INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

INDEX TO VOLUME 84 – 1990

1) SUBJECT INDEX:

A comprehensive index to all subjects covered in the *Gazette*, January to December 1990.

2) CASE INDEX:

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(ii) Cases examined and\or specially mentioned in articles, editorials etc.

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(Registered Indexer of the Society of Indexers)

1. SUBJECT INDEX

This is a comprehensive index to subjects covered in the Gazette, with entries also under major headings such as, Acts of the Oireachtas, Articles, Associations and Societies; Book Reviews, Editorials, European Communities; Law Society; Practice Notes, President's Column, Solicitors etc. Pictorial items are indexed under People and Places. Local and international societies are indexed under Associations and Societies, Sports Activities, or People and Places (if pictorial references only).

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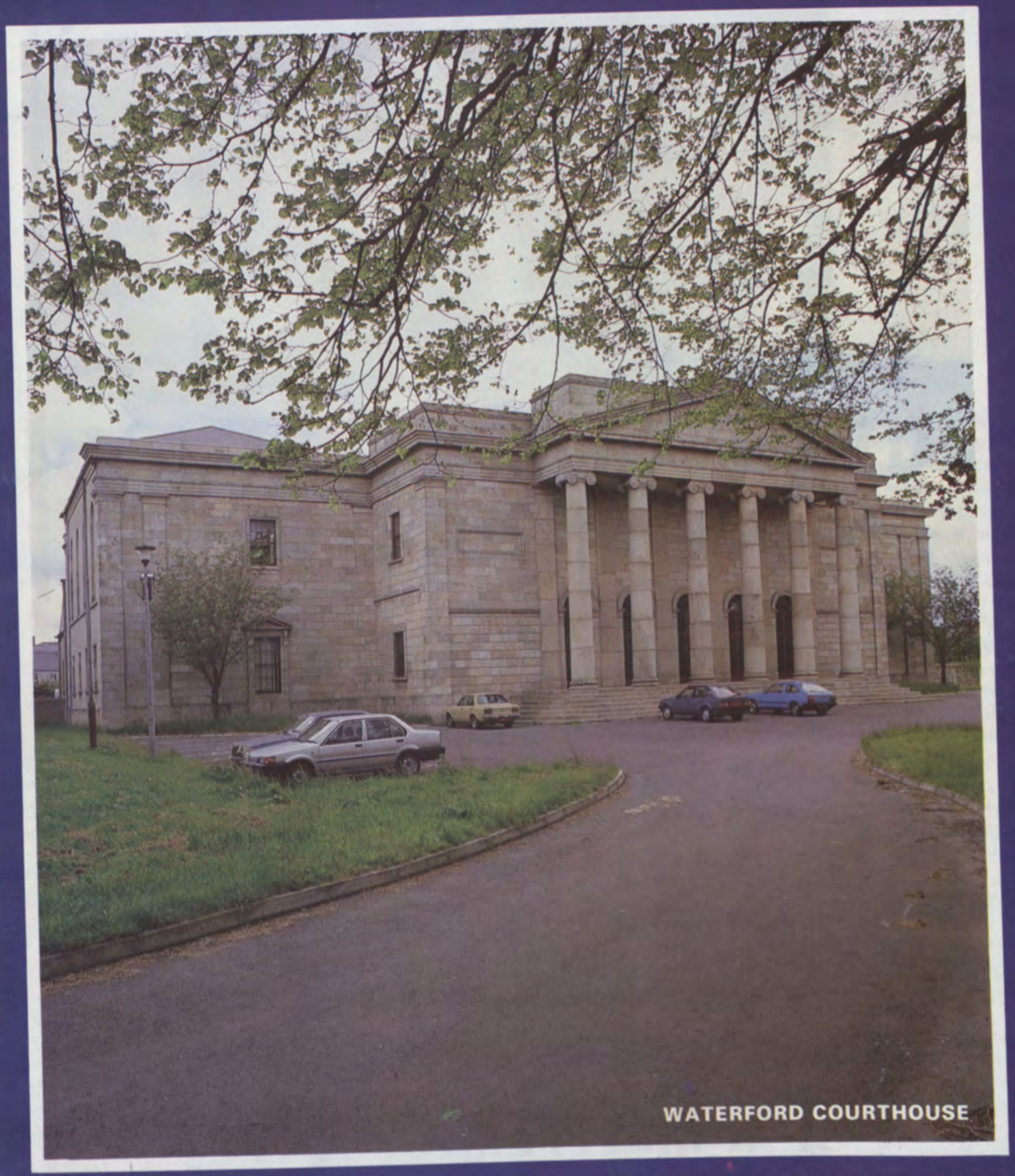

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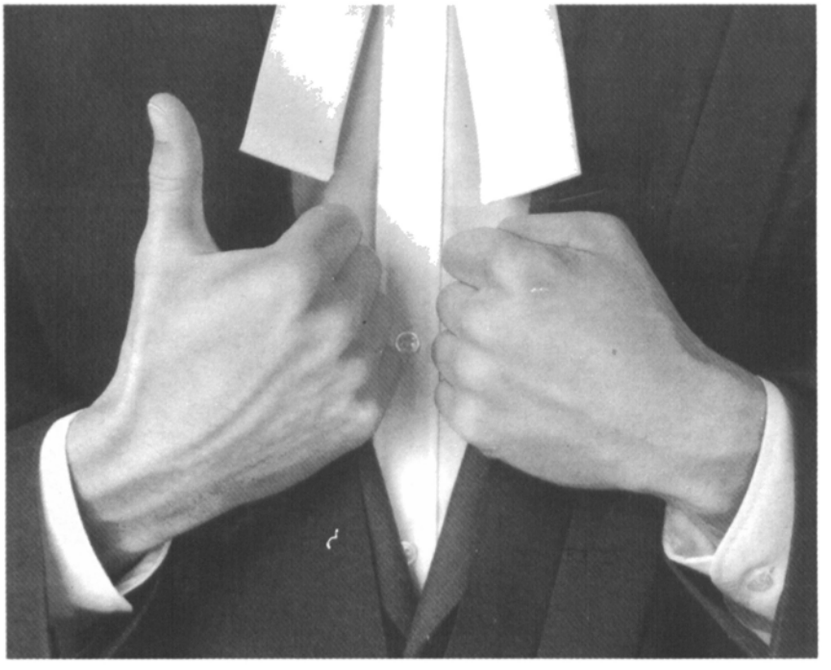

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Viewpoint

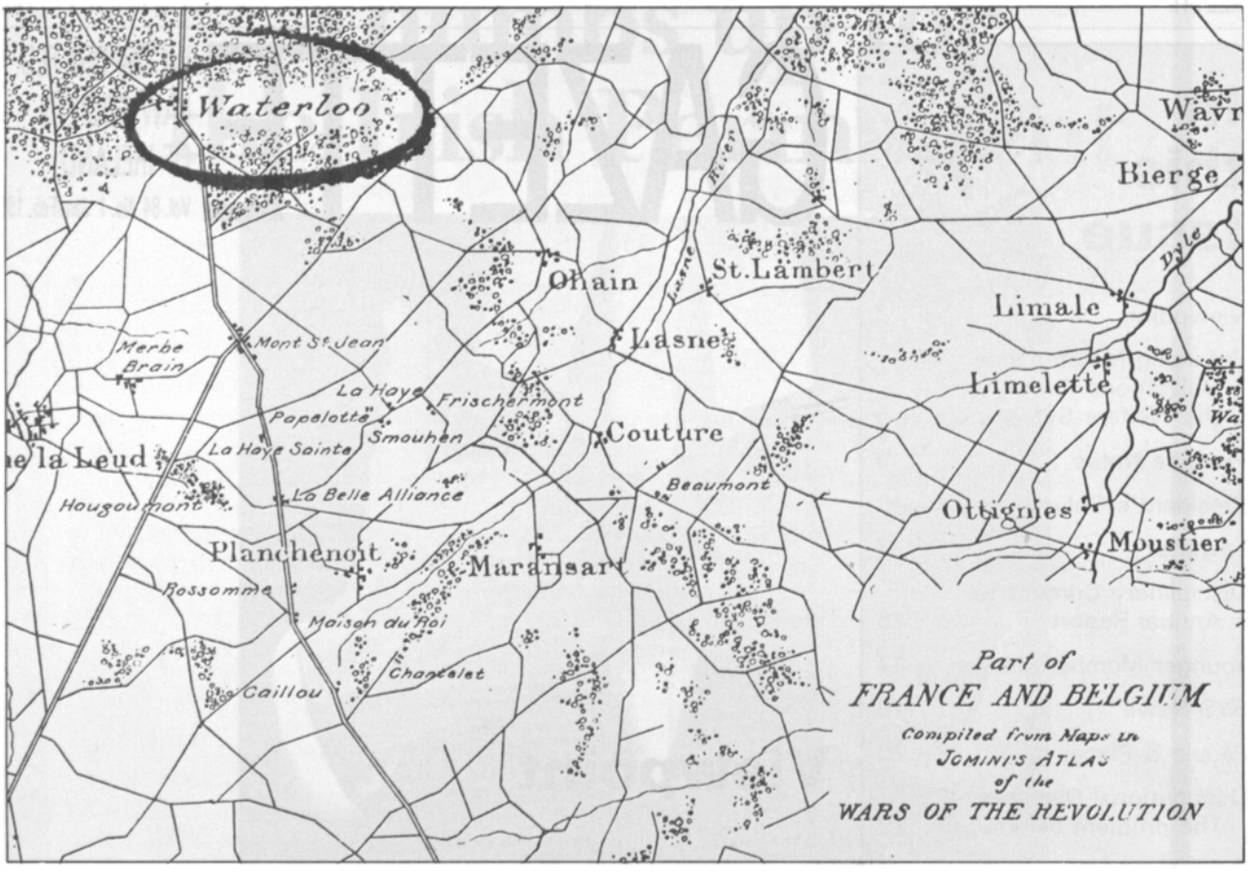
This Journal has regularly criticised the operation of the Civil Legal Aid Scheme, usually in conjunction with the publication of the Annual Reports. While these Reports themselves have been exemplary, unlike many reports of similar bodies they actually updated the information on the operation of the Scheme as nearly as possible to the date of publication, the tale which they told was almost invariably a sad one. The recent resignations of the President of the Law Society and the Chairman of the Bar Council from the Civil Legal Aid Board have drawn public attention to this 'Cinderella' service.

The criticisms which this Journal has made of this Scheme over the years still remain unanswered. The Scheme has never been set up on a proper statutory basis which after 10 years is really quite extraordinary. The under-funding of the Scheme in most of the years of its operation has led to the deplorable situation whereby many of its centres are closed for significant periods except for "urgent" cases. As the vast majority of the cases which the Scheme handles are family law cases, it is reasonable to wonder whether there are many that are not "urgent".

The rigid adherence to the ideology that legal aid should only be provided through centres has led to a most inadequate service being provided in rural areas. Again, with most of the cases being family law cases it is reasonable to assume that in a significant number of cases both parties to the dispute will require the services of the Scheme. In the absence of any private practitioner involvement this means that one of the parties is likely, in rural areas, to have to travel significant distances to consult with one of the Scheme's solicitors.

The Scheme appears to have been a victim of the long-standing belief of the Government that the provision of a service is evidenced by the presence of a building from which the service is supposed to be delivered.

It was particularly disappointing to find that the recent Budget did not appear to indicate any intention to provide any relief. In the past it has been noted that the pressure for additional funding has only been met on an 'ad hoc' basis. It is long past the time that the Civil Legal Aid Scheme be put on a proper statutory basis, properly funded and widened to include some private practitioner services particularly in rural areas. □



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Enforcing Maintenance Obligations through the Welfare System

One of the interesting aspects of social welfare law is the extent to which the State uses it as a means of social control. Among the examples of this phenomenon listed by Cranston in his book, *Legal Foundations of the Welfare State*[1] is the policy of enabling social welfare administrations to recoup some of the expenditure on social welfare benefits from those who have a legal obligation to maintain claimants. Recent legislation extends the powers of the Department of Social Welfare in this respect and is likely to have an impact on many cases of marital breakdown.

By
Gerry Whyte
Lecturer-in-Law
Trinity College, Dublin

At present, the Department may compel a person to maintain his or her dependants in four different situations:

(a) Where a person is in receipt of one of a number of specified welfare payments as his or her sole or main source of income, the Department may directly enforce his or her maintenance obligations by paying some of the welfare directly to the claimant's dependants. This is done through the exercise of the general power to pay welfare to an "appointed person", rather than to the claimant himself or herself, and this power is conferred by s.112(3) (b) of the Social Welfare (Consolidation Act 1981, (hereafter "the 1981 Act") as amended by s.16 of the Social Welfare Act 1989 in relation to insurance schemes[2] The power to make payments to appointed persons has also been extended to a number of means-tested schemes, such as unemployment assistance,[3] old age (non-contributory) pension and blind pension,[4] rent allowance,[5] and supplementary welfare allowance.[6]

(b) In relation to two specific welfare schemes,[7] deserted wife's benefit [D.W.B.] and deserted wife's allowance [D.W.A.], an applicant must have made reasonable efforts to secure maintenance from her spouse before she can be eligible for payment.[8] The authorities are also empowered, in relation to a third scheme – supplementary welfare allowance [S.W.A.] – to require a claimant to apply for such supplementary or other benefits to which he may be entitled before granting the allowance, and this presumably embraces applications for maintenance under the Family Law (Maintenance of Spouses and Children) Act 1976 and the Judicial Separtion and Family Law Reform Act 1989.

(c) Various Departmental means tests provide for the aggregation of resources in the case of married claimants and the net effect of such provisions is to compel the claimant to look to his or her spouse as the primary source of maintenance.

(d) Finally, the Department may recover welfare already paid to a claimant from that claimant's relatives in certain specified situations. It is this power which has recently been extended by Part III of the Social Welfare Act 1989 and which forms the subject matter of this note.

Part III of the Social Welfare Act 1989

Part III of the Social Welfare Act 1989 effects significant changes in respect of an individual's liability to maintain a family member who is in receipt of specified welfare payments. Heretofore, such a liability only existed under the S.W.A. scheme.[9] Section 12 of the 1989 Act now inserts seven new sections into the 1981 Act which extend this liability to cover both deserted wives' payments and deserted husband's allowance [D.H.A.], in addition to S.W.A.

". . . the Social Welfare Act 1989 effects significant changes in respect of an individual's liability to maintain a family member . . ."

The new statutory provisions are ss.314 to 320 of the 1981 Act[10] and s.13 of the Social Welfare Act, 1989.[11] Section 315 lists the following categories of person who can be obliged to contribute to the support of claimants of D.W.B., D.W.A., D.H.A. and S.W.A.

(a) A man can be obliged to maintain his wife[12] and any child of his under the age of 18 or, (except in the case of S.W.A.), 21 where, in the latter case, the child is receiving full-time education or instruction by day at any university, college, school or other educational establishment.[13] The father's obligation to maintain in this context now extends to his non-marital children, though there is still no obligation to maintain a common law spouse.

(b) A woman has similar obligations to maintain her husband and children.[14]

Where either D.W.A., D.W.B., D.H.A. or S.W.A. is paid to a person's spouse or children[15] as defined above, that person is liable to contribute to the appropriate "competent authority"[16] such amount as that authority may determine to be appropriate towards such benefit or allowance.[17]

Though this is not explicitly provided for in the new provisions, it is submitted that the relative's obligation to contribute is dependent on the claimant being entitled to receive one of the four welfare payments in question.[18] So, for example, if the competent authority mistakenly paid D.W.A. to a woman who did not satisfy the statutory definition of "deserted wife" because she had not taken all reasonable steps to secure maintenance from her husband, it would seem unjust that the cost of this error could simply be passed on to the claiant's spouse. In the same way, it is arguable that there is an implicit obligation on the competent authority to notify the spouse or parent, as the case may, as soon as possible of the fact of the claimant's receipt of welfare. The presumption of constitutionality which applies to s.316 implies, *inter alia,* that the "proceedings, procedures, discretions and adjudications which are permitted, provided for or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice."[19] It is submitted that such principles require, in the present context, that the maintaining relative be notified of his or her liability at the earliest possible opportunity, rather than allow a liability to develop of which he or she is unaware.

Once it can be shown that the claimant is the spouse or child of the person against whom it is sought to enforce the obligation to contribute and that such claimant is properly in receipt of one of the specified payments, the obligation to contribute appears to be quite strict and is qualified only by the person's ability to pay. In particular the fact that the claimant may be guilty of desertion or adultery will not affect his or her spouses's liability under this provision.[20] Nor does there seem to be any basis for defending proceedings under s.316 simply on the grounds that the parties had been separated and living apart prior to the claimant receiving the appropriate welfare payment. Furthermore, private maintenance arrangements made between the parties whereby one spouse agrees to take no, or an inadequate amount of, maintenance cannot affect the statutory liability imposed by s.316.[21]

An interesting point in relation to the liability of parents to support a child[22] is whether such liability is joint or joint and several. If the former, then judgment against either one bars any further action against the other even if the competent authority has not obtained the fruits of the judgment. This problem does not arise if liability is joint and several. The legislation is silent on this issue but there are convincing arguments in favour of liability being joint and several, based on the presumption, in the context of statutory interpretation, against intending what is inconvenient or unreasonable.[23]

"An interesting point in relation to the liability of parents to support a child is whether such liability is joint or joint and several."

Enforcement of the obligation to maintain is through recourse to the District Court by the competent authority, but only after notice of this application to court has been served on the person liable to make the contribution – S.316.[24] Section 316(4) provides that where the Court is satisfied that such person has failed or neglected to make the contribution and that he or she was able to contribute to the benefit or allowance granted, it shall fix the amount of the contribution to be made and shall order the payment of such contribution to the competent authority by way of such payments as the Court shall think proper.[25] It follows that if the defendant can establish inability to contribute, the Court cannot make any order.

Contributions due from a person under s.316(1) may be offset, either in whole or in part as the competent authority may determine, by payments made by such person pursuant to a court order under the Family Law (Maintenance of Spouses and Children) Act, 1976.[26] By the same token, a claimant of D.W.A., D.W.B., D.H.A. or S.W.A. is obliged to transfer to the appropriate competent authority payments received by such claimant pursuant to a court order made under the 1976 Act – s.318.[27] This obligation does not appear to exist where the maintenance is being paid pursuant to an agreement between the parties, as opposed to a court order. If such transfer is not made, the claimant's benefit or allowance will be reduced by the amount which he or she is liable to transfer.[28]

It is not clear whether the competent authority can recover, pursuant to s.316, a sum greater in amount than that paid to the claimant by way of benefit or allowance. Such a result would seem to be quite unreasonable and at odds with the purpose of this provision, which is to enable the State to shift, in whole or in part, the burden of maintaining a claimant onto the claimant's spouse or parents, as the case may be. At the same time, it is regrettable that the Minister did not see fit to re-enact the terms of s.215(5) of the 1981 Act, which expressly limited the amount which the health board could recover to the amount of S.W.A. granted, together with the cost of the legal proceedings. It could be argued that the failure to re-enact this provision meant that the Oireachtas deliberately intended to allow the Court to order the repayment of a sum greater than that paid to the claimant, though it is difficult to envisage any situation in which such an order could be justified. From the relative's point of view, of course, it could equally be argued that the failure to re-enact this provision

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meant that the relative could not be made liable for the cost of the legal proceedings instituted in order to enforce the obligation to contribute, as a liability to pay legal costs would seem to exceed the strict terms of the obligation to contribute as provided for in s.316(1).

"It is not clear whether the competent authority can recover, pursuent to s.316 [of the 1981 Act] a sum greater in amount than that paid . . ."

It is worth commenting briefly on the manner in which claimants of D.W.A., D.W.B. or D.H.A. appear to be affected by this provision. In the case of D.W.A. or D.W.B.[29] a claimant, in order to qualify for such a payment must have attempted and failed to secure maintenance from the deserting spouse.[30] The only exception to this is where the claimant is in receipt of maintenance of inconsiderable extent,[31] which does not affect the claimant's status as a deserted wife. The obligation to secure maintenance from the deserting spouse is a continuing one, so that a woman in receipt of a deserted wife's payment must avail of any reasonable opportunity of obtaining maintenance from her husband. If such maintenance is secured, the claimant ceases to be a deserted wife for the purposes of the Social Welfare code, and consequently becomes disentitled for receipt of D.W.A. or D.W.B., unless the maintenance can be deemed to be inconsiderble. In the latter case, it would appear that if such maintenance is being paid pursuant to a court order, the claimant must transfer it to the Department, whereas if it is being paid pursuant to a maintenance agreement between the parties, no such obligation exists.[32] This would appear to be somewhat anomalous and it is not clear that this result was clearly envisaged by the Oireachtas. However, s.318 has yet to come into operation and therefore it remains to be seen how the Department will apply this provision in practice.

Finally, s.319 confers powers of investigation on the Department and the Health Boards into any question arising on or in relation to any of the four welfare payments affected by these provisions and further provides that the investigating officer may require a person liable to contribute under s.316(1), or his or her employer, to furnish the officer with such information and to produce for inspection such documents relating to the person as the officer may reasonably require. Failure to comply with this request is an offence punishable, on summary conviction, by a fine not exceeding £1,000, or on conviction on indictment, by a fine not exceeding £10,000.

