Practitioners who are not familiar with the detailed provisions of the legislation would perhaps be more interested in an overview or a summary of the various Parts of the Act. There is very little reference to case law throughout the book – Mr. Phelan refers to eight company law cases in all.

The Companies Act of 1990 does not in itself follow a logical sequence and for practitioners who require to read the provisions of the Act in their general context a book such as "Company Law in the Republic of Ireland" by Judge Ronan Keane is likely to be of more relevance.

In general, therefore I feel the book is unlikely to gain a substantial following amongst general practitioners, particularly those who only occasionally encounter company law problems. Mr. Phelan's treatment requires an overall knowledge of the provisions of earlier legislation and of the general company law structure as a whole. Practitioners who are company law specialists will require more detail than the summaries presented by Mr. Phelan. However, the book may be helpful as a quick reference to particular sections of the Act, although, I personally would prefer to refer to the Irish Current Law Statutes Annotated.

Anne Neary

Havers' Companion to The Bar

(1992 edition) (Sweet & Maxwell 1514 pp, £85.00, Hardback).

Compiling a directory is a thankless task as the writer of this notice well knows. For, no sooner is the directory published, than the information in it begins to date. People change their employment, move premises or their telephone numbers acquire extra digits. The compilation of Havers' Companion to the Bar was undoubtedly a mammoth task, made commerically viable by the fact that, in addition to solicitors, members of some 31 professional organisations in England and Wales are now entitled to instruct barristers directly.

A note from the publishers says that publication of the book followed closely on the relaxation of the bar rules restricting advertising. This, the publishers say, has enabled the bar to give the range of information that makes production of a book of this nature possible. Information is provided on over 5,000 individual barristers who practise in England and Wales.

The directory is user friendly. The first step is to identify the area of practice, then consult the relevant table which lists those barristers offering their services within that field of law. You may then turn to the alphabetical list of biographies for assistance in selecting the individual barrister from amongst those practising within the field you require. Interestingly, there is a section which indicates those barristers who are capable of conducting their practices in a foreign language. Finally, a section on chambers lists their members' addresses and scope and nature of their work.

The directory is attractively presented with clear print – essential features of a publication so dense with information.

In his foreword, The Right Hon. Lord Havers says: "The Courts and Legal Services Act and the Single European Act heralded a period of increasing demand for, as well as great change in, the provision of legal services in England and Wales. With more people offering and competing to provide those services, it is now more important than ever that those who need legal services have access to the particular legal expertise which they require".

Inevitably, this raises the question as to whether it is time for the General Council of the Bar of Ireland to consider compiling a similiar directory in Ireland in addition to their entry in the Law Directory published by the Law Society.

At £85.00 stg, Havers' Companion to the Bar would be an expensive purchase for the average Irish solicitor except for one who does business regularly with firms in England and Wales and would like to cross check on their choice of counsel.

Barbara Cahalane

Irish Journal of European Law (Incorporating the Journal of the Irish Society for European Law).

Edited by James O'Reilly and Anthony M. Collins [The Round Hall Press, 1992 £45 (postage included)].

The 1992 volume of the newly published Irish Journal of European Law contains a number of valuable articles and reports of decisions of the Irish courts in which points of European law have arisen.

The Law Reports section of the Journal is divided into two sections. Section one contains cases from 1984-1989, previously unreported in a series of Irish Law Reports, while section two contains head notes of 1989 cases previously reported in a series of Irish Law Reports.

The following articles are published in the Journal:-

- **Application in Ireland of the Directives on Public Procurement** by Mary Robinson (the article was written prior to her election as President of Ireland);
- **Fiscal Harmonisation in Ireland** by Nuala Butler;
- **Irish Competition Law and Concentration of Undertakings Control** by Jeremy Maher;
- **The application of Community Law in Ireland 1973-1989** by Anthony M. Collins and James O'Reilly;
- **The Availability of Interim Relief in National Courts to Uphold Community Law Rights** by Anthony M. Collins; and
- **Procedure and Practice and the Judgements Convention: Some Further Developments** by Gerard Hogan.

The first three of the above articles on public procurement, fiscal harmonisation and competition constitute the Irish National Reports prepared for the 14th Congress of FIDE (Fedération Internationale pour le Droit Européen), held in 1990.

The article on public procurement details the application in Ireland of EC Directives relating to public works contracts and public supply contracts and highlights the unsatisfactory nature of implementing EC Directives by way of administrative circular. The article on fiscal harmonisation describes progress to June 1991 towards harmonisation of indirect taxes at EC level and the legal basis for same. Jeremy Maher's article presents a concise exposition of competition law in Ireland prior to entry into force of the Competition Act, 1991.

Anthony M. Collins and James O'Reilly's article on the application of Community law in Ireland 1973-1989 commences by summarising the historical background of the Constitution and then proceeds to examine the application of Community law under three headings, namely; the incorporation of Community law into Irish Law, access to and availability of Community law and compliance by the State with Community law.

In describing the availability of interim relief to uphold Community law rights and in particular the power of national courts to put a stay on the execution of a national Act implementing a Community Regulation, Anthony M. Collins' article highlights the importance of lawyers being aware of the potential application of Community law to any given set of facts.

Gerard Hogan's article considers the implications of decisions in three important cases dealing with procedural issues under the Judgements Convention and demonstrates the need for greater uniformity in approach in resolving procedural issues under the Convention.

In general all articles are well written and will serve as useful sources of reference to students and practitioners alike.

Donncadh Woods

Law Reform Commission Report on the Crime of Libel

(LRC 41-1991 £4.00 20pp, paperback).

Of the three discussion papers published by the Law Reform Commission during 1991 examining the law of defamation and contempt, the paper on the crime of libel attracted the least public attention and response. In their final Report on the Crime of Libel, the Law Reform Commissioners note that the National Newspapers of Ireland was the only body to furnish written submissions on the consultation paper. The Commissioners comment that this is not particularly surprising since the subject is of small practical importance today and would hardly have merited such extensive examination had it not been included in the then Attorney General's request.

Notwithstanding objections advanced by the National Newspapers of Ireland, the Law Reform Commission has stood by its principal provisional recommendation that the common law offence of defamatory libel should be retained, albeit in a more confined form. The Commissioners

observe that in view of the fact that there have been no prosecutions against Irish newspapers in this century, they doubt it could be realistically urged that the retention of the crime would be unduly onerous to the fourth estate.

The Commission has also stood by its provisional recommendation that prosecutions for criminal libel should be instituted only with the consent of the DPP and that the offence should be triable either summarily or on indictment, at the option of the Director, thus rejecting criticism from one Senior Counsel that such a provision would deprive an accused person of the right to trial by jury on a major charge of criminal defamation.

It is recommended that a defendant should be found guilty of the offence of defamatory libel only where the defamatory matter is false and where the defendant knows that it is defamatory and either knows it to be false or is recklessly indifferent to the question of its truth or falsity. As the offence would be confined to the publication of false or defamatory statements of fact there would be no requirement for a defence of fair comment or comment based on fact.

With regard to privilege, the Commissioners recommend that those instances of absolute privilege prescribed by the Constitution should remain. They also recommend that the law should be clarified to allow absolute privilege in respect of judicial proceedings and fair and accurate reports thereof, but absolute privilege should not be retained in respect of communications between members of the executive, husband and wife and solicitor and client. This latter recommendation will hardly be welcomed by some hard-pressed members of the Cabinet nor is it likely to be welcomed by the largest wing of the legal profession.

In their report, the Commissioners have decided against widening the definition of defamatory matter to include statements concerning a deceased person. Their decision was influenced by the criticism of their proposal in the Consultation Paper on the Civil Law of Defamation that a remedy should be available for defamation of the dead. Having proposed in that paper that there should be a civil remedy but that it should be limited to a declaration and/or injunction, the Commissioners say that "in this difficult and controversial area, this is as far as alterations in the law should go at the present time".

In general, the Commissioners have not departed from their provisional recommendations as published in the consultation paper. They recommend the abolition without replacement of the common law offence of seditious libel. Blasphemous libel should be replaced by a new offence entitled "publication of blasphemous matter". Blasphemous matter would be defined as matter the effect of which is likely to cause outrage to a substantial number of adherents to any religion by virtue of its insulting content concerning matters held sacred by that religion. They also suggest the abolition without replacement of the common law offence of obscene libel. The Commissioners further recommend that an examination should be undertaken of legislation on obscene and indecent matters and of the various schemes of censorship in order to determine whether they are consistent with the requirements of the Constitution as to freedom of speech.

This succinct report (20 pages) is written with the admirable clarity that is the hallmark of all Law Reform Commission publications.

Barbara Cahalane

A Short History of Western Legal Theory

By JM Kelly, [Oxford: Clarendon Press, 1992, xvi + 466 pp, IR£16.50, paperback].

John Kelly was a unique person and an accomplished scholar. Mr Justice Ronan Keane, in a perceptive and warm tribute to the author in the foreword to the book, praises John Kelly's contribution to the establishment of Irish legal studies. In the world of affairs, the judge notes that the author brought to Irish political life "a gift for oratory, coruscating wit and sharpness of debate which was almost without equal since the foundation of the State." The judge writes about John Kelly's "endless relish for the absurdity and oddness of life itself." He or she who can speak of the absurdity and oddness of life and still remain an optimist has achieved a deep and enviable maturity.

In his essay, "Tradition and the Individual Talent," TS Eliot advises the apprentice poet to discipline his talent by steeping himself in the tradition of English poetry and thereby to develop "the historical sense" – "a perception not only of the pastness of the past, but of its presence." John Kelly in his book is introducing lawyers to the pastness of the past thereby assisting us in our understanding of the present law. The author is introducing us to jurisprudence, or legal theory, in order to ensure in his own words, "a humane foundation to what will be [the law student's] life profession." The book is divided into ten chapters dealing with certain legal themes from the world of Homer to that of Gorbachev. Themes considered by the author include the basis of the state and of government, the basis of the validity of law, natural law, natural rights, the theory of property, the rule of law, equality before the law, criminal law and punishment and related themes.

There are "Kellyesque" expressions that will delight the reader. For example, at page 308 the author

(Continued on page 280)

PRACTICE NOTES

Renewal of Liquor Licences 1992 – Tax Clearance Certificate

Section 242 of the Finance Act, 1992 introduced a new requirement whereby holders of the licences hereafter specified must obtain a Tax Clearance Certificate before their licence will be renewed at the annual licensing.

1. A spirit retailers on-licence (which shall include publican ordinary licences, hotel licences, railway refreshment room licences, publican six day licences, publican early closing licences, publican six day and early licences, special restaurant licences, and theatre licences).

2. Spirit retailers off-licence.

3. Wine retailers on-licence.

The position is that if any person wishing to renew any of the aforesaid licences at the annual licensing in September has not already obtained an application for Tax Clearance Certificate from the Revenue Commissioners, he/she should do so immediately.

There does not appear to be any provision in the Act determining what is to happen in the event that the Clearance Certificate, although applied for, has not been issued by the date of the annual renewal. However, in the event that the Certificate has been refused on the date of the renewal of licences and an appeal has been lodged then where a licence has been granted in respect of the previous licensing year such licence would continue in force beyond its latest expiry date pending the final determination of the appeal. In the event that the Certificate is refused the aggrieved party has 30 days within which to lodge an appeal against the notification of refusal.

In a case where a licence has not been granted in the previous licensing year, a temporary licence will be issued and will remain in force pending the final determination of the appeal provided that the licence could have been issued but for the provisions relating to the Tax Clearance Certificate and provided that in all cases that amount of duty that would have been payable on the granting of the licence is duly deposited with the proper collector of Customs & Excise. On final determination of an appeal where an appeal has failed, the temporary or continued licence shall expire not later than seven days after the determination of any appeal and any excess duty paid shall be refunded in such circumstances.

It is important to note that there are certain circumstances involving the transfer of a licence where a Tax Clearance Certificate will not be issued unless the tax affairs of the applicant and the tax affairs of the previous holder of the licence, in so far as they relate to the activities conducted under the licence, are up to date. These circumstances are:

Where the transfer took place after 24 April, 1992 (but not if the transfer was contracted before 24 April) *and* the transfer was one of the following:

a) a company to an individual;
b) a company to a company;
c) a company to a partnership; or
d) a partnership to a company; *and* there is a connection between the parties.

When applying for the Tax Clearance Certificates in these circumstances, details of the connection between the parties should be given to the Revenue Commissioners.

Conveyancing Committee

Stamp Duty on Memorials

Practitioners are reminded that there are two distinct circumstances which arise in relation to Stamp Duty on Memorials arising from the provisions of the following Acts:-

(1) **Section 14 Family Home Protection Act, 1976.** An assurance of a Family Home by one spouse into the *joint names of both spouses* is exempt from Stamp Duty.

A Memorial of the Deed of Assurance is also *exempt from Stamp Duty.*

(2) **Section 114 Finance Act, 1990.**

(a) An assurance by one spouse which has the effect of placing a family home into the sole name of the other spouse *is exempt* from Stamp Duty.

(b) An assurance between spouses of a property which is not a Family Home *is exempt* from Stamp Duty.

However, Memorials of these Assurances *are liable* to Stamp Duty.

Conveyancing Committee

Payment of Funeral Accounts

Solicitors acting in the administration of estates are reminded that they should not place legal administration fees and expenses in priority to a funeral bill when acting for a personal representative. Practitioners are referred to Brady on Succession Law in Ireland, 10.3:1 – "Funeral expenses even in the case of insolvent estates, have long had the first priority in the administration of the deceased's estate."

Professional Purposes Committee

Data Protection Act, 1988 – Does it apply to Solicitors?

The Data Protection Act came into operation in April, 1989. The Data Protection Commissioner maintains that the Act applies to the profession and has approached a number of firms seeking information. He has requested that his views on the Act be brought to the attention of members; and they are reproduced below.

The Society does not accept the Commissioner's views. The opinion of counsel has been obtained and the papers for a proposed High Court declaratory action have been prepared. However, discussions with the Commissioner are continuing.

Would any member of the profession who has been approached by the Commissioner please contact the Secretary of the Professional Purposes Committee, *Linda Kirwan,* at the Law Society.

John B. Harte,
Chairman,
Professional Purposes Committee.

The Application of the Data Protection Act to the Solicitors Profession

by *Donal C. Linehan*
Data Protection Commissioner

The Act is designed to control the use of personal information held on computer about individuals (**personal data**), irrespective of the kind of computer on which it is held, or of the persons or bodies who may hold it.

The obligations of the Act apply therefore, to **every person** who controls the contents and use of personal data, i.e. every **data controller**, whether that person is a department of State, a corporation or a member of a profession.

If such a person holds sensitive data of the kind mentioned in Section 16(1), then the additional obligation to register applies.

Restrictions on the right of access
Since data protection is concerned with the privacy of the individual as regards personal information held about him in automated form, the Act gives him a right of access to his data so that he may know what information is kept about him and by whom it is kept.

Although this right is given precedence over any privacy provision already in existence, either by virtue of a statute law or a rule of law (for example, a rule of confidentiality), it is not an absolute right, but is subject to the rights and freedoms of others in certain cases. For example:

- because the subject access provisions override any existing law that forbids or restricts the disclosure of personal information, some of these laws are allowed to prevail where the interest of the individual or of others so requires **(see section 5(3) and Data Protection Act, 1988 (Restriction of section 4) Regulations (S.I. No. 81 of 1989)**

- the right of access is subordinated to the principle that third party information must not be disclosed to a data subject making an access request without the consent of the individual concerned (see **section 4(4))**

- the right of access is **modified** in the interest of the data subject as regards health and social work data, where to grant it would cause serious harm to the health of the individual seeking access **(section 4(8))**

- where personal data are such that a claim of privilege could be maintained in respect of them in legal proceedings, the right of access does not apply at all **(section 5(g)).**

Other exclusions and exemptions
Access is not the only area where exclusions or exemptions operate. The Act also provides for the following:

- the complete exclusion of certain kinds of data from its scope **(section 1(4))**

- the relaxation in certain cases of the principle requiring any disclosure of personal data to be compatible with the purpose for which they are collected and stored **(section 8)**

- if an **"operation"** is performed on computer (e.g. on a wordprocessor) solely for the purpose of preparing the text of documents; it will not be deemed a "processing" of personal data **(section 1)**. A person who prepares the text of a document on a word processor is in the same position as a person who does so on an ordinary typewriter. It should be noted, however, that this provision does **not** give any exemption to the **personal data** associated with such an operation where such data are retained on computer.

Needless to say, every data controller is entitled to rely on any of these exceptions or exclusions in an appropriate case.

Appeals procedures
The scheme of the Act ensures furthermore that a data subject or a data controller may appeal to the Commissioner in relation to the interpretation or application of any of its provisions. If any person is aggrieved by, or disagrees with any decision or act of the Commissioner, that person can appeal against it to the Circuit Court.

Donal C. Linehan

Temporary Closure of Land Commission Records Office

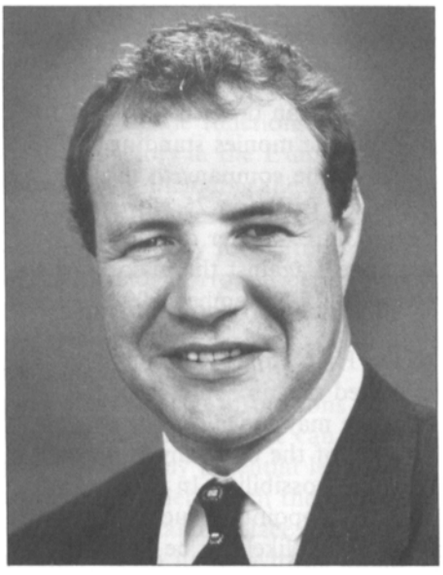
The Land Commission Records Branch is being transferred from 23 Upper Merrion Street to the National Archives in Bishop Street. As transfer of the records will take about three months the public office of the Records Branch of the Land Commission has closed with effect from Monday 17 August, 1992 until 17 November, 1992. □

Appointing an Examiner – Is It Worthwhile?

by John L O'Donnell, B.C.L. LI.M. (Cantab), Barrister-at-Law.

Does a petitioner have to establish that a company has a real prospect of survival before the High Court will order the appointment of an Examiner? The recent Supreme Court decision in *Atlantic Magnetics* rejects this contention. John L. O'Donnell analyses the issues.

To a company encountering severe financial difficulties, the prospect of obtaining court protection from pursuing creditors is undoubtedly attractive. In a procedure analogous to that of Chapter 11 in the United States, the Companies (Amendment) Act, 1990 allows the High Court to place a company under its protection and to appoint an Examiner to that company for the purpose of examining the state of the company's affairs during that period of protection.[1] The court, however, clearly has a discretion in exercising its jurisdiction to appoint an Examiner and while the rules contained in Order 75 A envisage the possibility of appointing an interim Examiner on the basis of an *ex-parte* application prior to the hearing of the petition itself,[2] there does not appear to be anything to stop a creditor who has been served with notice of the hearing of the petition (or who has seen an advertisement of the hearing) from attending court at the hearing of the petition and objecting to the appointment of an Examiner to the company. Faced with such a dispute between a petitioner and a hostile creditor or creditors, the court must then exercise what appears to be a fairly wide discretion under the Act in deciding whether or not to appoint an Examiner. Since the matter of how this discretion is exercised may in such circumstances effectively mean the difference between survival and death for the company in question, it is unsurprising that a recent Supreme Court decision indicating how this discretion might be exercised has attracted considerable attention.[3] Insofar as the decision rejects the contention (apparent in a number of English decisions) that a petitioner should establish that the company has a real prospect of survival before an order for the appointment of an Examiner will be made, it is a decision which will surely be welcomed by stricken companies seeking at least the time to investigate whether or not their affairs can be put in order. The decision will thus facilitate rather than obstruct the appointment of an Examiner in the appropriate circumstances.



John O'Donnell, BL

The decision in *Atlantic Magnetics* was also of significance in another notable respect. Since an Examiner will not be appointed to a company unless it is (or is likely to be) unable to pay its debts, any appointment of an Examiner to a company in difficulty is in effect an express (or implied) admission of insolvency. An Examiner who wishes to investigate the prospects for survival of a company may wish to continue to trade as a going concern while so doing, but will frequently require significant additional funding. A financial institution is unlikely to be willing to advance monies to an insolvent company unless it can be given an extremely firm assurance that monies so advanced by it will be repaid in priority to any other claims, even if the company subsequently goes into liquidation. By a combination of section 10 and section 29 of the Act, the Supreme Court enabled the Examiner to borrow monies by declaring that monies so borrowed and expended would be treated as expenses properly incurred by him and would be repaid in full out of the assets of the company in priority to any other claim. The effect of this part of the decision cannot be underestimated for it means that if such a declaration is made, an Examiner of an insolvent company would be able to borrow monies (which may indeed secure the future financial stability of that company) by guaranteeing to the relevant financial institution that these monies will be repaid in priority as reasonable expenses incurred by *him,* even if the company is subsequently placed in receivership or wound up. The fact that the financial institution in question is a secured creditor of the company with a charge over the entire of the assets which have become fixed will not necessarily be sufficient to enable it to prevent the Examiner from obtaining access to monies standing to the credit of the company in that financial institution. It is clear that the Supreme Court[4] were not prepared to countenance a situation where a secured creditor could also veto the appointment of an Examiner and the consequential exercise of a variety of powers which might follow from this. The purpose of the Act is to provide a protected "breathing space" for the company and its shareholders, workforce and

creditors; the legislature does not appear to have intended one or more large creditors (even if secured) to be able to frustrate any such protection granted to a company.

"The purpose of the Act is to provide a "breathing space" for the company . . . the legislature does not appear to have intended one or more large creditors to . . . frustrate such protection . . ."

Background

The company manufactured discs, components and other electronic products, employing a workforce of 170 people. While its export business had grown in Europe, it had sustained losses due to squeezing of margins and increased competition from non European Community manufacturers. The customer base of the company was fairly strong and interest in investing in the company had been expressed by foreign manufacturers. West Deutsche Landesbank (Ireland) Limited ("the bank") held a fixed and floating charge over all the assets of the company, including a fixed charge over the book and other debts of the company and the proceeds of such book and other debts. In October, 1991 the company's indebtedness to the bank was in excess of £2 million. Pursuant to its debenture the bank appointed a receiver to the company on 18 October, 1991. A petition seeking the appointment of an Examiner was presented two days later by the company. The High Court appointed an Examiner on 15 November, 1991 and subsequently made an order enabling the Examiner to borrow a sum not exceeding £429,000 for certain specified purposes for the continuance of the company and declared that the monies so borrowed and expended should be treated as expenses properly incurred by the Examiner, pursuant to section 29 (1) of the Act and should be repaid in full out of the assets of the company in priority to any other claim pursuant to section 29 (3) of the Act. Both Bank of Ireland and Barclay's Bank were authorised by a subsequent court order to have recourse to funds standing to the credit of the company in the company's account in those banks to make the relevant loan to the Examiner. Against this last order Bank of Ireland also appealed, as it did against an order directing it to pay out the monies standing to the credit of the company to the Examiner made on 25 November, 1991. The Examiner did not oppose the appeal against the making of the order on 25 November, 1991.

In the High Court, Lardner J[5] indicated that in some cases the evidence may make it clear that the survival of the company is not a practical possibility. In such a case an order appointing such an Examiner is likely to be refused. In other cases there may be a strong possibility of the requisite adjustment, as a result of which the company may survive and prosper. In those circumstances it will clearly be possible to make an order appointing an Examiner. There could however also be circumstances in which no clearcut conclusion emerges from the evidence and indeed there may be conflict between parties at the hearing of the petition. In such circumstances Lardner J held that the standard to be applied by the Court in deciding whether or not to appoint an Examiner was whether on the evidence in all the circumstances it appeared worthwhile to order an investigation by an Examiner into the company's affairs to see if it could survive, there being some reasonable prospect of survival.

The Supreme Court approved this test. Finlay CJ indicated that he would qualify the test in a minor way by requiring only that there be "some prospect of survival" rather than there being some "reasonable prospect".[6] McCarthy J went even further and rejected the "real prospect" test completely.[7] In his view it would be difficult to come to any firm conclusion on the prospects for survival of the company until the Examiner had carried out his preliminary task of examining the company and furnishing his first statutory report to the court within the three weeks of his appointment.[8]

Both judgments emphasised that the petition to appoint an Examiner is only the first step in a process within a very short time frame. It is of course possible that the Examiner will, when filing his first report under Section 15, express the view that the whole or part of the company would not be capable of survival as a going concern and indeed that continuing the whole or part of the undertaking of the company would be unlikely to be of more benefit to the members or creditors that to wind up the company. In these circumstances the court will hold a hearing to consider the matters arising out of such a report and may even subsequently order that the company be wound up.[9] In such circumstances the maximum delay in winding up the company which was not in fact capable of survival and was insolvent would only be a three week period in which the Examiner had time to compile and file his report to the court. Indeed, the whole time frame envisaged under the Companies (Amendment) Act, 1990 is short since the process of examination must conclude within three months from the date of the appointment unless it is extended by special order for a further 30 days. Perhaps the result of appointing an Examiner will be to lessen the eventual return to a secured creditor or indeed the dividend to an unsecured creditor in the event that the company does not survive. In balancing this possibility against the possibility that the company is capable of surviving it would appear that a short protection period can at least be afforded under the Act to the Examiner in order to allow him to carry out an *examination* of the situation, affairs and prospects of the company before expressing a more emphatic view on its viability for the future.

Unlike the English legislation, the Act confers an extremely wide

discretion on the court as to how the power to appoint an Examiner should be exercised. Indeed the only guide given appears in Section 2 (2) where the court is empowered particularly to appoint an Examiner if it considers that such an appointment would be likely to facilitate the survival of the company or any part of it as a going concern. This is clearly not a fetter on the power to appoint an Examiner – indeed, Finlay CJ regarded that section as providing a "strongly persuasive obligation" to appoint an Examiner where such an order is likely to facilitate the survival of the company.[10] The English Insolvency Act 1986, on the other hand, sets out the particular purposes for whose achievement an Administration Order (the equivalent of the appointment of an Examiner for these purposes) may be made, and the order so made must specify the particular purpose or purposes for which it is made.[11] The English courts have also adopted "the real prospect" test on a number of occasions and indeed have sometimes held that the evidence must enable the court to hold that the purpose in question sought to be used by the making of an Administration Order will more probably than not be achieved.[12] While this approach may well be an example of judicial self-restraint, the Irish courts are given a wide discretion of the exercise of their powers under the 1990 Act.[13]

An objection made by a secured creditor of a company to the appointment of an Examiner may carry considerable weight – but it cannot operate as an absolute veto. McCarthy J was of the view[14] that while the appointment of an Examiner may lessen the eventual return to the secured creditor, in the event of the company not surviving, the damage to other creditors (perhaps less well equipped to bear the loss) may be far greater. Indeed it has been accepted that the interests of a secured creditor may weigh far lighter in the scales than the interests of other creditors when a court is asked to decide on whether or not to appoint an Examiner.[15] A declaration of the sort granted in this case enabling an Examiner to borrow funds despite the existence of a fixed charge held over all the assets and book debts of the company is undoubtedly irritating in the extreme to any secured creditor. But the Act clearly empowers the court to make orders ancillary to the appointment of an Examiner including an order vesting all or any of the functions or powers of the directors in the Examiner (presumably including the power to borrow). It is clear that a declaration according priority to the repayment of such funds borrowed because they were expenses properly incurred by the Examiner is extremely useful to an Examiner in attempting to persuade financial institutions to advance him monies. He can thus place before any potential lender the conditions under which the proposed borrowing is taking place and the priority which its repayment would have in the event of the continued insolvency of the company.[16]

Implications of The Decision

While not a charter for the appointment of an Examiner it is clear as a result of this decision that in any situation where it would be considered worthwhile to examine the prospects of survival of a company, a court should be extremely slow to exercise its discretion against a petitioner who seeks the appointment of an Examiner and the protection of the court. Unless there are exceptional circumstances which effectively negative the identification of any possibility for the survival of the company, a court is likely to appoint an Examiner at least to allow an opportunity for the examination of the prospects of the company to take place (under the protection of the Court) over a short period. Once an Examiner is appointed (even on an interim basis) the court will naturally attach weight to his views, he being an independent court appointed officer. Even the appointment of an interim Examiner may assist a petitioner in defeating opposition at the hearing of the petition. A report prepared by him setting out whether or not he thinks the company is capable of survival is helpful and the court, in making what is essentially a commercial decision, must necessarily place considerable reliance on the views of an insolvency practitioner in such a situation.[17] The appointment of an interim Examiner is also obviously essential where the company wishes to continue to trade. Since such a company is technically insolvent, it would not be in a position to make payments of day to day outgoings and expenses unless these were certified at the time of being incurred as being appropriately and properly incurred by the Examiner under section 10 of the Act.

But the decision has found very considerable disfavour with banks, and it is not hard to understand why. A bank which has secured its loan to a company by taking a charge over the assets of that company sees the appointment of an Examiner as a threat to its security, since it may well be forced as part of a court sanctioned scheme of arrangement to dilute its claim and be paid only a fraction of what it is owed. Insofar, therefore, as the decision widens rather than restricts the criteria for the appointment of an Examiner, it was bound to provoke an adverse reaction from such institutions. Even more galling for a bank must be the priority accorded under section 29 to the costs and expenses properly incurred by the Examiner in the course of the examinership, the payment of which will take precedence to any other claim, secured or otherwise, against the company. Unsurprisingly, therefore, the criticisms by the lending institutions of the Act have intensified since the decision. This hostility has already manifested itself in the course of the ill-fated examinership of the United Meat Packers group of companies. The refusal of banks (who were already secured creditors) to advance further monies to enable the companies to survive during the period of Examinership left the Examiner with no option but to indicate to the High Court that continued court protection was unlikely to facilitate

the survival of the group and the Examinership was therefore terminated.[18]

Clearly, if the banks maintain this attitude it will be extremely difficult for any company which requires an immediate cash injection in order to trade to survive, even during the examinership period. In the absence of some form of State-assisted funding (from perhaps a re-constituted version of Foir Teo) this practical expression of opposition by the banking institutions to the examinership legislation may render the appointment of an Examiner futile, unless a company can survive without borrowing for a period of some weeks.

"This practical expression of opposition by the banking institutions to the examinership legislation may render the appointment of an Examiner futile, unless a company can survive without borrowing for a period of some weeks."

But even within the terms of the Act as it now stands there are ways in which a secured creditor can go some way towards protecting its position. Before a petition for the appointment of an Examiner is presented, a secured creditor can appoint a receiver – and section 3 (6) (as amended) of the Act indicates that a court shall not give a hearing to such a petition if a receiver stands appointed, and has so stood appointed for a continuous period of at least three days prior to the presentation of the petition. One can certainly envisage an increase in the number of receivers appointed on a Friday – though this in itself is obviously not foolproof.[19]

A secured creditor will often be critical of the management of the company, and may be unhappy that the same personnel will continue to run the company both during and after the examinership. There is nothing to prevent a secured creditor from attempting to persuade an Examiner to apply under section 9 to court to have all the functions and powers of the directors performed only by the Examiner. Indeed, it is arguable that such a secured creditor could apply itself to court as an interested party if the Examiner failed or refused to apply, where the affairs of the company were being conducted in a manner likely to prejudice the interests of the company, its employees or creditors as a whole under section 13 (7).[20]

Secured creditors are also entitled to be heard at any hearing by the Court of the Examiner's proposals for a scheme of arrangement under Section 24 if their claims as creditors would be impaired if the proposals were implemented. As a secured creditor will almost certainly be receiving less than its full claim (including e.g. interest) under the proposals, its claim is clearly "impaired".[21] Creditors may choose to oppose the proposals completely. In a recent decision, however, the court modified a scheme of arrangement proposed so that directors would not be released from the personal guarantees given by them to a bank, and further ordered that two directors would cease to act as directors of the company henceforth.[22] This type of modification preserves the liability under personal guarantees of directors and other such persons which would otherwise be effectively extinguished after the confirmation of proposals under section 24 (6). It may also be encouraging for a creditor to know that the power of the court to modify proposals for a scheme of arrangement can be used to remove officers whose conduct has been unsatisfactory or lacking in candour.

It is now clear also that even at the early stages of the presentation of the petition, failure by the petitioner or its advisers to exercise utmost good faith or to disclose all material facts may amount to an abuse of the process of the court (particularly where the application is made on evidence known to be false, or for an improper purpose). In another recent decision[23] Costello J. held that such an abuse of the process of the court could lead to the court refusing to sanction a scheme of arrangement. Commenting on the potential injustice involved in the making of a protection order when the proper course is to wind up the company, Costello J expressed the view that an Examiner should have a duty imposed upon him to consider whether any of the evidence placed before the court at the petition stage was misleading in any material respect, and to re-enter the matter before the court if this is the case. Costello J's judgment in that case also makes it clear that proposals for a scheme of arrangement will be scrutinised extremely carefully, and any ambiguities or inconclusive arrangements for the future of the company may prove fatal to such a scheme. In particular, the chances of a scheme being approved by the court are greatly jeopardised if adequate provision is not made for (among other matters) the future of the employees of the company – a scheme of arrangement is not to be regarded as being simply an investment opportunity in an ailing company.

Conclusion

The court clearly has a wide discretion in deciding whether or not to appoint an Examiner, although a petitioner may well wonder whether it is "worthwhile" if a company which requires immediate funding has no prospect of raising money. But the examinership procedure involves a balancing of the rights of all creditors, not just secured creditors. There is much scope within the Act for a creditor to seek to have considerable restraints imposed on a company (and its officers) without having to condemn the company to financial death. Insofar as the decision in *Atlantic Magnetics*

facilitates the examination of a company's prospects, it is consistent with the positive aspects of the Act. □

Notes

1. Under Section 5 of the Act the protection period commences with the presentation of the petition.
2. Rules of the Superior Courts, Statutory Instrument 147, 1991, Order 75 A, Rule 5.
3. In *re Atlantic Magnetics Limited* (Under the Protection of the Court) Supreme Court, unreported 5 December, 1991 (hereafter referred to as "Atlantic Magnetics").
4. McCarthy J especially.
5. High Court, unreported 15 November, 1991 *ex tempore* (Lardner J).
6. With whom Hederman, Egan and O'Flaherty JJ agreed.
7. With whom Egan J also agreed.
8. Section 15 (9).
9. Section 17.
10. At page 7 of the judgment.
11. Section 8 (3).
12. Re *Consumer and Industrial Press Limited* [1988] BCLC 177. Re *Harris Simmons Construction Limited* [1989] BCLC 202. Re *Primlake (UK) Limited* [1989] BLCL 735. Re *SCL Building Services Limited* [1990] BCLC 98.
13. See Hamilton P's analysis of the absolute discretion granted to the Court under section 24 (3) of the Act empowering the Court to confirm as it thinks proper proposals for a scheme of arrangement in *Re Goodman International,* High Court 28 January, 1991 (unreported).
14. At page 3 of his judgment.
15. Re *Consumer and Industrial Press Limited* above.
16. Section 9 (3): Section 29.
17. Re *Primlaks (UK) Limited* above at page 747.
18. *United Meat Packers* and associated companies High Court 12 March, 1992 unreported *ex tempore* (Keane J). A stay was refused in the Supreme Court on March 13, 1992.
19. In *Atlantic Magnetics* a receiver had been appointed on a Friday, but the Examiner was appointed on Sunday, two days later. Subsequent to this decision, the examinership terminated and the receiver moved back in.
20. See section 9 (2).
21. Re *Jetmara Teoranta,* High Court unreported May 10, 1991 (Costello J).
22. Re *Selukwe Limited,* High Court, unreported December 20, 1991 (Costello J).
23. *Re Wogans (Drogheda) Limited,* High Court unreported May 7, 1992 (Costello J).

Tax Efficient Life Cover

Tax relief on life assurance policies having been gradually reduced over previous years was finally eliminated completely in the most recent budget.

However, many people may not be aware of the fact that it is still possible to obtain tax relief on life assurance policies effected under Section 235A of the 1967 Finance Act. This means that for the 48% tax payer the cost of this cover is effectively halved.

This benefit is available to anyone who is self-employed or in non-pensionable employment. Relief is restricted to premiums paid not exceeding 5% of net relevant earnings. Such premiums are also set against the 15% limit allowed for pension contributions.

As an example of the cost, £50,000 life cover to age 65 can be provided from £12.00 net per month for a male aged 40 and £7.50 net per month for a female age 40 assuming both pay tax at 48%.

N.B. A special non medical offer is currently available to members of the Law Society through Sedgwick Dineen. Further details are contained in the insert enclosed in this issue. □

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AG Appoints Solicitor

Thomas Shaw

The Attorney General, *Harold A. Whelehan* SC has appointed *Thomas D. Shaw* to be his solicitor in charitable matters with effect from July 1, 1992.

Tom Shaw is a senior partner in the firm of JA Shaw and Company, Solicitors, Mullingar, Co. Westmeath. He qualified as a solicitor in 1959 having been educated at St. Gerard's School, Clogowes Wood College and University College Dublin where he graduated with a Degree in Civil Law. Mr. Shaw is a former President of the Law Society and has been a member of the Council of the Law Society since 1974, during which time he has been Chairman of the following Committees of the Society – Registrar's Committee, the Finance Committee and the Insurance Committee. In addition he was a founder director of the Solicitors Mutual Defence Fund.

Mr. Shaw succeeds Gordon A. Holmes, of Messrs. Holmes, O'Malley and Sexton, Solicitors, who has resigned following his appointment to the Garda Complaints Board. Gordon Holmes is a member of the Rules Committee of the Superior Courts, Chairman of the Betting Appeals Board, and Chairman of the Garda Disciplinary Body. He acted as solicitor to the former Attorney General, Mr. John L. Murray, during his periods as Attorney General since 1982 and has acted for the present Attorney General since his appointment last Autumn. □

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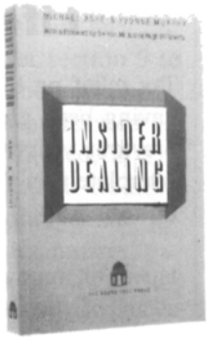

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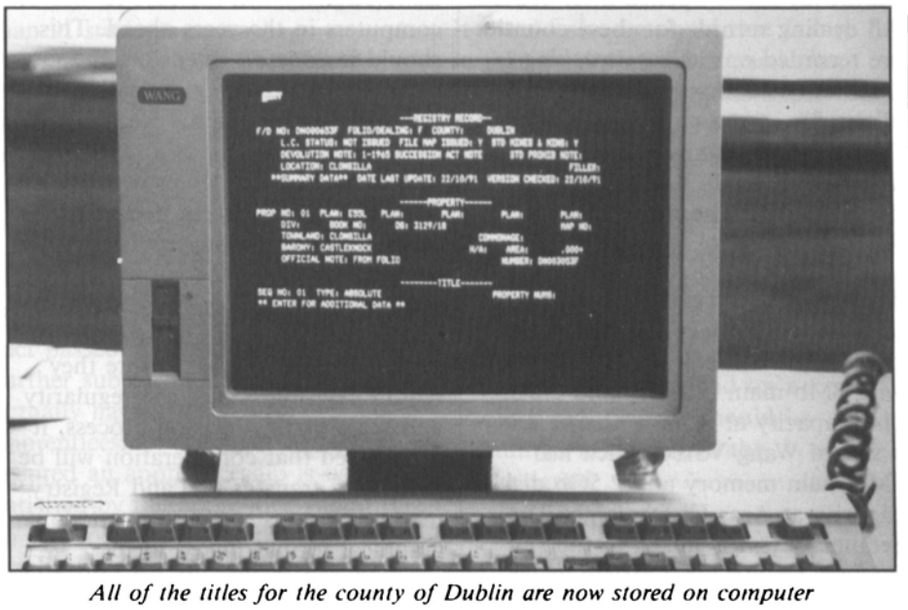
Automating the Registries

by John Furlong, Solicitor

The Land Registry and its sister office the Registry of Deeds which both come under the statutory control of the Registrar of Deeds and Titles, are engaged in an extensive programme of computerisation.

This year, the Land Registry marks its one hundredth anniversary as the statutory authority maintaining the registration of title system and at present processing over 230,000 applications per year. These comprise approximately 85,000 applications for registration as well as requests for copy documents and certificates. An average of 25,000 new land titles are added to the registration system annually. The Land Registry at present maintains a register of over 1.4m folios which document titles throughout the State by reference to description, ownership and rights or changes affecting the particular title.

The Registry of Deeds which dates from 1707 maintains registers of all Acts affecting land titles which are not registered in the Land Registry. This system is based on the filing of relevant extracts of deeds and conveyances and the provision of an extensive facility for public inspection and searching of the registers and various indices. The abstract database comprises approximately 3m files and the Registry processes approximately 45,000 new registrations each year. In addition it deals with 6,000 vacates and satisfactions per annum.



All of the titles for the county of Dublin are now stored on computer

The scale of work and processing operations in both Registries is substantial with a statutory obligation to maintain accurate and true records of applications registered.

Land Registry

The Land Registry commenced computerisation of its folio records in 1982. The present system is based on a case tracking procedure which records details of each application lodged including name of applicant, folio number, date of lodgement, solicitor, etc. The progress of the case is then recorded on the system allowing for immediate enquiry and updating on any of the stored detail. Allied to this, the folio itself is held in computerised format. Any change in the status of an application can be recorded on the computerised folio and on completion of a registration, it is updated using codified text.

All of the titles for the county of Dublin are now stored on this

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automated system providing for quick and comprehensive access, updating and inspection. The system has been extended to the Western Region of the Land Registry (Sligo, Roscommon, Clare, Galway and Mayo) for folios opened after 1987. All dealing records for these counties are recorded on the case tracking system. The computerised system allows for secure multi-user access from over 50 terminals linked via WANGNET and FASTLAN networks throughout the Land Registry office.

The Land Registry system using "PROMIS" application software operates on a Wang VS100 processor with 8Mb main memory and 2.2Gb disk capacity at Setanta Centre and a shared Wang VS100 which has 8Mb main memory and 2.5Gb disk capacity at Aras Ui Dhalaigh. The Setanta system is linked to the five Western Region local offices which use dial up facilities for search and inquiry.

Registry of Deeds

Computerisation of the memorial abstracts held in the Registry of Deeds commenced in 1989 with the development of a system operating in a UNIX environment on a Philips P9070 host server with 8Mb memory and 1.2Gb disk capacity. The application is written in Progress 4GL and managed by Progress RDBMS as the development tool. The new system which is now operational allows for search and inquiry against grantor name for registrations made after September 1990. The system is based on data entry of the details abstracted from the memorials lodged for registration. A data capture programme to enter details of older abstracts will expand the database and eventually encompass sufficient records to satisfy enquiries for standard conveyancing searches. It is likely that a further 11 years of abstracts will become available in computerised format before the end of this year. In addition the Registry has installed a new micro-filming system which will provide for reading and printing of all memorials filed from 1950 by the end of this year.

Further developments

A major consultancy report commissioned on behalf of the Land Registry was completed in 1991. As a result of this, it is probable that the Land Registry will increase its use of computers in the years ahead. This should include an extension of folio and case record computerisation to the other regions of the Registry.

The Land Registry stores over 30,000 ordnance survey sheets. Heavy usage of these sheets for inspection and copying together with constant recompilation of Registry details means that they have an average life span of 2 to 2½ years before they require revision. Given the regularity and scale of this revision process, it is expected that consideration will be given to a transfer of Land Registry mapping details to an automated graphical format linked to the computerised folio.

Development and expansion of the systems in both Registries is progressing. This will result in speedier service and will also allow for the possibility of introducing some means of direct access by practitioners to both databases.

The Technology Advisory Group is an informal grouping of solicitors who, with the approval of the Technology Committee of the Law Society, seek to promote awareness of and the use of technology within the profession. Further details are available from the Honorary Secretary: John Furlong, c/o William Fry, Solicitors, Fitzwilton House, Wilton Place, Dublin 2. □

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Lost Property

Law Society Office Four Courts

A quantity of lost property has accumulated in the Law Society's office in the Four Courts, Dublin (spectacles, overcoats, old files, umbrellas etc.). Please note that this property will be disposed of unless it is claimed before Monday, 19 October, 1992. All enquiries should be directed to *Mary Bissett* or *Paddy Caulfield* at the Four Courts, Telephone: 681806.

Book Reviews

(Continued from page 270)

states that the writings of the German philosopher Hegel were of "an intoxicating vagueness." Translated, Hegel's ideas sound wonderful but cannot be understood easily. John Austin's *The Province of Jurisprudence Determined* is described by the author as "far from being a monument of literature." Translated, Austin had a poor writing style.

Sir Edward Coke (c. 1628) wrote in his Institutes of "the gladsome light of jurisprudence." On the other hand, it was Dicey (c. 1890) who wrote that jurisprudence is a word "which stinks in the nostrils of a practising barrister." The pages of history will never be lost on a thinking lawyer. John Kelly has written an epic work, a fascinating history, that will stand the test of time. It will become a basic textbook for future generations of lawyers.

Eamonn G. Hall □

Dates Set for Law School Courses

The Education Committee of the Society has decided the dates for Professional Courses in 1993 and 1994. These are:

32nd Professional Course
18 January - 7 May, 1993
33rd Professional Course
8 June - 1 October, 1993
34th Professional Course
1 November, 1993 - 28 February, 1994
35th Professional Course
22 March - 13 July, 1994
36th Professional Course
23 August - 14 December, 1994

The dates for 1994 should be regarded as slightly approximate. The timetable for the 33rd Professional Course includes a two week break during August, 1993. The terminal date in each case is the last date of class contact, and the Conveyancing Examination for each course will occur approximately ten days after that date. This should be borne in mind both by apprentices and offices in arranging their respective commitments.

The Education Committee has also decided the dates for the Advanced Courses in 1993. These are:

27th Advanced Course
15 February - 7 April, 1993
28th Advanced Course
14 June - 30 July, 1993
29th Advanced Course
18 October - 8 December, 1993

There may be some modification of the termination dates due to the vagaries of examination timetabling. These would also be liable to variation if there were to be any increase in the time allocation for existing subjects or an introduction of any new subjects.

With effect from the 32nd Professional Course, commencing in January 1993, there will be no more than 91 students on each Professional Course. The 32nd Professional Course is now full.

Places on Professional Courses are allocated on a 'first come first served basis', provided that the applicant is exempt, or is entitled to apply to be exempt, the Final Examination - First Part, or has in fact passed that examination, and further subject to the applicant's actually having secured an apprenticeship. Evidence of having secured an apprenticeship is usually satisfied by the apprentice submitting to the Society the completed application for consent to become apprenticed together with the necessary accompanying documentation. In the absence of any one condition of eligibility, such as not having an office, or not having passed the First Irish Examination, an allocation will not be made.

Offices considering the recruitment of more than one apprentice during 1993 and 1994 may wish, on the basis of this timetable, to seek to have a prospective apprentice allocated to any one particular course. To facilitate such offices, and in the hope of encouraging the recruitment of apprentices, the Society's Law School will provisionally assign apprentices to the courses requested by their offices subject to full compliance in due course by the apprentice with the appropriate requirements, and subject to the availability of places on the preferred course.

Offices seeking to avail of this facility should apply in good time - in effect, as soon as they are aware of the names and circumstances of their prospective apprentices. It will be appreciated that it is not possible to make arrangements once a course has already been filled.

It should also be noted that failure to take up a place on a particular Professional Course by an apprentice does not automatically ensure postponement to the next available Professional Course, and that in such circumstance it will be the responsibility of the apprentice to re-apply for a place.

Applications, whether from offices or apprentices, to attend on a Professional Course, should be submitted in writing to the undersigned:

Albert Power,
Assistant Director of Education,
Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7

Tel: (01) 710711 Ext. 326

Pre-Apprenticeship Register

The attention of practitioners is drawn to a Pre-Apprenticeship Register which is maintained by the Society's Law School. This is a comprehensive index of the names and personal particulars of students seeking the help of the Law Society in securing an apprenticeship and who are otherwise eligible to attend the Law School's Professional Course.

Students on the Register are catalogued by name and their area of origin. Accordingly practitioners, and particularly those outside of Dublin, are encouraged to make use of the Register if they are considering taking on an apprentice.

The merits of a rural practitioner taking on an apprentice at a time where there is some evidence of disinclination on the part of qualified solicitors to move to

employment outside Dublin or the larger commercial centres cannot be over-emphasised. The same logic applies to a rural or city-based practitioner contemplating a phased expansion of his or her enterprise with the possible corollary of additional staffing requirements initially at a modest level.

An apprentice retained by an expanding practice after the expiry of his or her indentures can be of greater intrinsic value to such an office than an assistant newly-recruited without prior knowledge or experience of their abilities.

Furthermore, not infrequently, students on the Pre-Apprenticeship Register who are recruited by practitioners find that they can ease the worry of offices by securing admission to the next available course, provided they will have spent three months in the office before the course starts. As of mid-August 1992, the next Professional Course on which places are available will be starting on 8 June, 1993 and ending in October, 1993.

This service is without charge and is absolutely confidential. It is entirely a matter for any solicitor contacting the Law School whether he or she wishes to recruit or even to interview a prospective apprentice whose details have been furnished. The Society strongly encourages practitioners to consider taking on an apprentice, and, furthermore, to consider the use of the Society's Pre- Apprenticeship Register.

For further particulars please contact:

Albert Power,
Assistant Director of Education,
Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7.

Tel: (01) 710711 Ext. 326

Law Directory 1993 – Final Reminder

Members of the profession who have not updated their entries in the Law Directory on the form distributed by the Society last July are asked to do so **immediately,** as work is now commencing on the compilation of the 1993 Law Directory. (If the information displayed on the form sent to you was correct, there is no need to return it to the Society.) The Society has no other method of verifying whether the information held on its database about each individual solicitor and each practice is correct.

It is particularly important this year to check in regard to telephone numbers. In various parts of the country new dialling codes or additional digits have been introduced. Therefore, please ensure that the correct telephone numbers for your office have been notified to the Society. Likewise, an increasing number of firms and practitioners are acquiring fax machines and dispensing with telex machines.

The information in the Directory can only be as accurate as that supplied to the Society by each practitioner and each firm.

Commissioner for Oaths
Updating the section on Commissioners for Oaths is particularly difficult. The information is printed on a street by street basis in Dublin and on a county basis for the rest of the country. It would be appreciated if practitioners would kindly check all the entries listed for their particular street/county and notify the Society of any changes of which they are aware. For example, a former neighbour may have moved premises, ceased to practise, or sadly, passed away.

Please send all information, in writing, to *Barbara Cahalane,* Public Relations Executive, Law Society, Blackhall Place, Dublin 7.

Please note that it will not be possible to include information received after September 30, 1992 in the 1993 Directory.

Incorporated Council of Law Reporting for Ireland
The Publication of Legal Works

Notice to Lawyers

The Incorporated Council of Law Reporting for Ireland invites lawyers to submit proposals for the writing of legal works which the Council would publish. Such proposals may cover any area of law, practice or procedure, including matters with limited commercial potential or of limited interest to a small number of practitioners.

All related questions such as the length of the work, its format, royalties etc are open for discussion. Any person interested should contact the undersigned at the Law Library, Four Courts, Dublin 7.

Carroll Moran, Barrister, Honorary Secretary.

CORRESPONDENCE

Criminal Injuries Compensation

Dear Editor,

The President of the Law Soceity's recent call for an extension of the Criminal Injuries Scheme as reported in the July/August issue of the *Gazette* has caught my eye.

When practising in England I pursued a number of claims with the Criminal Injuries Compensation Scheme in that country.

Paradoxically, upon returning to practise in Ireland, my first instruction was from a client resident in Ireland who suffered injury as a result of a crime committed in London. The contrasting approach of the two countries' similar schemes is illustrated by the likely awards payable in this particular case.

Taking the fact situation: **H** (husband) **W** (Wife) and **I** (infant child of **H**+**W**). H murders W (in London), and is eventually convicted and sentenced to life imprisonment. **I**, then becomes effectively an orphan, and is cared for by **G** (**I's** grandmother), who witnessed some of the criminal act and suffers minor physical but more serious psychological injuries.

Under the British scheme, **I**, as a dependent of W can expect to receive a bereavement award of STG £7,500, and an additional award based upon the financial dependency of I to W. In addition, a "reasonable sum" is payable in respect of W's funeral expenses. G can also claim compensation for her physical and psychological injuries.

If the crime had happened in Lucan, rather than London, neither **I** or G would be eligible to claim under the Irish scheme. The only financial contribution of the State in this case is an Orphan's Allowance of £32 payable to G who now cares for and maintains **I**.

A further twist in this story is that the Compensation Board in Britain will not make any payment to G on behalf of **I**, until G establishes parental rights over **I**, by being appointed **I's** guardian and **I** becoming a Ward of the Court. The likely level of awards under the British scheme is illustrated by details I have received showing awards of £750 for a broken nose, £11,500 for total loss of hearing in one ear and £20,000 for loss of one eye.

Not only does "crime not pay", but in Ireland being a victim of crime does not pay either!

Yours etc.

John Hussey
John Hussey & Co.
Fermoy
Co. Cork.

Objections & Requisitions on Title, August, 1990 (Revised) Edition.

Dear Editor,

Requisition 23.5 of the above edition states in relation to the Family Home Protection Act, 1976, "Was the property or any part thereof at any time or does it presently comprise the "family home" as defined in the Act of any person other than the Vendor or previous owner on Title?"

This requisition fails to take into account the High Court decision of Mr Justice Gannon in *Guckian -v- Brennan* [1981] *IR 478* where he held that in respect of Registered Land there is no obligation on the purchaser of such land to make enquiries as to the validity under the Family Home Protection Act, 1976 of prior transactions as the Register, in the absence of actual fraud, is conclusive as to the validity of any such transaction.

Therefore in light of this decision Requisition 23.5 should be amended so that where it refers to Registered Land enquiries should be confined in respect of the 1976 Act to after the current registered owner was registered.

Yours etc.

John Kilraine, BA, LLB,
Apprentice Solicitor.
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Association of Pension Lawyers has Busy First Year

The 1991 season of activities of the Association of Pension lawyers in Ireland started with an examination of the new set of disclosure regulations which the Minister for Social Welfare bought into force under the Pensions Act, 1990. On 24 September, *Brian Bohan* of Ernst & Young, addressed the Association on "Some Technical Issues arising from the new Disclosure Regulations".

On 9 October the then Minister for Social Welfare, *Dr. Michael Woods* TD, formally launched the Asssociation of Pension Lawyers in Ireland at a reception which coincided with the two day Annual Conference of the Association of Pension Lawyers (our sister Association in the UK) which was held for the first time in Dublin on 9 and 10 October.

On 28 November, the Association held a Joint Meeting with the Limerick Bar Association at which *Mary Hutch,* Trustee Consultant, Mercer Fraser Pension & Investment Consultants Ltd, presented a paper on "Facing the Reality of Member Trusteeship" and *Brian Gallagher,* Gallagher Shatter, presented a paper on the "Interaction of Labour Law and Family Law with Pensions".

On 9 December, Prudential Life of Ireland Ltd hosted a meeting on "Investment Management Agreements for Pension Funds - Some Legal and Operational Considerations". Papers at the meeting were presented by *Michael Lane,* Secretary of the Association, and *Michael Dangerfield,* Investment Manager of New Ireland Investment Managers Ltd.

On 13 February, the Association's first meeting for 1992 took as its theme mergers and acquisitions. Members of the Society of Actuaries in Ireland were invited to participate in this meeting. The speakers were *Brian Buggy* of Matheson Ormsby Prentice and *Andrew Fleming* of Maclay Murray & Spens of Glasgow.

The Committee of the Association met with the Chief Executive of the Pensions Board in March to report to him on various subjects which the Association's Legislation and Parliamentary Committee had been examining during the year and to discuss matters of general interest to both the Association and the Pensions Board.

In May the Association hosted a most successful dinner.

Our Agenda for 1992/1993 is well in hand. Our trusteeship seminar, which we intend holding later in 1992, is 'on the drawing board'.

The Association has not been idle and our membership is now well into the 80s. The Association's strength is an active membership whose interest and commitment has ensured that pensions law is fast becoming one of the most dynamic areas of law for the future. Further details and information about membership is available from Ms Raymonde Kelly, Chairman, Irish Association of Pension Lawyers, Irish Life plc, Irish Life Centre, Lr Abbey Street, Dublin 1. □

Raymonde Kelly

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STAMP DUTY LIABILITIES ON DOCUMENTS EXECUTED BEFORE 1 NOVEMBER, 1991 WHICH ARE PAID ON OR BEFORE 30 SEPTEMBER, 1992 WILL BE CHARGED INTEREST AND PENALTIES FROM 1 JUNE, 1992 ONLY.

PAYMENT OF THESE LIABILITIES AFTER 30 SEPTEMBER, 1992 WILL ATTRACT MINIMUM PENALTIES OF 35 PER CENT OF THE DUTY.

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30 SEPTEMBER 1992

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DUBLIN CASTLE

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Land Registry – issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.
11 September, 1992

Lost Land Certificate

Catherine Whelton, Folio: 40793; Land: Dunworly; Area: 3.513 hectares. **Co. Cork.**

James Keating, Plot A, 33 College Park Estate, Terenure, Dublin 6. Folio: DN010754; Land: Townland: Kimmage, Barony: Rathdown. **Co. Dublin.**

William Doherty, Folio: 20625; Land: Ballynakilly; Area: 0.808 acres. **Co. Donegal.**

Minister for Lands, Folio: 3168; Land: Sawyerswood; Area: 16a 1r 36p. **Co. Kildare.**

Laurence Grace, Folio: 267 closed to 15113; Land: Mounteagle and Ballyroan. **Co. Queens.**

Thomas Kehoe (deceased), Folio: 5091; Land: Part of the lands of Brownswood; Area: 15a 0r 13p. **Co. Wexford.**

James Falkner, Folio: (1) 1718 and (2) 1719; Land: Part of lands of Hightown or Balloughter; Area: (1) 20a (2) 15a 2r 10p. **Co. Westmeath.**

Thomas Fitzpatrick and **Mary Katherine Fitzpatrick,** Folio: 11961; Land: (1) Clondalever, (2) Balreagh; Area: (1) 9a 2r 30p, (2) 245a 1r 39p. **Co. Westmeath.**

James Sheerin, Larganmore, Foxford, Co. Mayo. Folio: 211R; Townland: Larganmore; Area: 15a 2r 20p. **Co. Mayo.**

Denis Sheehan deceased, Folio: 26364; Land: Belgrove; Area: 37.956 acres. **Co. Cork.**

Anthony Joseph Faherty and **Madeleine Faherty,** Folio: 3515; Land: Glen Lower; Area: 10a 2r 36p. **Co. Waterford.**

John Morgan, Folio: 17215; Land: Part of Lands of Killeen. **Co. Queens.**

George P. Wilson, Folio: 8176; Land: Faulkland; Area: .33p. **Co. Monaghan.**

Brian Keaney, deceased, Folio: 2761; Land: Ardkipmore; Area: 43a 1r 20p. **Co. Leitrim.**

Irish Steel Holdings Ltd. Folio: 22979; Land: Ringaskiddy (part). **Co. Cork.**

Margaret O'Boyle, Folio: 2926; Land: Part of the lands of Leabgarrow; Area: 4a 32p. **Co. Donegal.**

Kathleen Kavanagh, Folio: 20816; Land: Part of the land of Ballybeg. **Co. Meath.**

Jeremiah Meehan, Folio: 13139F; Land: Tullaha; Area: 0.500 acres. **Co. Kerry.**

Philip Sheridan, Folio: 5536; Land: Parts of lands of Aghavonan; Area: 6a 2r 38p. **Co. Cavan.**

James Melody, Clonmoney, Bunratty, Co. Clare. Folio: 25993; Land: Part of townland of Clonmoney North and Barony of Bunratty Lower. **Co. Clare.**

Donal Casey, Folio: 8528; Land: Part of the lands of Ballybrack; Area: 2r 12p. **Co. Donegal.**

George Frederick Duncan, Folio: 13420; Land: Tullyard; Area: 121 acres. **Co. Donegal.**

Robert Bermingham, Folio: Meath; Land: Part of the lands of Clongall; Area: 4a 0r 36p. **Co. Meath.**

John Gleeson, Folio: 25384; Land: Knockballyfokeen; Area: 90a 2r 25p. **Co. Limerick.**

Thomas Clinton, Folio: 20552; Land: Part of land of Ballivor. **Co. Meath.**

Patrick Brennan, Folio: 14282; Land: (1) Reevanagh, (2) Coolgreany, (3) Reevanagh; Area: (1) 79a 3r 20p, (2) 31a 2r 4p, (3) 11a 3r 14p. **Co. Kilkenny.**

Alkem Chemicals Limited, Folio: 9187L; Land: Townland of Ballytrasna. **Co. Cork.**

Thomas Reilly, Folio: 13354; Land: Derver; Area: 23a 1r 22p. **Co. Meath.**

John & Eileen Smyth, Folio: 5128F; Land: Stradbally West; Area: 0a 2r 0p. **Co. Galway.**

Patrick Bradley, Folio: 3675F; Land: Crocknamurleog; Area: 32p. **Co. Donegal.**

William Duignam, Folio: 18731; Land: Part of the townland of Grange South. **Co. Westmeath.**

John Sharkey, Folio: 1212F closed to 1685F; Land: (1) Maine, (2) Maine, (3) Linns; Area: (1) 6a 2r 0p, (2) 12a 0r 30p, (3) 17a 1r 30p. **Co. Louth.**

James Michael O'Mahony, Folio: 5729F; Land: A plot of ground situated in the townland of Killelton. **Co. Kerry.**

Most Reverend Doctor O'Neill, Reverend Patrick Lynch and Reverend William O'Connell, Folio: 11359; Land: Lisnacullia; Area: 1a 3r 29p. **Co. Limerick.**

Theresa Cullen, Folio: 21017L; Land: 82 Tolka Road in the Parish of St. George and District of Drumcondra, Co. Dublin. **Co. Dublin.**

John and Elizabeth Caffrey of 1 Dargel Drive (formerly 1 Doyle Drive), Marley Grange, Rathfarnham, Dublin 14. Folio: 29394L; Townland: Haroldsgrange, Barony: Rathdown. **Co. Dublin.**

Robert Davidson, deceased, Folio: 15848; Land: Roosky; Area: 2r. **Co. Cavan.**

Patrick J. Harrison and Kevin Connell, Folio: 6003F; Land: Rathfeigh; Area: 0.462 acres. **Co. Meath.**

James Murphy, Folio: 19696, 19698; Land: Coolclough. **Co. Cork.**

Stephen and Carol Henry, Folio: 36077F; Land: Ballincollig. **Co. Cork.**

James McDermott, Kiltoltagne, Ballymacurly, Co.Roscommon. Folio: 12366; Land: Kiltultoge; Area: 26a 3r 4p. **Co. Roscommon.**

Lynn Duffy, Folio: 25183F; Land: 8 Oakdene, Parish St. Finbarr. **Co. Cork.**

Lost Wills

Desmond, Miss Mary, late of 34 Wycherley Place, College Road, Cork. Would anyone knowing of the whereabouts of a will of the above named deceased, who died on 3 June, 1992, please contact Denis O'Sullivan & Co., Solicitors, 64 Patrick Street, Cork, (021) 271985.

Mannix, Daniel, deceased late of Ahabeg West, Lixnaw, Co. Kerry. Would any person having knowledge of the whereabouts of a will of the above named who died on 16 May, 1984, please contact Duncan White & Breen, Solicitors, 6 Kellyville, Portlaoise, Laois, reference KR, telephone (0502) 21066.

Taylor, Dorothy Bridget, late of Sneem, Kerry and formerly of Glenamara, 41, Coliemore Road, Dalkey, Co. Dublin, who died on January 27, 1992. Would anybody having knowledge of the whereabouts of the original of the deceased's will which is dated November 5, 1985, or of a later will, please contact Eugene F. Collins, Solicitors, 61 Fitzwilliam Square, Dublin 2.

Nugent, Michael, deceased, late of Clonmoher, Bodyke, Co. Clare. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on 7 June, 1992, please contact Gearoid McGann & Company, Solicitors, 50, O'Connell Street, Limerick. Tel: (061) 418277 (Ref: 3/B).

Kearney, Patrick, deceased, late of Moneystown Upper, Bray, Co. Wicklow. Would any party having knowledge of the whereabouts of a will of the above named deceased who died on 6 July, 1992 please contact Tarrant & Tarrant, Solicitors, Law Chambers, Arklow, Co. Wicklow (Telephone: 0402-32424).

Heber-Percy, Elise, deceased, late of 2 Barnhill Park, Dalkey, County Dublin and also of Orwell House Nursing Home, 112 Orwell Road, Rathgar, Dublin 6. Will anyone having knowledge of the whereabouts of a will of the above named deceased who died on 27 January, 1992, please contact McKeever & Son, Solicitors, 5/6 Foster Place, Dublin 2. Reference: PS/BM/8138.

Cronin, John, deceased, late of Lyre, Milltown, Co. Kerry. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on 31 July, 1992, please contact Henry PF Donegan & Son, Solicitors, 74 South Mall, Cork. Ref: FT. Telephone: (021) 277155.

Employment

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Notice

Gerard McCormack, *The New Companies Legislation,* published by The Round Hall Press (1991). Some errors have been noted in the above text. Virtually all stem from the fact that the author refers to a late text of the Bill rather than the Act in its final form. An errata slip is available on request from The Round Hall Press, Kill Lane, Blackrock, Co. Dublin, tel: (01) 2892922; fax: (01) 2893072.

Lost Deeds

Indenture of Conveyance dated 6 of July, 1975 between Edward Goggin of Bohoona East, Spiddal, in the County of Galway, retired teacher and Lucy Hoadley of Bohoona East, Spiddal, in the County of Galway, married woman of part of the lands at Bohoona East in the Parish of Killanin in the Barony of Moycullen and County of Galway. Will any person having knowledge of the whereabouts of this deed please contact Geoffrey Browne & Co., Solicitors of Tyrone House, 47 Eyre Square, Galway. Telephone: 091-68713/66751.

Cornelia, George, formerly of 144 Comeragh Road, Drimnagh, Dublin, deceased, and Elizabeth Cornelia, deceased, late of 144 Comeragh Road, Drimnagh, Dublin. Will any person having knowledge of the whereabouts of any title deeds to the above property please contact Collins Crowley & Co., Solicitors, 30 Kildare Street, Dublin 2. Telephone: 767192 or 767193.

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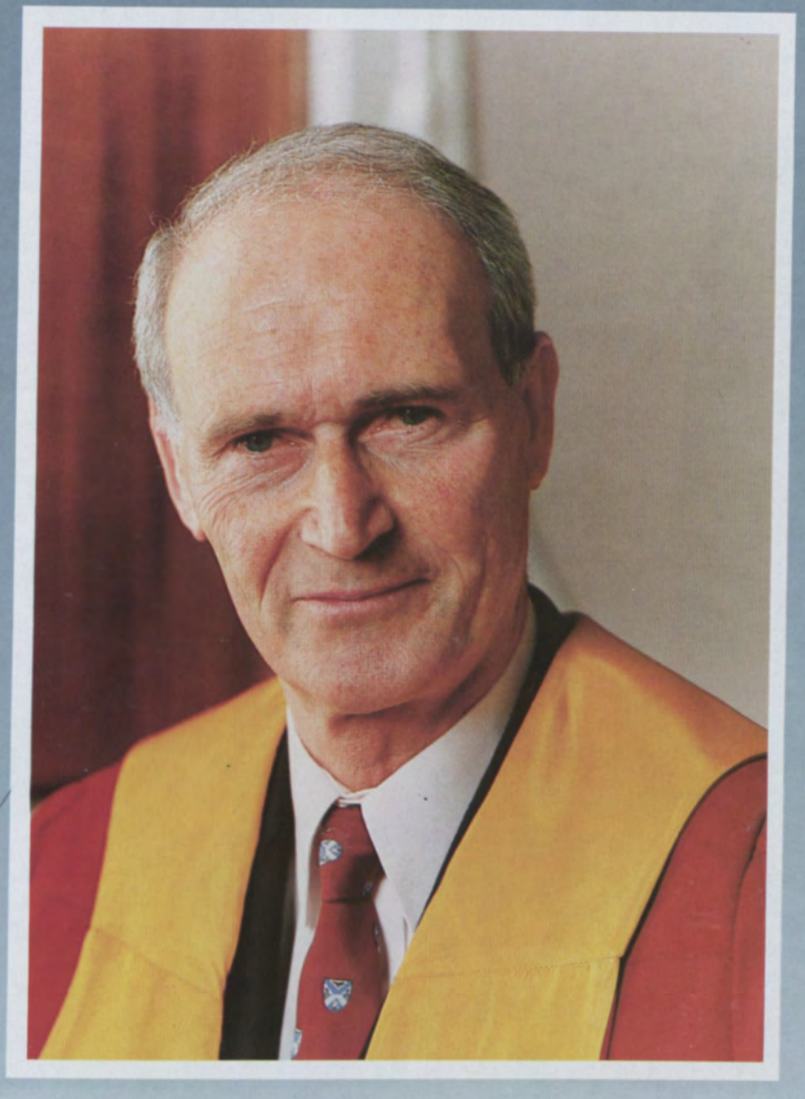
GAZETTE



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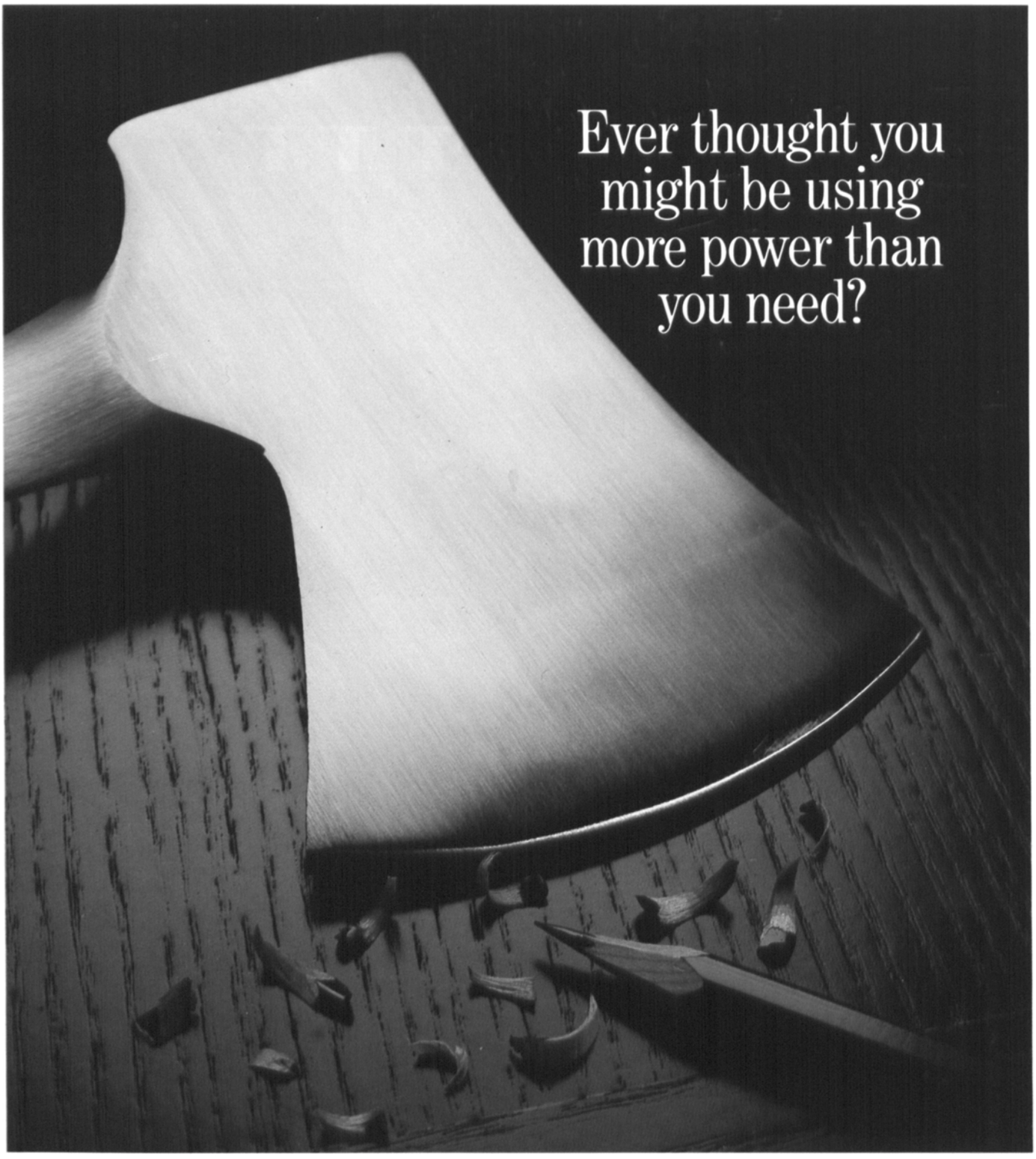

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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Front Cover: Professor *Laurence Sweeney* who retired on 30 September last after fifteen years service as Director of Training in the Society's Law School.