NOTES

1. Weidenfeld & Nicholson, (1985).
2. See also S.I. No. 277 of 1972.
3. S.148(4) of the 1981 Act and S.I. No. 143 of 1973.
4. S.170(4) and S.I. of No. 117 of 1975.
5. S.23(3) of the Housing (Private Rented Dwellings) Act 1982 and S.I. No. 220 of 1982.
6. S.219 oif the 1981 Act and S.I. No. 168 of 1977.
7. It will not be surprising if a similar condition is also introduced in relation to the new Deserted Husband's Allowance which has yet to be brought into effect.
8. This follows from the definition of deserted wife in the Social Welfare (Deserted Wife's Allowance) Regulations 1970 – S.I. No. 227 of 1970 as amended by S.I. No. 74 of 1972.
9. See ss.214 and 215 of the 1981 Act, though the roots of this legislation can, in fact, by traced back to the Poor Relief (Ireland) Act 1838 which provided in s.53 that a man was liable to maintain his wife and any children under the age of 15, a widow was liable to maintain her children and a mother was liable to maintain any illegitimate children she had.
10. These provisions will come into effect, and the existing provisions be repealed, on such day or days as the Minister may direct. To date no such Ministerial order has been made.
11. Though ss.214-5 will continue in force until such time as the Minister decides – s.12(3) of the 1989 Act.
12. In the UK, the High Court ruled that the word "wife" in the comparable provision of the old National Assistance Act, 1948, included the wife in a polygamous marriage – *Din -v- National Assistance Board* [1967] 2 Q.B. 213.
13. The reason for excluding S.W.A. in this situation stems presumably from the fact that full-time students are not entitled to S.W.A. – see s.201 of the 1981 Act.
14. The immediate legislative predecessor to s.315 – s.214 – was unmistakably sexist in the manner in which it delineated the obligation to maintain – women were obliged to maintain their non-marital children, whereas men had no such obligation – but happily any such sexism is now absent from the current provisions.
15. In the case of the children, the welfare might be paid directly, e.g. the payment of S.W.A. to a teenager who has left home, or indirectly as an increase on the welfare paid to the other parent. In either event, the maintaining relative is liable to contribute to any welfare paid to, or in respect of, such children.
16. The Department, in the case of the first three of these payments, and the Health Board, in the case of S.W.A.
17. The former provision, s.215, appeared, on the face of it, to be somewhat more flexible, in that it referred to the relative's obligation to contribute to the health board "according to his ability" towards any S.W.A. granted to the claimant. As we shall see, however, ability to pay does feature in the new provisions at the enforcement stage of the proceedings.
18. See *South Cork Public Assistance Board -v- O'Regan* [1949] I.R. 415, decided under the comparable provisions of the Public Assistance Act, 1939.
19. *East Donegal Co-op -v- A.G.* [1970] I.R. 317.
20. See the old case of *McEvoy -v- Kilkenny Union Guardians* (1896) 30 I.L.T.R. 156 for a decision to this effect under the comparable provisions of the Poor Relief (Ireland) Act, 1838.
21. See *National Assistance Board -v- Parkes* [1955] 2 Q.B. 506; *Stopher -v- National Assistance Board* [1955] 1 Q.B. 486; *National Assistance Board -v- Prisk* [1954] 1 All E.R. 443. See Casey, "The Supplementary Benefits Act: Lawyer's Law Aspects" (1968) 19 N.I.L.Q. 1.
22. And also relevant in the case of spouses of a polygamous marriage having to maintain one of their number – see n.12 above.
23. See Casey, *loc. cit.*, p.9.
24. It is worth noting, incidentally, that s.45 of the Status of Children Act, 1987, provides *inter alia*, that a finding of parentage in proceedings taken under the legislative predecessor to s.316-s.215 of the 1981 Act – shall be admissible in evidence in any subsequent civil proceedings for the purpose of establishing parentage.
25. *Quaere* whether there is a *lacuna* in the law here relating to enforcement of such an order as the 1989 Act does not provide that the references to order in the Enforcement of Court Orders Act, 1940 shall encompasss a District Court order made pursuant to s.316. See, by way of comparison, s.38 of the Family Law (Maintenance of Spouses and Children) Act, 1976.
26. S.317. The relevant court orders under the 1976 Act are maintenance orders, lump sum orders, attachment of earnings orders, variation orders or interim orders – s.314(1).
27. S.13(1)(d) to (g) of the 1989 Act amends various provisions of the 1976 Act in order to enable such payments to be transferred direct to the Minister or the Health Board, as the case may be. This obligation does not extend to any person who, prior to the commencement of this section, is in receipt of one of the specified payments and a maintenance payment made pursuant to a court order under the 1976 Act. However, where such an order is varied by the Courts after this section comes into effect, such a person shall be liable to transfer to the competient authority the amount by which the original payment was varied, assuming the variation was upwards.

28. S.318(3). There is a curious discrepancy in terminology in this provision. Whereas ss.318(1) and (2) refer to the claimant's liability to transfer payments to the "competent authority", i.e. the Minister in the case of D.W.A., D.W.B. or D.H.A. or the Health Board in the case of S.W.A., sub-s.3 indicates that the reduction in allowance or benefit shall be of the amount which the claimant is liable to transfer to "the Minister". This might seem to imply that S.W.A. is excluded from the scope of this sanction, though it is hardly likely that this was intended by the Oireachtas.
29. To date, there are no implementing regulations for D.H.A., but, as we have already observed, it will not be surprising if a similar condition of eligibility is present when such regulations do appear.
30. See n.8 above.
31. Art.4(2) of S.I. No. 227 of 1970, as amended by art.2 of S.I. No. 74 of 1972. Current Departmental practice is to treat maintenance which is less than unemployment assistance rates as being inconsiderable. Maintenance paid specifically in respect of any children of the marriage is also ignored.
32. In some cases, however, the existence of a maintenance agreement might lead the Department to conclude that the husband has not left the claimant of his own volition and therefore that she is not a deserted wife within the meaning of the 1970 Regulations. □

German-Irish Lawyers Association

46 Fitzwilliam Square
Dublin 2

The President of the Incorporated Law Society of Ireland, Ernest J. Margetson and His Excellency Dr. Helmut Rueckriegel, Ambassador of the Federal Republic of Germany will attend a reception to launch the German-Irish Lawyers Association at 6 p.m. on Wednesday 28 March 1990, at the Incorporated Law Society, Blackhall Place, Dublin 7. Full details about the Association's forthcoming seminar in Dublin will be given at the reception.

Invitations to the reception will be issued to each member of the Association.

"European Court of Human Rights"

A talk will be delivered by Judge Rolv Ryssdal, President of the European Court of Human Rights, former President of the Supreme Court of Norway, on the work of the European Court of Human Rights in Strasbourg, in the Law Society, Blackhall Place, Dublin 7 at 6.00 p.m. on Tuesday, 6th March, 1990.

Members are welcome to attend.

PRESENTATION OF PARCHMENTS, 22 FEBRUARY, 1960, SOLICITORS LIBRARY, FOUR COURTS. (Left to right): James O'Connor, Gary McMahon, John Fish, John J. Nash (deceased), Barry O'Reilly (deceased), Donal Stuart, Paddy Madigan.

Practice Notes

Form 46G

The Revenue Commissioners have commenced serving the above Form on solicitors. This Form is issued pursuant to Section 173 of the Income Tax Act 1967 and Section 22 of the Finance Act 1983. Solicitors who have been served with this Form are requested to furnish particulars of all payments made by them to other parties, such as Barristers, Medical Practitioners, Engineers and other persons whose services they the Solicitor have retained on their own behalf. The particulars to be furnished are:-

The names and adresses and tax reference No. of the persons supplying the services.

The Taxation Committee of the Law Society considers that the information given should relate solely to the solicitors' business and office account and under no circumstances should information be given to the Revenue on this form in relation to client account or to client file. Any such information would be a breach of privilege or confidentiality. □

Taxation Committee

Commissioner for Oaths

The attention of members of the profession is called to Appendix C to the Guide to Professional Conduct of Solicitors in Ireland which reproduces the late Gerard Frewen, B.L.'s excellent notes on the Duties of a Commissioner for Oaths.

It appears that there has been an increasing incidence in recent years of the practice of people calling on Commissioners to complete documents where the deponent is not present. Practitioners who wish to adhere to the correct practice are put in a very embarrassing position and are regarded as less than helpful by their colleagues, if they insist upon the deponent being present.

Members of the profession are reminded that unless a document is properly sworn in the manner provided for in the various Statutes and Rules of the Superior Courts, it must not be executed by any Commissioner for Oaths as an affidavit. Failure to observe the formula can lead to serious consequences.

There has recently been a court case where an affidavit was produced as completed by a particular Commissioner for Oaths, where it was clearly demonstrated in court that the Commissioner for Oaths was on holidays at the time.

The procedure as provided for in the various Statutes and Rules of the Superior Courts is essential to the proper administration of justice and should be properly adhered to by practitioners. □

Judicial Separation and Family Law Reform Act 1989

From the 19th October, 1989 under the provisions of Sections 5 & 6 of the Judicial Separation and Family Law Reform Act 1989 each solicitor dealing with a Judicial Separation client must present the Court with a certificate in conformance as appropriate with either Form No. 1 or 2 as set out in Statutory Instrument No. 289 of 1989.

The Society is endeavouring to obtain a list of persons qualified to effect reconciliation which would be made available to practitioners on request. □

Litigation Committee

Scale of Fees for Attendance at Court by Solicitors as Witnesses

1) Fee for attending High Court per day or part of day (Fee to include Consultation with Counsel if necessary on day of Court). £235
2) Fee for attending Circuit Court per day or part of day (Fee to include consultation with Counsel if necessary on day of Court). £160
3) Fee for attending District Court per day or part of day (Fee to include consultation with Counsel if necessary on day of Court). £135
4) Consultation with Counsel on day other than day of the Court case. £55
5) A stand-by fee is payable where the solicitor is asked to be available on a particular date to attend Court and for any reason his services are not required as follows:
   (a) If the Court is held within five miles of the solicitor's practice and he is not given at least 72 hours notice (or 96 hours where the notice includes Saturday and Sunday) that his services are not required the fee payable shall be 25% of the fee he would have required had he actually attended Court.
   (b) Where the Court is outside a radius of five miles from the solicitor's practice and he is not given a minimum of four days notice that his services are not required the fee payable shall be 50% of the fee for attending Court.

Notice that the solicitor's services are not required should be given to him as quickly as possible after it becomes apparent that he is not required to attend Court or to hold himself available to do so. □

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From the President . . .

Since the last month's Gazette a number of developments have taken place and no doubt the members of the Profession have seen the reports of some of these in the media.

I issued a statement in January regarding the increases in stamp duty on court documents. Whilst the increases in the High Court and the Circuit Court were not very large they still do considerably increase the total expenditure in taking an action in either of these courts and this expenditure is very often borne by the solicitor. The increase however that caused me the greatest concern was the increase in District Court fees. The increase of stamp duty on a Civil Process and on a Decree were in the region of almost 200%. In many cases this will have the effect of depriving a person of limited means of having access to the District Court. It seems contrary to natural justice that the largest increases should take place in the Court of the lowest jurisdiction.

As many members will have seen, I resigned from the Board of the Civil Legal Aid Scheme on the 24th January last. At the same time, the Chairman of the Board, Mr. Nial Fennelly, S.C., Chairman of the Bar Council, also resigned. The reasons for our resignations have been widely publicised and my hope is that the publicity which has been given to this will have some effect in forcing the Government to fund a proper scheme. It seems to me that initially there could be great improvement if more flexibility was given to the Scheme and there could be an involvement of the private practitioner.

Membership of the Solicitors Financial and Property Services Company has been increasing steadily and the amount of business written has produced commissions in excess of £250,000. Extra Consultants have now been employed by Sedgwick Dineen and I think that now a prompt and efficient service is being provided. I would urge all members to join and support this venture which enables the solicitor to provide an extra and useful service to clients.

Lastly, I would like to refer to our Annual Conference which is again being held in the Hotel Europe, Killarney, from the 3rd-6th May, 1990. Within the next couple of weeks all members will receive the brochure giving details of the Conference. I think that it will be a very interesting Conference in that we have succeeded in obtaining some distinguished and varied Speakers. Jack Charlton, Manager of the Irish Soccer Team and Eamonn Barnes, Director of Public Prosecutions, will speak on Friday and Brian Coyle, the well known art expert will give an address on Saturday morning. I would encourage all members to book early and to support the Conference. □

Ernest J. Margetson

ERNEST J. MARGETSON,
President.

LAW SOCIETY

ANNUAL CONFERENCE 1990

Thursday, 3rd May to Sunday, 6th May 1990

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DIRECTOR
GENERAL

The Society is the professional body for solicitors in Ireland, responsible for the training and education of solicitors, the maintenance of professional standards and the provision of services for its members. On completion of the current Director General's term of office in the Autumn, a successor is to be appointed.

The person selected will work closely with the President and Council of the Society maintaining close contact with the Profession, with Government departments and other organisations. The Director General will be responsible for ensuring that appropriate strategies and policies are developed and efficiently implemented. The role will, therefore, require a great deal of managerial talent in directing and motivating senior executives and staff.

The individual we are seeking may/may not be a member of the legal profession, but should have a wide range of personal contacts in legal, business and Government circles. The challenges posed by the position require that he/she have the intellectual and communication abilities to present complex issues clearly. Organisational talent combined with commercial and financial skills are also necessary attributes. While age is not a major factor, it is unlikely that a candidate under 35 will have the requisite stature.

The salary and other emoluments will reflect fully the importance and seniority of the position.

If you would like to be considered for this appointment please send a detailed C.V. to

Mr. Ernest J. Margetson,
President,
The Law Society,
Blackhall Place,
Dublin 7.
Ref: D/G

The Irish Society For European Law

Founded in 1973
Irish Affiliate to the
Fédération Internationale
Pour le Droit Européen (F.I.D.E.)

President: The Hon. Mr. Justice Brian Walsh
Chairman: Mr. Eamonn G. Hall, Solicitor

Programme for Spring/Summer 1990

1. **Thursday, March 15th, 1990:**
   John Handoll, Barrister, of the Inner Temple, Lecturer in EC Law, University College, Dublin, EC Consultant to Arthur Cox & Co., Solicitors – *Community Citizenship: Myth or Reality?*

2. **Thursday, April 5th, 1990:**
   The Hon. Mr. Justice Brian Walsh, Judge of the European Court of Human Rights, President of the Society – *The Right to Privacy: Irish and European Law.*

3. **Wednesday, April 25th, 1990:**
   The Hon. Mr. Justice Donal Barrington, Judge of the Court of First Instance of the European Communities – *The Court of First Instance of the European Communities.*

4. **Thursday, May 10th, 1990:**
   Nuala Butler, Barrister, National Rapporteur, FIDE (Madrid – 1990) Congress – *Fiscal Harmonisation;*

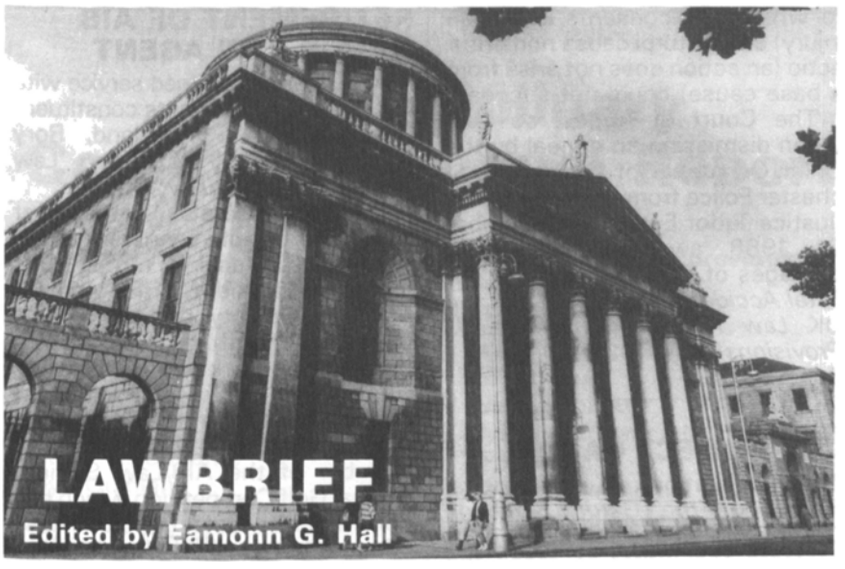
   Jeremy Maher, Barrister, National Rapporteur, FIDE (Madrid – 1990) Congress – *Impact of European Communities Merger Control on Ireland.*

5. **Tuesday, July 17th, 1990:**
   Mary Robinson, Senior Counsel, Director Irish Centre for European Law, National Rapporteur, FIDE (Madrid – 1990) Congress – *Public Procurement.*

Lectures take place at 8.15 pm 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 Committee and guest speakers *for dinner* at the Club at 6.15 pm on the evening of each lecutre. Members intending to dine must communicate with the Membership Secretary, Jean Fitzpatrick, Solicitor's Office, Telecom Eireann, Harcourt Centre, 52 Harcourt Street, Dublin 2. (Tel. 01 714444 ext. 5929, Fax. 01 793980, Electronic Mail (Eirmail) (Dialcom) 74: EIM076) not later than two days before the dinner, as advance notice must be given to the Club.

Membership of the Society is open to lawyers and to others interested in European Law. The current annual subscription is £15.00 (£10 for students, barristers and solicitors in the first three years of practice). Membership forms and further details may be obtained from the Membership Secretary.



THE NAME OF THE STATE

Considerable confusion arises from time to time about the precise name of this State. In *Ellis -v- Assistant Commissioner O'Dea and District Justice Shields* (The Irish Times Law Report, January 8, 1990, Supreme Court) Mr. Justice Walsh referred to what appeared to him to be the conscious and deliberate practice of incorrectly setting out the name of the State in extradition warrants. Mr. Justice Walsh stated that in the English language the name of the State was "Ireland" as prescribed by Article 4 of the Constitution; the *Republic of Ireland Act, 1948* did not purport to change the name of the State nor could it have done so and a constitutional referendum would be required to effect any change in name. Mr. Justice Walsh considered that if the courts of other countries seeking the assistance of the courts in this jurisdiction were unwilling to give the State its constitutionally correct and internationally recognised name, then in his view warrants from such countries should be returned to the requesting state until they have been rectified.

Mr. Justice McCarthy in *Ellis* endorsed the views expressed by Mr. Justice Walsh as to the use of the correct name of the State in documents emanating from courts in other countries which seek the assistance of the courts in this jurisdiction. He considered that in future the courts should decline to sanction any further such refusal to recognise Article 4 of the Constitution and that if this resulted in a warrant not being endorsed or enforced in the State, the problem would not have been created in this jurisdiction.

The Chief Justice, Mr. Justice Finlay, agreed that it was most undesirable that the name of the State should be incorrectly set out in the warrants at issue but he preferred to reserve the question of whether such a misnomer would constitute good grounds for refusing to make an order for the delivery of the person whose extradition is sought.

Mr. Justice Walsh in a Foreword to William Binchy's *Irish Conflicts of Law* (Dublin, 1988) also dealt with this theme. He stated that the name which Irish law attributes to this State was "Ireland" and was so acknowledged by a communique from 10 Downing Street in 1937. He continued:

> "Regrettably some of our semi-State bodies seem to be infected with a similar confusion [as the English courts]. There is only one State in the world named "Ireland" and reference in contracts to the applicable law as "the law of the Republic of Ireland" or "the law of the Irish Republic" are wrong. Whatever justification may exist for English confusion there is none whatsoever for Irish ignorance. Our semi-State bodies and their legal advisers might at least honour the Golden Jubilee of the Constitution of Ireland by learning the correct name of the State upon which they depend".

It behoves lawyers in Ireland and elsewhere to have regard to these dicta when preparing legal documents.

INCREASE IN COURT FEES

The Minister for Justice increased certain Court fees with effect from January 1, 1990. These fees are specified in *District Court (Fees) Order, 1989* (S.I. No. 343 of 1989) (Stationery Office; Price: 90p Postage: 32p), *Circuit Court (Fees) Order, 1989*, (S.I. No. 342 of 1989), (Stationery Office; Price: 70p Postage: 32p and the *Supreme Court and High Court (Fees) Order, 1989* (S.I. NO. 341 of 1989) (Stationery Office; Price: £2.20 Postage: 63p)

The President of the Law Society, Mr. Ernest Margetson, in a press release on January 11, 1990, strongly attacked the increase in fees. Mr. Margetson stated that recent increases in stamp duty imposed from 1 January 1990 on District Court documents make it prohibitively expensive for members of the public to pursue modest claims such as the recovery of small debts, redress for defective goods, unsatisfactory holidays or minor road accidents.

Mr. Margetson stated that the increase in stamp duty in the District Court on civil processes have been by as much as 200% and come at a time when the efficiency of the legal process through the District Courts has been significantly eroded by the embargo of staff recruitment. The increases have also been imposed against a background in which the District Court Office had previously been declared to be self financing.

The increase in stamp duties will have the effect, for example, of increasing from £10.50 to £25.00 the preliminary court cost of taking the necessary legal steps to enforce the collection of an unpaid debt.

Demanding that the increases be immediately withdrawn, Mr. Margetson said "this increase effectively constitutes a denial of the right of access to the District Courts for people of modest means with claims which in money terms may not be great but which to them are very important. In effect, the increases withdraw a right of redress for many with very genuine injuries and grievances."

AUCTIONEERS WERE NOT LIABLE FOR FAILING TO DETECT A MASTERPIECE

The Court of Appeal (Lord Justice Slade, Lord Justice Mann and Sir David Croom-Johnson) held in *Luxmoore – May and another -v- Messenger May Baverstock* (The Independent (UK) December 22, 1989) that the standard of care to be expected of provincial auctioneers and valuers in assessing the sale value of an unattributed work of art was analogous to that of a medical general practitioner, as opposed to a specialist, and allowed ample scope not only for differing views, but even for a wrong view, without necessarily rendering the valuer liable for breach of his duty.

The Court of Appeal allowed an appeal by the defendants, Messenger May Baverstock, from the decision of Mr. Justice Simon Brown (The Independent, 23 November 1988) who awarded the plaintiffs, Penelope Luxmoore-May and Paul Andrew Luxmoore-May, the sum of £101,625, including £76,222 damages and £25,403 interest, on their claim against the defendants for breach of contract in failing to exercise reasonable skill and care in the valuation and sale of two oil paintings.

These paintings which were now said to be the work of George Stubbs ARA (1724-1806), had initially been valued by the defendants at £30 to £50 the pair. They were sold at the defendants' auction house for £840. Five months later they fetched £99,000 at Sotherbys.

POLICE LIABLE TO SUICIDE'S WIDOW

The Court of Appeal (Lord Justice Lloyd, Lord Justice Farquharson and Sir Denys Buckley) held in *Kirkhan -v- Anderton* (The Times, January 4, 1990) that where a prisoner committed suicide in a remand centre while suffering from clinical depression and the police knew of his suicidal tendencies, yet failed to pass that information on to the remand centre authorities, his widow was entitled to recover damages in negligence against the police.

In the circumstances, the defences of volenti non fit injuria (that to which one consents is not an injury) and ex turpi causa non oritur actio (an action does not arise from a base cause) could not succeed.

The Court of Appeal so held when dismissing an appeal by the Chief Constable of Greater Manchester Police from the order of Mr. Justice Tudor Evans on December 21, 1988, awarding the widow damages of £6,717 under the UK *Fatal Accidents Act, 1976* and the UK *Law Reform (Miscellaneous Provisions) Act, 1934.*

THE PERFECT GARDA

The publication of the *Annual Report of the Garda Siochana Complaints Board* for 1988-1989 prompts the writer to recall the words of Professor August Vollmer, a leading police administrator in the United States, who argues in his book *The Police and Modern Society* that

> "the citizen expects police officers to have wisdom of Solomon, the courage of David, the strength of Samson, the patience of Job, the leadership of Moses, the kindness of the Good Samaritan, the strategical training of Alexander, the faith of Daniel, the diplomacy of Lincoln, the tolerance of the carpenter of Nazareth and finally an intimate knowledge of every branch of the natural, biological and social sciences. If he had all these he might be a good policeman".

The *Annual Report of the Garda Siochana Complaints Board* for 1988-89 is published by the Stationery Office (Pl. 6637) £2.20. The Chairman of the board is Mr. Seamus MacKenna, S.C.

THE IRISH SECRET SERVICE

The *Appropriation Accounts* together with the *Report of the Comptroller and Auditor General* for 1988, recently published by the Stationery Office (Pl. 6615 £9.00), disclose that the sum of £90,906 was expended for Secret Service out of a grant of £150,000. A surplus of £59,094 had to be surrendered. The Accounting Officer explained the cause of variation between expenditure and grant by stating that the estimate was necessarily conjectural. The Comptroller and Auditor General certified that the amount shown in the account to have been expended was supported by certificates from the responsible Ministers. □

RETIREMENT OF AIB GROUP LAW AGENT

After 31 years combined service with Allied Irish Banks and its constituent Provincial Bank of Ireland, Rory O'Connor retired as Group Law Agent on 1st January this year.

During his years as legal adviser to AIB, Rory kept in constant touch with the profession through his active involvement in the work of the Law Society and served on various committees. He contributed to the work of the Education Committee and was involved at different times with the work of the Law School. He was a founder member of the AIB/Law Society Annual Golf Competition which has done much to foster good business relations between the Bank and the members of the Solicitors profession. In 1988, Rory had a definitive work on the law and practice of notaries in Ireland, *The Irish Notary*, published by Professional Books. We understand that Rory will be continuing in private practice and has been retained by AIB for a particular professional assignment in a non-banking area which is likely to keep his mind active for some time to come. □
(See photo on p.20)

SADSI

The Solicitors Apprentices Debating Society of Ireland are entering a team for the Philip C. Jessup International Law Moot Court Competition. The competition takes the form of a moot court, with each team being required to present arguments for both applicant and respondent based on the hypothetical problem of pollution of the international environment. The competition involves the preparation of detailed written memorials and the presentation of oral arguments over a one week period from the 24th to 31st March in front of a panel of international judges in Washington D.C. This prestigious competition, which is organised by the American Society for International Law, has this year attracted entries from thirty-five countries. The Law Society has made a very generous contribution towards the cost of sending this five person team. However, the apprentices are now faced with the task of raising the remaining necessary funds, which it is estimated will be in the region of £3,500. It is hoped that members of the profession will support the team by making a generous contribution the the S.A.D.S.I. Jessup Fund, at the Bank of Ireland, Stoneybatter. (See photo on p.20)

The Disciplinary Committee Annual Report

Committee:
Walter Beatty, *Chairman*
W. B. Allen
Terence Dixon
Michael Hogan
Donal Kelliher
Elma Lynch
William A. Osborne
Moya Quinlan
Grattan d'Esterre Roberts
Andrew F. Smyth

Between the 1st September 1988 and the 31st August 1989 the Disciplinary Committee met on 24 occasions.

The following applications were considered by the Committee during this period:-

NEW APPLICATIONS 52

Law Society
- Prima facie cases found 38
- No prima facie case found 2
- Leave to withdraw before inquiry directed 3

Private
- No prima facies cases found 7
- Prima facie decision adjourned 2

At Hearing 38

Law Society
- Misconduct 19
- No misconduct 3
- Adjourned generally 1
- Leave to withdraw after inquiry directed 2
- Application dismissed 1
- Adjourned 12

Applications from previous year 14

At hearing

Law Society
- Misconduct 5
- No misconduct 2
- Adjourned generally 1
- Adjourned 4
- Leave to withdraw after inquiry directed 1

Private
- Adjourned 1

Subject matter of complaints
- Circuit Court Action
- Conveyancing
- Personal Injuries Action
- Practising Certificate
- Probate
- Solicitors' Accounts Regulations

Principal grounds on which the Committee found misconduct

Breaches of the Solicitors' Accounts Regulations.

Delay in complying with an undertaking and in furnishing a release of a mortgage.

Failure to return stamp duty and registration fees.

Failure to stamp a deed or register title.

Delay in the completion of a sale of lands.

Failure to advise a client in relation to the terms of a loan or to recommend that he should be independently advised in regard thereto.

Failure to properly protect a client's interest in respect of the purchase of a house.

Failure to advise a client of a situation with a potential for a conflict of interest or to advise him to take independent advice.

Failure to advise a client properly or at all in respect of the purchase of a house or in respect of a bridging loan arrangement – as a consequence the client suffered loss.

Failure to account to a client in relation to the proceeds of a sale.

Failure to notify clients that a Circuit Court action was listed.

Delay in processing a personal injuries claim.

Failure to forward to the Revenue Commissioners an Inheritance Tax Return.

Retention of a sum of money from a settlement cheque and failure to account fully for it.

Failure to inform a client of the amount of party and party costs or to seek his instructions before agreeing same.

Failure to furnish an itemised account in respect of a solicitor/client charge.

Delay in the completion of an Administration of an Estate.

Failure to apply for a Practising Certificate.

Misled the Law Society.

Failure to reply to correspondence from the Society, the complainants or colleagues.

Failure to attend meetings of the Registrar's and Compensation Fund Committees.

Cases presented to the High Court between the 1st September 1988 and the 31st August 1989 17
- Name of respondent struck off the Roll 3

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Practising Certificate limited to enable the respondent practise only whilst under the supervision and in the employment of another solicitor to be approved of by the Law Society.

Costs to the Society	1
Censured, fined and costs	2
*Fined and costs	2
Censured and costs	2
Petitions struck out with costs to the Society	2
Adjourned generally	1
Adjourned	1
Stay on Order – adjourned for six months	1

*Fines ranged from £50 to £1,000.

Cases adjourned by the President of the High Court last year 7

Name of respondent struck off the Roll of Solicitors	2
Remitted to the Disciplinary Committee	1
Costs awarded to the Society	1

Awaiting presentation to the High Court 17

I would like to take this opportunity to distinguish the Disciplinary Committee's porocedures from those of the Law Society when dealing with complaints. The Disciplinary Committee is an independent statutory committee and its procedures are governed by the Solicitors' Acts 1954 and 1960. Its members are appointed by the President of the High Court to investigate allegations of misconduct made against solicitors either by the Incorporated Law Society of Ireland or by members of the public.

There are two avenues open to the profession as well as members of the public if they wish to make an allegation of misconduct against a solicitor. They may do so either by writing to the Registrar's Committee of the Incorporated Law Society of Ireland or they may make a direct application to the Disciplinary Committee by way of affidavit. Should this latter course be taken the Clerk to the Committee will forward the appropriate forms and explain the procedures to the complainant.

The Law Society's Registrar's Committee investigates complaints made directly to the Society by way of correspondence. In the event that it wishes to report a matter to the Disciplinary Committee it may do so by completing the necessary application form and affidavit.

Any person or body may make a direct application to the Disciplinary Committee for an inquiry into the conduct of a solicitor on the grounds of alleged misconduct.

The majority of the Committee's findings this year related to the area of conveyancing. The complaints in particular related to the failure of the solicitor-respondents to carry out routine procedures such as stamping documents and lodging them in the Land Registry. Failure to communicate with clients and/or the Law Society or explain a situation to a colleague were also a major feature of complaints brought before the Committee. As Chairman of the Committee, I would urge all practitioners to ensure that such simple tasks as stamping documents etc. are carried out as a matter of course.

It is the Committee's experience that a key element in the prevention of complaints is communication. In the majority of cases which come before the Committee there is always a complaint of failure to communicate with a client and/or the Society. It is the Committee's experience that had a solicitor explained the situation to a client or the Society the complaint may not have been pursued. Therefore it is in the interests of both the client and the practitioner that there is good and open communication between them.

During the year Mr. Gerald Hickey retired from the Committee. Mr. Hickey was appointed to the Committee in November 1980 and I would like to thank him for his hard work and dedication to the Committee.

Mr. Terence Dixon was appointed to the Committee for a period of five years from the 1st June 1989.

My own period as Chairman of the Committee has been extended by the President of the High Court for a further five years from 1st February 1989.

I would like to thank all the members of the Committee for their hard work and note that while the Committee met less frequently this year than in the previous year, it dealt with the same number of new applications.

Dated this 6th day of December 1989.

Walter Beatty
Chairman

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Younger Members News

Changes in the Law School

By
Albert Power,
Assistant Director of Education, Law School, Blackhall Place

On 8th September 1989 the Council of the Law Society decided to exempt all law graduates of Universities in the State, with degrees containing the six core subjects of the Final Examination – First Part, from sitting that examination. The result of this is that there will be approximately double the traditional number of apprentices coming through the Law School each year. In the order of 380 are anticipated during 1990, and also during 1991, with some reduction thereafter.

". . . the Law Society [has] decided to exempt all law graduates . . . from sitting [the Final Examination – First Part]"

Number of Courses

The Professional Course has been shortened. There will be four Professional Courses during 1990, and three per year subsequently.

Structure of Professional Course

The number of lecturing days has been reduced from 69 to 50. Most modules have now been coalesced into four major modules, which are as follows:

Litigation, now including Labour Law and Family Law,

Conveyancing, now including New Houses, Registered Land, Planning, Landlord and Tenant, Ground Rents and V.A.T.

Probate including Wills and Administration of Estates,

Capital Tax.

There will also be an independent module in *Commercial Law.* At the moment, this is being confined to three days, although it is hoped to improve upon this as time and resources permit.

Reduction of Time

The method by which the course is being reduced from 69 days to 50 days is by compression rather than elimination.

Fundamentally, the entire course has been critically examined, with a view to removing the incidence of duplicated coverage – such as taking of instructions for District Court, Circuit Court and High Court – and further filling up days which had tended to end early.

In some incidences a decision has been taken to allot certain portions of the courses to the Advanced Course. For example, in Litigation, the Road Traffic Offences Day seems to adapt better to the Criminal Law Module on the Advanced Course. Likewise, the element of Damages in the day on Negotiations can be assigned to the Advanced Course. In cases where it is impossible to avoid some truncation, the preferred remedy is to increase the significance of preliminary reading handouts.

Co-Ordinators

The Education Committee has appointed two co-ordinators in each of the four major modules. The purpose of these co-ordinators is

1. To review and upgrade, or arrange for the upgrading of, the materials being distributed to the students in that module.
2. To prepare, from questions submitted by the individual day consultants, an examination paper in that module, together with model answers.

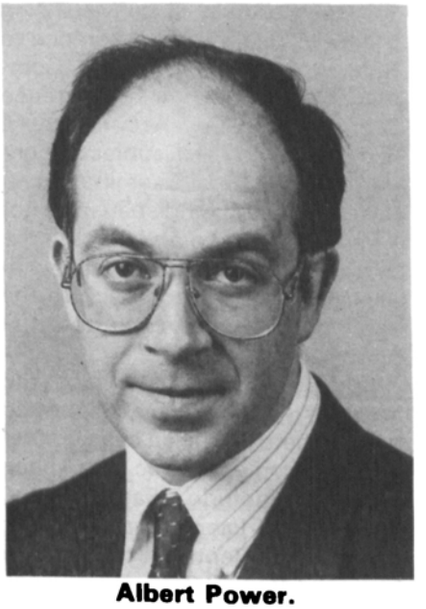
Consultants and Tutors

It is recognised that there will be a necessary increase in the pool of consultants and tutors in order to run more courses per year. To that end, a recruitment drive is being embarked upon by the Education Department. This drive has been supported by a circular letter to the Profession from the President of the Society and the Chairman of the Education Committee, which letter was included in the December issue of the Gazette.

Examinations

One of the methods by which time is to be saved is the elimination of the conventional continuous assessments tests. These tended to be somewhat sporadic, and were sometimes regarded less than seriously by some of the apprentices. The new apprentices have been advised that there will be an increased emphasis on the assessment procedures. Essentially, at the end of each of the major modules, there will be a three hour written paper. This paper will be practice oriented, but will be based upon the entirety of the constituent subjects in each of the major modules. For example, in Conveyancing there will no longer be a separate paper for Planning, Landlord and Tenant Law, Registered Land, and so forth, but one paper in which these formerly separate modules will appear. The results of the four examinations in the major modules, together with the tutors' assessments, and the results of a more conventional con-

". . . the [Professional] course is being reduced from 69 days to 50 . . . by compression."



Albert Power.

tinuous – assessment examination in Commercial Law, will constitute the Final Examination – Second Part.

". . . at the end of each of the major modules, there will be a three hour written paper."

The standard for these examinations will be such that the apprentices will have to work hard during the Professional Course in order to pass them. Candidates who fail to pass any examination will be expected to repeat the examination. Continuing failure will mean that a candidate will not be able to attend on the Advanced Course appropriate to his or her Professional Course.

Examiners
The examination papers will be corrected by Examiners especially appointed for this function. An advertisement for Examiners appeared in the December issue of the Gazette, and applications are still invited.

Academic Law Sub-Stratum
The Professional Course examinations will constitute the Final Examination – Second Part. In this regard, due recognition will be given to the fact that the apprentices will either have passed or been exampted from the Final Examination – First Part, and will be expected to have a familiarity with the core subjects for that examination.

It is unavoidable that in Litigation there will be repeated reference to Tort and Contract, in Conveyancing there will be repeated reference to Real Property Law, and in Commercial Law there will be reference to Company Law. Accordingly, a knowledge of the subjects constituting the Final Examination – First Part will be indispensable for a proper understanding of the Professional Course, and, unavoidably, for a proper approach to the xaminations which constitute the principal mode of testing.

In certain subjects, which the students will not have encountered before, there will be an even greater emphasis on academic law. These subjects include, Family Law, Labour Law, Landlord and Tenant Law, Ground Rents, Social Welfare Law, and Capital Tax.

Premises
All eight rooms over the lecture hall are now available for tutorials. Work is now in progress in the gym to enable that building to accommodate a larger number of students than heretofore. The gym is being equipped with four concertina-type dividers which will allow it to be divided into five tutorial rooms. This involves the removal of the stage.

More so than ever before, the continuing success of the Law School depends on the willingness of members of the profession to contribute at least a modicum of their time as either a consultant or tutor in their particular areas of practice. The Law Society's Professional Course is now regarded internationally as a model for Solicitors' training in the Common Law World; it is hoped that this status will be materialised, and so ensure the high standards of professional conduct and expertise which both the public and the profession have every right to expect. □

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The Society of Young Solicitors Spring Conference 1990

The Great Southern Hotel, Galway

6-8th April 1990

The Society of Young Solicitors is delighted to announce that it is holding the first ever joint conference in Ireland with its kindred Associations from England and Wales, Northern Ireland and Scotland.

The weekend activities will be based in the Great Southern Hotel, Eyre Square, Galway. The speakers will include.

- Judge Donal Barrington
- Gerald FitzGerald of McCann FitzGerald
- A panel of speakers comprising Finbarr Murphy (Group Legal Adviser to Bank of Ireland and co-author of ''European Community Law in Ireland''), Greg Myles (Northern Ireland Solicitor and author of ''EEC Brief'') and Michael Dean (a Scottish Solicitor practising in London).

The unifying theme of the Conference will be E.C. law which is increasingly part of a solicitor's day-to-day practice.

Social activities will not be neglected either and every opportunity will be given for the exchange of views between Young Solicitors from each of the four jurisdictions. The weekend will kick off on Friday evening when amongst the activities will be traditional music and a disco at the Great Sourthern Hotel. On Saturday afternoon a range of activities are being organised including a tennis tournament for the energetic and tours around the sights and hostelries of Galway and Connemara. The social highlight of the weekend will be the Gala Banquet on Saturday night.

We are very much obliged to The Bank of Ireland Group (The Investment Bank of Ireland Limited and ICS) whose generous sponsorship has made the weekend possible.

Booking forms are enclosed with the Gazette. □

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LAUNCH OF BROCHURE FOR THE FIRST YOUNG SOLICITORS JOINT COMMITTEE

(Left to right): Terence McCrann, Immediate Past President SYS, Harry Cassidy, Senior Investment Manager, Investment Bank of Ireland Ltd., Katherine Delahunt, Chairman, SYS, and Colin Sainsbury, Vice Chairman, SYS.

GOLDEN PAGES

PEOPLE AND PLACES

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SADSI enter team for Philip Jessup International Law Moot Court Competition. *(see note on p.14)*
(Left to right) Dermot Cahill (Gerard O'Keefe & Co.), T. P. Kennedy (McCann Fitzgerald), Monika Leech (Liam Lysaght) and Joseph Kelly (A. & L. Goodbody). The team also includes Rosemary O'Farrell (McCann Fitzgerald).

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The Hon. Mr. Justice Donal Barrington on the occasion of his investiture as a Judge of the European Court of First Instance.

Retirement of AIB Group Law Agent
E. Rory O'Connor, Solicitor (right) retired as AIB's Group Law Agent on 1st January, 1990. He is pictured here with James J. Ivers, Director General of the Law Society, at a retirement presentation by his colleagues.

Dublin Solicitors Bar Association Council 1990. Standing: Dominic Dowling, Ruadhan Killean, Justin McKenna, Tony Sheil, Gerard Doherty, Michael D. Murphy, Hugh O'Neill. Seated: Rosemary Kearon, Colm Price, Geraldine Clarke, President, Gerry Griffin, Christine Scott.

Visit to the Court of Justice of the European Communities
(Left to right): Judge O'Higgins, Paddy Glynn, Solicitor, Junior Vice President of the Law Society, Judge Barrington, David O'Keefe, Solicitor.
(See note on p.33)

GOLDEN PAGES

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Occupational Diseases — The Problem of Time

Occupational disease may be acute, chronic, allergic, localised, or systemic. It may be due to a multiplicity of causes or one obvious and specific cause. There is also the problem of sorting out those occupational diseases which are specific to the occupation from those which can occur spontaneously in the general population.

Dr. Dan Murphy M.B., F.F.O.M., D.I.H.*, Director Occupational Medical Services, National Authority for Occupational Safety & Health

Examples of what I mean by acute occupational disease would include gassing accidents, which may either kill the unfortunate worker or result in long-term disability, and acute irritant dermatitis (which can also be referred to as a "chemical burn"). By chronic I mean those diseases which are neither curable nor self limiting such as asbestosis. By allergic occupational disease I am referring to dermatitis of the allergic variety and one of our biggest problems at the moment, occupational asthma. Allergic alveolitis is best known in this country as farmers lung, but the condition can also occur in malt workers, mushroom growers and a host of other, agriculturally related, occupations where exposure to various spores occurs.

By isolated conditions I refer of course to dermatitis and the various diseases of the lung. Skin diseases, using data from the Department of Social Welfare Occupational Injuries Benefit Scheme, make up roughly two thirds of occupational diseases claimed for under this scheme. Lung diseases would be a considerably smaller proportion but skin disease and lung disease are a sizeable proportion of occupational disease overall. The reason is obvious: this is where the hazard strikes first, either directly on the skin or by being inhaled. Systemic disease such as heavy metal poisoning (lead), or organic chemical poisoning (benzene) will have effects on many different areas of the body (the brain, blood, and various organs).

"At the moment . . . there is no measurable way in which a particular state of ill-health can be attributed to a particular stressful work situation"

Something we may well have to deal with in the future are the effects of stress on general health. At the moment, despite many well founded suspicions about the effects of stress there is no measurable way in which a particular state of ill-health can be attributed to a particular stressful work situation.