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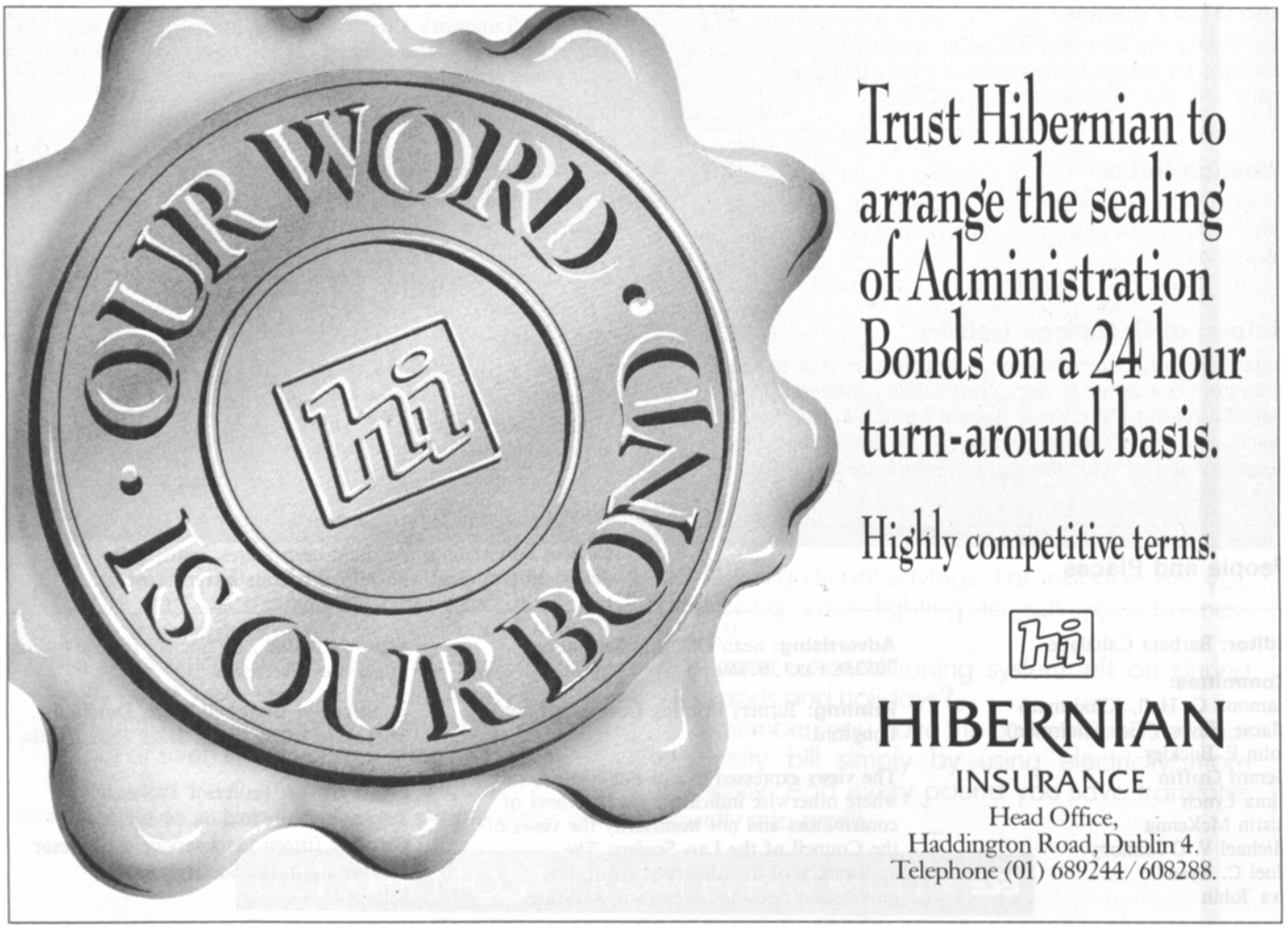

The Legal Aid Deficit

The Government's record on legal aid – both civil and criminal – is shameful. Thirteen years after the *Airey* judgment of the European Court of Human Rights, we still do not have a comprehensive scheme of civil legal aid in this country. Instead, 16 law centres, employing between them only 34 solicitors, attempt to provide a service. There are by contrast approximately 3,700 solicitors in private practice. Considering that one third of the population is dependent, to some extent, on social welfare payments and, therefore, unlikely to be able to afford to pay for legal assistance, the minimalist approach of the Government becomes obvious. Owing to the lack of resources, the law centres cannot keep up with demand. Some have had to close their doors to new clients. In others, there is a waiting period of six months. The system is as best providing a "casualty" service, and then virtually only in family law.

Within the past year, the Law Society, FLAC and the Irish Commission for Justice and Peace have all raised their voices on at least one occasion to highlight the inadequacy of the scheme of civil legal aid. The Law Society has recommended that a fully comprehensive scheme of civil legal aid should be introduced without delay, and has estimated that, by efficient utilisation of solicitors in private practice, expenditure on an adequate scheme would be in the region of only £6 -7 million per annum.

The Government's recently published White Paper on Marital Breakdown contains a commitment that "as and when the availability of financial resources and the overall situation with regard to the public finances allow, the Civil Legal Aid Scheme will be developed and expanded through the *phased* (our emphasis) opening of additional Law Centres. Legislation will be introduced to place the scheme on a statutory footing". While this statement of intent is welcome, it falls far short on specifics.

The situation in regard to Criminal Legal Aid, is now in an equally, if not more, perilous state. After seven months of patient negotiation by the Law Society, the Department of Justice has failed to make a realistic offer on an increase in fees for solicitors who undertake criminal legal aid in the District Court and has made no offer at all in relation to work in the Circuit Court. At present the level of fees in both the District Court and the Circuit Court is wholly unrealistic. A solicitor who does all the preparatory work on the case and represents the accused in court, is in many instances paid only the same or less than a professional *witness*. The current level of fees fails to take into account the substantial overheads a solicitor incurs in maintaining an office, and indeed, in preparing cases. Furthermore, the Department of Justice has refused to pay any fee to solicitors for visits to Garda stations to advise accused persons who are in custody.

The Government appears to have adopted the attitude that criminal legal aid work is less valuable, or less important, than other legal work since it is prepared to pay only a fraction of the fees that would be payable for comparable work in civil cases. If that is the underlying philosophy of its approach, we would challenge it. In a criminal case a person's liberty is often at stake and defending the rights of accused persons is work of a high order of importance. In failing to provide a realistic scale of fees is the Government saying that those who qualify for criminal legal aid are only entitled to a second class service?

Many solicitors in this country, in the course of their practices, do much pro bono work quietly and forego fees where a client finds himself in desperate circumstances. However, it is unrealistic of the Government to expect a formalised, in-built subsidisation of criminal legal aid by solicitors who serve on criminal legal aid panels. Solicitors have put up with paltry fees for years because they were reluctant to place further pressure on an already chaotic courts system. That has now changed and lawyers are unwilling to continue to subside the scheme. The blame for the breakdown must be laid at the feet of the Government.

The time has come to make the Government face up to its responsibilities. The Law Society has said that it believes any solicitor who wishes to withdraw from the criminal legal aid panel is justified in doing so. Already, solicitors in Cork and Sligo have withdrawn *en masse* from the panel, though they will, of course, continue with any case already underway. At the time of writing, solicitors in other parts of the country are considering what action they will take.

Access to justice is an indispensable feature of a modern democratic state that cares about all of its citizens and believes in equality. When it comes to access to justice, the greatest care has to be taken to protect the rights of those who have the least resources. Constitutional rights are meaningless if people have no means of enforcing them. Likewise, there is little point in introducing social legislation if those seeking to pursue their entitlements under the legislation cannot do so owing to lack of means.

The Government needs to rethink its attitude to the provision of legal aid in both the civil and criminal spheres. What is required is the introduction – immediately – of a comprehensive statutory scheme of civil legal aid. On the criminal side, it is time for the Department of Justice to come back to the negotiating table with an offer of a scale of criminal legal aid fees that is realistic and represents fair payment for the work involved. □

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Fusion is not a reform panacea

In a recent article in the Irish Independent entitled "Time for a shake-up in our Courts", Democratic Left TD *Pat McCartan,* who is a solicitor, rehearsed many of his favourite 'hobby-horses' on the need for reform across a wide spectrum of the legal world.

In fairness, Deputy McCartan is a person who takes his responsibilities as a public representative seriously and, being a lawyer, he does have something to contribute on the issue of legal reform. However, on the question of fusion he displayed an acute lack of understanding of the issues involved and, in particular, the likely consequences were the Government to go down that road. Deputy McCartan's thesis, in essence, is that there should be *coerced* fusion by means of legislation. His central point is that little effective reform will take place until such time as the Law Library is dismantled and barristers are allowed to travel out to work alongside other professions on the high street. This will "cut out the unnecessary middle man, the solicitor, in many instances". This very simplistic view of the consequences of removing the Bar's rule on direct access is, to my mind, naive and fundamentally misses the real issue involved in this debate.

Historically, the legal profession in these islands developed in response to the needs of litigants and in recognition of the separate and diverse functions that are involved in the provision of legal services. Solicitors are lawyers who provide a wide range of services to clients, many of which are of a non-contentious kind, involving property transactions, commercial activities, wills and trusts etc. Solicitors handle clients funds and, as such, are in the position of trustees in relation to the monies they hold. Their work is essentially client-related and, in the area of litigation, includes the preparation of the documentation necessary to commence and progress legal proceedings. Barristers, on the other hand, are essentially *trial lawyers* who specialise in the presentation of cases in court. The skills required for each branch of the profession are different and are not necessarily enjoyed by all lawyers. In any event, experience has shown that this kind of specialisation of function is necessary and works well in practice. Even in countries where there is a unified profession, the same general division of functions amongst lawyers is found. *Coerced* fusion would not necessarily make any difference in practice and, certainly, there is no evidence to suggest that it would reduce the cost of legal proceedings.

The idea that fusion would allow barristers to work alongside other professions in the high street, thereby cutting out the unnecessary middle man, the solicitor, is, to put it bluntly, nonsense. If barristers were allowed to take instructions directly from clients they would, in effect, become solicitors. The General Council of the Bar maintains that the rule which prohibits barristers from dealing directly with the client is a rule which, in fact, *defines what a barrister is.* In my view, if the direct access rule maintained by the Bar were removed, it would make no difference in practice. Lawyers who wanted to specialise as advocates or trial lawyers would continue to do so. Likewise, those who preferred the client-related area of work would remain as solicitors.

Deputy McCartan makes a good point when he says that there are two few lawyers in many important areas of social and legal need. I would agree. But my answer to that would be to insist on the Government introducing a decent system of civil legal aid, involving the private practitioner, which would bring many more lawyers into the area of the provision of legal services for the less well off. Another area, rightly identified by Deputy McCartan, in which urgent reform is needed is the appalling shambles that is our listing system in the higher courts and the inordinate delays in bringing cases to trial. Deputy McCartan correctly identifies the need for rationalisation and streamlining in the courts system and the introduction of proper information technology to improve efficiency. In my view, these and other areas of reform are the matters upon which Deputy McCartan should be concentrating, not on promoting the illusory concept of a fused legal profession.

This is my last President's message in the *Gazette.* I would like to express my appreciation to those who have taken the trouble to read some, or all, of them, and who have responded, sometimes warmly, sometimes critically! I would also like to place on record my thanks to *Noel Ryan* and the staff at Blackhall Place for their assistance. Finally, I would like to express my sincerest and heart-felt thanks to the entire legal profession for the warmth, courtesy and encouragement which I have been shown and given throughout the year.

Adrian P. Bourke
President

□

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Inheritance Tax and the Evolution of Section 60 and Section 119 Policies

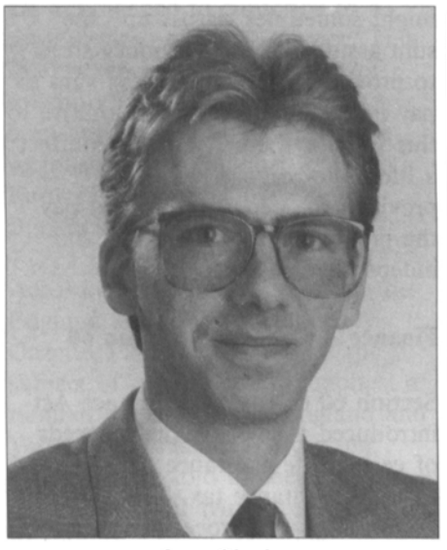
by Leo Clarke – Hibernian Life

Introduction

Capital Acquisitions Tax (CAT) is one of the less well known taxes administered by the Revenue Commissioners. This is because unlike income tax or corporation tax which are paid on a regular basis, CAT is a once-off type tax which arises on the receipt of a gift or inheritance. Having said this the significance of this tax cannot be underestimated – 1991 was a record year for capital acquisitions tax. The yield amounted to nearly IR£50 million, which was up by some IR£12 million (31%) on the yield for 1990. This increase was as a result of the consolidation of the self assessment system and of the amnesty for capital acquisitions tax announced by the Minister for Finance in his 1991 budget speech.

Distribution

Since capital acquisitions tax covers the assessment and collection of a number of taxes, namely:- discretionary trust tax, inheritance tax and gift tax, it is useful to provide particulars of the distribution of exchequer receipts classified under these headings.



Leo Clarke

The greatest proportion of revenue generated is by way of inheritance tax, some £33 million in 1990. With discretionary trust tax and gift tax it is noted that over the period revenue generated from these taxes has been fluctuating in alternative years between IR£1 million and IR£2 million. However, under discretionary trust tax a marked increase is evident in 1987, when some IR£4 million was obtained. This represents the introduction in that year of the 1% annual charge on discretionary trusts on top of those discretionary trusts liable to the 3% once-off charge. A further IR£1 million was generated for gift tax in 1990 over and above the trend indicated in earlier years, and this would seem to be attributable to the introduction of the self-assessment system, in that year.

The level of revenue generated under inheritance tax in comparison to that generated by discretionary trust tax and gift tax has much to do with some individuals' reluctance to deal with the CAT problem during their lifetime. This imposes a huge burden on beneficiaries, who are accountable for the payment of CAT and in many cases leaves them in the unfortunate position of having to dispose of valuable assets, whether they be business assets, investment property, personal assets or heirlooms. It is necessary therefore, that every effort be made, during the life of a disponer to highlight the significance of the CAT problem, to plan effectively, and ultimately to provide a solution which is both attractive and affordable. Much of the burden of responsibility lies with those involved in the legal profession, and necessitates a certain amount of tax planning to reduce the exposure. Although this may alleviate some of the burden, the problem of paying a hefty CAT bill may still remain, and in latter years the use of life assurance has become more prevalent, in providing funds to meet such liabilities.

Capital Acquisitions Tax

Distribution

Year	Discretionary Trust Tax IR£	Inheritance Tax IR£	Gift Tax IR£
1986	1,000,000	18,000,000	2,000,000
1987	4,000,000	20,000,000	1,000,000
1988	2,000,000	23,000,000	2,000,000
1989	1,000,000	28,000,000	1,000,000
1990	2,000,000	33,000,000	3,000,000

CAT Planning – Pre Section 60

Prior to 1985 planning for inheritance tax usually involved one or more of the following:

1. Discretionary will trusts
2. 6.5% Exchequer Stock 2000/05 or
3. Life assurance.

Discretionary will trusts

The primary use of a discretionary will trust, is that the succession to the deceased's estate can be delayed at the discretion of the trustees. In

this way inheritance tax can be avoided until assets are distributed out of the trust. The major disadvantage of using a discretionary will trust to plan for inheritance tax is that the tax is merely delayed, not avoided entirely. The 1984 Finance Act introduced a special once-off 3% discretionary trust tax on the value of assets held in a discretionary trust where the settlor is dead and none of the principal objects is under 25. This charge was to discourage the long term accumulation of assets within a discretionary trust for the purpose of avoiding CAT. The Finance Act, 1992 reduced the age of principal objects to 21, thereby bringing forward, in some cases at least the date on which the 3% charge will arise. In the 1986 Finance Act, the 3% charge was complemented with an annual 1% charge. These charges are applicable in addition to CAT arising when assets are appointed from the trust. The use of discretionary trusts as a means of planning for CAT are limited, and their days are numbered as a tax planning device.

6.5% Exchequer Stock 2000/05

Section 45 of the CAT Act, 1976 allows the use of certain Government securities to be used for the purpose of paying inheritance tax. Provided the relevant stock forms part of the property of the deceased at the date of death, and has been in his beneficial ownership for a period of at least 3 months prior to the date of death, the stock may be tendered to pay inheritance tax at its par value rather than its market value. The use of 6 1/2 Exchequer Stock for CAT planning, however does suffer from a number of drawbacks in that:

(a) It involves a loss of access to capital for both the disponer and the beneficiary.

(b) The CAT benefit in holding the stock will gradually reduce year by year as the stock approaches maturity and,

(c) income from the stock is fully taxable for income tax purposes.

Life Assurance – Pre 1985

The proceeds of any life assurance policy received by a beneficiary of the deceased was fully taxable for inheritance tax purposes. To overcome this problem an individual might sometimes "gross up" the sum assured under the policy so as to provide a certain after-tax sum to pay inheritance tax. An alternative to this was for the beneficiary to effect a life policy on the disponer, provided the beneficiary could pay the premiums out of his own independent income.

Finance Act, 1985 – Section 60

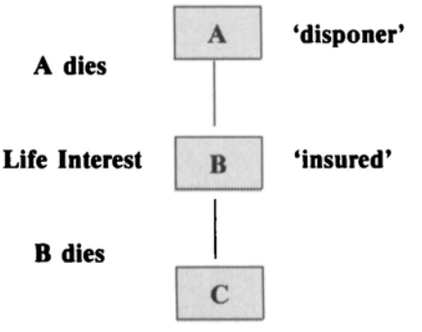
Section 60 of the 1985 Finance Act introduced a relief on the proceeds of certain life assurance policies used to pay inheritance tax. The relief given is that the proceeds of section 60 policies are exempt from tax in certain circumstances, to the extent that they are used to pay inheritance tax.

However, Section 60 relief, as originally introduced, did not cover all possible inheritance tax liabilities which could arise. The legislation at that time only provided for single life policies and a problem could arise where spouses would leave their assets to each other and then on second death to the children. The section 60 policy, single life, would not qualify in this scenario, and the only way the problem could be overcome was by the use of two single life policies.

Finance Act 1989 – Section 84

While contingent life policies were issued to provide an inheritance tax liability on the second death of two spouses, it involved issuing two separate policies and also the question of who was the payer of the premiums was somewhat vague. In the 1989 Finance Act, the Revenue Commissioners extended section 60 relief to allow policies providing a sum payable on the death of the survivor of two spouses or on the simultaneous death of both spouses. This form of policy is commonly known as the joint life/last survivor policy. However, as the legislation stood at this time, no provision could be made under section 60 where a life interest occurred.

An example best illustrates the problem:- (A) intends to leave his wife (B) a life interest in his estate, assuming she survives him, with the remainder over to son (C). The son (C) will have a liability on the second death of his parents but (A) will always be deemed to be the disponer, not the survivor. So a joint life/last survivor policy used in such circumstances would not qualify for relief if (A) died first.



Finance Act, 1990 – Section 130

Section 130 of the 1990 Finance Act extended the definition of 'relevant tax', and hence the potential use of section 60 policies to joint life/last survivor, and contingent life policies in the following two areas:

(a) life tenants
(b) quick succession.

In a life tenancy situation, a joint life/last survivor section 60 policy can now be used to fund for inheritance tax. This was achieved by defining 'relevant tax' to include tax payable in respect of an inheritance arising on the death of a spouse under a disposition made by the spouse of that insured.

In the situation of "quick succession" where both spouses might die within a very short period, say 31 days, there could be a mismatch between the disponer of

the inheritance and the insured. Section 130, therefore, provides relief to such cases by extending the relief to dispositions made by the spouse of the insured where both die within 31 days.

At this stage, the legislation governing section 60 policies was sufficiently extended to cover most situations where an inheritance tax liability would arise. However, no provision was made for those disponers who wished to transfer assets during their lifetime.

Finance Act, 1991 – Section 119

Section 119 of the 1991 Finance Act, introduced relief for certain life assurance policies, to enable the proceeds to be exempt from gift or inheritance tax, to the extent that the proceeds are used to pay gift tax or inheritance tax, in connection with a lifetime gift made by the insured within one year of the proceeds of the policy becoming payable. The legislation requires a minimum funding period for gift tax of 8 years. This means that the proceeds of the policy cannot be used for any assets transferred within this period. In addition to this the Revenue have issued strict guidelines, in terms of encashments taken from policies, and if not adhered to correctly, the policy could become non-qualifying. This section has also extended the use of existing section 60 policies to be used for the purposes of providing for gift tax.

At this stage, there is reasonably well developed legislation to cater for most inheritance tax and gift tax scenarios, which allows for a certain amount of flexibility in the provision and use of section 60 and section 119 policies. However, it should be stressed that timing is of the essence in the use of such products for CAT planning. Time and time again, situations arise where a policy cannot be effected due to age or ill health. The best advice is to *act now* and identify those clients who may have a CAT problem and to plan accordingly. □

Computerised Directory Service – Caution

The Chairman of the Society's Registrar's Committee, *Gerard Griffin,* is advising members of the profession to exercise caution if they are approached to subscribe to a computerised directory service. This follows reports that a number of solicitors in the Dublin area have been approached by an enterprise variously called Channel 7/ Eurovision/European Business Bureau.

According to a recent article in the England and Wales Law Society Gazette, Channel 7 has been the subject of dissatisfaction amongst a number of solicitors in England and Wales. Representatives from ten English firms told of their experiences of having been canvassed to subscribe to an electronic advertising facility at a cost of up to £1,000 in the expectation of obtaining referrals. None of the firms, according to the author of the article, *Evlynne Gilvarry,* reported receiving any referrals on foot of their subscriptions.

Recently a Dublin solicitor, *Paul O'Shea,* contacted the Law Society at Blackhall Place to say that he had been approached by a sales representative from Channel 7 (UK) Limited. "The gentleman's sales pitch was that his company required a firm of solicitors in Dublin for listing on his company's view data and information network. He explained that Channel 7 was very choosy as to what firms they would list because they wished to protect their own reputation. Our meeting started by way of an interview whereby the representative asked me many questions about our firm".

Mr. O'Shea said that he then became suspicious and when the representative gave him a copy of a letter written by the English Law Society he decided to phone the English Society's headquarters in London to check up on the situation. The Law Society of England and Wales has stated that it does not recommend services or products unless it has been directly involved in their design. Mr. O'Shea was informed that this was not the case with Channel 7. The letter issued by the Law Society was one from the Society's Ethics Committee pointing out that subscribing to Channel 7's electronic advertising facility would not breach the solicitors introduction and referral code, which, in any event, would have no application to foreign lawyers and that it was not a letter of endorsement.

Paul O'Shea is not the first Irish solicitor to be approached. Another Dublin firm of solicitors has notified the Society that it too was approached (last Autumn) by a firm called Eurovision styling itself as "information providers on Channel 7". A principal in the firm said, "We were told by Eurovision that we had been selected on the basis of our reputation. We paid over a total of £602.58, including the VAT, for a six months subscription. We heard nothing from them since although we had written to them three times seeking a hard copy confirmation of the text that it was agreed would appear on screen about us. Finally I did receive a letter stating that Eurovision had gone into liquidation."

Paul O'Shea reports a similar method of approach by the representative of Channel 7. "He informed me that our firm was shortlisted from a list of ten firms and that he had no interest in having any other firm than ours on the listing". Paul O'Shea said that notwithstanding this sales pitch, he has little doubt that other Irish solicitors will be targetted.

Gerard Griffin, Chairman of the Registrar's Committee, says "Obviously, it makes sense for solicitors to check out as fully as possible the credentials of any person or company who approaches them offering services of this kind". □

THE GARDA SÍOCHÁNA GUIDE

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This new edition of the *Garda Síochána Guide,* running to 1627 pages, updates the previous Fifth Edition published in 1981, and incorporates all the relevant legislation and caselaw of the last ten years.

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Price: IR£70.00 per copy plus IR£3.25 packing and postage.

Published by the Incorporated Law Society of Ireland
April 1991

Available from Blackhall Place, Dublin 7. Tel: 710711.

PRACTICE NOTES

Ordering of Copy Documents in The Probate Office

It is now proposed to introduce a system whereby copies of Wills and Grants if bespoken at the time of lodgment of the application papers for the Grant will be available on the same day as the Grant itself and both documents will issue accordingly.

A number of practitioners seem to be unaware of the fact that the fees charged for official copies (as distinct from sealed and certified copies) of Wills and Grants if bespoken at the time of lodgment of the application papers for the Grant cost £1.00 each which is half the fee charged for documents subsequently bespoken.

It should also be remembered that official copies of documents are adequate for all purposes within this jurisdiction. Sealed and certified copies are not essential.

I would like also to draw the attention of practitioners to the advisability of retaining on file a copy of the Schedule of Assets as certified by the Revenue Commissioners. This, apart from being essential for administration purposes, must be produced to both the Inspector of Taxes and the Department of Social Welfare when winding up the estate of a deceased. Copies of such Schedules are, of course, available from this office but it is a costly and time-consuming exercise.

W. G. Kenna
Probate Officer
The High Court.

Building Contracts – Lending Institutions' Requirements

The inclusion of special conditions in building contracts which limit a purchaser's rights may result in the purchaser's solicitor being unable to certify for a lending institution. Many loan approvals contain a condition that only the standard form of building contract may be used. Accordingly, members are advised to check all amendments to the standard building contract to ensure that they do not prevent them issuing a certificate of title in accordance with the lending institutions' requirements.

It has also come to the notice of the Committee that certain contracts are being produced on word processors which claim to be the standard contract but do not include all the clauses.

Where a solicitor has obtained the necessary consent from the Law Society either to reproduce the building contract or to prepare a document which refers to the building contract as being incorporated therein, the following clause must be used in the contract:-

"This contract shall be read as if it contained unamended all the terms and conditions of the Building Agreement issued jointly by the Incorporated Law Society of Ireland and the Construction Industry Federation in so far as said terms or conditions are not hereinafter altered or varied".

Conveyancing Committee □

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Reform of Occupiers' Liability?

by Eoin O'Dell*

Part 1

As a response to lobbying of successive Ministers for Justice, by the IFA and others, the Law Reform Commission has recently commenced a study of the law in relation to occupiers' liability. In this area, as in so many others, as a result of our history, the Irish common law has its roots in English law. However, from this common point of departure, the two jurisdictions have embarked upon different journeys, taking different routes to different destinations. Irish law has gone down the road of judicial reform of the common law.[1] In England, reform has been comprehensive but has taken a statutory route. The aim of this article is to consider the efficacy of the English position as a model for reform of Irish law in the area.

The article is in two parts. Part 1 will sketch the background to the English legislation, and will analyse the status of occupiers, premises and entrants under the English statutory position. Part 2 (which will appear in the November issue of the *Gazette*) will analyse the nature of the duty which the legislation imposes on the occupier, the type of damage for which he can be made liable and defences which the statute expressly supplies. It will conclude by considering whether statutory reform of the law in Ireland is necessary and whether the English statutes (or the rules they replaced) could be used as a model for such reform.

Background to the English legislation

English common law proceeds on the basis that an occupier's liability

Eoin O'Dell

to an entrant onto his land depended on the category into which the entrant fell. The common law analysed entrants into three categories:[2] those there (i) by the invitation, express or implied, of the occupier *i.e.* invitees, (ii) with the leave and licence of the occupier *i.e.* licensees, and (iii) trespassers. This structure was exhaustive and exclusive,[3] further refinement was resisted. No duty was owed to a trespasser;[4] a duty to warn of concealed dangers was owed to an invitee;[5] and a duty to prevent injury from dangers of which the occupier knew or ought to have known was owed to a licensee.[6]

Given that so much turned on the category into which the plaintiff entrant came, the lines between the categories became very subtle. Very often, the Courts elevated meritorious plaintiffs from one category to another. This was especially so in the case of trespassing children. A trespasser is one "who goes upon the land without invitation of any sort and whose presence is either unknown to the proprietor, or if known, is practically objected to".[7] As a result, the general principle was that he who entered wrongfully entered at his own risk. This left the child-trespassers without a remedy, so the Courts would go out of their way to hold that child-trespassers in effect were (implied) licensees to whom a duty could then be owed.

The presence on the premises of a dangerous object alluring to children in a place which is accessible to them does not necessarily of itself make the occupier liable to a child who is injured by it, but it may aid the inference of an implied licence.[8] Furthermore, where a child is the licensee of the occupier, then the "occupier (on the footing that he knows or ought to know that pursuant to his implied licence children are accustomed to frequent his premises), must, over and above his ordinary duty of care to licensees, take reasonable care to prevent damage to the child from dangerous things with which he is liable to meddle".[9]

Therefore, the line between trespasser and implied licensee was often manipulated to suit the justice of the case. However, sometimes it was not so manipulated, and the patent injustice of the law was evident. Thus for example, in *Videan -v- British Transport Commission*,[10] a child, playing on a railway line, was injured by an oncoming train and his father was killed trying to rescue him. The widow recovered in respect of the death of her husband, because he was the stationmaster and was thus lawfully there, but not in respect of the injuries to her son, because he was a trespasser to whom no duty could be owed.

"Therefore, the line between trespasser and implied licensee was often manipulated to suit the justice of the case."

These subtle and often illogical distinctions brought no credit to the

law, and the Lord Chancellor referred the question of reform of this area to the Law Reform Commission. Their Report on the issue[11] lead directly to the Occupiers' Liability Act, 1957,[12] the effect of which was to impose a "common duty of care" upon the occupier in respect of all lawful visitors, whether invitees or licensees.

The 1957 Act left untouched the law with respect to trespassers "probably because Parliament in 1957 could not make up its mind what to do, and not because Parliament impliedly approved of that law".[13]

As a consequence, the 1957 Act therefore left in place the line between licensees and trespassers in the guise of a line between lawful visitors and other entrants. This latter was as susceptible of manipulation as was the former, and the continuing vitality of the *Addie* doctrine that at common law the occupier owed no duty to a trespasser meant that the main cause of this manipulation persisted.

However, in 1972 in *British Railways Board -v- Herrington,*[14] the House of Lords were invited to overrule *Addie.* In effect they did so, and instead imposed a duty of "common humanity" on the occupier in respect of trespassers. The essence of this duty was subjective[15] to the occupier; it asked what should *that particular occupier* have done in the circumstances? Thus, for example, the financial means of the occupier were relevant in determining whether he had breached his duty.[16] This subjective approach differed from the common law duty to take reasonable care[17] and the duty under the 1957 Act, since both of these were objective, asking not what should that particular occupier have done in the circumstances but instead asking what a *reasonable* occupier would have done in the circumstances. The result of *Herrington* was that a duty was owed by occupiers to trespassers, but one which was easier to fulfil than that owed to lawful visitors.

Addie, despite all its faults, had one advantage: it was certain. It was felt that in bidding farewell to *Addie,* the House of Lords in *Herrington* bid "hello" to uncertainty, especially as to the real meaning of the duty of common humanity. Once again, the issue of occupiers' liability was referred to the Law Commission. Once again, there was a Report[18] which lead in due course to legislation, the Occupiers' Liability Act, 1984. This Act imposes a duty on an occupier who is aware of a danger to an entrant (other than a lawful visitor) against which in all the circumstances of the case he may reasonably be expected to offer the entrant some protection to take such care as is reasonable in the circumstances to avoid the injury.

The result of the English statutory reform is to create a structure in which an occupier owes (i) a "common duty of care" to a "lawful visitor" under the 1957 Act, and (ii) owes a duty to an entrant other than a lawful visitor under the 1984 Act. The remainder of this article is concerned with the details of an occupier's liability for injury to an entrant under the precise provisions of these items of legislation.

The Occupiers' Liability Acts, 1957 and 1984

The occupier's liability for injury to an entrant will be analysed by asking and answering the following questions. For the purposes of these Acts:

(i) Who are occupiers? *i.e.* who are the potential defendants?
(ii) What are premises? *i.e.* what is the nature of 'occupation' which will give rise to "occupiers' liability" on the part of those potential defendants?
(iii) Who are the entrants? *i.e.* who are the potential plaintiffs?
(iv) What duty does the occupier owe to the entrant *i.e.* when will the defendant be liable?
(v) For what damage will the defendant be liable?
(vi) Are there any defences?

In answering these questions, it is important to note that the Acts effected real change only in respect of the answers to questions (iii) and (iv). Thus, section 1(1) of the 1957 Act provides that "The rules enacted . . . regulate the duty which the occupier of premises owes" and, in effect, no more than that. In other words, it is only the common law with respect to duty which is affected. In fact, the legislation presupposes much of common law, and expressly does not change it. For example, section 1 (2) of the 1957 Act provides (in part) that the Act shall *"not alter the rules of the common law* as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purposes of the [Act], the persons who are to be treated as an occupier and as his visitors are the same... as the persons who would at common law be treated as an occupier and as his invitees or licensees." For our purposes here, it is sufficient to notice that the definition of "occupier" to be applied for the purposes of the Act is the common law definition. This is question (i).

(i) Who are occupiers?
Generally speaking, liability as an occupier is based on his or her occupancy or control, not on ownership. The person who is responsible for the condition of the premises is that person who actually has control of them since this is the person who has the immediate supervision and control of the premises and thus has the power of allowing or preventing the entry of other persons.[19]

As in most matters of application of rules, it will always be a question of fact in each case whether the defendant actually has this control. However, normally, a lessee and a licensee with exclusive possession will have such control, whereas the lessor and the licensor without a right of entry will not. But a "lease" of an abnormally short duration *e.g.* the hiring out of a dance hall for four hours where the "lessor" retained the right to provide refreshments

gave sufficient control for liability to accrue to the "lessor".[20]

(ii) What are premises?
Again, this is not defined in the Acts, so again we must turn to the common law. The concept of premises is very wide. It embraces all real property: land, houses and buildings.[21] However, it is not confined to real property but extends to appliances or objects upon it of which the plaintiff has been invited or allowed to make use - for example, grandstands, [22] stagings, [23] ladders,[24] and, according to the Northern Ireland case of *McLaughlin -v- Antrim Electricity Supply Co*,[25] electricity pylons.

However, the legislation is not silent on the matter of premises, adding for what it is worth, in section 1(3) of the 1957 Act that "the rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law, to an occupier of premises and his invitee or licensees would apply, to regulate (a) the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel vehicle or aircraft."

(iii) Who are the entrants?
It has been shown above that the common law divided entrants into the three categories of invitees, licensees and trespassers. Under the 1957 Act, the first two categories are "lawful visitors". It is to be noted that the 1957 Act did not affect the common law definitions of invitees or licensees in any way. (Section 1 (2): the Act shall "not alter the rules of the common law as to the persons... to whom [a duty] is owed; and accordingly for the purposes of the [Act] the persons who are to be treated as... visitors are the same... as the persons who would at common law be treated as... invitees or licensees".) Nevertheless, the effect was to create two categories of entrant at common law where once there were three: lawful visitors and trespassers. As we have seen, the 1957 Act applied to "visitors" and not to trespassers. The 1984 Act accepted the definitions in the 1957 Act, so that by section 1(2) of the 1984 Act, "occupier" and "visitor" have the same definitions as in the 1957 Act. The 1984 Act deals with entrants other than visitors (s. 1(3)). Consequently, the line drawn between the 1957 Act and the 1984 Act.

At common law, a licence may be granted either expressly or impliedly, but one who claims that he is an implied licensee must show that the occupier has permitted his presence and not merely tolerated it: "repeated trespass of itself confers licence;... how is it to be said that he [the occupier] has licensed what he cannot prevent".[26] However, the "mere putting up of a notice 'No Trespassers Allowed' or 'Strictly Private', followed, when people often come, by no further steps, would, I think, leave it open for a judge or jury to hold implied permission".[27] Nevertheless, it would seem that "there is no duty on [an occupier] to fence his land against the world under sanction that, if he does not, those who come over it become licensees." As a result of the two Acts, especially of the 1984 Act, the impetus to manipulate this line between licensees and trespassers in the manner described earlier has disappeared, and the tenor of *Herrington* is hostile to it. Consequently, the courts will be more willing properly to classify the entrant as lawful or not, because in either case, if the occupier is in breach of duty, the entrant will be able to obtain a remedy.

There is one situation in which this distinction is vital, where the entrant crosses the line from lawful visitor to trespasser. An entrant is a lawful visitor only for so long as he is using the premises for the purposes for which is is invited or permitted to be there. This is so even at common law in Ireland. "When you invite a person into your house to use the staircase, you do not invite him to slide down the bannisters".[28] If a visitor exceeds the ambit of invitation or permission he thereby becomes a trespasser. Again, it is a question of fact whether in all the circumstances of the case the occupier has taken reasonable care to define the ambit of the invitation and thus to define the ambit of the existence and scope of the prohibited area. If a lawful visitor has strayed from the area in which he was clearly permitted to be, the question is not whether he has been invited to stray but whether there was anything to define and delimit the area of invitation, whether in space or time.

Finally, it is not quite true to say that statute is silent on the question of the definition of an entrant. It does define one class of entrant as lawful: "persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not" (Section 2(6) of the 1957 Act).

Therefore, potentially *any* and *every* entrant onto land may have a right of action. If it is a lawful visit, it will be governed by the 1957 Act, if is not then it will be governed by the 1984 Act.

It ought to be noted that the definitions of premises and occupier under the legislation take their content from the common law. The Irish common law definitions of these concepts are at least very similar if not broadly the same. Thus, McMahon and Binchy consider that premises include "for example, platforms, grandstands, ships in a dock, a gully trap on a highway, scaffolding... electricity pylons...[and] moveables such as motorcars, ships and... airplanes".[29] Further, they conclude that a notion of control "is a more useful yardstick than occupation when one is determining liability".[30] Thus, the enactment into Irish law of these provisions would make little, if any, difference.

The remaining questions under the statutes and the potential reform of Irish law in the area will be considered in Part 2.

Notes

*. Lecturer in Law, Trinity College, Dublin. This article is based on a paper presented to the IFA Occupiers' Liability Conference on April 8, 1992.

1. *Purtill -v- Athlone UDC* [1968] IR 205; *McNamara -v- ESB* [1975] IR 1; *Foley -v- Musgrave,* Supreme Court, unreported, 20 December 1985; *Rooney -v- Connolly* [1986]IR 572; *Mullen -v- Quinnsworth* [1990] 1 IR 59; and *Smith -v- C.I.E.* [1991] 1 IR 314. See generally, McMahon and Binchy *Irish Law of Torts* (2nd. ed., Dublin, 1990), chapter 12.
2. *Indermaur -v- Dames* (1866) LR 1 CP 274. The structure in the text does not include (the possible fourth category of) contractual invitees, since the contract, governing the liability, would usually reach the same result as the tort-based duty to take reasonable care.
3. *Addie -v- Dumbreck* [1929] AC 358.
4. *Addie -v- Dumbreck* [1929] AC 358. As a result "no occupier is under any duty to potential trespassers, whether adults or children, to do anything to protect them from danger on his land however likely it may be that they will come and run into danger and however lethal the danger may be....If he knows that trespassers are already on his land... then he does incur a duty of a very limited kind - a duty not to act with reckless disregard of their safety". *British Railways Board -v- Herrington* [1972] 1 All ER 749, 754 *per* Lord Reid, *cp* to like effect Lord Wilberforce at 776.
5. *Perkowski -v- Wellington Corporation* [1959] AC 53.
6. *Indermaur -v- Dames* (1866) LR 1 CP 274. Here, the employee of a gasfitter who had contracted to do certain work on the occupier's factory was held to be an invitee of the occupier. Thus, so long as there is a community of interest between the occupier and the invitee, as where a person is on the occupier's premises with his consent on business, the visitor is an invitee.
7. *Addie -v- Dumbreck* [1929] AC 358, 371 *per* Lord Dunedin.
8. *Hardy -v- Central London Ry* [1920] 2 K.B. 459, 470; *Latham -v- Johnson* [1913] 1 KB 398, 416. The allurement doctrine predated *Addie* and was "perfectly sound policy", *British Railways Board -v- Herrington* [1972] 1 All ER 749, 771 and 777 *per* Lord Wilberforce. Its most recent consideration in Ireland is *Kenny -v- Motor Insurance Bureau of Ireland,* High Court, unreported, 29 November 1991, Costello J.
9. Cmnd 9305, para 30; *Cooke -v- MGW Ry. of Ireland* [1909] AC 229, 238; *Latham -v- Johnson* [1913] 1 KB 398.
10. [1963] 2 QB 650
11. Cmnd. 9305 (1954)
12. 5 & 6 Eliz. 2., c. 31
13. Salmond and Heuston *The Law of Torts* (19th. ed., London, 1987) by Heuston and Buckley, p. 317
14. [1972] AC 877, [1971] 1 All ER 74.
15. See expecially *per* Lords Reid and Diplock.
16. *Herrington* at p. 758 *per* Lord Reid: "It would follow that an impecunious ocupier with little assistance at hand would often be excused from doing something which a large organisation with ample staff would be expected to do".
17. Under *Donoghue -v- Stevenson* [1932] AC 562 and its extensive progeny.
18. Law Com. No 75: Cmnd 6428.
19. *Wheat -v- Lacon* [1966] AC 552, 574, 578; *Holden -v- White* [1982] QB 679, 687.
20. *Kelly -v- Woolworth* [1922] 2 IR 5;
21. *Bracey -v- Read* [1962] 3 All ER 472, *Maunsell -v- Olins* [1975] 1 All ER 16, HL.
22. *Francis -v- Cockrell* (1870) LR 5 QB 501.
23. *Heaven -v- Pender* (1883) 11 QBD 503.
24. *Wheeler -v- Copas* [1981] 3 All ER 405, 408.
25. [1941] N.I. 23 *cp. McNamara -v- ESB* [1975] IR 1.
26. *Edwards -v- Railway Executive* [1952] AC 737, 746 *per* Lord Goddard C.J.
27. *Addie -v- Dumbreck* [1929] AC 358, 372 *per* Lord Dunedin, *cp. O'Keeffe -v- Irish Motor Inns* [1978] IR 85, 94 *per* O'Higgins CJ.
28. *The Calgarth* [1927] P. 93, 110 *per* Sutton L.J.
29. McMahon and Binchy *Irish Law of Torts* (2nd. ed., Dublin, 1990), p. 208.
30. *Id.* p. 209.

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To mark the Quatercentenary of Trinity College Dublin, the Council of the Law Society held its July meeting in the Board Room at TCD. The photograph shows: L-R: Adrian Bourke, President, Law Society; Thomas Mitchell, Provost, Trinity College Dublin, who addressed the meeting; Ray Monahan, Senior Vice President, Law Society; and Council members Gerard Griffin, Geraldine Clarke, and John Fish.

The Senior Vice President of the Law Society, Raymond Monahan, presenting a cheque for over £12,000 to the Chairman of the Irish Hospice Foundation, Dr. Mary Redmond. The cheque was the proceeds of the Piano Recital by John O'Conor, organised by the Law Society in aid of the Hospice Foundation.

L-R: Peter Prost, Managing Director, Sedgwick Dineen Financial Services Limited; John Dillon-Leetch, solicitor; Pat Farrell, Associate Director, Sedgwick Dineen Financial Services Limited; Tom Kennedy, Development Officer, Solicitors Financial Services Limited, at a recent lunch in the Law Society at which John Dillon Leetch received an award for being the member of the Solicitors Financial Services who generated the highest level of business in the year to September, 1992.

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Recently Professor Richard Woulfe and Sean McDermott, authors of "Compulsory Purchase and Compensation in Ireland" presented a copy of the book to the President, of the Law Society, Adrian Bourke. At the presentation were L-R: Professor Richard Woulfe; Therese Carrick, Legal Editor, Butterworths; Adrian Bourke, President, Law Society; Sean McDermott and Noel Ryan, Director General, Law Society.

The President of Ireland, Mary Robinson, received the members of the Law Society Council and their spouses at a reception in Aras an Uachtaráin at the end of July. The photograph shows President Robinson greeting the Secretary of the Northern Ireland Law Society, Michael Davey and Monica Davey. Also in the photograph are L-R: Nicholas Robinson, Adrian Bourke, President, Law Society, Gerald Hickey, Council Member, Law Society and Dorinda Hickey.

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* Michael Byrne is used as a fictitious name to protect the identity of our client.

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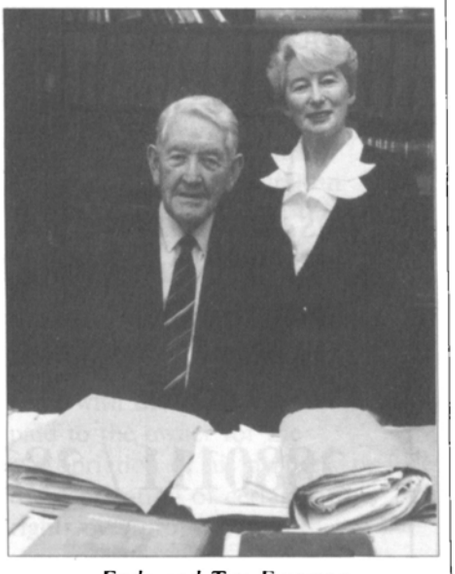

Enda and Tess Emerson

Congratulations to Enda and Tess Emerson who between them have given 100 years service to the firm, Emerson & Conway, St. Francis St., Galway, Enda having served 57 years and Tess 43 years. Enda has always concentrated on the conveyancing and Land Registry side of the firm preferring to work "back stage" while Tess helps run "front of house".

Both are founder members of the Patrician Musical Society, Galway, Tess being President in this, its 40th year.

In Enda's younger days he played rugby for Galway Corinthians and UCG. He also rowed in the famous Corrib Crew which brought the Leander Cup to Galway and West of the Shannon for the first time in 1936.

Both Enda and Tess work full time in the office and hope to continue to do so as long as both feel able. □

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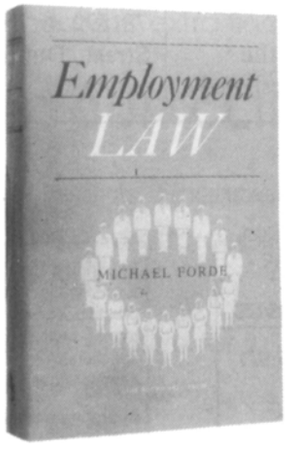

A very useful appendix provides the full text of all the relevant Acts. ISBN 0-947686-86-X £49.50

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BOOK REVIEWS

Law Firms in Europe

Edited by John Pritchard, Legalease Europe, London 1992, 488pp. 1992, £29 Paperback.

The world as we know it today could hardly function without lawyers. However, lawyers have always been unpopular figures. It was Dick the Butcher who proclaimed in a drunken state in Henry VI Part II: "The first thing we do, let's kill all the lawyers". Hamlet in the graveyard held up the skull of a lawyer and spoke to Horatio about the tricks of the lawyers. We survive. We battle on. We all endeavour to give the best possible service to our clients.

Law Firms in Europe is essentially an introductory guide to the major law firms throughout Europe. The book combines a mixture of factual information and personal comment. Each chapter falls into two distinct sections: directory and editorial. The directory section for each country is made up of professional information such as the total number of lawyers and the location of offices – supplied by relevant firms and approved by them prior to publication. In addition to this factual information, the publishers have included their own editorial commentary. The editorial sections include a general review of firms performing particular types of work and a review of firms which are generally recognised to have a good reputation within the national and international legal community. The publishers have stated that in reaching opinions about law firms they have been largely influenced by the confidential opinions expressed to them by many lawyers. Over a thousand lawyers contributed indirectly to the editorial sections either by letter or telephone conversation.

In the context of Ireland, the publishers write of the "big five" Dublin law firms but state that the big firms' monopoly of top-tier work has been eaten into by a number of medium-sized firms that are clearly ambitious to close the gap between themselves and the "big five". Interestingly, the editorial states that Irish law firms have been thriving in recent years with many firms doubling in size in the past five years.

Law Firms in Europe is a useful guide to the leading law firms throughout Europe. Lawyers who have an eye on the mainland continent of Europe and the United Kingdom could usefully peruse the pages of this book.

Eamonn G. Hall

Compulsory Purchase and Compensation in Ireland: Law and Practice

By McDermott & Woulfe, Butterworths, Irish Property Series, Dublin 1992, 397pp. Hardback.

This book represents a first venture into the complex area of compulsory purchase of land in Ireland.

That the law has evolved into a tangled bramble bush of procedures, is perhaps a failure on the part of legislators to tackle the whole issue as a single problem, requiring consolidating legislation.

The book is divided into two sections. The first part by Professor *Richard Woulfe,* considers all aspects of compulsory acquisition up to the formulation of a claim for compensation and picking up the procedure again from the conclusion of the claim either on settlement, following negotiation, or on completion of the arbitration process. It ends with the transfer of ownership to the acquiring authority and the payment of compensation to the owner.

The second part by Mr. McDermott, deals with the compensation to be paid to the owner for the expropriation of his property or for the deprivation of certain of his rights over property.

Practitioners have yearned for such a reference book for many years; until now having to rely on old notes or counsel's opinions. It is a most welcome addition to the book shelf and will survive as a standard text book for so long as the present laws remain and that should see us into the next millenium and the years beyond.

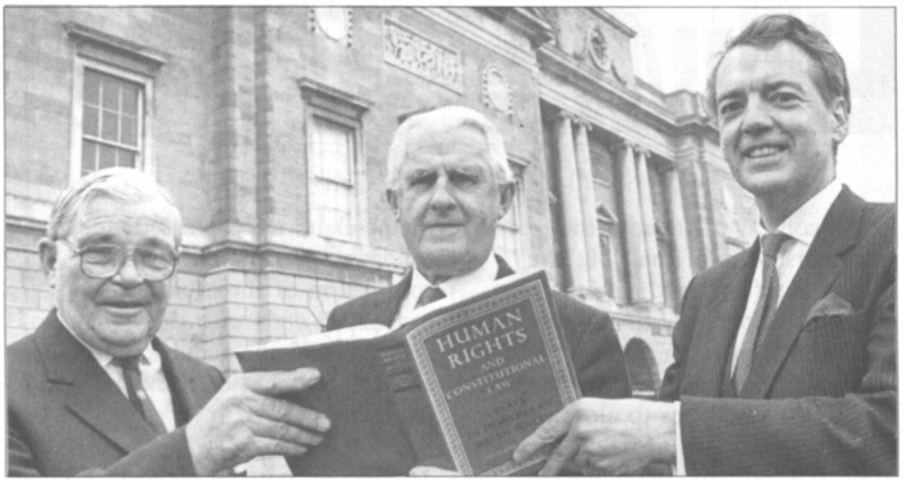
Justin McKenna

Human Rights & Constitutional Law

Essays in Honour of Brian Walsh: James O'Reilly (Editor) The Round Hall Press, Dublin 1992, 384pp. £47.50 Hardback.

Festschrifts are rare events in Irish legal writing. It is a curious though welcome coincidence that the volumes honouring two of our most distinguished judges both in the national and international scene should be published almost contemporaneously. The volume dedicated to Mr. Justice O'Higgins has already been reviewed in these pages (*Gazette*) and this tribute to Mr. Justice Walsh must also receive a generous welcome.

The range of topics and contributors is extremely wide. Not only do the



At the launch of the Publication "Human Rights and Constitutional Law were L-R: The Honourable Mr. Justice T.A. Finlay, Chief Justice, Mr. Justice Brian Walsh and James O'Reilly (Editor).

authors include a number of Judge Walsh's colleagues and former colleagues among the Irish judiciary but in tribute to Judge Walsh's long service on the European Court of Human Rights there are contributions by the President of that Court, two of its other Judges and its Registrar as well as a member of the Supreme Court of Cassation of Italy.

Volumes such as this are, of their nature, intended to be dipped into rather than read consecutively and here the work provides a wide range of choice to the reader. It is divided into four main sections:-

Historical Background,
Human Rights,
Constitutional Law and
European Community Law,

the contributions in the latter headed by Mr. Justice O'Higgins and with articles from the two editors of his Festschrift, Deirdre Curtin and David O'Keeffe. The contribution of Judge Walsh's European colleagues to the Human Rights sections are a tribute in themselves to Judge Walsh's service to the Court in Strasbourg.

No judge has had a longer or more profound effect on Irish constitutional law than Mr. Justice Walsh and while for that reason the contributions of Gerard Hogan and Justices McCarthy, O'Flaherty, Costello and Keane to this work should prove to be essential sources for students and practitioners of Irish constitutional law, all the essays are interesting and perhaps most significantly for the non-expert, eminently readable.

John Buckley □

Solicitors Somalia Fund

There has been a tremendous response to the appeal launched by the President of the Law Society, Adrian Bourke, and Vice-President, Raymond Monahan, on 29 September last seeking donations from members of the profession to the Solicitors Somalia Relief Fund. Within two days over £33,000 was received. Monies collected will be donated to an Irish relief agency working in Somalia. Full details of the amount collected will be published in due course.

If you have not already responded to the appeal, please do so now.

Contributions may be made by cheque directly to the Society in the envelope that was supplied with the letter from the President on 29 September last or transferred through your bank via giro to a special bank account at the Bank of Ireland, 2/3 College Green, Dublin 2 entitled "Solicitors Somalia Fund"; the account number is 30082086 and the bank sorting code is 90-00-17.

Bar Conference Focuses on Constitution

"The Irish Constitution – a Living Law" is the theme of the second Annual Conference of the Bar which takes place on 31 October next in the Royal Hospital, Kilmainham. The opening address will be made by Sir *Ninian Stephen*, who will compare and contrast the Irish and Australian constitutions.

Paul Gallagher SC, will examine the theme "Constitution and Community Law", while *Anne Dunne* SC, will address the topic "The Constitutional Family", and Professor *James Casey* will speak on the topic of "Constitutional Interpretation."

The conference will conclude with a debate on the motion "that Ireland needs a new Constitution". Chairing the debate will be Ms. Justice *Susan Denham,* while Michael McDowell SC and Felix McEnroy BL, will speak in favour of the motion and Nial Fennelly, SC, and Shane Murphy BL, will speak against. The day's proceedings will be chaired by Peter Shanley SC, Chairman of the Bar Council.

The conference will be confined to members of the Bar of Ireland, members of the Law Society, students of the Kings Inns and invited guests. Tickets priced £40.00 are available on request to the Bar Council.

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by **Eamonn G. Hall**

Nullity of Marriage: Question of Homosexuality

Supreme Court finds homosexual lacked capacity to sustain normal marital relationship

The case of *UF -v- JC* which has been reported recently in *The Irish Reports* [1991] 2 IR 330 has important ramifications for persons interested in family law matters and for those solicitors, though not specialists in family law, who may be asked from time to time to advise about marriage-related issues.

The wife (petitioner) and husband married when they were 20 and 22 years of age respectively. There was one child of the marriage. The wife presented a petition to the High Court seeking a declaration that the marriage was null and void on the grounds that at the date of their marriage and prior and subsequent thereto, the husband was a homosexual, had homosexual relationships and by reason of his homosexual nature and temperament lacked the capacity to form or to maintain a normal marital relationship with his wife and was unable to understand fully the nature, purpose and consequence of the marriage contract.

The parties had normal sexual relations with each other before their marriage and the wife did not suspect her husband's homosexual nature. The husband had a very close relationship with another man B, which the wife was uneasy about. In addition, the wife alleged that her husband deliberately picked rows with her so that he could use it as an excuse to sleep in a different bedroom. On one occasion the husband insisted on giving B a lift to the airport when he was going on holiday. The husband went with B the night before his departure on holiday and stayed overnight. Following this incident the wife left the matrimonial home with her son.

The wife confided her problem in a woman friend, M.C., who told her that her husband had been a homosexual for many years.

When the wife confronted her husband he admitted the truth about his homosexuality. He did not enter an appearance to the proceedings and intimated through his solicitor that he did not intend to defend the matter.

Dr. F P. O'Donoghue, a consultant psychiatrist, gave evidence of having seen both parties separately. He found the wife to be normal in every way, there being no evidence of any underlying psychiatric disorder except an understandable reactive depression to her situation.

The husband told Dr. O'Donoghue that his first episode of homosexual behaviour had been when he was aged 20, when he met a homosexual and engaged in mutual masturbation. From that point on he had multiple casual pick-ups usually resulting in mutual masturbation. He told Dr. O'Donoghue that prior to getting married he "hoped it would go away" but this behaviour continued after marriage. He also told Dr. O'Donoghue that he was involved in a homosexual relationship which had lasted over two years.

Keane J in the High Court considered that Dr. O'Donoghue's findings as to the husband were of crucial importance and he quoted the relevant passage from Dr. O'Donoghue's report. Dr. O'Donoghue stated that the husband appeared a quiet co-operative man who showed no evidence of schizophrenia or organic brain damage. Dr. O'Donoghue continued:

> "It was my opinion that he presented as a 29 year old male homosexual who rated at level 4 or 5 of the Kinsey scale. This is a scale from 0-6, those at 0 being described as exclusively heterosexual, those at 1 being almost exclusively [heterosexual] but with fleeting homosexual experiences, those at 2 being predominantly heterosexual but with a significant number of homosexual contacts, those at 3 being bisexual, those at 4 being predominantly homosexual but with a significant number of heterosexual experiences, those at 5 being almost exclusively homosexual with occasional heterosexual experiences, and those at 6 being exclusively homosexual."

Dr. O'Donoghue concluded that the husband had made a serious mistake in going into the marriage relationship, as from the history given, it would appear that he was predominantly homosexual.

Keane J refused the petition stating that, inter alia, the husband was at the time of the marriage a practising homosexual, a condition which he concealed from the wife who was completely unaware of this side of his nature. Keane J held that both the husband and wife were at the time of marriage intelligent adults who had fully understood the nature, purpose and consequence of the marriage contract and neither of whom was at the time of the marriage suffering from any form of mental illness. Keane J also considered that to formulate new grounds for nullity in the manner suggested in recent decisions of the High Court constituted an impermissible assumption of the legislative functions under Article 15 section 2 sub-section 1 of the Constitution which were vested exclusively in the Oireachtas. Keane J also considered that the development by the courts of the law of nullity in a fragmented and ad hoc fashion

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was particularly undesirable and that it was unsatisfactory that questions of status should be shrouded in uncertainty.

The wife appealed. The Supreme Court (Finlay CJ, Griffin, Hederman, McCarthy and O'Flaherty JJ) allowed the appeal and granted the decree of nullity. The Court held that the capacity of one of the parties, by virtue of a homosexual nature, to form or maintain a normal marital relationship with each other was a valid ground for nullity. The Court also held that the recognition by psychiatrists of the existence of a homosexual nature and inclination, which was not susceptible to being changed, made it a necessary and permissible development of the law of nullity. In certain circumstances, the Court concluded that the existence in one party to a marriage of any inherent and unalterable homosexual nature could form a proper legal ground for annulling the marriage at the instance of the other party to the marriage in the case, at least where that party had no knowledge of the existence of the homosexual nature.

McCarthy J also considered that the burden of proof required of a petitioner for nullity of marriage was on the balance of probabilities.

Jurisdiction of High Court to Discipline Solicitor Concerning an Undertaking

The status in law of a solicitor's undertaking was considered by the High Court in the *IPLG Limited* case, an unreported judgment delivered by Lardner J on March 19, 1992. The plaintiffs, inter alia, invoked the jurisdiction of the High Court to discipline solicitors as officers of the court.

Lardner J stated that it was admitted that the jurisdiction to discipline solicitors as officers of the court existed prior to 1920 in Ireland. Lardner J gave an example of its exercise as found *In the Matter of a Solicitor* 53 ILTR 57 (1919) where a solicitor for a vendor gave a signed undertaking to a purchaser of land already registered in accordance with the *Local Registration of Title Act, 1891* that in consideration of the purchaser paying the balance of the purchase money to him, he would have all the incumbrances affecting the property at the date of the sale, or found to affect the property up to registration of the deed of transfer, effectually released and the property discharged therefrom by all proper and necessary parties. The solicitor failed to observe the undertaking as to part on the grounds that it was contrary to the Act, useless and unnecessary. O'Connor MR was quoted by Judge Lardner as follows:

> "In my opinion the vendor's solicitor is bound to carry out his undertaking. The vendors not being in a position to close on a particular date induced the purchaser before the title was fully made out to pay them the balance of the purchase money and by doing that the purchaser incurred a very considerable risk; but acting on the faith of the agreement or undertaking given by the solicitors for the vendors he paid over the balance."

It was argued in the High Court in the *IPLG* case that this jurisdiction no longer existed and that a solicitor's undertaking was now only enforceable on the same terms as any other contractual obligation.

It had been submitted on behalf of the defendants that in Ireland the re-organisation of the disciplinary provisions in relation to solicitors in Part III of the *Solicitors' Act, 1954* had been held unconstitutional and that relevant provisions had been replaced by the *Solicitors' Act, 1960* which does not provide that solicitors are officers of the court. The Act provided for the appointment of a Disciplinary Committee of Solicitors by the President of the High Court. Section 7 (1) provided as follows:

> "An application by another person or by the Society for an inquiry into the conduct of a solicitor on the ground of alleged misconduct shall, subject to the provisions of this Act, be made to and heard by the Disciplinary Committee . . . . "

The judge also said that provision was made for the holding of inquiries and for the Disciplinary Committee to embody its findings in a report to the High Court and section 8 conferred jurisdiction on the Court to make certain orders in respect of any such report. The judge noted that these provisions relating to an inquiry by the Disciplinary Committee, a report to the High Court and for the Court to make Orders on the report were all concerned with cases where "an application was made for an inquiry into the conduct of a solicitor . . . ."

Section 7 (1) of the 1960 Act states that such application must be heard by the Disciplinary Committee. It is not provided anywhere that where the conduct of a solicitor is alleged to constitute a civil or criminal wrong, a breach of contract or of trust, the ordinary legal procedures or remedies are not available to be pursued by a complainant. This is so although "misconduct" which may be subject of a report to the Disciplinary Committee was given a broad meaning (see section 3) and may include for example a felony or misdemeanour.

Lardner J stated that he was led to the conclusion that the disciplinary code and procedure by inquiry before the Disciplinary Committee was instituted to provide a new procedure by which the Law Society might exercise internal discipline in the profession subject to the control of the Court and as an additional provision to the existing civil and criminal jurisdiction and procedures available to complainants. He stated that nowhere does the 1960 Act expressly provide that the inherent jurisdiction of the court to discipline its officers shall terminate or be replaced by the new provision nor did he find any necessary implication that this was so intended. The submission that because the 1954 and the 1960 *Solicitors' Acts* contained no provision that solicitors were to be or shall be officers of the

court, the pre-1920 jurisdiction of the Court in regard to the enforcement of undertakings had no basis and no longer existed was, in his view, unfounded.

The judge stated that sections 1 and 3 (3) of the 1960 Act were required to be construed together with the 1954 Act, referred to as the principal Act. Only Part III of the 1954 Act concerning the Disciplinary Committee was declared unconstitutional. The remainder of the Act enjoys a presumption of constitutionality including section 84 (1) which provided that

> "A reference in any enactment to a solicitor . . . shall be construed as a reference to a solicitor within the meaning of this Act."

One such reference appears in section 78 of the *Judicature (Ireland) Act, 1877* which provides that solicitors to whom the section applies shall be deemed to be officers of the Court of Judicature. This preserves the jurisdiction of the Court over solicitors exercised by courts of law and equity prior to the passing of this Act. Section 78 was unrepealed and was carried over in 1922 and in 1937 was part of the law in force in Ireland. Lardner J held that the jurisdiction of the High Court to discipline solicitors as officers of the court which the plaintiffs had invoked continued to exist. □

LAWTECH '92 – Imaging Technology

Imaging – the central theme of this year's LAWTECH exhibition – is a term that describes the copying of printed material in bulk onto a computer. Imaging is widely used in law offices in the United States to store and cross-reference information such as pleadings and proofs in litigation, and is proving to be a low-cost and reliable means of storing materials such as files and accounts without the usual overhead of warehouse storage.

Exhibitors at LAWTECH '92 will demonstrate a number of imaging products including document storage and litigation support packages.

The growth in the use of computers in solicitors' practices has been matched by an increasing awareness that information technology offers more than just a substitute for the electric typewriter. Imaging is an application of computing from which practices stand to gain much in the future. The Law Society Technology Committee looks forward to your attendance at LAWTECH '92 which will take place on 19 and 20 November at Blackhall Place.

Further information concerning LAWTECH '92 can be obtained from *Veronica Donnelly* at The Law Society, Blackhall Place, Dublin 7. Telephone (01) 710711. □

"Law and Liberty" Trinity 400 Lectures

A series of public lectures entitled "Law and Liberty in Ireland" will be staged this Autumn as part of the Trinity College quatercentenary celebrations. The lecture programme is as follows:

W.R. Duncan, "Divorce, abortion and the debate about liberty", 20 October.
N. Hyland, "What price freedom? – the pregnant woman in the workplace", 27 October.
W.N. Osborough, "Sport, freedom and the criminal law", 3 November.
B. Murray, "The right to silence and corporate crime", 10 November.
A. Whelan, "The liberty of peoples: Ireland, the EC and eastern Europe", 17 November.
W. Binchy, "Liberty, pluralism and the right to life", 24 November.
G. Whyte, "Legal aid: access to our liberties?", 8 December.

The lectures take place every Tuesday up to and including 8 December (1 December excepted), at 7.30 pm, in The Ussher Hall, 2037 Arts & Social Sciences Building, Trinity College, Dublin 2.

Further information can be obtained from *Anthony Whelan,* Trinity College. Telephone 7022296. All are welcome. There is no charge for admission. □

Are You Sitting Comfortably . . .?

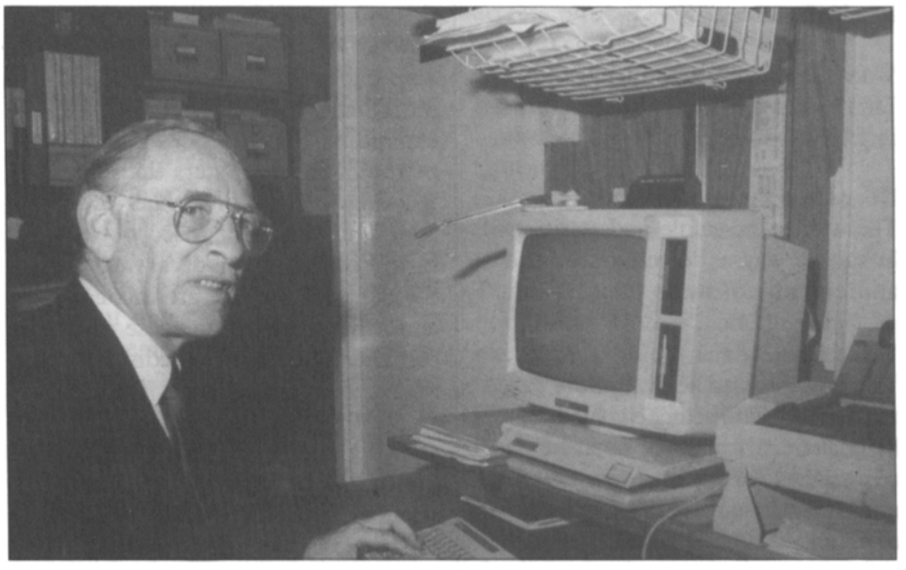
by Henry C. Barry

An EC Health and Safety Framework directive will impose obligations on employers of staff who operate VDUs, to comply with rigorous standards of ergonomics.

Two hundred metres underground in a disused section of a salt mine in Cheshire, England, there is a testing laboratory for ICL's complete product range where exhaustive tests measure the electromagnetic conformance of the equipment to make sure that it will comply not only with EC directive 87/391/EEC ("The Framework Directive") but also with seven satellite directives together wtih approximately 30 drafts on health and safety currently being discussed. The fact that ICL has invested over £1m in the project is indicative of how seriously the company regards not only the directive itself but future directives dealing with emissions from network cabling, printers, modems, and office equipment generally.

By 31 December, 1992 all newly purchased computer equipment must meet the directive's stringent requirements. Existing equipment must be brought up to the directive's requirements by employers within four years after that date.

However, before the reader becomes too complacent, it should be said that even now before national legislation in the UK and in this country has implemented the directives relating to health and safety at work, claims for damages for injuries at work associated with VDU operation are increasing, and nobody can afford to risk being sued. In the UK recently a Midland Bank employee, *Pauline Burnard,* received £45,000 damages in an out-of-court settlement after she was unable to work as a result of



Henry C. Barry

shooting pains in both arms. Twelve British Telecom employees have mounted actions against British Telecom. The National Telecommunications Union is bringing another 83 claims. The General Municipal and Boilermakers Union has approximately 1,000 cases lined up and the Inland Revenue Staff Federation is processing 40 cases while the Civil and Public Service Association has 90 cases in the pipeline.

It is only a matter of time before the first Irish case comes to court.

The incidence of stress, postural and musculo-skeletal problems, eyestrain and headaches among employees is increasing. Under the Framework Directive employers have until the end of this year to analyse the health and safety risks of "workstations".

The Framework Directive refers to an individual's 'workstation' which is defined as "an assembly comprising of display screen equipment, which may be provided with a keyboard or input device and/or software determining the operator/machine interface".

The scope of the Directive is very wide, covering furniture, computers, keyboards, software, environment factors such as lighting, heating, ventilation, noise, humidity, radiation, space planning, display-related work routines and practices, health and safety training, eyesight checks, and the provision of glasses by employers. Incidentially the term workstation includes VDUs (which are now called 'DSEs' (display screen equipment).

Pending the translation of the Framework Directive and satellite directives into national legislation, how is the potential buyer of computers and other office equipment to know what to buy and do to avoid being caught out? The Directive lists minimum requirements for the components of a workstation.

Screens

Characters should be clear, sharp, well-spaced and adequately sized. The image must be stable and not flicker and it must be easy for the user to adjust brightness and contrast. All screens must have a tilt and swivel base and must be free from reflective glare.

Keyboards
These must be tiltable and separate from the screen. There must be enough space in front for the operator to rest hands and arms. They must have a matt, non-reflective surface. Key symbols must be clear and legible.

Work Desk or Work Surface
This has to be large and have a non-reflective surface.

Document Holders
These must be stable and positioned in such a way as to minimise head and eye movements.

Work Chair
This must be stable and allow easy movement. The seat height and the height and tilt of back must be adjustable. A footrest must be available to any employee who wants one.

Work Environment
Enough space must be provided to enable operators to change position and vary movements if they want to. All lighting both artificial and from windows, has to be arranged to minimise glare and to provide sufficient contrast between the screen and background environment. Adjustable blinds must be fitted to windows. Noise from other equipment should not disturb speech or distract attention. Heat and radiation emissions from equipment should be kept to a minimum. Adequate humidity should be maintained.

Operator/computer interface
Software must be suitable for the task, easy to use and flexible to the operator's skill level. No qualitative testing must be carried out without the operator's permission. Systems must give the workers feedback on their performance.