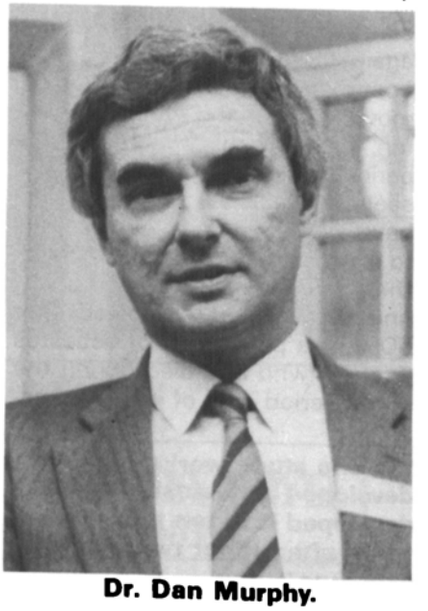
There are two final problems when dealing with occupational diseases which I will try to cover briefly. The first of these is that in fact many occupational diseases have more than one cause whether in the occupation itself or in the occupation and the individual's private life (asbestos and cigarette smoking). Next there is the problem of specific occupational disease versus non-specific. Asbestosis is a specific occupational disease. Lung cancer, also known as carcinoma of the bronchus, is sadly a common cancer. One study showed that in a group of asbestos workers, with asbestosis, followed up to the year 1963, just over 50% of them had died from lung cancer. Thus, lung cancer is a risk faced by asbestos workers, but how do you tell what proportion of the lung cancer in asbestos workers is due to their asbestos exposure or to their smoking, or just plain chance?

Asbestos – A useful example

In a brief introduction to some of the problems of the relationship in time between occupational disease and its cause, I am going to take the example of asbestos and asbestos related diseases. I believe it will serve as a useful example to indicate problems of multiple causes, non-specific as well as specific occupational disease, the problem of attributability, and, in the case of cancer, the problem of the long latent period.

Asbestos related Diseases

The problem of what diseases are related to asbestos is in fact compounded by the fact that there are certain health effects (such as "pleural plaque") which are not considered as diseases at all by most clinicians. In other words they



Dr. Dan Murphy.

cause x-ray change but do not give rise to any disability whatsoever. The possibility of cancer of the throat has been considered as being associated with asbestos but never proven. I intend only to consider asbestosis itself, "ordinary" lung cancer, and mesothelioma.

Asbestosis

Asbestosis is a disease characterised by scarring (fibrosis) of the spongy tissue or parenchyma of the lung. It is one of the pneumoconioses. The difference between asbestosis and other sorts of pneumoconiosis is very obvious to the respirologist, radiologist, or pathologist dealing with an individual case, where the real skill in diagnosis comes is at the very early stages however. The very earliest x-ray changes come at the base of the lung and the very earliest clinically detectable change is crackles, or wet sounds, also at the base of the lung. Diagnosis at this early stage takes a great deal of skill and experience. The severity of any pneumoconiosis including asbestosis is proportional to the amount of exposure both in volume and in time and no one knows why some individuals become easily affected and some individuals never develop the disease. The disease may not commence in fact until after exposure has ceased. In one study workers who developed asbestosis developed it in ten to twenty years after about two years of exposure. The first symptom of asbestosis is breathlessness. Here again other causes of breathlessness may lead the individual not to consult his general practitioner, and again there may be further diagnostic delays as an individual moves through the system. Finally, ten, twenty or thirty years after the period of exposure, the individual is seen by a specialist and told "you have an occupational disease due to exposure to asbestos". What is the likely outcome? A survey, finishing in 1963, showed that 50% of a population of asbestos workers who had died during the study period died of lung cancer.

"In one study workers who developed asbestosis developed it in ten to twenty years after about two years of exposure."

Lung Cancer

The term lung cancer is now used by respirologists and other clinicians to refer to what is pathologically correctly termed "carcinoma of the bronchus" (in other words not all cancers of the lung are what is colloquially known as lung cancer). This cancer is in fact a cancer of the lining of the bronchial tubes. As it grows it breaks through the walls of the bronchial tubes and becomes the ugly white mess so characteristic of x-rays of lung cancer. A question which I tried to deal with in an earlier paper (Murphy, D. L., *Journal of the National Industrial Safety Organisation,* July 1985) was whether lung cancer could occur in an asbestos worker with no evidence of asbestosis. Professor Sir Richard Doll and Professor R. Peto in one of their reports on asbestos related disease to the British Health and Safety Executive, felt that it was unlikely that lung cancer in an asbestos worker who had no evidence of asbestosis was due to asbestos exposure. As I said previously, 50% of a population of asbestos workers finally died from lung cancer, not asbestosis. It is obvious from this that the lung cancer comes at a later stage. Occupational cancers in general have a latent period of between 20-24 years. This latent period is the period from first exposure to the cancer causing agent (carcinogen) to diagnosis of the disease. Another general characteristic of cancer due to occupation is that it tends to occur at an earlier age than the same cancers normally appear in the general population.

"Occupational cancers in general have a latent period of between 20-24 years."

Mesothelioma

The lungs are surrounded by a membrane known as the pleura. This is often described, in popular medical articles, as the "cellophane wrapping" surrounding the lungs. A certain form of asbestos known as crocidolite or "blue asbestos" was known for many years before it was discovered, in about 1964, that most cases of this disease were due to exposure to crocidolite. Sadly, some of the early cases were in small black children who played on the slag heaps outside the crocidolite mines in southern Africa. As in all epidemiological studies, estimates vary. On this side of the Atlantic it is considered that 75% of cases of mesothelioma are due to exposure to asbestos. In the United States at least one expert, Professor Irving Sellikof, feels that as many as 90% of mesotheliomata are due to exposure to asbestos and that this need not always be just crocidolite. Mesothelioma tends to kill more quickly than ordinary lung cancer.

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Multiple causes

Looking at these three diseases we can now consider some of the problems which may be general to occupational diseases and occupational cancers. A smoker has a risk of developing lung cancer nine times the average. An asbestos worker, exposed to the kind of dust levels that would have been experienced in the industry thirty to forty years ago, who is not a smoker, has five times the average risk of developing lung cancer. An asbestos worker who is also a smoker has fifty times the risk of developing lung cancer. The well-known association between asbestos and lung cancer and smoking and lung cancer has been measured. What cannot be measured and must await future cancer research is why one smoker develops lung cancer and another

doesn't and why one asbestos worker goes on to develop lung cancer and another doesn't. These other causes may be rooted in the individual's lifestyle, temperament, and most of all, inherited characteristics.

"An asbestos worker who is also a smoker has fifty times the risk of developing lung cancer."

Specific Disease

The problem of whether an occupational disease is a specific one such as asbestosis or mesothelioma or a non-specific one such as cancer of the lung must be a constant problem for the legal profession when trying to attribute blame. I have the reasonable objective of preventing future cases from occurring; therefore, it is of little import to me whether a particular case of lung cancer was due to exposure at work or not. What is of interest to me is that asbestos workers are dying from lung cancer in excess and the answer must surely be to reduce the levels of asbestos dust. This same problem has I believe, occurred with leukaemia occurring in nuclear power station workers. Chronic leukaemia is a disease which occurs spontaneously in some adults. The problem is which are the cases which are due to exposure to low levels of ionising radiation?

Which Workplace?

Quite a number of asbestos workers with asbestosis to whom I have spoken gave a history of working in a number of different small insulation companies. These small companies, often employing only two or three laggers, may stay in business for a number of years and then go out of business or reform under another name. A particular individual may have learned his trade on building sites in the United Kingdom, worked back in Ireland for a while, emigrated again, and might now be working, still as a lagger, but is totally protected from any exposure to asbestos dust, either because of good hygiene measures or because the particular industry is using asbestos-free lagging. When he develops asbestosis or other asbestos related disease which exposure was responsible? Occupational hygiene techniques for measuring levels of asbestos dust were not available in those far off days. Even if they were available they were often much more crude than methods used nowadays and therefore not reliable.

When did the individual know?

Does an individual become aware of his personal ill-health due to exposure to asbestos or another occupational hazard on the day he first develops breathlessness, on the day he has a routine chest x-ray and the physician askes him if he has ever worked with asbestos, or the day when a chest specialist finally confirms that he has definite asbestos related disease? Asbestosis is not as easily diagnosable as I may have indicated in all cases. Other fibrotic diseases of the lung, many not due to any occupational exposure, may have been considered as an initial diagnosis by the physician. I believe it is not unknown for a physician to notice some of the "non-disease" conditions on an x-ray and to decide it

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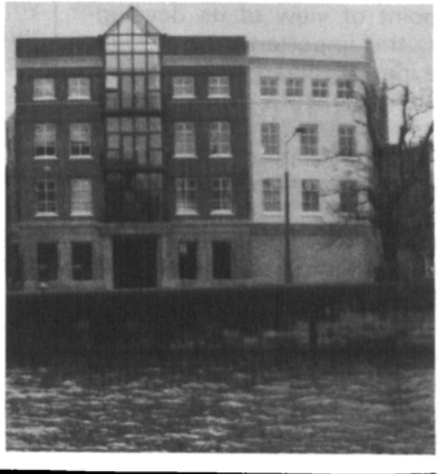

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would be better not to burden the individual, who may have other medical problems that are unrelated, with this particular information. If this individual goes on to develop frank asbestos related disease, the fact that he was unaware of the earlier development may lead him to seek help at a much later date.

When did it become known generally?

The cases of mesothelioma which I referred to earlier came to the notice of medical science in a series of articles in reputable medical journals. In 1963 there was one, in 1964 there was another one, 1965 there were 56 and numbers in excess of this in each year thereafter for some time. Downstream from this it seemed to be general knowledge by the time I studied occupational health at the London School of Hygiene in 1971. When does it become general knowledge for employers and for workers?

Noise induced hearing loss

Noise induced hearing loss is also an occupational disease of great significance in this area. Occupational deafness is not due to damage to the ear drum and small bones of the ear. It is a "nerve-deafness". This means that it affects the nerve carrying messages received from the ear to the brain. This is also known as "sensori-neural deafness". From the point of view of its development, the important thing about noise induced hearing loss is that we can measure the possible effects of a particular noise dose on a given population with great accuracy. From the point of view of the individual, however, it means that he does not notice that he is going deaf at first. It is only high tones in conversation or in music that are affected at first. Gradually, as the condition develops, the deafness starts to spread into the lower frequencies affecting the conversational range of hearing. It is at this stage that he begins to notice that he can't hear conversations in noisy pubs or other public places. It will take again between 10 to 30 years for a significant disability from noise induced hearing loss to develop. At what stage should the individual have known that he has been injured? The National Industrial Safety Organisation had short advertisements running on R.T.E. which should have informed some affected workers. I should mention that both noise and asbestos are covered by current regulations enforced by the Department of Labour and these will be further re-inforced by the implementation of European Directives on noise and asbestos in the near future.

"It will take again between 10 to 30 years for a significant disability from noise induced hearing loss to develop. At what stage should the individual have known that he has been injured?"

A recent development which will be of considerable help to sorting out the problem of occupational disease cases is the Law Reform Commission Report:

"The Statute of Limitations: claims in respect of latent personal injuries", published in 1987.

□

*This is the edited text of a paper delivered to *The Medico-Legal Society of Ireland.*

THE IRISH SOCIETY FOR EUROPEAN LAW

The following persons were elected as Officers and members of the Executive Committee of the *Irish Society for European Law* at the Annual General Meeting held on January 17, 1990.

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
Mr. Vincent Landy, SC
Mr. Finbarr Murphy, BL

The President of the Incorporated Law Society of Ireland
The Chairman of the Bar Council *Ex Officio*

Chairman: Mr. Eamonn G. Hall, Solicitor.
Vice-Chairman: Mr. Arthur F. Plunkett, B.L.
Hon. Secretary: Ms. Ann C. Walsh, Solicitor.
Hon. Treasurer: Mr. Patrick J. C. McGovern, Solicitor.

Ms. Margaret Barry B.L.
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Mr. Aindrias O Caoimh, B.L.
Mr. James O'Reilly, S.C.
Mr. Vincent J. G. Power, B.L.

Notaries Public should generally be Solicitors – Chief Justice

The Chief Justice, Mr. Justice Finlay, in an interesting reserved judgment delivered on 6th October 1989 dealt with the question of the appointment of Notaries Public. The particular applicant concerned was a retired person who was not a lawyer but who was already a Commissioner for Oaths and a Peace Commissioner. The application was for his appointment as a Notary Public for the City and County of Cork. The application was both supported and opposed. In the course of his judgment the Chief Justice said:

'The first thing which is clear beyond any demonstration is that the applicant's personal reputation for responsibility, integrity and community service, all of which would be relevant matters, is beyond any question or challenge and there is no suggestion that he would not be for any responsible position a responsible applicant. He is not a lawyer, and whilst he has recently gone to the trouble of having himself instructed by an academic lawyer with regard to the particular duties or aspects of the duties of a Notary Public, he is not a person who has either qualified as a lawyer or who has practised as a lawyer. In that context, I am disposed to follow precedents which I find my two immediate predecessors charged with this responsibility have laid down, and that is Chief Justice O'Dalaigh in the case of Alfred McKeown, and Chief Justice O'Higgins in the case of James O'Connell. The principle laid down by Chief Justice O'Dalaigh and confirmed and accepted by Chief Justice O'Higgins can be shortly stated, as it was stated in the judgment of Chief Justice O'Higgins in O'Connell's case as follows:

> ''The general rule confining the office of Notary Public to members of the Solicitors' profession does not, I need hardly say, arise from any desire to favour members of the legal profession. The reason for the rule is the very practical one that the discharge of the duties of Notary Public may call for a range of knowledge which is assured by academic training which precedes admission to the Solicitors' profession, the office of Notary Public is a high one in the field of international exhanges and its prestige will be safeguarded by a close adherence to the practice which my predecessors have established.''

That was a judgement of Chief Justice O'Dalaigh which was reported in 1965 Irish Jurist Reports, in other words a judgment on an application made in the year 1965. The applicant in that case was a person who had significant experience in that he was a chief clerk in a County Registrar's office.

Chief Justice O'Higgins in dealng with the O'Connell application significantly being satisfied that there was a need for a Notary Public in the area dealt with the application by in effect adjourning it to see if a qualified lawyer would apply to fill the gap.

I see no reason to depart from that general principle laid down in these two decisions. If anything has occurred which might even marginally alter the situation as I would understand it, since these two decisions were delivered by my predecessors it is that a greater legal significance, I believe, attches to the work of a Notary in an expanding European situation. It is for that reason that recently in dealing with an application I expressed in an 'ex tempore' debate rather than any judgment or ruling, I expressed the view that even a fully-qualified Solicitor might be more appropriately an applicant to be appointed a Notary Public if he or she had a significant number of years' experience rather than being a newly-qualified Solicitor.

In those circumstances, I must look, in this case, as to whether there is clear evidence of a need, and if there is, whether there are the exceptional circumstances which would warrant the appointent of a person who is not a lawyer as a Notary Public. I am satisfied, having carefully considered this matter, that there is not established a need which would warrant the appointment which is being sought.

An application was made supported by an expansion which is referred to in the affidavits of the applicant which I accept, of industrial and other activities in the Bishopstown and Western suburb area of Cork, but that application was made as recently as March of 1988, and notwithstanding significant opposition, I decided that there was a need and I appointed a fully appropriate and qualified Solicitor. His experience since that time seems to me to be vital and of great importance in this case. I must accept, of course, the total accuracy of my own Notaries' information and I have no reason to doubt it, and it is that though he is readily available, both in and out of his office in this area, there have been an extremely limited number of notarial acts which he has been requested to carry out. In those circumstances, I cannot see that a need has been established. The exceptional circumstance relied upon by counsel for the applicant in his careful submissions, namely, that there is a very special need and a very special capacity of the applicant as a retired person wholetime engaged in the functions of a Commissioner for Oaths and Peace Commissioner to fill it, does not seem to me to be established either.

Therefore, with reluctance, of course, I must refuse this application.' □

SOLICITORS BENEVOLENT ASSOCIATION NOTICE

NOTICE IS HEREBY GIVEN that the One Hundred and Twenty Sixth Annual General Meeting of the SOLICITORS BENEVOLENT ASSOCIATION will be held at the Incorporated Law Society's Building, Blackhall Place, Dublin, on Thursday the 8th of March 1990 at 12 noon:

1. To consider the annual Report and Accounts for the year ended 30th November 1989.
2. To elect Directors.
3. To deal with other matters appropriate to a General Meeting.

Clare Leonard
Secretary

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Catherine McGuinness, B.L.,
Kieran McGrath, Solicitor.

Venue:
Buswells Hotel, Molesworth St., Dublin 2.
Time: 7.00 p.m.

Future Meetings:
April 1990 Conveyancing and Family Law.
May, 1990 Civil Legal Aid in Ireland.
July, 1990 EC Convention on Jurisdiction of Courts and Enforcement of Judgments and its implications for Family Law.

For further information contact:
Brian Sheridan. Tel: 724133
or
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Notaries Public in Ireland

E. Rory O'Connor, solicitor and notary public, in his authoritive work "The Irish Notary" commences his historical introduction with the words "the notary public ranks among the most ancient of professions". Edward J. Montgomery, solicitor and notary public, in his equally authoritive manual on the Practice of Notaries Public in Ireland states that "the practice of a notary is probably the oldest profession in the world". As honorable lady solicitors now grace the ranks of notaries public in Ireland such august descriptions must be pronounced with due meaning and decorum.

By
Brendan Walsh*
Solicitor

The origins of the profession are unclear though it is accepted that they go back to the Roman legal system and perhaps further. Originally they were 'scribes' who performed duties of letter writing for illiterates, private secretaries to noblemen and clergymen and keepers of records. Naturally, the person who so reduced the spoken word had not only to be literate but also had to be honest as the interested parties would not be able to check the record. These writers were the first 'notaries' and an analysis of the position will show that the present notaries are still doing the same work although they do more in some countries than they do in others. They were known by many names but the present title is derived from the Latin 'notarius publicus' and 'notatio', meaning 'to record'. In Roman law times the 'notarium publicus' recorded letters of judicial importance as well as important private transactions or events where an authenticated record of a document drawn up with professional skill or knowledge was necessary or advisable.

In the period before the Reformation the appointment of notaries throughout western Christendom was by the Pope who delegated his functions to his legate, the Archbishop of Canterbury. Following on the Reformation, the power to grant 'faculties' was, by the Irish Statute of 28 Henry VII, c19, assumed by the King. A Court of Faculties was constituted and attached to the Archbishopric of Canterbury and later to the Archbishipric of Armagh; subsequently in 1870 transferred to the Lord Chancellor of Ireland and eventually in 1922 to the Chief Justice; whose power of appointment and dismissal – and indeed, in all regulatory matters concerning notaries public – was consolidated by the Courts (Supplemental Provisions) Act 1961.

There is a considerable distinction between the work done by a notary public and the work done by a commissioner for oaths. The person who approaches a notary becomes the notary's client and the notary is bound to take all reasonable care that the documents to which he places his Seal are true and correct; whereas a commissioner for oaths can by law only take an affidavit from a non-client and accepts no personal responsiblity for the contents of such affidavit. Broadly speaking, a notary's work is limited only by the requirements of the public and by far the larger part of a notary's work is recording, witnessing and certifying written records and documents for use outside the country. There is no absolute requirement – as there is in Northern Ireland – that an applicant for appointment as a notary be a solicitor but the trend has been that way over the last few decades and seems likely to continue, as confirmed by the written judgment of Finlay C.J. on the subject delivered on 6th October 1989.

There are at present 140 notaries in the Republic of Ireland, of whom 50 are in the City and County of Dublin and the rest spread more or less evenly throughout the rest of the country. Only four of that 140 are non-solicitors – by occupation, respectively, a chartered secretary, an office manager, a retired assistant County Registrar and an estate agent.

Prior to 1958 there was a loose association of notaries of Dublin and Wicklow organised by the late Sean Ó hUadhaigh, solicitor. In 1958, at the behest of Chief Justice Conor Maguire, The Faculty of Notaries Public in Ireland ("the Faculty") was formed to assist the Chief Justice in notarial matters – not simply in relation to the appointment of notaries but in relation to such other matters concerning notaries as from time to time the Chief Justice might have to decide upon or regulate. On the suggestion of Chief Justice Maguire, the then longest serving notary, Charles Doyle, Solicitor, Dublin, became the first Dean of the Faculty. He was succeeded in turn by Edward J. Montgomery, Peter Prentice and the present Dean, Walter Beatty. Toirleach deValera was Registrar of the Faculty until his appointment as Taxing Master when he was succeeded in turn by Enda Marren and then by the writer.

A few years ago the Faculty formed an incorporated body – a Company limited by guarantee – a necessary requirement in order to secure from the Chief Herald a grant-of-arms.

A Notary is usually appointed for the county where his practice is located and also for such nearby counties as he might need to service; so that a solicitor practising in, for example, Mayo, when appointed, might also be appointed for and be entitled to practise as a notary in counties Sligo, Roscommon and Galway.

When a person applies to be appointed a notary public, all of the

[*Brendan Walsh, Solicitor, 18 Herbert Street, Dublin 2, is the Registrar of The Faculty of Notaries Public in Ireland.]

existing notaries in the applicant's county and the surrounding counties are notice parties, as also are the Law Society and the Faculty. When the Faculty receives notice of an application it considers the application under three headings:

1. ability of the applicant to perform the functions of a notary;
2. facilities to carry out such functions; and,
3. the need for appointment in the particular area.

1. **Ability of the Applicant**
The Faculty takes the view that practising solicitors of at least three years' standing are qualified to carry out the functions of a notary public. The Faculty is further of the view that whereas it is not strictly necessary to be a qualified solicitor to be able to perform the funcitons of a notary (and, as referred to earlier, there are at present four non-solicotor notaries), by and large the Faculty feels it would have to look carefully at any application by a non-solicitor for appointment as a notary because most of the work of the notary is of a legal or quasi-legal nature and as time goes on with '1992' and all it entails is becoming more so.

2. **Available Facilities**
The Faculty assumes that any solicitor in private practice as a principal or partner has the normal office facilities necessary to duly carry out the functions of a notary; although where a solicitor applicant is not a principal within the firm where he works then the question of his availability to the public as of right and his availability to the office facilities should be clarified in the making of the application.

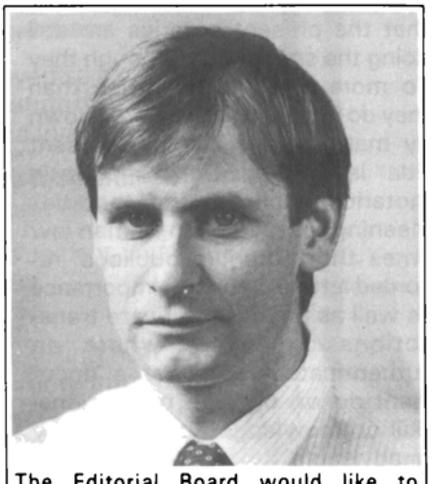
3. **Need for the Appointment**
The Faculty takes the view that the question of need is one to be decided on each individual application. A growth in population and industrial and commercial activity can create new needs in an area. A solicitor who has a number of clients who need the services of a notary from time to time would not thereby necessarily establish a need in the area because that solicitor, if appointed a notary, would not be in a position to notarise his own existing clients' documents – in the same way as a solicitor commissioner for oaths would not take his own clients' affidavits. At the present time it is the Faculty's view that there are few, if any, areas of the country where there is at present a need for another notary public. Also, it is the view of the Faculty that if a vacancy arises due to the death of an existing notary that the Faculty would favour an appointment from among any surviving partners of that deceased notary. Where there is more than one applicant to replace a deceased notary and where the Chief Justice is disposed to making one appointment only then the Faculty would favour the applicant who is the longer or longest in practice as a solicitor in the particular area. It is of interest to note that in Northern Ireland there are only 16 notaries as apposed to 140 in the Republic of Ireland and this is reflected in the small volume of work individually performed by the latter. Notaries in this jurisdiction have told me that they are averaging half a dozen to a dozen notarial acts in a year. Also, in the not too distant past, a notary, now deceased, was reluctant to pay his – then £10 per annum – subscription to the Faculty on the basis that this would leave him in a nett loss situation! However, following on his death that notary's solicitor son applied to be appointed in his stead so, perhaps, the position is not to be viewed purely in financial terms.

In addition to the above three heads of consideration of an application, the Faculty also wishes that it be made clear by an applicant that he has no intention or expectation of moving the location of his practice. It is obvious that if there be a need in a praticular area and the Chief Justice fills that need by appointing a notary then that area would be deprived of the services of the notary if there was a material change of his practice location shortly following on such appointment.

When the Faculty has taken a view, on the above bases, whether to support or oppose an applicaiton it would become my function, as Registrar, to swear an affidavit setting forth that view. This affidavit procedure has the advantage, where the Faculty is opposing an application, of making the applicant aware, in advance and without the embarrassment of an oral objection in open court, of the nature of such objection.

It is incumbent upon a notary to keep a record of each notarial act performed, sufficient to enable him to confirm, if such be the case, that he carried out a particlar notarial act on a particular day, if, for example, documentation subsequently went astray in transit between Ireland and another country.

A more detailed history of the notary public, and the forms necessary for the making of an application for appointment can be found in E. Rory O'Connor's book ''The Irish Notary''. As Registrar of the Faculty, I am available to answer any queries in relation to the appointment as, or functions of, the notary. □



The Editorial Board would like to congratulate Niall McGarrigle, a member of the Law Society staff, who recently won 1st Prize in the O.Z. Whitehead Playrights competition. While this annual competition is only open to Irish citizens at home and abroad, it is worthwhile noting that previous winners of this prestigious award include such names as Francis McGuinness, Bernard Farrell and Aodhan Madden.

Niall's play, a comedy entitled: *"Busy Hands are Happy Hands"* is about a sit-in at an office, and is currently undergoing the close scrutiny of the readers of a well established Dublin theatre, where it may be performed later this year.

For the record Niall was educated at CBS Monkstown Park and UCD. He has been working with the Law Society for the past four years. We wish him every success in the future.

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CONTACT: *Fiona McCann*

M.B.A. SCHOLARSHIP

The Incorporated Law Society is pleased to announce that the Bank of Ireland – Area West – has offered to sponsor a solicitor based within the area West so that he or she may attend a two-year programme at University College Galway leading to the MBA Degree. The sponsorship is to the extent of £2,000 per annum for the two years of the MBA Degree programme. The programme will commence in the academic year beginning October 1990.

The Society wishes to record its appreciation of the Bank's generosity in making available this endowment. The timetable for classes leading to the MBA Degree is arranged so as to permit candidates to attend the course with the minimum interruption to their work responsibilities during the 25 weeks of each academic year in which lectures take place. Classes are normally held each week from 10.00 am on Firday and on Saturday up to 1.00 pm – a total of about 10 lecture hours per week.

The Society is particularly anxious to promote among solicitors expertise in business methods. Any solicitor within the Bank's area West, namely the counties of Donegal, Galway, Laois, Leitrim, Longford, Mayo, Offaly, Roscommon, Sligo and Westmeath, interested in pursuing the MBA Degree programme in U.C.G. should note that application forms – available from Mr. Aidan Daly, Department of Marketing, University College Galway – should be returned to U.C.G. early in February to meet the College's closing date. The identity of the solicitor to receive sponsorship from the Bank will be known shortly before the programme starts in mid-October 1990.

Further information available from:

Professor Richard Woulfe,
The Law Society,
Blackhall Place,
Dublin 7.

Solicitors Financial and Property Services Update

Did you know that S.F.P.S. is in existence over six months? You may wonder how has the company been getting on during that initial period. Solicitors Financial and Property Services was launched last May by the Incorporated Law Society with a single purpose – to give your clients access to independent expert advice on wide ranging financial opportunities. In days gone by a solicitor's task was seen by his clients and the public at large to be a very straightforward one, provide advice on all sorts of *legal* matters. Not that many people thought of going to their solicitors seeking advice on educational funding, pensions or even the dreaded Life Assurance. How many settlements were made where clients receiving large lump sums without looking beyond the bank or building society and in the process suffering very meagre returns.

Times have changed and people are becoming more aware of Financial Services, primarily because of the mushrooming of companies/brokers/banks/building societies, all offering your clients advice on lump sums (those settlements we referred to) inheritance tax (wills you made for them) and mortgages (and just think how many conveyancing cases you completed). How can S.F.P.S. help? Solicitors Financial and Property Services can enhance and increase the services you are already providing. For the benefit of the cynics, and the apathetics and, last but certainly not least, the Faithful who have joined the scheme, let me tell you how the scheme has progressed. So far 232 member firms have participated as illustrated below.

An interesting fact is that out of 232 firms almost half the firms fell into the two to four member practice with 25% falling into the sole practice category.

What role does Sedgwick Dineen play in all of this? When S.F.P.S was set up they formed a link with an Independent Group of financial advisors, in fact the biggest financial broker group in Europe – Sedgwick Group. Sedgwick Dineen are part of that Group. Given our independence we owe no allegiance to any particular insurance company, financial institution or lending agency and are in a position to offer your clients up-to-date, impartial and honest advice. Sedgwick Dineen and S.F.P.S. are deeply committed to ensuring that the scheme works and as a measure of that commitment we have recruited additional consultants. Each consultant has a panel of solicitors in his area with whom he keeps in constant touch. Good, effective communication is essential for any business relationship to develop and we are relying on you, to some extent, to help us in this regard.

I am sure you would be interested in knowing more statistical information on the level of enquiries we have received. Over 800 enquiries have been received from S.F.P.S. members so far. In terms of business actually written over 85% relate specifically to lump sum investments. Many of your clients are in the way of receiving cash awards from various sources e.g. inheritances, compensation awards, property disposals. By providing professional, independent advice you are not only offering your clients a service that is beneficial to them but you are also increasing your practice income.

If you are thinking of joining S.F.P.S. or indeed want any further clarification, please feel free to telephone me at 781599 or return the coupon below (without obligation) to Sedgwick Dineen Personal Financial Management, 18/19 Harcourt Street, Dublin 2.

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S.F.P.S. ENQUIRY FORM

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Visit to the Court of Justice of the European Communities

A joint grouping of Solicitors from the State and Northern Ireland recently visited the Court of Justice in Luxembourg. After a thorough briefing by Mr. David O'Keeffe, Solicitor, Referendaire to Judge O'Higgins, on the role of the Court of Justice, and a most interesting introduction to the workings of the newly created Court of First Instance, the group were allowed to sit in on a case currently before the Courts. Unfortunately Murphy's Law was operating, as the case was promptly adjourned. Disappointment at this outcome was completely washed away by the superb hospitality afforded to the visitors by Judge Thomas O'Higgins and Judge Donal Barrington at lunch. Judge O'Higgins and Judge Barrington (recently appointed to the Court of First Instance) both spoke eloquently of the pivotal role of the Court in the lives of the citizens of the Communities. They reminded those at lunch that 80% of domestic law now emanates from Brussels. This was a most stimulating, educational and enjoyable visit, which is recommended as a ''must'' to all Lawyers. Particular thanks are due to Judge O'Higgins for his kindness and to David O'Keeffe, Solicitor, whose organisation and unfailing courtesy made the trip so worthwhile.

Colin Wilkinson (Northern Ireland), Gabrielle Dalton, William Cross (Northern Ireland) and Eva Tobin.

Judge Donal Barrington, Hilary Wells (Northern Ireland) Bridget Napier (Northern Ireland), Judge O'Higgins and Paul Spring (Northern Ireland).

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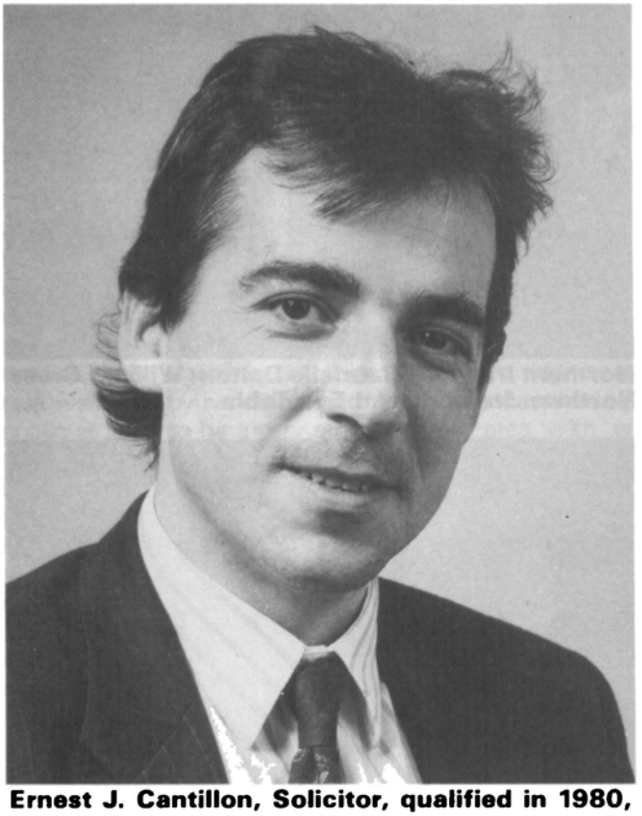
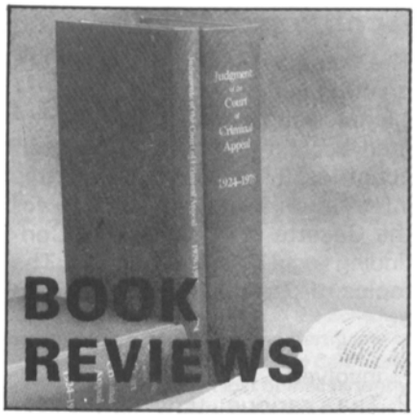


Ernest J. Cantillon, Solicitor, qualified in 1980, and practises with Cantillon Duggan & Co., Cork.

Anne M. Neary, Solicitor, qualified in 1982, and practises in Ranelagh, Dublin.

Philip M. Joyce, Solicitor, qualified in 1976 and practises in Tipperary.

Owen M. Binchy, Solicitor, qualified in 1971 and practises in Charleville, Co. Cork.



Civil Proceedings and the State in Ireland: A Practitioner's Guide
By Anthony M. Collins and James O'Reilly. [Dublin: The Round Hall Press. 1989. 439 and li pp. Hardback IR£47.50]

Joseph Story wrote in *Miscellaneous Writings* that special pleading contained the quintessence of the law, and that no man ever mastered it who was not, by that very means, made a profound lawyer. Anthony Collins and James O'Reilly have written a book containing pleadings and precedents but also substantive law in relation to civil proceedings and the State in Ireland. Any barrister and solicitor who masters the contents of *Civil Proceedings and the State in Ireland* has the *potential* of becoming a profound lawyer.

The President of the High Court, The Hon. Mr. Justice Liam Hamilton, in his foreword to the book states that it was with a keen sense of anticipation that he began reading the proof copy that was made available to him. Conscious of the distinguished record of the authors, your reviewer too looked forward to reading the fruit of the authors' labour with a sense of expectation; your reviewer was not disappointed.

The mission of the authors is stated in the book's preface. The book was written by practising lawyers for practising lawyers – judges, registrars, counsel and solicitors. The authors stated that they had endeavoured to describe from the practitioner's viewpoint those aspects of civil proceedings involving the State encountered most frequently.

The book is divided into two parts: the first part deals with the law and practice, while the second contains precedents of pleadings, including forms of relevant orders.

There are nine chapters in the book. Cases stated – appeals by way of case stated from the District Court and various other forms of cases stated – are dealt with in the first two chapters. Chapter 3 outlines the practice concerning enquiries under Article 40.4 of the Constitution. The law and practice on judicial review are set out in Chapter 4. Judicial review, in the context of constitutional and administrative law, may almost be compared to oxygen and the process of life itself. The authors describe the functions of the former state side orders of certiorari, mandamus, prohibition and quo warranto. Substantial amendments have been made to the procedure whereby these reliefs are obtained; the procedure is now provided for in Order 84 of the *Rules of the Superior Courts 1986*. The various Rules of Order 84, together with the substantive law on the orders of certiorari, mandamus, prohibition, quo warranto, declarations and injunctions are carefully examined in Chapter 4. The authors correctly allow much of this judge-made law to speak for itself (as it were) by generous use of quotation from the pronouncements of the judges themselves. This is to be welcomed. The use of indented quotations breaks up the solidity of a page of text, making the page much easier to read. Moreover, it is often futile to summarise in one's own words what the judge said – if the words of the judge can be encapsulated into a neat quotation.

"Constitutional Litigation" is the heading of Chaper 5. Issues such as who may raise a question of constitutional law; who are the appropriate parties in constitutional actions; what can be challenged; and by whom and where may a question of constitutional law be raised and what relief should be sought are considered under this heading.

The procedure applicable to references to the Supreme Court under Article 26 of the Constitution of a Bill passed by both Houses of the Oireachtas is dealt with in Chapter 6. Chapter 7 describes relator proceedings. Relator proceedings arise when the Attorney General gives his consent authorising the issue of civil proceedings in his name at the relation or instigation of a private person, association or incorporated body seeking a form of relief in the public domain. This form of proceeding may be utilised more often in the future.

The last two chapters deal with what the authors term "the European dimension". Chapter 8 explains procedural aspects of Community law and Irish law. Chapter 9 sets out the procedures before the European Commission of Human Rights and the European Court of Human Rights. Detailed precedents of pleadings are set out in the remaining part of the text.

Anthony Collins and James O'Reilly have succeeded admirably in the task they set themselves. The authors have written a book that will become a classic of its kind; they have secured two inches of glory on the bookshelves of time. Francis Bacon wrote in *Advancement of Learning* that the book – the monument of learning – was more durable thatn the monuments of power, or of the hands. Books outlive people and palaces.

John Campbell in *Lives of the Lord Chancellors* (1849) quotes the advice of John Singleton Copley, Baron Lyndhurst, Lord Chancellor, who stated that it was the duty of a judge to make it disagreeable for counsel to talk nonsense. In the context of ever-increasing litigation involving aspects of constitutional, administrative and European Community law, and despite the authors disclaiming any responsibility for any errors or omissions within the covers of the book, *Civil Proceedings and the State* will enlighten judges, registrars, counsel and solicitors. Lawyers without Anthony Collins and James O'Reilly's book will be impoverished in their legal calling. *Civil Proceedings and the State* can be heartily recommended.

Eamonn G. Hall

Correspondence

The Editor,
Incorporated Law Society Gazette,
Incorporated Law Society,
Blackhall Place,
Dublin 7.

1st February 1990

Dear Sir,

The following advertisement appeared at page 377 of the October 1989 edition of the Gazette under the heading "employment" "Member of the Medico Legal Society seeks forensic work, including research and analysis".

As Hon. Secretary of the Medico-Legal Society of Ireland I have been instructed by the Council of my Society to write to you as follows:

My Society is concerned by this advertisment, as it might be interpreted as:–

1) referring to this Society; and
2) implying that membership of this Society is a qualification of some kind.

Although the members of this Society are members of the Legal and Medical professions and those especially interested in medico-legal matters, membership, as such, is not a qualification for anything and of itself does not denote expertise whatsoever.

In fact this Society invites distinguished specialists to address it, so that our members may better inform themselves on the most up-to-date thinking on medico-legal problems.

Thank you for your consideration in publishing this.

Your sincerely,
Mary MacMurrough Murphy,
Hon. Secretary,
Medico Legal Society of Ireland.

Accidents Abroad

The Editor would like to hear from practitioners who have acted for clients who have been involved in road accidents in other European countries. It is hoped to collate this information in a future article for the Gazette or possibly in a Continuing Legal Education Course. The topics of particular interest would be:-

1. The different procedures involved.
2. The various time limits for instituting proceedings.
3. Any problems in identifying suitable foreign lawyers, and
4. Any difficulties encountered in enforcing judgement.

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For further information about the College's activities, please contact:

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St. Stephen's Green, Dublin 2.

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.
15th day of February, 1990.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

LOST LAND CERTIFICATES

Lydia Hilty Neschar, Clonmoylan Lodge, Ballyshrule, Ballinasloe, Co. Galway. Folio No: 31453 Lands: Cloonmoylan; Area: 5A.2R.36P. County: **GALWAY.**

Michael James O'Connell, Achonry, Ballymote, Co. Sligo. Folio No: 3189; Lands: Achonry; Area: 27A.0R.13P. County: **SLIGO.**

James Francis Anderson, Carrickbanagher, Drumfin, Boyle, Co. Roscommon. Folio No: 13073; Lands: Tunnagh; Area: 26A.1R.20P; County: **SLIGO.**

Bernard L. O'Donnell, Mountcharles, Co. Donegal. Folio No: 10855R; Lands: Mountcharles; Area: 4.887 Acres; County: **DONEGAL.**

Patrick Howard, Cahercrea, Loughrea, Co. Galway. Folio No: 24070; Lands: (1) Cahercrea East (2) Sonnagh Old (3) Sonnagh Old (one undivided 75th part of part); Area: (1) 7A.2R.3P. (2) 3A.2R.25P. (3) 54A.1R.29P. County: **GALWAY.**

Michael McEvoy, Duff's Farm, Clogherhead, Co. Louth. Folio No: 11282: Lands: Duffsfarm; Area: 1A.3R.2P; County: **LOUTH.**

Christopher Connolly, Baldoyle, Co. Dublin. Folio No: 4650; Lands: Baldoyle; County: **DUBLIN.**

Trident-Developments Limited, Behybridge Lodge, Glenbeigh, Co. Kerry. Folio No: 22243, Lands: Faha, Area: 5A.2R.25P. County: **KERRY.**

John Rafferty, c/o McEntee & O'Doherty, Solicitors, Co. Monaghan. Folio No: 11085; Lands: Cloghernagh and Knocknagrave; Area; 13A.0R.24P. (lands of Cloghernagh) 7A.3R.3P (lands of Knocknagrave); County: **MONAGHAN.**

Joseph Carey, 23 Marlboro Street, Cork. Folio No: 21215F; Lands: Ballynora; Area: 2.017 hectares; County: **CORK.**

Richard C. Prior-Wandesforde, Evington House, Carlow. Folio NO: 2081 closed to Folio 704F; lands: Newgarden; Area: 214A.1R.26P. County: **CARLOW.**

Luke Keane, Headley's Bridge, Abbeyfeale, Co. Kerry. Folio No: 8305; Lands: Ballyduff, Area: 65A.3R.32P; County: **KERRY.**

John McGrath, Oldtown, Ballyragget, Co. Kilkenny. Folio No: 2067; Lands: Byrnesgrove; Area: 26A.0R.8P; County: **KILKENNY.**

James & Bernadette Fox, Legar, Kinnegad, Co. Meath. Folio No: 9647F; Lands: Rossan; Area: 0.625 acres; County; **MEATH.**

Marc Brandel, Ballydehob, Cappaghglass, Co. Cork. Folio No: (1) 1530F (2) Cappaghglass; Area: (1) 2A.2R.27P. (2) 0A.2R.0P. County: **CORK.**

Kenneth Joseph Wallace, Folio No: 477L; Lands: Farranshoneen; Area: 13 Perches; County: **WATERFORD.**

Michael Loughnane, of Mountheaton, Roscrea, Co. Tipperary; Folio No: 12284; Lands: Mountheaton; Area: 1A.0R.0P; County: **KINGS.**

Richard Canavan of Gorteen, Ballinalee, Co. Longford; Folio No: 9547; Lands: (1) Gorteen; (2) Currygrane; Area: (1) 3A.1R.5P (2)16A.3R.33P; County: **LONGFORD.**

Francis McTeigue, of Tullyveela, Carlough, Bawnboy, Co. Cavan; Folio No: (1) 3252 (2) 3237; Lands: (1) Tullynaconspod (2) Tullyveela; Area: (1) 4A.3R.35P (2) 26A.0R.39P; County: **CAVAN.**

Martin Cash, of Kiltegan, Co. Wicklow; Folio No; 1025; Lands: Graysland; Area: 1A.0R.0P; County: **KILDARE.**

Robert P. Cawley, of Garrycloonagh, Cloghans, Co. Mayo. Folio No: 21625; Lands: (1) Cloonacauna (2) Gerrycloonagh; Area: (1) 6A.2R.39P (2) 16. 486 acres. County: **MAYO.**

Bernard Byrne (Junior), of Bayview, Clogherhead, Co. Louth. Folio No: 1756F. County: **LOUTH.**

Michael Quinn, of Bohalis, Ballaghaderreen, Co. Roscommon. Folio No: 30828; Lands: (1) Tonnagh, (2) Cloonmore, (3) Tonnagh; Area: (1) 6A.0R.6P, (2) 3A.1R.30P, (3) 11A.2R.19P. County: **MAYO.**

Frederick Bradfield Moore, Folio No: 634210F; Lands: 18 Thormanby Lawns, Howth, Co. Dublin. County: **DUBLIN.**

Thomas Leo Kerrigan, of Blakes Cross, Lusk, Co. Dublin. Folio No: 5453; Lands: Townland of Coldwinters, Barony of Balrothery East. Area: 9.283 hectares. County: **DUBLIN.**

IN THE MATTER OF THE LANDLORD AND TENANT (GROUND RENTS) ACTS, 1967 TO 1984 JOAN BUTLER – APPLICANT PEARE ESTATE AND MORTIMOR ESTATE – RESPONDENTS

WHEREAS the Applicant has applied to Patrick J. McCormack, the County Registrar of the County of Tipperary for an Order declaring that she is entitled to acquire the Fee Simple interest in the dwellinghouse and premises known as number 37/38 Main Street, Carrick-on-Suir, County Tipperary which property is held under a yearly tenancy arising by implication of law on the determination of a Lease dated the 21st day of May, 1889 for a term of 98 years from the 29th September, 1889 made between Charles Peare of the One Part and John O'Neill of the Other Part which property was in turn held by the Peare Estate under and by virtue of a Lease dated the 13th day of March, 1889 made between Sandra Mortimor of the One Part and Charles H. Peare of the Other Part for 99 years from the 1st November, 1888 both Leases now being expired.