Existing standards
Sweden is the front runner in relation to recommendations concerning electromagnetic emissions. Regulations were drawn up there in 1987 by the Swedish National Board for Measurement and Testing (SAFAD) and were further refined in 1991. Apparently there is a higher concentration of radiation emitted from the back and sides of the screen than there is from the front. One of the entrants in the 1991 Aer Lingus Young Scientist of The Year Exhibition did a study on this. The conclusion is that where a number of computer operators are working in the one office each is more likely to be affected by emissions from the sides and backs of the other computers than by working in front of his/her own computer. Studies carried out chiefly in the US and Canada as well as in Sweden and the UK are inconclusive as to the actual harm these emissions can cause. Even the Swedish regulations (MPR 1 (1987) and MPR 11 (1990)) are recommendatory showing that a doubt still surrounds the findings following extensive scientific research into electromagnetic emissions. Safety specifications set by the Swedish Confederation of Professional Employees (TCO) are even more stringent, requiring that monitors have a special anti-reflective panel that cuts down on electric fields emitted from the front of the monitor. The Germans have introduced their own standard for electrical products focusing on shock, injury, basic ergonomics (as laid down by the German equivalent of the UK BS6204, (ZHI/618)), and have further refined their standards, grading screens by contrast, reflection, flicker, very low magnetic field, electrostatic field, and alternating field. In addition image quality is governed by the international standard ISO 9241 and the main requirements of the Swedish MPR 1 and MPR 11 are also incorporated.

It remains to be seen which standards and specifications Irish legislation will follow. In the meantime, if you are thinking of buying any office equipment whether it be desks, chairs, computers, or whatever, bear in mind the directive and ask your supplier whether the equipment complies with the health and safety guidelines mentioned. Remember that under the Framework Directive employers putting workstations into service for the first time after 31 December, 1992 must comply with the requirements. They must analyse the health and safety risks of workstations in terms of eyesight, physical problems and mental stress. They must do so in consultation with their staff. They must also train their staff to use their workstations safely and in compliance with the directive.

Those employers with existing workstations must conform with the directive before 31 December, 1996. However, bear in mind the provisions of the Health and Safety at Work Act, 1989.

It does not end there. Staff must have regular breaks from the DSE and regular eye tests. If staff have to wear glasses in order to use the DSE, the employer is obliged to pay for them.

Further reading/sources
Directives 89/391/EC, 89/654/EC, 89/655/EC, 89/656/EC, 90/269/EC, 90/270/EC, 90/394/EC, 90/679/EC.

Independent, 30-5-90, P. 12.

Official Journal No. L 156, 21-6-90 P. 14.

VDU Hazards Handbook, by Ursula Huws (1987), published by Hazards Centre Trust Ltd., Headland House, 308, Gray's Inn Road, London WCIX 8DS.

The Ergonomics Society, Devonshire House, Devonshire Square, Loughborough, Leicestershire LE11 3DW England.

Institute for Occupational Ergonomics, Nottingham University, England.

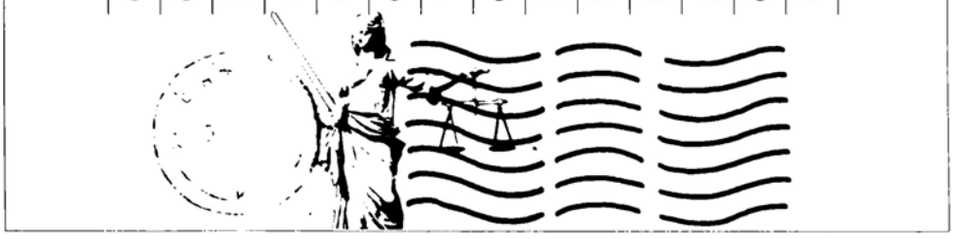
Health and Safety Executive, Baynards House, 1, Chepstow Place, London W2 4TE, England.

Non-Statutory Guidelines Issued by the Department of Labour, Davitt House, Adelaide Road, Dublin 2.

European Commission, Batiment Jean Monnet, Rue Alcide de Gaspari, L.2920, Luxembourg.

European Foundation for the Improvement of Living and Working Conditions, Loughlinstown House, Shankill, Co. Dublin. □

CORRESPONDENCE



Examinership: Too many Difficult Questions

Dear Editor,

Your editorial in the July/August issue highlighted some difficulties encountered under the Companies (Amendment) Act, 1990 ("the Act"). However, in suggesting that court protection is not working due to the security held by lenders, your editorial has misinformed the *Gazette's* readers as to the application of the law under the Act. For instance, you suggest that:

(1) an examiner may not be able to raise capital apart from the secured lender as he would have no security to offer – this in fact is incorrect as borrowings incurred by the examiner during the court protection period rank first in priority ahead of secured creditors (clarified and confirmed by the Supreme Court in *re. Atlantic Magnetics Ltd)*,

(2) court protection cannot operate satisfactorily due to the ability of Irish lenders to appoint a receiver but, under the Act even where a receiver has been appointed such receiver may be required to stand aside in favour of an examiner (as in *re. Atlantic Magnetics Limited)*; contrary to your suggestion, in practice the possibility of an examiner replacing a receiver acts as a deterrent from lenders appointing receivers,

(3) lenders should appoint directors to their corporate customers – this is not taken up by lenders partly no doubt due to the extremely wide reckless trading provisions introduced by the Companies Act, 1990; indeed, this Act may have further adverse implications for lenders who may in certain circumstances be deemed to be shadow directors,

(4) lenders, through their own fault, find out too late when there is a problem – this often arises due to the historical nature of accounts as by the time audited accounts reach the lender they are usually at least three months out of date; more regular management accounts sometimes prove to be unreliable; hopefully financial information will improve following the Report of the Financial Reporting Commission.

Secured lenders have had their priority substantially eroded in the past decade. The priority granted principally to the Revenue Commissioners over floating charge holders under section 285 of the Companies Act, 1963 was extended under the Companies (Amendment) Act, 1982 as well as by further social welfare and VAT legislation. This ever increasing encroachment of the Revenue Commissioners has pushed lenders towards taking fixed security where possible. However, even here priority has been lost. Within six months of the Supreme Court's confirmation that an effective fixed charge could be created over present and future book debts (re. *Keenan Brothers Limited*) the Revenue Commissioners obtained super preferential status which they can trigger at will against lenders with a fixed charge over a customer's book debts (Finance Act, 1986). This draconian legislation has resulted in the principal lenders in Ireland in practice declining to take fixed charges over book debts.

In 1988 additional powers were given to the Revenue Commissioners whereby they can now, by means of an attachment notice, obtain monies deposited with banks (as security or otherwise) where the depositor is in arrears on its tax payments. These attachment powers have been extended by the Finance Act, 1992. Furthermore, the prohibition on banks setting off monies in a customer's account where an examiner has been appointed is a further drawback to lenders.

Trade creditors may often be in a position to protect themselves by retention of title (thereby effectively taking a company's stock out of the charge held by the lender). This leaves secured lenders with little assets on which they may obtain effective security – land on realisation may well fall far short of the balance sheet value as indeed may expensive sophisticated machinery where there may not be a readily obtainable market. Security over shares in private companies is generally of minimal value.

The court protection procedure is yet another erosion in a secured lender's rights in that, apart from having its first fixed security subordinated to the examiner's liabilities, many schemes of arrangement arising from a period of court protection result in a secured lender writing off some debt essentially in favour of the Revenue Commissioners and unsecured creditors. In this regard the US Chapter 11 System to which you referred is more favourable to secured lenders than the Act. In view of the diminishing assets that are available to lenders as effective security, it is little wonder that lenders appear to be reluctant to make funds readily available – lenders too must protect the interests of their depositors, shareholders and employees.

The principle of court protection is a good one to be used in appropriate circumstances but the legislation does need improvement. To suggest, however, as your editorial does, that the fault lies with the secured lenders

Obituaries

Leo Ryan and Declan Murphy, R.I.P.

Leo Ryan – R.I.P.

The tragic death of Leo Ryan on August 4, 1992 at age 25 cut short a legal career poised for distinction. "Leo was a talented lawyer", "idealistic and principled", "engaging with a fine sense of humour" were only a few of the encomiums of him expressed when his accidental death on Lough Derg shocked the profession.

Leo took his law degree at University College Cork where he enjoyed considerable success and where he quickly became popular with students and staff at the law faculty. He signed his Indentures of Apprenticeship with James Reilly & Son, Clonmel, but prior to beginning his vocational training, he travelled extensively throughout Europe and on his return he assumed his elected position of Vice President of the Students Union at UCC. He was well respected in this post and went to great lengths to ensure that underprivileged students especially got his best attention.

As a lawyer in practice, Leo showed that he had a penetrating intelligence and a quick mind. He was attentive to evidence and governed by reason. His advice to clients and colleagues was both profound and wise. His conversations were often a combination of the rational and the dramatic but also reflected a rich background of culture and learning. His passionate side interest was creative writing, gusty and elegant, which demonstrated his excellent command of English and French and which he intended to develop further.

Leo was basically liberal, but unscathed by radicalism or frenzy. He thought things out free from the compulsion to conform. His colleagues were always fetched by his candour and were endlessly entertained by his opinions which were refreshing, yet serious, prodding and tickling, perhaps even controversial at times, always seeking to re-evaluate the favourite nostrums of the hour. His dignity was genuine, his idealism reasonable. He loved his family and had a strong sense of duty, of loyalty, of honesty and of courage. He was warm hearted and generous.

If one word could describe some of the images which remain of Leo – the gladiatorial flair, the concern wtih fairness and justice, the honesty, the friendship and the incredible courage, it might be gallant. Gallantry would even apply to his irrepressible wit, for with his exceptional command of French, he would be the first to report that the word gallant comes from the old French verb that means to "make merry".

While the sense of his loss is unrelenting, it is the price to be paid for the example Leo set for us, for what he taught us about life and for the sheer joy of having had him among us. Ar dheis Dé go raibh a anam dílis.

TN

Declan Murphy R.I.P.

The untimely death of Declan Murphy on 4 August, 1992 sent shock waves through the communities of Roscrea and Templemore. His large funeral was a testament and fitting final salute to a popular young man who met with a tragic death as a result of a boating accident.

He had a distinguished life. Educated at CBC Monkstown and CBS Roscrea he developed a love for sport, helping the local RFC Club win their first accolades on the field. Declan went on to study Law at UCC where he graduated with a BCL Degree. While in college he developed what was to be a fearless pursuit in the ideal of justice and stood as a candidate in the 1982 General Election for the constituency of Cork North Central.

Declan's versatility took him on to other fields and while travelling in Germany, Australia and the USA he developed his other passion and became an instructor in the Boston Harbour Sailing Club.

However, he was never deflected from his ultimate ideal in the pursuit of a career in law and returned to Ireland becoming an apprentice in the firm of Nash, McDermott & Co. of Templemore.

Declan was to show that he was not a dry academic or a book in breeches. He had a subtle sense of humour and wit. He charmed with an endless fund of anecdotes garnered from his experiences.

He will be sadly missed by his family and friends.

PD

□

Correspondence

(Continued from page 321)

is, I believe, mis-informed and any further diminution in the rights of such lenders is likely to lead to a further withdrawal of funds from industry with a consequential rise in unemployment.

Yours etc,

William Johnston,
Solicitor,
41-45 St.Stephen's Green,
Dublin 2. □

Obituary

The Hon Mr Justice Niall McCarthy R.I.P.

The late Hon. Mr. Justice Niall McCarthy. (Photo courtesy of The Irish Times)

Tributes were paid to the late Mr. Justice Niall McCarthy and his wife Barbara in the Supreme Court at the opening of the new term on 5 October last. The Chief Justice Mr. T.A. Finlay spoke as did the Attorney General H. Whelehan SC. Adrian Bourke, President of the Law Society; and Peter Shanley SC, Chairman of the Bar Council, also paid tribute.

In his tribute the Chief Justice said: "Niall St. John McCarthy was called to the Bar in Trinity Term 1946 having graduated with distinction in Classics from University College Dublin and having also achieved distinction in the Final Examination for the Degree of Barrister-at-Law at the King's Inns.

He quickly achieved a wide and varied practice as a Junior and was admitted to the Inner Bar in Michaelmas Term 1959.

From that time until he was appointed to the Supreme Court in 1982 he was a leader of the Bar enjoying a practice which was breathtaking in its size and in its remarkable diversity. His outstanding ability as an examiner and cross-examiner of witnesses led to a situation in which, if available, he appeared in nearly every notable witness action.

His knowledge of law allied to his special skill in the presentation of legal arguments ensured his participation as an advocate in a very high proportion indeed of the cases during that twenty-three years in which fundamental questions of Irish law, constitutional and otherwise, were decided.

The esteem in which he was held by his colleagues at the Bar inevitably led to his being urged to accept election as Chairman of the Bar Council. His sense of duty just as inevitably led to his making the very real sacrifices involved in accepting and he stamped that office with the force of his unique drive and talents. Very few people have come to the Bench in recent times in Ireland, or I would suspect elsewhere, with better credentials. Contrary to the consequence often resulting when great advocates are appointed to the Bench, Niall McCarthy in no way belied the promise involved in those credentials.

In my view, his career as a Judge of the Supreme Court, cruelly shortened even though it has been by this tragedy, will in retrospect be seen as his greatest contribution to the development of the law and indeed to the welfare of society in Ireland.

His judgments which represent the landmarks and monuments of his judicial career are clear, articulate and in many instances passionate in their sincerity. A penchant for the graphic and startling phrase not only relieves the potential boredom of reading judicial decisions, but tellingly drives home the point of view conveyed.

Through a very high proportion of these rightly acclaimed judgments there runs a golden thread which is fundamental and consistent. It is a deep and ruthless concern for the underprivileged, the oppressed and those threatened with abuse of power from any source, whether public or private.

As a colleague in a collegiate Court, Niall McCarthy was superb. He had a quick, inquisitive and well filled mind and he applied it with great energy and enthusiasm to the judicial task.

His convictions he held strongly and supported them with strenuous argument. He engaged in real dialogue both with counsel in court and with his colleagues in conference.

He had the capacity to convert or to be converted by rational discussion.

His energey was boundless and found outlets in many different spheres. Must of it was directed towards public charities such as the Association for the Deaf in which he and Barbara were very actively engaged. Much more, even, I suspect, was spent in acts of individual kindness and help to those in distress for any reason, which are known only to those who received them.

Particularly he had a love of travel and an interest in conferences and meetings concerning the judiciary, the law and human rights. On these occasions he constituted a magnificent ambassador for the Irish legal system and indeed for Ireland." □

Land Registry – issue of New Land Certificate

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.
19 October, 1992

Lost Land Certificates

Thomas Collins, Folio (1) 10902, (2) 6848; Land: (1) Glen, (2) (i) Glen, (ii) Glen; Area: (1) 10a 20 p, (2) (i) 7a 3r 7p, (ii) 3a 3r 15p. **Co. Limerick.**

Thomas and **Bridget Haran,** Folio: 3275L; Land: No. 7 Bleach, Athy, **Co. Kildare.**

Jeremiah S. Mahony, deceased, Folio: 43576; Land: Forenaght, **Co. Cork.**

Donal Muir and **Maureen Muir,** Folio: 24385; Land: Part of the land of Cloneymeath, **Co. Meath.**

Hugh Smyth, Folio: 14089; Land: Ardrums Little; Area: 3.1009 acres. **Co. Meath.**

John O'Shea, Folio: (1) 18922 and (2) 24069; Land: (1) Commaun, (2) Curraheen; Area: 13.151 acres, (2) 1r 25p. **Co. Kerry.**

James & Kathleen Dolan, Rye Hill, Ballyglunin, Tuam, Co. Galway. Folio: 16079F; Land: Glennagloghaun North; Area: .456 acres. **Co. Galway.**

Thomas Arthur Henry, Folio: (1) 1331, (2) 1871; Land: Part of lands of Calhame; Area: (1) 14a 3r 4p, (2) 32a 13p. **Co. Donegal.**

Shannon Transport and Warehousing Co. Ltd. Folio: 11233F. **Co. Limerick.**

James Gordan, Folio: 14787; Land: Ballysilla; Area: 19.090 acres. **Co. Wexford.**

Patrick Barrett, Loughwell, Moycullen, Co. Galway. Folio: 996; Land: Loughil; Area: 8a 2r 28p, 85a 2r 9p, 143a 0r 34p, 4a 0r 0p. **Co. Galway.**

William Fitzgerald, Folio: 8009; Land: Reanadampaun Commons; Area: 64a 0r 29p. **Co. Waterford.**

James and **Anne Byrne,** Folio: 16582; Land: Brockagh (part); Area: 3a 1r 20p. **Co. Tipperary.**

Margaret Hickey, Knockbrack, Clonbara, Co. Clare. Folio: 2471; Land: Knockbrack Upper; Area: 27a 1r 15p. **Co. Clare.**

Michael Payne, Folio: 20568; Land: Part of the land of Isaacstown. **Co. Meath.**

Holiday Cottages Limited, Folio: 29917F; Land: Skull, **Co. Cork.**

Bridget Doherty, Lisdeen, Kilkee, Co. Clare. Folio: 21R; Land: Lisdeen; Area: 5a 0r 8p. **Co. Clare.**

Albert L. Purcell, Folio: 6936; Land: Part of the lands of Killadangan. **Co. Tipperary.**

Dan Ryan Ltd. Folio: 4698F; Land: Ballinacurra (Western); Area: 1a 0r 3p. **Co. Limerick.**

William Dwyer, Folio: 4083; Land: Rooska West. **Co. Cork.**

Michael Murray, Folio: 19929; Land: Part of the land of Dardistown. **Co. Meath.**

Walter Brennan, Cloonacool, Co. Sligo. Folio: 12028; Land: Leitrim North; Area: 31a 0r 7p, 12a 1r 14p. **Co. Sligo.**

Sean and **Antoinette Moyles,** Folio: 7022F; Land: Part of the townland of Mayne. **Co. Meath.**

Julia Costello, Furbo, Barna, Galway. Folio: 32822; Land: Ballynahown; Area: 0a 1r 5p. **Co. Galway.**

Peter Lynch, Folio: 420 and 2697; Land: Part of lands of Leitrim Lower (420) and part of the lands of Moynalty (2697); Area: 3a 2r 1p (420), 45a 0r 25p (2697). **Co. Meath.**

Claire Elizabeth Aphra Mills, Folio: 55840; Land: Ballinluska. **Co. Cork.**

Michael Power, Main Street, Oughterard, Galway. Folio: 50810; land: Lemonfield; Area: 0a 3r 33p, 12a 2r 15p. **Co. Galway.**

Creditanstalt-Bankverein, Folio: 25404F; Land: Ballyandrew (part); Area: 96.855 acres. **Co. Cork.**

Denis Hall, Folio: (1) 2500, (2) 2506; Land: Part of the lands of Kilvemnon; Area: (1) 31a 2r 14p, (2) 20a 1r. **Co. Tipperary.**

Bernard Keelan, Folio: 4577; Land: Greaghlatacapple; Area: 7a 0r 20p. **Co. Monaghan.**

Michael Holland, 15 Sertkelly, Kilchreest, Loughrea, Galway. Folio: 887F; Land: Part of the townland of Isertkelly North situate in the Barony of Loughrea, shown as Plan 18 on the Registry Map (O.S. 104/15 and 114/3). **Co. Galway.**

Thomas M. Mullally and **Helen Mullally,** Folio: 1611F; Land: Ballymabin; Area: 0a 1r 25p. **Co. Waterford.**

Brendan Boland, Folio: 2302L; Land: North of Long Avenue in the Parish of Dundalk; Area: 0a 0r 8p. **Co. Louth.**

Mary McArdle, Folio: 10319; Land: Tattygare (parts); Area: 7a 3r 8p. **Co. Monaghan.**

Emily Ryan, Marie Louise Baptistine Bec, Mary Josephine Herlihy and **Josephine Enright,** Folio: 13388 and 13389; Land: (1) Puttaghan and (2) Puttaghan; Area: (1) 0a 0r 26p, (2) 0a 0r 26p. **Co. Kings.**

Noreen Kiernan, Folio: 648; land: Drumlish (part); Area: 4a 2r 9p. **Co. Longford.**

Cyril Callaghan, Folio: 40590; Land: (1) Tully More and (2) Keeloges. **Co. Donegal.**

Georgina Williams, Folio: 495; Land: Skreen, **Co. Sligo.**

James Hoey, Folio: 6099; Land: (1) Rathescar Middle, (2) Philipstown (E.D. Dunleer); Area: (1) 3a 1r 16p, (2) 8a 1r 32p. **Co. Louth.**

Patrick J. Kelly, Folio: 5816; Land: Part of Ballyhimmin in Electoral Division of Castlecomer; Area: 7a 2r 20p. **Co. Kilkenny.**

Robert Bermingham, Folio: 1512; Land: Part of the land of Clongall; Area: 4a 0r 36p. **Co. Meath.**

Lost Wills

O'Driscoll, Patrick, deceased, late of 33 Blessington Street, Dublin 7 and previously of 16 Blessington Street, Dublin 7. Would any person having knowledge of the whereabouts of a will of the above named deceased who died on 27 July, 1992, contact O'Donovan, Murphy & Co., Solicitors, Wolfe Tone Square, Bantry, Co. Cork. Telephone: (027) 50808.

O'Brien, Denis (otherwise Joseph Denis) deceased, late of 2 Lisheen Terrace, Thurles, Co. Tipperary. Would any party having knowledge of the whereabouts of any will of the above named deceased who died on 23 August, 1992, please contact Walter A. Smithwick & Son, Solicitors, 43 Parliament Street, Kilkenny. Tel: 056-21936.

Flynn, Thomas Patrick, late of Shannon Lodge (formerly of Main Street) Carrick-on-Shannon, Co. Leitrim. Would any person having knowledge of the existence or whereabouts of the will of the above named deceased who died on 3 August, 1992, please contact Arthur Cox, Solicitors, 41/45 St. Stephen's Green, Dublin 2. (Ref: WW) Telephone (01) 764661.

Gannon, Ellen, late of 4 Loreto Row, Rathfarnham in the County of Dublin. Would anyone knowing of the whereabouts of a will of the above named deceased, who died on 9 September, 1991, please contact Patrick Duffy & Co., Solicitors, 99 South Circular Road, Telephone: 538431.

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Miscellaneous

Lost Title Deeds Would anyone having any knowledge of the whereabouts of original title deeds of property at The Ridings, Riverside, Crosstown, Wexford belonging to Julius W. Segal, please contact M/s Doyle Lowney & Co., Solicitors, Anne Street, Wexford.

Lease Will any person having any knowledge of the original or counterpart lease dated 18 April, 1947 over the premises known as 48 Dollymount Park, Clontarf, Dublin 3 and made between Clontarf Estates Limited of the one part and William T. Maguire of the other part for a term of two hundred and forty five years from 29 September, 1946 at the yearly rent of £39.00 please contact: John O'Connor, Solicitor, 168 Pembroke Road, Ballsbridge, Dublin 4. Telephone: 684366.

Northern Ireland Agents: For all contentious and non contentious matters. Consultation in Dublin, if required. Contact Norville Connolly D&E Fisher, Solicitors, 8 Trevor Hill, Newry, Telephone: (080693) 61616; Fax: 67712.

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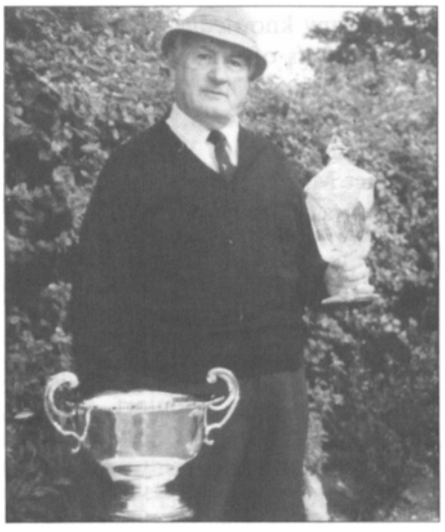
Solicitors Golfing Society



Andrew Curneen

Andrew Curneen was the winner of the President's Prize and the Law Society Challenge Cup at the competition held by the Solicitors Golfing Society on 3 July at Enniscrone Golf Club. This the third time Andrew Curneen has won the competition, the first time being thirty years ago in 1962 and the second time in 1968.

The major prizewinners at the competition were as follows:-

President's Prize and Law Society Challenge Cup
Andrew Curneen (16) 44 points

Runner-Up and Winner of the St. Patrick's Plate
Bill Jolley (13) 43 points

Third and Winner of Category Handicap 12 and under
Pat Barriscale (11) 41 points

First Nine
William Kennedy 19 points

Second Nine
Paul Malon

Owen O'Brien was elected Captain for the 1993 season at the Golfing Society's Annual General Meeting. William Jolley was elected as Honorary Secretary replacing Richard Bennett who resigned, and Frank Ward was elected Treasurer replacing William Jolley. □

Seminar on Consumer Law

William Fagan, Director of Consumer Affairs; *Peter Prendergast*, Director, Consumer Policy Service of the European Commission, and *Geraldine Clarke,* solicitor and member of the Law Society Council, will be the speakers at a Seminar on Consumer Law, being staged by the Public Relations Committee of the Society on the morning of Saturday, 14 November next.

The half-day seminar which will run from 9.30am to 1.00pm will examine the influence of the EC on the development of consumer law, the legislative framework in Ireland, and dealing with the Irish consumer.

The Seminar is aimed at people in the business community who have responsibility for dealing with quality control and customer service, the media, and of course, any member of the profession who would like to attend.

There is no charge for attending the seminar. However, members of the profession are requested to kindly book a place on the seminar by contacting: *Barbara Cahalane,* Public Relations Executive, at the Law Society. □

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Miscellaneous Ads

(Continued from page 325)

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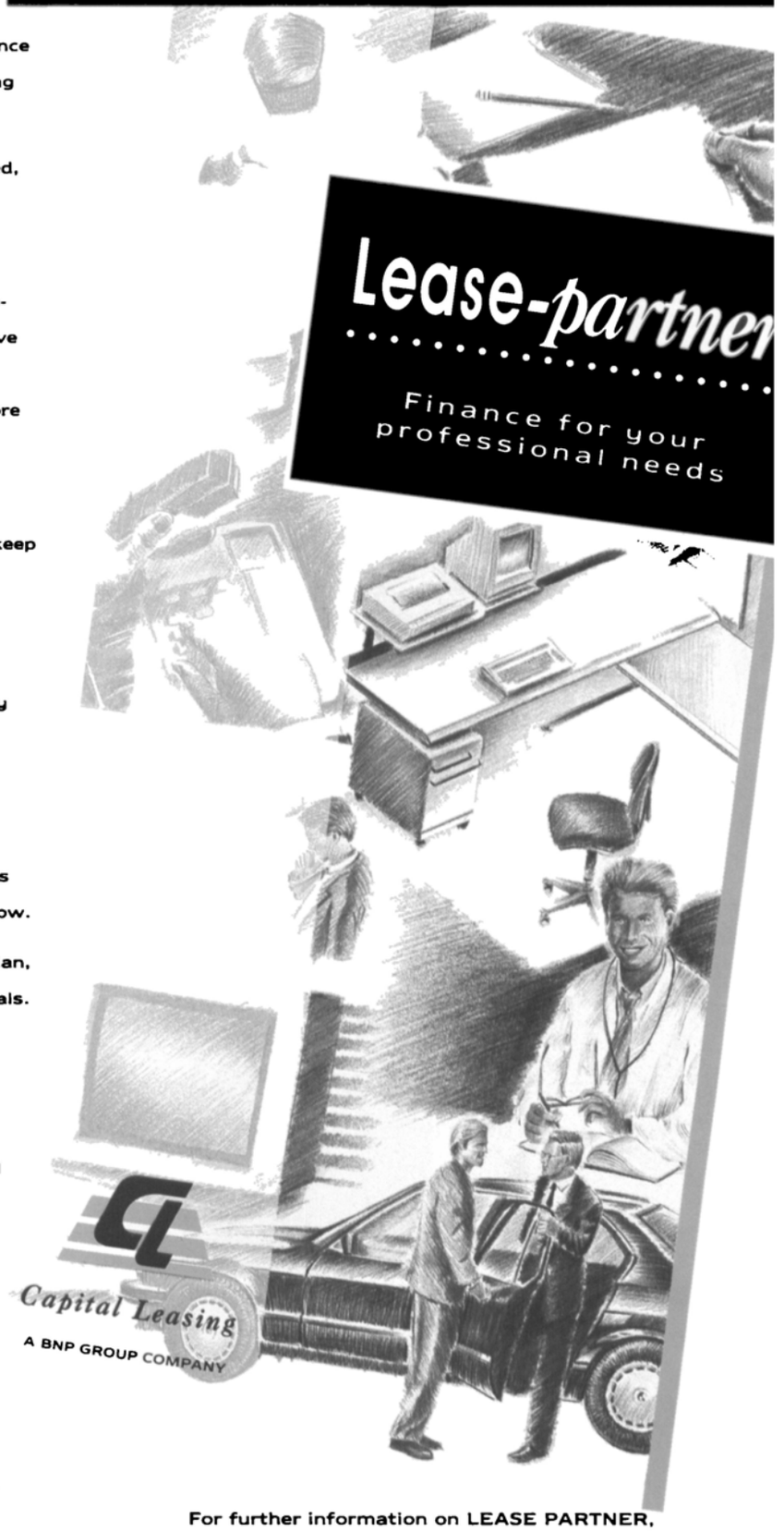

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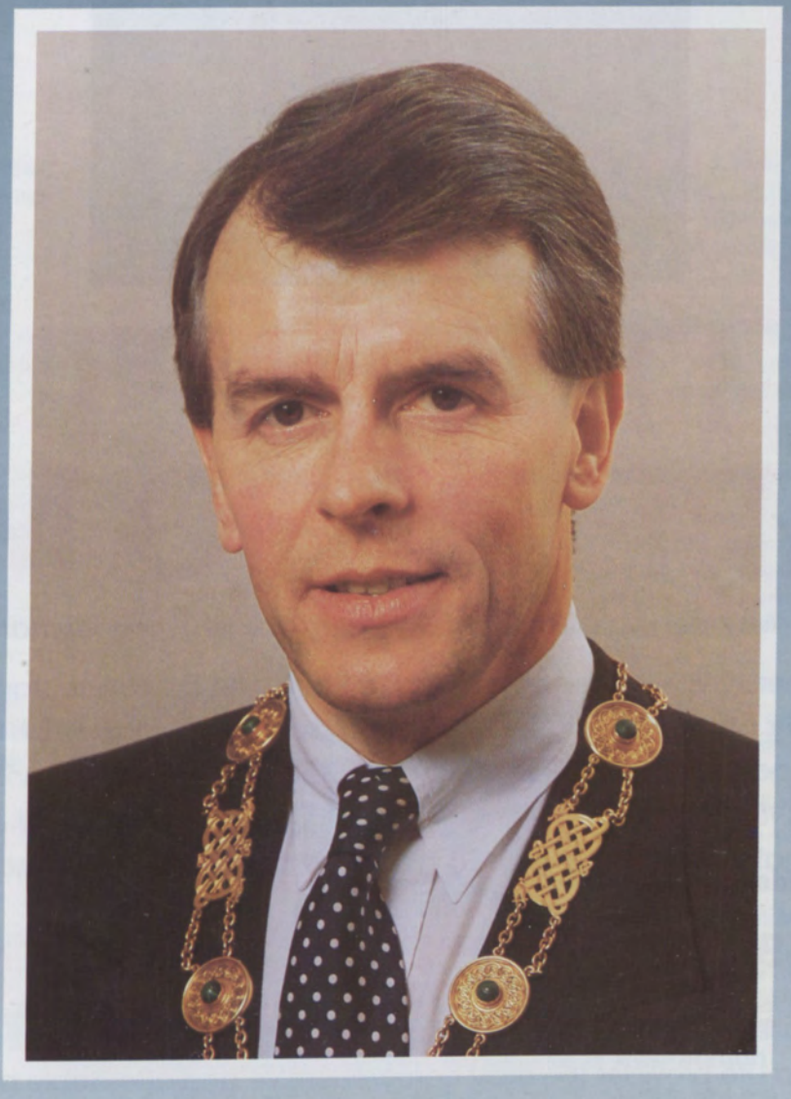
Past performance may not be a guide to future returns which are dependent on future investment conditions. Unit values can go down as well as up

VOL. 86 NO. 9 NOVEMBER 1992

INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE



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* Michael Byrne is used as a fictitious name to protect the identity of our client.

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GAZETTE

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Front Cover: *Raymond T. Monahan* who has been elected by the Council of the Law Society as President of the Society for 1992/1993.

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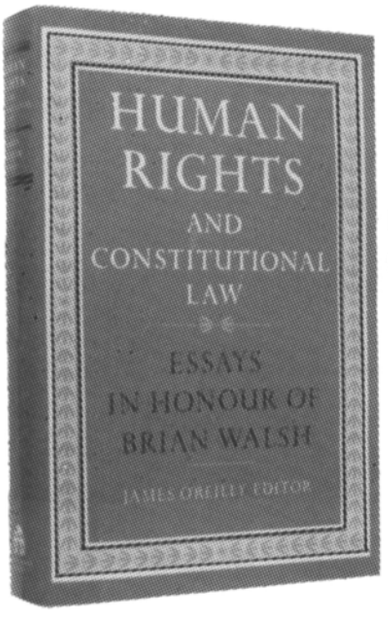
Several of the contributors examine European Community law - including the potential for stress with State law, the protection of human rights in the Member States, and the free movement of persons within the community.



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Medical Negligence Costs – A Reply

Recently views were expressed by members of the Irish Hospital Consultants Association that solicitors were partly to blame for the high level of malpractice claims brought against doctors which, the consultants said, had increased substantially the cost of professional indemnity insurance for consultant doctors. This was, they said, pushing up the cost of treatment. According to press reports, the consultants also said that compensation awards for personal injuries were too high and that the hearing of claims against doctors should be taken from the courts and given to a Medical Review Panel which would include doctors. We would take issue most vigorously with the consultants on these matters.

The consultants are reported to have expressed the view that, for reasons of greed, solicitors were encouraging patients to claim compensation against doctors. There is no substance to such a claim which is offensive and quite unacceptable to the legal profession. The truth is that solicitors are invariably cautious about taking claims for negligence against doctors mainly because of the immense difficulties involved in sustaining such claims. This is due largely to the difficulty of getting other doctors to give evidence against their colleagues and the very high cost of obtaining opinions and reports from the medical profession.

"No Foal No Fee" aids those on low incomes

The practice engaged in by some solicitors of offering their services on a "no foal no fee" basis, which has been criticised by the consultants, has developed in response to the needs of litigants because of the very high outlay involved in taking proceedings and because of the inadequacies of the existing civil legal aid system in this country. Many ordinary people, whose incomes are very low and who cannot afford to pay for legal services, are denied legal aid under the existing scheme because of the low eligibility limits. The Law Society has urged frequently that this should be changed and that these limits should be increased substantially. Solicitors who offer to provide legal services on a "no foal no fee" basis are, in effect, carrying the cost of all the outgoings that are involved in initiating legal proceedings. **Many of these outgoings are in fact paid to doctors in personal injury cases.** Medical reports and attendance by doctors as witnesses are very costly and usually must be paid in advance.

Damages not too high

We disagree that the level of damages for personal injuries is too high. Damages are awarded by judges in the courts having regard to all the evidence, particularly the medical evidence on the injuries sustained, the pain and suffering endured by the injured person and the prognosis as to recovery in the future. In the past, when decisions on the level of damages were taken by juries, it was frequently alleged by insurance companies and other interested parties, that juries were making excessive awards and that, if decisions on damages were reserved to judges, all would be well. Since the abolition of juries, these decisions are now made solely by **judges** yet the contention that awards are excessive continues to be made.

No case has been made by any independent or objective body that the level of damages in this country is too high. The public are entitled to be fairly and reasonably compensated for personal injuries suffered through no fault of their own. The public would be much better served if greater attention were paid to safety considerations, especially by those responsible for the condition of our roads and by employers in the workplace. This would greatly help to reduce the level of accidents and thereby eliminate many of the personal injury claims that are now brought. In the medical field, the fact that negligence actions against doctors in public hospitals are reported to be two to three times that taken against doctors in private practice has nothing to do with solicitors and raises an issue that needs to be addressed by the medical profession itself.

Doctors judges in their own cause

We strongly disagree with the consultants' view that the handling of personal injury cases, where doctors are alleged to have been negligent, should be taken from the courts and given instead to a Medical Review Panel, two-thirds of the members of which would be doctors. If this were to happen, doctors would, very largely, be sitting as judges in their own cause. It is not, in our view, a sufficient answer to say that the plaintiff should have a right of appeal to the courts. Matters of this kind should be determined in the first instance in an independent forum. A panel of this kind would simply add another layer to the process of deciding these cases, thus adding substantially to the cost. □

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PRESIDENT'S MESSAGE

The Challenges Ahead

May I firstly express my gratitude to the Council for the honour of electing me as President of the Society for the coming year. The office of President is a tremendous challenge having regard to the responsibility involved and the peak of involvement and activity to which recent Presidents have brought the office.

No President could function without the whole-hearted support of the administration in Blackhall Place. During this year the administration has been strengthened by the appointment of new personnel in various departments with a view to improving the level of service to members. In addition, the support of ordinary members of the profession is crucial to the effective operation of the Society whether through involvement in Council, its Committees or in the Law School. At the moment over 600 Solicitors give generously of their time and talent in assisting the Society. My heartfelt thanks goes to these members with an assurance that their valuable contribution is much appreciated.

Under the Presidency of *Adrian Bourke* unity between the Society and the profession was greatly developed as reference to the two Extraordinary General Meetings on the Solicitors (Amendment) Bill, 1991 and Finance Act, 1992 and also the campaign on criminal legal aid fees will vouch. It is my hope that during the coming year the Council and Committees will continue to reflect adequately the views of the profession and can again count on the support of its members.

Major Issues

The Society will seek the re-introduction of the Solicitor's

Ray Monahan, newly-elected President of the Law Society

(Amendment) Bill by a new government and will seek the deletion of the objectionable parts of the Bill, particularly the proposed inroads into the traditional areas of Solicitors' work.

Claims against the Compensation Fund continue to cause major concern and publicity. Annually, a small number of defaulting solicitors effectively hold the entire profession to ransom. In addition to the Society's present campaign to ensure a statutory cap on the level of any one claim, an urgent and fundamental review of the Fund and its operation is now required. I intend that this will be undertaken immediately.

The Society's campaign to ensure the appointment of Solicitors as Judges in the higher courts has met with considerable sympathy. I intend to continue this campaign and I hope that the Government will introduce appropriate legislation at the earliest opportunity.

There are also a number of issues which I would like to address during my period of office.

Review of Education Policy

As a former chairman of the Education Committee I have a deep interest in education policy. I note and will be supporting the Education Committee in its review of present policy to meet concerns about both numbers and standards. The Society's new policy will be developed side by side with the work and ideas of the Joint Council on Legal Education recently established to review legal education generally under the chairmanship of Judge *Ronan Keane.*

Resourcing the Justice System

Members of the profession at local level are now expressing deep dissatisfaction with many present aspects of the legal system, principally the serious delays in the Circuit and High Courts, poor courthouse accommodation generally and inadequate facilities for the hearing of family law cases, the lack of understanding by members of the judiciary of their role in family law cases, inadequate back-up staff in the courts particularly in the Circuit Court and inadequate facilities for solicitors and barristers. There would seem to be a clear case of wholesale neglect in so far as the administration of justice in this country is concerned. There are also problems experienced by the profession arising out of the failure of the Government to legislate to reform many aspects of the criminal and civil law and that legislation itself is inadequately prepared and promulgated.

I am conscious that a start has been made in creating the Land Registry and Registry of Deeds into a Semi-State body and in the improved terms for solicitors involved in criminal legal aid work. I hope that with prompting from the Society the Government's

attention can now be focused on these other inadequacies in the legal system.

Solicitors must earn a reasonable living

Finally, I am concerned at a statistic recently furnished that 1/3 of the profession now feels financially threatened. There is need for a strong, independent and vibrant solicitors' profession and it is essential therefore that members of the profession should be able to earn a reasonable standard of living. To assist in this regard I intend to take steps.

- to improve the flow of practical information from the Society both through the *Gazette* and otherwise, to increase the number and venues of CLE courses and bring on stream a new Practice Management Service.

- to establish a Committee on Solicitors Remuneration and Costs which will initiate a study of Solicitors fees and costs generally and prepare a detailed set of recommendations on fees,

- to have the Professional Purposes Committee prepare and publish detailed Practice Rules and Guidelines and have the Public Relations Committee examine proposals for institutional advertising to promote the message of a competent and disciplined profession.

As I look forward to an interesting and no doubt hectic year, I hope that, with the full support of Council, committees and members, I can achieve these and other necessary objectives for the benefit of the profession. □

The New President's Background

Raymond T. Monahan is from Sligo. He was educated at Blackrock College and at UCD where he graduated wtih a BCL and LLB degrees. He qualified as a solicitor in 1971 and having worked in Dublin for a number of years returned to Sligo to take over the family firm. He is now a partner in the amalgamated practice of Horan, Monahan & Co., Solicitors, O'Connell Street, Sligo.

A member of the Law Society Council since 1975, Ray Monahan has been a member of all the statutory committees and has been Chairman of the EC and International Affairs and the Education Committees. He was also for many years the Society's representative at the Commission Consultative des Barreaux Europeenne (CCBE). He served as Junior Vice-President in 1987/88 and as Senior Vice-President in 1991/1992.

He is also a past President of Sligo Chamber of Commerce, past Chairman of The North West Airport Company Limited, a past Executive Member of the Council of the Chambers of Commerce of Ireland and until now has been the Secretary of the North West Sub Regional Review Committee on Structural Funds. He is interested in sailing, windsurfing and water sking and keeps fit by running and cycling whenever possible.

He is married to Eileen (nee Doyle), a solicitor, and they have seven children.

Raymond Monahan has been elected President of the Society from November 1992 to November 1993.

Michael V. O'Mahony, McCann FitzGerald, has been elected as Senior Vice-President and *Laurence Shields,* LK Shields & Partners, has been elected Junior Vice-President. □

Environmental Law Association formed

The heightened public awareness of the environment is reflected in the increasing number of legal practitioners who find themselves dealing with environmental issues for clients.

A number of legal practitioners wish to establish an Irish Environmental Law Association membership of which will be open to members of the solicitors' profession and the Bar interested in environmental law. The primary purposes of the Association will include contributing to an increased knowledge of environmental law among its members and influencing prospective national and EC legislation in the area.

An ad hoc committee consisting of *Dr. Yvonne Scannell* of the Law School, Trinity College, Dublin, *Gerry Bohan* of Arthur Cox, Solicitors and *Donal O'Leary,* BL has been formed with a view to establishing the Irish Environmental Law Association. The first meeting of the Association will be held at **Room 39E, Law School, Trinity College, Dublin on Tuesday, 8 December, 1992 at 7.00p.m.** The purpose of the meeting will be to elect an organising committee from those present with a view to formal establishment of the Association early in 1993. All interested are invited to attend and any questions or suggestions can be directed in the first instance to *Dr. Yvonne Scannell* (Tel. 01 - 7021773). □

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Society at Issue with Government

Addressing a parchment ceremony on 16 October, the then President of the Law Society, Adrian Bourke, said the Law Society found itself at issue with the Government on a number of important issues.

"I must record with regret that the Society finds itself at issue with Government, on a number of fronts. You may be aware that the Society has decided not to cooperate in the implementation of Part VII of the Finance Act, 1992 which would, amongst other matters, require solicitors to report certain transactions exceeding £500 to the Revenue, and which would, in the opinion of the Society, seriously breach the confidential relationship between solicitor and client, and undermine the independence of the profession. Some of these provisions can be enforced with draconian powers which could allow for seizure of files, and arrest without warrant."

Adrian Bourke continued:
"The Society has made some very serious points to the Government in relation to the Solicitors Bill, and in particular in relation to a provision which would permit a cap on the level of any one claim made to the Compensation Fund, which makes compensation available where money has been misappropriated by solicitors. The reason for the cap being that the Fund will not survive if it is to pay out huge monies to individuals and, in particular, to financial institutions, and there will be a grave loss to the disadvantaged small client who was intended to benefit from the existence of the Compensation Fund in the first place.

"The Society has made respresentations to the Government in relation to the eligibility of solicitors to be appointed judges of the superior courts. The Society's submission has received wide acclaim, and is in accordance with the broad recommendations of the Fair Trade Commission Report.

"In recent pronouncements, *Willie O'Dea,* Minister of State at the Department of Justice, made a swingeing attack on the Law Society for failing to make a submission on representations relating to the Criminal Evidence Act which has passed through the Oireachtas. His remarks were inaccurate and unfounded. I have written to him demanding a retraction. Following Mr. O'Dea's remarks a press release was issued setting out that the Law Society had made substantial submissions and recommendations, well within time for them to have been dealt with by the Department and for the passage of the Bill through the Dail and the Seanad. The suggestion that we did not participate in making a submission is offensive to each member of this profession, to the Council itself, and to me as President. For my part, I will not tolerate that type of inaccurate, aggressive brinkmanship.

"It is, of course, inevitable, having regard to the very different roles that a profession such as ours, on the one hand, and the Government, on the other, have to play in society that there would, from time to time, be friction and that we would have our differences. It is important, however, that the Law Society should, on the whole, have a good working relationship with the Government and that, if we fall out or disagree on one particular issue, this should not be carried over into other areas or affect the general relationship that we have with the Government. If that were to happen it would, to my mind, be a sad day indeed. The stand we have taken on issues, in particular the Finance Act, is right in principle and our position must not and will not be compromised. There are other matters of concern to us at present where we are seeking the help and support and indeed, the co-operation of the government. I would hope very much that these matters will be looked upon, considered, evaluated and determined on their own individual merits," stated Adrian Bourke. □

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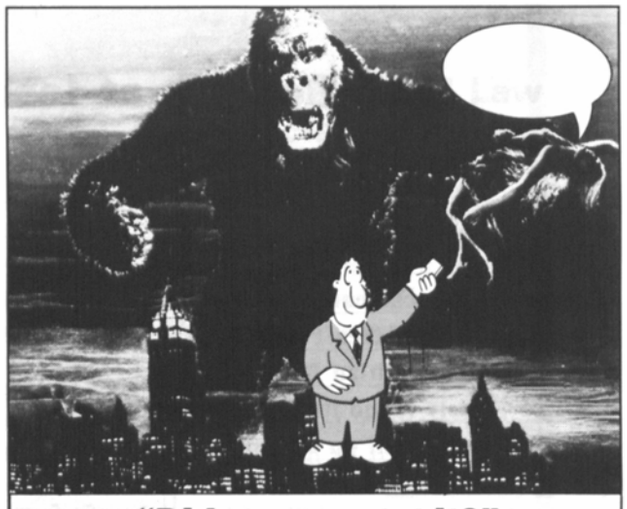

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Civil Legal Aid Charter Published

A newly formed group, the Alliance for Civil Legal Aid, has published a Charter for Civil Legal Aid which it has delivered to the Minister for Justice, *Padraig Flynn*, with a request for an immediate meeting to discuss its implementation. The Alliance for Civil Legal Aid comprises various non governmental groups who have been campaigning for the development of a comprehensive scheme of civil legal aid and advice.

The Alliance says that successive Governments have ignored the crisis in legal aid. The publication of the Charter for Civil Legal Aid is the first step by the Alliance in a campaign to achieve a comprehensive scheme of legal aid.

The Charter states that access to the law is vital in a society committed to justice and equality. It says that:

"The structure of our own society prevents many people from using the law in order to protect their rights. In the interests of justice, all obstacles to access to the law must be removed. A commitment to equality demands that every person be held equal before the law, thus effective access to legal services must be guaranteed."

The Charter goes on to enunciate the following principles:

- Every person is entitled to effective access to the law.
- In particular, the State shall ensure through the provision of public legal services that no person shall be denied access to the law by reason of their poverty, sex, geographical location, disability or ethnic origin.
- The right to public legal services shall be established by legislation.
- Such public legal services shall include legal aid, advice, information and education, shall be provided in a manner best suited to the needs of the individual and the needs of the local community; shall respect the dignity and privacy of the individual; shall be properly funded and properly advertised.
- All legislation establishing social rights shall ensure effective access to public legal services to vindicate these rights."

The Council of the Law Society will consider endorsement of the terms of the Charter at its November meeting.

□

Separation Agreements - The Financial Implications

Solicitors Financial Services

It is a well documented fact that the number of marriage separations in Ireland is on the increase.

When dealing with a marriage separation agreement one of the areas which should be borne in mind is that of the financial security of the financially dependent spouse (usually the wife) and children. Assuming that maintenance payments have been agreed, consideration should be given to the situation which would arise in the event of the death of the main income earner (for the purpose of this article we will assume that the income earner is the husband).

Maintenance payments can be protected by effecting a life assurance policy on the life of the husband in the name of the wife. This means that the wife is the owner of the policy and any benefit which arises is not subject to succession rights.

In the event of a serious illness - such as heart disease or cancer - affecting the husband's earning power, a critical illness policy can be used to pay a tax free lump sum to the wife thus ensuring that a subsequent decrease in the husband's earnings will not affect maintenance payments.

Adequate permanent health insurance on the husband's life ensures that in the event of his being unable to work owing to long-term illness, income will be provided to enable him continue maintenance payments.

The final matter which should be considered is that of the financial position of both parties on retirement. Proper pension planning should be undertaken to ensure that the income on retirement of the husband will be sufficient to support maintenance payments.

For further information on any of the above matters telephone *Tom Kennedy* at (01) 781599 or write to Solicitors' Division, Sedgwick Financial Services, 18/19 Harcourt Street, Dublin 2.

□

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Solicitors Contribute £67,000 to Somalia Fund

President Mary Robinson thanks Law Society members for Somalia contribution

Over £67,000 was contributed to the Solicitors' Somalia Fund by solicitors around the country, following an appeal launched by the then President of the Law Society, *Adrian Bourke,* at the end of September. The Council of the Society decided to transmit the money raised to the President of Ireland, *Mary Robinson,* to disperse as she thought fit, in the light of her recent visit to Somalia. In a letter to the Society Mrs. Robinson said:

> "I would like to acknowledge receipt of a cheque for £67,000 from the Incorporated Law Society to be used for the benefit of the Somalian people.
>
> "Having had an opportunity to see the Irish aid agencies at work on the ground I have decided to funnel all monies received through them for distribution in Somalia and Northern Kenya. Attached please find details of the agencies who will receive £13,400 each from the Law society's cheque."
>
> The letter concluded: "I would appreciate it if you would pass my sincere thanks to your members. As you know the visit was an arduous one, both physically and emotionally, but responses such as the Law Society's have made it a particularly rewarding experience."

Aid Agencies which will benefit

Christian Aid
Inter Church group; work through agencies on the ground rather than by deploying their own personnel. Focus on mid term, rather than immediate, relief.

Concern
Operating in Baidoa and Mogadishu during the President's visit – now in Mandera as well. Focus on feediong and therapeutic centres.

Goal
Operating in Baidoa and Afgoi during the President's visit. Focus on orphans and on medical care.

Irish Red Cross
Work with the International Red Cross and Red Crescent. Operating in Baidoa and North Mogadishu during the President's visit. Focus on feeding centres and medical care.

Trocaire
Operating in Mandera during the President's visit. Focus on repatriation of refugees from the Gedo area.

It is not too late to make a contribution if you have not already done so. All donations received will be forwarded to the President of Ireland to add to the monies already distributed. □

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Obituary

Michael D. White

The late Michael D. White

The death took place in the summer after a short illness of *Michael D. White,* Solicitor, Carndonagh, Co. Donegal, President of the Donegal Bar Association for the last fifteen years and a practising solicitor for upwards of sixty years.

Mr. White was apprenticed in 1924 and qualified as a solicitor in 1928. He worked for a short period of time with Jasper Wolfe, solicitor, Skibbereen, Co. Cork, before setting up practice in Carndonagh in 1930. He practised until 1988 when he retired at the age of 82.

Interested in golf, Mr. White was a founder member of the Ballyliffin Golf Club and a life member and trustee of Greencastle Golf Club. He was also a vocalist of considerable talent and was for many years a member of the church choir.

A man of many talents, Michael D. White had a long association with Carndonagh Dramatic Club and will be remembered for his many outstanding performances with the club.

A gregarious and outgoing man, Mr. White was actively involved in his local community and was very well known to the profession throughout the country. □

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Part III will be run in the Law Society over 12 Saturdays approximately commencing late February 1993. The Diploma examination will be held in June 1993. Dates to be confirmed.

There are *36* places on the Course to be filled on a first-come-first-served basis.

Solicitors who successfully complete the course and examination will be awarded the Diploma in Property Tax.

Fee £350 will include Part III Course attendance, materials and examination fee.

Successful completion of the Tax Modules on the Professional and Advanced Courses is a prerequisite to gaining admission to the Part III Course.

For further information please complete and return this form to:

Ms. Harriet Kinahan, Education Officer,
The Law Society,
Blackhall Place,
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Professional Course Attended: _____

Advanced Course Attended: _____

President to Meet Taoiseach About Compensation Fund

Report of the October meeting of the Law Society Council

At its meeting on 16 October, the Council of the Law Society endorsed a decision by the President of the Society to seek a meeting with the Taoiseach, *Albert Reynolds*, about the introduction of a cap on the level of any one claim on the Compensation Fund. It was the Council's view that the profession could not continue to operate the Compensation Fund in an open-ended manner and that the Fund's original raison d'etre to compensate small claimants had been lost sight of.

The Chairman of the Compensation Fund Committee reported that the committee was preparing a report that would put before the Council certain options for dealing with claims against the Fund, including a strategy for a "doomsday" scenario.

£13,000 minimum salary

At the meeting on 16 October, the Council approved a motion, brought forward at the behest of the Younger Members Committee, recommending that the minimum starting salary for newly-qualified solicitors should be £13,000 per annum. The Council took the view that such a guideline would be helpful to practitioners employing newly-qualified solicitors, and that, regardless of the number of solicitors qualifying, those who were successful in finding employment should be paid a fair and proper rate.

New Ethical Obligations on Doctors

The Council noted a new statement in the Medical Council's Ethical Guide which imposed an obligation on doctors to provide medico-legal reports. The new statement made it clear that doctors were under a moral and ethical obligation to provide such reports and that failure to do so would amount to professional misconduct. The Council viewed this as a significant advance since the Society's Litigation Committee had been lobbying the Medical Council on the issue for the past five years.

The Council of the Law Society noted that an appeal to the Supreme Court on the issue of stand-by fees would be heard shortly. This followed a recent case in which stand-by fees had not been allowed by the Taxing Master, whose views had been upheld by the High Court.

Committee to examine White Paper on Marital Breakdown

The Council approved the establishment of a Family Law Committee to deal with family law and legal aid issues. One of the first tasks of the Committee will be to examine the proposals in the Government's recent White Paper on Marital Breakdown. *Moya Quinlan* was appointed Chairman and *Brian Sheridan* was appointed Vice Chairman.

Annual Conference 1993

The dates for the Society's Annual Conference 1993 were fixed for 20-23 May. The venue chosen was the Connemara Coast Hotel, Furbo, Co. Galway. □

The J.P. O'Reilly Memorial Scholarship

Founded by Dr. A.J.F. O'Reilly to honour the memory of his late father, the Fund provides a **Scholarship of £10,000** to contribute towards the cost of attendance at a full-time or part-time MBA course.

The Fund seeks to promote knowledge of commercial law and corporate finance among young Irish solicitors.

The award – which may be apportioned among candidates – is by competition, open to all apprentices and solicitors qualified within the last ten years who satisfy entry requirements (see below) for an approved MBA course, whether at home or abroad.

The competition will have two tiers:

(1) An essay of between 3,000 and 5,000 words in a commercial law subject chosen by the candidate;
(2) a panel interview which will assess the background interests, motivation and potential of selected essayists.

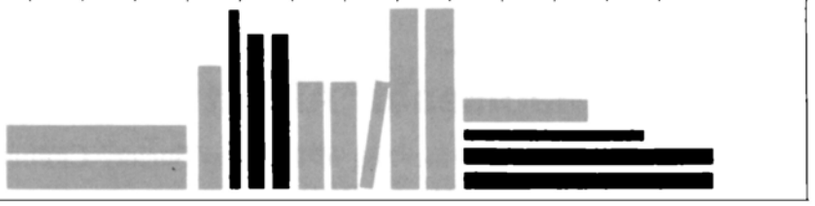
Applications to participate to be made not later than 8 January, 1993; and essays should be submitted by the 28 January, 1993. The successful candidate is expected to commence the study programme in Autumn, 1993. Telephone or write to Emily Francis or Sharon Hanson, Law Society, Blackhall Place, Dublin 7. Tel: 710711.

MBA Requirements

These are threefold:

- normally a primary degree, commonly with first or second class honours or an approved professional qualification,
- work experience at an acceptable level of responsibility over a period of three, four or five years depending on the institute and the candidate's other qualifications.
- a passing grade in the Graduate Management Admission Test (GMAT). The GMAT is internationally recognised and can be taken in centres in all countries. Information is available from:Graduate Management Admission Test, Educational Testing Service, CN6103 Princeton NJ 08541 - 6103, USA.

BOOK REVIEWS



Case Law of the European Court of Human Rights,

volume II 1988-1990. By Vincent Berger, [xiv + 291 pp, Dublin. The Round Hall Press, 1992, IR£37.50.]

In the spacious domain of constitutional jurisprudence, the European Court of Human Rights holds a special place. In the litigious make-up of the Irish, there is a deep respect for the courts associated with the European Communities and the Council of Europe. However, in particular, the European Court of Human Rights is regarded by many today as one of the principal moulders of the liberal faith. The casebook of Dr. Berger, Head of Division at the Registry of the European Court of Human Rights and Professor at the College of Europe at Bruges, is a testament to the success of the first international court of fundamental rights.

The executive branch of government in Ireland should be reminded that prior to the signing of the European Convention on Human Rights in Rome on November 4, 1950, the Irish representatives in the Committee of Ministers and in the Consultative Assembly of the Council of Europe had been prominent in urging that the present Convention did not go far enough in protecting human rights and fundamental freedoms. [See File S.14921A, Department of the Taoiseach, National Archives, Dublin]. In a memorandum for the Government, the Department of External Affairs in April, 1951 stated that the Attorney General was of the opinion that if a citizen obtained on recourse to the Commission or the Court some relief which was denied by our Courts, the prerogative of mercy or executive action of the like kind would be available to give effect to any compromise arrived at before the Commission or to any ruling of the Court. The memorandum for the Government was quite optimistic in stating that the Irish would have no need to have recourse to the Convention:

> "[T]he likelihood of this country being brought before the Commission or the Court is very remote, as all the 'rights' set out in the Convention are already conceded here. Furthermore, it is to be noted that the Convention itself qualifies such rights by restrictions of a far-reaching nature". [See Memorandum for Government dated April 6, 1951 in File S.14921A, Department of the Taoiseach, National Archives, Dublin].

Dr. Berger provides summaries of the seventy-two decisions handed down by the Court in the three-year period covered in this volume. Judge Walsh, judge of the European Court of Human Rights, has written the foreword to the book. The author and Judge Walsh note the ever-increasing case load of the Court.

The cases in the present volume relate to many diverse aspects of fundamental rights including freedom of expression, freedom of religion, freedom of religious observance and freedom to demonstrate. The *Norris* case concerning the Irish legislation which penalises certain homosexual acts carried out in private between consenting adult males is also included. Executive action is still awaited in relation to this case which involved a breach of Article 8 of the Convention (respect for private life).

A useful addition to the book is a summary bibliography at the end of each case. There is also a general bibliography. The text of the Convention and the various Protocols are also set out in an appendix.

Dr. Berger has provided a magnificent service to lawyers in presenting in a succinct manner the summaries of the decisions handed down by the Court betwen 1988 and 1990. Without human rights and fundamental freedoms, civilisation dies. Lawyers should ensure that rights are not lost through any form of neglect on their part. Dr. Berger's book is highly recommended.

Eamonn G. Hall

Harmonisation of Trade Mark Laws in the European Communities

Published by the European Communities Trade Mark Practitioners' Association, 1991, 127pp. £20.

The report is the seventh in the series of reports of conferences organised by the European Commjunities Trade Mark Practitioners' Association (ECTA). These conferences take as their theme a particular aspect of trade mark law or practice. The Report relates to a conference held in Dublin in May, 1990. The theme of the Conference was harmonisation of trade mark laws in the European Communities. It consists of the papers read at the Conference by various trade mark practitioners in the EC and an official of the European Commission.

There is a fairly comprehensive review by the Commission official of the history of the First Council Directive of the 21 December, 1988 to approximate the laws of Member States relating to trade marks ("The Directive"). There follows a paper concerning certain aspects of Article 5 of the Directive and papers from trade mark practitioners from the UK, Spain, France, Denmark, Germany and Italy who outline progress in their respective

(Cont'd on page 346)

From Parchment and Quill to High Tech

Land Registry Celebrates 100 years

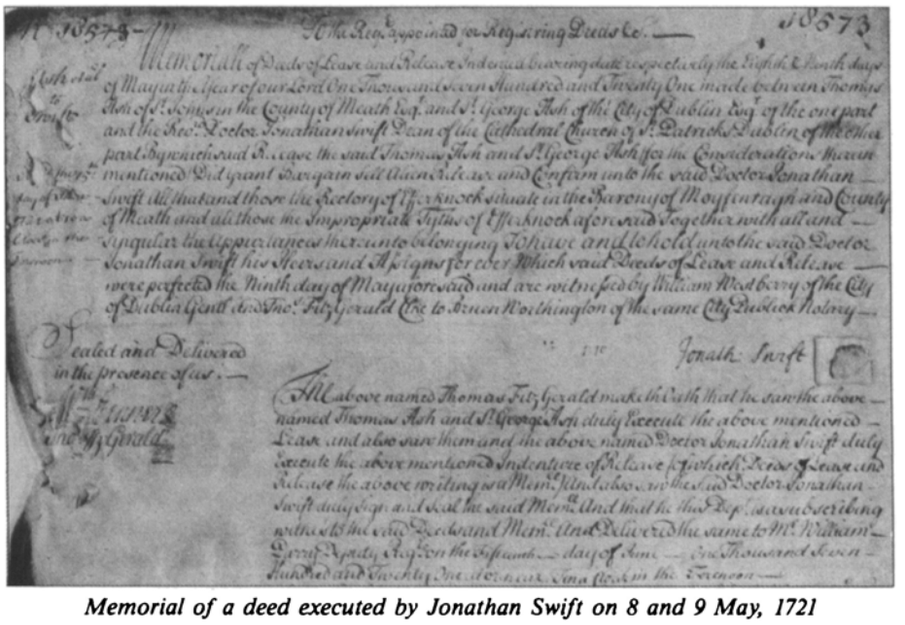
The Minister for Justice, *Padraig Flynn,* presided over a distinguished gathering of guests on 15 October to launch a book to mark the Centenary of the Land Registry and the Registry of Deeds.

Welcoming the Minister, *Catherine Treacy,* Registrar of Deeds and Titles, said a system of registration which enabled private property to be dealt with in a safe, efficient and reliable way was recognised as an essential pre-requisite to the smooth running of a modern economy. "I am very honoured to be at this historic point in time heading up an organisation which provides such a system for the people of Ireland and which is so ably staffed by many talented and dedicated people", she said.

In his address the Minister for Justice, Padraig Flynn, confirmed that he had made a start on the legislation necessary to formally vest the Registries in a Semi-State Board.

He said that the Registry first opened its doors to the public in 1892. "Back then, John Redmond's Home Rule Party was pressurising the Westminister Government to grant Ireland its own Parliament in Dublin. 1892 saw the switch on of the first electricity grid in Dublin – the electricity was generated by Dublin Corporation in Fleet Street. Irish Whiskey sold at eighteen shillings a gallon – that is about 14p a bottle in today's currency. God be with the days!"

The Minister continued: "The Local Registration of Title (Ireland) Act, 1891 brought the Land Registry into being on 1 January, 1892. It was to 'provide a simple, inexpensive and easily accessible Land Registry for the occupiers of land in Ireland'. To this day, the Registry continues to meet that objective.



Memorial of a deed executed by Jonathan Swift on 8 and 9 May, 1721

"Over the 100 years of its existence the range of services provided by the Land Registry has expanded and the volume of business directed to the Registry has increased enormously and indeed continues to grow in tandem with our economy. Just a few figures put that growth in perspective:-

- the first folio opened under the 1891 Act was a Co. Meath folio on 4th March, 1892 in the name of Mr. William Colin Hanbury;
- 43,000 titles were registered over the first 10 years of the Registry's existence;
- this had grown to 250,000 registrations by the time of the foundation of the State;
- today the figure stands at 1.3 million titles registered.

"The Registry, founded in the era of the parchment and quill, now has an annual intake of about 230,000 applications, including about 90,000 dealings involving transfer of ownership.

"The time of the parchment and quill and indeed the pen and the paper are over. New technology beckons. Computerisation commenced here in 1982. This year, the implementation of a major five year strategic information technology plan for the Land Registry and the Registry of Deeds began. When the plan is fully implemented, about 75% of the Land Registry will have support for title registration based on folio database and a significant proportion of the Registry will have automated support for mapping, using geographic information systems.

"As you all know, the Government have decided to reconstitute the Land Registry and Registry of Deeds as a Semi-State Body. This removes the Registries from the Civil Service structure. It will give the Registries the flexibility, structures and modern technology necessary to provide a fast efficient and up-to-date service to the public.

"I recently announced the establishment of a non-statutory

At the reception to mark the Centenary of the Land Registry were: l-r: Catherine Treacy, Registrar, the Honourable Ms. Justice Mella Carroll; Padraig Flynn, T.D., Minister for Justice; Harold A. Whelehan, Attorney General

Interim Board to the Registries. Its Chairman is *Joe Moran.* That Board will advise me on the various steps which need to be taken in readiness for the reconstitution. The Board has begun its work. Meanwhile, I've made a start on the legislation necessary to formally vest the Registries in a Semi-State Board."

The Minister publicly acknowledged the work of the current Registrar, *Catherine Treacy,* and her staff. He also paid tribute to some of Catherine Treacy's predecessors including *William Erskine Glover* whose term of office commenced in 1892 with a blaze – not of glory – but rather a disastrous fire which destroyed many of the Registry's documents, *Desmond McAlister* who served as Registrar from 1958-1975, *Nevin Griffith,* son of Arthur Griffith who served as Registrar from 1975-1978 and *Brendan Fitzgerald* who served from 1983-1988.

The Minister commended a book, written for the most part by the Land Registry staff, which was published to mark the centenary of the Registries. □

Book Reviews

(Continued from page 344)

jurisdictions in implementing the Directive. Finally, the Report sets out the discussions which ensued after the reading of the various papers.

The provisions of the Directive should be implemented in each Member State before 31 December, 1992. At the time of writing it is not known whether the Irish Government intends to implement the Directive by way of statute amending our 1963 Trade Mark Act or by way of regulation made pursuant to Section 3 of the European Communities Act, 1972. Most of the other Member States have implemented the Directive but it is believed that the UK and Germany may not have implemented it by 31 December, 1992.

The Report will have very limited interest for practitioners but does provide useful background reading on the history of the Directive and the effect on the trade mark law of some of the Member States.

Ken Parkinson

New President of the Law Reform Commission

The Honourable Mr. Justice Anthony Hederman

The Government has appointed Mr. Justice *Anthony J. Hederman* to be President of the Law Reform Commission for a five year period with effect from 20 October.

Mr. Justice Hederman, who was educated at Castleknock College, UCD and the King's Inns, was called to the Bar in 1944. He was called to the Inner Bar in 1965, having been Judge Advocate General from 1959 until 1965.

He held office as Attorney General from 6 July, 1977 until 29 June, 1981, when he was appointed a Judge of the Supreme Court.

The other members of the Commission, who were appointed by the Government for a five year term from 2 January last, are:

John F. Buckley, Solicitor, (member of the Editorial Board of the *Gazette* and Chairman of the Law Society's Publications Committee); *Simon P. O'Leary,* Barrister-at-Law; *William Robert Duncan,* Associate Professor of Law, University of Dublin, and *Maureen Gaffney,* Senior Psychologist, Eastern Health Board. □

PRACTICE NOTES

Value Added Tax

Implications of change to basis of assessment

Section 177 of the Finance Act, 1992 provides that where a registered supplier wishes to avail of the monies received basis of accounting then 90% or more of the value of supplies or services being provided by him must be to unregistered persons. This effectively means that most, if not all, practices currently paying VAT on a cash receipts basis will no longer be eligible to do so and will be obliged to change to accounting for VAT on a fees issued basis. The legislation empowers the revenue authorities to seek such changes as from 1 January, 1993 and it is our understanding that appropriate notices will issue to all practices currently registered on a cash receipts basis in advance of that date. These changes have two major implications:
1. Cash flow;
2. Accounting/computer systems.

1. **Cash Flow**
Practices obliged to change from a cash receipts basis to a fees issued basis as at 1 January 1993 will become liable to a "double hit" of VAT which is payable in March, 1993.

The first element of this payment will be the normal VAT arising, on a fees issued basis, for the taxable period January/February, 1993.

The second element arises on the conversion from cash receipts basis to fees issued basis. The amount is calculated on the difference between debtors as at 31 December, 1992 and debtors on the date from which the cash receipts basis of accounting was first authorised or 31 December, 1986 if later. The rate(s) of VAT to be applied to that excess will be the average rate(s) appropriate to cash receipts in the year ended 31 December, 1992.

This charge could be quite significant as in the general run of firms the level of debtors will have increased quite substantially between 1986 and 1992.

We understand, but are as yet unable to confirm, that where cash flow difficulties arise, the Revenue Commissioners may be prepared to accept payment over the first three VAT returns in 1993. Practices facing difficulties in this regard should take up the matter directly with their local VAT inspector.

We gather that the Revenue Commissioners are preparing a Statement of Practice covering this whole area which will probably have been issued by the time this note is printed.

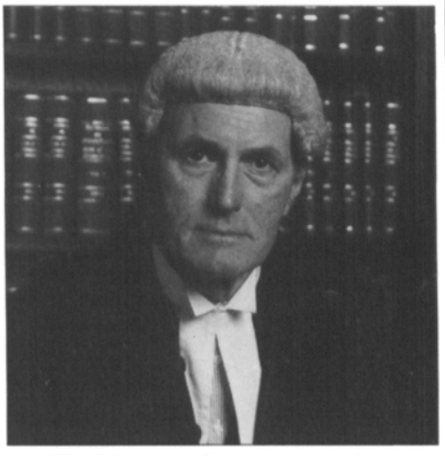
2. **Accounting/Computer Systems**
All such systems should be examined to ensure that they will be capable of handling the changed basis of accounting and of producing the required information for VAT returns on the fees issued basis. In the case of computer systems this may necessitate a rewrite of programs which will require some lead time and action should accordingly not be left until 1 January.

It is suggested that practices should immediately look into these matters with their bookeepers/financial controllers and auditors if necessary if they have not already done so. (See also article by *Fergus Gannon* on page 355 of this issue of the *Gazette*).

Technology Committee

N.B. Please note a letter from the Conveyancing Committee concerning undertakings to lending institutions which has been distributed to all members of the Law Society with this *Gazette*.

Supreme Court Appointment



The Honourable Mr. Justice John Blayney

The Honourable Mr. Justice *John Joseph Blayney* was appointed a Judge of the Supreme Court by the President of Ireland, Mrs. Mary Robinson, on 16 October last. Mr. Justice Blayney will fill the vacancy which arose following the tragic death of The Honourable Mr. Justice Niall McCarthy.

Mr. Justice Blayney was educated at Belvedere College, Dublin, Glenstal Abbey, Co. Limerick, UCD and the King's Inns. He was called to the Bar in 1948 and became a Senior Counsel in 1974. He was appointed a High Court Judge in January, 1986.

Mr. Justice Blayney was born in Dublin. He is married to *Bernadette Boullier* and the couple have six children. □

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Recently, Junior Vice President of the Law Society, Frank Daly, made a presentation to Edmund Carroll on the occasion of his 90th birthday. The photograph shows Mr. Carroll and members of his family, l-r: Brian Carroll (son), Frank Daly, Edmund Carroll, Declan Carroll (son), Valerie Carroll (daughter), and Justin McCarthy (nephew).

At a recent State Solicitors Dinner were L-r: Ciaran MacLochlainn, State Solicitor, Donegal; Geraldine Gillece, State Solicitor, Kildare; Harold A. Whelehan, Attorney General; John McEvoy, State Solicitor, Wexford and Barry St. J. Galvin, State Solicitor, Cork City and member of the Law Society Council.