Notice is hereby given that Patrick J. McCormack will sit at the Courthouse, Clonmel on the 28th March 1990 at 11.30a.m. to hear said application and any submissions by any interested parties hereto.

Signed: JOHN SHEE AND COMPANY, Solicitors, 28 Parnell Street, Clonmel, Co. Tipperary.

TO/
Whom it May Concern.

Lost Wills

TULLY, Mark, late of Castlegar Village, Galway, will anyone having knowledge of the whereabouts of a will of the above named deceased, who died on the 15th September, 1987, please contact William B. Glynn, Solicitors, Augustine Court, St. Augustine Street, Galway. Telephone (091) 67313.

WYNNE, Matthew, late of Taverone, Cloonloo, Co. Sligo. Will any person having knowledge of the whereabouts of the last Will dated the 12th day of August, 1987 of the above named deceased who died on the 5th day of March, 1989 please contact Kelly & Ryan, Solicitors, Teeling Street, Sligo. Tel. 071-62855.

MEARES, Keith M., Solicitor, late of 12A Cedar Hall, Millbrook Court, Milltown Road, Dublin 6 and formerly of White & Meares, Solicitors, Dublin. Would anybody having knowledge of the whereabouts of a Will of the above named deceased who died on 9th December 1989 please contact Binchy & Partners, Solicitors, 38/39 Fitzwilliam Square, Dublin 2, telephone 616144.

DEVLIN, Michael, late of No. 53 Gracepark Meadows, Drumcondra, Dublin 9 (retired Bank Manager) who died at Hampstead Private Hospital, Glasnevin, Dublin, on the 9th day of October, 1989. Will any person having knowledge of the whereabouts of a Will of the above-named deceased please contact Elizabeth Wright, Solicitor, 38 Ranelagh, Dublin 6. Telephone 964477.

LYNCH, Catherine, deceased, late of Clonalough, Killascully, Newport, Co. Tipperary. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 21st day of October 1989 at Clareview Nursing Home, Newport, Co. Tipperary, please contact Messrs. Hanahoe & Hanahoe, Solicitors, 14 North Main Street, Naas, Co. Kildare.

DALY, Marie Louise, late of 3 Clare Rd., Drumcondra, Dublin 9. Will any person knowing the whereabouts of the last Will and Testament of the above named deceased who died on 11 January, 1990, please contact Gabriel Daly, Solicitor, Rowan & Co. Solicitors, 34 Fitzwilliam Square, Dublin 2.

FLOOD, Jonathan, late of 20 Brookvale Downs, Rathfarnham, Dublin 14. Will any person knowing the whereabouts of a Will executed subsequent to 24 July, 1987, of the above named deceased who died on 13 April, 1988, please contact Arthur Cox & Co., Solicitors, 41-45 St. Stephen's Green, Dublin 2. Tel 01-764661.

KELLY, Dermot, late of Belvedere, Mullingar, Co. Westmeath. Will any person having knowledge as to the last Will of the above named deceased, who died on the 26 June, 1988, please furnish particulars to J.A. Shaw & Co., Solicitors for Administrators, Mullingar, Co. Westmeath. The said Will is believed to have been lost or mislaid in the post in the month of July, 1988, between Tullamore and Mullingar.

Miscellaneous

LICENCE: Ordinary Seven Day Licence Wanted; Reply to Messrs. Patrick J. O'Doherty & Co., Solicitors, Carndonagh, Co. Donegal.

WANTED: Ordinary Excise Licence. Reply to Crowley, Condon & O'Shea, Solicitors, Market Street, Killorglin, Co. Kerry. Ref. 3510; Phone 066-61355.

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Professional Information

DANIEL O'CONNELL & SON, Solicitors, 14 Francis Street, Dundalk. Telephone: (042) 34065. Fax: (042) 36678.
JAMES T. MURPHY B.C.L. and CAROLINE McARDLE B.C.L. wish to announce that from 2nd January 1990 they are jointly carrying on the above practice of Daniel O'Connell & Son at 14 Francis Street, Dundalk.

DIANA BYRNE, Solicitor, of 104 Mount Albany, Newtownpark Avenue, Blackrock, Co. Dublin, wishes to advise Solicitors that she is operating an agency service for those Solicitors who require attendance at Dublin and Bray District Courts. For further information please telephone (01) 833754.

JACINTA MORRIS, B.A., Solicitor, has commenced practice under the style of Morris & Co., Solicitors, Fairgreen, Naas, Co. Kildare. Tel: (045) 66797.

DEREK WILLIAMS, Solicitor, is pleased to announce that he has commenced practice under the style of Derek Williams & Co., Solicitors, 9 Francis St., Dundalk, Co. Louth; Tel: (042) 39727/39729.

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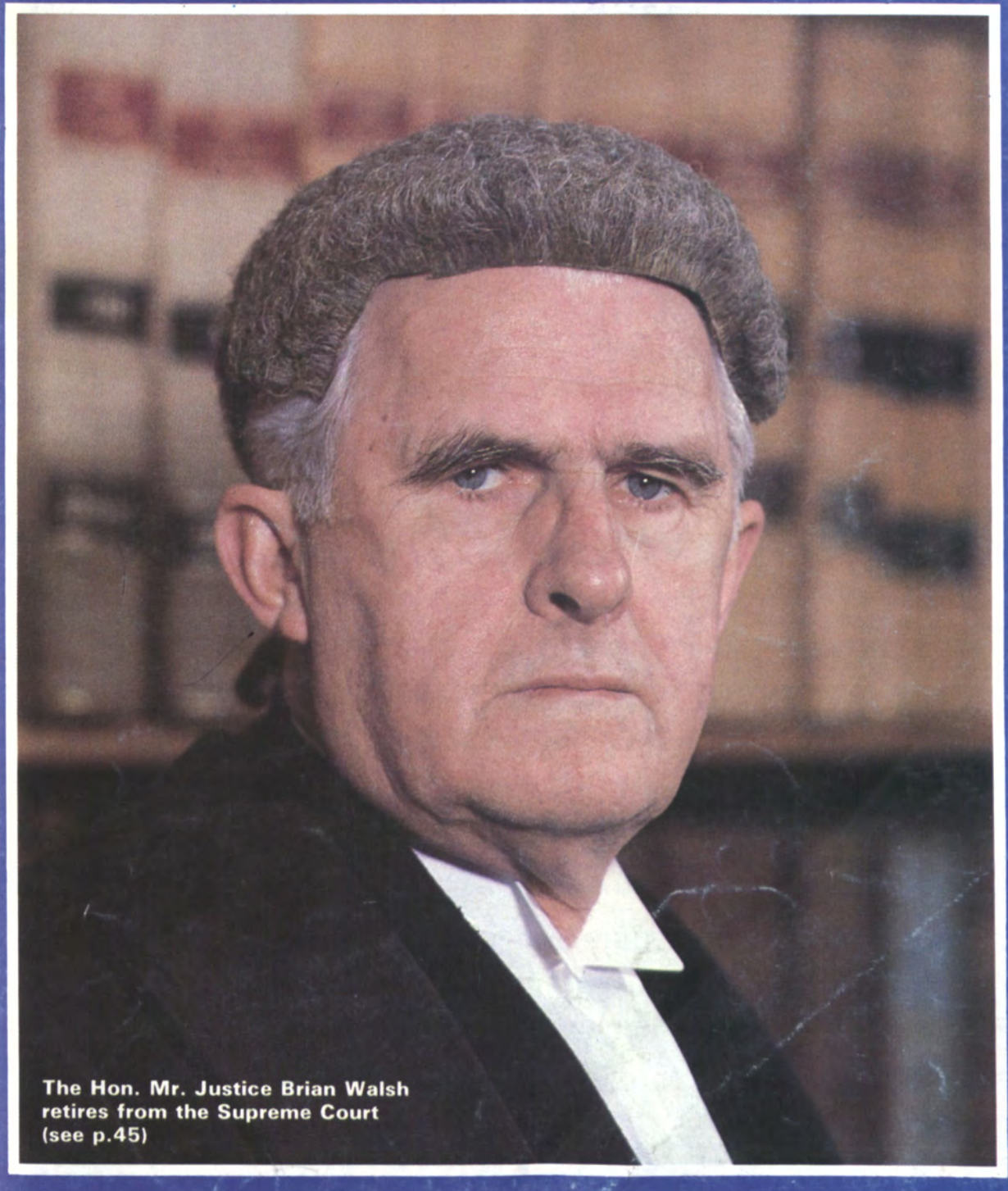
GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

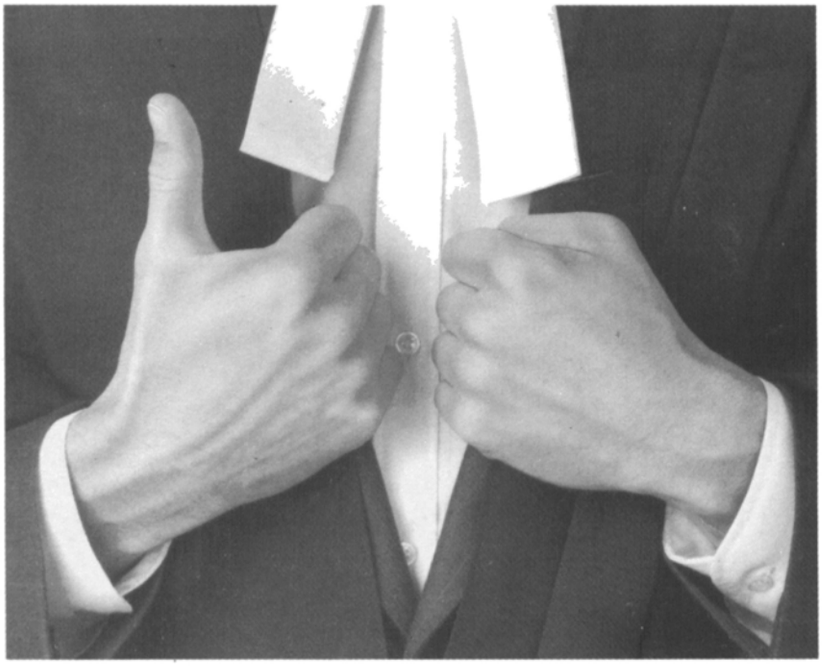
Vol. 84 No. 2 March 1990



The Hon. Mr. Justice Brian Walsh retires from the Supreme Court **(see p.45)**

- Nervous Shock, where are we now?
- Law Society AGM
- Psychological Trauma

Thumbs up for the Irish Permanent



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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 84 No. 2 March 1990

Viewpoint

It is remarkable how little note appears to have been taken of the remarks of Mr. Justice McCarthy in his judgment in the case of *Hegarty -v- O'Loughran & Anor.*, 8.2.1990 when he pointed out the difficulties of introducing the "discoverability" rule in relation to the operation of the Statute of Limitations in medical negligence cases without at the same time bringing in a "no fault" scheme for such cases.

Two recent cases have highlighted the enormous costs, both in monetary and other aspects, of the pursuit of serious claims arising out of alleged medical negligence.

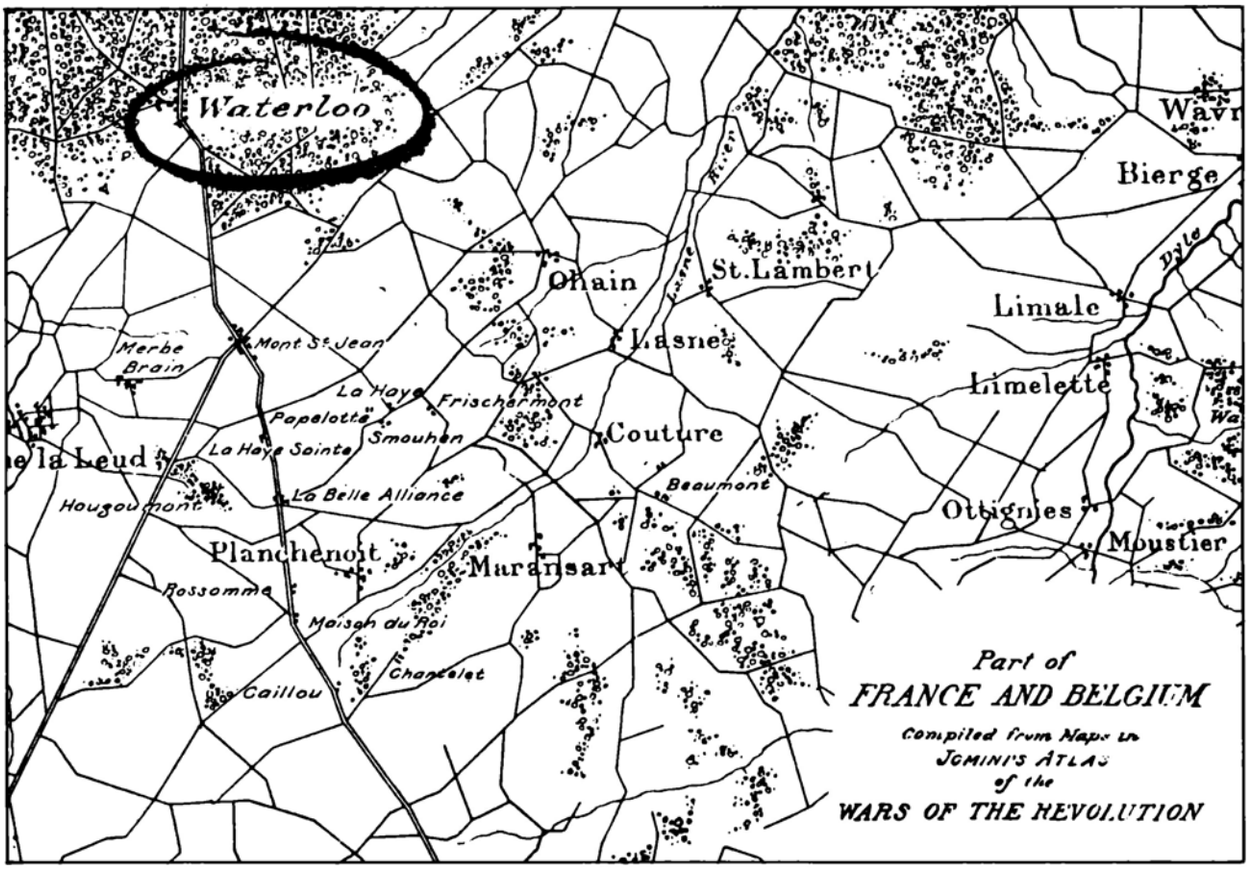
A number of factors contribute to the high costs involved. Frequently the issues are complex. Unlike personal injury claims arising out of motor accidents or accidents at work, expert evidence is usually required to establish negligence. In addition there are normally several defendants in these actions, one or more doctors, a hospital, a health board and possibly a pharmaceutical firm may all be involved. Not only does this lengthen the trial of the action but it is notorious that actions with more than one defendant prove particularly difficult to settle.

The Supreme Court in the *Dunne* case, indicated that there should be a relatively modest "cap" on the level of general damages to be awarded while leaving the amount of special damages to be worked out in each individual case. It seems an appropriate time to consider whether a "no-fault system" would not provide a more satisfactory solution to the problem and be in ease of all parties. It is notorious that premiums for insurance paid by medical practitioners are escalating and figures produced by the British Medical Association suggest that of the £90 million per year paid in insurance premiums less than half of that sum reaches injured patients.

Sweden operates a scheme under which compensation is paid for unforeseen mishaps and only compensates physical injury. The British Medical Association has proposed a scheme which would recommend the inclusion of pain and suffering. Trivial and minimum disability accidents are excluded, a victim must have been off work for at least 30 days or been hospitalised for 10 days or more before coming within the scheme. Payments under the scheme would take account of other sources of income such as disability benefits under a Social Welfare Scheme and there would be a ceiling – twice the national average wage has been proposed. The scheme would assume indefinite responsibility for permanent injury and would be inflation-indexed.

"No-fault" schemes are based on the proposition that accidents are inevitable and that it is reasonable that those who are unfortunate enough to be the victim of an accident should be entitled to compensation as a matter of course rather than have to plough the difficult furrow of litigation. There may be strong arguments against introducing "no-fault" schemes for all types of accident but this should not preclude serious consideration being given to them in the area of medical negligence. It would not be too difficult to envisage a "no-fault" scheme for medical negligence being funded partly by contributions from the medical profession and partly by State funding. The option of civil proceedings could of course be kept open for injured parties.

It is tempting to say that almost anything would be better than the present unsatisfactory arrangements where it is commonly alleged that many medical negligence actions never get off the ground because of the difficulty of getting satisfactory evidence and because the costs involved are generally much greater than those in other personal injury claims. It may be that professional bodies of lawyers and doctors in Ireland should get together to take up the torch which has been lit in the United Kingdom by the British Medical Association. □



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Mr. Justice Brian Walsh - One of the Helmsmen of the Constitution

"The great judge was great because when the occasion cried out for new law he dared to make it . . . "[1]

Mr Justice Brian Walsh retired from the Supreme Court in March 1990. Called to the Bar in 1941 and to the Inner Bar in 1954, he was appointed a High Court judge in 1959 and a judge of the Supreme Court in 1961. He served as president of the Law Reform Commission from 1975 to 1985 and as chairman of the Committee on Court Practice and Procedure from 1962 to 1988. A judge of the European Court of Human Rights since 1980, he was president of the International Association of Judges from 1986 to 1988.

Constitutional Cases

Judgments of Mr Justice Walsh will live for many reasons, but particularly because in these judgments he spoke with an authority greater than his own. That authority was Bunreacht na hÉireann - the document which orders the social, legal and political structure of the State. That law, in the words of Mr Justice Walsh himself, "speaks always in the present tense and is to be regarded as contemporary law, even though as a document it may be regarded as being of another generation".[2] Thus, there was considerable scope in appropriate cases for judicial discretion. Montesquieu's approach, according to which the judge is simply the mouth that repeats the language of the law, was not accepted by Mr Justice Walsh.

"He spoke with an authority greater than his own".

Mr Justice Walsh disliked the "mechanical" approach to judging. Oliver Wendell Holmes in *The Path of the Law* (1897) tells the story of a Vermont justice before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns and gave judgment for the defendants. Many judges of our own time still display the mentality of that Vermont justice. Mr Justice Walsh was not of that ilk.