The late Frank Gannon who had received the Society's Gold Medal in October, 1930, bequeathed the medal in his will to the first of his grandchildren who would qualify as a solicitor. At the Parchment Ceremony on 16 October last, Alan B. Gannon duly received the medal which was presented to him by the former Chief Justice. The photograph shows l-r: Gerard Gannon, The Honourable Mr. Justice T. F. O'Higgins, Alan Gannon and Eileen Gannon.

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At a dinner hosted recently by Adrian P. Bourke for Past Presidents of the Law Society were: Back row standing, l-r: Frank O'Donnell, Bruce St. J. Blake, Noel C. Ryan, Director General, David R. Pigot, Gerald Hickey, Michael Houlihan, Tom Shaw, Donal Binchy, Laurence Cullen and Ernest Margetson. Front row sitting, l-r: Andrew Curneen, Maurice Curran, John Carrigan, Moya Quinlan, Adrian P. Bourke, Raymond Monahan, William Osborne, Anthony E. Collins and Walter Beatty.

At a recent lunch in the Law Society hosted by Ruth Bourke were back row (standing) l-r: Pat Daly, Catherine Griffin, Joan Houlihan, Dorinda Hickey, Kay O'Connor, Joan Osborne, Muriel Overend, Geraldine Clarke, Sheila Prentice, Shirley Carrigan, Sally Walker, Eva Tobin, Yvonne Shaw and Vera Doherty. Front row (sitting): Joan Binchy, Eileen Monahan, Joan Taylor, Ruth Bourke, Adrian Bourke, Noelle Ann Curran, Carmel Killeen and Therese Nash.

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by **Eamonn G. Hall**

Does Aggressive Litigation Produce the Best Result for Your Client?

Two litigation lawyers in the September, 1992 edition of the Newsletter of the Corporate Counsel Section of the New York Bar Association (R.L. Haig and R.S. Getman) have argued that aggressive litigation does produce the best result for a client - if done responsibly and with good judgment. The writers refer to graphic descriptions of those at the receiving end of aggressive litigation: such persons have described aggressive litigation in terms of "rambo-style", "take-no-prisoners," "making the opposition's ordeal as expensive and tiring as possible", "obnoxious," "mean-spirited," "ad hominem," "petty obstructionism," "dirty players," and "scorched earth." The writers describe this as "hardball" litigation.

Concrete examples that might occur to a litigator are given such as timing service of papers at the proverbial eleventh hour, or at the verge of an adversary's vacation, holiday or birth of a child; refusing to agree to extensions or adjournments no matter how great the adversary's need and how reasonable the request; getting the last word, burying the adversary in lengthy interrogatories and document requests, endless discovery and generally acting belligerently.

Gerry Spence, a famed New York trial lawyer, is quoted as saying that he comes to court to do battle, not dance the minuet. A local bar association president is quoted as commenting that "litigation is war, the lawyer is a gladiator, and the object is to wipe out the other side." A judge is quoted as considering the relationship between settlement and trial preparation in terms of "you must pray for peace but prepare for war".

The ethical rules, however, are considered. Lawyers are required not to circumvent disciplinary rules, be dishonest or prejudice the administration of justice.

The writers point to the *disadvantages* of aggressive litigation. Clients hate aggressive litigation which is designed to inflate either the lawyer's ego or his wallet. Sometimes the tactic is not worth the gamble because of the tangible (or intangible costs) to the client. The lawyers stated that sometimes aggressive litigation becomes a habit which makes you more predictable - thus weaker and easy to trap. A lawyer who automatically refuses requests for extensions of time and never yields an iota on his position on discovery will often be hoisted "on his own petard" sooner or later. Aggressive litigation, according to the writers, may backfire in other ways. One should be careful not to "poison the well" of eventual settlement of a case. Those who are too aggressive only increase the aggression of the opposing side.

The writers note there are some defendants that are particularly vulnerable to unfounded claims and the suggestion is that they should adopt a more aggressive stance on occasions. The writers specify that a municipal government or consumer product manufacturer that litigates too weakly or pays too readily in response to specious personal injury claims risk "drawing the attention of litigants and their counsel like sharks to a wounded whale". Lawyers talk to one another. Lawyers know who are tough and who are easy to extract a settlement from and to beat at trial. The writers argue that some frequent defendants would benefit mightily from sending a message to the Bar that they are no longer easy targets.

Litigation is like a war, state the writers, but lawyers should remember that most wars have more than one battle and more than one objective – and that the goals may shift during the struggle.

The writers conclude by stating that those involved in litigation must think beyond today's case. In the long run a good litigation lawyer must consider his own reputation not only for the sake of his effectiveness in the next case for the same or another client but for his own future sake.

Lawbrief submits that the litigation lawyer should possess mental toughness, physical endurance, a certain modicum of intelligence and powers of persuasion. However, aggressive litigation lawyers of the mean-spirited, obstructionist and belligerent variety are often their own worst enemies. Aggression of the mean-spirited variety often generates aggression in the adversary who may adopt a "lets-fight-it-all-the-way approach" and the client may be the one who suffers ultimately.

Telephone Tapping and Undercover Surveillance did not Breach Applicant's Rights

The European Court of Human Rights has held unanimously in *Ludi -v- Switzerland* (judgment, June 15, 1992) that the surveillance of the applicant's telephone communications combined with the intervention of an undercover agent had not breached Article 8 of the *European Convention on Human Rights.*

By contrast, the Court found, by eight votes to one, that there had been a violation of Article 6.3 (d) with 6.1 of the *European Convention on Human Rights* in that the applicant had not enjoyed a fair trial, because of excessive restriction on the defence rights.

Article 8 of the European Convention on Human Rights provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In March 1984, a Swiss investigating judge, acting on information from the German police that Mr. Ludi was planning to buy drugs in Switzerland, opened a preliminary enquiry and ordered his telephone communications to be intercepted.

The police authorities selected one of their officers to pass himself off as a potential purchaser of cocaine. After five meetings with that agent, the applicant was arrested and charged with unlawful trafficking in drugs. He was subsequently found guilty and sentenced to three years imprisonment.

In order to protect the police officer's anonymity, the court had refused to call him as a witness on the ground that it followed clearly from his reports and the records of the telephone interceptions that the applicant had, independently of the agent's intervention, intended to act as intermediary in the supply of drugs.

The applicant's appeal against his conviction for two of the offences was dismissed by the Berne Court of Appeal, which likewise refused to call the agent as a witness.

The Court of Human Rights had no doubt that the telephone interception had been an interference with Mr. Ludi's private life and correspondence. It found, however, that that interference had been in accordance with the law of Switzerland and necessary in a democratic society for the prevention of crime. On the other hand, the Court agreed with the Swiss Government that in the present case the use of an undercover agent did not, either alone or in combination with the telephone interception, affect private life within the meaning of Article 8. There was no violation of Article 8.

According to consistent case-law of the European Court on Human Rights all the evidence must normally be produced in the presence of an accused at a public hearing with a view to adversarial argument. There were exceptions to that principle, but they must not infringe the rights of the defence.

As a general rule, paragraphs 3 (d) and 1 of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he made his statements or at a later stage. (See *Asch -v- Austria* April 26, 1991) (Series A No. 203, p10, paragraph 27).

The local District Court and the Berne Court of Appeal both refused to call the undercover agent as a witness, on the ground that his anonymity had to be preserved. The Court of Human Rights found the present case could be distinguished from *Kostovski -v- The Netherlands* and *Windisch -v- Austria* (The Times November 22, 1989 and September 17, 1990; Series A Nos 166 and 186), where the impugned convictions were based on statements made by anonymous witnesses.

In the instant case, the person in question was a sworn police officer whose function was known to the investigating judge.

Moreover, the applicant knew the said agent, if not by his real identity, at least by his physical appearance, as a result of having met him on five occasions.

However, neither the investigating judge nor the trial courts had been able or willing to call the undercover agent as a witness and carry out a confrontation with the aim of comparing his statements with Mr. Ludi's allegations.

Moreover, neither Mr. Ludi nor his counsel at any time during the proceedings had an opportunity to question him and cast doubt on his credibility. The court considered that it would have been possible to do that in a way which took into account the legitimate interests of the police authorities in a drug trafficking case, in preserving the anonymity of their agent, so that they could protect him and also make use of him again in the future.

In short, the Court held that the rights of the defence had been restricted to such an extent that the applicant had not had a fair trial. The Court of Human Rights therefore considered, Judge Matscher dissenting, that there had been a violation of paragraph 3 (d) in conjunction with paragraph 1 of Article 6.

Mr. Ludi claimed the reimbursement of his costs and expenses before the Federal Court and the Strasbourg institutions, but the Swiss Government considered the sums claimed excessive. The Court, reaching its decision on an equitable basis, awarded SwFr15,000.

Irish legislation regulating telephone interception by the Minister for Justice, the *Interception of Postal Packets and Telecommunications Messages (Regulation) Bill, 1992* was passed by Seanad Éireann on July 9, 1992. The Bill has yet to be passed by the Dáil. □

"Setting up Practice in the 90s"

The Younger Members Committee staged the second of a series of seminars on "Setting up Practice in the 90s in Cork on 2 October. The 80 participants heard about the importance of getting to know your bank manager, the assistance available from the Law Society, and how to deal with the firm that previously employed you. Committee member, Pat Casey, reports.

At the Younger Members Seminar were l-r: Michael Nugent, Solicitor; Adrian Buckley, Bank of Ireland; Michael McSweeney, Accountant and Patrick Casey, Younger Members Committee.

Adrian Buckley, Deputy Manager, Bank of Ireland, South Mall, Cork, emphasised the importance of the solicitor setting up in practice being totally open with his or her bank manager. He also encouraged any solicitor setting up in practice to be as thrifty as possible. For example, acquiring a large motor car shortly after setting up would not normally endear a solicitor to his or her bank manager! Referring to the recent interest rate changes, *Adrian Buckley* said it was important for a solicitor to shop around and obtain the best possible deal.

Michael McSweeney, Chartered Accountant, gave the audience the benefits of his experience as an accountant operating as part of the Law Society's Practice Advisory Service Scheme. He encouraged solicitors intending to set up to contact the Law Society who would then put that solicitor in touch with the local accountant operating on the Practice Advisory Service Scheme. Consultations between the accountant and the solicitor are provided free of charge by the Law Society under the scheme. At the first consultation the accountant will sit down with the solicitor and will go through such matters as the installation of an appropriate accounting system; maintenance of proper accounting records; compliance with the Solicitors Accounts Regulations, etc.

A later follow-up consultation is provided. Michael McSweeney emphasised the confidential nature of the consultation between the solicitor and the accountant operating the Practice Advisory Scheme. He went on to say that the scheme was not intended to interfere with the services provided by the solicitor's own accountant but rather was intended to supplement such advice and assistance.

Michael Nugent, a solicitor who had set up in practice on his own a few years ago, outlined what it was actually like setting up in practice. The first matter to be considered, he suggested, was whether the solicitor would set up on his or her own or go into partnership with another. The idea of office sharing was arguably the best of both worlds. Choice of location for the solicitor's office was the next decision. In the case of an urban practice ease of parking was an important factor in choosing a location. Advocating keeping overheads low, Michael Nugent said that the biggest expense in a solicitor's practice is drawings. In relation to other expenditure he suggested spreading these costs over as long a period as possible.

Michael Nugent strongly encouraged those in attendance to get to know their bank manager now and even suggested that they take out a loan at this stage! He suggested that a solicitor who was setting up in practice should bring projections with him or her to the first meeting with his bank manager. Emphasising the importance of complying with the Solicitors Accounts Regulations, he said that it was vital that the solicitor's bank is made aware of the difference between office and client accounts. The bank should also be requested to return used cheques to the solicitor's practice.

Michael Nugent went on to deal with such questions as: choice of notepaper; who to notify when setting up and also timing.

The audience was most interested in his comments as to how to deal with your former firm when setting up. Michael Nugent pointed out that the files and the clients belong to the firm that employed you and that a solicitor intending setting up in practice cannot poach or lure these clients away. However, he pointed out that a solicitor could inform clients that he or she was leaving your former firm. If clients ask to follow you he suggested that you should obtain a written authority from them, ask to take up the file from the firm and then agree outlays and fees with the firm.

The Younger Members Committee intends to stage the seminar at other locations around the country in the near future. The seminar was sponsored by the Bank of Ireland in Cork while documentation was sponsored by Legal & General Office Supplies. □

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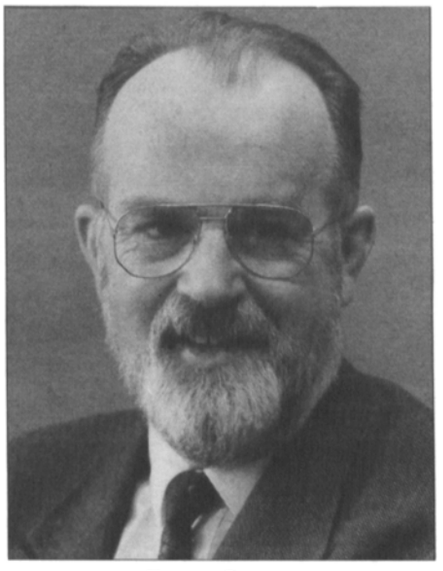
Bad News for Solicitors Finance Act, 1992 - VAT

By Fergus Gannon, Deloitte & Touche

The news for solicitors is very bad! From 1 January, 1993, the cash receipts basis will be available only to those whose turnover is 90% or more to unregistered persons. Many solicitors will not be within this category and are, therefore, going to lose their entitlement to the cash receipts basis.

Under the Value Added Tax Act (VATA) 1972 section 14 (1) (b), a person supplying services may choose to account for VAT, "by reference to the amount of monies which he receives" (usually referred to as the cash receipts basis or the cash basis) rather than by reference to invoices issued. You are no doubt familiar with the cash flow disadvantages of the invoice basis arising from the necessity to fund the payment of VAT to the Revenue Commissioners while awaiting receipt of the VAT from the customer or client. The cash receipts basis is a derogation permitted under Article 10 of the EC 6th Directive on VAT at the option of Member States.

Section 177 of the Finance Act, 1992 amended section 14 VATA 1972 with the result that the cash receipts basis will only be available to a person who "derives not less than 90 per cent of his turnover from taxable supplies to persons who are not registered persons". The double negative of not less than and not registered obstructs the ease of understanding. Put more positively the cash receipts basis will only be available to a person who derives 90% or more of his turnover from taxable supplies to persons who are not registered persons. The provision will be effective from 1 January, 1993.



Fergus Gannon

This will exclude the majority of accountants, solicitors, architects, advertising agencies, consulting engineers, management consultants, recruitment agencies, sub-contractors and others providing services to registered persons.

It follows that those who will lose the entitlement to the cash receipts basis should review their cash requirements for 1993. On 19 March, 1993 VAT will be payable on all invoices issued in January/February 1993, even though payment will not have been received in respect of many of them.

Debtors Adjustment

Section 14 VATA 1972 was originally supported by Statutory Instrument No. 177 of 1972. S.I. 177 of 1972 was replaced from 1 March, 1979 by Regulation 7 of the Value Added Tax Regulations, 1979 which in turn was replaced by Statutory Instrument No. 298 of 1986 with effect from 2 September, 1986. S.I. No. 298 of 1986 provides for what is commonly referred to as a debtors adjustment for those who have been on the cash basis for 6 years or less. This means that in the VAT period in which a person changes from the cash basis to the invoice basis he will have to account for VAT on the increase in debtors during the period he was on the cash receipts basis. For example, an accountant commenced practice on 1 January, 1988 and from the beginning was on the cash receipts basis. On 31 December, 1991 he changed to the invoice basis. At 31 December, 1991 his debtors were £36,300 made up of £30,000 plus £6,300 VAT. He had not accounted for VAT on these debtors while on the cash receipts basis. He had to include an additional £30,000 in the sales section of his Nov/Dec 1991 VAT return to account for the increase in debtors while he was on the cash receipts basis thus capturing the VAT not caught while on the cash receipts basis. This means that those who will lose the cash receipts basis from 1 January, 1993 face a double blow, firstly, a debtors adjustment in their November/December 1992 return and secondly, being on an invoice basis after 1992. I understand that the Revenue Commissioners are sympathetic to the idea of allowing a staged payment of the VAT arising on the debtors adjustment, but a final decisions on this has not yet been made.

On Cash Receipts Basis for more than 6 Years.

Up to 16 April, 1992 there was no debtors adjustment for those changing from a cash basis to an invoice basis if they had been on the cash basis for more than 6 years. From 16 April, 1992 a person who has been on the cash basis for more than 6 years and changes to the invoice basis is required to make a debtors adjustment by reference to his debtors 6 years previously rather than by reference to his debtors when he commenced on the cash receipts basis. This is as it is set out

in the Revenue Statement of Practice and the Explanatory Note attached to Statutory Instrument No. 93 of 1992. The Statutory Instrument does not clearly state the intention as set out in the Statement of Practice and the Explanatory Note. The Revenue Commissioners have confirmed that a revised Statutory Instrument will be issued later in the year.

Those who have been on the cash receipts basis for more than 6 years and are going to lose it from 1 January, 1993 should ascertain the level of their debtors at 30 April, 1986; 30 June, 1986; 31 August, 1986; 31 October, 1986; and 31 December, 1986 and compare them with the projected balances 6 years on. A study of the comparative figures will give a basis for deciding which of the foregoing is the most appropriate date for ceasing on the cash basis. The Revenue Commissioners have confirmed that the position as outlined in Statement of Practice VAT/2/92 can be relied upon until the new S.I. is issued.

Some will have debtor balances lower than the corresponding 1986 figures because they currently factor their debts. They should consider temporarily suspending the factoring arrangement to allow the debtors reach the 1986 level.

I have heard it suggested that those affected should get their debtors as low as possible at 31 December, 1992 to reduce the debtors adjustment. Doing so appears to solve the problem but does not. If the debtors are reduced by getting the cash in before 31 December, 1992, VAT becomes payable on the receipt of the cash. If debtors are reduced by a delay in invoicing, VAT on the invoices becomes due when on the invoice basis in 1993.

Other Changes

There are three other changes proposed in Section 177 of the Finance Act, 1992 as regards the cash receipts basis.

(i) Prior to the passing of the Act those on the cash receipts basis accounted for VAT at the rate in force at the time of receipt of the cash. This meant that those on a cash receipts basis gained when rates were reduced and lost when rates were increased. Since the passing of the Act those on the cash receipts basis account for VAT at a rate appropriate at the time of supply.

(ii) Prior to the passing of the Act if a person changed from the invoice basis to the cash receipts basis a double liability arose on the debts outstanding on changeover. Firstly, while on the invoice basis he was chargeable to VAT when the invoice was issued and secondly, after the changeover, when the cash was received from the debtor. Since the passing of the Act this no longer applies.

(iii) Prior to the passing of the Act the Revenue interpretation was that a person who opted for the cash receipts basis was liable to VAT on all cash receipts from supplies, even supplies made before he was registered. For example, vets who opted for the cash receipts basis on registration on 1 January, 1992 were liable on receipts for supplies made before he was registered. (This interpretation is open to question in view of the judgment of the European Court in the *Massalai* case (Case 111/75)). Since the passing of the Act this anomaly no longer exists.

What to do Now

- Those on the cash receipts basis for more than 6 years should now review their debtors of 6 years ago to decide on the best date for changeover to the invoice basis.

- Those who will lose the cash basis should review their cash requirements to meet the debtors adjustment and the cash flow loss for 1993. It would be prudent to discuss this with the bank manager before it arises. □

References:

EC 6th Directive Article 10 - derogation
A Guide to the Sixth VAT Directive
IBFD Publications - page 391
VATA 1972, section 14
S.I. 177 of 1972
VAT Regulations 1979 No. 7
S.I. 298 of 1986
S.I. 93 of 1992
Finance Act 1992 Section 177
Statement of Practice (VAT/2/92)
Value Added Tax - Institute of Taxation - Chapter 14
Value Added Tax Guide - Chapter 9.

SYS Committee 1992-1993

At the Annual General Meeting of the Society of Younger Solicitors (SYS), the following officers were elected:-

Chairman: Owen O'Sullivan
Vice Chairman: Paul White
Treasurer: Paul Marren
Secretary: Maureen Walsh
Public Relations Officer: Gavin Buckley

The following were elected as committee members:- James McCourt, Mary Hayes, Jennifer Blunden, Walter Beatty, Robert Hennessy. □

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On-Line Services and The Challenge of Rom

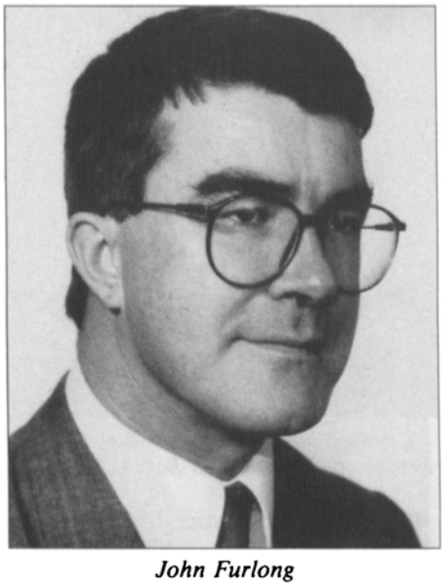
By John Furlong, Solicitor

One of the critical requirements in all legal offices is access to relevant and current information. A legal information system can be developed through a combination of practitioners' knowledge and training; library resources; the maintenance of suitable office precedents and exploitation of outside information resources.

Building on the communications capabilities of modern systems and in-house information retrieval systems, comes a wide range of on-line services which allow for searching of vast amounts of data via a PC and through the telecommunications system.[1] Provided that the PC is suitable, the additional requirements will include a communications software package, telephone or data communications links and a modern telecommunications modem.

On-line services consist of commercial databases providing full text availability to commercial, financial, corporate, scientific and legal information. There are over 100 databases which are either specifically of a legal nature or which contain information relevant to legal practice. Since they are full text systems, they allow searches to be made against any word or term in context and the retrieval of extracts or full versions of law reports, statutory materials, legal journal articles, company profiles etc.[2]

A large number of on-line services are accessed through host services; many are available direct from on-line service providers themselves. Services may be charged on a per usage basis calculated on a combination of time; the type of data accessed and/or the amount of material retrieved. Some services



John Furlong

impose initiation and minimum subscription charges.

The principal benefit of an on-line service is to allow direct and immediate access to a vast range of current information; with the ability to print or store this information for future use.

Balancing these benefits are the proportionate capital investment in equipment and ongoing costs which are involved. The efficient and cost effictive use of any on-line service requires an ability to frame accurately a search; the identification of appropriate on-line service or library for searching and skills in the use of various searching commands and syntax required for each on-line service.

CD-ROM

Developments in micro technology and in particular the emergence of the compact disk provide another source of information. Read Only Memory disks (ROMs) allow for access to between 500 and 600 Mb of data (compared to 40 Mb on the average PC hard disk). This is equivalent to about 250,000 A4 pages of information. This can readily be searched by means of key words and using a CD-ROM player linked to a PC.[3] CD-ROM players may be integrated into the PC box or operate as a separate item of equipment. The cost of players has decreased dramatically over the past two years. In addition to single drives, twin drive and jukebox CD-ROM players are now available.

The advantage of CD-ROM over on-line access include its lower costs; the availability of materials for future research or copying at no extra cost and the increasing range of materials now being made available. CD-ROM may not be as effective in providing current information since disks are reissued only at regular intervals and in order to benefit from many CD-ROM publications a long-term subscription is required.

Several major legal works are now available on CD-ROM and the market is rapidly developing in the United States.[4] The disks are usually updated on a regular basis. While CD-ROM provides a means to rapidly access material and to significantly reduce library storage costs, it is still comparatively expensive and limited in its application. It is highly probable however that CD-ROM will develop over the next few years as a major source of published legal material and that the costs of the technology will become more affordable. It is notable that a number of major on-line services are now providing CD-ROM versions of their databases as an ancillary or alternative means for their subscribers to use their information resources.

The whole area of digital information will be further transformed by the business uses to which the emerging technology of multimedia CD-ROMS will be applied. These advanced disks allow for the integration of pictures, text

(Cont'd overleaf)

IBA to Focus on Human Rights

The newly-elected President of the International Bar Association, *Claude Thomson,* QC, has said the implementation of the Association's recently approved human rights action plan would be an urgent priority in the coming months. "We are being given a chance to make a meaningful contribution to the struggle for human rights and the rule of law around the world" said Mr. Thomson.

Mr. Thomson was elected President of the International Bar Association for a two year term at its Annual Conference which took place in Cannes from 20-25 September last. The conference, which was the IBA's 24th biennial gathering, saw a record attendance of over 2,800 lawyers from 100 countries including more than 800 speakers and over 950 guests. Approximately 25 members of the Law Society attended the conference, including the then President of the Law Society, *Adrian Bourke.*

At the Conference, *John F. Buckley,* Consultant Partner at Beauchamps, (member of the Editorial Board of the *Gazette* and Chairman of the Law Society's Publications Committee), was elected Chairman of the IBA Section on General Practice, which has a current membership of 2,800.

All 56 specialist committees of the IBA's three sections held one or two day meetings during the conference week. The highlights included:

- "Issues affecting Life and Death", a showcase programme involving the arguments for and against compulsion by court order of the discontinuance of life support systems, and mandatory testing for Aids.
- "The Environment and Crime" – in which Lord Justice Wolfe of the English Court of Appeal, called for a UK and European Environmental Court to supervise compliance with EC Environmental standards.

Claude Thomson, Q.C., newly-elected President, International Bar Association.

- " . . . . and Justice for All" – a comparison of legal aid systems around the world.

The newly elected President of the IBA, Claude Thomson, QC graduated from Osgoode Hall Law School in Toronto, Ontario, Canada, and was called to the Bar of Ontario in 1958. He is Chairman of the National Partnership of Fasken Martineau and served as President of the Canadian Bar Association in 1984-1985.

Commenting on his election, Mr. Thomson said "the IBA is one of the most powerful legal organisations for bringing together lawyers from around the world to discuss issues of international importance. Some of the major issues facing the legal profession are: the responsibility and accountability of professional advisers, the mobility of lawyers – particularly across national boundaries – the administration of justice in developing countries, multi-disciplinary firms, legal aid and equal opportunity for women and minorities in the profession and the access and cost of legal service".

Other IBA Officers who were elected were:-

- Vice President: Professor *J. Ross Harper,* Harpers MacLeod, Glasgow, Scotland.
- Secretary General: *Desmond Fernando,* Columbo, Sri Lanka.
- Treasurer: *Walter Kolvenbach,* Heuking Kuehn Herold Kunz and Partners, Dusseldorf, Germany.
- Chairman of Section of Business Law: *Robert Briner,* Lenz & Staehelln. Geneva, Switzerland.
- Chairman of the Section on Energy and National Resources Law: *Stephen B. Pfeiffer,* Fullbright & Jaworski, Washington, USA. □

Technology News

(Continued from page 357)

graphics and sound. They also allow for interactive use and may provide the basis of expert legal systems and legal training in the near future. The rapid development of CD-ROM technology together with the expanding range of legal material available looks set to make this medium an important element of legal information resources over the next few years. □

References

(1) The most comprehensive listing may be found in *Law Databases 1991* Sarah J. Nichols (Aslib: The Association for Information Management London 1991) See also "Keeping Abreast of Databases" Sarah Nichols, *The Lawyer* 26 May, 1992 and "Comercial Intelligence" *Finance* Magazine August, 1991.

(2) Lexis is perhaps the best known on-line service in the legal area providing access to Irish and United Kingdom law reports as well as United States and Commonwealth judgements. It also provides access to a range of European Community material and to United Kingdom statutory material. See "Going the Distance" Melanie Jappy, *The Lawyer* 26 May, 1992.

(3) See "Nice and CD does it" Neil Cameron, *Solicitors Journal* 26 June, 1992.

(4) Susan Breed provided a quick overview of available CD-ROMS relevant to legal practice in "CD-ROM-memories are made of this" *The Lawyer* 12 March, 1991. Comprehensive listings are contained in "CD-ROMs in Print" published by Meckler Ltd. and "The CD-ROM Directory" published by TFPL on an annual basis.

Reform of Occupiers' Liability? – Part 2

by Eoin O'Dell*

Introduction

Against a background of disquiet with the current law on occupiers' liability, part two of this article considers the question whether the Irish common law on the area[1] ought to be reformed along the lines of the English statutes of 1957 and 1984.

Part 1 of this article sketched the background to the English legislation, and analysed the occupier's liability for injury to an entrant on the basis of six questions. The first three, as to the status of occupiers, premises and entrants under the English statutory position were considered in Part 1. This part will continue the analysis of the nature of the duty which the legislation imposes on the occupier, the type of damage for which he can be made liable and defences which the statute expressly supplies. It will conclude by considering whether statutory reform of the law in Ireland is necessary and whether the English statutes (or the rules they replaced) could be used as a model for such reform.

The Occupiers' Liability Acts, 1957 and 1984.

Of the six questions under this head, three were analysed in Part 1. The three remaining are:

(i) What duty does the occupier owe to the entrant? *i.e.* when will the defendant be liable?

(ii) For what damage will the defendant be liable?

(iii) Are there any defences?

(i) What duty does the occupier owe to the entrant?

Eoin O'Dell

This is the area in which the Acts have effected substantial reform expressly. So section 1 of the 1957 Act provides that the rules enacted "shall have effect, *in place of the rules of common law,* to regulate the duty which the occupier of premises owes to his visitors". And section 1 of the 1984 Act provides that the rules enacted "shall have effect, *in place of the rules of the common law,* to determine (a) whether any duty is owed by [an occupier to] . . . persons other than his visitors . . . and (b) if so, what that duty is."

If the visitor is a lawful entrant in the sense of being an invitee or licensee, then the duty is governed by section 2 of the 1957 Act. By subsection (1) "an occupier of premises owes the same duty, the "common duty of care", to all his visitors". By subsection (2) "the common duty of care is to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there". And there it is: the occupier owes the same duty to invitees and licensees, and in essence it is the standard duty to take reasonable care. In other words, it is an objective test which asks whether a reasonable man in those circumstances would have acted in the same way as the defendant. However, the Act does provide a partial guide to what would be reasonable in this context. Thus by section 1 (3) (a) "an occupier must be prepared for children to be less careful than adults" and by section 1(3) (b) "an occupier may expect that a person in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so". In this regard the Law Commission gave the following explanatory example:

> For example, if a window cleaner (not being an employee of the occupier) sustains injury through the insecurity of some part of the exterior of the premises which he uses as a foothold or handhold for the purpose of cleaning the outside of the windows, the occupier merely as such should not be liable. *Aliter* if the window-cleaner is injured through some defect in the staircase when going upstairs in the ordinary way to reach the windows on the upper floor".[2]

There is one more section in the Act relevant to the question whether the occupier took reasonable care. That is section 1(4) which provides that where the occupier warned the visitor of the danger "the warning is *not* to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe".

One point requires to be stressed. The duty is a duty to take reasonable care. It does not impose

intolerable burdens on the occupier.[3] An action which may be reasonable if the occupier does it in respect of one entrant may not be enough to discharge liability in respect of another. Consider the following situation. An occupier is aware that a specific person will use his premises for a specific purpose at a specific time. A danger arises. The duty of the occupier to take reasonable care may require him specifically to warn this entrant. On the other hand, it may be reasonable for the occupier to put up a notice warning of the danger to the general public, but this may not be enough in the context of the known entrant. Thus, the old categories are not entirely gone, they encapsulated a truth, one which the concept of reasonableness, whether under the 1957 Act or at common law in Ireland, also holds.

Thus the 1957 Act in effect imposes a duty on an occupier to take reasonable care for the safety of lawful visitors. It is to the terms of the 1984 Act we must turn to seek the standard of care owed to a trespasser. According to section 1 (1) of the 1984 Act the question is whether "any duty is owed by a person as *occupier* of premises to *persons other than his visitors* in respect of any *risk* of their suffering *injury* on the premises by reason of any *danger* due to the *state* of the *premises* or to things done or omitted to be done on them".

Section 1(3) of the 1984 Act provides that an occupier owes a duty in respect of such a risk if

(a) he is aware of the danger or has reasonable grounds to believe that it exists,

(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger or that he may have come into the vicinity of the danger (in either case whether the other has lawful authority for being in that vicinity or not); and

(c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

The interpretation of this section is crucial to the liability of the occupier. In particular, the risk of injury must be one against which the occupier "may reasonably be expected to offer the other *some* protection." These are the circumstances in which a duty can arise. Section 1 (4) goes on to provide for the duty which the occupier will owe to the entrant if these conditions are satisfied. The "duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned". The intent behind this formulation was to replace the subjective *Herrington* test with an objective one.

Again, what is reasonable will depend on the facts of the case, and one of the relevant factors will be the type of entrant in question. As Salmond and Heuston observe "trespasser has an ugly sound but it covers the wicked and the innocent . . . although the nature of the duty is laid down in general terms, there can be no doubt that that its content may differ radically in the case of a small child, for example, from that of a burglar".[4]

Even though the duty is to take reasonable care in all the circumstances to see that the entrant does not suffer injury, two important related questions, it would seem, have yet to be answered: if the duty arises only in respect of risks against which the occupier "may reasonably be expected to offer the [entrant] *some* protection" (section 1(3) (c)), is the duty to take reasonable care (section 1(4)) satisfied when that "some protection" is put in place? Further, is liability for breach of that duty limited to the extent of that "some protection" which ought to have been in place? In principle, the answer should be in each case that it should, but it seems that no English court has yet addressed the point.

Again, the Act provides some limited guidance as to what can be reasonable. Thus by section 1(5) any "duty owed by virtue of this section in respect of risks may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case *to give warning* of the danger concerned or to discourage persons from incurring the risk." It seems that a clear warning of the risk will discharge liability in the case of a trespasser, provided, (one assumes) that the warning was successful: where a warning is clearly given, but the trespasser is a child, it may very well be ineffective. However, the different treatment of warnings under the two statutes is significant. Under the 1957 Act it may not be enough to constitute reasonable care towards lawful entrants, whereas under the 1984 legislation, it may be enough to discharge the duty. The different emphasis is significant, since it further reinforces the distinction between lawful and unlawful entrants.

Under both statutes, however, the fundamental point to be borne in mind is that it is the *entrant* who has to be made safe and not the premises.[5] Thus for example if the occupier has a danger on his property, he need not remove the danger, merely ensure that an entrant will not be affected by it, and in so doing will have taken reasonable care.

Thus, while both statutes base the liability to the entrant on the lack of reasonable care, each has different ideas about what actually will constitute reasonable care in the circumstances. If there has been a lack of reasonable care on the part of the occupier, the next question is for what damage will he be liable.

(ii) For what damage will the defendant be liable?

Section 1 (1) of the 1967 Act in speaking of a duty owed to visitors to avoid dangers clearly contemplates liability for personal injury from such danger. Section 1 (3) (b) of the Act goes on to provide that such liability also applies in "respect of damage to property". It has been held that the entrant can recover in respect of financial loss consequent upon the injury or damage to property.[6]

On the other hand, section 1(8) of the 1984 Act provides that "where a person owes a duty by virtue of this section, he does not, by reason of any breach of the duty, incur any liability in respect of loss or damage to property." In other words, not only is there a more limited standard of care owed to a trespasser, his measure of recovery is also more limited. All types of entrant can recover in respect of personal injury, but it is only where the entrant is a lawful visitor will he be able to recover in respect of loss or damage to property.

(iii) Are there any defences?

In so far as contributory negligence on the part of the plaintiff-entrant reduces the amount of the liability of the defendant-occupier, then it has been held that it will provide a defence.[7] However, of much more significance are the two statutory provisions: section 2 (5) of the 1957 Act and section 1 (6) of the 1984 Act. Under neither Act will an occupier owe a duty to an entrant "in respect of risks willingly accepted as his by the visitor". Both sections further provide that "the question whether a risk was so accepted falls to be decided on the same principles as in other cases in which one person owes a duty of care to another". These principles are such that where the plaintiff has voluntarily accepted the risk, the defendant will not be liable. It is much easier to make out this defence in England than in Ireland. In Ireland, under statute,[8] the plaintiff must accept this risk by means of a written contract, whereas in England, such an assumption may be inferred from the plaintiff's conduct.[9]

The above then is a thumbnail sketch of the English law on occupier's liability. The question is whether reform of Irish law is desirable along those lines.

Is reform necessary?

In essence the question to be addressed here is whether the Irish rules on duty of care ought to be reformed, and, if so, whether the English legislation can serve as a model for this reform. As a preliminary point, where law is unclear or unjust, clarifying and reforming legislation is always to be sought and welcomed. This was the case in respect of both of the English Acts above. The question therefore is whether there is a need to clarify or reform Irish law in the area.

The evolving case-law suggests that there is now, or very soon will be, a general duty on occupiers to take reasonable care not to injure any entrant onto their premises. It would seem that the justification for this lies in the development of the law of negligence from *Donoghue -v- Stevenson*[10] through *Anns -v- Merton LBC*[11] to *Ward -v- McMaster.*[12] As a result of this development, negligence principles are being allowed to infuse the entire of the law of occupiers' liability.[13] However, this has lead to a perception, in certain quarters, that the occupier will be liable for every injury that is suffered by every entrant, whether lawful or not. This is misconceived. Although the duty is to take reasonable care, it must be emphasised again that what may be reasonable for one entrant may not be for another.[14] In other words, although the language in which the duty is expressed is exactly the same, the law does not require that the same actions be taken by the occupier in respect of all of the potential entrants onto his land. As Salmond and Heuston observe, even if an approach based on *Donoghue -v- Stevenson* has been adopted by the common law in England, "some distinctions between the various classes of entrants would have been necessary, for they correspond to real differences in the nature of the user of property and in the reasonable claims to protection of those who are permitted such use".[15] Such distinctions would be flexible, however, and not rigid categories. Nevertheless, it may be argued that, fundamentally, there is a distinction between those who are lawful entrants on the one hand and those who are not on the other. As Lord Diplock observed in *Herrington.*[16]

> "There is a relevant distinction between a person who is lawfully on the occupier's land with the occupier's consent and a trespasser. In the case of the former the occupier has consented to the creation of the relationship from which the duty flows; in the case of the trespasser the relationship has been forced on the occupier against his will".

It is this distinction which is at the heart of the dichotomy between the scheme set up in the 1957 Act and that in the 1984 Act.

The Occupier's Liability Act, 1957 "as interpreted by the Courts, has been a noticeably successful piece of law reform".[17] Thus, Lord Hailsham of St. Marylebone L.C. called it "a little gem of a statute",[18] and even Lord Diplock who was initially opposed to reform by legislation, later conceded that "it has worked like a charm".[19] In fact, the marked lack of appellate level case law is indicative of how successful it has been. It has brought certainty to an area of the law previously characterised by technicality and uncertainty. Much of this is as a result of the imposition of liability on licensees and invitees on the basis of negligence principles. However, this is a change which the Irish courts have also achieved. The perceived problems with Irish law arise in the context of a potential over-liberal application of such negligence principles to the liability of occupiers to trespassers, thereby, it is said, broadening the ambit of liability alarmingly and perhaps unjustly. If that is the case, then the 1984 Act commends itself. Not only does it pitch the duty to the

trespasser at a lower level, it also limits the heads of damage which the plaintiff may claim.

A reform or clarification by statute in Ireland which did no more than to codify the existing law that there is a duty on occupiers to take reasonable care in respect of entrants onto their premises or land, which emphasised that the concept of reasonable care is situation-specific, would be a welcome clarification. It may go so far as to allay any fears of being overgenerous to unmeritorious plaintiff-trespassers by drawing a distinction between lawful and unlawful entrants, perhaps limiting the range of remedies available to the latter. There therefore arises the question whether a statute on the English model is necessary to achieve this end. It would seem not, as this is a position which is well within the potential judicial development of the current law. There has been much recent academic and judicial debate as to the structure of the tort of negligence. In Ireland, the early leading cases on this issue, *viz*, the judgments of Walsh J. in *Purtill -v- Athlone UDC*[20] and *McNamara -v- ESB*,[21] are, in fact, occupier's liability cases, and the (minority) judgment of McCarthy J. in *Rooney -v- Connolly*[22] is the logical progression from this position. The attitude to the tort of negligence in these cases is consistent with, and prefigures, the judgment of McCarthy J. in *Ward -v- McMaster*[23] which accepts the speech of Lord Wilberforce in *Anns -v- Merton LBC* as the correct statement of Irish law on the question of duty of care. Thus, on the question whether the defendant owes a duty of care to the plaintiff, it is necessary to ask, firstly.

> whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.[24]

The recent Supreme Court decision in *Smith -v- CIE*[25] which proceeded on a concession to the effect that the law on occupiers' liability was based on the foreseeability and proximity test,[26] supplies a clue as to how this would apply in practice. Here, it was held that a trespasser was not on the facts reasonably foreseeable; even though he used a route on which some presence was foreseeable: his was not. Thus, a sophisticated approach to the principles of negligence would seem capable of drawing the necessary distinctions.

Indeed, this is the lesson to be learned from the Australian experience. The *ratio* of the leading case, *Australian Safeway Stores -v- Zalona*[27] may be expressed to be that:

> in an action for negligence against an occupier it is necessary to determine only whether in all the relevant circumstances, including the fact of the defendant's occupation of the premises and the manner of the plaintiff's entry upon them, the defendant owes a duty of care under the general principles of negligence. In other words, it is not necessary to consider whether a special duty is owed to a particular class of entrant.

However, if it is felt that the illustration provided by *Smith* and *Zalona* is not a sufficient reassurance to the landowner, it may well be that arguments like that of Lord Diplock in *Herrington* are acceptable as legitimate policy arguments on the second leg of the *Anns* principle. Certainly, the different genesis of the duty itself is significant. Echoing Lord Diplock, Lord Reid was of the opinion that "an occupier does not voluntarily assume a relationship with trespassers. By trespassing, they force a 'neighbour' relationship on him. When they do so he must act in a humane manner – that is not asking too much of him – but I do not see why he should be required to do more".[28] Lord Diplock's conclusions[29] from his equivalent starting point are worth quoting in full:

> First the duty does not arise until the occupier has actual knowledge of the presence of the trespasser on his land or of facts which make it likely that the trespasser will come onto his land; and has also actual knowledge of the condition of his land or of activities carried out on it which are likely to cause personal injury to the trespasser to make any enquiry or inspection to ascertain whether or not such facts so exist.
>
> Secondly, once the occupier has actual knowledge of such facts, his own failure to appreciate the likelihood of the trespasser's presence or the risk to him involved, does not absolve the occupier from his duty to the trespasser if a reasonable man possessed of the actual knowledge of the occupier would recognise the likelihood of that risk.
>
> Thirdly, the duty when it arises is limited to taking reasonable steps to enable the trespasser to avoid the danger. Where the likely trespasser is a child too young to understand or heed a written or a previous oral warning, this may involve providing reasonable physical obstacles to keep the child away from the danger.
>
> Fourthly, the relevant likelihood to be considered is of the trespasser's presence at the actual time and place of the danger to him. The degree of likelihood needed to give rise to the duty cannot, I think, be more closely defined than as being such as would impel a man of ordinary humane feelings to take some steps to mitigate the risk of injury to the trespasser to which the particular

> damage exposes him. It will thus depend on all the circumstances of the case . . .

This seems eminently fair. The rule is no more or less certain than the statute, and it flows from the distinction as to the genesis of the duty which the 1984 Act has chosen to preserve. *Smith* reaches a similar result, and thus suggests that the Irish courts are not in danger of ignoring this distinction.

One further significant point arises. The English statutes expressly recognise the defence of voluntary assumption of risk. If the English model were to be followed the question then arises as to whether Irish law should also adopt the English rules on this point or whether the much more restrictive Irish rules on the point in general should be applied. Certainly, a modified form of either might be appropriate in the context of trespassers. Although s. 34 (1) (b) of the Civil Liability Act, 1961 abolished the defence generally at Irish law, a result similar in effect is not beyond the bounds of judicial development, if it is argued and accepted that voluntary assumption of risk by the entrant in some circumstances serves to reduce or negative or limit the duty owed to him by the occupier within the meaning of the second leg of the *Anns* principle.[30] Indeed, in taking "all the circumstances of the case" into account, the Supreme Court in *Smith* almost achieves this position.

Conclusions

The emerging Irish system has one advantage and one disadvantage. The advantage is elegant simplicity. The disadvantage is that it can lead to injustice, or at the very least it can lead to the perception that it is unjust. In so far as the English model is rather less elegant but rather more just, at least in the context of trespassers, it commends itself to that extent as a model which may with profit be adopted. However, the common law, flowing from decisions such as *Zalona* (taking the step suggested in *Rooney -v- Connolly,* applying negligence principles to the law on occupiers' liability), *Smith,* (on the application of the first leg of the *Anns* principle), and *Herrington* (supplying policy arguments for the second leg of the *Anns* principle) probably constitutes, on balance, an even more suitable model. It will not freeze late twentieth century standards in the law in the same way as the old categories froze late nineteenth century categories in the law, and it is one which is well within the reach of our courts.

The abolition, in the 1957 Act, of different types of duty owed towards lawful visitors is to be welcomed and endorsed. The imposition of a duty towards a trespasser in *Herrington* and the 1984 Act was a justifiable development. The express statutory recognition of the defence of voluntary assumption of risk is a point which any statutory reform or judicial development of the law of occupiers' liability would have to address. Further, the curtailment of the heads of damage for which a trespasser may recover is a statutory restriction which could commend itself to statutory reform of the law in this area.

In conclusion, the House of Lords has emphasised that the occupier is not an insurer[31] in the sense that he is not required to insure against the whole world entering his premises. Whatever direction Irish law takes, it would do well always to keep this in mind as a guiding principle. Irish common law already shares much of the English position, and the remainder is well within the grasp of judicial development. However, it is this judicial development which has lead to a perception that the law is unfair on this issue. If statutory reform does come to pass, and all that is achieved by it is the codification of the existing position, (perhaps taking the opportunity of adding certain of the attractive features of the English legislation), and as a consequence, the misperception of potential injustice is dispelled, then it will be successful. □

FOOTNOTES

* Lecturer in Law, Trinity College, Dublin. This article is based on a paper presented to the IFA Occupiers' Liability Conference on April 8, 1992. Part 1 was published in *Gazette* Vol 86. No. 8 (October 1992) p. 303.

1. In cases such as *Purtill -v- Athlone UDC* [1968] IR 205; *McNamara -v- ESB* [1975] IR 1; *Foley -v- Musgrave,* Supreme Court, unreported, 20 December 1985; *Rooney -v- Connolly* [1986] IR 572; *Mullen -v- Quinnsworth* [1990] 1 IR 59. *Smith -v- CIE*]1991] 1 IR 314. See generally, McMahon and Binchy *Irish Law of Torts* (2nd. ed., Dublin, 1990), chapter 12.
2. Third Report of the Law Reform Commission, para. 77., cited in Salmond and Heuston *The Law of Torts* (19th ed., London, 1987) by Heuston and Buckley, at p.305.
3. For a recent Irish illustration, see *Dolan -v- Keohane,* High Court, unreported, 14 February 1992, Keane J.
4. Salmond and Heuston, *op. cit.,* p.321.
5. *Roles -v- Nathan* [1963] 1 WLR 1117, 1122.
6. *AMF International -v- Magnet Bowling* [1968] 1 WLR 1028.
7. *McGinlay -v- British Railways Board* [1983] 1 WLR 1427, 1434.
8. The Civil Liability Act, 1961, section 13 (1) (b).
9. *Smith -v- Charles Baker* [1891] AC 325; *Merrington -v- Ironbridge Metal Works* [1952] 2 All ER 1101; *White -v- Blackmore* [1972] 2 QB 651. See generally, Salmond and Heuston *op. cit.* pp; 556 et seq.
10. [1932] AC 562.
11. [1978] AC 728.
12. [1988] IR 337.
13. See cases cited in fn. 1 *supra.*
14. As for instance in *Smith -v- CIE* [1991] 1 314.
15. Salmond and Heuston, *op. cit.* p. 294.
16. *British Railways Board -v- Herrington* [1972] 1 All ER 749, 792. See also Lord Reid, *ibid,* at p. 758: "an occupier does not voluntarily assume a relationship with trespassers. By trespassing, they force a 'neighbour' relationship on him".
17. Salmond and Heuston, *op. cit.* p. 294.
18. *Ibid.* fn.49, citing: H.L. Deb., Vol. 443, col. 720.
19. *Id.,* citing: (1971) 45 Austin L.J. 531, 569.
20. [1968] IR 205.
21. [1975] IR 1.
22. [1986] IR 572.
23. [1988] IR 337 (S.Ct.), noted by Kerr in (1988) 10 *DULJ (n.s.)* 182. See also [1985] IR 29, (H.Ct.), *per* Costello J., noted by Murray in (1986) 8 *DULJ (n.s.)* 109. The case was followed on this point in *Sweeney -v- Duggan* [1991] 2 IR 274.

YMC – Representing the Concerns of a Young Profession

The work of the Younger Members Committee of the Law Society, which is currently reappraising its role, is described by Committee member *Pat Casey*.

Members of the Younger Members committee. Back row, l-r: John Campbell, Graham Hanlon, Jeremy Doyle, Ursula Condon, James MacGuill, Michael Nugent. Front row, l-r: John Shaw, Michael Lanigan (Chairman); Patricia Boyd and Robert Hennessy

Work of the Committee:

The bulk of the time of the Committee is spent on professional matters relevant to the younger members of the profession. Earlier this year the Committee organised meetings, in both Dublin and Cork, to discuss the Solicitors (Amendment) Bill 1991. Representations have been made to Council and the President of the Society expressing the serious concern of young solicitors and apprentices about aspects of the Bill. Two representatives of the Younger Members Committee have now been invited to sit on the sub-committee of the Council dealing with the Bill.

Members of the Committee also sit on other committees of the Law Society. The Committee has met with representatives of the Education Committee and has, for example, expressed concern, on behalf of apprentices, in relation to the recent changes in course fees.

The Committee has also encouraged the Law Society and the Public Relations Committee to adopt a more positive approach when dealing with politicians, the media and the public in general.

The Committee was recently involved in the staging of a joint conference with Northern Ireland Young Solicitors and the Society of Young Solicitors in Newcastle, Co. Down. Representatives from 26 Countries attended this conference and the largest attendance was from the Republic of Ireland.

The Committee recently staged seminars in Dublin and Cork on the theme: "Setting up in Practice in the 90s". (See page 353).

Social Matters

The Committee arrange a number of Social Activities for young solicitors and apprentices including an annual soccer blitz, table quizzes, etc.

Composition

A total of 19 sit on the Younger Members Committee, comprising of Council Members, nominees of local Bar Associations, committee members of SADSI and Society of Young Solicitors and other "volunteers"! The Committee meets at least once a month.

Review

The Committee is at present reappraising its role within the profession. Any solicitor or apprentice with views or comments is invited to contact the Chairman of the Younger Members Committee c/o, The Law Society. □

Reform of Occupiers' Liability?

– *(Cont'd from page 363)*

24. [1978] AC 728, 751.
25. [1991] 1 IR 314.
26. As a consequence the question whether the law should properly be regarded as based on these questions was "reserved for an occasion on which it is fully argued and may be necessary for decision. "*Id.* at p.319, *per* Griffin J.
27. (1987) 162 CLR 479, as explained by Mason CJ, Deane, Toohey and McHugh JJ in *Calin -v- Greater Union Organisation* (1991) 173 CLR 33, 38; see also *Hackshaw -v- Shaw* (1984) 155 CLR 614 and *Papatonakis -v- Australian Telecommunications Commission* (1985) 156 CLR 7.
28. *Herrington* [1972] 1 All ER at p. 758.
29. *Id.* at p. 796.
30. See generally on this point, Kidner "The variable standard of care, contributory negligence and *volenti*" (1991) 11 *Legal Studies 1.*
31. *McGinlay -v- British Railways Board* [1983] 1 WLR 1427, 1432.

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(Registrar of Titles)
Central Office, Land Registry, (Clarann na Talun), Chancery Street, Dublin 7.

18 November, 1992

Lost Land Certificates

William and Margaret Moroney, Knockloskeraun, Miltown Malbay, Co.Clare. Folio: 3108F; Land: Knockloskeraun; Area: 0.1r 33p. **Co. Clare.**

Peggy Flanagan, Folio: 19139; Land: Part of the land of Singland; Area: 0a 2r 5p. **Co. Limerick.**

Albert and **Eileen Moran,** Folio: 15745; Land: (1) Headford and (2) Headford; Area: (1) 24a 3r 13p, (2) 2r 3r 0p. **Co. Leitrim.**

Eamon McGoldrick, Loughanelteen, Calry, Co. Sligo. Folio: 15548; Land: Loughanelteen; Area: 8.395 hectares. **Co. Sligo.**

Patrick McCarron, Folio: 13625; Land: (1) Killgowan (part), (2) Latlorcan (part), (3) Latlorcan (part); Area: (1) 2a 2r 20p, (2) 2a 0r 0p, (3) 6a 3r 30p. **Co. Monaghan.**

Owen McKenna (deceased), Folio: 12425; Land: (1) Mullaghmore, (2) Drumbirn, (3) Drumbirn, (4) Drumbirn; Area: (1) 14a 2r 31p, (2) 31p, (3) 32p, (4) 18p. **Co. Monaghan.**

Turf Development Board, Folio: 100; Land: Part of the lands of Lea Beg; Area: 20a 2r 38p, **Co. Kings.**

Charles Herman, Folio: 7834; Land: Part of the lands of Carrowtrasna; Area: 19a 2r 2 p. **Co. Donegal.**

Michael and **Christina Carey,** Moyasta, Co. Clare. Folio: 6529; Land: (1) Gorraun, (2) Moanmore South; Area: (1) 9a 0r 32p, (2) 0a 2r 4p. **Co. Clare.**

Michael Columba Normoyle, Co. Clare **Edward B. Doyle,** St. Mary's, Marino, Dublin; **Timothy G. Moynihan,** St. Helen's, Booterstown, Co. Dublin. Folio: 25997; Land: Ballyurra; Area: 3a 2r 6p. **Co. Clare.**

Mary Sylver, Folio: 56244; Land: Kingstown, Glebe or Ballymaconry; Area: 2a 0r 0p. **Co. Galway.**

Most Rev. Dr. T. Morris; Rev. Michael Lee; Rev. James Ryan; Folio: 20783; Land: Part of the land of Mohober; Area: 1a 3r 2p. **Co. Tipperary.**

Most Rev. Jeremiah Kinane D.D.; The Rev. Thomas Morris D.D.; The Rev. Francis Ryan; Folio: 31335; Land: Kilfithmone; Area: 1a 0r 0p. **Co. Tipperary.**

Most Rev. Jeremiah Kinane D.D.; The Rev. Thomas Morris D.D.; The Rev. Francis Ryan; Folio: 22919; Land: Part of the lands of Moynetemple. **Co. Tipperary.**

Most Rev. Jeremiah Kinane D.D.; The Rev. Thomas Morris D.D.; The Rev. Francis Ryan; Folio: 29815; Land: Moynetemple; Area: 0a 0r 3p. **Co. Tipperary.**

Most Rev. Thomas Morris D.D.; Right Rev. Francis Archdeacon Ryan P.P.; Rev. Michael Russell D.C.L., Folio: 36186; Land: Clonoulty Churchquarters; Area: 0a 2r 8p. **Co. Tipperary.**

Most Rev. Thomas Morris D.D.; Rev. Michael Lee P.P.; Rev. James Ryan; Folio: 34865; Land: Ballingarry Upper; Area: 1a 0r 18p. **Co. Tipperary.**

Sylvester Murray, Folio: 4027; Land: A parcel of land with house thereon situate on the west side of David Road in the parish of St. George and District of Glasnevin reg. map plan 106, division 8 book no. 9 from folio 68. **Co. Dublin.**

Edward McCafferty (deceased); Folio: 7108 closed to 36720; Land: 1. Finner, 2. Finner; Area: 1. 6a 1r 13p, 2. 5a 2r 20p. **Co. Donegal.**

Laurence Walpole, Folio: 14948; Land: (1) Corrasra, (2) Belhavel, (3) Tullinlongham, (4) Leamaskelly; Area: (1) 9a 2r 33p, (2) 1a 2r 28p, (3) 2a 1r 39p, (4) 13a 2r 30p. **Co. Leitrim.**

Henry Kelly (deceased), Folio: 18796 and 17994; Land: (1) Annahean and (2) Annahean; Area: (1) 110a 2r 30p, (2) 11a 1r 25p. **Co. Monaghan.**

Evelyn Atkinson, Folio: 4803; Land: Carrigduff. **Co. Cork.**

Michael Gerard (otherwise Gerard) Morris Folio: (1) 6644, (2) 6787, (3) 11412; Land: (1) Carolina, (2) Killyvaghan, (3) Killyvaghan; Area: (1) 10a 0r 4p, (2) 13a 3r 2p, (3) 14a 3r 25p. **Co. Cavan.**

Michael McKenna, 11 Balbriggan Road, Skerries, Co. Dublin. Folio: 12858; Land: Townland: Townparks Barony: Balrothery East. **Co. Dublin.**

John Corcoran, Folio 4641; Land: Ferskill; Area: 71a 2r 30p. **Co. Longford.**

Kevin Gallen, Folio: 1167L. **Co. Kildare.**

Charles Orr Stanley (deceased), Folio: 10756; Land: Ahalisky and Monteen, **Co. Cork.**

Kenneth O'Donovan and **Noreen Walsh,** Folio: 19900F; Land: Ballymartle, **Co. Cork.**

Irish Tanners Limited, Folio: 429; Land: Part of the lands of Guilcagh; Area: 13a 2r 21p. **Co. Waterford.**

Eamonn M. Owens, Hillstreet, Carrick-on-Shannon, Co. Roscommon. Folio: 8366; Land: Killinaddan; Area: 7a 3r 22p. **Co. Roscommon.**

Margaret Kelleher, Dromod, Bodyke, Co. Clare. Folio: 4731; Land: Drummod; Area: 34a 3r 28p. **Co. Clare.**

Brian Cooling, 26 O'Moore Road, Dublin 10. Folio: 22921L; Land: 26 O'Moore Road, Parish of Saint Jude, District of Kilmainham. **Co. Dublin.**

Robert Dawson, 2 Elmwood Avenue, Ranelagh, Dublin 6. Folio: 18575; Land: 32 The Demesne, Killester, Dublin 5. **Co. Dublin.**

John Derby, Folio: 17086; Land: Hughes-lot East; Area: 1a 3r 0p. **Co. Tipperary.**

Gerard and **Veronica Feeney,** Graffymore, Rahens, Castlebar, Co. Mayo. Folio: 8611; Land: Fraffamore; Area: 18a 1r 0p. **Co. Mayo.**

Lost Wills

Mulcahy, William late of 3 Presentation Avenue, Cathedral Road, Cork. Will any person having knowledge of the whereabouts of a will of the above named deceased who died on 16 March, 1991, please contact Ahern Roberts O'Driscoll, Solicitors of Mill House, Carrigaline, Co. Cork. Telephone: 021-372034.

O'Kane, James (orse James Kane). Would any person who is or knows of any heirs of James O'Kane (otherwise James Kane) who died on 19 May, 1954, School Headmaster, (son of the late John O'Kane and Helen O'Kane and previously married to Agnes Killoran and Margaret Harper) please contact the undersigned, on or before 16 November, 1992. Matheson Ormsby Prentice, Solicitors, 3 Burlington Road, Dublin 4. (Ref. GCR/TG) Telephone: 01-760981.

Hamilton, Frederick Longmuir. Would any person who is or knows of any heirs of Frederick Longmuir Hamilton born on 28 December, 1982 (son of the late Joseph and Jane Hamilton) please contact the undersigned on or before 16 November, 1992. Matheson Ormsby Prentice, Solicitors, 3 Burlington Road, Dublin 4. (Ref. GCR/TG). Telephone: 01-760981.

Urbanic, Kathleen, deceased, late of 12, Temple Street, Sligo. Would any person having knowledge of the whereabouts of the original Title Deeds of 12, Temple Street or the will of the above named deceased who died on 12 August, 1992, please contact Mr. Thomas W. Enright, Solicitor, John's Place, Birr, Co. Offaly.

Swalbe, Elliott, deceased late of 34 Temple Hill, Terenure Road West, Terenure, Dublin 6W. Would any person having knowledge of the whereabouts of a will of the above named deceased who died on 7 September, 1992, contact Donal T. McAuliffe & Co., Solicitors, 57 Merrion Square, Dublin 2. Telephone: (01) 761283.

Lost Title Deeds

"Estate of Margaret Motherway", Rock Street, Cloyne, Co. Cork. Would anybody having knowledge of the whereabouts of the original title documents for the dwellinghouse at Rock Street, Cloyne, Co. Cork, the property of the late Margaret Motherway, please contact Messrs. James A. Sheridan & Co., Solicitors, Innygraga, Midleton, Co. Cork. Telephone: 021-631136. Ref: PJS/499.

Creevy Lands Limited: Would anyone having knowledge of the whereabouts of original Title Deeds of property known as 130 Ranelagh, Dublin 6, the title to which is vested in Creevy Lands Limited, please contact Mr. Sean Bourke, Solicitor, 9 Upper Fitzwilliam Street, Dublin 2.

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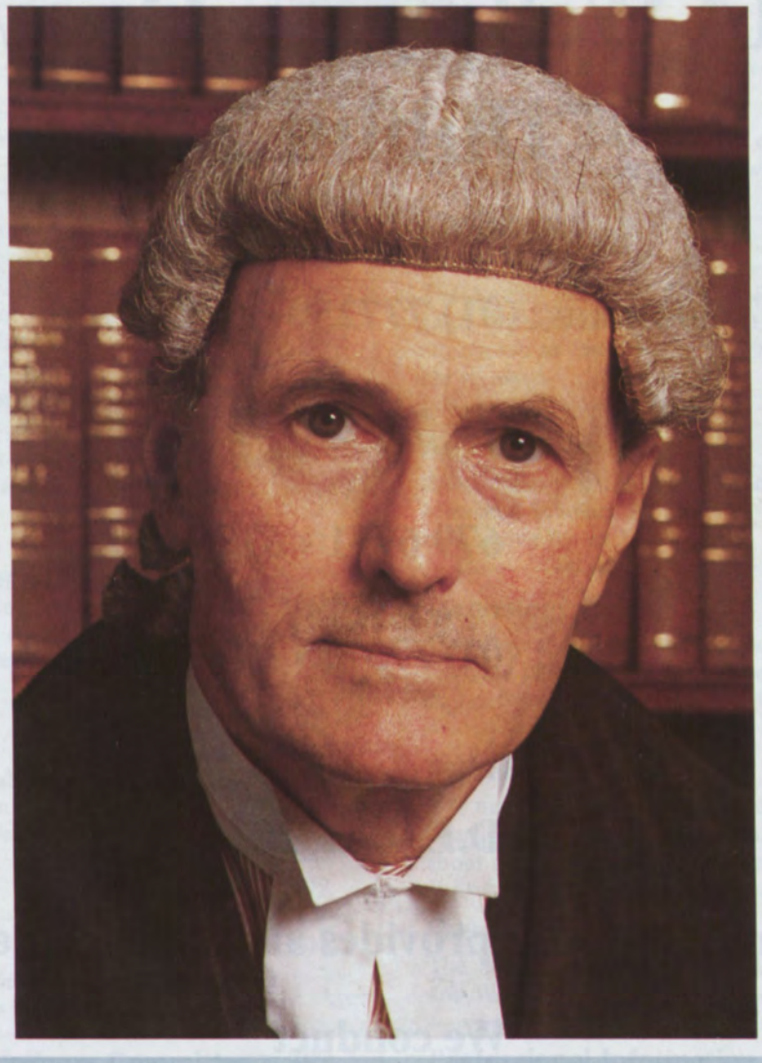

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Front Cover:
The Honourable Mr. Justice John Joseph Blayney who was appointed a Judge of the Supreme Court on 16 October last.

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Legal Agenda for New Government

As we go to press, discussions are underway on the formation of the new Government. Whatever its composition, it has an enormous task ahead of it to address the serious problems facing the country, particularly in the economic area, and we would take this opportunity of wishing it well in its work on behalf of the people.

While the primary focus of political activity over the next few years will undoubtedly be the unemployment problem, to which we all expect the incoming Government to devote the major share of its energies and talents, we feel, nevertheless, that it is important at this time to direct the attention of the incoming Government to the problems that legal practitioners face in their work on a day-to-day basis.

We think it is both opportune and timely, therefore, to suggest to the Government an agenda for action in the legal sphere over the coming year. The agenda we are putting forward does not necessarily reflect all the issues, but each of the items listed represents a problem that has been with us for some time and all are, to one degree or another, important to the legal profession and its ability to serve the public. It will be apparent that, should it prove possible to have action taken on these matters by the incoming Government, considerable progress would be made in our legal system, apart from any credit which would justifiably redound to the Minister(s) in question.

The priorities, as we would see them, are the following:

- **Substantial additional resources for the courts**
  It has become increasingly clear to us that the entire infrastructure supporting the courts service in this country is seriously underfunded and the system is now in crisis. We need more judges at every level, greater investment in support staff and technology in the court offices and a more coordinated and cohesive system of management in the courts to address the many problems that exist.

- **An improved Civil Legal Aid Scheme**
  During the course of the last twelve months, at least three major reports (including that of the Law Society) have pointed to the serious inadequacies in the civil legal aid scheme. There is an urgent need to broaden the scope of the Scheme, to make more people eligible to avail of it and allow greater choice by bringing in private practitioners. It is now thirteen years since the Scheme was established but it is not yet on a statutory footing. We would ask how long more can any Government, claiming to have a social conscience, condone this neglect and the denial of equality of access to justice that this scheme represents.

- **Solicitors to be made eligible to be judges of the higher courts**
  This matter has been the subject of a comprehensive submission from the Society to the Government in July of this year. We can think of no change that would lend greater impetus to further desirable changes in legal practice than this. This is a provision that *must* be included in the forthcoming Court and Court Officers Bill.

- **Changes in Solicitors (Amendment) Bill**
  It is to be expected that the new Government will bring forward the Solicitors (Amendment) Bill in due course. Some fundamental changes are needed to this Bill, including the removal of the objectionable provision which would allow banks and trust corporations to provide probate and conveyancing services, the provision which would make the Law Society liable for the cost of the office of the new Legal Ombudsman and the provision which would introduce fee advertising. In addition, it is essential that fundamental changes are made in relation to the Compensation Fund, including a provision which would place a legal limit or 'cap' on the level of claims that could be brought.

- **Withdrawal of some provisions of the Finance Act, 1992**
  This Act, which was introduced without consultation and with the minimum of consideration in the Dail, places an unacceptable burden on the legal profession and threatens the fundamental principle of solicitor/client confidentiality. We are calling on the Government to modify this Act by removing these objectionable features. No other issue has united the profession, or made it more determined, in recent years.

- **Major law reform programme**
  The new Government must give greater priority to law reform and should, as soon as possible, announce a major programme of law reform for the 27th Dail. Family law and criminal law are two priority areas. We will have more to say on this topic in the course of the life of the new Government. □

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All monies received by the Society are expended within the Republic of Ireland.

"Conquer Cancer Campaign" is a Registered Business Name and is used by the Society for some fund raising purposes. The "Cancer Research Advancement Board" allocates all Research Grants on behalf of the Society.

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★ **DRIVING TUITION FOR DISABLED PEOPLE**
★ **REPORT WRITING AND COURT APPEARANCE**

All of these services are available nationally through our Regional offices
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Irish Wheelchair Association,
Blackheath Drive, Clontarf, Dublin 3.
Tel: 01-338241/335366 Fax: 01-333873

★ Statistics say that **ONE PERSON IN EVERY TEN** becomes disabled at some stage in his/her lifetime - staggering !
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★ Please **REMEMBER US** when **ADVISING CLIENTS** on **WILLS** etc...

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Compensation Fund - the Realities

Legitimate concern among members of the profession as a result of recent publicity, some of it inaccurate, highlighting claims before the Compensation Fund requires comment.

As members are well aware the Society has a statutory obligation under the Solicitors Acts 1954/60 firstly to maintain a Compensation Fund at a minimum level of £25,000 and secondly, to make payments out of that Fund to any person sustaining loss in consequence of dishonesty on the part of a solicitor in connection with that solicitor's practice or in connection with any trust of which that solicitor is a trustee. The amount of the compensation must represent, in the opinion of the Society, full indemnity for such loss. In practice the Society maintains a Fund greatly in excess of its legal obligations and has to date never failed to pay out on any claim.

Thus the Fund provides a guarantee to the ordinary clients of solicitors and is a powerful testament to the decency and integrity of the vast majority of members of the profession. No other profession, in so far as I am aware, operates an open-ended Fund of this kind providing full indemnity and the profession should feel extremely proud of it. However, the sheer size of recent claims calls into question the whole concept of the Fund as it is structured at present.

Excluding the large claims which give rise to the present difficulty, the Compensation Fund has paid out since 1 January, 1980 a total of £4.7 million with annual payments increasing from £100,000 to over 10 times that amount within that period. At all times the Fund has been reinsured for a multiple of its actual size but, with its claims experience to date and the potentially large claims now threatened, the Society sees a real danger that reinsurance may become prohibitively expensive or not be possible from here on. The cost of such reinsurance has risen dramatically over recent years forcing the Society to scale down the level of reinsurance and it may well be that reinsurance will, in any case, not be cost effective.

Already a number of steps have been taken by the Society to deal with the problem of dishonesty in the profession and to modify the law relating to the Fund.

- The Society now has a total of seven full time investigating accountants whose sole function is to investigate solicitors' accounts and practices.

- Careful monitoring by the Society has increased compliance with the Accounts Regulations so that an average of 97% of solicitors each year have their accountant's certificates in order and furnished within the statutory period.

- At the Society's request cases prosecuted before the High Court by the Disciplinary Committee are now publicised and it is intended that the Society will from January, 1993 carry reports of the outcome of disciplinary cases in the form of legal-style reports in the *Gazette.*

- An amendment to the Solicitors Bill has been accepted whereby "clients" of Solicitors only rather than "persons" will have the protection of the Fund and claims will only be possible in future in respect of monies *entrusted* to a solicitor.

- A further amendment under negotiation by the Society seeks to impose a limit (cap) on any individual claim. This amendment has not yet been accepted by the Government.

Despite these efforts, the total amount of claims notified this year stands at £2.9m. From the information available at the moment the best estimate is that all proper and provable claims can be met in full out of the Fund and that for next year the annual contribution to the Fund will not be increased from this year's level of £475.

Nevertheless, the substantial increase in both the number and extent of current claims gives rise to serious concern. The time is ripe to investigate the principle on which the Fund was established almost 40 years ago, namely to protect the ordinary citizen, against the present circumstances whereby the law abiding members of the profession must carry the open-ended and continuous liability of guaranteeing a tiny minority involved in calculated and massive fraud. New concepts must be found to give effect to the original principle of the Fund while at the same time seeking to make its operation fair and equitable.

As promised, I have established a Compensation Fund Policy Review Committee under the Chairmanship of the Junior Vice-President, *Laurence Shields,* to carry out a wide ranging investigation of the Fund and its present constitution and operation and to examine possible options which might lead to new concepts. The membership has been chosen to be as representative as possible with both a mixture of firms and sole practitioners, urban and rurally based. This Committee has its first meeting in early December and will be happy to take on board any views or suggestions any member might have. Members are requested to forward their views in writing to the Secretary of the Committee, *Mary Keane,* at Blackhall Place. □

MAKING A WILL?

PLEASE REMEMBER THE

SOLICITORS BENEVOLENT ASSOCIATION

The following is the text of a suitable bequest:

I GIVE DEVISE AND BEQUEATH THE SUM OF

£ _____

To the trustees for the time being of the Solicitors Benevolent Association, c/o The Law Society, Blackhall Place, Dublin 7 for the charitable purposes of the Association in Ireland and I direct that the receipt of the Secretary for the time being of the Association shall be sufficient discharge for my executors.

Law Society Council 1992 - 1993

The newly elected Council of the Society for 1992 - 1993 held its first meeting on 13 November last. The members of the Council elected *Raymond T. Monahan* as President, *Michael V. O'Mahony* as Senior Vice President and *Laurence K. Shields* as Junior Vice President.