In constitutional cases the judge often stands at a fork on the road. Justice Cardozo vividly described this process:

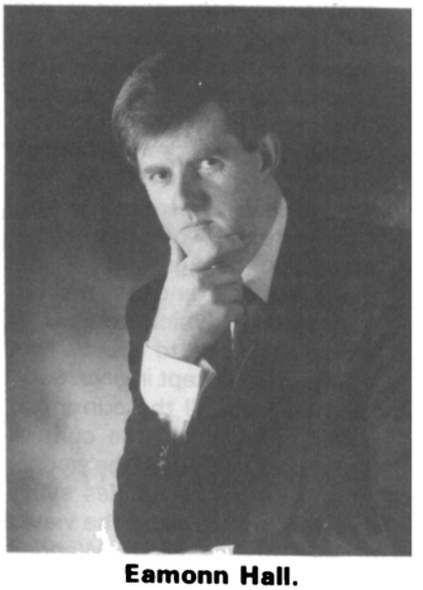
> "There have been two paths, each open though leading to different goals. The fork in the road has not been neutralised by a barrier across one of the prongs with the label of 'no thoroughfare'. [The judge] must gather his wits, pluck up his courage, go forward one way or the other and pray that he may be walking, not into ambush, morass, and darkness, but into safety, the open spaces, and the light".[3]

by
Eamonn G. Hall, Solicitor

Mr Justice Brian Walsh often plucked up his courage, went forward and made new law.

The Irish Constitution was not often referred to in Irish courts prior to the appointment of Cearbhall Ó Dálaigh and Brian Walsh. Cearbhall Ó Dálaigh was appointed Chief Justice in 1961 - the day Brian Walsh was appointed a judge of the Supreme Court. The precedents of the United States Supreme Court were a rich fertile ground upon which to base an interpretation of the Irish Constitution. New law was made. The leading judgment of Mr. Justice Walsh in *Byrne -v- Ireland*[4] remains a seminal judgment in Irish jurisprudence. The case of *McGee -v- Attorney General*[5] was another landmark decision. Mr. Justice Walsh held that the use of contraceptives by married couples within the context of marital privacy was guaranteed against invasion of privacy, and as such assumed the status of a right guaranteed under the Constitution. Mr. Justice Walsh's approach to interpreting the Constitution was fleshed out by him in 1988:

> "The Constitution in Ireland has been brought in – even to the construction of common law – to every sphere of legal activity. By laying down markers one might inspire practitioners to pick them up and use them in the next case that may be more central. We certainly didn't stick to the rigid system of saying nothing about anything except the precise point before us, and we didn't attempt to avoid issues. In other words, we got away from what is perhaps the easier judicial approach of saying no. We went out of our way to try and find remedies and, effectively, adopted the view that if the Constitution provided a right, there was automatically a remedy; and one doesn't have to wait for legislation to provide a remedy".[6]



Eamonn Hall.

It is not easy to reconcile judicial review with democracy. If the legislature has voted for a particular tax, for example, can it be right for judges who are not elected or directly accountable to the people to invalidate these decisions? Mr. Justice Walsh responded to that criticism:

> "We said that judicial power is a co-ordinate of government; therefore it has its own function in the government of the State. The Constitution sets out that the organs of government are the judiciary, the executive and the legislature. We are not subordinates of any other department of State. Therefore the fact that our decisions may appear to affect the government of the country is to be expected, because we are part of the government of the country".[7]

Literary Legacy

Few judges leave a literary legacy to posterity apart from their judgments. Mr. Justice Walsh is one of those judges whose extra-judicial writings will survive. The Forewords which he has written to many leading Irish textbooks contain prominent insights into the juristic process. It is appropriate to quote the following extract from Mr. Justice Walsh's Foreword to O'Reilly and Redmond's *Cases and Materials on the Irish Constitution*:

> "There may yet be a field for a fascinating study of how judges choose among the possible solutions to any matter which comes before them in the field of constitutional law. Are their choices influenced by personal values and experiences acquired either before or after coming to the Bench and by their relationships with judicial colleagues or other public officials? It may well be that judicial decisions are to some extent affected by the socio-economic background of the judge himself and by the environment in which he lives. It would be unreal to believe that a judge can be kept in a vacuum, isolated from all the current of public opinion and the cultural and moral values of the people among whom he resides every day. It is well to recall the views of Mr. Justice Oliver Wendell Holmes who said: 'The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than syllogism in determining the rule by which men shall be governed".[8]

The extra-judicial writings of Brian Walsh could usefully be collected together and published under the title – *The Evolving Constitution*.

Profound Influence on Irish Life

It would be false of the writer to pretend that he agreed with the law expounded by Mr. Justice Walsh in all his judgments. However, the judge must decide a case in accordance with the declaration which he made upon appointment. The judge promises and declares that he will to the best of his knowledge and power exercise the office of judge without fear or favour, affection or ill-will towards any man and that he will uphold the Constitution and the laws.[9] The words of Horace are appropriate here:

> "A good and faithful judge prefers what is right to what is expedient".[10]

Mr. Justice Walsh has exercised a profound influence on Irish life. It is too early to say who the twentieth century "Michaelangelo" of Irish law will be – but Brian Walsh must be among one of the contenders.

NOTES

1. Louis Jaffe, *English and American Judges as Lawmakers,* Clarendon, Oxford, 1969.
2. B. Walsh, "The Constitution and Constitutional Rights" in F. Litton (ed) *The Constitution of Ireland 1937-1987,* IPA, 1988, p 86.
3. B. Cardozo, *The Growth of the Law* (1924) p. 144.
4. [1972] IR 241.
5. [1974] IR 284.
6. G. Sturgess and Philip Clubb, *Judging the World,* Butterworths, 1988, p. 420.
7. Ibid., p. 423.
8. Incorporated Law Society of Ireland, 1980, p. xii. See also, *inter alia*, the Forewords written by Mr. Justice Brian Walsh to Bryan McMahon and William Binchy's *Irish Law of Torts,* Professional Books, 1981, Bryan McMahon and Willian Binchy's *A Casebook on the Irish Law of Torts,* Professional Books, 1983, William Binchy's *A Casebook on Irish Family Law,* Professional Books, 1984, Peter Charleton's *Controlled Drugs and the Criminal Law,* An Clo Liuir, 1986, William Binchy's *Irish Conflicts of Law,* Butterworth (Ireland) Ltd, 1988, and James Casey's *Constitutional Law in Ireland*, London, Sweet & Maxwell, 1987.
9. Article 34.5.
10. Horace, *Carmina*, c. 13 B.C.

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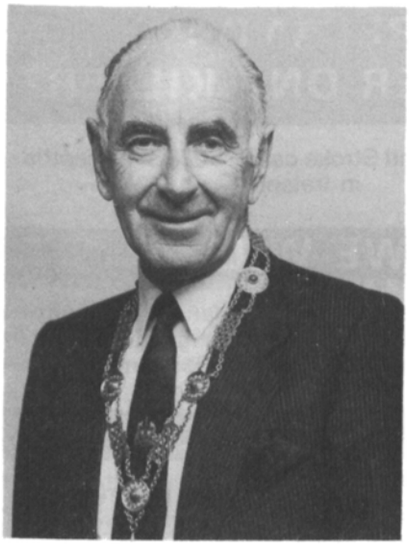

At the end of February I had the pleasure of attending the 18th Conference of Presidents of Bar Associations and Law Societies in Europe which was held in the beautiful city of Vienna. During our stay in Vienna we enjoyed most beautiful weather, wonderful hospitality and a very interesting Conference. It was a somewhat historic Conference in that representatives attended from countries such as Czechoslovakia, Romania, Hungary and Russia.

The principal discussions centered around the overall situation of the legal profession in European countries and the remarkable recent developments. It was interesting that the Russian representative told the meeting that the legal profession had been given greater independence and freedom but issued the warning that this in itself was not of any great avail until independence was established in the Courts and the judicial system.

The Director General, James J. Ivers, also attended the Conference in his position as President of ESSEBA.

At home the principal news relates to the issue of the report of the Fair Trade Commission on its study of the Legal Profession in Ireland. This report which is a very comprehensive document comprising more than 700 pages was submitted to the Minister for Industry and Commerce, Desmond O'Malley in the first week in March. The document will obviously have to be considered by the Minister prior to its submission to the Government and subsequent publication. As I mentioned in an earlier message a Committee of the Society was established this year and has already met. As soon as the report is available it will be considered in detail and with all possible expedition by this Committee and we will obviously be seeking the views of the Bar Associations on the contents of the Report as it affects our Profession. We have not at this stage any indication as to the contents of the report but the Minister for Industry and Commerce when referring to it at the Limerick City and County Bar Association Annual Dinner Dance said that the report's recommendations, when implemented, would lead to a diminuation in the restrictive practices within the Legal Profession.

I hope that as many members as possible have already completed their Registration Forms for the Annual Conference in Killarney.

□

Ernest J. Margetson.

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Nervous shock, where are we now?

Everyone reacts differently to a frightening experience. The more robust members of society cope well, make a rapid recovery and get on with life. For many others, the damage caused by a shocking experience can be deep and lasting and much more disabling than many physical injuries. A person who suffers a whip lash injury to the neck, through the fault of another, is adequately compensated for such a disruption to his life but what about the person who, through the medium of the senses, suffers a lash to a much more complex and delicate thing – the mind? To what extent will he be compensated?

By
Paul Sreenan B.L.

The purpose of this article is not to record the historical development of the award of damages for nervous shock,[1] but to set out in a summary way the extent to which the law on nervous shock has developed.

The number of Irish cases on nervous shock is small. Although there is no doubt that in appropriate cases, Irish Courts will award damages for nervous shock[2] the extent to which our Courts would be prepared to go is unclear. Accordingly, the law as set out hereunder is mostly English Law and we cannot be certain that it would be followed by Irish Courts. One would hope that, far from following English decisions, the Irish Courts would lead the way towards a more liberal and compassionate development of the law of compensation for mental injury.

Before going into the specific area of nervous shock, it is worth saying a few words about foreseeability. On general principles, foreseeability of loss is not in itself sufficient to establish a duty of care.[3] In *Donoghue -v- Stevenson*, Lord Atkin spoke not of a duty of care to anyone to whom damage can be foreseen but to those "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected".[4] There are two stages in the test. Firstly, is there a sufficient relationship of proximity of neighbourhood, such that in the reasonable contemplation of the wrongdoer carelessness would be likely to cause damage to the Plaintiff – the *prima facie* duty of care? Secondly, are there any considerations which ought to negative or reduce or limit the scope of the duty or the class of persons to whom it is owed and/or the damages to which the breach of it may give rise?[5] There are many cases where, despite the proximity of the wrongdoer to the victim and the foreseeability of damage, the law as a matter of policy denies the existence of any duty of care or alternatively excludes recovery on the basis of "remoteness". Thus in *Leigh & Sillavan Ltd. -v- Aliakmon Shipping Co. Ltd.*,[6] Oliver J. gives the example of an ironmonger who opens a workshop next door to an existing ironmonger and thereby damages his business. "Policy" can provide a convenient method by which recovery for foreseeable damage can be excluded. It is important, however, that judges in different courts should not simply deny recovery on a willy nilly basis citing "policy" as the reason. If there are policy considerations they should be cautiously used, logically based, referrable to precedent and properly articulated by the Superior Courts on a case by case basis. Such arguments as the classic but discredited floodgates argument are not good reasons for creating new policies.[7].

When it comes to recovery of damages for nervous shock, the dictum of Denning L. J. in *King -v- Philips*[8] that "the test of liability for shock is foreseeability of injury by shock" has often been quoted with approval. Injury by nervous shock to the Plaintiff must be foreseeable to enable the Plaintiff to recover damages for nervous shock[1] since otherwise (in the case of tort) the Defendant would owe the Plaintiff no duty of care not to inflict such damage and (in the case of contract) the damage would be too remote. It is irrelevant whether the tortfeasor could or could not foresee physical injury to the claimant. It is foreseeability of injury by nervous shock that is relevant. Likewise, it is not necessary in order for the tortfeasor to be liable that he should foresee the precise consequences of the nervous shock, merely that he should foresee the possibility of some nervous shock. Once this is foreseeable the egg shell mind of the Plaintiff which caused him or her to suffer extreme and unforeseeable consequences is irrelevant.[9] However, if the tortfeasor can only foresee physical injury – not nervous shock, but the egg shell mind of the Plaintiff causes him/her to suffer nervous shock, damages under the heading are not recoverable since injury by nervous shock is not foreseeable and accordingly, there is no duty to take care not to inflict nervous shock or, alternatively, injury by nervous shock is too remote.[10]

The leading English case on nervous shock is the House of Lords decision in *McLoughlin -v- O'Brian*.[1] That was the case where the Plaintiff's husband and three children were involved in a road traffic accident. The car in which they were travelling was driven by the Plaintiff's son. The Plaintiff was not present at the scene of the accident and did not hear it or see it but she was told of the accident

by a motorist and went to the hospital where she saw the injured members of her family. As a result of this, she suffered nervous shock. The High Court and Court of Appeal dismissed her claim but the House of Lords held that the test of liability for damages for nervous shock was reasonable foreseeability and, applying that test, the Plaintiff was entitled to recover.

The most recent Irish case is *The State (John Keegan and Eoin J. Lysaght) -v- The Stardust Victims Compensation Tribunal.*[11] John and Christine Keegan lost two daughters in the Stardust Fire and a third was seriously burned. John Keegan submitted fatal injuries claims arising out of the death of his two daughters and in each case the tribunal awarded damages including damages for mental distress. These damages were apportioned between John Keegan and the other dependants. Both John Keegan and his wife submitted separate claims for nervous shock. It is interesting to note that the Attorney General conceded, for the purposes of the claims, that they should be approached on the basis of the Judgment of Lord Wilberforce in *McLoughlin -v- O'Brian*. There, Lord Wilberforce summed up, in five paragraphs, what he saw as the state of the law. They were referred to both by

[In the most recent Irish case] the Attorney General conceded that [the claims] should be approached on the basis of . . . *McLoughlin -v- O'Brian*."

Finlay C. J. and Henchy J. in the Supreme Court. They are as follows:–

1. While damages cannot, at Common Law, be awarded for grief and sorrow, a claim for damages for nervous shock caused by negligence can be made without the necessity of showing direct impact or fear of immediate personal injuries for oneself.
2. A Plaintiff may recover damages for nervous shock brought on by injury caused not to him or herself but to a near relative, or by fear of such injury.
3. Subject to the next paragraph, there is no English case in which a Plaintiff has been able to recover nervous shock damages where the injury to the near relative occurred out of sight and ear shot of the Plaintiff.[12].
4. An exception from or (as Lord Wilberforce would prefer to call it) an extension of, the latter case has been made where the Plaintiff does not see or hear the incident but comes on its immediate aftermath.
5. A remedy on account of nervous shock has been given to a man who came on a serious accident involving people immediately thereafter and acted as a rescuer of those involved.

The Supreme Court made it clear that it was not approving or disapproving of the decision in *McLoughlin -v- O'Brian* nor was it saying that it represented the law of this country. That would have to await an appropriate case.[13]

Despite the criticisms contained in some of their Lordships Judgments in *McLoughlin -v- O'Brian*, of the reasoning and conclusions contained in some other Judgments in that case, I would venture to suggest that the differences are more apparent than real. All five Law Lords agreed that reasonable foreseeability of injury by nervous shock was the criterion for recoverability of damages and all five agreed that the nervous shock of a mother who arrived in hospital to see her injured husband and children was reasonably foreseeable by the negligent motorist. All five agreed that it was not necessary for the mother to be present at or to see or hear the accident itself. The only differences were that Lord Wilberforce emphasised that liability in negligence, based on foreseeability, only extends to those closely and directly affected by one's act (but nevertheless accepted that the Plaintiff was such a person) and Lord Edmund-Davies kept the door open for "policy" restricting the unlimited application of recoverability based on foreseeability, whereas the others (although they did not dispute the general applicability of this principle) felt that there were no such policy considerations applicable to this area of law. In the context of the manner in which *McLoughlin -v- O'Brian* was treated in the Stardust case, it is important to note that the five statements contained in the speech of Lord Wilberforce were, I would suggest, never meant to be rigid classifications of the cases in which recovery would be granted but merely a convenient grouping of cases to summarise the development of the law up to the decision in that case.[14]

". . . the five statements . . . in the speech of Lord Wilberforce [in *McLoughlin*] . . . [were] . . . to summarise the development of the law up to [then]."

NERVOUS SHOCK

Section 49 of the Civil Liability Act, 1961, introduced the concept of damages for the mental distress suffered by dependants following upon fatal injuries. This was initially limited to £1,000 and later increased by the Courts Act, 1981, to £7,500. Subject to that statutory exception, it is the Law (in England at least) that one cannot recover damages in tort for grief, worry or emotional distress (the so called "normal reactions").[15] Before damages can be recovered for a mental reaction such as this, it must be what lawyers call "nervous shock".[16]

It is not at all clear precisely what is meant by "nervous shock". In *Behrens -v- Bertram Mills Circus*, Devlin J. said "When the word "shock" is used in "the cases", it is not in the sense of mental reaction but in the medical sense as the equivalent of nervous shock". In the normal course of events, nervous shock although a mental reaction is invariably associated with physical symptoms of varying severity such as shaking, crying or even death (as in *Hambrook -v- Stokes Brothers* [1925] 1 K.B. 141). In *McLoughlin -v- O'Brian*, Lord Russell used the phrase "mental trauma". In *Brice -v- Brown*[17] Stuart-Smith J. described it as "a convenient phrase to describe mental injury or psychiatric illness to distinguish it from, on the one hand, grief and sorrow and, on the other, physical or organic injury. The psychiatric injury does not

have to have any particular label or term of art applied to it. Used in the sense which I have indicated the Plaintiff in my judgment has to establish three things: firstly that the circumstances of the accident caused or materially contributed to the nervous shock; secondly that the nervous shock was reasonably foreseeable by the tortfeasor as a natural and probable consequence of a breach of his duty of care. For this purpose the Plaintiff is assumed to be a person of normal disposition and phlegm . . . . . this would exclude the pursuer in *Hay (or Bournhill) -v- Young* as a person who faints at the sight of a road accident no matter who is involved. And, thirdly, that once the first two matters are established the Plaintiff is entitled to compensation for nervous shock and such of its consequences as were not dissimilar in kind, whether or not the same were initially reasonably to be foreseen''. In one of the latest cases on the subject *Attia -v- British Gas*[18] Bingham L. J. described it as ''a misleading and inaccurate expression'' and instead used the general expression ''psychiatric damage'' intending to comprehend within it ''all relevant forms of mental illness, neurosis and personality change''.

'' . . . the Plaintiff has to establish [cause] . . . and [reasonable foreseeability] . . .''

One finds it hard to justify the distinction between recoverability of damages for nervous shock and non-recoverability for grief, sorrow or emotional distress. There is no sharp dividing line between deep emotional distress and nervous shock. In certain cases (for example assault, defamation), we permit the recovery of aggravated damages for humiliation and injury to feelings – reactions much milder than grief or emotional distress. Likewise, if a bride can get damages for distress and disappointment because she had no pictures of her wedding day[19] or if a holidaymaker can get damages for distress and disappointment because he didn't have the ''great time'' he was promised;[20] if an investor who was deceived into buying shares in a company that are not the vendor's to sell can get aggravated damages for his injured feelings;[21] if a person who suffers great personal strain as a result of his Solicitor's negligence in a property transaction can get damages for this[22] and if as is becoming commonplace, a person directly injured by a wrongful act can get compensation for depression, it is a bit hard to see why the genuine and foreseeable grief and worry of a near relative should not form the subject of damages. Surely the distinction ought to be relevant only to the size of the award?

It was two Irish cases that first established a cause of action for nervous shock and lead the way for English Courts that had already decided that such claims unaccompanied by physical injury were inadmissible. In *Victoria Railways Commissioners -v- Coultas*[23] the Plaintiff, a pregnant lady who was a passenger in a buggy, suffered a severe nervous shock which caused her to faint and miscarry when a negligent gate keeper allowed the buggy to cross the line and it was narrowly missed by a train. The Privy Council clearly affected by the floodgates argument, reversed the inferior Courts award of damages and dismissed the claim.

However, in *Byrne -v- Great Southern and Western Railway Company*[24] the Irish Court of Appeal had awarded damages for nervous shock to a telegraph superintendant whose office had been struck by a train, and in *Bell -v- Great Northern Railway Company*[25] (decided after the *Victoria Railways* case) a passenger was awarded damages for nervous shock sustained when a carriage became unhooked and rolled down a hill. In that case, Murphy J., discussing what the damages could be awarded for, said that it was immaterial what name was given to the injuries. ''The only questions to be considered, in my opinion, are: was the health or capacity of the Plaintiff for the discharge of her duties and enjoyment of life affected by what occurred to her whilst in the carriage?'' Next, was this caused by the negligence of the Defendants?'' One would hope that using this enlightened approach, Irish Courts would refuse to consider themselves confined to nervous shock and unable to compensate Plaintiffs for emotional distress, worry and grief. For example, a mother who sees her young child run down and suffer life threatening injuries might suffer great emotional distress and worry particularly if the treatment is prolonged or involves many surgical procedures. Indeed, she may have to witness for the rest of her life her child growing up disabled or physically deformed. Is she to be denied compensation merely because her injuries are not sufficiently severe to fall into the category of nervous shock?

''It was two Irish cases that first established a cause of action for nervous shock . . . ''

Indeed, in Britain there are growing signs of unease with this arbitrary rule. Thus, in *Whitmore -v- Auto Transportes Julia S.A.*[26] the Plaintiff and her husband were injured coming home from Spain in a bus crash in France. The husband was seriously injured. The wife claimed damages for shock as a result of seeing him injured and

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seeing the serious consequences of his injuries. There, Comyn J. said "There is no use in having views unless one is prepared to state them boldly and I do strongly hold the view that the law is harsh in making worry, strain and stress wholly irrecoverable as a head of damage in a case such as this . . . I hold that the shock she suffered and the shock she suffered (a) on her own behalf and (b) on her husband's behalf was shock in the ordinary, general, everyday meaning of the word and not in any medical or psychiatric sense". Nevertheless, he awarded her compensation. In *Brooks -v- Wessex Regional Health Authority*[27] a woman gave birth to a severely retarded baby who lived and whom she commenced to look after in her own home. A claim for damages was brought both on behalf of the child and on her own behalf. Her claim included a claim for damages for shock. There was apparently no suggestion of any psychiatric illness or anything other than the natural upset and strain of such a situation. Indeed, the report would suggest that the woman was an extremely well balanced and caring person. The Judge recited the distinction between grief and sorrow on the one hand and nervous shock on the other, and then went on to award the Plaintiff damages under the latter heading.