The newly elected President, *Ray Monahan,* paid a warm tribute to his predecessor and said that *Adrian Bourke* had led the profession throughout his year in office with great distinction, panache, energy, elegance and charm. No one could have done more for the Society or done better. The newly elected President went on to outline his priorities for the coming year, among them: continuing to pursue the Society's objectives concerning the Solicitors Bill, a review of the workings and operation of the Compensation Fund, a review of the issue of both standards and numbers in the education system, a campaign to highlight the whole under-resourcing and neglect of the administration of justice in this country and many other issues.

Charter for Civil Legal Aid
The Council decided to lend its support to the Charter for Civil Legal Aid which was recently published by the Legal Aid Alliance.

Education
The Council approved three statutory instruments. The first dealt with increases in apprentices' fees. Members of the Council requested that all students in the Law School should be fully informed immediately of the increases and the rationale behind them. The second statutory instrument dealt with certain technical amendments concerning the apprenticeship and education regulations and the third amended these regulations to increase the number of subjects to be examined in the Final Examination-First Part from six to eight subjects.

Council Committee 1992
The composition of the various Standing Committees and Committees of the Council for 1992 was circulated and is published below.

Council Elections 1992/1993
The list of members of the Council of the Society for 1992/1993 is also published below. In the case of elected members, the number of votes they received in the ballot is recorded in brackets after each name. The total number of valid voting papers received was 2375.

(For year ending 12 November, 1993)

President: Raymond Monahan (deemed elected)
Vice Presidents:
Senior: Michael O'Mahony (1,037)
Junior: Laurence Shields (967)

Donal Binchy (1,118)
Owen Binchy (847)
Adrian Bourke (1,262)
Niall Casey (920)
Geraldine Clarke (931)
Stephanie Coggans (739)
Francis Daly (865)
Anthony Ensor (1,144)
John Fish (813)
Barry Galvin (1,243)
Patrick Glynn (802)
Gerard Griffin (789)
Maeve Hayes (840)
Michael Irvine (999)
Philip Joyce (750)
Elma Lynch (869)
Stephen Maher (758)
Brian Mahon (843)
Ken Murphy (1,072)
James MacGuill (756)
Patrick O'Connor (980)
Frank O'Donnell (962)
Moya Quinlan (1,196)
John Shaw (1,111)
Brian Sheridan (786)
Andrew Smyth (812)
Michael Staines (864)
Eva Tobin (992)

Dublin Solicitors Bar Association
David Walley
Gerry Doherty
Justin McKenna

Southern Law Association
Justin Condon
Cormac O'Hanlon
Ernest Cantillon
Tim Lucey – North Cork
Fergus Appelbe – West Cork

The Law Society of Northern Ireland
Patrick Duffy
Anthony McGettigan
G. Andrew Carnson
Margaret Elliott
William Cumming

Provincial Delegates
Connaught – Edward McEllin
Leinster – John Harte
Munster – Angela Condon
Ulster – Peter Murphy

Past Presidents: entitled to sit on Council pursuant to rule 6(20) of the Society's bye-laws:
Brendan Allen
Walter Beatty
Bruce St. John Blake
John Carrigan
Anthony Collins
Laurence Cullen
Maurice Curran
Joseph Dundon
Gerald Hickey
Michael Houlihan
John Maher
Ernest Margetson
William Osborne
David Pigot
Peter Prentice
Thomas Shaw

Disciplinary Committee

(Appointed by the President of the High Court)

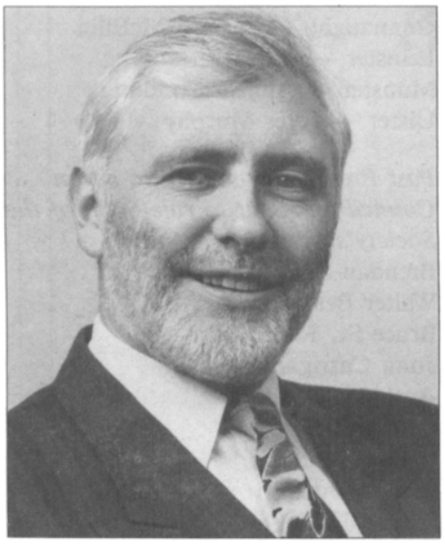
Walter Beatty (Chairman),
Moya Quinlan (Vice-Chairman),
Brendan Allen,
Terence Dixon,
Michael Hogan,
Donal Kelliher,
Elma Lynch,
William Osborne,
Grattan d'Esterre Roberts,
Andrew Smyth,

Standing Committees

Compensation Fund

Edward McEllin (Chairman),
Barry St. J. Galvin (Vice-Chairman),
Ernest Cantillon,
Gerard Griffin,
John Harte,
Maeve Hayes,
Michael Irvine,
James MacGuill,
Brian Mahon,
Frank O'Donnell,
Cormac O'Hanlon,
Michael O'Mahony,
John Shaw,
David Walley.

David Walley



David Walley who has just completed a year as President of the Dublin Solicitors Bar Association, is one of the DSBA'S nominees on the Council for 1992 - 1993. David, who was admitted to the roll in 1978, has practised on his own since 1987. He says his main objective for the coming year is to ensure that the sole practitioner has a say and is represented on the Council.

Education

Patrick O'Connor (Chairman),
Brian Mahon (Vice-Chairman),
Anthony Ensor,
Justin McKenna,
Stephen Maher,
Ken Murphy,
John Shaw.

Finance

Geraldine Clarke (Chairman),
Andrew Smyth (Vice-Chairman),
Donal Binchy,
Adrian Bourke,
Francis Daly,
Patrick Glynn
Stephen Maher,
Raymond Monahan,
Edward McEllin,
Patrick O'Connor,
Frank O'Donnell,
Michael O'Mahony,
Moya Quinlan,
Laurence Shields.

Policy

Raymond Monahan (President),
Michael O'Mahony (Senior Vice-President),
Laurence Shields (Junior Vice-President),
Donal Binchy,
Adrian Bourke,
Geraldine Clarke,
Maeve Hayes,
Philip Joyce,
Edward McEllin,
Patrick O'Connor,
Frank O'Donnell,
Moya Quinlan.

Public Relations

Maeve Hayes (Chairman),
Justin Condon (Vice-Chairman),
Niall Casey,
Geraldine Clarke,
Stephanie Coggans,
Francis Daly,
Gerard Griffin,
Philip Joyce,
James MacGuill,
Brian Sheridan
Eva Tobin.

Registrar's

Philip Joyce (Chairman),
Ken Murphy (Vice-Chairman),
Owen Binchy,
Niall Casey,
Geraldine Clarke,
Angela Condon,
Anthony Ensor,
John Fish,
Patrick Glynn,
Tim Lucey,
Peter Murphy,
Michael Staines.

Stephanie Coggans

Stephanie Coggans is a newly-qualified member of the profession and has been practising with the firm Wells & O'Carroll since February, 1992. She sought election to the Council because of the under-representation on the Council of younger members who now form the majority of the profession. She says it is important for new ideas and new blood to be brought onto the Council and that the Council itself be made more accessible to the members of the Law Society. Over the coming year she would like to contribute to the work of improving the image of the profession in the eyes of the public which, she says, is "terrible" at the moment.

Non-Standing Committees

Arbitration

Andrew Smyth (Chairman),
Peter Murphy (Vice-Chairman),
Timothy Bouchier-Hayes,
Michael Carrigan,
Bernard Gogarty,
Frank O'Donnell,
David Pigot,
Brendan Walsh.

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Angela Condon

Angela Condon is the newly-appointed provincial delegate for Munster, replacing *Mary O'Halloran* who was recently appointed a District Judge. Angela has been practising with her father since 1973 in Killorglin and also in Cahirciveen since 1987 in the firm of J.B. Crowley & Co. Her major concern, she says, is to seek a softer regime than the existing penalties applied by the Revenue Commissioners for late payment of stamp duties and inheritance tax. She says this militates severely against many people in her part of the country who simply are not aware of these provisions. She is also very concerned about the threat to solicitor/client confidentiality posed by Part VII of the Finance Act, 1992 and fully supports the Council's tough stance on the issue.

Blackhall Place Development Plan: Fund-Raising

Adrian Bourke (Chairman),
Anthony Ensor (Vice-Chairman),
Richard Bennett,
Geraldine Clarke,
Stephen Maher,
Ernest Margetson,
Raymond Monahan,
Patrick O'Connor,
Michael O'Mahony,
Laurence Shields.

Company and Commercial Law

Cormac O'Hanlon (Chairman),
Gerald FitzGerald (Vice-Chairman),
David Beattie,
Neil Breheny,
Gerard Coll,
Anthony Collins,
Paul Dobbyn,
Paul Egan,
Robert Hennessy,
Michael Irvine,
William Johnston,
John King,
Clare Leonard,
Patricia McGovern,
Brian O'Connor,
Alvin Price,
Mark Ryan.

Conveyancing

Owen Binchy (Chairman),
Colm Price (Vice-Chairman),
Fergus Appelbe,
Vivienne Bradley,
Brid Brady,
John Buckley,
Eric Brunker,
Eugene Cush,
William Devine,
Paddy Fagan,
Brian Gallagher,
Maeve Hayes,
Richard Joyce,
Michael Mullaney,
Kieran Murphy,
Brendan McDonnell,
Rory O'Donnell,
Robert Potter-Cogan.

Criminal Law

Michael Staines (Chairman),
James MacGuill (Vice-Chairman),
Ernest Cantillon,
Barry Donoghue,
Padraic Ferry,
Noel Ryan,
Garrett Sheehan.

EC & International Affairs

John Fish (Chairman),
Michael Irvine (Vice-Chairman),
John Buckley,
Anthony Burke,
Anthony Collins,
Angela Condon,
John Larkin,
Philip Lee,
Tim Lucey,
Petria McDonnell,
Arthur Moran,
Julie Sadlier,
Brian Sheridan,
Donncadh Woods.

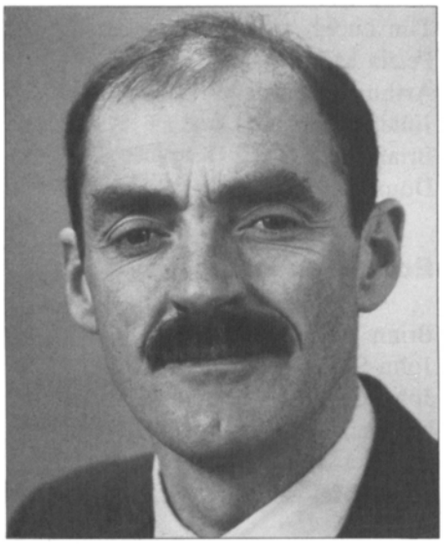
Education Advisory

Brian Mahon (Chairman),
John Shaw (Vice-Chairman),
John Costello,
Noeleen Blackwell,
Michael Irvine,
Justin McKenna,
Dudley Potter,
Brian Sheridan,
Liam Young.

Fergus Appelbe

Fergus Appelbe was nominated to the Council by the West Cork Bar Association and is the Association's current President. He has been practising since 1969 and has been a partner in P.J. O'Driscoll & Sons since 1972. "My main concern is to streamline the conveyancing procedure which in my opinion has become very cumbersome," he says. "In particular, something must be done to improve the situation concerning the proofs required under the Family Home Protection Act. The Act is now sixteen years old and reform is badly needed."

Michael Staines



Michael Staines has been practising since 1976 and in 1985 formed the firm Michael J. Staines & Co. As a new member of the Council he is looking forward to representing the particular concerns and objectives of criminal lawyers and to upgrading their status both within the Law Society and generally in the profession. As Chairman of the Criminal Law Committee, he hopes "to secure adequate payment for solicitors who attend at Garda Stations, to secure an upgrading of the Attorney General's Scheme and to put forward the views of criminal law practitioners on all criminal law legislation that is brought forward."

Family Law and Civil Legal Aid

Moya Quinlan (Chairman),
Brian Sheridan (Vice-Chairman),
Donal Binchy,
Eugene Davy,
Mary Devlin,
Joseph Dundon,
Rosemary Horgan,
Pauline O'Reilly,
Des Rooney.

Gazette

Eamonn Hall (Chairman),
Elma Lynch (Vice-Chairman),
John Buckley,
Justin McKenna,
Michael O'Mahony,
Noel Ryan,
Barbara Cahalane (Editor).

Litigation

Gerard Doherty (Chairman),
John Reidy (Vice-Chairman),
Bruce St. J. Blake,
James Cahill,
John Campbell,
Justin Condon,
Orla Coyne,
Joseph Deane,
Ivan Durcan,
Patrick Groarke,
Joseph Kelly,
Noel McDonald,
Eugene O'Sullivan,
David Pigot,
Gary Rice,
Michael Tyrrell.

Parliamentary

Anthony Ensor (Chairman),
Ken Murphy (Vice-Chairman),
Fergus Appelbe,
Donal Binchy,
Owen Binchy,
Stephanie Coggans,
Justin Condon,
John Fish,
Barry St. J. Galvin,
Elma Lynch,
James MacGuill,

Practice Development/ Continuing Legal Education

Justin McKenna (Chairman),
Dominic Dowling (Vice-Chairman),
Fred Binchy,
John Glynn,
Frank Lanigan,
Brian Mahon,
Patrick O'Connor,
Brian O'Reilly,
Robert Pierce.

Premises

Stephen Maher (Chairman),
William Jolley (Vice-Chairman),
Adrian Bourke,
Anthony Ensor,
Carmel Killeen,
Elma Lynch,
Justin McKenna,
Patrick O'Connor,
Moya Quinlan,
Eva Tobin.

Stephen Maher

Family tradition and a deep interest in the buildings at Blackhall Place were the factors that motivated newly-elected member, *Stephen Maher,* to seek a seat on the Council. His father, John Maher, served on the Council for forty years and was President of the Society in 1964-65, while Stephen, himself, has been an active member of the Premises Committee for a number of years and will serve as its Chairman this year. "It is an issue of great importance to me that members would be satisfied with the facilities available to them both at Blackhall Place and in the Four Courts office," he says.

Professional Purposes

John Harte (Chairman),
Eva Tobin (Vice-Chairman),
Owen Binchy,
Ernest Cantillon,

Niall Casey,
Gerard Doherty,
Michael Irvine,
Tim Lucey,
Carmel Killeen,
Peter Murphy,
Cormac O'Hanlon,
Michael Staines,
Frances Twomey.

Publications/Library

John Buckley (Chairman),
Garret Gill (Vice-Chairman),
Walter Beatty,
Michael Carrigan,
William McGuire,
Michael O'Mahony,
Michael O'Sullivan.

Remuneration/Costs

Gerard Griffin (Chairman),
Niall Casey (Vice-Chairman),
Richard Bennett,
Laurence Cullen,
John Dillon-Leetch,
Philip Joyce,
Frank Lanigan,
Frank Murphy,
Noel Ryan,
Susan Stapleton.

Solicitors Retirement Fund

Gerard Hickey (Chairman),
Anthony Collins (Vice-Chairman),
Walter Beatty,
Donal Binchy,
Geraldine Clarke,
Maurice Curran,
Gordon Holmes,
Ernest Margetson,
Noel Ryan,
Patrick Treacy.

Staff Retirement Fund

Maurice Curran (Chairman),
Geraldine Clarke (Vice-Chairman),
P. J. Connolly,
Patrick Glynn,
Ernest Margetson,
Noel Ryan.

Solicitors Acts

Maurice Curran (Chairman),
Donal Binchy (Vice-Chairman),
Adrian Bourke,
Anthony Collins,
Joseph Dundon,
Gerard Griffin,
Patrick Glynn,
Philip Joyce,
Ernest Margetson,
Edward McEllin,
Patrick O'Connor,
Michael O'Mahony,
Laurence Shields,
John Shaw,
Andrew Smyth.

Taxation

Francis Daly (Chairman),
Desmond Rooney (Vice-Chairman),
Walter Beatty,
Donal Binchy,
Brian Bohan,
Adrian Bourke,
Padraig Burke,
Caroline Devlin,
David Donegan,
Ciaran Keys,
Peter Maher,
Tom Martyn,
Paul McNally,
Eugene O'Connor,
John O'Connor,
Michael O'Connor,
Paul Smyth.

Technology

James Heney (Chairman),
Michael Browne (Vice-Chairman),
Harry Barry,
Colman Curran,
Frank Nowlan,
John O'Donnell,
Michael O'Sullivan,
Seamus Toomey,
David Walley.

Younger Members

John Shaw (Chairman),
Orla Coyne (Vice-Chairman),
John Campbell,
Pat Casey,
Stephanie Coggans,
Pat Crowley,
Graham Hanlon,
Robert Hennessy,
Rosemarie Loftus,
James MacGuill,
Eva Tobin,
Michael Nugent. □

Medico-Legal Society Programme 1992-1993

The Medico-Legal Society has published details of its programme for 1993.

Thursday, 21 January, 1993
The Role of the Expert Witness
Speaker: *Barry White,* SC

Thursday, 25 February, 1993
Psychiatric Problems in Prison
Speaker: *Dr. Charles Smith,* Director, Central Mental Hospital, Dundrum.

Thursday, 25 March, 1993
Involuntary Admissions to Psychiatric Hospitals
Speaker: *Tom Cooney:* Irish Council of Civil Liberties, and *Professor Tom Fahey,* Department of Psychiatry, University College Hospital, Galway.

Lectures take place at 8.30 pm at the United Service Club, St. Stephen's Green, Dublin 2.

Membership of the Society is open to members of the medical and legal professions and to others especially interested in medico-legal matters. The current annual subscription is £10.00 and proposal forms and full details may be obtained from *Mary McMurrough Murphy,* BL, at 2 Whitebeam Road, Clonskeagh, Dublin 14. Telephone: 2694280 or at the Law Library, Four Courts, Dublin 7. Telephone: 720622.

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1992 Planning Act – New Time Limits

The Conveyancing Committee of the Law Society has for many years been urging on the Department of the Environment the need to put a limit on the times within which enforcement notices or warning notices under the Planning Act could be served. Particularly in relation to change of use, the absence of any time limit meant that solicitors for vendors and purchasers were obliged to pursue detailed enquiries as to the use to which particular properties have been put for the entire period from 1 October, 1964 to date. A recommendation that time limits be imposed was also made by the Law Reform Commission in its Report Land Law and Conveyancing Law (1) General Proposals published in 1989.

The Conveyancing Committee is glad to report that its representations to the Department of the Environment were favourably received by the Department and following consultation with representatives of the Conveyancing Committee, time limits have now been introduced by the 1992 Planning Act. The provisions relating to the time limits are quite complicated and the Conveyancing Committee is much obliged to *John Gore Grimes,* for the preparation of the note on this matter which follows.

Summary of Time Limits

In relation to Enforcement Procedures Under Section 19 of the Local Government (Planning and Development) Act, 1992

1. Section 31 of the 1963 Act provides that an Enforcement Notice under that section must be served by the Planning Authority:

   (a) within five years of such development being carried out where no Permission was granted;

   (b) within five years of the "appropriate date" in a case where there has been non-compliance with a condition in a Planning Permission. The "appropriate date" means:

   (i) either the date specified in the Grant of Planning Permission within which time the work must be carried out in order to achieve compliance with the Condition, or;

   (ii) if there is no such date in the Grant of Planning Permission specifying a time limit for compliance with the Condition then within five years of the date for completion specified in a Notice (often referred to as a "latest date" Notice, which is not to be confused with an Enforcement Notice) served on the offending party by the Local Authority requiring compliance with the Condition.

   Section 19 of the 1992 Act adds a new provision which provides that the "latest date" notice, as opposed to the Enforcement Notice, to be served by the Planning Authority seeking compliance with a Condition, must be served:

   (i) in the case where a Condition in a Planning Permission is not complied with – within the life of the Planning Permission which is normally five years from the date of grant (see section 2 of the 1982 Act) or such additional time as may be allowed under section 4 of the 1982 Act.

   (ii) If the Condition which is not complied with is contained in a Retention Permission – within a five year period from the date of issue of the Retention Permission.

2. Section 32 of the 1963 Act also contained its own five year time limit and time started to run after the "appropriate date". The "appropriate date" in that case is either the date specified in the Permission for Retention by which time the Condition must be complied with or, if there is no such date, an Enforcement Notice must be served within five years of the date specified in the "Latest Date" Notice served by the Planning Authority requiring compliance with the Condition.

   Section 19 of the 1992 Act provides that the "Latest Date" Notice requiring compliance with the Condition in the Retention Permission must be served within five years from the date on which the Retention Permission issued.

3. In relation to both sections 31 and 32 of the 1963 Act, section 19, (1) (c) of the 1992 Act also provides that the time limit under sub section s.19 (1) has effect in relation to Conditions which have not been complied with before or after the commencement of the sub section namely 19 October, 1992.

4. Section 35 of the 1963 Act did not provide any time limit for the service of Enforcement Notices. However, under that section, because of the wording of the section, the Enforcement Notice could only be served on the person who has carried out or is carrying out the Development. Section 19 of the 1992 Act now provides that the Enforcement Notice under section 35 must be served within the lifetime of the Permission, that is to say within

five years of the date of Grant of Permission or such greater period as may have been specified in the permission (see section 2 (3) of the 1982 Act) or such extended period as may be granted under section 4 of the 1982 Act.

5. Before leaving the enforcement provisions of the 1963 Act reference should be made to prosecutions under section 24 (3). Prosecutions are in fact rarely instituted under this sub section, the planning authorities tending to rely either on Enforcement Notices served under the 1963 Act or Warning Notices served under the 1976 Act. Proceedings on indictment would of course be instituted by the Director of Public Prosecutions and it is believed that he would have a reluctance to institute proceedings by indictment after 5 years or more had elapsed at a time when no Enforcement Notice or Warning Notice could be served, unless the offence was a very serious one.

   A summary prosecution could only be brought after 5 years under the provisions of Section 9 of the 1982 Act (as amended by Section 20 of the 1992 Act) where the Judge is satisfied that the facts constituted a minor offence, the Director of Public Prosecutions consents and the defendant does not object to a summary trial. It is apprehended that the risk of prosecutions being instituted under section 24 (3) of the 1963 Act in the vast majority of cases must be extremely remote.

6. Section 26 of the 1976 Act prescribed no time limit within which a Warning Notice under that section may be served. There are three circumstances where the section 26 Warning Notice (as amended by section 19 of the 1992 Act) may be served namely;

   (a) Where it appears that land is or is likely to be developed in contravention of section 24 of the 1963 Act.

   (b) Where it appears that any unauthorised use is being made or is likely to be made of land.

   (c) Where it appears that any tree or other feature (whether structural or natural) or any other thing, the preservation of which is required by a Condition subject to which a Permission for the development of any land was granted, may be removed or damaged.

   Section 19, sub-section (4) (e) of the 1992 Act provides:

   "A Warning Notice in relation to any unauthorised use of land shall not be served after the expiration of a period of five years beginning on the day on which such unauthorised use first commenced".

   Section 19 applies a time limit to paragraph (b) only of the above three circumstances in which a Warning Notice may be served. No time limit is provided in the circumstances envisaged by paragraph (a) above but it is clear that under paragraph (a) a Warning Notice cannot be served after the completion of the development. Also, there is no time limit provided for the service of a Warning Notice in circumstances envisaged by paragraph (c) above.

7. Section 27 of the 1976 Act has been re-written into section 19 of the 1992 Act by sub-section (4) (a) and there are subtle and effective changes. There are two circumstances in which a planning injunction may be sought under section 27 (as amended by section 19 of the 1992 Act) namely:

   Sub-section 1

   (a) Where development of land being development for which permission is required under Part 4 of the Principal Act *has been carried out* or is being carried out without such permission;

   or

   (b) An unauthorised use is being made of land.

   The High Court or the Circuit Court may on the application of a Planning Authority or any other person, whether or not that person has an interest in the land, by Order require any person to do or not to do or to cease to do as the case may be anything that the Court considers necessary and specifies in the Order to ensure as appropriate:

   (a) that the development or unauthorised use of land is not continued;

   (b) in so far as is practicable that the land is restored to its condition prior to the commencement of the development or unauthorised use.

   Section 19 of the 1992 Act allows injunctions to be taken in the Circuit Court as well as the High Court. The Court is now empowered to make an Order to stop the development or the unauthorised use and, as far as practicable, to restore the land to its condition prior to the commencement of the development or unauthorised use. Under the provisions of the 1976 Act in section 27 sub section 1, the Court could merely prevent the continuation of a wrongful state of affairs but it did not have the jurisdiction to order the knocking down of unauthorised buildings or the carrying out of any other steps which it might think appropriate.

   The new section 27 procedure under section 19 of the 1992 Act, permits an application for a planning injunction to be made *even though the development has been completed.*

   Sub-section 2

   Sub-section 2 of section 27 of the 1976 Act, as now amended by section 19 of the 1992 Act, allows for an application to be made for a planning injunction in cases where

development is proceeding which is authorised by Permission granted under Part IV of the 1963 Act but which has not been or is not being carried out in conformity with the Permission because of non compliance with the requirements of a Condition attached to the Permission or for any other reason. Again, application can be made either to the High Court or to the Circuit Court.

Section 19 of the 1992 Act has effectively abolished the old distinction which existed between sub-section 1 cases and sub-section 2 cases under section 27 of the 1976 Act.

The time limits applying to section 27 may be summarised as follows:

(A) application for injunction to the High Court or to the Circuit Court in relation to development carried out without Permission shall not be made once five years have passed from the date on which the development was substantially completed.

(B) application for injunction to the High Court or to the Circuit Court in relation to an unauthorised use where no Planning Permission at all has been obtained for the change of use shall not be made after five years from the date when the use first commenced, no matter whether the use commenced on or before 1 January, 1994 (the date on which paragraph (g) of s.19 (4) comes into operation. (Commencement order S.I. No. 221/1992) The effect of this will be that the five year period will in some cases already have expired, but an application for an injunction can still be brought before 1 January, 1994.

(C) application for injunction to the High Court or to the Circuit Court in relation to authorised development where there is non compliance with the Condition cannot be made after the expiration of five years. The five year period starts to run at the end of the life of the Planning Permission that is to say, in a normal case, the five year period provided for under section 2 of the 1982 Act or such greater period as may have been prescribed or such extended period as may be allowed under sections 2 and 4 respectively of the 1982 Act. The effect of this will be that the five year period will in some cases already have expired, but an application for an injunction can still be brought before 1 January, 1994.

John Gore-Grimes

Insider Dealing

The attention of practitioners is drawn to the provisions of Statutory Instrument No. 131 of 1992. This Statutory Instrument takes the form of a declaration expressed to be for the purposes of "the removal of doubt" that section 108 of the Companies Act, 1990 does not apply to dealing outside the State in securities. Section 108 is the basic provision under which insider dealing is made unlawful. Accordingly, it appears that even where the securities being dealt in are Irish securities and/or the parties to the dealing are Irish, an insider dealing effected outside the State is not unlawful for the purposes of the 1990 Act and will therefore not attract the civil liability provided for in Section 109 of that Act."

Company and Commerical Law Committee

Independent Medical Examination of Plaintiffs

The Litigation Committee has sent the following letter to the Irish Medical Council:

"Dear Sir,

Independent medical examinations of a plaintiff by a doctor or consultant on behalf of the defendant is an established practice in litigation where a plaintiff is seeking compensation for injury suffered allegedly at the hands of the defendant(s) his/their servants or agents. Such independent medical examinations are carried out in consultation with the plaintiff's doctor or consultant. Formerly, the practice was for the plaintiff's doctor or consultant to be physically present at such an examination. In recent years, that practice has largely been departed from and more commonly the defendant's doctor or consultant consults with the plaintiff's doctor or consultant by telephone or by post prior to the examination taking place. In these circumstances, the plaintiff is examined alone by the consultant or doctor for the defendant.

The function to be discharged by the defendant's doctor or consultant is to establish the nature and extent of the injuries allegedly sustained by the plaintiff and it is well established that no question should be asked of the plaintiff during the course of the examination the answer to which might have a bearing on the issue of liability between the parties to the litigation. The reason for this is that the proper forum for the establishment of the facts and the determination of the issues is the court.

A number of communications have been received in recent times from solicitors concerned that at such examinations questions are occasionally asked which have a bearing on the liability issue. It is appreciated that a thin line divides categories of questions directed to establish what the nature and the extent of the injuries are from questions touching on the liability issue, but it is precisely because the defendant's doctor or consultant must confine himself to the former that consultation with the plaintiff's doctor or consultant is an essential part of the procedure whereunder independent medical examinations are carried out.

The Litigation Committee of the Law Society considers that as far as is reasonably practicable, all questions should be put by the defendant's doctor or consultant to the plaintiff's doctor or consultant who is better qualified than the plaintiff to distinguish between questions concerning the nature and extent of injuries from questions which touch on the liability issue. We would accordingly appreciate it if you would bring to the attention of your members this Committee's concern that questions and discussions between the defendant's doctor or consultant and the plaintiff should be confined only to establishing the nature and extent of the injuries and limiting discussion generally to a minimum. We would emphasise that the doctor or consultant representing the plaintiff is expected to provide full and frank details of the injuries to this colleague. In a word, it is both appropriate and expedient that questions to be raised by the defendant's doctor or consultant should be directed to the plaintiff's doctor or consultant and that only where it is essential that any questions at all should be directed to the plaintiff himself.

We trust that you and your members will understand the concern of solicitors for their plaintiff client's interests in connection with such examinations, especially where some clients are unsophisticated and ill-equipped to deal with questions in circumstances where additionally they may feel vulnerable and disadvantaged."

Litigation Committee

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VAT Transitional Changes Update/Reminder

The Taxation Committee would like to correct an error in their article which was published as an insert in the November *Gazette* in relation to the date upon which bills should issue to avail of the three VAT periods. Practitioners should note that in relation to any bill which should issue in January it may be appropriate to allow same to issue in December thus availing of the three VAT payment dates.

The Taxation Committee would also like to draw attention to paragraph 21 of the Statement of Practice (SP-VAT 16/92) entitled "Moneys Received Basis of Accounting", issued by the Revenue Commissioners wherein it is stated that application to local inspector of taxes is necessary to obtain the concessions by the Revenue Commissioners and therefore practitioners availing of this facility will have to justify this approach to the inspector. □

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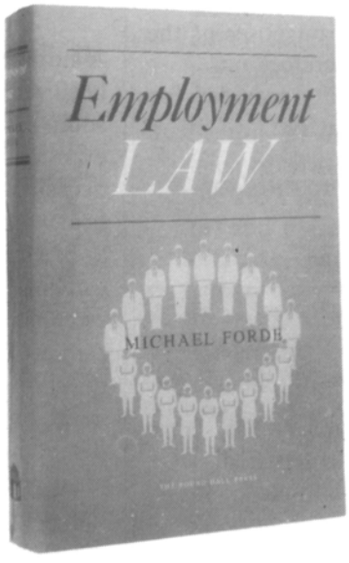

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Liability to Maintain

by Mel Cousins BL

This article examines the liability to maintain provisions in the Social Welfare code in the light of recent amendments in the Social Welfare Act, 1992.[1]

Introduction

The introduction by the Minister for Social Welfare in November, 1990 of the lone parent's allowance and of the liability to maintain provisions has led to an important shift in the balance between public and private support for lone parents. Support can come either from the public authorities by way of social welfare payments or privately by way of maintenance from (ordinarily) the father/husband. Prior to November, 1990, the primary onus was on private support and it was only where efforts to enforce the maintenance obligation failed that the Department of Social Welfare would step in to provide public support. Following the recent changes, the primary responsibility remains, in theory, on private support. However, the Department will now step in much more quickly to provide public support without insisting on prolonged efforts to enforce the maintenance obligation. The Department now has the power to recover some or all of the lone parent's payment from the other spouse or parent.

Such legislation has existed since the time of the Poor Law and existed in relation to Supplementary Welfare Allowance (which is administered by the regional health boards) prior to 1989. However, it appears to have largely fallen into disuse and did not, in any case, apply to any payments administered directly by the Department of Social Welfare. The legislation extending the liability to maintain provisions to Departmental payments was contained in the Social Welfare Act, 1989. However, it did not come into force until November, 1990. Even then, it required considerable administrative work to bring the provisions into operation and it is only now that the Department has begun to attempt to enforce this obligation.

Mel Cousins

The Minister for Social Welfare, speaking in the Dail on 26 March, 1992,[2] stated that almost 6,000 cases had been examined to determine liability on the part of a spouse.[3] The cases fell into three categories. Sixteen per cent were employed or self-employed. 47% were social welfare recipients; and 37% could not be traced. Maintenance recovery is being pursued only in the case of employed or self-employed persons i.e. just over 1,000 persons (including 83 living in the UK). At that time 32 determinations had been issued directing that weekly payments be made to the Department. However, the Minister stated that recovery had "not been very successful" and payments had been received in six cases only. Nine cases had been prepared for civil debt proceedings for non-compliance with the determinations.

It seems likely that, if the Department is to enforce seriously the liability to maintain provisions, considerable litigation will ensue. This article looks at the legal and administrative rules which apply in this area and considers some of the issues which may arise.

The Legislation

Briefly, section 314 of the Social Welfare (Consolidation) Act, 1981 (the Act)[4] provides that every person is liable to maintain his or her spouse and any child under the age of 18 years or (except in the case of supplementary welfare allowance) between the age of 18 and 21 while the child is in full-time education. These provisions apply to deserted wife's allowance and benefit, lone parent's allowance and supplementary welfare allowance. Where a claimant receives such a payment, every person who is liable to maintain that claimant is liable to repay to the Department of Social Welfare or the Health Board (as the case may be) such amount of the payment as that body may determine to be appropriate. The maximum amount which may be deducted cannot exceed the total social welfare payment being paid to the claimant.

The Initial Determination

The initial determination that a person is liable to contribute and the amount of that contribution is made by an officer of the Department of Social Welfare.[5] However, such decisions are not made by "deciding officers" and there is therefore no statutory right of appeal to the Social Welfare Appeals Office. No guidance is given in the Act as to how the amount of the contribution is to be assessed and no regulations have been drawn up. However, the Department has established internal administrative guidelines to guide

officers in assessing the amount of the contributions due.[6] These guidelines provide that, in calculating the contribution due by the liable relative, account will be taken of his/her particular financial circumstances and commitments.

In general, the contribution will be based on the net pay, less a personal allowance which is set at the rate of the personal allowance of benefit or assistance payable to the spouse, less an allowance for any children of his/hers resident with him or her (again equivalent to the child dependant allowance rate of the benefit or assistance payable to the spouse). An allowance for accommodation costs up to a maximum of £75 per week is given. This is reduced by 50% where the person is living with a new partner who is receiving income in excess of £55 per week from employment. An allowance is also given for any mortgage payments which are being paid on the former family home where the claimant's spouse is residing. The remaining amount is determined to be the appropriate contribution. Thus the amount is determined as follows:

Net pay
- Personal allowance
- Allowance for child(ren)
- Accommodation costs
- Mortgage payments
- Assessable amount

Where the claimant is already in receipt of a maintenance order under the Family Law (Maintenance of Spouses and Children) Act, 1976 or an order made on foot of a separation order, payments made under that order are to offset in whole or in part any contributions due and the claimant is liable to transfer the amount of the order to the Department or the Health Board.[7] This provision now applies to all maintenance orders whether made before or after November, 1990.[8] If the claimant fails to transfer the payments made under the maintenance order as required, the benefit or allowance paid to that person will be reduced by the amount which s/he would have been liable to transfer.[9]

Application to the District Court

If the liable relative fails or neglects to make the contribution, the Department of Social Welfare or the Health Board may apply to the District Court for an order directing the liable relative to make such a contribution.[10] It appears that such proceedings will not be held *in camera.* Once the court is satisfied that the person before the court is liable to maintain the claimant (or the children), that s/he has failed or neglected to make the contribution required and that s/he was, at the time of the hearing, able to contribute, the court shall fix the amount of the contribution to be made and shall order payment thereof by way of such payments as the court shall think proper. Again

". . . the legislation gives no guidance as to how the court is to assess the appropriate contribution"

the legislation gives no guidance as to how the court is to assess the appropriate contribution.

Possible Defences

There are several defences which may be advanced by a defendant in such circumstances. These include:

a) Inability to pay:

As stated above, there is unfortunately no legislative guidance as to how ability to pay is to be assessed and no guarantee that the court will apply criteria similar to those applied by the Department. The Irish caselaw on the assessment of maintenance between spouses is not particularly clear and, in any case, different considerations may be held to apply where the proceedings are between one spouse and the Department of Social Welfare. The difficulty of obtaining any kind of judicial consistency in this area is a worldwide one and has led in some jurisdictions to the adoption of presumptive but rebuttable standards for awards. The judge can only depart from the standard award by making a written judgement setting out the reasons for doing so.[11]

b) Conduct of the parties:

It is not clear if defences such as desertion or adultery by the claimant or that the circumstances of the case make it repugnant to justice to require the liable relative to contribute, which might act as a defence to a claim for maintenance *inter partes,* would operate to defeat the Department's claim for a contribution from a liable relative. In *National Assistance Board -v- Wilkinson,*[12] the Divisional Court, considering similar UK legislation, held that a husband was not liable to contribute if his wife had been guilty of adultery or desertion. However, the Court of Appeal in *National Assistance Board -v- Parkes*[13] held that the correct basis for this decision was the phrase in the UK legislation which required the court to "have regard to all the circumstances".[14] The Irish legislation contains no such phrase and the old Irish case of *McEvoy -v- Guardians of the Kilkenny Union,*[15] which interprets the Irish Poor Law provisions from which our current legislation is derived, is authority for the proposition that liability to maintain is absolute and that the behaviour of the spouse is irrelevant.

c) Agreements between the parties:

One spouse may agree to transfer property to the other on the basis that no maintenance or only a low maintenance payment is to be made. It is well established that one party cannot contract out of his/her right to maintenance.[16] Nonetheless should a subsequent application for maintenance be made, the courts may take into account all the relevant facts including any property transfers.[17] Will such an agreement be taken into account in deciding whether a spouse is liable to contribute? The UK authorities are unanimous that an agreement between the parties will not relieve a spouse from liability to maintain although, under the UK legislation, it can be taken into account in deciding the appropriate amount.[18]

This is an issue which solicitors would need to bear in mind in advising clients in regard to separation agreements.

d) Payment incorrectly awarded:

It appears that, in order for the liable relative to have to contribute, the payment must have been correctly made to the claimant.[19] Thus the liable relative could argue that the claimant did not satisfy the statutory conditions for payment, e.g. in the case of a claimant in receipt of a deserted wife's payment the liable relative could argue that the claimant was not in fact deserted and therefore should not have received the payment. It appears that it is open to the District Court to reconsider cases where the Department of Social Welfare has incorrectly awarded payment, at least where this arises from a mistake of law.

e) Lack of fair procedures:

A liable relative may also be able to argue that the rules of fair procedures have not been complied with if s/he has not been given timely notice of the Department's intention to award payment to the claimant and an adequate opportunity to make such representations as are appropriate.

f) Nullity or divorce:

Finally, it would seem that liability in respect of a spouse will only exist as long as a valid marriage subsists. Thus a recognised degree of divorce or nullity would terminate liability in respect of the 'ex-spouse' (although not of any children).

Enforcement

When originally introduced, one of the obvious weakness in the liability to maintain legislation was the lack of enforcement mechanisms. This lack has been rectified by the provisions of the Social Welfare Act, 1992 (the 1992 Act). A contribution order from the District Court is now deemed to be an instalment order under the Enforcement of Court Orders Acts for the purpose of variation or enforcement. The Court may make an order for the arrest and imprisonment of the debtor under the same Acts.[20] In addition, the District Court may now make an attachment of earnings order in respect of a liable relative either with his/her consent or where s/he had defaulted without reasonable excuse in making the payments due.[21]

Conclusion

It is difficult to predict how the Irish courts will interpret much of this new legislation, although some guidance can be gained from the UK caselaw in this area. It seems likely that the provisions will lead to a considerable increase in litigation in this area. This is a reverse of the general trend in social welfare matters which tends to be moving in the direction of giving jurisdiction to specialist tribunals rather than the courts. In the UK, for example, following major reforms of the legislation in relation to child support, jurisdiction is largely being given to Child Support Tribunals rather than to the courts.

"It seems likely that the provisions will lead to a considerable increase in litigation in this area. This is a reverse of the general trend in social welfare matters . . ."

It may be that further amending legislation will be required in this area in order to clarify existing uncertainties, and to ensure a coherent and consistent relationship between public and private family support legislation.

References

1. For the background to this situation see Ward, *The Financial Consequences of Marital Breakdown*, Dublin 1990; Whyte, "Enforcing Maintenance Obligations though the Welfare System (1990) 84 *Gazette* 5; Cousins, "Social Welfare Payments and Maintenance" [1991] 11 *Fam. L J* 7.
2. *Vol. 417 Dail Debates* col. 2039.
3. It appears that the provisions have not yet been operationally implemented in relation to non-marital couples.
4. As inserted by s. 12 of the Social Welfare Act, 1989 and amended by s. 13 of the Social Welfare Act, 1990 and s. 20 of the Social Welfare Act, 1992.
5. In this section we consider only the procedures relevant to the Department of Social Welfare as the Health Board procedures have not been announced.
6. It should be noted that these guidelines have been altered from those originally drawn up, which are set out in Cousins, *supra* fn. 1, apparently because the original guidelines were felt to be too generous to the liable relative.
7. Ss. 317 and 318 of the Act as inserted by s. 12 of the Social Welfare Act, 1989 and s. 23 of the Social Welfare Act, 1992.
8. S. 23 of the Social Welfare Act, 1992.
9. S. 318 (3) of the Act.
10. S. 316 of the Act as inserted by s. 12 of the Social Welfare Act, 1989 and amended by s. 21 of the Social Welfare Act, 1992.
11. Garfinkel and Wong, "Child Support and Public Policy", in OECD, *Lone Parent Families: The Economic Challenge*, Paris 1990.
12. [1952] 2 All ER 255.
13. [1955] 2 All ER 1.
14. See Casey "The Supplementary Benefits Act: Lawyer's Law Aspects" (1968) 19 NILO 1].15. (1896) 30 ILTR 156.
16. *HD -v- PD*, Supreme Court, unreported 8 May 1978 and section 27 of the Family Law (Maintenance of Spouses and Children) Act, 1976.
17. *OC -v- TC* High Court, unreported 9 December 1981.
18. *National Assistance Board -v- Prisk* [1954] 1 All ER 400; *National Assistance Board -v- Parkes* [1955] 2 All ER 1; *Hulley -v- Thomson* [1981] 1 All ER 1128.
19. *Board of Public Assistance for the South Cork Public Assistance District -v- O'Regan* [1949] IR 415.
20. S. 21 of the 1992 Act.
21. S. 22 of the 1992 Act.

□

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The Class of '52 – Still Going Strong

Presentation of Parchments, Michaelmas 1952. Front Row: Fionnbar Callanan, Henry Burleigh, Colm Price, John Phelan, Eileen Bourke, Paddy Downes, RIP, Mary Moore and Patrick Conway. Middle Row: Enda Gearty, Edwin McCloughan, Thomas P. Kelly, Frank Keane, Daniel Brilley, David Warren, David Punch and Patrick Markey. Back Row: Brendan O'Flynn, Eamon Kane, Reginald White and Phelim Meade.

A reunion was held on 6 November for those solicitors who either passed their Final Examination and/or received their parchments during Michaelmas Term, 1952. This get-together to mark the 40th Anniversary of their entry into the solicitors' profession was marked by a dinner held at the Society's Headquarters in Blackhall Place.

Notwithstanding that they had not assembled together as a group during the 40 year period which had elapsed since they qualified, this unique occasion was a resounding social success as those present reminisced effortlessly with their colleagues.

During the event, a floral bouquet was presented to Mrs. *Dyphna O'Reilly* in recognition of the consideration which both she and her husband *Willie*, had extended to those present during their apprenticeship days.

The photo above shows those who received their parchment in Michaelmas term 1952. A photograph of the reunion dinner appears overleaf. □

Colm Price

Correction

Please note that on Page 349 of the October issue of the *Gazette*, in a photograph of a recent dinner held in honour of Past Presidents of the Law Society, former President of the Society, *John Maher*, was incorrectly identified as *Andrew Curneen*. We regret the error.

DE

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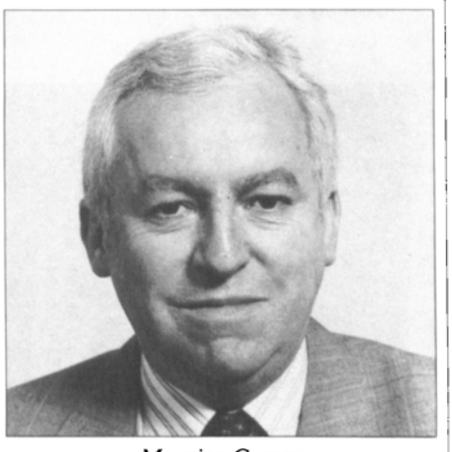
UCD Creates Adjunct Faculty



Maurice Curran

The Law Faculty of University College Dublin is establishing an adjunct faculty to enable its law school to utilise at a high level, and in a coherent and structured manner, the expertise of distinguished members of the practising legal profession.

The Dean of the Faculty, *Paul O'Connor,* says "the expansion in the range of legal courses at UCD – particularly the creation of new specialised Masters' programmes in commercial and European law – has made both desirable and inevitable the creation of an adjunct faculty. The adjunct faculty programme is viewed by the faculty as one which will enhance the quality of legal education at UCD and establish closer ties with the legal profession."

In January, 1993 the UCD Law Faculty will welcome *Maurice Curran* as its first adjunct faculty member. He will have the title Visiting Fellow, and will contribute to the faculty's undergraduate and postgraduate legal programmes in commercial law and corporate affairs.

Maurice Curran is senior and managing partner in Mason, Hayes and Curran, a former President of the Law Society, a Fellow of the Chartered Institute of Arbitration, and a government appointed inspector (Greencore). He is a first class honours BCL and LLB graduate of UCD and subsequently tutored in UCD in the law of real property. □

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The Irish Law Society Golfers who won the Inaugural European Legal Team Championship in Cadiz, Spain. Back row standing (l-r): Bill Jolley, Padraig Gearty, Gerry Walsh, Pat Reidy, Richie Bennett, Tommy Dalton and Pat Duffy. Front row standing: Pat Barriscale, Cyril Coyle, Owen O'Brien, John Lynch, Colm Berkery and Patrick Macklin. (See report on page 394)

"Class of Michaelmas 52". At a reunion held in Blackhall Place on 6 November, 1992 were (back row, standing): David Warren, Jack Phelan, Larry O'Reilly, Brendan Boushel, Reggie White (at rear), Pat Markey, Brian Price (at rear), David Punch, Frank Keane, Willie Corrigan, Brendan O'Flynn, Tim Ryan. (front row, sitting): Brian Overend, Colm Price, Mary King (nee Moore), Eileen Bourke, Elizabeth Wright, Nora McDowell (nee Murphy), Margaret Callanan (nee Magan), Fionnbar Callanan. (See report of reunion and parchment ceremony photo on page 391).

The newly elected President of the Dublin Solicitors Bar Association for 1992/93 Anthony F. Sheil (right), pictured with his father Eamon Sheil (left) who was President of the DSBA in 1966/67.

On the occasion of the opening of the new District Courthouse in Dun Laoghaire, Judge Hubert Wine presented a photograph of the old courthouse to the Dun Laoghaire District Court. L-R:Siobhra Hooper (photographer of picture), John Hooper, Ronald Lynam, Pearse Mehigan, Justin McKenna, William Montgomery, Capt. Kelly (retired Judge of the District Court); Brian Gardiner, Judge Donnchadha O'Buachalla, Anthony Sheil, President DSBA; Judge Hubert Wine, (retired Judge of the District Court); Kevin O'Higgins, Adrian O'Gorman, Robert Sheehan, Gerard Lambe and Rory O'Riordan.

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McCann FitzGerald recently hosted a reception in London for 400 leading lawyers, bankers and financial advisors to launch their three Guides to the International Financial Services Centre. The Irish Ambassador, Mr. Joseph Small, formally launched the Guides. Pictured with the Ambassador (centre) are: Fergus Armstrong, Brian O'Connor, John Cronin and Ronan Molony (all McCann FitzGerald).

Irish Lawyers win European Golf Championship

The Irish Law Society golfers are champions of Europe!

In the Spanish sun, near Cadiz, Irish Law Society golfers won the inaugural European Legal Team Championship, played from 2 to 7 November last.

Also competing were teams representing Holland, France, Belgium, Northern Ireland, Wales, Scotland and England, ten in all, a total of over 130 players.

Even some who might wonder at or question the composition of the team cannot but be pleased and proud of this historic achievement.

The entire panel responded magnificently to the inspired and determined leadership and example of Society Captain *John Lynch* and Team Captain *Richie Bennett*. They topped their group, and won a superb final victory over the English Blue "Dream" team.

There was no one who did not play his part nobly. Unprecedented levels of excellence were achieved in the early rounds, involving 5 fourball matches each morning over 18 holes, and 5 foursomes games over 9 holes, each afternoon.

The same format applied for what was, in effect, a close and exciting semi-final against the Scots on the Friday. In the final, on Saturday, there were six foursomes over 18 holes, after which, at lunchtime, our representatives led 4/2. Even still, 5½ of the twelve 18 holes singles points had to be won in the afternoon. And so they were, some decisively and comfortably, others narrowly and agonisingly.

L-R: Gordon Fenton, Royal Bank of Scotland, the sponsor of the European Legal Team Golf Championship, about to present the Championship Trophy to the Captain of the Irish Law Society Team, Richard Bennett.

The top quality golf played was always matched by exemplary conduct/sportsmanship, about which there was much favourable comment. And it has to be said that the social side of the adventure was not at all neglected. Late nights and reasonable consumption of alcohol helped to create new friendships, to ease any nervous tension there might have been, and were followed by effectively relaxed golf. It might be hard to argue, indeed, that our men and women are not social champions also! Their impromptu Bodega Sherry and Nibbles reception was hailed as an outstanding success for its novelty, ingenuity, and enjoyment, and in which the entire party combined to ensure no guest was in any way neglected.

It was a rare and striking tribute that there was standing acclaim by over 200 Europeans in attendance at the banquet for the presentation of the perpetual trophy and medallions to the winning team.

The winning team:- Tom Dalton and Pat Barriscale (Limerick), Paddy Macklin (Monaghan), Padraig "Jud" Duffy and Colm Berkery (Drogheda), Padraic Gearty (Longford), Pat Reidy (Kilcullen), Cyril Coyle (Castleblayney) and Owen O'Brien, Bill Jolley, Gerry Walsh, John Lynch and Richie Bennett (all Dublin).

Padraic Gearty □

(See photograph overleaf).

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by Eamonn G. Hall

Freedom to Receive and Impart Information Violated by Ireland

The European Court of Human Rights in *Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. -v- Ireland,* (judgment delivered on October 29, 1992), held that an injunction granted by the Irish Supreme Court restraining counselling services from, inter alia, providing pregnant women with information concerning abortion facilities abroad violated the applicants' right to receive and impart information as guaranteed by article 10 of the European Convention on Human Rights. The decision was by a majority, 15 votes to 8.

Article 10 of the Convention provides, inter alia, that the right to freedom of expression includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority.

Two applications were lodged with the European Commission of Human Rights in August and September, 1988: the first by Open Door Counselling Ltd, a company which was engaged, inter alia, in non-directive counselling of pregnant women in Ireland concerning, if requested, the possibility of obtaining abortions in Great Britain.

The second was brought by Dublin Well Woman Centre Ltd, a company involved in similar activities, Ms. *Bonnie Maher,* a citizen of the USA who worked as a trained counsellor for the Well Woman Centre, Ms. *Ann Downes,* an Irish citizen, who also worked as a counsellor there, Mrs. X and Ms. *Maeve Geraghty,* both Irish citizens of child-bearing age.

Proceedings had been brought against the applicant companies in Ireland by the Attorney General at the request of the Society for the Protection of Unborn Children. The Supreme Court on March 16, 1988 found that non-directive counselling assisted in the destruction of the life of the unborn, contrary to the constitutional right to life of the unborn expressly guaranteed by article 40.3.3 of Bunreacht na hEireann (the Constitution of Ireland).

The courts in Ireland had restrained the applicant companies and their servants or agents from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity, and location of and the method of communication with, a specified clinic or clinics, or otherwise.

The Court of Human Rights noted that the Irish Government accepted that the injunction interfered with the freedom of the corporate applicants to impart information. It also found that there was an interference with the rights of the applicant counsellors to impart information and the rights of Mrs. X and Ms. Geraghty to receive information in the event of being pregnant.

To determine whether such an interference entailed a violation of Article 10 of the Convention, the Court had to examine whether or not it was justified under Article 10, paragraph 2, by reason of being a restriction prescribed by law which was necessary in a democratic society on one or other of the grounds therein specified.

The Court recalled that the State's discretion in the field of protection of morals was not unfettered and unreviewable (see mutatis mutandis, *Norris -v- Ireland* (1988) Series A, No. 142, p. 20 paragraph 45). The Court had to determine whether there existed a pressing social need for the measures in question and, in particular, whether the restriction complained of was proportionate to the legitimate aim pursued. In that context, the Court recalled that freedom of expression was also applicable to information or ideas that offend, shock or disturb the State or any section of the population.

The Court of Human Rights was first struck by the absolute nature of the Supreme Court order which imposed a perpetual restraint on the provision of information to pregnant women concerning abortion facilities abroad regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy. On that ground alone the restriction appeared over-broad and disproportionate.

Other factors influenced the Court of Human Rights. In the first place, the corporate applicants were engaged in the counselling of pregnant women in the course of which counsellors neither advocated nor encouraged abortion, but confined themselves to an explanation of the available options. The decision as to whether or not to act on the information so provided was that of the woman concerned.

In the second place, information concerning abortion facilities abroad could be obtained from other sources in Ireland such as magazine and telephone directories or by persons with contacts in Great Britain. The information that the orders of the Irish courts sought to restrict was therefore already

available elsewhere, although in a manner which was not supervised by qualified personnel and thus less protective of women's health.

Finally, the Court considered that the available evidence, which had not been disputed by the Irish Government, suggested that the order of the Irish courts had created a risk to the health of those women who at the time of the Court's judgment were seeking abortions at a later stage in their pregnancy, owing to lack of proper counselling, and who were not availing themselves of customary medical supervision after the abortion had taken place. Moreover, the Court noted that the orders might have had more adverse effects on women who were not sufficiently resourceful or who had not the necessary level of education to have access to alternative sources of information.

The Court, by 17 votes to 6, awarded Dublin Well Woman IR£25,000 for loss of income as a result of the orders of the Irish courts. It unanimously accepted Open Door's claim for costs and expenses incurred in both the domestic and Strasbourg proceedings and awarded IR£68,985.75 less the amounts already paid by way of legal aid in respect of fees.

The Court also unanimously accepted, in part, the claims of Dublin Well Woman for reimbursement of the costs and expenses it had incurred in both the domestic and Strasbourg proceedings. It awarded Dublin Well Woman IR£100,000 less the sums already paid by way of legal aid in respect of fees and expenses.

So Many Lawyers, So Little Opportunity

The United States, the United Kingdom and Ireland are currently experiencing an over-supply of lawyers in the marketplace. Some of the comments from abroad are applicable to this small jurisdiction.

One commentator has stated that battered by recession and cost-conscious clients, firms in the United States who had fattened up in the 1980s are "hurting". Many firms in the United States are deferring starting dates for new "hires", rescinding job offers and cutting down on summer intern programmes.

Lujuana W. Treadwell, executive director of the US National Association for Law Placement, has stated that rescinded offers and job deferrals in the United States were virtually unheard of until 1991. Equally unheard of were massive layoffs of associates and partners that have affected even the most prestigious law firms in the United States. Not only have the big firms slowed their recruiting of new lawyers but they have also toughened associate evaluations, and held the line on pay raises.

In England, *Hugh Thompson* reported in *The Times* on November 10, 1992 that the numbers applying to law firms for traineeships have reached almost tidal proportions. Macfarlanes, a 42 partner, city practice with Brussels and Tokyo offices and alliances with firms in Germany and America, stated that it received over 2,300 applications and expects to take on 20 trainees.

The recruitment partner at Macfarlanes, Andrew Jackson, first looks at academic results, next he looks for the tutor's reference. Although he stated that a lot of academic references were like estate agents' blurb, he has learned to read between the lines and ask specific questions.

The firm was particularly looking to see if the candidate on paper matched up with the candidate in the flesh. Many candidates were confused and inarticulate about what they were applying for. He stated that it was not enough to want to work in the city and drive around in a BMW. The firm was looking for focused ambition, the ability to manage hard work and clients, willingness to work and a sense of responsibility.

All the doom and gloom about the lack of opportunity for lawyers has not scared away law school applicants. Since the mid 1980s some 35,000 law graduates have qualified annually in the United States. An unprecedented 94,000 applicants were competing to enter law school in 1991 – the fourth consecutive year to set a record.

Meanwhile, the Law School of the Irish Law Society has been creating its own records with 3757 solicitors on the Roll who are required to hold practising certificates and some 900 apprentices in the system together with a registered waiting list. □

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Annual Report of the Disciplinary Committee

The Disciplinary Committee met on 29 occasions between 1 September, 1991 and 31 August, 1992.

The following applications were considered by the Committee during this period:-

Subject Matter of Complaints

- Civil Claims
- Conveyancing
- Probate
- Solicitors' Accounts Regulations

New Applications			52
Law Society			
	Prima facie cases found	32	
	Prima facie case not found	1	
	Postponed under Section 7 (4) before inquiry directed.	2	
Private			
	Prima facie case found	5	
	Prima facie case not found	12	
At Hearing			37
Law Society			
	Misconduct	14	
	Adjourned	16	
	Adjourned generally	1	
	Dismissed without prejudice	1	
Private			
	Adjourned	4	
	No misconduct	1	

Applications From Previous Year			15
Law Society			
	Misconduct	10	
	No misconduct	1	
	Further inquiry held when case was remitted by the President of the High Court	1	
	Adjourned	2	
Private			
	Misconduct	1	

Main Grounds on which the Committee found Misconduct

- Allowing a deficit to arise on client account.
- Misappropriation of clients' monies and utilising them for solicitor's own benefit.
- False and inaccurate entries made in the books of account in order to conceal the deficit arising from the misappropriation of clients' funds.
- Deliberately misleading and making false representations to the Society's investigating accountant in order to conceal the misappropriation of funds.
- Allowing a debit balance to arise on client account.
- Failing to maintain proper books of account.
- Failing to comply with the provisions of Regulation 3 of the Solicitors Accounts Regulations (No. 2) 1984 (S.I. 304 of 1984.)
- Proper books of account were not written up at all times as required under the provisions of paragraph 10 of the Solicitors Accounts Regulations (No. 2) 1984.
- Failing to furnish an accountant's report as required under the Solicitors Accounts Regulations.
- Withdrawing from client account monies other than monies permitted by Regulation 7 of the Solicitors Accounts Regulations (No. 2) 1984;
- Failing to comply with Regulation 10 (3) of the Solicitors Accounts Regulations in connection with preparing the balancing and reconciliation statements relating to a client account.

- Unlawfully withholding monies due to a client.
- Failing to account to the complainant in respect of monies held.
- Delaying in the administration of an estate.
- Failing to keep a client adequately advised as to the progress of an administration of an estate.
- Failing to protect and advance the interests of the beneficiaries by making and/or seeking authority for interim distribution of the assets of an estate.
- Failing to account for all sums received and distributed in respect of an estate.
- Failing to take all proper and necessary steps to complete the administration and distribution of an estate.
- Failing to have regard to the hardship caused to the complainant and residuary legatee in the handling of requests for an interim payment.
- Failing to comply with a client's instructions to institue a claim despite having been paid fees for instituting the said claim and allowing the statutory period for bringing such a claim to expire.
- Failing to inform a client of the progress of Circuit Court proceedings.
- Prejudicing a client's legal affairs by not issuing Circuit Court proceedings when instructed to do so.
- Deliberately misleading a client by stating that proceedings had been issued and served when such was not the truth of the matter.
- Delaying in registering a client's title.
- Failing to protect the best interests of a client.
- Deceiving clients by making false representations, knowing such representation to be false.
- Failing to lodge a deed of assent in respect of lands to be registered with the Land Registry.
- Failing to hand over files and documents of a former client, to a former client's new solicitors notwithstanding assurances to the Society that the solicitor would do so.
- Delaying in stamping and registering a mortgage deed.
- Misrepresenting the position to the complainants in stating on several occasions that their mortgage had been registered when in fact it had not been lodged for registration.
- Failing to reply to the request of the complainant to hand over his file and papers to the complainant's new solicitor.
- Failing or delaying to discharge stamp duty notwithstanding that the solicitor was placed in funds to do so.
- Delaying in completing the purchase of a dwellinghouse on behalf of the complainants.
- Failing to protect a clients' interests in relation to the purchase of a dwellinghouse in that the solicitor allowed proceedings to be issued directly against the complainants.
- Failing to reply to clients' correspondence and telephone enquiries.
- Failing to reply to the Society's correspondence.
- Failing to produce a client's file to the Registrar's Committee when requested to do so.
- Failing to attend the Registrar's Committee when requested to do so.
- Failing to comply with the undertaking to the Registrar's Committee to resolve outstanding matters and furnish a report to the complainant's solicitors.

The High Court

Cases presented to the High Court between the 1 September, 1991 and the 31 August, 1992		**19**
Censured, fined and costs	3	
Censured and costs	3	
Fined and costs	2	
Costs awarded	2	
Adjourned generally	1	
Adjourned	8	
Awaiting presentation to the High Court		**5**

Cases adjourned by the President of the High Court last year	**6**
Name of solicitor struck off Roll of Solicitors	1
Remitted to the Disciplinary Committee Stay on Order of Suspension – Adjourned	1
Remitted to the Disciplinary Committee Adjourned	1
Censured and costs	2
Suspended from practising as a solicitor.	1

Fines ranging from £1,000 to £3,000 were imposed in the appropriate cases.

Commentary

The Disciplinary Committee is a statutory committee, wholly independent of the Law Society, appointed by the President of the High Court under Section 6 (1) of Part III of the Solicitors Acts 1954-1960. It consists of ten practising solicitors.

The Committee's principal function is to hold, on application by the Law Society or any person, an inquiry into the conduct of a solicitor on the ground of misconduct, having first considered the application as to whether a prima facie case has been established for such an inquiry.

Where the Committee is of the opinion that a prima facie case has not been disclosed, the applicant is advised accordingly and no further action is taken.

If a prima facie case is found the Committee proceeds to hold an inquiry and subsequently reports to the High Court where misconduct has been found.

Misconduct is defined under Section 3 of the Solicitors Act, 1960 and includes

(a) The commission of treason or a felony or a misdemeanour.

(b) The commission outside the State of a crime or an offence which would be a felony or a misdemeanour if committed in the State.

(c) The contravention of a provision of the Solicitors Acts, 1954/1960 or any Order of Regulation made thereunder.

(d) Conduct tending to bring the profession into disrepute.

While the Disciplinary Committee has no power to impose any penalty or sanction, the Committee may in its report to the High Court include their recommendation as to the fitness or otherwise of the solicitor to be a member of the profession. The President of the High Court after consideration of the Committee's report may order

(i) That the name of the solicitor be struck off the Roll of Solicitors.

(ii) Suspend the solicitor from practice for such period as he may think fit.

(iii) Censure, and/or impose a fine.

Forms leading to the institution of an inquiry into the conduct of a solicitor may be obtained from the Clerk to the Committee, Blackhall Place, Dublin 7.

The year which has just passed has been marked by an increase in the number of applications coming before the Committee. The main areas of complaint related to matters involving the Solicitors Accounts Regulations, conveyancing, probate and litigation.

The Committee had to consider a number of cases in which separate firms were in breach of the Solicitors Accounts Regulations. Conduct such as allowing deficits to arise on the client account, misappropriation of funds for personal benefit and misleading the Society's Investigative Accountants cannot be permitted. Members of the public, the profession and the Law Society rightly expect the highest degree of honesty and integrity from each member of the profession.

Solicitors are expected to carry on their practices in a responsible manner and to be open, frank and honest when replying to enquiries from their clients and the Law Society. There would appear however, to be an increasing incidence of failing to comply with such criteria. In cases where this behaviour has been proven the Committee has recommended the ultimate sanction.

Again I must emphasise the importance of maintaining properly written up books of account and complying with the Solicitor Accounts Regulations. This is necessary not only because failure to do so is a breach of the Regulations, but it is also good practice management.

The other hardy annuals of delay and lack of communication made their appearance this year. This kind of conduct not only brings the solicitors concerned into disrepute but also harms the profession as a whole. Solicitors have a duty to ensure they deal with their clients cases as expeditiously as possible and that they keep their clients informed of all progress that has been made. This would help to eliminate complaints and maintain confidence in the profession.

Apart from its regulatory function, the Disciplinary Committee also has the power to make an order removing the name of a solicitor, **at his own request,** from the Roll of Solicitors. This usually arises when a solicitor wishes to be called to the Bar. Members should note that one of the pre-requisites of the Bar is that a solicitor must have his/her

(Continued on page 402)

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A Living Law?

Second Bar Conference Examines the Constitution

At the Second Annual Conference of the Bar were L-R: Sir Ninian Stephen, who opened the Conference and the Chairman of the Bar Council, Peter Shanley, SC, who chaired the Conference.

The "Irish Constitution – A Living Law?" was an intriguing theme said the Right Hon. Sir *Ninian Stephen,* opening the Second Annual Conference of the Bar which took place at the end of October. The 100 participants heard Sir Ninian say that he had not been aware that Ireland had a constitution until a few months ago. Since then, however, he had become "a good deal familiar with the small portion of it, in particular two articles."

Sir Ninian said it was poignant that while most constitutions suffered from the extraordinary optimism of their makers who sought to express timeless truths, nonetheless, most had a limited life. Most of the nations of the world since World War II had exchanged one constitution for another. The ability of a constitution to change with changing times was a crucial factor in its being a living law and he suggested that a change mechanism such as that provided in Article 46 of the Irish Constitution was an indicator that a constitution could be a living thing.

The Conference, which was chaired by *Peter Shanley,* SC, heard papers delivered by *Paul Gallagher,* SC, on the Constitution and Community Law; *Anne Dunne,* SC, on the Constitutional Family, *Michael Forde,* BL, on the State Action Question and Richard Humphries, BCL, on Constitutional Interpretation.

Paul Gallagher argued that when the Constitution was amended on Ireland's accession to the EEC in order to ensure compatability between the two legal orders, that amendment created a dynamic force which has resulted in EC law having a substantial influence and effect on the development of constitutional law in Ireland since 1972. He argued that EC Law was now in a position to protect some of those rights which were previously protected only by the Irish Constitution. In addition, if properly utilised, EC Law could provide a rich source of new ideas and precedents to assist in the continued development and evolution of the fundamental rights enjoyed under Irish law. In turn, argued Mr. Gallagher, the development of fundamental rights under Irish law could influence the development of those rights under EC Law.

Anne Dunne, SC, in her paper entitled "The Constitutional Family", said it was appropriate to consider whether or not the provisions relating to the family in a constitution that had been with us for almost thirty years were adequate in present day Ireland. She said it was questionable whether the personal rights available to people under Article 40 were being disregarded by the blind adherence to the prohibition on divorce in Article 41. The consequences of Article 41 were that parties to a broken marriage could not remarry and therefore there existed in Ireland a growing number of unconstitutional families the members of which were not permitted to enjoy the benefits available to members of the constitutional family.

Michael Forde examined the classic "state action" doctrine which holds that the obligation to respect fundamental rights granted to citizens under a constitution is an obligation on the State and only on the State. He argued that there would be important practical difficulties with abandoning a state action restriction on constitutional obligation and that it would introduce enormous uncertainty into the law. Examining case law, Mr. Forde said that there had been only one Supreme Court case where the state action argument was made, *McGrath and O'Rourke -v- Maynooth College (1979 ILRM 166)* in which Mr. Justice Kenny held that the guarantee of religious freedom bound only the State and did not place obligations on private bodies even if they obtained some State funding for their activities.

Mr. Forde postulated that if the state action principle had been applied in the *Open Door, Grogan,* and *'X'* cases then the defendants in those cases would have had cast iron

defences. They could have said "look at the wording of this clause (Article 40.3.3) 'The State acknowledges . . . and guarantees by its law . . ' We are not the State. What we are doing – disseminating information on travelling to England – cannot conceivably be regarded as a form of State activity. You have got the wrong defendants. The constitutional duty clearly is on the State and it is on it to introduce appropriate laws to protect the unborn".

Mr. Forde said that it had never been suggested by the courts that the article of the Constitution on equality applied to private as well as public action, but the case for such an application was much stronger. For unlike the abortion article, the equality clause was not expressed in terms of "the State shall". If there was to be consistency in our Constitutional Law then perhaps sex discrimination throughout the private sector was unconstitutional and rules which purported to exclude women from a variety of bodies and associations were null and void and perhaps even actionable. Could we now expect the courts, he queried, to vindicate the right to equality, for example, whenever a liquor licence application was being heard or planning permission was being sought by a men-only body? Or would a state action principle be applied to the equality article? If that were so, why should the abortion article by any different?

"Does Ireland need a new Constitution?" was the theme of a lively and witty debate chaired by Ms. Justice *Susan Denham,* during the afternoon session of the Conference.

Arguing for the motion, *Michael McDowell,* SC, said that it should be possible to embody the necessary minimum protections in a constitution without the "metaphysical and ideological baggage" contained in the 1937 Constitution. "Ideological continence is possible", he asserted. It would be entirely feasible to put in place a new constitution which should be balanced and inclusive, he said. His co-proponent of the motion, *Felix McEnroy,* BL, said that the whole thinking behind the 1937 Constitution had been an attempt to nail down certain principles on which it had been felt the judiciary and legislature could not be trusted. Article 41 was a "moral dinosaur" he stated, and its message to the women of Ireland was a simple one: "go home girls". He said there had been a disturbing development in recent times where specific interest groups had decided to use the Constitution as a means of enforcing their views about what was good for everyone. He said the whole "copperfastened" mentality amounted to a "template of terror" by which our fundamental document would be used as a sword by pro life groups rather than a shield to protect fundamental rights.

Opposing the motion, *Nial Fennelly,* SC, said that the constitutional interpretation over half a century by judges of all persuasions had made a living document of the Constitution. The Constitution should not be regarded as a suit of clothes to change when fashions change. Rather, it was a suit of clothes which had served the Irish people well, it did not fit too tightly and it was large enough for people to grow into. It had been the instrument which had achieved the development of human rights and he did not think the Irish people wanted to be told by their lawyers that they should jettison this tradition and all that had been achieved under the Constitution.

Despite massive social change in Ireland since 1937, the predominant ethos in society was still Christian and democratic said *Shane Murphy,* BL, also arguing against the motion. He said it was a popular misconception that in 1937 De Valera had given the Church what it wanted, a Catholic Constitution. In fact, the issue had been whether it was possible to express majority principles without offending minorities. It was possible to do so and the 1937 constitution had proved this. He said a paranoid fixation about the events of 1937 infused the arguments of the proponents of the motion, but it was clear that the courts had interpreted the Constitution in a manner which could be seen to be independent. He said interpretation was the basis on which life could be given to this document to make it capable of living beyond this generation and into future generations. "We have the basis for organic growth, not a vehicle for social engineering," he stated.

The motion when put to a vote, was defeated. □

Disciplinary Committee

(Continued from page 399)

name removed from the Roll of Solicitors at least three months in advance of being called to the Bar.

During the year, Mr. *Grattan Roberts,* Mr. *Michael Hogan* and Mr. *Donal Kelliher* were re-appointed to the Committee by the President of the High Court for another period of five years.

I would like to record my thanks to the members of the Committee for their hard work and support during the past year. *Mary Lynch,* the Clerk to the Committee, has dealt with its affairs in a most efficient and competent manner. We are indeed grateful to her.

Dated this 20th day of November 1992.

Walter Beatty, Chairman

A list of the members of the Disciplinary Committee appointed by the President of the High Court appears on page 377.

Lawyers Desk Diary 1993

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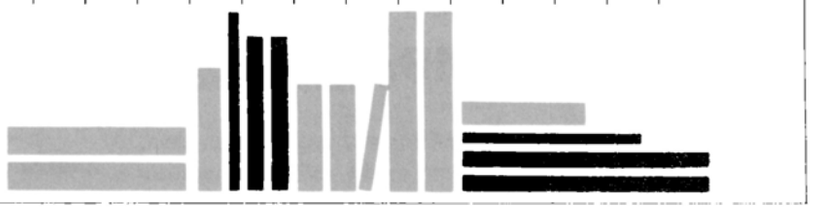
Now Available!

BOOK REVIEWS



Law Reform Commission – 13th Report

The 13th Report of the Law Reform Commission outlines its activities during the year ending 31 December, 1991 and notes that 1991 saw a number of the recommendations of the Commission being enacted into legislation. The Statute of Limitations (Amendment) Act, 1991 substantially enacted the recommendations contained in the Commission's Report on Personal Injuries, (LRC 21-1987) while the Criminal Damage Act, 1991 was in substantial accord with the Commission's recommendations in its report on Malicious Damage (LRC 26 1988). The Adoption Act, 1991 implemented many of the recommendations made in the Report on the Recognition of Foreign Adoption Decrees (LRC 29 - 1989), the Child Abduction and Enforcement of Custody Orders Act, 1991 implemented the substance of the Commission's recommendations in its Report on the Hague Convention on the Civil Aspects of International Child Abdunction and Related Matters (LRC 29 - 1989), and the Child Care Act, 1992 implemented the recommendations regarding care proceedings made by the Commission in its Report on Child Sexual Abuse (LRC 32 1991).

Reports in 1991

In 1991, the Commission produced a number of reports and discussion papers including:-

- Confiscation of the Proceeds of Crime.
- A Report on the Civil Law of Defamation.
- A Discussion Paper on Contempt of Court.
- A Consultation paper on the Crime of Libel.
- A Report on the Indexation of Fines.

During 1991 two further Reports relating to Conveyancing Law and Land Law were submitted to the Attorney General: The Passing of Risk from Vendor to Purchaser (LRC 39 1991) and Service of Completion Notices (LRC 40 1991).

A lengthy Discussion Paper on Dishonesty was circulated to interested groups, containing provisional recommendations relating to the creation of new and simplified offences relating to fraud. The Commission hopes to publish a Report on this in 1992.

During the year the Commission worked on the first draft of a Discussion Paper on Choice of Law on Tort and a Discussion Paper to deal with the formulation of a coherent sentencing policy. The latter paper is near completion.

An ad hoc advisory committee of the Commission continued its examination of various aspects of family law and a Consultation Paper will be completed this year.

The Commission also commenced research into the law relating to insanity, intoxication and also commenced research on the law relating to compensation in personal injury cases with particular reference to periodic payment of damages.

Copies of the Thirteenth Annual Report (1991) are available from the Law Reform Commission, Ardilaun Centre, St. Stephen's Green, Dublin 2. Price £2.00. □

Current Legal Problems 1992

Vol 45 – Part 1 Annual Review.
By Ben Pettet, (Editor), Oxford University Press, 1992, 214pp, paperback £15.00

This annual review is a new venture forming Part 1 of the Current Legal Problems series which previously consisted of papers from a series of lectures and seminars. The aim of the review is "to provide a high quality analysis of fundamental legal developments in each of 6 core areas: contract, criminal law, European Community law, property law, public law and tort but it may also carry one or two articles on current developments and fields not limited to these core areas.

The volume immediately invites comparison with the Annual Review of Irish Law edited by *William Binchy* and *Raymond Byrne* which has been in existence since 1987. The Irish publication takes a braver approach to the year's developments in the law offering a comprehensive review of the full spectrum of the law's activities. It is, therefore, more satisfactory from the point of view of the practitioner who is scanning the entire range of legal problems to look for particular developments.

While a number of the cases which are reviewed in the book are of significant interest to Irish practitioners since they cover areas of law where there is little difference between English law and Irish law,

(Continued on page 405)

An MBA Degree?

by Richard Devereux

Solicitors who are regular readers of the business or financial press will have read comment on the subject of post-graduate management education or what is commonly called an "MBA" degree. A Masters degree in Business Administration is considered to be almost a pre-requisite to entry into the business world in the United States where over 70,000 MBAs graduate each year. Many US lawyers hold the degree. The number of MBAs graduating in the UK each year has risen from 1,100 in 1980 to over 4,000 in 1990 and currently in excess of ninety educational colleges throughout the UK offer MBA courses. MBA courses are now available on a full and part-time basis in Ireland in five different colleges.

An MBA degree is a general business degree and one which is of relevance to any lawyer, whether he or she is a sole practitioner, in practice with others or working in-house. Company and commercial lawyers in particular will benefit greatly from many of the skills taught. The degree does not come cheap and requires commitment.

An MBA can be undertaken usually in three different ways. Firstly, it may be undertaken on a full-time basis either on a 12 month programme or on a 24 month programme. Secondly, it may be undertaken on a part-time basis over a three year period requiring attendance at a business school a few nights a week and also on occasional week-ends. Finally, some institutions offer distance learning programmes similar to correspondence courses which vary in length of duration.

Courses offered by different institutions and colleges may vary in content to some extent – there are an increasing number of MBA courses offering a focus on Europe

Dr AJF O'Reilly presenting the JP O'Reilly Memorial Scholarship 1991-92 to Richard Devereux

for example – but the core disciplines are generally the same. Accounting, Finance, Corporate Finance, Marketing, Human Resources, General and Strategic Management, Corporate Law, Economics, Management Science, Managerial and Management Skills, Computing and Information Systems are some of the subjects common to most courses. The work load is heavy, lectures run from 9.00am to 5.30pm with study and group work carried on outside class hours. Assessment of the academic side of the course is continuous through individual and group work and by examination at the end of each term. Team work plays a significant part of any course with the development of team player skills seen as a priority. The final 3 months of a one year course are dedicated to a thesis or project which can be done through an in-company placement or through research into a theoretical area of study covered in the course.

A multitude of MBA courses are run to-day, not all of high quality, and an applicant should be discerning. This begs the question whether the degree has lost its "cachet" and has become too common place. Undoubtedly it has to some extent, but the contrary argument is that increasingly employers, and more importantly interviewers, will themselves hold an MBA and will be looking for something additional from a prospective employee. Clients may also be MBA qualified.

A course applicant, who should have at least five years' work experience, will first have to sit the Graduate Management Admission Test which tests the applicant's technical or academic abilities to handle the course. This test is run in most major cities throughout the world and is run from a test centre in Princeton, New Jersey. Pre-test courses are available as are revision manuals. The best schools ask for high scores followed by an interview and selection process.

Most of the reputable full-time courses in the United States are two year courses, although there are a few highly regarded one year courses. The cost of being away from the work place for two years should be carefully considered if a full-time course in the USA is being contemplated. Choosing a full-time course in Europe will generally involve choosing between various one year full-time courses. The Association of MBAs, 15 Duncan Terrace, London N1 8BZ, publishes a useful guide to courses, including some of the Irish courses.

If an Irish solicitor is prepared to take time out at his or her own expense to do a full-time degree a foreign course might be contemplated. This is not to say that the available Irish MBA courses are not worthwhile pursuing. Part of the experience of doing an MBA is the people you will study with and the contacts you will make. Foreign schools will obviously afford you the opportunity to live and work in a

(Continued overleaf)

different culture and maybe to acquire an additional language skill.

The degree, particularly if done on a full-time basis, is expensive. Applicants should budget £7,000 to £10,000 on fees alone and there will also be living expenses. The loss of a year's salary is the biggest cost. Many participants take out a bank loan. For Irish solicitors there is also the possibility of obtaining a scholarship through the Law Society's "J P O'Reilly Memorial Fund".

The degree should not be undertaken with unrealistic expectations. Completion of the course does not double one's salary, it may not even increase it in the current recessionary environment. The payback is in the long term. More importantly, finding a job as good as or better than the one left behind to do a full-time course might not be easy. The job placement rate from the top UK Business Schools this year has been slow and in some cases disappointing.

With ever increasing competition from within and without the profession, obtaining an MBA degree, by whatever method, should better equip a solicitor for the years ahead. Pursuing the degree will certainly broaden a participant's horizons. The answer to whether the qualification is worth the cost and effort involved has to be based upon a solicitor's individual assessment of his or her situation and ambitions.

Richard Deveueux qualified as a Solicitor in Dublin in 1985. He was last year's recipient of the J P O'Reilly Scholarship and he recently completed a full-time one year MBA course at Strathclyde Graduate Business School in Glasgow, Scotland.

Applications for the 1993/1994 J. P. O'Reilly Scholarship should be submitted to the Law Society by 8 January, 1993. Details and application forms are available from Emily Francis or *Sharon Hanson* at *the Law School* (01-710711). □

Book Reviews – *(Continued from page 403)*

there are however a significant number of topics where recent English legislation is being construed by the courts and those portions of the work which deal with those areas are of less value to the Irish practitioner.

The sections on European Community law and on criminal law are probably of most interest to the Irish practitioner.

The book is well laid out with comprehensive tables of cases and statutes and the readability level of the articles is high.

John F. Buckley

The New Product Liability Regime and Annotation of the Liability for Defective Products Act, 1991

Edited by Alex Schuster, Irish Centre for European Law, 1992, 96pp, paperback, IR£12 (members) IR£16 (non members).

The Brookings Institution in the United States, in a study entitled the "The Product Liability Maze", has shown that the current system of product liability law in the United States has kept good products off the market, because manufacturers are afraid to take the legal risks. Studies also show that research on new products such as an AIDS prevention vaccine has been inhibited by the product-liability system. Further, America's product liability system has generated unnecessary legal costs.

The US Federal Product Liability Fairness Bill struggled for a decade to be heard and finally reached the Senate floor in September 1992. The reformers urged that a single, national standard for product liability would bring sanity to a runaway legal system. However, the US Senate killed product-liability reform in mid-September 1992 in what was described as a cliffhanger vote. Reform supporters vowed that they would try again next year.

Ireland is in the fortunate position (hopefully) of having reformed its product liability law in the form of the *Liability for Defective Products Act, 1991.* Alex Schuster, the editor of the book under review, notes that the *Liability for Defective Products Act, 1991* owes little to the creative instincts of the denizens of the Dail or Seanad. He states the new legislation is mainly the product of Ireland's offshore legislature, the Council of Ministers of the European Community. However, we should note that Ireland is ahead of the United States with its reform.

This book contains papers delivered at a conference designed to explain the implications of the law on liability for defective products. *Alex Schuster* in his paper assesses both the provisions of the new legislation and the extent to which they would fit within the framework of the common law. Professor *Bryan McMahon* examines some of the practical problems generated by the new legislation. *Rolald Rowell,* the Legal Services Director of Law Laboratories Limited, offers advice to producers as how best to exercise control over their manufacturing operations. *Jim O'Mahoney* concentrates in his paper on the insurance implications of the new regime. *Maurice Healy,* the Director of the National Consumer Council, offers a consumer perspective. *William Fagan,* the Director of Consumer Affairs, writes on the implications of product liability for business. *Gerard Sheedy* of the Confederation of Irish Industry and *Ewing Paterson* also write briefly on the new regime.

The book contains the annotated text of the *Liability for Defective Products Act, 1991* together with the Product Liability EC Council Directive of July 25, 1985.

The Irish Centre for European law and Alex Schuster have provided a practical vade-mecum for lawyers and students. This is indeed welcome.

Eamonn G. Hall □

TECHNOLOGY NOTES

Time Recording, At Last!

by Frank Lanigan

Time recording, like Guinness, is good for you. But how many of us would enjoy the black brew if we had to have the hangover first? Preparation for time recording is a hangover of sorts and a pain that most lawyers readily put off from year to year. After many years of resolve and broken promises, we finally bit the bullet and introduced time recording to our office this year. Starting in April, 1992, we set a timetable for the job to go live on September 1, and we met our target.

Time recording, The nonsense

How many boring articles have we seen over the years about time recording? How many seminars? Why is there no easy guide to time recording with a step by step tutorial? Because time recording seems to have been designed by accountants for accountants (boring ones at that). Sample time sheets and learned articles have frightened off most solicitors. Time sheets assume skills to which the legal profession does not easily aspire, viz the ability to keep track of your work, to note what you are doing and to add it all up at the end of the day. Definitely too difficult.[1]

The Homework

Every known article and seminar, every "how to manage" textbook and every known "expert" was consulted. The only uniform factor was the lack of uniformity. Text books assume that you have nothing better to do than to watch your every move and note it. None of them related to a country practice which might be lucky to be able to record one hour in five, let alone charge for it. The documentation

Frank Lanigan

was complex, the homework lengthy and the method of analysis often pointless.

Into Action

So what did we do? We worked it our for ourselves. First, we formed a committee of five, three scapegoats, one minder and an "organiser" (to mind the "minder"). The scapegoats were primed to start time recording on June 1, the minder to start harassing them on June 2, and the organiser to maintain a pained and worried expression for the next three months! The second team of scapegoats were introduced on 1 July and the entire office (on trial) on 1 August, the system going live on 1 September.

The Form

Then we set out to design a form. We have an excellent computer system with a time recording package integrated with the accounts system. Until we started this project, we had never used the time recording system. So we read the manual and tinkered around with the computer package, including the beautiful forms supplied.

While it was possible to do so, we discounted using the computer to fill out the form. So also we did not use hand held computers; too difficult to use and train; no allowance for human error, cooking the books or (most importantly) downright fraud!

Careful examination of the forms supplied showed them to be as complex as tax returns and, knowing the absolute incompatibility between laywers and forms, we scrapped the lot and designed our own. We worked out what the package would need and designed a form which was **absolutely basic.** The purpose of the form was to ascertain what clients we were dealing with and how long we were dealing with them.

Our form details the client by reference number, the type of work by code number (e.g. interview, telephone call, document drafting) and the time spent, in units of six minutes. Nothing else, no addition, subtraction, extensive notes or analysis of "idle time" (who wants to know what you do when you are staring at the ceiling?). The purpose is to record time and have it analysed. What you do with it is a further step but, if you don't record it clearly and sensibly in the first place, there is no point in the operation.

So, each fee earner got a sheet and a pencil. . . and (of course) the minder, leaning over his shoulder.

The Hourly Charge

Each fee earner has an hourly rate. This is not picked out of the sky. Using the booklet "The Expense of Time" as prepared by the Law Society in England, we assessed the hourly rates.

Roughly speaking, you look up your accounts, find out how much it costs to run the office, add an increment

(Continued on page 408)

Retirement Planning – It's Never Too Early to Start!

by Harry Cassidy

Many self employed people wait until it is too late to start thinking about retirement and their likely pension requirements. Do you fall into this category?

With increasing uncertainty surrounding future taxation provisions and the reduction of allowances and reliefs, one of the most attractive tax breaks available to self-employed professionals is in the area of pension contributions. Under current legislation, all contributions to authorised pension plans are fully deductible against income tax at the top rate. This is subject to an overall limit of 15% on net relevant earnings per annum.

The deadline for contributions to achieve full tax relief, however, is 31 January following the year of assessment. To avail of tax relief for the year of assessment 1991/92, the deadline for contributions **is only six weeks away, namely 31 January, 1993.**

While this brief article does not allow time to outline the detailed tax computations of pension contributions, I would like to bring to your attention one of the most attractive and beneficial plans available at present, namely, the Law Society Retirement Annuity Plan. The benefits of this unique Plan are not confined to the tax advantages outlined above but include specific cost and structural features.

Retirement Annuity Plan

The Incorporated Law Society established a Retirement Annuity Plan in 1975 to provide its members who are self employed or in non-pensionable employment with the opportunity to provide for their retirement during their working life. The numbers involved in this Plan have been increasing annually although the current membership of 450 still represents quite a small percentage of qualified solicitors in the country.

Main Advantages

A key feature of the Plan is its very low entry costs thus providing key benefits to young solicitors in the early years. The initial and ongoing charges of the Retirement Annuity Plan are also lower than those of any other life assurance scheme available at present. The initial entry charge is only 2.5% of each sum invested and the ongoing management, administration and investment fee is only 0.6% per annum.

Normally, most insurance schemes carry an entry charge of at least 5% with management fees ranging from 0.75 to 1%. Such a high level of charges would obviously have a negative effect on investment levels and performance. In addition, the Law Society Retirement Plan has the following benefits:

- No initial units.
- No charge for switching between funds.
- No penalty charges for ceasing contributions.

The Plan offers complete flexibility in that participants are not tied to making annual payments or payments of any specific amount. Indeed the minimum contribution currently required in a year is a mere £500.

Performance

Although we cannot guarantee the rate of return of the Plan, particularly in current market conditions, our objective as Fund Managers is to achieve a real rate of return substantially in excess of inflation. The returns of the past six years and the first six months of this year are shown in the chart below.

As you can see, the Law Society Plan has performed very favourably in comparison with the main insurance companies. In addition, it should be remembered that all gains made within the Fund are completely tax-free.

Fund Options

The Plan offers solicitors considerable flexibility in the choice of funds at their disposal. A solicitor can choose to invest in the Managed Fund (which is a broad spread of equities, gilts, property and cash) or in the Cash Fund. Typically, in those years immediately prior to retirement, the Cash Fund is a beneficial option since it allows participants to protect accumulated gains.

	Year to 30/6/92	91	90	89	88	87	86
Irish Law Society Pension Fund	5.5	17.3	(9.4)	19.2	26.9	7.4	20.8
Irish Life Managed Fund	(0.5)	12.4	(11.2)	19.8	26.1	10.9	22.1
Standard Life Managed Fund	2.2	15.6	(14.8)	16.4	29.0	14.1	20.8

L-R: David Gallagher, Business Development Manager, Pensions, IBI; Harry Cassidy, Associate Director, IBI, and Terence Deacon, Portfolio Manager of IBI.

Time to Invest

Although there are undoubtedly many competing demands for your funds at this time, the upcoming 31 January deadline might cause you to give extra consideration to making payments to a recognised pension plan, so why not consider contributions to the Law Society Plan?

For further details on the Law Society Pension Plan, please contact either myself or *Joe Hanrahan* at The Investment Bank of Ireland Limited, 26 Fitzwilliam Place, Dublin 2. Telephone: 616433.

Harry Cassidy,
Associate Director,
IBI Investment Services Ltd.

Technology Notes – *(Continued from page 406)*

for indexation, add a sum for a reasonable salary for the partners and the rent of buildings, divide it proportionally among the fee earners according to their salaries and divide each sum by, say 1000 hours, or if you're a workaholic, 1500 hours. Our experience shows that 1000 to 1200 hours is reasonable. In retrospect, this calculation was less difficult than it appeared at the outset.

To be absolutely sure of our figures, we analysed the data from the three month trial period and made suitable adjustments.

Keeping Time

Skill in time recording is inversely proportional to the age and seniority of the recorder, partners being the worst. In this endeavour the minder was authorised to "take no prisoners". He introduced an incentive scheme:- "no time sheets, no pay," "fill out three forms wrong and you will have to do all the posting for the office for a day (after-hours at that)." Untidy forms with wrong references were unceremoniously fired back. Protestations of innocence or latent dyslexia were treated with withering contempt.

There are no short cuts for keeping time. If you don't record it, your monthly report will show you up as a laggard. If you make mistakes you'll record no time at all.

Time Posting

We took the view that the fee-earners would record time, the minder would collect the time sheets (and mete out punishment) and the time would be posted by trained staff. The minder did the posting during the test period and taught the fee earners how to do it properly. He then handed over the task to the posting staff with the problems ironed out. Posting time records takes time, approximately 10 minutes per fee-earner per day. This factor should be taken into account when deciding on a system.

Why Bother?

What delight I find when I put down the phone from a particularly unpleasant client to record our phone call on my sheet, safe in the knowledge that, at some time soon, he'll have to pay me for the pleasure.

The immediate effect of the system is to see what you are doing, how much time is spent on clients and how much is wasted. You become aware of your time, you seek time records for clients affairs and, most importantly, you bill them . . and you are able to stand over the bill.

The system analyses the work done by each fee earner, in each area of work, during the present week/month, during the present year. It tells you in graphic terms where you are making and losing money. It helps you encourage paying work and refuse non-paying work. If the office is large, there is a cost benefit analysis for each area of business, enabling you to plan for expansion (or contraction). The awful prospect of self-organisation, long the bane of the legal profession, is handed to you on a plate.

All you have to do is to fill a time sheet. If I can do it . . anyone can.

Frank Lanigan,
Frank Lanigan Malcomson & Law,
Court Place, Carlow. □

One Profession

Quality issue dominates Conference of England and Wales Law Society

Mark Sheldon, President, Law Society, England and Wales.

The issue of quality was to the fore at the Annual Conference of the Law Society of England and Wales held in Birmingham at the end of October which had as its theme "One Profession". Addressing delegates, the President of the Society, *Mark Sheldon,* said "my theme of one profession is clearly no cover for tolerating those who let us down. Solicitors who default are the extreme examples," he said. "Those who give rise to repeated negligence claims or whose treatment of clients leads to repeated complaints let us down as well. They tarnish our reputation and they cost us dear."

"We have stark choices ahead of us," said *Mark Sheldon.* "We can either hope that those who let us down will, under pressure from the market, mend or bend – improve or leave practice, but they may cost us a lot along the way. Or we can ourselves set standards of quality by which it would be reasonable to allow clients to judge the standard of work they should be entitled to expect. Put that way – there really is no choice. The role of a professional body in setting standards can no longer simply be confined to the definition of ethical conduct rules". Mr. Sheldon expressed his concern that "if we do not take action soon, outside bodies will take this task into their own hands, a process which could indeed leave us fragmented and divided." ●

Tackling the cost of default

At the Conference it emerged that there were differing views in the profession in England and Wales about how the cost of default should be tackled. The Law Society of England and Wales began a consultative process of its members last July when it circulated a Consultation Paper to members. By the time of the conference, some 1,400 responses had been received, 890 of which came from sole practitioners. It emerged that the majority of sole practitioners was against most of the fraud prevention measures suggested in the paper by the Law Society while the rest of the profession saw merits in them. The Head of Communications of the Law Society of England and Wales, *Walter Merrick,* suggested that many sole practitioners might have responded the way they did because they had interpreted the Consultation Paper as some sort of witchhunt against them. An overwhelming majority of sole practitioners had answered 'yes' to the key question asking whether sole practice should be allowed to continue in its present form without restriction.

Overall, the majority of respondents including sole practitioners favoured capping the Compensation Fund for claims by institutions, while the balance of the profession appeared to be against a cap on private claims. In general, said Mr. Merrick, the inconclusive outcome of the consultation meant that the Law Society of England and Wales was facing some difficult decisions in the coming months. ●

What the clients want

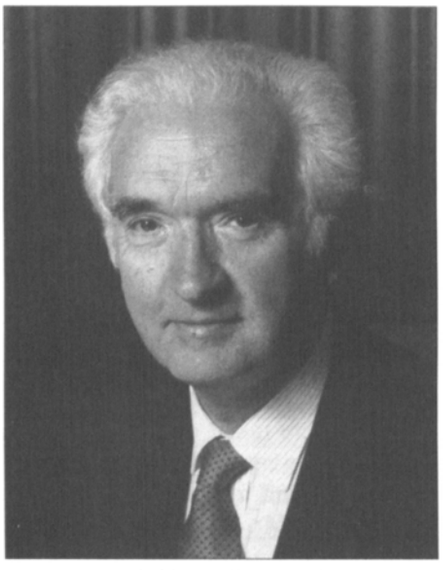
The UK Legal Ombudsman, *Michael Barnes,* who was appointed under the Courts and Legal Services Act, 1990 to consider complaints about barristers, solicitors and licensed conveyancers said that inefficiency was the most common charge levelled against lawyers. He said he was receiving grievances at the rate of 1,500 a year. Approximately 750 of these were taken up and in two thirds of the cases, the complaints centred around a charge of inefficiency. Mr. Barnes said clients wanted information from lawyers on how the work being done for them was progressing, regular reviews of their cases, and the active involvement of the practitioner. They also wanted to know exactly where they stood on costs. Simply quoting hourly rates to clients was not good enough. "You cannot and must not leave the client to do the arithmetic," he told the conference. ●

Legal Aid Changes Inevitable – Lord Chancellor

Just as the dispute on criminal legal aid fees in Ireland was ending, the UK Lord Chancellor, Lord Mackay, told the Conference of the Law Society of England and Wales that legal aid could not continue to take an ever increasing share of public expenditure. The Lord Chancellor said that spending on the legal aid services in the UK would exceed £1 billion during this financial year, and If the current trends continued, it would be nearing £2 billion by the middle of the decade.

The Lord Chancellor proposed that people should have to pay towards the cost of their legal help in as far as they could reasonably afford to. He said that it was also clear to him that controls over the grant of

criminal legal aid in the magistrate's courts were inadequate and he intended to introduce regulations which would spell out more clearly the requirements that should be met.



Lord Chancellor Mackay

The Lord Chancellor was addressing the England and Wales Conference in the context of an experiment in legal aid franchising which had just been completed in Birmingham. The Legal Aid Board intends to invite applications for franchises from UK legal firms from July, 1993. Meanwhile, the Law Society of England and Wales has said that it will withhold support for the proposals until some key details outstanding have been worked out. At the heart of practitioners' dissatisfaction with the proposed system of franchising is the level of control that would be exercised by the Legal Aid Board regarding personnel and financial management as well as the actual management of cases. In turn, the Legal Aid Board argues that its intention is merely to obtain certain assurances about the level of service that legal aid clients would receive from the franchised firms.

The Lord Chancellor told the conference that he was aware that considerable fears and misgivings had been expressed by the profession about the Legal Aid Board franchising experiment. It seemed to him likely, however, that franchised firms would have a competitive edge in attracting the legal aid client. "Franchising has to be an active policy which insists that practitioners meet proper standards. The choice is then yours on how to meet the challenge".

The Lord Chancellor told his audience that he had become increasingly concerned about the differential betwen the rates paid for civil and criminal work. "I note," he said, "that the rates for civil work are being set so much above the hourly rates for criminal cases." He said that in the longer term, the way ahead for civil remuneration lay in standard payments probably for stages of work as they were completed rather than for the case as a whole. In the largest cases he hoped to move to a system of payment in which the fees were negotiated at the beginning of the case and it would be possible to agree and pay much of the expenditure as the case proceeded.

In relation to fees for criminal legal aid work, the Lord Chancellor repeated his intention to introduce standard fees in the magistrates' courts at the end of this year. The Lord Chancellor said he would like to see firms entering into long term contracts with the Legal Aid Board to undertake blocks of cases both civil and criminal. This could be done following competitive tendering and would of course be against defined quality standards.

No Foal No Fee

Turning to remuneration, the Lord Chancellor announced that he intended shortly to make an order which would allow for the introduction of conditional fee arrangements permitting lawyers to agree to accept cases on a no-win, no-fee basis, with an uplift in the fee level if the case were won. □

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New York Irish Lawyers Gain Admission to Supreme Court

The active Irish Lawyers Association of New York has scored a major coup by receiving permission for up to fifty of its members to be admitted to the Bar of the US Supreme Court. The admission ceremony will take place in January, 1993. Association Chairman, *Brian Farren,* says it marks the "coming of age" of young Irish lawyers in the United States.

The Hon Mr. Justice *Anthony Hederman* has accepted the Association's invitation to Washington for the occasion. *Peter Sutherland* has also been invited, and a programme of activities over the weekend of Friday, 22 January, culminating in the Admission Ceremony on 25 January, is currently being organised. The New York lawyers hope that members of the Law Society of Ireland who have been admitted to practice in the States of the United States might form part of the group being admitted to the Supreme Court. Lawyers who have been admitted to the highest court of any State of the United States for at least three years on the date of the application to the US Supreme Court would be eligible.

The Irish Lawyers Association of New York was formed in the mid eighties and this is not its first coup, says Brian Farren, "a few years ago we had to take on the New York City Bar Association to retain our right as law graduates from a common law jurisdiction to sit the New York Bar exam without further study in the United States. We won." The main aims of the Association are to assist Irish lawyers who emigrate to New York, to enable Irish lawyers in New York to keep in touch with one another, to liaise with the profession in Ireland, and to welcome visiting Irish lawyers. □

CORRESPONDENCE

Literature from Council Election Candidates

The Editor,
Gazette

Dear Madam,

Recently, many of my colleagues wrote to me asking me for support in the Council election. Their letters were thoughtful, stimulating documents. I am sure those who were elected will help the profession greatly in planning for the future.

However, I trust they will show more foresight in their work for the Council than they did in sending me their literature. With one exception, I received these stimulating letters after I had voted and returned my paper to the Law Society.

This is the first time that all bar one were received late. However, every year I receive at least a couple of these letters after I have voted. If people who think they deserve a Council seat show this level of efficiency, what must the standard be like over the profession as a whole?

Yours etc,

Michael O'Malley

Re: Wigs: Abolition of: precedent for

The Editor,
Gazette,

Sir,

"We must become civilised men from every point of view . . . our thinking and mentality will become civilised from head to foot. We shall acquire, keep and finally improve the place we deserve in the civilised family to which we belong.

"Civilised international forms of dress are a worthy costume for our nation. We shall wear shoes or boots on our feet, then trousers, waistcoats, shirts, ties, jackets, and naturally to crown it all, we shall wear brimmed headgear. I want to say clearly that this brimmed headgear is called a hat".

– Mustafa Kemal (Ataturk)

. . . . on 25 November, 1925 the Turkish Assembly adopted a law making it illegal for a Turk to wear a fez.

Yours etc,

Frank O'Mahony

P.S. Just like that.

Your Clients Can Pay Less Tax

Self-assessment was first introduced for the income tax year 1988/89. Originally, it was on the preceding year basis, meaning that tax was assessed on the profits of the accounting year which ended in the previous year of assessment.

The 1990 Finance Act abolished the preceding year basis and replaced it with the Current Year Basis.

Self-assessment introduced the concept of "preliminary tax" and "final assessment". Currently, preliminary tax must be paid by 31 October in the year of assessment. So, for the year 1991/92, preliminary tax had to be paid by 31 October, 1991 and by 31 October, 1992 for the tax year 1992/93.

The amount of preliminary tax to be paid to avoid penalty interest charges should be no less than the lower of:

- 90% of the final tax liability for the current tax year, or
- 100% of the final tax liability for the previous tax year.

Your income tax returns for the tax year must be filed with the Revenue Commissioners by 31 January in the following tax year, giving you 15 months to finalise your affairs after the date for payment of preliminary tax.

Where adequate preliminary tax was paid by 31 October when due, the outstanding balance of tax for that year need not be paid until the later of one month from the date of assessment or the relevant 31 January. So, for the tax year 1991/92, the normal date of final assessment would be 31 January, 1993.

The most efficient method of reducing your tax liability is by way of pension contributions. You can obtain full tax relief on contributions to a pension of up to 15% of your net relevant earnings.

Contributions to a pension plan made before 31 January, 1993 can be used to reduce the liability for the tax year 1991/92 and thus reduce the final assessment payable to the Revenue Commissioners by 31 January, 1993.

For further details on this matter, write to *Tom Kennedy,* at Solicitors Division, Sedgwick Financial Services, 18/19 Harcourt Street, Dublin 2 or telephone (01) 781599. □

FLAC survives to fight another year

***Sabha Greene* Information Officer of FLAC reports on its activities in 1992.**

The Free Legal Advice Centres began the year in a financial crisis which threatened closure. Having launched a major appeal for funds we were overwhelmed with the response we received and would like to take this opportunity to thank all those members of the profession who gave so generously. As part of the appeal FLAC called on the Department of Justice for support and, as a result, for the first time in 12 years we received a grant of £40,000 which will meet half of our running costs.

This year, as before, the FLAC helpline continues to provide an essential advice and referral service. In the period January to September, 1992 we dealt with nearly 4,000 calls. Many more queries are handled by volunteers in our 16 evening clinics in and around Dublin and Cork.

Representation in social welfare appeals and Employment Appeals Tribunal cases remains a large part of our work and the latest figures show that we have acted in over a 100 such cases this year. Furthermore, the High Court action on behalf of 1,800 married women to recover arrears of social welfare due under an EC Equality Directive is still ongoing, as are other High Court actions.

As part of our campaigning work, in March and June we highlighted the chronic waiting lists for legal aid around the country, more than a year in some areas. In response to this situation FLAC participated in the establishment of the Alliance for Civil Legal Aid. This is a coalition of women's, church, trade union, and several anti-poverty groups, launched in September with the objective of placing civil legal aid firmly on the political agenda.

FLAC has always maintained an emphasis on the training of local welfare advisors and this year we have organised several highly successful courses for welfare rights groups setting up advice services. These courses are intended to provide a broad knowledge of family law, social welfare, consumer rights, housing and labour law. Also, as part of the National Social Service Board's nationwide training programme, FLAC was invited to run two full day courses on the Social Welfare Appeals system.

The effectiveness of new legislation in the area of employment was the theme of a seminar organised jointly by FLAC and the trade union, Manufacturing Science Finance, during the sunner. The 1990 part – time workers legislation, the enforcement of employment decisions and the 1991 Payment of Wages Act were considered.

Publications this year included the third in our series of handbooks on social welfare "A Guide to Family Payments," and a second edition of 'A Guide to Claims and Appeals." These guides have proved very popular and we hope to be able to produce further titles in the series next year.

In the area of research we have recently completed a study of access to the courts in four European countries with special emphasis of the legal aid systems in each jurisdiction. FLAC was also contracted by the Commission of the EC to investigate the legal instruments in operation in Ireland to combat racism.

FLAC has an essential role to play in the provision of legal services and the campaign to improve legal aid. This work requires the encouragement and help of the legal profession and we thank you for your continued support over the years.

Sabha Greene,
Information Officer, FLAC □

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Registration of Title Act, 1964

An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution from the original Land Certificate as stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

(Registrar of Titles)
Central Office, Land Registry, (Clarlann na Talún), Chancery Street, Dublin 7.
Published: 18 December, 1992

Land Certificates

John Quigley, Folio: 6456; Land: Part of the lands of Corrageen; Area: 22(a) 2(r) 13 (p). **Co. Wexford.**

Catherine Golden, Caher, Louisburgh, Co. Mayo. Folio: 3362F; Land: Caher; Area: 0(a) 1(r) 2(p). **Co. Mayo.**

John Dunleavy, Folio: 961F; Land: Oghill; Area: 14(a) 0(r) 34(p). **Co. Longford.**

Philip Hayes, Folio: 52924; Land: Clashatarriff, **Co. Cork.**

Timothy E. Kelly, Folio: 2964; Land: Part of the lands of Sugarhill; Area: 121(a) 2(r) 15(p). **Co. Limerick.**

James and **Irene Gavaghan,** Folio: 5924F; Land: Part of the townland of Magheross. **Co. Monaghan.**

William Dowling, Folio: 7117 and 7119; Land: (1) Sevensisters (folio 7117), (2) Sevensisters (folio 7119); Area: (1) 8(a) 1(r) 3(p) (Folio 7117), (2) 71(a) 3(r) 22(p) (Folio 7119), **Co. Kilkenny.**

Stephen Conneelly (Jnr) and **Mary Conneelly,** Folio: 24669F; Land: Lands of Cappanaveagh, **Co. Galway.**

John Kelly, Folio: 5790 – closed to 6573F; Land: (1) Rathronshin, (2) Rathronshin, (3) Coolroe, (4) Rathronshin, (5) Rathronshin, (6) Courtwood, (7) Rathronshin, (8) Rathronshin, (9) Rathronshin, (10) Rathronshin, (11) Rathronshin; Area: (1) 10.850 acres, (2) 8.375 acres, (3) 11.856 acres, (4) 18.875 acres, (5) 11.375 acres, (6) 26.731 acres, (7) 6.375 acres, (8) 21.025 acres, (9) 9.500 acres, (10) 5.250 acres, (11) 6.105 acres. **Co. Queens.**

Gerard Carroll, Folio: 15643; Land: Raheever (part); Area: 16(a) 1(r) 29(p), **Co. Cavan.**

Maura Bannon, Folio: 41326F; Land: 285 Carnlough Road, Cabra, Dublin 7. **Co. Dublin.**

Brendan V. Coyle, Folio: 22453; Land: Balina Upper; Area: 1(a) 2(r) 3(p), **Co. Wexford.**

John Cormack (junior) (otherwise John Cormack). Folio: 31268; (1) Crab, (2) Crab, (3) Clonamicklon; Area: (1) 0(a) 1(r) 25(p), (2) 15(a) 0(r) 32(p), (3) 12(a) 2(r) 3(p). **Co. Tipperary.**

Daniel O'Brien, Folio: 21356L; Land: Townland of Jobstown Barony of Upper Cross, Dublin. **Co. Dublin.**

Michael P. Ward, 65 Ballygall Road East, Finglas, Dublin. Folio: 34154L; Land: 65 Ballygall Road East, Parish of Glasnevin and District of Glasnevin North. **Co. Dublin.**

Mary Sexton, Belmont, Wood Road, Cratloe, Co. Clare as tenant in common of an undivided moiety of the property. Folio: 12260; Land: Newtown; Area: 10(a) 0(r) 0(p), **Co. Waterford.**

Stanley Leslie Miller, Folio: 2512; Land: Townland: Blessington; Area: 1(a) 1(r) 4(p). **Co. Wicklow.**

John Moyles, Carrowkeel, Laherdane, Ballina, Co. Mayo. Folio: 44290; Land: Townland: (1) Castlehill, (2) Carrowkeel (E.D. Addergoale); Area: (1) 3(a) 2(r) 17(p), (2) 14.506 acres. **Co. Mayo.**

Thomas Keogh, Lecarrow, Strokestown, Co. Roscommon. Folio: 9931; Land: Lecarrow; Area: 35(a) 3(r) 26(p). **Co. Roscommon.**

John Finbarr Barry and **Mary Barry,** Folio: 174092F; Land: Ballintubrid West, **Co. Cork.**

Lost Wills

Mullamphy (Mellamphy), Peter, deceased, late of Blackrock in the City of Cork, formerly of 9 Military Road, St. Luke's, in the City of Cork and St. Patrick's Hospital, Marymount, in the City of Cork. Date of death – 8 November, 1992. Will any person having knowledge of the whereabouts of the will of the above named deceased, please contact: Messrs. Burke O'Riordan & Co., Solicitors, Washington House, 33 Washington Street, Cork. Telephone – 021 272242.

Coleman, Michael, late of Bridgestown, Inniscarra, Co. Cork. Would anyone knowing of the whereabouts of a will of the above named deceased who died on 13 August, 1992, please contact Messrs. Quirke & Co., Solicitors, Church Lane, Midleton, Co. Cork. Tel: (021) 632429/632208.

Moran, John, deceased, late of 14 McNeela Terrace, The Quay, Westport, Co. Mayo. Date of death 3 July, 1991. Would any person

having knowledge of the whereabouts of a will of the above named deceased please contact M/S Patrick Shanley & Co., Solicitors, James Street, Westport, Co. Mayo. Tel: (098) 25296.

Keady, Michael, deceased, late of Knockadoagh, Costello, in the county of Galway, farmer. Would anybody having knowledge of the whereabouts of the original will of the deceased which is dated 7 August, 1980, please contact W.B. Gavin & Co., Solicitors, 4 Devon Place, The Crescent, Galway.

Hall, Phyllis (Philomena), deceased, late of 33 Glenamuck Road, Carrickmines, Dublin 18. Any person having knowledge of the whereabouts of a will of the above named deceased who died on 5 November, 1992 is requested to contact Russell & O'Brien, Solicitors, 9 Prince of Wales Terrace, Quinsboro' Road, Bray, Co. Wicklow (Ref: R/H56-1).

Barry, Anne T. deceased, late of 8, Bracken Crescent, North Circular Road, Limerick. Would any person having knowledge of the whereabouts of a will of the above named deceased who died on 27 October, 1992, contact Mary Murphy of Tynan Murphy Yelverton & Co., Solicitors, 16 William Street, Limerick. Telephone: 061-415888.

Flynn, Patrick late of Ballycorick, Ballynacally, Co. Clare, ob. 26 June, 1988. Would any person aware of the existence of and whereabouts of the original last will and testament of the above named deceased, please contact Messrs. John Casey & Co., Solicitors, Bindon House, Bindon Street, Ennis, Co. Clare. Reference: DKC.NT.

Flynn, Martin, late of Ballindrimley, Castlerea, Co. Roscommon, farmer, deceased. Will any person having knowledge of a will of the above named deceased, who died on 31 October, 1992, please contact Messrs. Dermot M. MacDermot & Co., Solicitors, Castlerea, Co. Roscommon – Telephone: (0907) 20125.

Hamilton, Frederick Longmuir, Would any person who is or knows of any heirs of Frederick Longmuir Hamilton born on 28 December, 1892 (son of the late Joseph and Jane Hamilton) please contact on or before 4 January, 1993: Matheson Ormsby Prentice, Solicitors, 3 Burlington Road, Dublin 4. Ref: GCR/TG) Telephone: 01-760981.

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Experienced solicitors seeks conveyancing and probate position in the Athlone/Mullingar area. Box No: 107.

Solicitor seeks position. Three years general practice experience. Qualified 13 months. Partic. areas Litigation and Matrimonial. Reply to: No. 2 Haywood Avenue, Ormeau Road, Belfast, N. Ireland.

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Miscellaneous

Small to Medium sized practice required for purchase in the Leinster area. Some commercial clientele preferable. Reply in confidence to Box No: 103.

For Sale. Irish Statutes 1922-1986; Irish Law Times 1920-1985; Halsbury; English and Empire Digest; Irish Reports; Assorted textbooks. Box No: 104.

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"Asio Otus" (Long-eared owl). Photographed by Richard T. Mills.

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Recent Irish Cases

Compiled by Raymond Byrne, BCL, LLM, BL, Lecturer in Law, Dublin City University.

The following case summaries have been reprinted from the *Irish Law Times and Solicitors Journal* with the kind permission of the publishers.

Mapp v Gilhooley Supreme Court 23 April 1991

PRACTICE - EVIDENCE - UNSWORN EVIDENCE OF CHILD - WHETHER ADMISSIBLE IN CIVIL TRIAL - TRIAL JUDGE SATISFIED THAT CHILD UNDERSTOOD IMPORTANCE OF TELLING TRUTH - WHETHER MISTRIAL RESULTING - ACQUIESCENCE OF PARTIES TO TRIAL PROCEDURE - WHETHER ESTOPPEL ARISES - Constitution, Article 40.1, 40.3

The plaintiff, who was 8 years of age at the date of the trial of his action, instituted proceedings in the High Court claiming damages arising from personal injuries sustained while a pupil in the school managed by the defendant. When he was called to give evidence, he was asked by the trial judge whether he understood the oath, and the plaintiff stated he did not. The trial judge was asked by the plaintiff's counsel to hear his evidence and to judge it as best he could. The trial judge told the plaintiff that it was very important to tell the truth and then proceeded to hear the plaintiff's account of the incident in the school. The trial judge also heard the sworn evidence of teachers who had been supervising the plaintiff, their account of the incident in question being different from the plaintiff. The trial judge concluded that he preferred the plaintiff's account, found that the defendant had been negligent and awarded the plaintiff £8,000 damages. On appeal, the defendant argued only that the procedure adopted by the trial judge in hearing the plaintiff's unsworn evidence amounted to a mistrial. **HELD** by the Supreme Court (Finlay CJ, McCarthy and O'Flaherty JJ) allowing the appeal and ordering a retrial on liability: (1) a fundamental principle of the common law was that *viva voce* evidence in civil or criminal trials must be given on oath or affirmation, subject to certain exceptions contained in legislation applicable to criminal trials only; since the purpose of the rule is that such evidence shall be true by the provision of a moral or religious and legal sanction against deliberate untruth, such a rule cannot be regarded as inconsistent with the Constitution, either on the basis that it is discriminatory or as being an impermissible restriction on the right of access to the courts; (2) the practice by which documentary evidence can be accepted as proof of matters by agreement of the parties does not constitute an exception to the rule of evidence by oath or affirmation, since such agreement is a method of avoiding the giving of evidence; (3) the inevitable consequence of acting on unsworn *viva voce* evidence in a civil case is that a mistrial has occurred; and a party could only be prevented from seeking to argue a mistrial in such a case on the basis of estoppel by acquiescence or on the ground that to allow an appeal would amount to a virtual fraud or an abuse of the process of the courts; (4) while the defendant had appeared to accept the validity of the plaintiff's unsworn account at the trial of the action, the Court would order a retrial on liability in the Circuit Court having regard to the fundamental nature of the rule that evidence be given on oath, since the plaintiff's interests could be preserved by an award of interest under s.22 of the Courts Act 1981 if he were ultimately to be successful. *Per curiam*: where it appears that a child does not understand the menaing of an oath, the proper course is to adjourn the trial so that the child may be adequately instructed on its meaning.

In re McCairns (PMPA) plc (In Liquidation) Supreme Court 18 July 1991

COMPANY - WINDING UP - SECURED CREDITOR - SALE OF SECURED PROPERTY BY LIQUIDATOR WITH CONSENT OF SECURED CREDITOR - AGREEMENT BY LIQUIDATOR TO DISCHARGE SECURED CREDITOR IN FULL FROM PROCEEDS - WHETHER SUBJECT TO PAYMENT OF PROPORTION OF EXAMINER'S FEES - ESTOPPEL - WHETHER INTEREST PAYABLE ON DEBT AFTER WINDING UP - Supreme Court and High Court (Fees) Order 1986 - Companies Act 1963, s.284

The company was put into liquidation in 1987. Hill Samuel & Co (Irl) Ltd (the Bank) was a secured creditor in respect of a substantial site. The Bank agreed with the liquidator to the sale of the site. On depositing the deeds of the site with the liquidator, the Bank stated in writing that its consent was subject to full discharge by the liquidator of the sum due under its security together with interest up to payment. The liquidator agreed, in writing, that this was the basis of the consent to the sale. On completion of the sale, the liquidator sought to deduct from the amount payable to the Bank a portion of the costs of the Examiner incurred under the 1986 Fees Order. There was also dispute as to whether interest was payable on the secured amount. In the High Court, Costello J **HELD** that the relevant Examiner's costs were correctly deductible and that no interest was payable after the commencement of the winding up. On appeal by the Bank **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) allowing the appeal: (1) in view of the express agreement between the liquidator and the Bank at the time of the consent to the sale of the site, which was enforceable notwithstanding the failure at that time to advert to the question of fees, the liquidator was precluded from arguing that the Bank should pay a portion of the Examiner's fees incurred; (2) assuming that Court approval for such agreement would have been required, the liquidator could not now make a case on that point since no such application for approval had been made to the High Court; (3) where a creditor chooses not to bring the property over which it has an interest into the winding up, as the Bank did in the instant case, then it would appear logical that the creditor is entitled to rely on the terms on which it granted the security, including the claim to interest, so that the liquidator's claim is limited to the equity of redemption of the property; (4) the Bank was therefore entitled to claim interest after the date of the winding up and the trial judge had thus erred in deciding that s.284 of the 1963 Act had incorporated the rule in bankruptcy which would exclude such an award of interest. *In re Humber Ironworks and Shipbuilders Co* (1869) LR 4 Ch App 643 not approved. *In re Egan Electric Co Ltd* [1987] IR 398 overruled.

Cox v Ireland and Ors Supreme Court 11 July 1991

CONSTITUTION - PERSONAL RIGHTS - PROPERTY RIGHTS - CONVICTION IN SPECIAL CRIMINAL COURT - FORFEITURE OF AND DISQUALIFICATION FROM EMPLOYMENT BY STATUTORY BODY OR ONE FUNDED BY THE OIREACHTAS - WHETHER STATE ENTITLED TO ENACT FORFEITURE LAWS TO MAINTAIN ITS AUTHORITY - WHETHER PARTICULAR LAW IMPERMISSIBLY WIDE IN SCOPE - WHETHER CONSTITUTING FAILURE TO PROTECT CONSTITUTIONAL RIGHTS AS FAR AS PRACTICABLE - Constitution, Article 40.3 - Offences against the State Act 1939, s.34

The plaintiff, a qualified vocational teacher, pleaded guilty in the Special Criminal Court to certain firearms offences and was sentenced to two years' imprisonment. While serving his term of imprisonment, his position was filled on a temporary basis. On his release, he was informed that by virtue of s.34 of the 1939 Act, his teaching position had been forfeited and that he was disqualified from holding the position for a period of seven years. The plaintiff instituted proceedings claiming that s.34 of the 1939 Act was in breach of the Constitution. In the High Court, Barr J granted the declaration sought (High Court, 2 October 1990) (1991) 9 ILT Digest 170. On appeal by the defendants **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) dismissing the appeal: (1) s.34 of the 1939 Act constituted an attack and major inroad on the unenumerated right of the person involved to earn a living and also on certain property rights of that person protected by the Constitution, such as the right to a pension or the right to the advantages of a subsisting contract of employment; (2) the State was entitled, for the protection of public peace and order and to maintain its own stability, to provide by law for far-reaching penalties to deter major crimes threatening the State, and to ensure that persons who commit such crimes are not involved in carrying out the functions of State, but such laws must also protect the constitutional rights of the citizen; (3) since s.34 of the 1939 Act was mandatory in terms and since forfeiture followed a conviction in the Special Criminal Court without any reference to

whether the scheduled offence in question involved an attack on the maintenance of public peace and order, such as conviction in the Special Criminal Court for possession of a sporting gun without a licence, and since the ultimate factor triggering s.34 was the venue of the trial, the section failed as far as practicable to protect the constitutional rights of the citizen and was, accordingly, impermissibly wide and indiscriminate and not warranted by the objectives it was sought to secure; (4) the power of the government under s.34 to remit in whole or part the effects of a forfeiture did not save s.34 from its constitutional invalidity.

Cowzer v Kirby and Director of Public Prosecutions High Court 11 February 1991

CRIMINAL LAW - PROCEDURE - INDICTABLE OFFENCE - DEMANDING MONEY WITH MENACES - ACCUSED ELECTING FOR SUMMARY TRIAL - PROSECUTION AMENDING DATES OF ALLEGED OFFENCES - PROSECUTION ALTERING CHARGES - DEFENCE SEEKING COPY OF STATEMENT GROUNDING ORIGINAL COMPLAINT - WHETHER COPY MUST BE FURNISHED IN ADVANCE OF TRIAL - CONSTITUTION - TRIAL IN DUE COURSE OF LAW - Larceny Act 1916, ss.29, 30 - Criminal Procedure Act 1967, s.6 - Constitution, Articles 38.1, 40.3

The applicant had been charged with demanding money with menaces on a particular date, contrary to s.29 of the 1916 Act. The applicant was brought before the first respondent in the District Court and elected for summary trial, the first respondent indicating that he was prepared to accept jurisdiction. On the date set for trial, the applicant proposed to adduce alibi evidence to indicate that he could not have committed the offence on the date indicated in the charge. At the outset of the hearing, however, the prosecution applied to have the date in the charge amended and this was accepted by the first respondent and the trial was adjourned. The prosecution also indicated that the s.29 charge was being abandoned and that a charge of demanding money with intent to steal, contrary to s.30 of the 1916 Act, would be brought instead. The applicant's solicitor then sought from the second respondent a copy of the statement from the complainant on which the original charges had been brought, but this was refused. The applicant then sought an order of prohibition preventing his prosecution and trial on the existing or any substituted charges unless all witness statements were furnished to him before the trial. **HELD** by Barr J granting the application: (1) the charges against the applicant were not in any way trivial in nature, since he ran the risk of a prison sentence of up to 12 months, and the constitutional guarantees of fair procedures and of a trial in due course of law required that the applicant be afforded every opportunity to defend himself; and there was no prior authority indicating that in summary proceedings an accused is not in any circumstances entitled to receive, prior to his trial, copies of written statements made by prosecution witnesses. Dicta in *The State (Healy) v Donoghue* [1976] IR 325 applied. *Clune v Director of Public Prosecutions* [1981] ILRM 17 and *Kelly v O'Sullivan* (High Court, 11 July 1990) (1991) 9 ILT 126 considered; (2) there was no logic in the proposition that merely because the applicant elected for summary trial he should lose rights which he would have if he had elected for trial on indictment and would then have been served with a book of evidence under s.6 of the 1967 Act; and while the applicant was not entitled to receive a formal book of evidence, the Constitution required that he receive, at the least, copies of the statements of all witnesses whose evidence is crucial to the prosecution case against him, particularly having regard to the change in the dates and in the charges themselves which the Director of Public Prosecutions had indicated; and he was accordingly entitled to the relief sought.

Westman Holdings Ltd v McCormack and Ors Supreme Court 14 May 1991

INJUNCTION - INTERLOCUTORY - TRADE DISPUTE - INJUNCTION TO PROHIBIT PICKETING DISPUTE AS TO WHETHER NEW OWNER OF PREMISES WAS EMPLOYER OF WORKERS EMPLOYED BY PREVIOUS OWNERS OF PREMISES - WHETHER FAIR QUESTION TO BE TRIED AS TO ISSUE - BALANCE OF CONVENIENCE - European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980 - Industrial Relations Act 1990, ss.8, 11

The plaintiff company had purchased premises known as 'Judge Roy Beans' which were operated as a restaurant, licensed premises and night club. The defendants had been workers in the premises and had been employed by the former occupiers of the premises from whom the plaintiff company had purchased it. The defendants' union representative claimed that the defendants' employment continued on the transfer of the business to the plaintiff, in accordance with the 1980 Regulations. The plaintiff company rejected this claim and the defendants subsequently began to picket the premises. The plaintiff obtained an interim injunction preventing picketing and an interlocutory injunction was subsequently granted. On appeal by the defendants **HELD** by the Supreme Court (Finlay CJ, O'Flaherty and Egan JJ) dismissing the appeal: (1) there were fair and bona fide questions to be tried as to whether the defendants were employed by the plaintiff company under ss.8 and 11 of the 1990 Act and also whether they were entitled to the benefit of the 1980 Regulations; (2) once it is decided that fair questions arose, a court hearing an application for an interlocutory injunction should not express any view on the strength of the contending submissions concerning those questions but should proceed to consider the balance of convenience. *Campus Oil Ltd v Minister for Industry and Energy* (No.2) [1983] IR 88 applied; (3) while the plaintiff's potential loss if refused an interlocutory injunction was primarily monetary, it was unlikely that it would receive adequate compensation if it was successful at the trial of the action, having regard to the inability of some of the defendants to pay damages and also to the potential immunity of suit of members of a trade union engaged in a trade dispute; whereas the plaintiff's undertaking as to damages if granted an injunction would be sufficient to compensate the defendants in the event that they were ultimately successful, even having regard to their argument that their ability to picket at this stage of the proceedings constituted a great aid to them in the negotiations with the plaintiff; and having regard to a consideration of all the factors, the balance of convenience was in favour of granting the interlocutory injunction sought by the plaintiff. [Note: s.19 of the Industrial Relations Act 1990, when it comes into operation on 18 July 1992, will alter the rules in cases such as the above.]

National Union of Journalists and Ors v Sisk and Ors Supreme Court 20 June 1991

LABOUR LAW - TRADE UNION - TRANSFER OF ENGAGEMENTS - ENGAGEMENTS TO BE TRANSFERRED TO TRADE UNION NOT REGISTERED IN THE STATE - WHETHER REGISTRAR OF FRIENDLY SOCIETIES HAVING JURISDICTION TO CONSIDER TRANSFER - Trade Union Act 1913, ss.1, 2 - Trade Union Act 1941 - Trade Union Act 1975, s.9 - Constitution, Article 40.6.1.ii

The first applicant was a trade union registered as such under the relevant legislation of the United Kingdom. It also carried on negotiations in this State on behalf of over 2,300 members and had an Irish council which was responsible for the administration of its members in the State. It **HELD** a negotiation licence issued by the Minister for Labour under the 1941 Act. The applicant had reached agreement with the Irish Print Union, a trade union registered in the State, for the transfer of engagements from that union to the applicant. It applied for the registration of that transfer of engagements with the first respondent, the Registrar of Friendly Societies, pursuant to the 1975 Act. The respondent considered that he had no jurisdiction to deal with the proposed transfer on the ground that the applicant Union was not registered in the State. On judicial review by the first applicant Keane J dismissed the claim (High Court, 31 July 1990) (1991) 9 ILT Digest 127. On appeal by the applicant **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) allowing the appeal: (1) the term 'trade union' in s.2 of the 1913 Act was not defined by reference to the registration or certification of a trade union by the Registrar of Friendly Societies, but rather in relation to what a trade union is and what its principal objects are, such objects being outlined in s.1 of the 1913 Act; and in this light, while the first applicant was not registered or certified under s.2 of the 1913 Act, it was nonetheless a 'trade union' within s.2 of the 1913 Act; (2) aside from the interpretation contended for s.9 of the 1975 Act, there was nothing in the 1975 Act to indicate that, for the purposes of a transfer of engagements, it was necessary that the union to which the transfer was to take place should necessarily be registered under the 1913 Act; nor did this interpretation involve the necessary conclusion that the 1975 Act had extraterritorial effect, since the purpose of the 1975 Act was simply to ensure that the transferee would be capable of looking after the interests of the members of the union from whom the transfer took place; and in the instant case, the fact that the first applicant had a presence in the State and **HELD** a negotiating licence under the 1941 Act indicated that it would be capable of looking after the interests of the IPU members; (3) s.9 of the 1975 Act did not, by express terms, limi

the ability of the IPU members to transfer engagements to the first applicant; and since such a limitation would amount to a regulation by law of the right to join associations or unions under Article 40.6.1.ii of the Constitution, the section should not be interpreted as having imposed such a regulation by some form of implication; and so the first applicant was entitled to a declaration that it came within the terms of the 1975 Act.

Gleeson v Feehan and O'Meara Supreme Court 20 June 1991

LIMITATION OF ACTIONS - ACTION BY PERSONAL REPRESENTATIVE FOR RECOVERY OF LAND WHETHER STATUTE BARRED - WHETHER SUBJECT TO SIX YEAR OR 12 YEAR LIMITATION PERIOD - STATUTE - INTERPRETATION - Statute of Limitations 1957, ss.13, 45 - Succession Act 1965, s.126

The plaintiff was the personal representative of James Dwyer, who had died intestate in 1937, and of Edmund Dwyer, who had died intestate in 1971. Both were the registered owner s of two parcels of land which were the subject matter of the proceedings. On Edmund Dwyer's death in 1971, the only person in possession of the land was his sister's son, and in 1975 he sold one parcel of land to the second defendant's predecessor in title and in 1978 sold the other parcel to the first defendant. In 1983, the plaintiff obtained grants of administration to the estates of James and Edmund Dwyer and he also instituted proceedings by ejectment Civil Bill in the Circuit Court in 1983 against the two defendants. Judge Sheridan **HELD** that the proceedings were statute barred as they had been instituted beyond the six year limitation period in s.45 of the 1957 Statute. On appeal to the High Court, Barron J stated a case for the Surpeme Court as to whether s.45 of the 1957 Statute applied. This required consideration as to whether the 12 year limitation period in s.13 of the 1957 Statute was applicable, in which case the proceedings were not barred. **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) finding the claim was not statute barred: s.45 of the 1957 Statute was, by its plain and ordinary meaning, a provision applicable to proceedings *by* a person seeking an interest in a deceased's estate *against* a personal representative, but it was not applicable to the instant case where proceedings were instituted *by* the personal representative *against* a stranger to the estate; and since the plaintiff's action was essentially one to recover land based on a superior title, s.13 of the 1957 Statute was applicable. Dicta in *Drohan v Drohan* [1981] ILRM 473; [1984] IR 311 approved.

Nolan and Ors v Minister for the Environment and Electricity Supply Board Supreme Court 10 July 1991

LOCAL GOVERNMENT - MOTORWAY SCHEME - REMOVAL OF ELECTRICITY PYLONS FROM MOTORWAY ROUTE AND RELOCATION OF PYLONS PURSUANT TO CONSENT BY MINISTER TO RELOCATE - WHETHER CONSENT ULTRA VIRES - WHETHER PLANNING PERMISSION REQUIRED FAIR PROCEDURES - WHETHER NOTICE OF INTENTION TO CONSENT TO RELOCATION REQUIRED - Local Government (Planning and Development) Act 1963 - Local Government (Roads and Motorways) Act 1974, ss.8, 10 - Constitution, Article 40.3

The respondent Minister had made an order under the 1974 Act approving a motorway scheme by Dublin County Council. The motorway path included a number of pylons which the respondent Board sought to remove and relocate. The Board applied to the Minister pursuant to the 1974 Act for his consent to removal and relocation of the pylons. The Minister purported to grant such consent pursuant to s.10 of the 1974 Act, which authorises that consent may be given by the Minister to a statutory undertaker in relation to excavating any apparatus in the motorway path. The applicants, householders beside which the pylons were to be relocated, sought judicial review of the Minister's consent on the grounds that it was ultra vires (i) in purporting to permit the respondent Board to perform an illegal act, namely to relocate the pylons without planning permission under the 1963 Act and (ii) in failing to comply with the principles of fair procedures and natural justice. In the High Court Costello J granted the applicants a declaration that the Minister had acted ultra vires the 1974 Act in allowing a development which was not exempted under the 1963 Act: [1989] IR 357. On appeal by the respondents **HELD** by the Supreme Court (Finlay CJ, Hederman and O'Flaherty JJ): (1) (*per* Hederman and O'Flaherty JJ; Finlay CJ dissenting) since s.8 of the 1974 Act prohibited a planning authority from granting permission for any development which is part of a motorway scheme under the 1974 Act, the 1974 Act should be regarded as a self-contained piece of legislation quite separate from the planning code; and thus it was not appropriate to approach the instant case by considering whether the respondent Board's actions were or were not exempt from the 1963 Act; and the trial judge had thus erred in finding that the Minister had acted ultra vires, so that the respondents' appeal on this ground would be allowed; (2) (*per* Finlay CJ, Hederman and O'Flaherty JJ): the principles of fair procedures and natural justice required the Minister, in exercise of his powers under s.10 of the 1974 Act, to consider the views of persons, such as the applicants, who might be directly affected by the proposal which the respondent Board had made to the Minister and, since this question had not been considered in the High Court, it remained for decision by the High Court. *Per curiam*: the requirements of fair procedures did not require a formal public notice, or an oral hearing for all objections, but would be satisfied if the Minister received and considered the gist of local objections. *East Donegal Co-Op Ltd v Attorney General* [1970] IR 317 and *O'Brien v Bord na Mona* [1983] ILRM 314; [1983] IR 255 discussed. Per Hederman and O'Flaherty JJ: without expressing a final view, the Minister may have complied with the requirements of fair procedures in the instant case.

Baxter v Horgan Supreme Court 7 June 1991

PRACTICE - COSTS - PARTNERSHIP - DISSOLUTION - COSTS OF LITIGATION INCURRED AFTER DISSOLUTION - DISCRETION NOT TO AWARD COSTS OUT OF PARTNERSHIP ASSETS

The plaintiff had begun High Court proceedings in 1976 seeking the dissolution of a partnership between himself and the defendant. The defendant denied a partnership, but the proceedings were compromised in 1977 by a consent order dissolving the partnership. An account by the Examiner of all transactions was ordered, but various disputes arose as to whether certain transactions formed part of the partnership. These disputes led to various High Court hearings, including a judgment of Carroll J that certain invoices produced by the defendant were forgeries (High Court, 21 February 1986). Further disputes between the parties resulted in another reference by the Examiner to the High Court. In relation to some of the items referred, Murphy J found in the defendant's favour, but he awarded the costs of the proceedings to the plaintiff (High Court, 28 May 1990). On appeal by the defendant against the award of costs **HELD** by the Supreme Court (Finlay CJ, McCarthy and Egan JJ) dismissing the appeal: while it is usual that in partnership actions the costs of accounts after dissolution are directed to be paid out of partnership assets, the trial judge has a wide discretion in the matter; and in the instant case, it was appropriate to take into account that the defendant was the partner responsible for keeping proper accounts and that he had failed to do so; and having regard to previous findings that the defendant had produced forgeries, the plaintiff was entitled to put the defendant on proof of each item relevant to the accounts; and while not every issue was decided in the plaintiff's favour, the trial judge had strong grounds for awarding the plaintiff the costs of the issues referred from the Examiner.

Redmond v Ireland and Attorney General Supreme Court 18 July 1991

PRACTICE - DAMAGES - STAY ON AWARD - NO APPLICATION MADE IN HIGH COURT - APPLICATION FOR STAY TO SUPREME COURT - APPEAL ON LIABILITY AND QUANTUM - WHETHER SUPREME COURT SHOULD TAKE VIEW ON LIKELY OUTCOME OF APPEAL

The plaintiff was awarded £49,969 damages in the High Court in his action against the defendants in respect of injuries sustained in the course of employment. The defendants made no application to the trial judge for a stay on the award. The defendants appealed the decision to the Supreme Court on liability and quantum, and sought a stay on the High Court award. The Court ordered a payment of £15,000 be made, pending a determination on the question of a further stay. **HELD** by the Supreme Court (McCarthy and Egan JJ; Finlay CJ dissenting) declining to grant any further stay on the High Court award: (*per* McCarthy J) the trial judge delivered a reasoned decision on liability which was not demonstrably wrong, and there was no substance in the appeal on quantum; (*per* Egan J) having reviewed the transcript, but without taking a final view, it was difficult to conceive that the findings of the trial judge on liability would be set aside and it was totally unlikely that there would be any reduction in damages. *Per* McCarthy J (Finlay CJ concurring) the factors to be taken into account in applications for a stay include: (i) whether liability is in issue; (ii) a heavy onus lies on

those seeking a stay; (iii) the court should not try the substantive appeal; (iv) whether the appeal alleges that the trial court's findings were not supported by any credible evidence; (v) whether monies payable on foot of a decree might not be recoverable; (vi) that bringing an appeal can, itself, be damaging to an injured party; (vii) that an appeal may be used as a bargaining weapon; (viii) the length of time involved in hearing the appeal; (ix) the absence of an application for a stay at the trial.

Megaleasing UK Ltd and Ors v Barrett and Ors Supreme Court 16 May 1991

PRACTICE - DISCOVERY - WHETHER DISCOVERY MAY BE SOUGHT AS SUBSTANTIVE RELIEF - HIGH COURT GRANTING SUCH ORDER FOR DISCOVERY - REFUSAL TO GRANT STAY - WHETHER SUPREME COURT SHOULD ORDER STAY - CONSTITUTION - RIGHTS INVOLVED - Constitution, Article 40.3

The plaintiffs instituted plenary proceedings against the defendants in which the substantive relief was for orders for discovery concerning certain invoices said to be in their possession. The purpose of such orders was stated by the plaintiffs to be to facilitate them in bringing proceedings against other parties whose tortious acts the plaintiffs claimed had caused them (the plaintiffs) to suffer loss. In the High Court, Costello J granted the plaintiffs the relief sought, and refused to grant a stay of execution upon the order. On appeal by the defendants against the refusal of the stay **HELD** by the Supreme Court (McCarthy, O'Flaherty and Egan JJ) granting the stay: while in principle the courts should aid in obtaining all information relevant and necessary to the true determination of facts, the defendants' appeal involved important constitutional issues concerning the rights of privacy and of communication; and if the stay was not granted, an appeal against the order made in the High Court would be rendered moot and a decision in the plaintiff's favour at this stage of the proceedings would determine the action; and in the circumstances, the interests of justice required that a stay be granted on the High Court order. *Norwich Pharmacal Co and Ors v Customs and Excise Commissioners* [1974] AC 133 and *International Trading Ltd v Dublin Corporation* [1974] IR 373 discussed.

Fallon v An Bord Pleanala and Anor Supreme Court 16 November 1990 and 15 May 1991

PRACTICE - SECURITY FOR COSTS - PLAINTIFF OF MODEST MEANS - WHETHER NOMINAL PLAINTIFF - WHETHER GROUNDS EXISTING FOR REQUIRING SECURITY FOR COSTS - AMOUNT OF SECURITY - WHETHER NORMAL ONE THIRD RULE SHOULD APPLY - FACTORS TO BE CONSIDERED - Rules of the Superior Courts 1986, O.58, r.17 - Constitution, Article 40.3

The plaintiff, a man in his late 20s, instituted proceedings seeking to have invalidated a decision of the defendant Bord granting retention planning permission for certain bungalows which had been built by the second defendant. The plaintiff's claim was dismissed in the High Court. The plaintiff appealed this decision to the Supreme Court. The second defendant then applied, pursuant to O.58, r.17 of the 1986 Rules, for an order from the Supreme Court requiring the plaintiff to furnish security for costs in respect of the appeal. **HELD** by the Supreme Court (Finlay CJ, Griffin and Hederman JJ) granting the order: special circumstances existed under the 1986 Rules justifying the making of an order requiring security for costs, since: (i) the plaintiff was a young man of modest means; (ii) the appeal would not involve a question of law of public importance; and (iii) there were special circumstances in the case, involving the uncontroverted assertion that the plaintiff had been deliberately chosen as a person of little means to bring the proceedings, which were such that security for costs should be required. On remittal of the issue to the High Court, the Master fixed security at £2,500, being about one third the defendant's estimated costs in contesting the plaintiff's appeal to the Supreme Court. On appeal to the High Court, Egan J affirmed that sum. On appeal by the second defendant **HELD** by the Supreme Court (Hederman and McCarthy JJ; Finlay CJ dissenting) dismissing the appeal: (1) the customary practice of the courts to require one third of the estimated costs of an appeal as security could be departed from in exceptional circumstances, such as where an appeal was bordering on vexatious litigation or devoid of any merit; but the constitutional right of equal access to the courts required that no litigant should be prevented by poverty from proceeding with a case through requiring that person to furnish a greater amount than one third. *Thalle v Soares* [1957] IR 182 discussed; (2) it was undoubtedly the case that the plaintiff was a man of limited means, but the interests of justice did not require an increase in the amount of security fixed by the Master, since the defendant would not be in any way prejudiced by the level of security actually set; nor was the plaintiff's appeal devoid of merit as there was an arguable point of law to be made and the plaintiff had also lodged appeal papers and the case was ready for hearing in the Supreme Court.

D'Arcy (A Minor) v Roscommon County Council Supreme Court 11 January 1991

PRACTICE - THIRD PARTY NOTICE - NEGLIGENCE CLAIM ON BEHALF OF INFANT - APPLICATION TO JOIN NEXT FRIEND AS THIRD PARTY - DISCRETIONARY NATURE OF APPLICATION - AFFIDAVIT GROUNDING APPLICATION - HEARSAY - Rules of the Superior Courts 1986, O.16, r.1

The plaintiff, a minor suing by her mother and next friend, instituted proceedings in negligence against the defendant Council. The Council sought to have the plaintiff's parents joined as third parties in the proceedings. The application was grounded on the affidavit of the solicitor for the Council, who averred that, to his knowledge and belief, the plaintiff's parents had themselves been negligent in relation to the incident the subject matter of the proceedings. In the High Court, MacKenzie J refused the application to join the parents as third parties. On appeal by the Council **HELD** by the Supreme Court (Hederman, McCarthy and O'Flaherty JJ) dismissing the appeal: the allegations against the plaintiffs' parents were inadequate to justify making an order joining them as third parties, and the trial judge was correct in taking into account the lack of clarity in the allegations made, particularly as the power to join under O.16, r.1 is discretionary and the effect of making the order might be intimidatory on the parents in considering the running of the case and any settlement which might be offered. *Per curiam*: it was undesirable, in an application to join a third party, that the solicitor for the applicant should swear the grounding affidavit, and it was preferable that it be sworn by the person having first hand knowledge of the events in question.

Johnston (A Minor) v Fitzpatrick Supreme Court 11 July 1991

PRACTICE - THIRD PARTY NOTICE - NEGLIGENCE CLAIM ON BEHALF OF INFANT - APPLICATION TO JOIN NEXT FRIEND AS THIRD PARTY - DISCRETIONARY NATURE OF APPLICATION - WHETHER GROUNDS FOR MAKING ORDER ESTABLISHED - Rules of the Superior Courts 1986, O.16, r.1

The plaintiff, a minor suing by his mother and next friend, instituted proceedings in negligence against the defendant. The plaintiff, then 10 years old and in his parents' company, was struck by a car driven by the defendant. The defendant brought a motion to join the plaintiff's parents as third parties. In support of the motion, the defendant's solicitor averred that the plaintiff 'dashed' onto the road in front of the defendant; and that his parents did not, in the circumstances, exercise any reasonable supervision over the plaintiff. In the High Court, MacKenzie J declined to join the parents as third parties. On appeal by the defendant, he was permitted, having regard to the decision in *D'Arcy v Roscommon County Council* (Supreme Court, 11 January 1991) (supra), to file an affidavit in which he personally deposed to the events of the accident. **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) dismissing the appeal: the power of the Court to join a third party under O.16 of the 1986 Rules is not mandatory in nature, and the party seeking the order must establish that the proposed third party contributed to the accident; and in the instant case, having regard to the child's age, the averment in the grounding affidavit did not establish that the parents contributed to the plaintiffs' 'dash' onto the road. *Semble*: the case would be different if there was an allegation that the plaintiff had a disability or that the parents had encouraged him to make a 'dash' across the road. *Per* Finlay CJ (McCarthy J concurring): a direct affidavit is not required in all applications to join a third party, but it was required in the instant case. *D'Arcy v Roscommon County Council* (Supreme Court, 11 January 1991) (supra) referred to.

Recent Irish Cases

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Dunleavy v Glen Abbey Ltd High Court 9 May 1991

TORT - BREACH OF STATUTORY DUTY - EMPLOYER'S LIABILITY - FACTORY REGULATIONS - MANUAL HANDLING - WHETHER A 'PROCESS' WITHIN REGULATIONS - WHETHER BREACH OF DUTY ESTABLISHED - WHETHER CAUSATIVE FACTOR IN ACCIDENT - Factories Act 1955 (Manual Labour) (Maximum Weights and Transport) Regulations 1972, Regs.3, 6, 7

The plaintiff was an employee of the defendant company, and about half of his duties involved carrying and lifting loads into and in the company's factory premises. On the occasion giving rise to the proceedings, nine cartons of metal fasteners arried at the company's premises in a van, the cartons being stored on a pallet in the van. The plaintiff went for the fork-lift truck in the premises to lift the cartons from the van, but its battery was dead. The plaintiff then proceeded to lift the cartons manually from the van with the help of the van driver. Each carton was small, being 57 cm x 24 cm x 23 cm, but weighed between 35 and 42 kilos. They lifted four of the cartons in this way, but with the fifth carton the van driver let go, the plaintiff was jerked by the weight and he suffered a back injury. The plaintiff claimed damages in negligence and breach of statutory duty. It was accepted that the plaintiff had regularly complained that the fork-lift truck was inoperative from time to time and that he not received manual handling training. **HELD** by Barron J finding for the plaintiff: (1) since the plaintiff was employed by the defendant company in activity which normally included the manual transport of loads, and was therefore of more than a minimal duration, and since that employment was carried on in a factory, he was engaged in a 'process' within the meaning of Reg.3 of the 1972 Regulations. *Nurse v Morganite Crucible Ltd* [1989] AC 692 approved; (2) the defendant had not provided the plaintiff with manual handling training, and was thus in breach of Reg.6 of the 1972 Regulations; and, since it was aware that the fork-lift truck was inoperative from time to time, it was also in breach of Reg.7, which required that, so far as is reasonably practicable, suitable mechanical devices be used to avoid the necessity for manual transport of loads; (3) as to whether the breaches of statutory duty were causative factors in the accident, it was agreed that the plaintiff was using the proper posture for lifting and loading weights, so that the failure to provide training on this point was not a causative factor in the accident; (4) while there might be a tendency to assume that the proper way to perform the task was obvious or involved common sense by the employee, this ignored the need for the Regulations which applied in the instant case; and if the plaintiff had received the training required by the 1972 Regulations he would have learned that, in addition to good posture, in some circumstances it is better to take the entire load than to share it and that a load should sometimes be broken up; and if he had had such training he would have approached his task in a different manner; and on this basis there was a causative link between the breach of statutory duty and the accident; (5) there was no question of contributory negligence, having regard to the plaintiff's good posture and lack of training; (6) while the injury received did not at first appear to be particularly serious, a congenital weakness in the plaintiff's back made him more susceptible to prolonged injury, and the medical evidence indicated that he should not engage in repetitive bending or heavy lifting; and in the circumstances an award of 15,000 general damages was appropriate.

Director of Public Prosecutions v Corbett High Court 24 January 1991

CRIMINAL LAW - PROCEDURE - DELAY - SUMMARY OFFENCE - WHETHER DELAY EXCESSIVE SUMMONS - AMENDMENT IN DISTRICT COURT - WHETHER PREJUDICIAL TO DEFENDANT - FACTORS TO BE CONSIDERED - District Court Rules 1948, rr.21, 88

The defendant was charged, inter alia, with an offence under s.49 of the Road Traffic Act 1961, as amended, the summons originally alleging the offence took place on 19 September 1989. The summons was applied for on 9 February 1990, and the hearing was set for 3 May 1990 in the District Court. At the hearing, the defence sought to have the case struck out for prejudice to the defendant arising from the delay involved. No evidence being led on this point, the District Court dismissed the application. The prosecution then applied, under r.88 of the 1948 Rules, to change the date of the alleged offence on the summons from 19 September 1989 to 18 September 1989, and to change the number of the defendant's dwelling on the summons from '27' to '25'. The District Court refused to amend the summonses and dismissed the charges. On case stated **HELD** by Barr J remitting the case to the District Court: (1) although there was delay in applying for the summonses, this was within the appropriate statutory limit and therefore prima facie the summons was good; and since there was no unreasonable delay between application and the trial, the District Court had correctly dismissed the defendant's application in the absence of evidence as to prejudice; (2) the District Court had a discretion under rr.21 and 88 of the 1948 Rules as to whether to grant the application to amend the summons; but the District Court should not have taken account of the delay factor since there was no indication that this would prejudice the defendant, and he should have confined himself to considering prejudice from the point of view of the defendant's alibi evidence which he had intended to introduce and also whether the prosecution had taken the relevant blood or urine sample on the date in the summons or on the date sought to be inserted; and in all the circumstances, the matter should be remitted for the District Court to enter continuances. The State (Duggan) v Evans (1978) 112 ILTR 61 applied.

Director of Public Prosecutions v Carlton High Court 24 June 1991

CRIMINAL LAW - PROCEDURE - DELAY - SUMMARY OFFENCE - WHETHER DELAY EXCESSIVE OR UNCONSCIONABLE - WHETHER PREJUDICIAL TO ACCUSED - WHETHER DECISION OF DISTRICT COURT DISMISSING CHARGE UNREASONABLE - Courts (No.3) Act 1986, s.1(7)

The defendant had been charged with an offence under s.49 of the Road Traffic Act 1961, as amended, alleged to have taken place on 11 November 1989. The summons was due to be heard on 12 March 1990 but due to an oversight the prosecuting Garda had not been informed about this and the charges were struck out. The Garda applied for a fresh summons and this was issued on 21 June 1990, returnable for 26 July 1990. On the latter date, the defendant sought to have the charges struck out on the basis that the 8 month delay was unfair, and this application was granted. On case stated by the Director **HELD** by Morris J remitting the case to the District Court: (1) the District Court could strike out charges on the alternative grounds that: (a) there had been excessive or unconscionable delay in bringing the case, where the onus is on the State to justify delay; or (b) the defendant would be prejudiced by a delay in bringing the case, where the onus is on the defendant to prove prejudice. *The State (Cuddy) v Mangan* [1988] ILRM 720 and dicta in *Director of Public Prosecutions v Corbett* (High Court, 24 January 1991) (supra) applied; (2) in the absence of evidence of prejudice, the District Court must have based its decision on the excessive nature of the delay; but, having regard to the six month time limit permitted in s.1(7) of the 1986 Act for the making of a complaint, it was unreasonable for the District Court to decide that an eight month delay was excessive. *O'Keeffe v An Bord Pleanala* (Supreme Court, 15 February 1991) (1991) 9 ILT Digest 172 applied. Per curiam: the District Court may have been influenced by the previous striking out of the case, but this was not a proper matter to take into account.

Director of Public Prosecutions v McKillen High Court 19 December 1991

CRIMINAL LAW - PROCEDURE - SUMMONS - DANGEROUS DRIVING - SUMMONS APPLIED FOR WITHIN SIX MONTH TIME LIMIT - SUMMONS NOT SERVED - FRESH SUMMONS APPLIED FOR WHETHER PROPERLY WITHIN TIME LIMIT - Courts (No.3) Act 1986, s.1 - Petty Sessions (Ireland) Act 1851, s.10

On 3 August 1989, a summons alleging dangerous driving by the defendant on 13 March 1989 was applied for under s.1 of the 1986 Act. Due to difficulties in serving the defendant, a second summons was issued on 27 September 1989, returnable for 16 November 1989. In the District Court, the charge of dangerous driving was dismissed on the ground that the second summons was applied for outside the six month time limit specified in s.1 of the 1986 Act. On case stated **HELD** by Lavan J remitting the case to

the District Court: since proceedings pursuant to s.10 of the 1851 Act had permitted the re-issue of a summons and that the second summons would be deemed to have been grounded on the first complaint, the provision in s.1(7)(a) of the 1986 Act that its parallel procedure was subject to 'any necessary modifications' to the procedure under the 1851 Act must be deemed to include the possibility of seeking a second summons in circumstances such as the present. *Ex p. Fielding* (1861) 25 JP 759 and *Director of Public Prosecutions v Nolan* [1989] ILRM 39; [1990] 2 IR 526 applied. *Director of Public Prosecutions (Moran) v Ayton* (Circuit Court, Judge Sheehy, 26 February 1990) overruled.

Director of Public Prosecutions v Brady High Court 15 February 1991

CRIMINAL LAW - ROAD TRAFFIC - DRIVING WITH EXCESS OF ALCOHOL - WHETHER GARDA HAD FORMED OPINION THAT VEHICLE DRIVER HAD CONSUMED ALCOHOL - WHETHER SUCH OPINION REQUIRED TO FOUND CONVICTION - Road Traffic Act 1961, s.49 - Road Traffic (Amendment) Act 1978, ss.10, 12

The defendant had been charged with driving a vehicle when his blood-alcohol level was in excess of the limit prescribed by s.49 of the 1961 Act, as inserted by s.10 of the 1978 Act. The defendant had been stopped at a Garda check point. The arresting Garda had noticed that the defendant's eyes were bloodshot, that his speech was slurred and his appearance untidy. He asked the defendant to provide him with a breath test, informing him that refusal would be an offence. The breath test proved positive, the Garda formed the opinion that the defendant was unfit to drive the vehicle and informed him that he was arresting him on suspicion of drunken driving under s.49 of the 1961 Act. In the District Court, the charge was dismissed on the ground that there was no formal proof that the Garda had formed the opinion that the defendant had consumed intoxicating liquor. On case stated **HELD** by O'Hanlon J remitting the case to the District Court: a charge under s.49 can be dismissed if the result of the breath test formed the sole basis for the Garda's opinion that the person was unfit to drive the vehicle; but in the instant case the Garda had given evidence of an observational nature as to the defendant's condition, and the failure to give formal proof of his opinion that the defendant had consumed intoxicating liquor could not invalidate all the subsequent steps taken by the Garda. *Director of Public Prosecutions v Gilmore* [1981] ILRM 102 distinguished. *Per* O'Hanlon J: if the defendant had been charged with the offence of failure to provide a breath test under s.12 of the 1978 Act, it would be a good defence if no evidence had been adduced to show that the Garda had formed the necessary opinion that the defendant had consumed intoxicating liquor before requiring the defendant to undergo the breath test.

Director of Public Prosecutions v O'Donoghue High Court 15 February 1991

CRIMINAL LAW - ROAD TRAFFIC - FAILURE TO PROVIDE BLOOD SAMPLE TO REGISTERED MEDICAL PRACTITIONER - WHETHER SUFFICIENT EVIDENCE ADDUCED THAT PRACTITIONER INTRODUCED TO DEFENDANT WAS REGISTERED PRACTITIONER - OMNIA PRAESUMUNTUR RITE ESSE ACTA - BEST EVIDENCE RULE - Road Traffic (Amendment) Act 1978, s.13

The defendant was charged with failing to provide a blood or urine sample to a registered medical practitioner, contrary to s.13 of the 1978 Act. The defendant was presented to a doctor in the Garda station and told he was 'the designated medical practitioner.' In the District Court the doctor was asked: 'I think you are a registered medical practitioner?', to which he replied 'I am.' He was also asked in Court: 'Were you designated by the Gardai on the night in question?', to which he replied: 'I was.' The charge was dismissed on the ground that there was no sufficient evidence that the doctor was a registered medical practitioner at the time the defendant was requested to supply a blood or urine sample. On case stated **HELD** by O'Hanlon J affirming the dismissal: while the testimony of a doctor, that he was at the time of the request a registered medical practitioner, was prima facie evidence of that fact, this was a relaxation of the best evidence rule, and the prosecution could not ask for a further relaxation of the rule by reference to the maxim *omnia praesumuntur rite esse acta;* and as the evidence in the instant case did not amount to an express confirmation of the necessary formal proof, the charge was correctly dismissed. *Martin v Quinn* [1980] IR 244 applied.

Ward v Walsh Supreme Court 31 July 1991

DAMAGES - AWARD - ROAD TRAFFIC ACCIDENT - LOSS OF EARNINGS - CONVERSION FROM STERLING TO IRISH POUNDS - FUTURE HOSPITAL CARE - WHETHER DEFENDANT REQUIRED TO MEET EXPENSE OF PRIVATE HOSPITAL TREATMENT - VHI COVER PRIOR TO ACCIDENT - FINANCIAL ADVICE - EXTENT OF ALLOWANCE - WITNESS EXPENSES - DISCRETION OF TRIAL JUDGE - CONTRIBUTORY NEGLIGENCE - FAILURE TO WEAR SEAT BELT - 20% REDUCTION IN AWARD

The plaintiff suffered partial paraplegia and other injuries while a passenger in a car which overturned when being driven by a servant or agent of the defendant, the car's owner. The trial judge (Lardner J) concluded that the car was being driven at between 60 and 70 mph at the time of the accident. The driver was wearing a seat belt but the plaintiff was not. The trial judge found the plaintiff to be 20% contributorily negligent for failing to wear his seat belt. The plaintiff appealed against this finding and both parties appealed various headings of the damages awarded. **HELD** by the Supreme Court (Finlay CJ, Hederman and Egan JJ) increasing the plaintiff's award: (1) the finding of 20% contributory negligence was open to the trial judge and would not be disturbed, having regard in particular to evidence that the driver had advised him on previous occasions to wear the seat belt; and although the plaintiff had requested the trial judge to adjourn the hearing to enable a specific expert witness to be called on the effects of not wearing a seat belt, the trial judge had correctly exercised his discretion to refuse such an adjournment having regard to the length of the trial and that the plaintiff had an ample opportunity otherwise to address the court on this point; (2) as to loss of earnings, there was a slight error by the judge in failing to convert potential earnings in England into Irish pounds, and the award under this heading would accordingly be increased to reflect this conversion; and although the trial judge had correctly deducted an amount, taking account of the plaintiff's injuries, in respect of future loss of earnings in the plaintiff's family electrical business, the deduction had been excessive and the sum awarded under this heading should also be increased; (3) as to future home help, the trial judge had been correct in using the normal multiplier of 4 rather than the multiplier of 2.5 suggested by the plaintiff having regard to the rural location of the plaintiff's home; (4) as to whether the defendant should bear the cost, in damages, of future private hospital care, the trial judge had erred in not allowing some amount to take account of private hospital care, having regard to the evidence that the plaintiff's parents had, prior to the accident, taken out private hospital insurance through the VHI scheme; and a sum should be awarded for this; (5) the trial judge had rightly disallowed a figure for repair and maintenance of equipment, such as bathing equipment, since such maintenance was part of the running costs of an ordinary household; (6) some figure should be allowed for initial financial advice as to investing the total award, but not in respect of continuing advice; nor should there be an award for the cost of an accountant in respect of home help, since the plaintiff appeared to be capable of dealing with relevant tax returns; (7) the trial judge had wrongly refused to allow the expenses of an expert witness from the United States, since although the trial judge had found that his evidence had been duplicated by other witnesses, his authority had been accepted and he had been cross-examined in great detail on behalf of the defendant; and while the trial judge had a discretion in the matter, he had been wrong to disallow the expenses at the end of a lengthy trial; (8) the defendant should not be required to bear the cost of a daily transcript of the evidence, since there were instructing solicitor and one junior and two senior counsel and there was no detailed scientific evidence in the case.

Fennessey and Anor v Minister for Health High Court 29 April 1991

HEALTH SERVICES - NURSES - REGISTER OF AN BORD ALTRANAIS - WHETHER REGISTRATION STATUTORY OR CONTRACTUAL IN NATURE - REQUIREMENT TO MAINTAIN REGISTER - WHETHER FORMER REGISTER CARRIED OVER TO NEW STATUTORY REGIME - Nurses Act 1950, s.42 - Nurses Act 1985, ss.7, 26, 27

The plaintiffs instituted proceedings claiming that An Bord Altranais (the Board) was not entitled, under the 1985 Act, to alter the basis on which nurses were registered under the 1950 Act. The plaintiffs also claimed that the Board was not entitled to charge a retention fee for registration in 1987 since it had not established a register under the 1985 Act until 1988. **HELD** by Blayney J: (1) the basis on which nurses had been registered pursuant to s.42 of the 1950 Act was statutory in nature, not contractual, notwithstanding any communications to the plaintiffs which might have indicated the contrary; and since the right was statutory in nature and it could not be argued that it was not capable of repeal or amendment by the 1985 Act, the Court would reject the plaintiffs' claim that nurses registered under the 1950 Act had a right not to be removed from the register maintained under the 1950 Act. Dicta in *R. v United Kingdom Central Council for Nursing, Midwifery and Health Visiting, ex p. Bailey* (1989) Independent 14 March, (Queen's Bench Division, 13 March 1989) applied; (2) since s.27 of the 1985 Act required the Board to prepare, in accordance with rules made under s.26, a register 'as soon as may be' after its establishment under the Act, this indicated a lapse of time for preparation of a register; and since the register adopted in 1988 under new rules

(approved by the Minister) included new categories of nurses, it was not possible for the Board to argue that the old register could be capable of adaptation under the 1985 Act; so that while the Board was entitled under s.25 of the Act to charge retention fees in respect of the register, the Board had not been entitled to charge a fee in 1987 when it had not yet prepared a register under the 1985 Act; and to that extent the plaintiffs were entitled to succeed.

Mantruck Services Ltd and Anor v Ballinlough Electrical Refrigeration Co Ltd Supreme Court 30 July 1991

INJUNCTION - INTERLOCUTORY - FAIR ISSUE - BALANCE OF CONVENIENCE - SOLE DISTRIBUTOR AGREEMENT - WHETHER AGREEMENT RESTRICTING OR DISTORTING COMPETITION CONTRARY TO EUROPEAN COMMUNITY LAW - WHETHER AGREEMENT VALID ON ITS FACE - Treaty of Rome, Article 85

Since 1980, the plaintiffs had held a form of sole distributorship agreement to supply within the State certain transport refrigeration equipment of the 'Carrier' make. The defendant company was established in 1986 and initially obtained 'Carrier' equipment from the plaintiffs. The plaintiffs discovered in early 1991 that the defendants had begun to import directly 'Carrier' equipment from Belgium or France and that it was holding itself out as an authorised distributor in the State of the 'Carrier' equipment. The plaintiffs instituted proceedings claiming injunctive and other relief and damages. They were granted interlocutory injunctions in the High Court (Denham J) preventing the defendant from holding itself out as distributor of 'Carrier' products and also from selling or advertising 'Carrier' products. On appeal by the defendant **HELD** by the Supreme Court (Finlay CJ, Hederman and McCarthy JJ) allowing the appeal in part: (1) the plaintiffs had made out a fair case that the defendant was not entitled to describe itself as authorised distributor, and since the making of such order was not opposed, this part of the High Court order would be upheld; (2) there should be no interlocutory injunction preventing the defendant selling or advertising 'Carrier' products, because the plaintiffs had not made out a fair case that their sole distributorship agreement was compatible with the prohibitions in Article 85 of the Treaty of Rome, and the trial judge had erred in stating that the agreement was valid on its face; and, moreover, the balance of convenience also favoured the defendant on this aspect of the case because, notwithstanding the normal undertaking as to damages by the plaintiffs, it would be difficult to quantify the damage in money terms to a growing business; and in the circumstances the defendant would not be protected by an undertaking. Passage in Bellamy and Child, *Common Market Law of Competition,* 3rd ed., para.6-013 discussed.

In re Estate of Curtin, decd. Supreme Court 31 July 1991

LAND LAW - SUCCESSION - WILL - INTERPRETATION - INCONSISTENCY - WHETHER EXTRINSIC EVIDENCE ADMISSIBLE - WHETHER REQUIRED - INTENTION OF TESTATOR - FUNCTION OF COURT - Succession Act 1965, s.90

The testator, who died in 1987, had made a will in 1985. The will stated that his dwelling house was to be left to one Catherine O'Mahony. The will continued: 'In the event of I [sic] selling the dwelling house... I direct that my estate both real and personal which I die possessed of... be divided in the following percentage shares.' There followed a distribution of the estate in percentage terms, which included a share of 10% to Catherine O'Mahony. The dwelling house in question had not been sold at the time of the testator's death. The question then arose as to whether, in the light of the quoted sentence from the will, the estate should be distributed under the intestacy rules. In the High Court, Lardner J held that the percentage distribution of the estate could only take place if the house had been sold, and since this had not occurred that part of the will was not effective. He also declined to admit as extrinsic evidence that the testator had made two previous wills as indicating an intention against intestacy. On appeal **HELD** by the Supreme Court (Finlay CJ, McCarthy and O'Flaherty JJ) allowing the appeal: (1) the text of the will indicated that the testator did not intend an intestacy, but the will had been poorly drafted to deal with the situation which arose; and since the court's first duty was to give effect to the testator's intention, it should endeavour to fill an omission in the will, even if this goes against a literal reading of the will, provided the court does not affect the substance of the words used so as to create a completely new will. Dicta in *In re Patterson, decd.* [1899] 1 IR 324 applied; (2) in this light the will should be interpreted as indicating that, since the dwelling house had not been sold, Catherine O'Mahony was to receive the dwelling house as well as 10% of the residue of the estate. Per curiam: since extrinsic evidence was not required to resolve the issues raised in the instant case, the Court would reserve for a future case the extent of the admissibility of extrinsic evidence under s.90 of the 1965 Act. Rowe v Law [1978] IR 55 discussed.

Calor Teo v Sligo County Council High Court 26 July 1991

LOCAL GOVERNMENT - PLANNING PERMISSION - DEFAULT PERMISSION - WHETHER GRANTED - WHETHER SUCH PERMISSION AMOUNTING TO MATERIAL CONTRAVENTION OF DEVELOPMENT PLAN - Local Government (Planning and Development) Act 1963, s.27 Local Government (Planning and Development) Regulatoions 1977, Article 15

On 12 May 1989, the applicant company sought planning permission for a bulk LPG Depot. The appropriate fee was not paid by the company until 30 June. The company then made enquiries as to the processing of the application. On 31 August 1989, the Council wrote to the company to suggest a meeting concerning the safety aspects of the application. A meeting took place on 6 September 1989, during which the company discovered for the first time that the plans it had submitted with the application omitted details concerning thermal insulation. Details of this were furnished on 8 September 1989. The planning application was refused on 10 November 1989. It was agreed that this decision reached the company within 2 months of the company supplying details of the thermal insulation, but the company sought a declaration that a default permission must be deemed to have been issued on 30 August 1989, 2 months after the appropriate fee was lodged by the company. **HELD** by Barron J: (1) the company's notice for planning permission complied with Article 15 of the 1977 Regulations since it referred to the physical 'nature and extent' of the development and it was not required to specify the possible or even probable consequences of such development. *Keleghan v Corby* (1977) 111 ILTR 144 distinguished; (2) since the Council did not serve any notice on the company under s.27 of the 1963 Act, the time period for a default permission began on 30 June 1989, and thus a default permission was granted on 30 August; (3) a default permission is permission to carry out the development in accordance with the original plans submitted. *Readymix (Eire) Ltd v Dublin County Council* (Supreme Court, 30 July 1974) applied; (4) since the company had failed to submit thermal insultation plans with its original application and the Council's Fire Officer had indicated that such an application would not conform to the requirements of the 1981 Act, the default permission in the instant case was not valid because it would constitute a material contravention of the the Council's development plan, which required compliance with the 1981 Act.

Sun Fat Chan v Osseous Ltd Supreme Court 30 July 1991

PRACTICE - ACTION - DISMISSAL - ADMITTED FACTS - WHETHER CLAIM COULD SUCCEED WHETHER CLAIM SHOULD BE DISMISSED AT STAGE OF DELIVERY OF STATEMENT OF CLAIM - ACTION IN CONTRACT

The plaintiff instituted proceedings claiming specific performance of a contract with the defendant company for the sale of land. The contract was subject to the plaintiff, as purchaser, obtaining planning permission, within six months, for the erection of a single dwelling on the land. Permission within the stated period was not sought. Some time later the plaintiff successfully obtained, with the encouragement of the defendant, planning permission but this was revoked by An Bord Pleanala on appeal by a third party. The defendant then rescinded the contract of sale. In the High Court, the defendant sought to have the plaintiff's proceedings dismissed on the ground that, on the admitted facts, the plaintiff could not succeed. The plaintiff argued that the right to rescind was vested in the plaintiff only. Blayney J rejected this argument and dismissed the action on the ground put forward by the defendant. On appeal by the plaintiff to the Supreme Court, the plaintiff did not rely on the ground put forward in the High Court but argued that, since the defendant had encouraged the plaintiff to seek planning permission outside the time limit specified in the contract, the defendant should not be entitled to rely on the right to rescind stated in the contract. **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) dismissing the appeal: (1) since the plaintiff had not questioned the inherent jurisdiction to dismiss a claim at the stage of the delivery of a statement of claim, the Court should proceed on the basis that such jurisdiction existed; but in any event it should be exercised with caution, and the Supreme Court should be prepared to take into consideration arguments by a plaintiff which were not raised at first instance even if they might have been. *Barry v Buckley* [1981] IR 306 referred to; (2) the plaintiff's argument on appeal required the court to imply a term into the contract between the parties, but since it could not be said that such a term would have been agreed to by the defendant as vendor at the time the contract was made, the court

should not imply such a term, and the plaintiff's action would therefore be dismissed.

Ambiorix Ltd and Ors v Minister for the Environment and Ors Supreme Court 23 July 1991

PRACTICE - DISCOVERY - PRIVILEGE - CLAIM BY GOVERNMENT DEPARTMENT FOR PUBLIC INTEREST IMMUNITY - WHETHER CONSISTENT WITH JUDICIAL POWER - PRECEDENT - WHETHER DECISION OF SUPREME COURT SHOULD BE RECONSIDERED - Constitution, Article 34

The plaintiff companies, all engaged in property development in Dublin, instituted proceedings seeking, inter alia, a declaration that the Minister had acted ultra vires the Urban Renewal Act 1986 in determining that a site on George's Quay, Dublin, owned by the fifth defendant Irish Life Assurance plc, was a designated area under the 1986 Act. In connection with the case, the plaintiffs sought discovery of documents from the defendants, including memoranda between civil servants and government Ministers as well as correspondence between Irish Life and the relevant government departments. The Minister resisted the motion for discovery on the grounds that discovery of the departmental memoranda would impair the efficient operation of the civil service and that the correspondence from Irish Life and others, which included financial information, had been treated as confidential. Lardner J ordered discovery. On appeal by the defendants **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) dismissing the appeal: (1) the suggested claim to privilege in respect of the documents in question ignored the constitutional basis on which discovery is ordered in cases such as the present; and it was for the judicial power, not the executive, to determine whether certain documents be produced in evidence; (2) where there was a conflict alleged between the production of documents and the public interest in confidentiality in the exercise of the executive power, the resolution of the conflict was also a matter for the judicial branch, and thus there cannot be a general class of documents for which any public interest immunity from production can be claimed; and any claim to 'class immunity' would involve an interference with the right of access of the citizen to the courts. *Murphy v Dublin Corporation* [1972] IR 215 approved and followed. Dicta in *O'Keeffe v An Bord Pleanala* (Supreme Court, 15 February 1991) (1991) 9 ILT Digest 172 approved. *Conway v Rimmer* [1968] AC 910 considered; (3) in the absence of a claim that production of the documents would affect the safety and security of the State, the trial judge had acted correctly in examining the documents in question; (4) any issue of confidentiality of financial information supplied to the government departments could be dealt with either by way of deletion of the information under the direction of the court or through restricting access to the legal advisers for the plaintiffs; and in any event the use of the discovered material for any purpose extraneous to the proceedings would be a contempt of court.

Chambers v An Bord Pleanala and Sandoz (Ringaskiddy) Ltd Supreme Court 23 July 1991

PRACTICE - LOCUS STANDI - PLENARY PROCEEDINGS - DECLARATION SOUGHT THAT PLANNING PERMISSION ULTRA VIRES - WHETHER PLAINTIFFS HAVING LOCUS STANDI - Local Government (Planning and Development) Act 1963, s.82(3)(a) - Local Government (Planning and Development) Act 1976, s.42

The plaintiffs instituted proceedings seeking a declaration that the planning permission granted by the defendant planning board to the second defendant was ultra vires the 1963 Act, as amended. The plaintiffs were residents in the area in which the second defendant proposed to site its pharmaceutical plant in respect of which permission was granted. S.82(3)(a) of the 1963 Act, as inserted by s.42 of the 1976 Act, provides that proceedings challenging a planning permission must be brought within two months of the grant of permission. The permission in the instant case had been given on 24 July 1990 and the plaintiffs' action was begun on 21 September 1990. The defendants sought to have the action dismissed on the ground that it was frivolous and vexatious or an abuse of the process of the courts. Blayney J dismissed this application. A preliminary issue was then set down for action as to whether the plaintiffs had locus standi to bring the proceedings. The defendants argued, inter alia, that the plaintiffs had no locus standi since they had not participated at the hearing before the defendant planning board and that since the 1963 Act constituted a comprehensive code the plaintiffs should not be permitted to raise matters in the proceedings which they could have raised, but did not, at the planning hearing. In the High Court, Lavan J held that the plaintiffs had no locus standi. On appeal by the plaintiffs **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) allowing the appeal: since the plaintiffs had instituted the proceedings within the statutory time period specified in the 1963 Act, and since they were also aggrieved persons, in the sense that the permission impacted on them personally, they had locus standi to continue the proceedings as part of the constitutional right of access to the courts to litigate justiciable issues. Dicta in *The State (Lynch) v Cooney* [1983] ILRM 89; [1982] IR 337 applied. *The State (Abenglen Properties Ltd) v Dublin Corporation* [1982] ILRM 590; [1984] IR 381 distinguished. *Semble*: the issues raised by the defendants were more appropriate to the substantive proceedings.

Dunleavy v Glen Abbey Ltd High Court 9 May 1991

TORT - BREACH OF STATUTORY DUTY - EMPLOYER'S LIABILITY - FACTORY REGULATIONS - MANUAL HANDLING - WHETHER A 'PROCESS' WITHIN REGULATIONS - WHETHER BREACH OF DUTY ESTABLISHED - WHETHER CAUSATIVE FACTOR IN ACCIDENT - Factories Act 1955

(Manual Labour) (Maximum Weights and Transport) Regulations 1972, Regs.3, 6, 7

The plaintiff was an employee of the defendant company, and about half of his duties involved carrying and lifting loads into and in the company's factory premises. On the occasion giving rise to the proceedings, nine cartons of metal fasteners arried at the company's premises in a van, the cartons being stored on a pallet in the van. The plaintiff went for the fork-lift truck in the premises to lift the cartons from the van, but its battery was dead. The plaintiff then proceeded to lift the cartons manually from the van with the help of the van driver. Each carton was small, being 57 cm x 24 cm x 23 cm, but weighed between 35 and 42 kilos. They lifted four of the cartons in this way, but with the fifth carton the van driver let go, the plaintiff was jerked by the weight and he suffered a back injury. The plaintiff claimed damages in negligence and breach of statutory duty. It was accepted that the plaintiff had regularly complained that the fork-lift truck was inoperative from time to time and that he not received manual handling training. **HELD** by Barron J finding for the plaintiff: (1) since the plaintiff was employed by the defendant company in activity which normally included the manual transport of loads, and was therefore of more than a minimal duration, and since that employment was carried on in a factory, he was engaged in a 'process' within the meaning of Reg.3 of the 1972 Regulations. *Nurse v Morganite Crucible Ltd* [1989] AC 692 approved; (2) the defendant had not provided the plaintiff with manual handling training, and was thus in breach of Reg.6 of the 1972 Regulations; and, since it was aware that the fork-lift truck was inoperative from time to time, it was also in breach of Reg.7, which required that, so far as is reasonably practicable, suitable mechanical devices be used to avoid the necessity for manual transport of loads; (3) as to whether the breaches of statutory duty were causative factors in the accident, it was agreed that the plaintiff was using the proper posture for lifting and loading weights, so that the failure to provide training on this point was not a causative factor in the accident; (4) while there might be a tendency to assume that the proper way to perform the task was obvious or involved common sense by the employee, this ignored the need for the Regulations which applied in the instant case; and if the plaintiff had received the training required by the 1972 Regulations he would have learned that, in addition to good posture, in some circumstances it is better to take the entire load than to share it and that a load should sometimes be broken up; and if he had had such training he would have approached his task in a different manner; and on this basis there was a causative link between the breach of statutory duty and the accident; (5) there was no question of contributory negligence, having regard to the plaintiff's good posture and lack of training; (6) while the injury received did not at first appear to be particularly serious, a congenital weakness in the plaintiff's back made him more susceptible to prolonged injury, and the medical evidence indicated that he should not engage in repetitive bending or heavy lifting; and in the circumstances an award of 15,000 general damages was appropriate.

Recent Irish Cases

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[Note: Due to a compositing error, the March 1992 *Digest contains two identical summaries of Dunleavy v Glen Abbey Ltd.* We apologise for any inconvenience this may have caused readers.]

Heeney v Dublin Corporation High Court 16 May 1991

TORT - EMPLOYER'S LIABILITY - FIRE SERVICES - FIREFIGHTER SUFFERING FROM HYPERTENSION AND CORONARY DIFFICULTIES - FIRE AUTHORITY PROVIDING BREATHING APPARATUS TO OTHER FIRE BRIGADES - LABOUR COURT RECOMMENDING RETIREMENT OF FIREFIGHTERS FOR ILL HEALTH - DISPUTE AS TO IMPLEMENTATION OF RECOMMENDATION FIREFIGHTER GIVING INDEMNITY - EFFECT

The plaintiff's husband had been a firefighter and Station Officer with Dublin Corporation's Balbriggan Fire Brigade. Having been called out to a fire on 12 October 1985, he entered the building in question without breathing apparatus. He emerged after three entries complaining of breathing difficulties and was brought to hospital where he died. A post-mortem indicated a heart attack. The Corporation had trained some brigades under its control in the use of breathing equipment, but at the time of the fire in question the Balbriggan Fire Brigade had not yet been supplied with such equipment as it was primarily a part-time (retained) brigade and priority was given to full-time brigades. In addition, in March 1985, the Labour Court had recommended retirement of firefighters for ill-health at 55 and annual medical checks for them. However, because of negotiations with employee representations on the pay and pensions effect of this recommendation, no medical checks had been put in place by October 1985. The plaintiff's husband was over 55 at the time of his death, and suffered from hypertension. The plaintiff claimed damages in negligence arising from her husband's death. **HELD** by Barron J finding for the plaintiff: (1) the evidence indicated that the deceased's heart attack was due to smoke and gas inhalation in the building, and that this was in turn due to the absence of any breathing apparatus; (2) the Corporation was in breach of duty to the deceased in not providing breathing apparatus, and it was no defence to argue that the deceased should have waited for a brigade with breathing apparatus to come on the scene before entering the building; (3) the Corporation recognised that firefighters over the age of 55 might have medical problems, and it was not relevant that there was a dispute as to the full implementation of the March 1985 Labour Court recommendation, as it appeared that medical examinations would not have been resisted and if they had been implemented, and the deceased's coronary artery disease would probably have been discovered; (4) an indemnity which the deceased gave to the Corporation in October 1984 that he was not aware of any reason which would prevent him from taking part in practical and physical work in the fire service did not absolve it from its liability in relation to breathing apparatus and medical checks; (5) the actuarial figures had not been questioned and a sum of £65,000 for future loss of earnings, less 30% to take account of diminished life expectancy, would be awarded, together with the full £7,500 for mental suffering having regard to the traumatic nature of the deceased's death.

Boyhan and Ors v Tribunal of Inquiry Into the Beef Industry High Court 8 October 1991

CONSTITUTION - FAIR PROCEDURES - TRIBUNAL OF INQUIRY - RIGHT TO REPRESENTATION BEFORE TRIBUNAL OF INQUIRY - LIMITED REPRESENTATION GRANTED - WITNESS BEFORE TRIBUNAL - NO ALLEGATION MADE AGAINST WITNESS - Tribunal of Inquiry (Evidence) Act 1921, s.2

The plaintiffs were all members of the United Farmers' Association. A Tribunal of Inquiry into the Beef Industry had been established on foot of an order of the Minister for Agriculture of 31 May 1991 after resolutions had been passed by the Houses of Oireachtas that such Tribunal be established. The effect of the resolutions was that the Tribunal was vested with the statutory powers conferred by the Tribunals of Inquiry (Evidence) Acts 1921 and 1979. The UFA submitted to the Tribunal that it use the evidence of some of its members in the Inquiry. The Tribunal indicated it would do so. The UFA applied for full legal representation before the Tribunal but this was rejected. The plaintiffs then sought a declaration that they were entitled to full legal representation. On applying for interlocutory relief HELD by Denham J dismissing the application: (1) the Attorney General was the appropriate person to represent the public interest and the UFA had no interest over and above that of any member of the public; and indeed counsel for the Tribunal also represented the public; (2) no allegations had been made against the UFA or its members so that it was in the position of witness before the Tribunal; and since the Tribunal was required to comply with fair procedures, as it had indicated it would, the limited representation granted the plaintiffs by the Tribunal was sufficient to protect their interests and good name. *Dicta* in *In re Haughey* [1971] IR 217 applied; (3) the plaintiffs were not 'interested' persons within the meaning of s.2 of the 1921 Act, and the Tribunal had acted within its jurisdiction in refusing the plaintiffs full legal representation. *Dicta* in *K Security Ltd v Ireland* (High Court, 15 July 1977) and Passages from Appendix 4 of Report of Tribunal of Inquiry Into Whiddy Island Disaster (Prl.8911, 1980) approved; (4) the plaintiffs had misunderstood the purpose of the Tribunal, which was inquisitorial in nature, and was not adversarial in nature, nor was it a court of law, civil or criminal; and in the circumstances the plaintiffs' rights were adequately protected by the observance of fair procedures and they had not made out a ground for the exceptional relief of a mandatory injunction against the Tribunal.

Goodman International and Goodman v Mr Justice Hamilton and Ors High Court, 21 October 1991; Supreme Court, 1 November 1991

CONSTITUTION - SEPARATION OF POWERS - TRIBUNAL OF INQUIRY - INQUIRY INVOLVING MATTERS SUBJECT TO POSSIBLE CIVIL AND CRIMINAL PROCEEDINGS - INQUIRY CONCERNING PAST CRIMINAL PROSECUTIONS - WHETHER TRIBUNAL CONSTITUTING ADMINISTRATION OF JUSTICE - WHETHER CONSTITUTING CRIMINAL TRIAL - WHETHER CONSTITUTIONALLY VALID - WHETHER FAIR PROCEDURES APPLIED - Constitution, Articles 34, 38, 40.3 - Tribunals of Inquiry (Evidence) (Amendment) Act 1979, s.6

The first respondent, President of the High Court, had been appointed the sole member of a Tribunal of Inquiry into the Beef Industry. The appointment was on foot of an order of the Minister for Agriculture of 31 May 1991 establishing the Tribunal of Inquiry after resolutions had been passed by the Houses of Oireachtas that such Tribunal be established. The effect of the resolutions was that the Tribunal was vested with the statutory powers conferred by the Tribunals of Inquiry (Evidence) Acts 1921 and 1979. The Tribunal was empowered to investigate certain allegations made in the Oireachtas and on an ITV 'World in Action' documentary concerning fraud and malpractice in the beef industry in Ireland. These allegations involved references to the activities of the first applicant, a company, and the second applicant, who was the chief executive of the first applicant. The Tribunal of Inquiry prepared a document headed 'Statement of Allegations' which was read out at the first sitting of the Tribunal. The applicants brought a constitutional action claiming that the Tribunal could not validly inquire into allegations which were the subject matter of civil proceedings, or of criminal proceedings which had either been heard or which might be heard in the future. The applicants also claimed relief in relation to the rules of evidence to be employed by the Tribunal. HELD by Costello J dismissing the claim: (1) in carrying out its functions as defined in the order establishing it, and having regard to the resolutions of the Oireachtas, the Tribunal was entitled to assume that the Oireactas had acted constitutionally; (2) although the Tribunal would express an opinion on the matters referred to it, such opinion was of no legal effect, and the Tribunal determines no legal rights and imposes no legal obligations, its conclusions being for the guidance of the legislature and the executive, so that the Tribunal could not be regarded as being concerned in the administration of justice within the meaning of Article 34.1, and its establishment did not breach the principle of separation of powers. *McDonald v Bord na gCon* [1965] IR 217 and *Kennedy v Hearne* [1988] ILRM 531; [1988] IR 481 applied; (3) the Tribunal was required to act judicially in the sense of applying the principles of fair procedures; (4) the establishment of a Tribunal of Inquiry does not in any way inhibit the judicial power from dealing with any civil dispute which may be pending, so

that no interference with the judicial domain is involved and the same considerations apply to matters which may in the future become the subject of civil proceedings; (5) the Tribunal might in practice affect the due course of a criminal trial which might later arise from the matters under its consideration, but such could be overcome by the observance of fair procedures, and the Tribunal was not prohibited from inquiring into matters which might in the future be the subject matter of criminal proceedings; nor was the Tribunal precluded from inquiring into the circumstances surrounding past criminal prosecutions, provided it did not purport to reopen such prosecutions. *In re Haughey* [1971] IR 217 referred to; dicta in *Victoria v Australia Building Contractors and Building Labourers Federation* (1981-82) 152 CLR 26 approved; (6) where, as in the instant case, there was no challenge to the opinion expressed in the resolutions of the Houses of the Oireachtas that it was in the public interest to inquire into the allegations concerned here, the Tribunal was not precluded from inquiring into disputes between private parties. *Watkins v United States,* 354 US 178 (1956) referred to; (7) there was no rule of law requiring the Tribunal to observe the rules of evidence, but since it must observe fair procedures it might be required to hear parties affected by the admission of hearsay, as it had indicated in the instant case; nor was there an obligation on the Tribunal to hear evidence in advance of testimony being given at a public hearing of the Tribunal, although the Tribunal indicated that in most instances it would attempt to obtain statements in advance from witnesses; (8) the Tribunal was entitled, in the absence of any indication to the contrary, to inquire into all of the allegations made in the Oireachtas and on the television documentary and no ground had been established which would restrict the allegations into which the Tribunal could inquire. On appeal by the applicants HELD by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) dismissing the appeal: (1) the presumption of constitutionality, deriving from the respect of one organ of government for another, should be held to apply mutatis mutandis to the resolutions passed by the Houses of the Oireachtas as it does to Acts of the Oireachtas. *Dicta* in *East Donegal Co-Op Ltd v Attorney General* [1970] IR 317 applied; (2) the proceedings of the Tribunal had none of the ingredients of a criminal trial within the meaning of Article 38 of the Constitution. *Dicta* in *Deaton v Attorney General* [1963] IR 170 and *The State (Murray) v McRann* [1979] IR 133 applied; (3) the Tribunal was not engaged in the administration of justice within the meaning of Article 34, since although it might be engaged in a controversy as to the existence of legal rights or the violation of the law, it would not make legally binding determinations but would report its findings of fact to the legislature in vacuo; and the powers conferred on the Tribunal by s.6 of the 1979 Act allowed it to operate more effectively, but did not in any way involve the administration of justice. *Dicta* in *McDonald v Bord na gCon* [1965] IR 217 applied; *dicta* in *Victoria v Australia Building Contractors and Building Labourers Federation* (1981-82) 152 CLR 26 approved; (4) the Court should apply a presumption that the Tribunal would apply fair procedures in accordance with Article 40.3; (5) the submission that the Tribunal's activities could prejudice the applicants' fair trial if criminal proceedings were brought against them did not invalidate the resolutions establishing the Tribunal; but the courts retained full jurisdiction to prevent an injustice occurring should an argument be made by an accused concerning pre-trial publicity.

Magee v Culligan High Court, 25 January 1991; Supreme Court, 15 November 1991

CRIMINAL LAW - EXTRADITION - POLITICAL OFFENCE - EXCLUSION BY LEGISLATION OF CERTAIN OFFENCES FROM BEING CONSIDERED POLITICAL OFFENCES - WHETHER AMOUNTING TO CREATION OF RETROSPECTIVE CRIMINAL ACT - WHETHER CONSISTENT WITH CONSTITUTION - FIREARMS OFFENCES - WHETHER POLITICAL - ADMINISTRATION OF JUSTICE - TEMPORARY JUDGE OF DISTRICT COURT - WHETHER INDEPENDENT - RISK OF ILL-TREATMENT - WHETHER ESTABLISHED - ESTOPPEL - DELAY - Courts of Justice Act 1936, s.51 - Courts (Supplemental Provisions) Act 1961, s.48(8) - Extradition (European Convention on the Suppression of Terrorism) Act 1987 - Constitution, Articles 15.5, 35, 36.iii, 40.3,

The applicant had been charged in the courts of Northern Ireland with murder and attempted murder of members of the British army. The deaths had involved the use of an M60 machine gun. The applicant escaped from custody in Crumlin Road Prison on 10 June 1981, two days before the conclusion of his trial for the offences referred to, and he was convicted in his absence. The applicant was arrested in the State in January 1982 and was charged with and convicted of offences arising from his escape from custody, pursuant to the provisions of the Criminal Law (Jurisdiction) Act 1976. He was sentenced to 10 years imprisonment on foot of these convictions. On 23 October 1989, a temporary Justice of the District Court ordered the applicant's delivery to Northern Ireland on foot of warrants seeking his extradition in respect of the 1981 murder and attempted murder convictions. The applicant sought judicial review of this decision. The applicant argued, inter alia, that the 1987 Act created retrospective criminal liability contrary to Article 15.5 of the Constitution by excluding offences involving the use of automatic firearems from the definition of political offences within s.50 of the 1965 Act. **HELD** by Lynch J dismissing the application: (1) the 1987 Act was not inconsistent with Article 15.5 of the Constitution, since it did not create a retrospective criminal act but involved the exclusion of certain offences form being regarded as political offences and thus merely developed the law on political offences; and assuming that the 1987 Act deprived the applicant of a right not to serve a sentence of imprisonment, such was not a right protected under Article 40.3 of the Constitution and so the removal of the protection of the political offence exception by the 1987 Act in respect of the offences for which the applicant had been convicted was not unconstitutional; (2) s.51 of the 1936 Act, which provides for the appointment of temporary Justices of the District Court, and which was re-enacted to apply to the present District Court by s.48(8) of the 1961 Act, must be presumed constitutional and in the absence of any evidence in the instant case that the power to appoint had been used in an improper manner, the applicant had not established that s.51 was inconsistent with the Constitution; (3) having considered the evidence, the applicant had not established that he would be ill-treated if returned to Northern Ireland; (4) the delay in seeking the applicant's extradition arose from his imprisonment in the State on foot of his 1982 conviction and thus no ground relating to delay had been made out; (5) the Northern authorities were not estopped from seeking extradition since they did not seek extradition in respect of the applicant's prison escape and they had given undertakings that the term served in this State would be taken into account, and there was therefore nothing oppressive or unjust involved in the extradition within the meaning of s.50(2)(bbb) of the 1965 Act, as inserted by the 1987 Act; (6) the offences relating to possession of firearms could be regarded as political offences within s.50 of the 1965 Act, since although they were committed on behalf of the IRA they did not as such involve subversion of the Constitution, but this was subject to the provisions of the 1987 Act. *Finucane v McMahon* [1990] ILRM 505; [1990] 1 IR 165 applied; (7) since the firearms offences had resulted in the commission of murder, the application of the political offence exemption was precluded by s.3(3)(a)(v) of the 1987 Act and the plaintiff's application for release under s.50 of the 1965 Act would therefore be dismissed. On appeal by the applicant on the constitutional issues HELD by the Supreme Court (Finlay CJ, Hamilton P, Hederman, McCarthy and Egan JJ) dismissing the appeal: (1) Article 15.5 of the Constitution did not contain any general prohibition against retrospective legislation, but only against legislation which declares acts retrospectively to be infringements of the law; and since the 1987 Act did not declare any act to be an infringement of the law but merely made a statutory amendment to a developing jurisprudence, it could not infringe Article 15.5; (2) the applicant did not have any vested right to be dealt with in accordance with any law which might have applied in 1982, and fair procedures required only that the application for his extradition would be dealt with in accordance with the law applicable at the time of the application, and thus the use of the 1987 Act in the instant case did not involve the State in infringing the applicant's rights under Article 40.3; (3) although the Judge of the District Court in the instant case was a temporary Judge within s.51 of the 1936 Act, this did not in any way affect his independence of function under Article 35.2 of the Constitution since his warrant of appointment was held under the President and for the period of his appointment he was free in the exercise of his functions; and the fact that as a temporary Judge his removal was not subject to the same protections as for permanent members of the judiciary did not affect his independence and was a permitted regulation of the business of the courts under Article 36.iii.

Sloan v Culligan High Court, 25 January 1991; Supreme Court, 15 November 1991

CRIMINAL LAW - EXTRADITION - POLITICAL OFFENCE - EXCLUSION BY LEGISLATION OF CERTAIN OFFENCES FROM BEING CONSIDERED POLITICAL OFFENCES - WHETHER AMOUNTING TO CREATION OF RETROSPECTIVE CRIMINAL ACT - FIREARMS OFFENCES - WHETHER POLITICAL - UNDERTAKING BY REQUESTING AUTHORITY CONCERNING BALANCE OF SENTENCE BALANCE HAVING EXPIRED - RELEASE ORDERED - Constitution, Article 15.5 - Extradition Act 1965, s.50 - Extradition (European Convention on the Suppression of Terrorism) Act 1987, s.3

The applicant had been charged in the courts of Northern Ireland with possession of auto-

matic weapons with intent to endanger life and with false imprisonment. He escaped from custody in Crumlin Road Prison on 10 June 1981, two days before the conclusion of his trial for these offences, and he was convicted in his absence. The longest sentence he recieved was for five years. He was arrested in this State in January 1982 and charged with and convicted of offences arising from his escape from custody, pursuant to the Criminal Law (Jurisdiction) Act 1976. In October 1989, the District Court ordered his extradition to Northern Ireland in relation to the 1981 convictions. The applicant sought his release pursuant to s.50 of the 1965 Act. In the course of the hearing, an undertaking was given that the applicant would only be required to serve the balance of his 1981 sentence and that the term served in respect of the convictions in this State would be taken into account. **HELD** by Lynch J dismissing the applicant's claims: (1) the 1987 Act was not inconsistent with Article 15.5 of the Constitution since it did not create a retrospective criminal act but involved the exclusion of certain offences from being regarded as political offences and thus merely developed the law on political offences; (2) the aims and purposes of the IRA, in connection with which the offences in question had been committed, involved an attempt to overthrow the institutions established by the Constitution, but since the particular offences with which the applicant had been involved might not have had such a purpose they could be regarded as political within s.50 of the 1965 Act, subject to the 1987 Act. *Finucane v McMahon* [1990] ILRM 505; [1990] 1 IR 165 applied; (3) since the circumstances of the applicant's possession of the automatic weapons involved in the offences alleged did not, at that time, involve a present danger to persons, the possession offence did not fall within the exclusion in s.3(3)(a) of the 1987 Act (which states that the political exemption shall not apply to possession of firearms 'if such use endangers persons') and he was thus entitled to rely on the political exemption in respect of that offence; (4) the offence of false imprisonment with which the applicant was involved was a 'serious false imprisonment' within s.3(3)(a) of the 1987 Act and thus the applicant was not entitled to rely on the political offence exemption in s.50 of the 1965 Act in respect of that offence and his extradition should be ordered. On appeal, the only issues raised were whether the possession of firearms fell within the terms of s.3(3)(a) of the 1987 Act and the effect of the undertaking given by the Northern authorities. **HELD** by the Supreme Court (Finlay CJ, Hamilton P, Hederman, McCarthy and Egan JJ) allowing the appeal: (1) the exclusion in s.3(3)(a) should be strictly construed and since it referred to the use of firearms in the present tense it should not be interpreted as applying to the case where firearms possession might in the future endanger persons; if that had been the intention of the Oireachtas, it could have used clear language to indicate that intention; (2) since the Northern authorities had undertaken that the applicant would only serve the balance of his five year sentence, taking account of the sentence served in this State, the effect at this stage was that the applicant would be released immediately on rendition to Northern Ireland, and since the courts would not act in vain his release should be ordered. *Quaere* (*per* McCarthy J): whether a requesting State should be encouraged to give undertakings that its laws would not be enforced in respect of a citizen of its own State. Dicta in *Bourke v Attorney General* [1972] IR 36 approved.

McKee v Culligan High Court, 25 January 1991; Supreme Court, 15 November 1991

CRIMINAL LAW - EXTRADITION - POLITICAL OFFENCE - EXCLUSION BY LEGISLATION OF CERTAIN OFFENCES FROM BEING CONSIDERED POLITICAL OFFENCES - WHETHER AMOUNTING TO CREATION OF RETROSPECTIVE CRIMINAL ACT - FIREARMS OFFENCES - WHETHER POLITICAL - Extradition Act 1965, s.50 - Extradition (European Convention on the Suppression of Terrorism) Act 1987, s.3

The applicant had been charged in the courts of Northern Ireland with possession of automatic weapons with intent to endanger life. He escaped from custody in Crumlin Road Prison on 10 June 1981, two days before the conclusion of his trial for these offences, and he was convicted in his absence. He was arrested in this State in December 1981 and charged with and convicted of offences arising from his escape from custody, pursuant to the Criminal Law (Jurisdiction) Act 1976. In October 1989, the District Court ordered his extradition to Northern Ireland in relation to the 1981 convictions. The applicant sought his release pursuant to s.50 of the 1965 Act. **HELD** by Lynch J granting the applicant's claim and ordering his release: (1) the 1987 Act was not inconsistent with Article 15.5 of the Constitution since it did not create a retrospective criminal act but involved the exclusion of certain offences from being regarded as political offences and thus merely developed the law on political offences; (2) since it had not been established that the particular offences with which the applicant had been involved were intended to overthrow the Constitution, they could be regarded as political within s.50 of the 1965 Act, subject to the 1987 Act. *Finucane v McMahon* [1990] ILRM 505; [1990] 1 IR 165 applied; (3) as the circumstances of the applicant's possession of the automatic weapons involved in the offences alleged did not, at that time, involve a present danger to persons, the possession offence did not fall within the exclusion in s.3(3)(a) of the 1987 Act (which states that the political exemption shall not apply to possession of firearms 'if such use endangers persons') and he was thus entitled to rely on the political exemption in respect of that offence, and was thus entitled to his release. On appeal, the only issue was whether the possession offence fell within s.3(3)(a) of the 1987 Act. **HELD** by the Supreme Court (Finlay CJ, Hamilton P, Hederman, McCarthy and Egan JJ) dismissing the appeal: the exclusion in s.3(3)(a) should be strictly construed and since it referred to the use of firearms in the present tense it should not be interpreted as applying to the case where firearms possession might in the future endanger persons; if that had been the intention of the Oireachtas, it could have used clear language to indicate that intention. *Sloan v Culligan* (Supreme Court, 15 November 1991) (supra) applied.

Keady v Garda Commissioner Supreme Court 26 November 1991

GARDA SIOCHANA - DISCIPLINARY INQUIRY - WHETHER EXERCISING JUDICIAL POWER - MEMBER CHARGED WITH CRIMINAL OFFENCES - SUBSEQUENT ENTRY OF NOLLE PROSEQUI - DISCIPLINARY CHARGES PROCEEDED WITH - WHETHER INVALID - Constitution, Article 34.1 - Garda Siochana (Discipline) Regulations 1971, Reg.6, Schedule

The plaintiff, then a member of the Garda Siochana, was charged with a number of offences relating to claims in respect of night duty while a member of the Garda. Having opted for trial on indictment, a nolle prosequi was subsequently entered. Disciplinary proceedings under the 1971 Regulations were then instituted against the plaintiff arising out of the same facts which had given rise to the criminal proceedings. The plaintiff was dismissed from the Garda arising from these proceedings. The plaintiff challenged the validity of these proceedings. Costello J dismissed the claim (High Court, 1 December 1988) (1989) 7 ILT Digest 260. On appeal **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) dismissing the appeal: (1) the requirement in Article 38 that all criminal matters must be tried in die course of law in the courts did not preclude the investigation of such claims before administrative or domestic tribunals such as that constituted under the 1971 Regulations. *The State (Murray) v McRann* [1979] IR 133 approved; (2) the reference in the Schedule to the 1971 Regulations to criminal conduct in respect of which there was a conviction in the courts did not preclude the investigation of conduct with criminal connotations under separate headings, as occurred in the instant case. *Semble*: no argument was addressed as to a possible estoppel arising; (3) the inquiry under the 1971 Regulations did not constitute an administation of justice within Article 34.1 since there was no determination as such (though the proceedings must be conducted in a judicial manner in accordance with fair procedures), and although the plaintiff was deprived of a particular means of earning his livelihood, he was not deprived of any qualification in the process. *In re the Solicitors Act 1954* [1960] IR 239 and *K. v An Bord Altranais* [1990] 2 IR 396 distinguished.

Treacy v Dublin Corporatiion Supreme Court 26 November 1991

LOCAL GOVERNMENT - SANITARY AUTHORITY - POWER TO ENTER AND DEMOLISH DANGEROUS BUILDING - ADJOINING TERRACED BUILDING HAVING EASEMENT OF SUPPORT - WHETHER SANITARY AUTHORITY OBLIGED TO CONTINUE EXISTING SUPPORT - Local Government (Sanitary Services) Act 1964, s.3(2)(a)

The defendant Corporation, as sanitary authority, declared a building to be dangerous within the meaning of the 1964 Act. Under s.3 of the 1964 Act, it gave notice in March 1988 to the plaintiff, the occupier of the adjoining building, of its intention to enter and demolish the dangerous building. The plaintiff obtained an interim injunction restraining such demolition unless the defendant provided the plaintiff's building with adequate support and protection against the weather. It was accepted that the plaintiff's premises enjoyed an easement of support from the dangerous building. Costello J granted a permanent injunction in the terms sought. On appeal by the Corporation **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) dismissing the appeal: (1) where the Corporation exercises its power to demolish a dangerous building under s.3 of the 1964 Act, this cannot be done unless existing easements of support are protected, since otherwise the Corporation would be in breach of its overall obligation

under the 1964 Act to prevent the creation or development of dangerous structures; and this required the Corporation to give back support to the plaintiff's premises. *The State (McGuinness) v Maguire* [1967] IR 348 distinguished; (2) while there is not a separate easement against 'wind and weather', it would be unrealistic in the context of terraced buildings to confine the support requirement to one of buttressing, since in a short time the buttressed wall, having regard to its age, would become unstable and cease to be a support. *Phipps v Pears* [1967] 1 QB 76 referred to. Per curiam: having regard to the dangerous condition of the building, the appeal to the Court should have been expedited and an early hearing would have been granted on application.

Kehoe v C.J. Louth & Son Supreme Court 18 November 1991

NEGLIGENCE - SOLICITOR - CONVEYANCE OF PROPERTY - YEARLY RENT - PURCHASERS ASSURED THAT CONVEYANCE AS GOOD AS FREEHOLD - DIFFICULTY IN OBTAINING FREEHOLD AMOUNT REQUIRED TO OBTAIN FREEHOLD - - REQUIREMENT THAT PREMISES BE REVALUED INCREASED LIABILITY TO RATES - Landlord and Tenant (Ground Rents) (No.2) Act 1978, s.15

The plaintiffs, husband and wife, purchased a licensed premises on a yearly tenancy at a yearly rent of 9.67 and in respect of which the rateable valuation was 9. At the time of signing the contract, for which the purchase price was 43,000, the plaintiffs were assured by the defendant firm's managing clerk, who was experienced in conveyancing matters, that the yearly tenancy was 'as good as freehold.' The plaintiffs subsequently made an offer of 500 for the freehold, but the vendors refused this. The plaintiffs instituted proceedings in negligence claiming the premises were, as a result, virtually unsaleable. **HELD** by the Supreme Court (McCarthy, O'Flaherty and Egan JJ) finding for the plaintiffs: (1) since in the instant case, the yearly rent was less than the rateable valuation, a notice for revaluation was required by s.15(1)(d) of the 1978 Act, and while it was difficult to anticipate the outcome it was likely that any revaluation would result in an increased liability for rates, and the plaintiffs were thus entitled to damages under this head; (2) the plaintiffs must have been aware that buying out the ground rent would involve some expenditure, but they would not have been aware that a figure of £3,500 (estimated by the defendants in the present action) would be involved; that the sum of £500 would appear to have been a reasonable estimate in the circumstances and that the plaintiffs were entitled to damages of £3,000 under this head.

Quirke (Minor) v O'Shea and CRL Oil Ltd Supreme Court 18 November 1991

PRACTICE - THIRD PARTY - INFANT CLAIM - APPLICATION TO JOIN INFANT'S NEXT FRIEND - WHETHER PRIMA FACIE CASE ESTABLISHED - WHETHER COURT HAS DISCRETION TO JOIN - FACTORS TO BE CONSIDERED - Rules of the Superior Courts 1986, O.16, r.1 - Civil Liability Act 1961, s.27

The plaintiff, an infant, through his mother and next friend, claimed damages for personal injuries arising from an accident involving a lorry driven by the first plaintiff and the property of the second defendant. The lorry had delivered oil to the house occupied by the plaintiff and his family. The occurred as the lorry was driving away from the house. The defendants sought to jojn the plaintiff's mother as a third party in the proceedings. In an affridavit in support, the first defendant stated that the mother had signed the delivery docket for the oil and was near the plaintiff when he began driving away; that he had assumed that she was in control of the plaintiff and that on this basis she had not taken reasonable care of the plaintiff. In the High Court, MacKenzie J declined to join the mother as a third party. On appeal **HELD** by the Supreme Court (Finlay CJ, Hederman and Egan JJ) dismissing the appeal: (1) the defendant's affidavithad made out a prima facie case for joining the mother as a third party; (2) although the mother was not a person of great means, this was not in itself sufficient to indicate that the application to join her was an abuse of the process of the court; (3) if a third party application was refused under O.16, this would not be a basis for a court to refuse, under s.27 of the 1961 Act, contribution to the party refused in separate proceedings against a concurrent wrongdoer; and thus the court's discretion under O.16, r.1 as to whether to join a third party was extremely wide; and the court in entitled to balance the disruption to existing proceedings (where the next friend would have to be substituted if made a third party) against the convenience of trying all the issues in one action; (4) in the instant case, the disruption involved in granting the application would not be justified, having regard in particular to the limited means of the mother. *D'Arcy v Roscommon County Council* (Supreme Court, 11 January 1991) (1992) 10 ILT Digest 56 referred to.

Texaco (Irl) Ltd v Murphy (Inspector of Taxes) Supreme Court 3 December 1991

REVENUE - CORPORATION TAX - CAPITAL EXPENDITURE - RELIEF - SCIENTIFIC RESEARCH PETROLEUM EXPLORATION - INTERPRETATION OF TAXING LEGISLATION - Income Tax Act 1967, ss.244, 245 - Corporation Tax Act 1976, s.21(1)

Between 1976 and 1978, the taxpayer company engaged in offshore exploration for petroleum, under licence granted pursuant to the Petroleum and Other Minerals Development Act 1960. The company claimed a capital allowance in respect of the expenditure incurred in the scientific testing involved in the exploration, pursuant to s.244 of the 1967 Act, as amended by s.21 of the 1976 Act. This provides for an allowance in respect of capital expenditure on scientific research which is not related to the trade activities of the company involved. S.245 of the 1967 Act provides for capital expenditure in relation to certain mining exploration activities, but offshore exploration was excluded from s.245. The Appeal Commissioners held that the company was nnot entitled to the allowance under s.244, pointing in particular to the juxtaposition between s.244 and s.245. This view was upheld by Carroll J (High Court, 19 May 1988) (1989) 7 ILT Digest 56. On appeal **HELD** by the Supreme Court (Finlay CJ, Hederman and McCarthy JJ) allowing the appeal: the principal canon of interpretation was to have regard to the ordinary meaning of words used by the Oireachtas; and while it may be of relevance to look at the overall intention of a statute, this was less the case in a revenue statute; and having regard to the plain meaning of the words in s.244, the company was entitled to the allowance claimed, and the Commissioners had erred in examining the provisions of s.245 in this context. Dicta in *Cape Brandy Syndicate v IRC* [1921] 1 KB 64, *Revenue Commissioners v Doorley* [1933] IR 750 and *Inspector of Taxes v Kiernan* [1982] ILRM 13; [1981] IR 117 applied.

Heeney v Dublin Corporation High Court 16 May 1991

TORT - EMPLOYER'S LIABILITY - FIRE SERVICES - FIREFIGHTER SUFFERING FROM HYPERTENSION AND CORONARY DIFFICULTIES - FIRE AUTHORITY PROVIDING BREATHING APPARATUS TO OTHER FIRE BRIGADES - LABOUR COURT RECOMMENDING RETIREMENT OF FIREFIGHTERS FOR ILL HEALTH - DISPUTE AS TO IMPLEMENTATION OF RECOMMENDATION FIREFIGHTER GIVING INDEMNITY - EFFECT

The plaintiff's husband had been a firefighter and Station Officer with Dublin Corporation's Balbriggan Fire Brigade. Having been called out to a fire on 12 October 1985, he entered the building in question without breathing apparatus. He emerged after three entries complaining of breathing difficulties and was brought to hospital where he died. A post-mortem indicated a heart attack. The Corporation had trained some brigades under its control in the use of breathing equipment, but at the time of the fire in question the Balbriggan Fire Brigade had not yet been supplied with such equipment as it was primarily a part-time (retained) brigade and priority was given to full-time brigades. In addition, in March 1985, the Labour Court had recommended retirement of firefighters for ill-health at 55 and annual medical checks for them. However, because of negotiations with employee representations on the pay and pensions effect of this recommendation, no medical checks had been put in place by October 1985. The plaintiff's husband was over 55 at the time of his death, and suffered from hypertension. The plaintiff claimed damages in negligence arising from her husband's death. HELD by Barron J finding for the plaintiff: (1) the evidence indicated that the deceased's heart attack was due to smoke and gas inhalation in the building, and that this was in turn due to the absence of any breathing apparatus; (2) the Corporation was in breach of duty to the deceased in not providing breathing apparatus, and it was no defence to argue that the deceased should have waited for a brigade with breathing apparatus to come on the scene before entering the building; (3) the Corporation recognised that firefighters over the age of 55 might have medical problems, and it was not relevant that there was a dispute as to the full implementation of the March 1985 Labour Court recommendation, as it appeared that medical examinations would not have been resisted and if they had been implemented, and the deceased's coronary artery disease would probably have been discovered; (4) an indemnity which the deceased gave to the Corporation in October 1984 that he was not aware of any reason which would prevent him from taking part in practical and physical work in the fire service did not absolve it from its liability in relation to breathing apparatus and medical checks; (5) the actuarial figures had not been questioned and a sum of £65,000 for future loss of earnings, less 30% to take account of diminished life expectancy, would be awarded, together with the full £7,500 for mental suffering having regard to the traumatic nature of the deceased's death.

Recent Irish Cases

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Rooney v Minister for Agriculture and Food and Ors Supreme Court 19 December 1991

ADMINISTRATIVE LAW — ANIMAL DISEASE — ACT PERMITTING STATUTORY SCHEME OF COMPENSATION — REQUIRING MINISTERIAL ORDER FOR IMPLEMENTATION — ABSENCE OF ORDER — NON-STATUTORY GRANT SCHEME IN OPERATION — WHETHER IN BREACH OF CONSTITUTIONAL RIGHTS — Diseases of Animals Act 1966, ss. 17, 22 — Bovine Tuberculosis (Attestation of the State and General Provisions) Order 1978.

In 1984, 20 of the plaintiff farmer's cattle were slaughtered as 'reactor' cattle, that is, they were deemed to be infected with bovine TB in accordance with the procedures provided for under the 1978 Order. Under a non-statutory scheme operated by the defendant Minister, the plaintiff was paid certain sums in relation to each head of cattle so slaughtered. The plaintiff instituted proceedings claiming, inter alia, that the sums so paid were inadequate and thus in breach of the terms of the Constitution and that he should have been paid full compensation under the terms of the 1966 Act. Ss.17 and 22 of the 1966 Act provide that the defendant Minister may institute a scheme of compensation by which the appropriate levels of compensation for slaughtered animals could, in the event of disagreement between the owner and the Minister, be referred to arbitration. No such statutory scheme had been instituted. In the High Court, the plaintiff's claim was dismissed by Lavan J. On appealed **Held** by the Supreme Court (McCarthy, O'Flaherty and Egan JJ) dismissing the appeal: since the non-statutory scheme constituted a reasonable scheme for providing a measure of assistance to owners of diseased cattle, the Court had no power to review the course of action adopted by the Minister in the instant case; and indeed it might be that the Court had no function to enjoin the Minister to introduce a statutory scheme under s.20 of the 1966 Act. *Pine Valley Developments Ltd v Minister for the Environment* [1987] ILRM 747; [1987] IR 23 and *The State (Sheehan) v Government of Ireland* [1987] IR 550 applied. *Semble:* the Minister was providing a reasonable measure of compensation in the non-statutory scheme, and this complied with any constitutional requirements in this regard, if any general constitutional right to compensation existed.

Gallagher v Revenue Commissioners High Court 11 January 1991

ADMINISTRATIVE LAW — FAIR PROCEDURES — SUSPENSION FROM EMPLOYMENT — CIVIL SERVANT — WHETHER SUSPENDED PERSON AWARE OF REASONS FOR SUSPENSION — WHETHER SUSPENSION BECAME INVALID — WHETHER DELAY IN PROCEEDINGS INVALIDATES FURTHER ACTION — DISCOVERY OF DOCUMENTS — WHETHER LEGAL REPRESENTATION AT DISCIPLINARY HEARING TO BE GRANTED.

The plaintiff, an officer of customs and excise, was interviewed in July 1985 about the seizure of certain vehicles for non-payment of relevant duties. The plaintiff was moved to other duties at that time. The officer investigating the seizures completed a written report in December 10985. Nothing further occurred until March 1987 when the seizures were further investigated and the plaintiff was interviewed in relation to 41 files in June and October 1987. During these interviews, it was put to the plaintiff that he had, *inter alia,* understated the value of vehicles seized and had fictionalised certain reports. By letter dated 25 January 1988, the plaintiff was informed that he was suspended form duty as it appeared he was guilty of grave irregularity and misconduct. His solicitors immediately wrote inquiring about the nature of the matters for which he was suspended, and were informed that details would be given at the end of March 1988. No details were furnished, and the solicitors wrote again in October 1988 seeking details. Details were furnished in January 1989, involving 18 separate transactions. The plaintiff issued proceedings contending, *inter alia,* that the suspension was invalid, that he was entitled to transcripts of the interviews conducted in June and October 1987 and to be legally represented at the oral hearing of the charges. **Held** by Blayney J: (1) although the plaintiff had not been informed in January 1988 of the reason for the suspension, it was not invalid for this because the plaintiff must have been well aware of the basis for the suspension, and this was confirmed by the delay in seeking particulars of the reasons for the suspension. *Flynn v An Post* [1987] IR 68 applied; (2) the suspension after May 1988 was invalid. *Flynn v An Post* [1987] IR 68 applied; (3) unlike the situation involved in delays in the processing of criminal charges, the delay in proceeding with the disciplinary charges against the plaintiff was not a ground for prohibiting them, as the issues raised were not criminal in nature but involved the law of master and servant; however, the investigation should have been completed very much sooner and the delay should be considered by the Revenue authorities in the hearings themselves in connection with the plaintiff's ability to deal adequately with the details of the charges. *The State (O'Connell) v Fawsitt* [1986] IR 362 and *The State (Cuddy) v Mangan* [1988] ILRM 720 distinguished; (4) the plaintiff was entitled to full disclosure of the transcripts of the interviews conducted in June and October 1987 and also the evidence to be tendered against him; (5) having regard to the extremely serious consequence of dismissal for the plaintiff if the charges against him were established and to the large number of charges against him and that further criminal proceedings could, ultimately, result he was entitled to legal representation at the disciplinary hearing. Dicta in *Flanagan v University College Dublin* [1989] ILRM 449 applied.

In re Atlantic Magnetics Ltd Supreme Court 5 December 1991

COMPANY — EXAMINER — APPOINTMENT — WHETHER COURT TO CONSIDER WHETHER COMPANY HAS PROSPECT OF SURVIVAL — ORDER AUTHORISING EXAMINER TO BORROW FOR SPECIFIED PURPOSES — WHETHER BORROWINGS MAY BE BASED ON ASSETS SUBJECT TO FIXED CHARGE — INTERPRETATION — Companies (Amendment) Act 1990, ss.2,9, 11,29

In the High Court, an examiner had been appointed to the company under the 1990 Act. Lardner J held that the test under s.2 of the 1990 Act as to whether an examiner should be appointed was whether the company had a reasonable prospect of survival. He also authorised the examiner, under s.9 of the 1990 Act, to exercise the power of borrowing sums not exceeding £429,000 for the purpose of continuing the company, and that monies so borrowed be treated as expenses properly incurred in the examinership under s.29 of the 1990 Act and be repaid in full out of the assets of the company in priority to any other claim, whether secured or unsecured. Among the company's assets was a sum of £229,000 in an account with the Bank of Ireland, which was subject to a fixed charge held by the Bank. The Bank was authorised by the High Court to have recourse to this sum in facilitating borrowing by the examiner. The Bank appealed against the order appointing the examiner and also against the order authorising the borrowing. **Held** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) dismissing the appeal: (1) since the terms of s.2 of the 1990 Act were strongly in favour of granting the appointment of an examiner, the test as to whether an examiner should be appointed was simply whether the company had a prospect of survival, and it was not appropriate at the date of appointment for the court to enquire whether the company had a reasonable prospect of survival. *Per* McCarthy J (concurring in the order): the Court should not consider the question of prospect of survival at all. Passage in Keane, *Company Law in Ireland,* 2nd ed, p.455 discussed; (2) the High Court was correct in authorising the examiner's borrowing under s.9 of the 1990 Act, and in allowing such to repaid in priority to all other claim under s.29 of the 1990 Act; and although s.11 of the 1990 Act referred to the sale of assets subject to fixed charges and to repayment of the proceeds of such sale to the holder of the fixed charge, the order made in the instant case was not affected by s.11; and any interpretation of s.11 which would limit the borrowing power of the examiner would allow the holder of a fixed security to prevent the examiner exercising any effective power to borrow and would be inconsistent with the plain intention of the 1990 Act.

In re Jetmara Teo High Court 10 May 1991

COMPANY — EXAMINER — REPORT — WHETHER CREDITOR HAVING STANDING TO OBJECT TO SCHEME SUGGESTED BY EXAMINER — BANK'S ENTITLEMENT TO REPAYMENT DEFERRED BY SCHEME — FRAUD BY DIRECTOR OF COMPANY PRIOR TO AND AFTER APPOINTMENT OF EXAMINER — WHETHER SCHEME SHOULD BE APPROVED — Companies (Amendment) Act 1990, ss.22, 29.

An examiner was appointed to the company

under the 1990 Act. The examiner prepared a scheme of arrangement for the company and presented it to the Court. A creditor bank sought standing to object to the scheme at the hearing. The bank argued that if the scheme was adopted the repayment of its loan would be deferred. The bank also drew attention to evidence of fraud by a director of the company prior to and after the commencement of the protection and argued that the scheme should not be approved. **Held** by Costello J approving the scheme: (1) the bank had standing to appear under s.22 of the 1990 Act, having a contractual interest which would be impaired by the scheme of arrangement proposed by the examiner, since the scheme would involve deferment of the bank loan and it would therefore lose interest on that loan; (2) not without hesitation, the scheme should be allowed to proceed, subject to some of the amendments which had been suggested by the bank, since the company was probably capable of surviving under the scheme; and it was significant that the scheme had been approved by all the company's creditors and by Udaras na Gaeltachta; (3) the scheme would be subject to any proceedings the bank may be advised to take against any of the company's directors arising from any wrongdoing in relation to the company's relations with the bank; (4) the bank was entitled to its costs as an expense of the examination under s.29 of the 1990 Act.

Browne and Ors v Attorney General High Court 6 February 1991

CONSTITUTION — INCOME TAX — BENEFIT IN KIND — SALES REPRESENTATIVES — CAR SUPPLIED BY EMPLOYER AND AVAILABLE FOR PRIVATE USE — AVAILABILITY FOR PRIVATE USE TAXED AS BENEFIT IN KIND — WHETHER IN BREACH OF RIGHT TO EARN LIVELIHOOD — WHETHER ARBITRARY — Finance Act, 1982, s.4 — Constitution, Article 40.1, 40.3.

The plaintiffs were all sales representatives. Their respective employers had supplied them with cars for their employment, and they were permitted to use the cars for private purposes. Where such private use occurred, the plaintiffs paid for the petrol involved. One of the plaintiffs did not use the car for any private purpose. Under s.4 of the 1982 Act, the availability of such cars for private use was treated as taxable income. Taking account of various deductions allowed under s.4, the effect was that the three plaintiffs were taxed for the availability of the cars for private use. They claimed that s.4 of the 1982 Act constituted an unjust attack on their right to earn a livelihood or alternatively was arbitrary in its effect. **Held** by Murphy J dismissing the claims: (1) in relation to taxation legislation, the presumption of constitutionality was particularly strong and the plaintiffs faced an uphill battle to establish their case. Dicta in *Madigan v Attorney General* [1986] ILRM 136 applied; (2) the 1982 Act did not tax the car or its business use, nor even its private use; rather it taxed the availability for private use; and while the burden fell more heavily on some because of the low level (or nil level in the case of one of the plaintiffs) of private mileage actually used, it could not be argued that this in itself rendered the 1982 Act unconstitutional, because there could be no objection in principle to the imposition of taxation on the availability of an asset any more than on ownership or possession of assets; and in any event there were alternative arrangements which employers and employees could enter into where the application of s.4 of the 1982 Act resulted in a heavy burden of taxation on an individual employee; (3) the 1982 Act was not arbitrary in its application, but was predicted on the reasonable assumption that a car made available for private use was, in general, likely to be used for that purpose. *Brennan v Attorney General* [1984] ILRM 355 distinguished. *Per* Murphy J: it was not necessary to consider the validity of the benefit in kind tax taking account of the impact of inflation from the time it was first introduced in 1958 by reference to an annual income of £15,000, since s.4 of the 1982 Act stood on its own without reference to any earlier statutory provisions on the subject.

Boyle v Lee and Goyns Supreme Court 12 December 1991

CONTRACT — SALE OF LAND — 'SUBJECT TO CONTRACT' — WHETHER LETTER INCLUDING TERMS FOR SALE 'SUBJECT TO CONTRACT' CAPABLE OF CONSTITUTING NOTE OR MEMORANDUM OF AGREEMENT — WHETHER CONCLUDED ORAL AGREEMENT MADE — LAW REFORM — Statute of Frauds (Irl) 1695, s.2

The defendants were the owners of a house. The house was placed with an auctioneer, and the plaintiff made an offer of £90,000 for the house. The auctioneer obtained the oral agreement of the defendants to the figure offered by the plaintiff. The plaintiff inquired about a deposit, and the auctioneer stated that this would be a matter for the solicitors in the transaction to determine. The auctioneer wrote to the defendants' solicitor stating that the figure of £90,000 had been agreed with the plaintiff 'subject to contract' and further stating that the letter itself was 'for information purposes only and does not by itself constitute part of a binding contact.' The letter included reference to the property and that it was to be sold subject to existing tenancies. The defendants ultimately did not proceed with the transaction, and the plaintiff then brought proceedings for specific performance. In the High Court Barrington J held that there was a concluded oral agreement and that the letter written by the auctioneer constituted a sufficient note or memorandum for the purposes of the Statute of Frauds. On appeal **Held** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) allowing the appeal: (1) (per Finlay CJ, Hederman, O'Flaherty and Egan JJ; McCarthy J dissenting) on the evidence, the issue of a deposit had not been agreed between the auctioneer and the plaintiff and the trial judge had erred in his finding that there was a concluded oral agreement; (2) the letter from the auctioneer to the defendants' solicitor, by its terms, could not be regarded as a note or memorandum for the purposes of the Statute of Frauds, and on that ground also the plaintiff's action should be dismissed. Per Finlay CJ, Hederman and McCarthy JJ: the decisions of the Court in *Kelly v Park Hall School Ltd.* [1979] IR 34 and *Casey v Irish Intercontinental Bank Ltd* [1979] IR 364 should not be followed. *Per curiam:* for the sake of legal certainty the phrase 'subject to contract' should be regarded as reflecting the absence of agreement between parties. *Per* O'Flaherty J: consideration should be given to the replacement of the Statute of Frauds with a legal requirement that all contracts for the sale of the land be in writing.

The People (D.D.P.) v Martin Court of Criminal Appeal 1 July 1991

CRIMINAL LAW — APPEAL — SENTENCE — EVIDENCE OF BAD REPUTATION — GROUNDS NOT ARGUED IN TRIAL COURT

The applicant pleaded guilty to maliciously causing grievous bodily harm with intent to disfigure, contrary to s.18 of the Offences against the Person Act 1861. In the Circuit Court, evidence was given by the arresting Garda that certain people would not testify against the applicant because they were in fear of their lives, and he also stated the applicant was a violent person. The trial judge sentenced the applicant to seven years imprisonment, having regard to the evidence of the Garda and the applicant's previous convictions. On application for leave to appeal **Held** by the Court of Criminal Appeal (McCarthy, Barr and Lavan JJ) dismissing the application: (1) evidence of bad reputation should, as a general rule, be restricted and should not be allowed to found a view that the applicant had committed previous offences; but since the trial judge had not drawn such conclusions in the instant case the application would be dismissed; (2) although the arguments made on appeal had not been advanced in the trial court, this should not preclude the applicant from raising them on appeal. Dicta in *The State (O'Connor) v O Caomhanaigh* [1963] IR 112 applied.

Director of Public Prosecutions v Holmes High Court 19 December 1991

CRIMINAL LAW — ROAD TRAFFIC — DANGEROUS DRIVING — EVIDENCE AS TO PRE-ACCIDENT CONDITION OF VEHICLE — GARDA GIVING EVIDENCE THREE HOURS AFTER INCIDENT SUBJECT MATTER OF PROSECUTION — WHETHER ADMISSIBLE — Road Traffic Act 1961, s.53 — Road Traffic (Amendment) Act 1978, s.10

The defendant had been charged, inter alia, with the offence of driving a mechanically propelled vehicle when it was in a condition that was dangerous, contrary to s.53 of the 1961 Act, as inserted by s.10 of the 1978 Act. Evidence was given that the Gardai were called to the scene of a crash involving a minibus driven by the defendant. A Garda began giving evidence of his examination of the minibus after the accident. Objection was taken on the basis that the scene of the accident had not been fully preserved, that the chain of evidence had been broken and that the examination had taken place three hours after the accident. The prosecution stated that the evidence would relate solely to the pre-accident condition of the minibus. The District Court Judge declined to hear the evidence and dismissed the dangerous driving charge. On case stated **Held** by Lavan J remitting the case to the District Court: having regard to the accusatorial nature of criminal proceedings, there was no sound basis in law for the trial court refusing to hear the evidence being tendered by the prosecution in relation to the pre-accident condition of the minibus. Dicta in *The State (O'Connor) v Larkin* [1968] IR 255.

B.L. v M.L. Supreme Court 5 December 1991

FAMILY — HUSBAND AND WIFE — PROPERTY — TRUST — WIFE CONTRIBUTING TO FAMILY FUND THROUGH REMAINING AT HOME — WHETHER GIVING RISE TO BENEFICIAL INTEREST IN HOME — CONSTITUTION — POSITION OF WIFE IN HOME — WHETHER GRANTING SUCH INTEREST WOULD AMOUNT TO UNWARRANTED DEVELOPMENT OF LAW — Constitution, Article 41.2

The parties had married in 1968, and had two

children. The wife remained full-time in the home, and contributed a substantial amount of time to the refurbishment of the family home. She made no direct or indirect financial contribution to the refurbishment or to the farming activities in which the husband engaged. The wife instituted proceedings for divorce a mensa et thoro, for alimony and also for orders under the Married Women's Status Act 1957 claiming a beneficial interest in the family home and farm. In the High Court, Barr J granted the decree of divorce a mensa et thoro and alimony. He also awarded her a 50% share in the beneficial ownership of the family home, having regard to Article 41.2 of the Constitution: [1989] ILRM 528. On appeal by the husband in relation to the beneficial ownership only **Held** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) allowing the appeal: Article 41.2 of the Constitution did not justify the conclusion of the trial judge that the wife was entitled to a 50% beneficial ownership in the family home; and such conclusion was an unwarranted development of the doctrine by which a spouse, whether through direct or indirect money contributions, could obtain a beneficial ownership by way of constructive trust. *Per curiam:* it was permissible for the Oireachtas, in order to give effect to the provisions of Article 41.2.2 that a wife should not be obliged to engage in work outside the home to the neglect of her duties in it, to legislate that a beneficial ownership could be declared in judicial separation proceedings, as in the Judicial Separation and Family Law Reform Act 1989.

N.(E.) v N.(R.) and Anor Supreme Court Supreme Court 5 December 1991

FAMILY — HUSBAND AND WIFE — PROPERTY — TRUST — WIFE CONTRIBUTING TO FAMILY FUND THROUGH REMAINING AT HOME — WIFE ALSO MANAGING SOME BUSINESS AFFAIRS IN HOME — WHETHER GIVING RISE TO BENEFICIAL INTEREST IN HOME — RESULTING OR CONSTRUCTIVE TRUST — Constitution, Article 41.2.

The plaintiff, a widow, instituted proceedings against the executors of her husband's estate claiming entitlement to a beneficial interest in the family home. After she and her husband had married, she gave up nursing and devoted her time to looking after the home and three children of the marriage. The family home was bought from the husband's resources and was in his sole name. A sum of £5,000 was borrowed to convert part of the house into bedsitters for letting. These bedsitters, nine in all, were managed by the plaintiff. The borrowed sum was paid off out of the rent received from the bedsitter tenants. A further sum of £15,000 was borrowed to build a two storey extension to the house. On the husband's death, this loan was paid off by virtue of the endowment policy. In the High Court, Barron J held that the plaintiff's contribution as mother in the home did not entitle her to any beneficial share in the house pursuant to Article 41.2 of the Constitution, but he found she was entitled to a 15% share arising from her management of the bedsitters and the contribution this made to the repayment of loans: [1990] 1 IR 383. On appeal to by the plaintiff **Held** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) allowing the appeal: (1) the High Court had been correct in deciding that the plaintiff was not entitled to any beneficial interest in the family home by virtue of Article 41.2 of the Constitution. *L v L* (Supreme Court, 5 December 1991) (supra) applied; (2) the High Court was correct in concluding that, in the absence of an express agreement between husband and wife, money contributions by the wife to improvements made in the family home would not entitle the wife to a beneficial interest in the family home. Dicta in *W v W* [1981] ILRM 202 applied; (3) having regard, however, to the substantial contribution made by the plaintiff to the repayment on the loans taken out on the property arising from her management of the bedsitter lettings, the High Court had erred in limiting the plaintiff's beneficial interest in the family home to 15%, and the correct portion to which she was entitled was 50%. Dicta in *W v W* [1981] ILRM 202 applied.

A.I.F. Ltd v Hunt and Hunt High Court 21 January 1991

HIRE-PURCHASE — MEMORANDUM OR NOTE — INACCURATE STATEMENT OF PRICE — INACCURACY KNOWN TO DEALER AND HIRER BUT NOT TO FINANCE COMPANY — WHETHER JUST AND EQUITABLE TO DISPENSE WITH REQUIREMENTS OF LEGISLATION — PRACTICE — APPEAL FROM CIRCUIT COURT — ESTOPPEL — WHETHER ARISING — Hire-Purchase Act 1946, s.3.

The plaintiff company was the finance company in relation to a hire-purchase contract entered into by the defendants as co-hirers. The note or memorandum required by the 1946 Act overstated the hire-purchase price. This inaccuracy was known to the defendants and the dealer involved, but not the plaintiff company. The plaintiff had required the second defendant to enter into the transaction as co-hirer with the first defendant, his son. The second defendant directed his bank to repay the instalments by monthly order. When 17 of the 36 instalments had been repaid, the second defendant countermanded the order. The plaintiff instituted Circuit Court proceedings seeking enforcement of the agreement. The claim was dismissed as against the first defendant but was unsuccessful against the second defendant. The second defendant appealed against the Circuit Court decision; the plaintiff did not appeal the dismiss against the first defendant. **Held** by Barron J dismissing the second defendant's appeal: (1) although, by virtue of the inaccuracy in the statement of the hire-purchase price, the requirements of s.3 of the 1946 Act had not been complied with, it was just and equitable that the Court dispense with such requirements having regard to the knowledge of the defendants and the lack of awareness of the inaccuracy on the part of the plaintiff; (2) once the second defendant had appealed by way of re-hearing to the High Court, all issues debated in the Circuit Court were open again; and even if the Circuit Court had found that the first defendant had not signed the hire-purchase agreement (and such finding had not in fact been made since if it had been the plaintiff's claim against the second defendant could not have been successful) the plaintiff was not estopped in any manner by the dismiss of its claim against the first defendant in the Circuit Court.

Texaco (Irl) Ltd v Murphy High Court 17 July 1991

LAND LAW — TENANCY OR LICENCE — EXCLUSIVE POSSESSION — TENANT ENTERING INTO POSSESSION ON BASIS OF COMMITMENT THAT TENANCY WOULD BE PREPARED — GRANTOR NOT INTENDING TO GRANT TENANCY.

The defendant applied to the plaintiff company in 1969 to operate as a Texaco retail outlet on a site he intended to buy. The company informed him that it would not be interested in such a proposal but that it would be looking for tenants for Texaco-owned sites. In fact, the company did not, at that time have a practice of granting tenancies but rather successive three month licences only. The defendant was successful in entering into possession of a Texaco-owned site. On entry, he was informed that a tenancy agreement was being drawn up, but he also signed an agreement acknowledging that the arrangement with the company was for a three month licence. A number of further agreements were signed by the defendant over the years, but no tenancy agreement was ever produced. In respect of some of the later agreements, the defendant objected to the form of the documents. The company produced a three year licence agreement which the defendant refused to sign and it then sought immediate possession. **Held** by Barron J refusing the relief sought: although the company had a policy for not entering into tenancy arrangements, the defendant in the instant case had entered into possession on the basis that he would at some stage be granted such a tenancy and having regard to the exclusive possession enjoyed by him such a tenancy must have come into effect and the plaintiff was not therefore entitled to possession. *Irish Shell & BP Ltd v J Costello Ltd* [1984] IR 511 distinguished.

Smith v Ireland and Ors High Court 14 February 1991

PRACTICE — COSTS — COUNSEL'S FEES — WHETHER SOLICITOR MAKING INDEPENDENT JUDGMENT AS TO LEVEL OF FEE — SOLICITOR NOT AVAILABLE TO GIVE DIRECT EVIDENCE COUNSEL HAVING DIED — CLIENT INFORMED — WHETHER SPECIAL FEE — PRE-TRIAL OPINION — WHETHER JUSTIFIABLE — Rules of the Superior Courts 1986, o.99, r.37(18).

The plaintiff had instituted civil proceedings arising from his arrest under s.30 of the Offences against the State Act 1939, claiming damages for slander, wrongful arrest, false imprisonment, negligence and failure to vindicate his constitutional rights. The trial of the action lasted 5 days. It appeared that the Gardai thought that the plaintiff was another person. The trial judge put two questions to the jury,the first being whether the plaintiff had been arrested as 'Kevin Walsh', to which the jury answered 'Yes', and, secondly, if the first question was answered in the affirmative, to assess damages which the jury assessed at £28,000. On taxation of costs of the action, the Taxing Master reduced the brief fee allowed to the senior counsel for the plaintiff. The briefing solicitor for the plaintiff, who had emigrated to the United States, was unavailable to state whether he had exercised an independent judgment on the level of fee to be allowed with the leading senior. The leading senior had since died. The second senior had understood the fee to have been agreed. The plaintiff had been informed prior to the trial as to the level of the fees. The Taxing Master had also disallowed a pre-trial opinion given by the junior counsel for the plaintiff. On appeal by the plaintiff **Held** by Lynch J allowing the appeal and remitting the case to the Taxing Master: (1) the Taxing Master had erred in concluding that the solicitor for the

plaintiff had not exercised an independent judgment on the correctness of the fee to senior counsel; and it was to be presumed, in the absence of contrary evidence, that a briefing solicitor would do his duty conscientiously and would consider the appropriate level of fee payable; (2) having regard to the transcript of the trial of the action, the Taxing Master had not taken into account the actual complexity of the case even though the questions put to the jury appeared to focus on the issues of false imprisonment; (3) the Taxing Master had erred in concluding that the fee agreed with the senior counsel was a 'special fee' within the meaning of 0.99, r.37(18) of the 1986 Rules, and the briefing solicitor had been correct to inform the plaintiff in advance of the potential fee he might be exposed to if the claim was unsuccessful; (4) the Taxing Master should have allowed the pre-trial opinion under 0.99, r.37(18) having regard to the complexity of the case.

Gormley v Ireland and Ors High Court 7 March 1991

PRACTICE — DISCOVERY — PRIVILEGE — GOVERNMENT DEPARTMENT COMMUNICATIONS — INTERNMENT OF PERSON — WHETHER MATERIAL PRIVILEGED — COMMUNICATIONS WITH GARDAI.

The plaintiff, a clerical officer with the Department of Posts and Telegraphs, was interned pursuant to the Offences against the State (Amendment) Act 1940 between July 1957 and November 1958. On release, he was requested to sign a declaration to respect the Constitution of Ireland and not to support or assist any unlawful organisation. Between 1958 and 1983, the plaintiff declined to sign this declaration and he was suspended as a clerical officer. In 1983, he signed the declaration and he was restored to his position. He instituted proceedings claiming a salary without regard to the interruption arising in his suspension from duties. In the course of the action, the defendants claimed privilege from discovery of certain documents relating to the plaintiff's internment and also in connection with communications with the Gardai. **Held** by Murphy J ordering discovery of some documents: (1) while some of the memoranda and letters prepared in connection with the plaintiff's internment were confidential and sensitive, they could not be regarded as involving national security, and it was in the public interest that they be disclosed for the purposes of the proceedings; and likewise documentation concerning the alleged refusal of the plaintiff to sign the declaration should also be disclosed, except for some elements which concerned legal advice, which should be pasted over; (2) certain communications with the Gardai concerning internment were highly confidential and while they might be of some value to the plaintiff they were in no sense fundamental to it and discovery would not be ordered of these documents.

Ambrose v O'Regan Supreme Court 20 December 1991

PRACTICE — EVIDENCE — IRRELEVANT CONSIDERATIONS — ROAD TRAFFIC — WHETHER DRIVER OF CAR HAVING CONSENT OF OWNER — TRIAL JUDGE TAKING IRRELEVANT CONSIDERATIONS INTO ACCOUNT — Road Traffic Act 1961, s.118.

In 1974, the plaintiff was injured while a passenger in the defendant's car which, at the time, was being driven by the defendant's son. The plaintiff issued proceedings against the defendant, but the question of compensation was then addressed in the context of the Agreement operated by the Motor Insurance Bureau of Ireland (MIBI). The case ultimately came before the High Court in 1990 on the question as to whether the defendant's son was driving with the defendant's consent within s.118 of the 1961 Act. In holding that the defendant's son had not been driving with her consent, the trial judge (MacKenzie J) stated that the plaintiff was ultimately entitled to be compensated for his injuries and that the case was an attempt by the MIBI to offload responsibility onto the defendant. On appeal by the plaintiff **Held** by the Supreme Court (Finlay CJ, McCarthy and O'Flaherty JJ) allowing the appeal: the trial judge had taken into account irrelevant considerations in his judgment; and although the evidence in the case supported a conclusion one way or the other, it was appropriate to order a re-trial of the action bearing in mind that the onus lay on the defendant to disprove consent. *Buckley v Musgrave Brook Bond Ltd* [1969] IR 440 followed.

Merriman v Dublin Corporation and Dublin County Council High Court 29 November 1991

TORT — BREACH OF STATUTORY DUTY — FAILURE TO MAINTAIN SEWER — CONCURRENT WRONGDOERS — WHETHER ESTABLISHED — Public Health (Irl) Act 1878, ss.2, 15

The plaintiff was injured when he fell into an open gully on the side of a roadway. The gully, road and adjacent housing had been built by the Corporation in the Council's administrative area, but the roadway had not been taken in charge by the Council at the time of the accident. A grill on the gully had been removed at some unknown stage prior to the plaintiff's accident. The gully constituted a 'sewer' within the meaning of s.2 of the 1878 Act. **Held** by Costello finding for the plaintiff against the Council only: (1) the Corporation owed no duty of care at common law to the plaintiff nor was it in breach of statutory duty to the plaintiff either as sanitary authority or as a road authority; (2) although the Council had not taken in charge the road in question, it was in breach of statutory duty since the gully constituted a 'sewer' under s.2 of the 1878 Act and it was obliged to keep in repair all sewers belonging to it under s.15 of the 1878 Act. *White v Hindly Local Board* LR 10 QB 219 applied; (3) although the Corporation had agreed with the Council to maintain the road in question until it was taken in charge, this did not create any statutory obligations towards third parties and so the defendants were not 'concurrent wrongdoers' under s.11 of the 1961 Act and the Council was not therefore entitled to an indemnity from the Corporation; (4) the plaintiff had not been a candid witness in relation to the extent of his injuries and having regard to the medical evidence he was entitled to £10,000 in damages.

Recent Irish Cases

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O'Dea v O Briain and Ors High Court 22 October 1991

ADMINISTRATIVE LAW - FAIR PROCEDURES - WHETHER APPLICABLE TO EXERCISE OF POWER OF RELIGIOUS SUPERIOR OVER NUN - NUN ALSO ENGAGED AS MEMBER OF TEACHING STAFF IN SCHOOL - BOARD OF MANAGEMENT REQUESTING TRANSFER OF NUN - WHETHER TRANSFER POWER VALIDLY EXERCISED - INTERLOCUTORY INJUNCTION - WHETHER MANDATORY INJUNCTION SHOULD BE GRANTED

The plaintiff, a nun who was a member of the Congregagtion of St-Louis, was also a teacher in a St Louis school. The board of management of the school communicated their dissatisfaction with the plaintiff's sick leave absence and other aspects of her performance to the plaintiff's religious superior. The board stated that they could take action against the plaintiff but requested the superior to transfer the plaintiff to another school in exercise of the religious superior's powers. The plaintiff's superior held two meetings with the plaintiff concerning the board of management's dissatisfaction. Subsequent to this meeting the plaintiff was informed that she was to be transferred to a school in Monaghan. The plaintiff claimed a mandatory injunction preventing the transfer from proceeding pending full consultation with her on the issue of her transfer. The plaintiff stated on affidavit that while the dissatisfaction with her was discussed in her meeting with her religious superior, no mention was made of the plaintiff's relocation to another school. Her superior stated that such discussion had taken place. On the plaintiff's application for an interlocutory mandatory injunction **HELD** by Murphy J refusing the relief: (1) while on an interlocutory application it was not necessary to decide whether the plaintiff could succeed in her claim, there was great difficulty for her in sustaining her action, since the issue of fact as to whether her transfer was discussed was likely to be resolved in favour of the plaintiff's religious superior, and it was unlikely that mandatory relief would be granted to restrain an action which could be remedied merely by holding an interview; (2) while any action by the board of management would, as it had acknowleged, require compliance with the rules of natural and constitutional justice, there was no authority for the proposition that these rules applied to a decision made by a religious superior in relation to his or her community; the decisions of a religious superior were not necessarily made to ascertain truth but might also be made to inculcate humility or to advance the interests of the religious order, whereas a lay tribunal was required to ascertain truth and vindicate rights; and, without expressing a final view on the matter, the power of a religious superior appeared to be absolute or virtually absolute, the vow of obedience being a converse of that power; (3) it was not appropriate to grant interlocutory mandatory relief as there was no guarantee that this would give the plaintiff the remedy she sought, namely review of her transfer by another body, since the court was not capable of ruling on her competence as a teacher and this would in any event be intruding on the rights of others to take the action open to them. *Campus Oil Ltd v Minister for Industry and Energy (No.2)* [1983] IR 88 distinguished.

MacGairbhith v Attorney General High Court 13 November 1991

CONSTITUTION - ACCESS TO COURTS - STAMPING FEES - WHETHER UNREASONABLE INTERFERENCE WITH ACCESS TO COURTS - LOCUS STANDI - WHETHER PLAINTIFF ACTUALLY INHIBITED FROM GAINING ACCESS TO COURTS - Constitution, Article 40.3

The plaintiff instituted proceedings claiming that his right of access to the courts had been infringed by the requirement that stamp duty be paid on legal documents. He also claimed that access was restricted by the failure of the State to make available a law library for lay litigants. **HELD** by O'Hanlon J dismissing the claim: (1) to resolve the difficult question raised by the applicant would require detailed evidence of the intervention by the State in the work of the law courts for the purpose of raising revenue, and it would be difficult to establish that all such interventions involved a breach of constitutional rights without regard to the question of whether hardship resulted; and in the absence of actual evidence, it was not appropriate to determine the issue; (2) since it was apparent that the plaintiff had exercised his right of access to the courts on a number of occasions and there was no evidence that he had actually been prevented from exercising his right, the question of his locus standi to raise the issue was in doubt, and this was another reason why the resolution of the matter should be left to another time. *Per* O'Hanlon J: the frightening cost of litigation, made up in part by the heavy stamp duties levied by the State are a major deterrent to access and may in many cases actually prevent parties from availing of rights nominally guaranteed to them under the Constitution; and a similar claim to that in the instant case had been upheld in the United States. *Boddie v Connecticut*, 401 US 371 (1971) referred to; (3) while lay litigants were afforded every opportunity by judges and court staff to present their cases as an aspect of the right of access to the courts, the further provision by the State of a law library to lay litigants was not an unenumerated right under the Constitution.

Trustee Savings Bank Dublin v Maughan High Court 8 October 1991

CONTRACT - BANKER AND CUSTOMER - CURRENT ACCOUNT LOAN SUBJECT TO 'CHARGES' AND 'USUAL TERMS AND CONDITIONS' - WHETHER BANK ENTITLED TO CHARGE COMPOUND INTEREST AND TO CAPITALISE OVERDRAFT - INTERPRETATION OF CONTRACT

The defendant entered into an agreement with the plaintiff bank in 1983, in which the bank furnished the defendant with a current account overdraft facility of £5,000. On 11 August 1983, the defendant signed an application form which stated that 'charges may be made on this account, at a scale that the bank may from time to time decide.' On 23 August, the bank sent the defendant a letter stating that the overdraft was 'on the usual terms and conditions including interest repayable on demand.' On that date, the defendant had already drawn a cheque of over £4,000 on the account. In September 1983, the defendant obtained a further loan of £2,000 from the bank. On the defendant's default on the loans, the bank instituted proceedings claiming it was entitled, under the terms of the agreement, to compound interest annually and also to charge a default rate of interest of 6% over its normal rates for overdrawn current accounts. On the bank's calculations, the amount due in July 1991 in respect of the £7,000 loans amounted to £32,906.01. **HELD** by Costello J: (1) the bank was not entitled, under the 11 August application form, to compound interest or to charge a default rate of interest, since the proposal referred to 'charges' and not to interest, and the bank was thus entitled to simple interest only; (2) the letter of 23 August could not be effective to impose any new terms on the agreement reached on 11 August, since the contract had largely been performed on that date; (3) the loan of 2,000 was subject to the letter of 23 August, but there was nothing in that letter which would allow the bank to compound interest annually or to a default rate of interest, since the courts lean against compound interest in the absence of special agreement; and accordingly the bank was entitled to a sum of 21,313.14. Passage in *Paget's Law of Banking*, 10th ed, p.247 approved.

Hourigan v Kelly and Ors High Court 26 April 1991

CRIMINAL LAW - FIREARMS - SHOTGUN LICENCE - REVOCATION - FAIR PROCEDURES - BASIS FOR REVOCATION NOT PUT TO LICENCE HOLDER - FIREARM IN POSSESSION OF GARDAI - Firearms Act 1925, s.5

The applicant, a farmer, had held a shotgun licence under the 1925 Act. In 1990, he was involved in an incident with a neighbour. No assault had taken place and no firearms had been involved, but the Gardai requested both parties to surrender their shotguns with a view to their licences being revoked and both parties complied with this request. The first respondent revoked the applicant's licence based in part on a report of the incident. He also had regard to

a conviction of the applicant in 1984 for assault, in an incident in which it was alleged that the applicant had discharged his shotgun, but in relation to which no charge under the 1925 Act was brought. S.5 of the 1925 Act provides that a licence may be revoked where a Superintendent is 'satisfied', inter alia, that the holder is a person who cannot, without danger to the public safety or to the peace, be permitted to possess firearms. The applicant challenged the revocation on the ground that he had had no opportunity to reply to or deal with the grounds of the decision. **HELD** by Egan J quashing the revocation order: although s.5 of the 1925 Act did not provide for a hearing, the revocation must be conducted with fair procedures; and while in some circumstances instant revocation would be perfectly permissible, this was not such a case having regard to the fact that the shotgun was in Garda custody; and thus the applicant was entitled to a hearing on the basis of the audi alteram partem principle.

Devereaux v Kotsonouris High Court 21 March 1991

CRIMINAL LAW - SUMMONS - CHARGE OF REFUSAL TO PERMIT PHOTOGRAPH OR FINGERPRINT TO BE TAKEN - WHETHER BAD FOR DUPLICITY - JUDICIAL REVIEW - APPLICANT HAVING APPEALED CONVICTION IN DISTRICT COURT TO CIRCUIT COURT - WHETHER JUDICIAL REVIEW LIES - Criminal Justice Act 1984, s.6

S.6(1) of the 1984 Act empowers a member of the Garda Siochana to do a number of things in relation to a person detained under s.4 of the 1984 Act. S.6(1)(c) empowers a Garda to photograph such person, and s.6(1)(d) empowers a Garda to fingerprint such person. S.6(4) of the 1984 Act states that any person who obstructs or attempts to obstruct a Garda exercising such powers shall be guilty of an offence. The applicant had been convicted before the respondent Judge of the District Court on a summons which alleged that he had unlawfully obstructed a member of the Garda Siochana by refusing to allow himself 'to be photographed or fingerprinted'. The particulars in the summons stated that such was 'contrary to s.6(1)(c)(d) Criminal Justice Act 1984.' The order of the District Court recorded that this was treated as a single offence, and the applicant was sentenced to 8 months imprisonment. The applicant appealed the conviction to the Circuit Court and then applied for judicial review of the District Court decision. The Circuit Court appeal was adjourned generally pending the judicial review proceedings. **HELD** by Lavan J refusing judicial review: (1) there were no offences created by s.6(1)(c) or (d) of the 1984 Act; but it was clear that s.6(4) created a number of offences in respect of the powers conferred by s.6(1) of the 1984 Act; (2) to lay more than one charge of 'obstructing' or 'attempting to obstruct' was duplicitous. *The State (McGroddy) v Carr* [1975] IR 275 applied; (3) since the applicant was charged under s.6 of the 1984 Act, he was not prejudiced in the conviction entered against him and was thus not entitled to judicial review ex debito justitiae; and since he had appealed the conviction to the Circuit Court it was not appropriate to grant judicial review. *The State (Vozza) v O Floinn* [1957] IR 227 distinguished; *The State (Roche) v Delap* [1980] IR 170 applied; (4) since the Circuit Court would be entitled to confirm, vary or reverse the decision of the District Court, the Circuit Court could deal with any problems of duplicity in the summons. *Per* Lavan J: the evidence on affidavit indicated that the applicant had been guilty of one of two offences provided for by s.6(4) of the 1984 Act, assuming that such evidence was established to the satisfaction of the respondent Judge of the District Court.

Sweeney v Brophy and DPP High Court 20 December 1991

CRIMINAL LAW - TRIAL - IMPROPRIETIES OF TRIAL JUDGE DURING TRIAL - CONVICTION QUASHED ON JUDICIAL REVIEW - WHETHER RETRIAL COULD BE ORDERED - WHETHER DEFENDANT ENTITLED TO PLEAD AUTREFOIS ACQUIT

The applicant had been convicted of assault before the respondent Judge of the District Court. The applicant sought certiorari to quash the verdict on the ground that a number of improprieties had occurred during the hearing of the case. The respondents did not oppose the application for certiorari but sought to have the matter remitted to the District Court. **HELD** by Barron J refusing to remit the case: the improprieties which had occurred did not make the trial void ab initio, but the resulting conviction was voidable so that certiorari lay to quash it; and since the applicant had been put in peril in a trial which had initially been valid, he was entitled to plead autrefois acquit and it was thus not appropriate to remit the case. Dicta in *R.(Drohan) v Waterford Justices* [1901] 2 IR 548 applied; *Singh v Ruane* [1989] IR 610 distinguished.

Director of Public Prosecutions v Brennan High Court 20 December 1991

CRIMINAL LAW - TRIAL - TRIAL JUDGE DISMISSING CHARGE BEFORE ENTERING INTO MERITS - DECISION QUASHED ON JUDICIAL REVIEW - WHETHER MATTER TO BE REMITTED TO TRIAL COURT - WHETHER DEFENDANT ENTITLED TO PLEAD AUTREFOIS ACQUIT

The respondent Judge of the District Court was the trial judge in a prosecution of two persons for malicious damage and burglary. The two defendants had been arrested under s.30 of the Offences against the State Act 1939 on suspicion of malicious damage. The defendants made confessions of their involvement in the malicious damage, and at about 4.30 p.m. on the date in question they were visited by their solicitor. The Gardai wished at this stage to bring them before a court, but the respondent was unavailable at the time. The defendants were, accordingly, released from their s.30 custody and immediately rearrested at common law and were charged with malicious damage and burglary. They were detained overnight in Garda custody and brought before a court the following morning. The defendants elected for summary trial and indicated that they would plead guilty. At the hearing of their case, their solicitor argued that their detention after 4.30 p.m. on the date in question was unlawful and that accordingly the charges should be dismissed. The respondent Judge acceded to this submission. On judicial review by the Director **HELD** by Barron J quashing the respondent's decision and remitting the case to the District Court: (1) the respondent had acted improperly, and should have allowed the case to proceed and then dealt with any submissions as to unlawful custody in the course of the trial, and so his decision should be quashed; (2) the respondent's decision was a nullity, and since he never entered into an adjudication on the charges against the defendants it was appropriate to remit the case to the District Court to deal with the matter. *R.(McGrath) v Clare Justices* [1905] 2 IR 510 applied.

Latham v Hibernian Insurance Co Ltd and Peter J Sheridan & Co Ltd High Court 22 March and 4 December 1991

INSURANCE - NON-DISCLOSURE OF MATERIAL INFORMATION - INSURED CONVICTED OF RECEIVING STOLEN PROPERTY - WHETHER INSURER AWARE OF CONVICTION - WHETHER AGENT OF COMPANY AWARE OF INFORMATION - NEGLIGENCE - BROKER - WHETHER AWARE - DAMAGES - WHETHER INSURED WOULD HAVE OBTAINED COVER IF INFORMATION DISCLOSED - INTEREST - WHETHER SHOULD BE AWARDED - Courts Act 1981, s.22

The plaintiff was the owner of a shop premises. In August 1983 he entered into a policy of insurance with the defendant company to cover the building, stock, fixtures and fittings and loss of profits for one year. The second defendant acted as insurance broker for the plaintiff. The policy was renewed in August 1984. In November 1983, the plaintiff was arrested and charged with receiving stolen goods. He later pleaded guilty to the charge and was sentenced to a term of imprisonment. A fire occurred in the shop premises in May 1985 causing substantial damage to the building and its contents. When the plaintiff made a claim under his policy, the defendant company repudiated liability on the ground that the plaintiff's arrest and conviction had not been disclosed to it in 1983 or on the renewal of the policy. The plaintiff instituted proceedings against the two defendants, claiming that the insurance company was not entitled to repudiate and, in the alternative, that the second defendant had been negligent. **HELD** by Blayney J dismissing the claim against the insurance company but finding the broker negligent: (22 March 1991) (1) the commission of the offence of receiving stolen property was a material fact which should have been disclosed on renewal, since it would have affected the mind of a prudent insurer. *Chariot Inns Ltd v Assicurazioni Generali SPA* [1981] ILRM 173; [1981] IR 199 applied; (2) the insurance company had no knowledge of the plaintiff's arrest in November 1983; and even if the Court were to accept the evidence for the plaintiff that a clerk in the company's office was aware of the arrest, he had not become aware in the ordinary course of his employment, and so knowledge could not be imputed to the company; and thus the company was entitled to repudiate liability. Passage in *MacGillivray and Parkington on Insurance Law*, 7th ed, para.674 approved; (3) the evidence established that the principal of the defendant broker had become aware of the plaintiff's arrest in November 1983, and he was in breach of his duty to the plaintiff by not advising him to disclose this infor-

mation to the insurance company; (4 December 1991) (4) as to whether the plaintiff was entitled to damages from the second defendant, the matter was to be approached on the basis of whether the plaintiff would have received insurance cover from another company if the plaintiff's arrest and conviction was revealed, the onus being on the plaintiff; (5) since evidence had been given for the plaintiff that such cover could have been obtained from an English company, albeit at a higher premium, and this had not been disputed by the second defendant, the plaintiff was entitled to damages under the same headings as those in the policy he had obtained from the first defendant; (6) the plaintiff was not entitled to any loss of profits beyond the one year in the policy since the plaintiff's inability to borrow to reinstate his premises was not a direct consequence of the second defendant's negligence, though if he had been able to boorow to reinstate he would have been entitled to claim from the defendant any interest on a loan. *Murphy v McGrath* [1981] ILRM 364 distinguished; (7) the plaintiff was entitled to interest on his damages under s.22 of the 1981 Act since he would have been compensated over five years ago were it not for the second defendant's negligence.

Application of Chariot Inns Ltd High Court 12 April 1991

LICENSING - INTOXICATING LIQUOR - RESTAURANT CERTIFICATE - APPLICATION FOR DECLARATION THAT PREMISES SUITABLE FOR LICENCES ON BASIS OF SUBSTANTIAL WORKS IN PROGRESS - WHETHER DECLARATION SHOULD BE GRANTED - EFFECT - LAW REFORM - Intoxicating Liquor Act 1960, ss.15, 16

The applicant company sought declarations under ss.15 and 16 of the 1960 Act that, having regard to substantial building works in progress and to planning permission received, the premises in its ownership were suitable for the granting of an intoxicating liquor licence and a restaurant certificate. The applicant indicated that it intended to apply for permission to operate the premises, located in Ranelagh in Dublin, as a disco up to 2 a.m. Local residents objected to the application on the basis of, inter alia, the nuisance which would thereby be created. They also objected on the ground that an application under ss.15 or 16 of the 1960 Act could not be made after building works had commenced. HELD by Johnson J granting the declarations sought: (1) the applications under ss.15 and 16 could be made at any time before the completion of the building works; (2) the extension to the premises clearly made it suitable for an intoxicating liquor licence under s.15 of the 1960 Act; (3) having regard to the fact that the premises in question were already in possession of a restaurant certificate for accommodation which was far inferior to that planned, and to the fact that planning permission had already been obtained for a restaurant, the applicant had made out a case that the premises were suitable to be certified as a restaurant under s.16 of the 1960 Act; (4) the declarations granted did not amount to permission for the premsies to be used at any time for any purposes, since these would be dealt with under the relevant legislation and in relevant courts for the determination of such issues; but it would be much easier for the Bench and for objectors if cases such as the present were dealt with under a codified system of licensing in which all relevant issues could be considered together rather than separately.

Sheehan v Reilly High Court 19 April 1991

LICENSING - PUBLIC MUSIC AND PUBLIC DANCING LICENCES - REVOCATION - WHETHER LIMITED TO CASES IN WHICH CRIMINAL OFFENCE COMMITTED - WHETHER COURT GRANTING LICENCES ENTITLED TO GRANT REVIEWABLE LICENCE - JUDICIAL REVIEW - WHETHER LICENSEE CONSENTED TO GRANT OF REVIEWABLE LICENCE - Public Health Acts Amendment Act 1890, s.51 - Public Dance Hall Act 1935, s.6

The respondent Judge of the District Court had granted the applicant a public music licence under s.51 of the 1890 Act and a public dance licence under s.6 of the 1935 Act. The order of the Court stated that the objectors to the licences were entitled to re-enter the matter at any time during the currency of the licences. On one such re-entry, the objectors stated that the licences were operated in such a manner as to cause a public nuisance and, having heard the evidence, the respondent Judge revoked the applicant's licences. The applicant sought judicial review of the revocation on the ground that the Judge had no jurisdiction to revoke the licence, and that the only basis for revocation under s.51 of the 1890 Act or s.6 of the 1935 Act was a conviction for a licensing offence. **HELD** by Barron J quashing the respondent's revocation: (1) the respondent had no jurisdiction to revoke the licences in the instant case, having regard to s.51 of the 1890 Act and s.6 of the 1935 Act; having granted the licences he was functus officio, and he was not entitled to grant, in effect, a reviewable licence; (2) since the error went to jurisdiction, the applicant was not estopped from seeking judicial review by his failure to challenge the re-entry provision in the Order of the respondent.

Smyth and Anor v Tunney and Ors (No.2) High Court 8 August 1991

PRACTICE - COSTS - COUNSEL'S BRIEF AND REFRESHER FEES - FUNCTION OF TAXING MASTER AND HIGH COURT IN RELATION TO SUCH FEES - SOLICITOR'S INSTRUCTION FEES WHETHER REASONABLE - LENGTHY CIVIL ACTION INVOLVING ALLEGATIONS OF FRAUD - Rules of the Superior Courts 1986, O.99, r.37(8), Appendix W

The parties had been involved in a 17 day civil action in which the plaintiffs contended, inter alia, that the defendants had fraudulently concealed alterations to an agreement between the parties and the defendants argued that the proceedings constituted an abuse of the process of the courts and an attempt to blackmail them: see *Smyth and Anor v Tunney and Ors* (High Court, 6 October 1989). Each of the defendants was represented by one senior and one junior counsel. Senior counsel for the first defendant agreed in advance with his instructing solicitor a brief fee of 10,000 guineas, and a refresher fee of 2,000 guineas per day. The instructing solicitor considered these fees reasonable. The Taxing Master allowed a brief fee of 6,875 and a refresher fee of £1,000. The instructing solicitor for the first defendant sought an instruction fee of £90,000, which the Taxing Master reduced to £25,000. Reductions to £12,500 and £8,000 were made in the instructing fees of the two other solicitors for the defendants. On appeal to the High Court **HELD** by Murphy J: (1) the former practice of a solicitor marking a fee on a brief, which had the merit that the solicitor focused on the question of the appropriate fee for counsel, had fallen into disuse and it was not the court's function to seek to revive the practice. Dicta in *Robb v Connor* (1875) IR 9 Eq 373 referred to; (2) it was not the function of the Taxing Master in reviewing counsel's fees to determine whether such fees were correct, but he did have a discretion to review counsel's fees in that he was required to decide whether a reasonably prudent solicitor acting in a reasonable way would have offered such a fee. Dunne v O'Neill [1974] IR 180, Kelly v Breen [1978] ILRM 63 and The State (Gallagher Shatter & Co) v deValera (No.2) [1991] 2 IR 198 discussed; (3) the Taxing Master had erred in describing the fee charged by counsel as a special fee, since there was no evidence to support this; (4) having regard to the fact that a fee of more than 5,000 guineas had rarely been allowed on taxation, and since the instant case did not involve any special scientific evidence but was largely fought on questions of fact, the fee of 10,000 guineas was not one which a reasonable solicitor would have offered; and the appropriate brief fee was 7,500 guineas and a refresher fee of 1,000 guineas; (5) in relation to the solicitor's instructions fees, the Taxing Master was entitled to determine whether the fee sought was the correct fee, and for this reason the experience of the Taxing Master was especially relied on by the courts; (6) an instruction fee could not be used to compensate the solicitor in some way for the low levels of fees allowable under Appendix W of the 1986 Rules in respect of other expenses, and in the instant case the solicitors' role was not dominant but its outcome depended primarily on the forensic skills of counsel; however, in the circumstances the fees allowed by the Taxing Master were too low and instructing fees of £40,000, of £22,500 and of £16,000 should be allowed, bearing in mind that the solicitor for the first defendant had completed much of the paperwork for the case; (7) the Taxing Master had correctly disallowed a fee of £1,500 for senior counsel and of £1,000 for junior counsel for thier attendance to take judgment in the case; (8) the Taxing Master had correctly allowed attendance fees for an estate agent and an architect who, although not called, were correctly regarded as witnesses whose attendance might be crucial. *Duan v Freshford Co-Op Ltd* (1942) ILTR 220 applied.

Aspell v O'Brien High Court 26 November 1991

PRACTICE - COSTS - 'STANDBY' FEES FOR MEDICAL WITNESSES - WHETHER REASONABLE CHARGES OR EXPENSES - WHETHER PRACTICE BY WHICH SUCH FEES ARE PAID BY SOLICITORS MADE THEM ALLOW-

ABLE IN TAXATION - PERSONAL INJURIES ACTION - LAW REFORM - WHETHER NEED TO ALTER PRE-TRIAL PROCEDURES FOR MEDICAL REPORTS - Rules of the Superior Courts 1986, O.99, r.37(8) and (18)

The plaintiff's personal injury action against the defendant was listed for 30 and 31 May 1990. Evidence was heard on 30 May but the action was settled on 31 May. Counsel for the plaintiff had directed the attendance of four doctors, but only one had given evidence when the case was settled. All four doctors had charged standby fees for 30 May, and the plaintiff's solicitor discharged these fees. It was a long standing practice that such standby fees were not allowed on taxation by the Taxing Master, but the Incorporated Law Society of Ireland recommended that such fees be discharged. It was argued that such fees should be allowed on taxation, but the Taxing Master declined to allow them. On appeal **HELD** by Costello J dismissing the appeal: (1) although the listing system for personal injuries actions in the High Court was not very satisfactory, and this undoubtedly caused inconvenience to all professional witnesses who are not called on the date scheduled for their evidence, it was not reasonable, within the meaning of O.99, r.37(8) of the 1986 Rules, for professional witnesses to charge standby fees, since it was not suggested that they necessarily suffer any financial loss for a day on which they have mistakenly made themselves available to appear in court, and any additional inconvenience is compensated for by the payment of the attendance fee; (2) while medical witnesses are in a special category, since their inconvenience may be accompanied by hardship to other people, the courts took account of this by arranging, for example, to have their evidence heard out of turn or specially fixing a date for hearing an action; (3) the practice of paying such standby fees, albeit recommended by the Law Society, did not mean that such payment was either necessary for the attainment of justice or for enforcing the rights of either party, within O.99, r.37(18) of the 1986 Rules; and no practice could confer a right to payment outside the terms of O.99. Principles in *Kelly v Breen* [1978] ILRM 63 explained. *Per* Costello J: it would be in the interests of the administration of justice and of the medical profession if agreement could be reached more frequently to accept medical reports as evidence without the necessity to call their authors merely for the purpose of confirming and repeating their contents in court; and consideration should be given to the establishment of pre-trial procedures to permit this to be done formally, as well as the acceptance of reports, maps and photographs from other professional witnesses without the necessity of having to prove them formally.

O Laochdha v Johnson & Johnson (Irl) Ltd High Court 6 November 1991

REVENUE - CORPORATION TAX - RELIEF - SALE BY EXPORT OF GOODS MANUFACTURED IN STATE - WHETHER GOODS PRODUCED FROM CUTTING, FOLDING AND PACKAGING OF LARGE BALES OF FABRIC 'MANUFACTURED' - Finance Act 1980, s.42

S.42 of the 1980 Act provides for relief from corporation tax in respect of profits derived from the sale by export of goods manufactured in the State. The respondent company engaged in the production of nappy liners and J Cloths in the State which were then exported. These were produced by placing large bales of fabric (1,200 to 3,000 cubic metres) into a machine which, it was agreed, was expensive, sophisticated and required special training for its operatives. In relation to J Cloths, the machine was capable of packaging as well as cutting the cloths. The applicant Inspector of Taxes refused to allow the company relief from corporation tax under s.42 of the 1980 Act. On appeal the Appeal Commissioner held that the relief should be granted. On case stated **HELD** by Carroll J affirming the decision: looking at the end product in the instant case, it was immediately clear that it was commercially different from the bales of fabric, adding more than 70% in value to the J Cloths and 40% to the nappy liners; the reduction in size had utility, quality and worth which were due to the process carried out by the company; and although the process did not bring about any change in the raw material itself (just as confetti was unchanged from its original state as bulk paper), this did not prevent it from being a manufacturing process; and an ordinary person, even if unaware of the actual process, would consider it to be manufacturing. Dicta in Cronin v *Strand Dairy Ltd* (High Court, 18 December 1985) and *Irish Agricultural Machinery Ltd v O Culachain* [1989] ILRM 478; [1990] 1 IR 535 applied.

Brosnan v Cork Communications Ltd High Court 15 October 1991

REVENUE - VALUE ADDED TAX - BUSINESS OF RELAY OF CABLE TELEVISION AND RADIO SIGNALS - SIGNALS TRANSMITTED BY ELECTRICAL POWER - WHETHER RELAYER OF SIGNAL ENGAGED IN SUPPLY OF ELECTRICITY - PRACTICE - CASE STATED - INFERENCES FROM PRIMARY FACTS - WHETHER REASONABLE - Value Added Tax Act 1972

The respondent company's business was the relay of cable television and radio signals to domestic householders. The signals were transmitted through cables to each house by means of electric current, at a voltage of about 0.001 of a volt. Such current is not normally capable of any use except for the relaying of broadcast signals. The supply of electricity is zero rated for the purposes of the 1972 Act. In the Circuit Court, it was held that the respondent was supplying electricity and that the zero VAT rate was applicable. On case stated **HELD** by Carroll J reversing the Circuit Court: (1) the findings of the Circuit Court judge, whether viewed as a mistaken interpretation of the law or an unreasonable inference from the primary facts, could not be upheld since they were inconsistent with the finding that the company's business was the transmission of TV and radio signals. *Mara v Hummingbird Ltd* [1982] ILRM 421 applied; (2) while the company used electricity to carry the signals, this could not be descroibed as supplying electricity in the ordinary colloquial meaning of the words. *Inspector of Taxes v Kiernan* [1982] ILRM 13; [1981] IR 117 applied.

Corcoran v Minister for Social Welfare High Court 7 June 1991

SOCIAL WELFARE - UNEMPLOYMENT ASSISTANCE - WHETHER APPLICANT ENTITLED TO PAYMENT - APPLICANT RETAINING VAN - WHETHER REFUSAL OF ASSISTANCE REASONABLE - WHETHER APPLICANT ENTITLED TO LEGAL REPRESENTATION AT APPEALS HEARING - Social Welfare (Assistance Decisions and Appeals) Regulations 1953 - Social Welfare (Consolidation) Act 1981, s.138

The applicant received unemployment assistance after his redundancy. A social welfare Deciding Officer investigated whether he was entitled to continue to receive the assistance. He concluded that the applicant was not entitled to a qualification certificate pursuant to s.138 of the 1981 Act, having regard in particular to the applicant's purchase of a Nissan van in a trade-in of an older van which the applicant had bought while he was employed. The applicant had retained a firm of solicitors to deal with his claim to assistance, and they wrote to the Department asking to be represented at any appeal hearing. The Department had arranged an appeal for the day after this letter was sent and the firm was not aware of the hearing, although the applicant had been informed of the hearing a week earlier. At the appeal hearing, the Appeals Officer upheld the decision not to grant the applicant social assistance. A further appeal, at which the applicant was represented by his solicitor, also declined to grant the applicant the unemployment assistance. On judicial review by the applicant **HELD** by Murphy J dismissing the application: (1) the Deciding Officer was entitled to take account of the applicant's personal circumstances, particularly his continued ownership of the van bearing in mind the obvious demands on his limited resources; and the inference that he had a more substantial income or an undisclosed income in excess of the statutory maximum permitted under s.138 of the 1981 Act could not be described as unreasonable; and similar reasoning applied to the decision of the Appeals Officer. *The State (Keegan) v Stardust Victims Compensation Tribunal* [1987] ILRM 202; [1986] IR 642 applied; (2) the 1953 Regulations did not provide for a right to legal representation at an appeals hearing, and the appeals notice in the instant case had conformed to the requirements of those Regulations; but, in any event, the applicant had not been prejudiced by the absence of his solicitor from the first appeals hearing; (3) there was no basis for the proposition that the applicant was entitled to be represented by legal advisers at an appeal hearing, even where such legal advisers notified the Department of their intention to appear; nor was there any basis for the suggestion that such representation should be at the expense of the State, bearing in mind that a refusal of assistance was not final and could be reviewed in the light of new evidence as to means. Dicta in *Flanagan v University College Dublin* [1989] ILRM 469 discussed. *Per* Murphy J: although the solicitors had no right to appear, it would have been churlish if they had been refused permission to appear.

Recent Irish Cases

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Government of Canada v Employment Appeals Tribunal (Burke, Notice Party) Supreme Court 12 March 1992

CONSTITUTION - INTERNATIONAL RELATIONS - SOVEREIGN IMMUNITY OF FOREIGN GOVERNMENT - WHETHER ABSOLUTE OR RESTRICTED TO MATTERS RELATING TO PUBLIC BUSINESS AND POLICY OF FOREIGN GOVERNMENT - DEVELOPMENTS IN INTERNATIONAL PRACTICE - CHAUFFER OF EMBASSY OF FOREIGN GOVERNMENT - DISMISSAL - WHETHER SOVERIEGN IMMUNITY APPLIED - WHETHER CLAIM FOR UNFAIR DISMISSAL MAY BE MADE TO EMPLOYMENT APPEALS TRIBUNAL - Constitution, Article 29.3 - Unfair Dismissals Act 1977, s.10

The notice party, Mr Burke, had been employed as chauffeur to the Canadian ambassador in Ireland in the Canadian Embassy in Ireland until May 1988, when he was dismissed. He instituted unfair dismissal proceedings pursuant to the 1977 Act. At the hearing of his case before the Employment Appeals Tribunal, the Canadian Government's solicitor argued that the Tribunal had no jurisdiction to hear the matter, claiming that the Government of Canada was entitled to rely on the doctrine of sovereign immunity. The Tribunal rejected this argument and held that it had jurisdiction to hear the matter; the Canadian Government then withdrew from the proceedings. The Tribunal went on to conclude that Mr Burke had been unfairly dismissed and awarded him damages. The Government of Canada sought judicial review of the Tribunal's decision, but this application was rejected in the High Court by MacKenzie J: [1991] ELR 57. On appeal by the Government of Canada **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) allowing the appeal: (1) the case should be determined by reference to the generally recognised principles of international law, in accordance with Article 29.3 of the Constitution; and in this context, the Court was entitled to take account of developments in other jurisdictions and was not confined to examining whether the Irish legislature or executive had not expressly addressed the doctrine of foreign sovereign immunity; (2) having regard to developments in other jurisdictions since World War II in particular, it was clear that other States had abandoned the notion of an absolute sovereign immunity; such an absolute immunity was relevant only to a time when a State was concerned with the conduct of its armed forces, foreign affairs and the operation of its currency; but it was no longer appropriate to an era when so many States were engaged in the business of trade, whether directly or indirectly; (3) the more restrictive form of foreign immunity now recognised by most States was one which attached to the actual public business or policy of a foreign State, but no immunity attached to private trade conducted by States. *Dicta* in *Zarine v Owners* of SS Ramava [1942] IR 148 approved. *Dicta* in *Saorstat and Continental Steamship Co v Rafael de las Morenas* [1945] IR 291 doubted. I Congresso [1983] 1 AC 244 approved; (4) the contract between Mr Burke and the embassy to act as chauffeur for the ambassador was not a commercial contract in the ordinary sense and it involved, in effect, an element of trust and confidentiality which was connected with the Government of Canada's public business and interests; and accordingly the Government of Canada was entitled to rely on the restricted form soveriegn immunity in the instant case; (5) the application for judicial review was not premature in that the Employment Appeals Tribunal had made a determination and the Government of Canada was not required to await enforcement proceedings (if any) by the Minister for Labour under s.10 of the 1977 Act.

A.S. v S.S. Supreme Court 21 February 1992

FAMILY LAW - CUSTODY OF CHILDREN - WELFARE AS PARAMOUNT CONSIDERATION - PRACTICE - SUPREME COURT - FUNCTION OF COURT ON APPEAL - FINDINGS BY TRIAL COURT - Guardianship of Infants Act 1964, s.11

The plaintiff wife instituted proceedings under the Judicial Separation and Family Law Reform Act 1989 seeking a judicial separation from the defendant husband. She also claimed custody of the children of the marriage, three girls aged from 13 to 7. The trial judge (Morris J) granted the judicial separation. He found that the plaintiff had left the marriage to form a relationship with another married man, that the plaintiff was not truthful in her evidence as to the breakup of her marriage and that on occasion she had left the children alone at night when she went out socialising. He also found that the man with whom she was having a relationship had nothing to offer the children in the way of a father figure. Morris J considered that the defendant husband was a hard-working and retiring man, and that while he was strict this would have a positive effect on the children, whereas the plaintiff's lifestyle was not likely to have a beneficial effect on them. The trial judge held that, although the defendant husband would be away from the family home for most of the day (during which time he stated he would employ a housekeeper), the welfare of the children indicated that he should be given custody of them. On appeal by the plaintiff as to the custody of the children **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) dismissing the appeal: (1) the Court should be slow to interfere with the findings of a trial judge in relation to conclusions drawn from primary facts which are supported by the evidence given. *Hay v O'Grady* (Supreme Court, 4 February 1992) (below) applied; (2) since the trial judge had had regard to the welfare of the children as the paramount factor and had taken into account the totality of the picture presented to the court, his decision to award custody to the defendant father should not be interfered with. Per curiam: while previous cases in relation to the question of custody provide guidance on the general principles applicable, each case tends to turn on its own individual circumstances. *Dicta* in *MacD. v MacD.* (1979) 112 ILTR 60 discussed.

K. v K. Supreme Court 13 February 1992

FAMILY LAW - MAINTENANCE - DESERTION BY SPOUSE - WHETHER BAR TO MAINTENANCE - CONSTRUCTIVE DESERTION - WHETHER INTERESTS OF JUSTICE IN FAVOUR OF GRANTING MAINTENANCE - MAINTENANCE OF CHILDREN - WHETHER CHANGED CIRCUMSTANCES - Family Law (Maintenance of Spouses and Children) Act 1976, s.5 - Judicial Separation and Family Law Reform Act 1989, s.38

The applicant wife sought maintenance from the respondent husband for herself, and a variation of maintenance previously granted to their children. In previous judicial separation proceedings, the High Court had found that the applicant had constructively deserted the respondent primarily arising from her morbid jealousy which had resulted in the respondent leaving the family home. This decision was confirmed on appeal by the Supreme Court. In the instant application in the High Court, Costello J had held that the applicant was barred by s.5 of the 1976 Act from claiming maintenance by virtue of the constructive desertion. He also held that she was not entitled to the benefit of the amendment to s.5 of the 1976 Act effected by s.38 of the 1989 Act, by which maintenance could be awarded notwithstanding desertion where it would be repugnant to the interests of justice not to make such an order. Costello J also declined to increase the maintenance previously awarded to the children of the marriage. On appeal **HELD** by the Supreme Court (Finlay CJ, Hederman and McCarthy JJ) allowing the appeal in part only: (1) the definition of 'desertion' in s.5 of the 1976 Act clearly and unambiguously applied to a case of constructive desertion, such as occurred in the instant case; (2) the applicant was not entitled to the automatic benefit of the exemption to s.5 of the 1976 Act which had been inserted by s.38 of the 1989 Act, and that its true interpretation placed a heavy onus on a person seeking to claim the benefit of an otherwise absolute ban on payment of maintenance to a spouse who had deserted the other spouse; (3) the finding that the applicant had a morbid jealousy of the respondent did not amount to a finding that the applicant was a person of unsound mind deserving of special protection by the courts; and in fact the applicant

appeared on the evidence to be well capable of looking after her own affairs, so that she had not discharged the onus on her in this respect; (4) although the trial judge had not, in his ex tempore judgment, explained why the applicant did not come within the exemption in s.38 of the 1989 Act, the Supreme Court was in as good a position to judge whether the applicant fell within its terms, and it was not therefore necessary to order a re-hearing on this matter; and having regard to all the evidence, the applicant had not made out a case that she was entitled to the benefit of s.38 of the 1989 Act; (5) an an application for a variation of a maintenance order, the court must not commence de novo to reach a new view on the general question, but must determine whether, from the last effective order, the circumstances have changed which would warrant either an increase or a decrease in the amount of the maintenance; and while the applicant had made some vague and excessive claims as to the increased costs of schooling of the children since the original order was made in 1989, the Court was entitled to take judicial notice of the inflationary decrease in the value of money even since 1989 and that the costs of schooling the children would have increased in that time; and therefore the Court would increase the weekly sum of 225 to 265 to take account of such changes.

H.S. v J.S. Supreme Court 3 April 1992

FAMILY LAW - NULLITY - WHETHER PARTY HAD CAPACITY TO ENTER INTO LIFE-LONG COMMITMENT - WHETHER PARTY HAVING MATURITY TO APPRECIATE EFFECT OF ENTERING INTO MARRIAGE

The petitioner, an Irish citizen, met the respondent on holiday in Europe and they had sexual relations. On the petitioner's return to Ireland, she was notified that she had obtained a Donnelly visa, which entitled her to work in the United States of America. She contacted the respondent and invited him to Ireland. When he arrived, she told him that she would like him to accompany her to the United States. They were informed that the respondent could do so if he was married to the petitioner. The respondent stated that he was willing to marry the petitioner on the basis that they could obtain a divorce in the United States. The parties were married in the Dublin Registry Office. Some days later, the marriage certificate was discovered by the petitioner's mother and the instant proceedings, seeking a declaration that the marriage was a nullity, were instituted shortly thereafter. The petitioner went to the United States and the respondent returned to his native country. The marriage was never consummated. In the High Court, Carroll J refused to grant a declaration of nullity, holding that there was no evidence that the petitioner lacked the capacity to enter into a life-long commitment and also holding that the petitioner was a mature person who understood the nature of the marriage contract. She concluded that the petitioner had got what she wanted, but that the mental reservation that the parties could obtain a divorce in the United States was not sufficient to make the marriage a nullity. On appeal by the petitioner **HELD** by the Supreme Court (Finlay CJ, Hederman and McCarthy JJ; O'Flaherty and Egan JJ dissenting): the trial judge had not erred in concluding, on the evidence presented, that it had not been shown that the petitioner lacked the capacity to enter into a life-long commitment when she went through the marriage ceremony; and a marriage was not invalid merely by reason of the fact that the parties to the marriage had knowingly entered into the marriage with mental reservations as to whether the marriage would in fact be one for life; and therefore the Supreme Court would not interfere with the conclusions of law at which the trial judge had arrived. *Per* O'Flaherty and Egan JJ (dissenting): in view of the mental reservations of the parties to the marriage, the marriage could not be described as a marriage in the normal sense of the term, and a decree of nullity should issue.

Hutch v Dublin Corporation Supreme Court 1 April 1992

MALICIOUS INJURIES - APPLICANT HAVING CRIMINAL RECORD - WHETHER DISENTITLED TO CLAIM UNDER MALICIOUS INJURIES LEGISLATION - PUBLIC POLICY - WHETHER ESTABLISHED IN EVIDENCE THAT PROPERTY DESTROYED RESULTED FROM CRIMINAL ACTIVITY - Malicious Injuries Act 1981

The applicant claimed under the 1981 Act arising from a fire which occurred in 1984 in the house in which he was tenant and which had resulted in the destruction of furniture in the house. It was agreed that the fire had been started maliciously. In the course of the Circuit Court hearing, the applicant was cross-examined as to whether he had a criminal record, and the applicant accepted that he had been convicted of a number of offences, including larceny. The applicant, who had been unemployed since 1977, produced receipts in respect of all items of furniture in respect of which claims were made and stated that the items had been paid for out of savings, loans from family members and also from part-time work. The Circuit Court judge (Judge Carroll) concluded that the furniture had been purchased from the proceeds of criminal activity and that, accordingly, he was disentitled to claim for malicious damage to the furniture under the 1981 Act. The case was referred on case stated to the High Court, which in turn stated a case for the Supreme Court. **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy and Egan JJ; O'Flaherty J dissenting): (1) while a witness was entitled, in general, to refuse to answer questions which might incriminate him, the applicant had agreed to answer the questions in the instant case and, in any event, questions as to convictions which had already been recorded were admissible; (2) the applicant should not be precluded from claiming under the 1981 Act because (per Finlay CJ and McCarthy J) the conclusion of the Circuit Court judge that the furniture in the instant case had been purchased from the proceeds of crime was not warranted by the evidence proferred; or (per Hederman and Egan JJ) there was no general public policy principle by which a person who suffered damage within the 1981 Act should not be compensated in full, where that person's criminal activity did not lead directly to the loss complained of. *R. v National Insurance Commissioner, ex p Connor* [1981] 1 All ER 769 distinguished. Semble per Finlay CJ, McCarthy and O'Flaherty JJ: where it was established that proceeds of crime were destroyed maliciously, it would offend against common sense if the wrongdoer could also claim against the community for malicious damage in respect of the destruction of the proceeds of crime. [Note: the Malicious Injuries (Amendment) Act 1986, which came into effect after the incident in the instant case, severely limited the circumstances in which dama
ges can be claimed under the 1981 Act.]

Dunleavy v McDevitt and North Western Health Board Supreme Court 19 February 1992

NEGLIGENCE - MEDICAL - SURGICAL OPERATION - WHETHER PARTICULAR FORM OF SURGERY PERFORMED WITH DUE CARE - WHETHER ALTERNATIVE SURGERY SHOULD HAVE BEEN PERFORMED - WHETHER ALTERNATIVE SURGERY WOULD HAVE AVOIDED INJURY

The plaintiff was referred to the first defendant, a consultant surgeon, in respect of a lump behind the angle of his left lower jaw, near his left ear. After examination, the first defendant performed an operation to remove the lump during which the lump was removed. Subsequent to the operation, the plaintiff suffered from damage to the facial nerve on his left side. The plaintiff instituted proceedings for damages on the grounds, inter alia, of the negligence of the first defendant. It was argued that the first defendant should have removed the lump in an operation, called a wider operation, in which the facial nerve would have been exposed at all times and that damage to it could have been avoided. In the operation actually performed, called a limited operation, the facial nerve was not exposed during the operation. It was stated that the first defendant should have performed the wider operation in view, in particular, of his initial view on examination of the plaintiff that the lump was malignant. This initial view, in fact, proved unfounded, the lump not being malignant. In the High Court it was held that, having regard to the expert testimony presented, the first defendant had acted with all reasonable care. On appeal by the plaintiff **HELD** by the Supreme Court (Finlay CJ, Hederman, McCarthy, O'Flaherty and Egan JJ) dismissing the appeal: (1) even if it was established that the wider operation amounted to a reasonable precaution which existed to prevent the spread of malignancy (and this had not been established in the instant case), such alternative operation could not be relied on in the instant case since it was a precaution which had no causative relation to the instant case; (2) in relation to the limited operation actually performed by the first defendant, the expert evidence in the instant case indicated that he had conducted the operation in accordance with a reasonable standard of care and had exercised proper judgment in the course of that operation.