The concept of what can and what cannot be compensated has not been very clearly defined in Ireland. Thus, in *Cosgrove -v- Ireland*[28] the Plaintiff recovered damages for mental distress and anxiety caused by deprivation of constitutional and statutory rights. In *Whelan -v- Madigan*[29] a tenant recovered damages for mental distress and shock inflicted as a result of a landlord's trespass.

Four recent English cases demonstrate the extent to which English Law has now developed. In *Galt -v- British Railways Board* [1983],[30] a train driver driving his train around a bend at speed, suddenly came upon workmen on the line. There was no lookout man, as the defendants' regulations required. The Plaintiff blew the horn repeatedly, but it was only when he was six or seven yards away from them that they got out of the way. He thought he was going to hit them and suffered nervous shock which brought on a heart attack (which he survived). Tudor-Evans J. held: –

(a) that the workmen owed a duty of care to get off the line not only to the driver but also to the public,

(b) that the risk of injury by nervous shock to the driver was in such circumstances foreseeable and the Defendants owed the Plaintiff a duty of care not to expose him to injury by nervous shock in such circumstances,

(c) the coronary attack consequent on the nervous shock came within the egg shell skull principle and the Defendants were liable for that also.

In *Ibrahim (a minor) -v- Muhammad* [1984],[31] young Tayfun Ibrahim when five years of age, underwent an operation to be circumcised in accordance with the Moslem religion. The Defendant who was a doctor, carried out the operation. In accordance with tradition, a big hall was hired for a party and 200/250 people were invited. After the party had started, the young boy was taken home by his mother so that the Defendant could carry out the circumcision. The parents and various family friends were present. The father was operating a cine camera. The mother stepped out but was just around a door. The Defendant then invoked the name of a deity and was seen to carry out a slashing movement. The boy screamed. The mother ran in to discover that blood was spouting from his penis, about half of which the Defendant had cut off. There followed a dash to the hospital and days of waiting to find out if the operation to re-attach the severed part was successful (it transpired in medical terms to be a success). The reader familiar with awards in the Irish Courts, will be surprised to note that for this injury and added psychological sequelae which I have not detailed, the poor infant was awarded a mere £10,000 damages and the parents £3,000 each for nervous shock!

A most instructive case is that of *Kralj -v- McGrath* [1985].[32] In that case, the Plaintiff was expecting twins and Mr. McGrath was her gynaecologist. She was a private patient and, accordingly, there was a contractual relationship between them. The first twin was born normally but the second twin was in a transverse position. The Defendant attempted to turn it manually without administering an anaesthetic to the Plaintiff. This treatment was described by a professor of gynaecology in evidence, as "horrific and completely unacceptable and must have caused the Plaintiff excruciating pain". The Plaintiff was conscious during all of this but later underwent caesarean section for delivery of the second twin. When she was in post-natal recovery she was told that the second twin was a bit poorly and had been taken to another hospital. Later she was told that he had in fact died but had been resuscitated after about 20 minutes. She saw him two days later. He was in an incubator and was convulsing, twisting and would not cry, suck or swallow. She was told that if he survived, he would be a vegetable. Eight weeks later he died. The Plaintiff said in evidence that she felt devastated and guilty because she had hoped the child would die and the guilt would be with her all her days. She was also terrified of having another child. Although there is no doubt that the Plaintiff suffered dreadful emotional distress including grief, guilt and worry, there was apparently no psychiatric evidence of nervous shock. Woolf J. (as he then was) held that the Plaintiff was entitled to damages for "the shock she undoubtedly suffered as a result of being told what happened to Daniel and of seeing him during her visits".

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She was not entitled to damages for grief and worry *per se* but insofar as that grief and worry aggravated her physical sufferings caused by the negligent attempts at delivery or prolonged her recovery from those injuries, it could be taken into account.

Finally, it is worth considering an interesting case which occurred near the frontiers of the existing law on nervous shock. This was *Attia -v- British Gas* (1987)[18]. That case concerned a woman who claimed that she suffered nervous shock as a result of watching her house and contents being extensively burned in a fire that was caused by the Defendant's negligence. Thus, the Plaintiff had no apprehension of injury to herself or any other person – merely to her property. On a preliminary application by the Defendants, the High Court held that it was not reasonably foreseeable that the Plaintiff might suffer psychiatric illness as a result of watching her house and contents being burned in a fire started by the Defendant's negligence. The Court of Appeal, however, reversed that decision and held that it was a matter of fact to be decided on the evidence whether or not such an injury was reasonably foreseeable. Woolf and Bingham L. JJ. also held that there was no general rule of law that claims for damages for nervous shock were excluded where they related to witnessing or apprehending injury to property, rather than death or injury to person. Everything depended on its own facts. In relation to this case, it should be noted that the Defendant had a contractual relationship with the Plaintiff since they were carrying out works on her home, they clearly owed her a duty of care not to start a fire and could have foreseen the risk of some injury to her as she may have gone in to save her possessions or telephone the fire brigade.

GENERAL PRINCIPLES

From the above, some general principles can be deduced.

1. Nervous shock is invariably associated with both physical symptoms (shaking, crying, etc.) and mental symptoms (anxiety, depression, personality change, neurosis, etc.)
2. Physical contact with the wrongdoer is not necessary to recover damages.
3. The Plaintiff need not show that he himself was in danger of physical impact.
4. Injury by nervous shock to the Plaintiff, must be foreseeable to enable a Plaintiff to recover damages.
5. As a general rule, foreseeability of injury to the Plaintiff by nervous shock is sufficient for the recovery of damages. However, notwithstanding the fact that such injury is foreseeable, there are some cases where recovery will be denied on the basis of remoteness or policy considerations.
6. It is more likely that shock to a relative or close friend of the victim would be regarded as foreseeable, than shock to a total stranger.
7. Shock to a person who sees or hears an accident is normally regarded as foreseeable, provided there is reasonable apprehension of injury to himself or to his property or to a relative, friend or other person.
8. Shock to a rescuer who comes on the aftermath of an accident, is normally regarded as foreseeable.

CASES WHERE THERE HAS BEEN RECOVERY

Without in any way attempting to limit the scope of the doctrine of compensation for nervous shock, it may be helpful to classify the cases in which damages have been recovered.

1. *Nervous shock associated with other physical injury to the direct victim of a wrongful act.* Thousands of cases have been successfully brought under this heading. See especially *Hogg -v- Keane* [1956] I.R. 155.
2. *Nervous shock only, to the direct victim of a wrongful act.*[33] Cases which illustrate this classification are *Wilkinson -v- Downton*,[34] *Janvier -v- Sweeney*,[35] and for an illustration of a slander case where recovery was denied see *Allsop -v- Allsop*.[36]
3. *Nervous shock to a person present at a wrongful act who apprehends injury to himself.* See *Dulieu -v- White* .[37]
4. *Nervous shock to a person present at a wrongful act who apprehends injury to another person, (a) spouse and children,*[38] *(b) fellow workers.*[39]
5. *Nervous shock to person present at a wrongful act who apprehends damage to property.* See *Attia -v- British Gas.*[18]
6. *Nervous shock to a person present at a wrongful act who witnesses a ghastly spectacle (other than injury to person or the consequences therof).* See *Owens -v- Liverpool Corporation* (40) – where a hearse containing a relative's coffin overturned.
7. *Nervous shock to a person who does not witness the wrongful act but hears of it later or sees its consequences,*

(a) rescuer cases;[41]
(b) mother after caesarean. See Kralj -v- McGrath;[32]
(c) mother going to scene of an accident and seeing injured son;[42]
(d) mother/wife not at the scene, but seeing the consequences at a hospital. See McLoughlin -v- O'Brian;[1]
(e) mother who heard from her husband that two of her children had been killed in a crash;[43]
(f) wife who heard in hospital of her husband's death. See *Schneider -v- Eisovitch.*[12]

THE FUTURE?

In the light of modern case law, the drawing of an arbitrary line between grief and nervous shock which denies the recovery of damages for grief, anxiety and emotional distress but permits recovery for nervous shock, seems to be totally unreal. We are told that this is a distinction embedded in the common law. If it ever was embedded (and the paucity of authority would appear to cast doubt on that), it is clear that such a principle does not for practical purposes exist in contract and in tort there are a number of specific instances where it does not appear to apply. Although *McLoughlin -v- O'Brian* has yet to be expressly approved by the Supreme Court, the principle that one can recover damages for nervous shock is firmly established in Irish law and it would be unlikely that the

Supreme Court would want to fix boundaries where the House of Lords refrained from so doing.

Nevertheless, one can foresee major problems that will arise in this area in the future. Take for example, the situation that arose in *McLoughlin -v- O'Brian*. There, the negligent driver, who struck the car driven by the Plaintiff's son and containing members of the Plaintiff's family, was held to owe a duty of care not to cause nervous shock to the Plaintiff. The Defendants were entirely to blame for that accident. What if the Plaintiff's son was partly to blame? Presumably, he would be joined as a Third Party to his mother's action and would have to contribute towards the damages payable. What if he was entirely to blame for the accident? It would seem to follow logically that the mother would be entitled to recover the same damages for nervous shock from her own son. Is she to be denied recovery because she is the wrongdoer's mother rather than say, a rescuer? Taking the matter one step further, what if the Plaintiff's son was travelling alone – surely this could not affect the Plaintiff's position? Indeed, is not one's own mother more closely and directly affected by one's acts (to use the words of Lord Atkin) than the mother of the driver/passenger of another car? Thus, on the basis of *McLoughlin -v- O'Brian*, it would seem that a mother could sue her son for nervous shock which she suffers when she visits him in hospital and sees the horrific injuries he sustained in an accident caused by his own negligence. If nervous shock is foreseeable say, to one's mother or wife in such circumstances, surely economic loss (say where the driver is the breadwinner) is equally foreseeable? If a wife can sue her husband for nervous shock arising out of an accident which was his fault, why can she not sue for economic loss which she suffers when he drives so negligently that he permanently disables or kills himself? This is an area where the number of claims is potentially great. For example, can the pilots of aerobatic aircraft performing head to head flypasts at air shows not foresee that if they misjudge matters and collide, the spectators (of which there might be a large number) may suffer nervous shock? It is not for me to answer these questions. However, history has shown that every time the Courts attempted to draw the line, subsequently it had to be abandoned. Perhaps the best approach is to be found in the immortal words of Lord Scarman in *McLoughlin -v- O'Brian*: –

> "The distinguishing feature of the common law is this judicial development and formulation of principle. Policy considerations will have to be weighed; but the objective of the Judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the Court's funct-

" . . . one can foresee major problems that will arise in this area in the future."

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ion is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament. Here lies the true role of the two law making institutions in our Constitution. By concentrating on principle the Judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path. The real risk to the common law is not its movement to cover new situations and new knowledge but lest it should stand still, halted by a conservative judicial approach''.

NOTES

(1) *McLoughlin -v- O'Brian and Others,* House of Lords, [1983] A.C. 410, [1982] 2 All E.R. 298 [1982] 2 W.L.R. 982, [1982] R.T.R. 209, 5 I.L.R. 121, 6 May 1982. The historical development of compensation for nervous shock is chronicled in the speech of Lord Bridge.

(2) For cases where it has received passing mention, see *Kelly -v- McElligott* (Sup Ct) [1951] 85 I.L.T.R. 4; *Plunkett -v- St. Laurence Hospital* [1952] 86 I.L.T.R. 157; *Heaney -v- Malocca* [1958] I.R. 111, 92 I.L.T.R. 117. For a case which is more to the point see *Hogg -v- Keane* [1956] I.R. 155.

(3) See *Anns -v- Merton Borough Council* [1977] 2 All E.R. 492, [1978] AC 728; [1977] 2 W.L.R. 1024; and *Leigh and Sillavan Ltd. -v- Aliakmon Shipping Co. Ltd.*, Court of Appeal (Civil Division), [1985] Q.B. 350, [1985] 2 All E.R. 44, [1985] 2 W.L.R. 289, [1985] 1 Lloyd's Rep. 199, (48 M.L.R. 352), 7 December 1984.

(4) [1932] AC 562 at 580.

(5) See *Rondel -v- Worsley* [1967] 3 All E.R. 993, [1969] 1 A.C. 191. Also *Hosford and Others -v- John Murphy & Sons* [1988] I.L.R.M. 300, excluding claims in respect of non-pecuniary benefits deriving from the parent/child relationship.

(6) *Leigh and Sillavan Ltd. -v- Aliakmon Shipping Co. Ltd.,* Court of Appeal (Civil Division), [1985] Q.B. 350, [1985] 2 All E.R. 44, [1985] 2 W.L.R. 289, [1985] 1 Lloyd's Rep. 199, (48 M.L.R.. 352), 7 December 1984.

(7) See the Judgment of Lord Scarman in *McLoughlin -v- O'Brian* [1982] 2 All E.R. at 310.

(8) [1953] 1 All E.R. 617, 623.

(9) *Brice and Others -v- Brown and others,* Queen's Bench Division, [1984] 1 All E.R. 997, ([1984] C.L.J. 238), 13 July 1983 and *Galt -v- British Railways Board,* Queen's Bench Division, 133 N.L.J. 870, (Transcript: WH Clark), 20 May 1983.

(10) *King -v- Phillips,* Court of Appeal [1953] 1 Q.B. 429. [1953] 1 All E.R. 617, [1953] 2 W.L.R. 526, 5 I.L.R. 70, 16 February 1953 and *Smith -v- Leech Brain & Co.* [1961] 3 All E.R. 1159.

(11) [1987] I.L.R.M. 202, [1986] I.R. 642.

(12) This does not appear to be entirely correct. See *Schneider -v- Eisovitch* [1960] 2 Q.B. 430, [1960] 2 W.L.R. 169 and [1960] 1 All E.R. 169, where a wife who was involved in a road traffic accident with her husband but was rendered unconscious in the accident was told in hospital (after she recovered consciousness) of her husband's death. She recovered damages for nervous shock. McGregor on Damages, 14th Edition, paragraph 154, suggests that this decision is based on *re Polemis* and is no longer good law because it was not foreseeable that the Plaintiff would suffer injury by nervous shock. However, this case was approved post Wagon Mound in *Andrews -v- Williams* [1967] V.R. 831, and the unforeseeability argument would appear to be unconvincing in the light of the decision in *McLoughlin -v- O'Brian* fn(l). Supra.

(13) In the claim for damages for nervous shock, Christine Keegan was awarded £50,000 and John Keegan was awarded nothing.

(14) This view is supported by *Wiggs -v- British Railways Board,* Queen's Bench Division, 136 N.L.J. 446, The Times 4 February 1986 (Transcript: Palantype), 31 January, 1986.

(15) See *Behrens and Another -v- Bertram Mills Circus Ltd.,* Queen's Bench Division, [1957] 2 Q.B. 1, [1957] 1 All E.R. 583, [1957] 2. W.L.R. 404, 30 January, 1957 and *Benson -v- Lee* [1972] V.R. 879, 17 Digest (Reissue) 151, and *Kralj and another -v- McGrath and another,* Queen's Bench Division, [1986] 1 All E.R. 54, 27 June, 1985. In *The State (Keegan) -v- Stardust Compensation Tribunal.* Supra, Finlay C.J. said that it appeared to be the law in Ireland that grief even if it gave rise to psychiatric disorder may not give rise to liability for damages.

(16) However, if grief makes recovery from other injuries more prolonged it may be taken into account. *Kralj and another -v- McGrath and another,* Queen's Bench Division, [1986] 1 All E.R. 54, 27 June, 1985.

(17) *Brice and Others -v- Brown and others,* Queen's Bench Division, [1984] 1 All E.R. 997, ([1984] CLJ 238), 13 July, 1983.

(18) *Attia -v- British Gas plc,* Court of Appeal, Civil Division, [1987] 3 All E.R. 455, 2 W.L.R. 1101, 26 June, 1987. Leave to appeal refused. [1988] 1 All E.R., xvi, H.L.

(19) *Diesen -v- Samson* [1971] S.L.T. 49.

(20) *Jarvis -v- Swan Tours* [1973] Q.B. 233.

(21) *Archer -v- Brown,* Queen's Bench Division, [1985] Q.B. 401, [1984] 2 All E.R. 267, [1984] 3 W.L.R. 350, 28 October, 1983.

(22) *Roche -v- Peilow.* [1985]IR 232. See White: Irish Law of Damages p734. See also *Flannery -v- Houlihan HC,* 1987 op. cit. p738.

(23) (1888) 12 App. Cas 222. In *Kelly -v- McElligott* (Sup. Ct. 1951). 85 I.L.T.R. 4, 16. Black J. described this as ''a thoroughly discredited decision''.

(24) (1884) Unrep. cited in 26 L.R. IR. at 428, 36(1) Digest (Reissue) 310.

(25) (1890) 26 L.R. IR 428, 36(1) Digest (Reissue) 310.

(26) *Whitmore -v- Auto Transportes* Julia SA, Queen's Bench Division, unreported, (Transcript: Baxter & McCarthy), 4 May, 1984 Comyn J.

(27) *Brooks -v- Wessex Regional Health Authority,* Queen's Bench Division, unreported, (Transcript: W H Clark), 1 May, 1984 Michael Davies J.

(28) [1982] I.L.R.M. 48.

(29) [1978] ILRM 136, High Court, Kenny J, 18 July, 1978.

(30) *Galt -v- British Railways Board,* Queen's Bench Division, 133 N.L.J. 870, (Transcript: Haswell), 19 May 1983.

(31) *Ibrahim (a minor) -v- Muhammad; Ibrahim and another -v- Muhammad,* Queen's Bench Division, unreported, (Transcript:Marten Walsh Cherer), 21 May 1984.

(32) *Kralj and anotehr -v- McGrath and anotehr,* Queen's Bench Division, [1986] 1 All E.R. 54, 27 June 1985.

(33) McMahon & Binchy, Irish Law of Torts (1981), treats this as a separate tort.

(34) [1899] A.C. 86.

(35) [1919] 2 K.B. 316.

(36) (1860) 5 H. & N. 534 Analysed in McGregor, Damages, 14th Edition, paragraph 146.

(37) [1901] 2 K.B. 669.

(38) *Hambrook -v- Stoke Brothers* [1925] 1 K.B. 141 *Ibrahim (a minor) -v- Muhammed (supra), Stevenson -v- Basham* [1922] N.Z.L.R. 225; *Whitmore -v- Auto Transportes Julia (supra); Boardman -v- Sanderson* [1964] 1 W.L.R. 1317; *Hinz -v- Berry* [1970] 2 Q.B. 40.

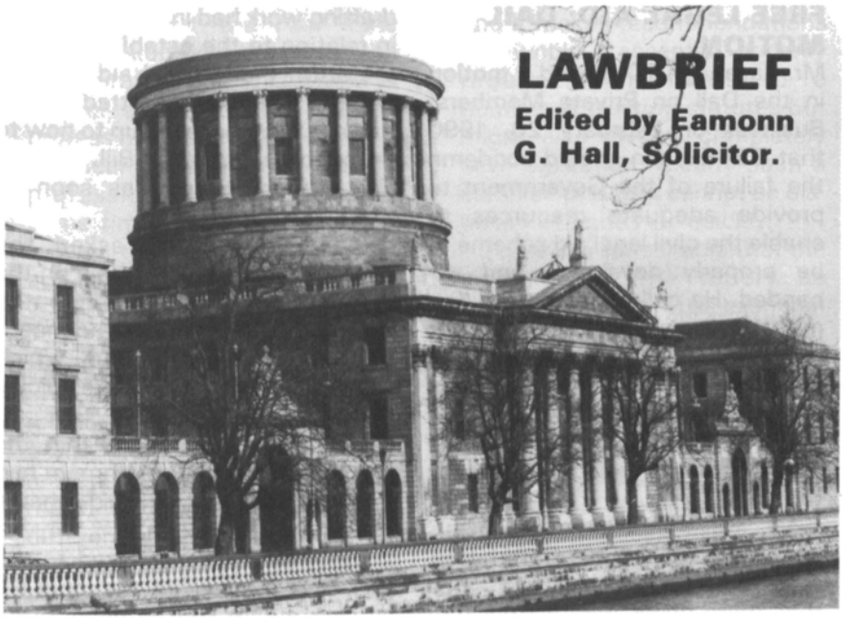
(39) *Galt -v- British Railways (supra).*

(40) [1939] 1 K.B. 394.

(41) *Chadwick -v- British Transport Commission,* Queen's Bench Division [1967] 1 All E.R. 945, [1967] 1 W.L.R. 912, 5 I.L.R. 101, 12 May 1967 and *Wigg -v- British Railways Board,* Queen's Bench Division, 136 N.L.J. 446, The Times 4 February 1986 (Transcript: Palantype), 31 January 1986.

(42) *Benson -v- Lee* [1972] V.R. 897. For a contrary decision see *Chester -v- Waverley Municipal Council* (1939) 62 C.L.R. 1 where a child fell into a trench and his mother in the course of a search came across his dead body. The dissenting judgment of Evatt J. in this case is the one that is generally preferred.

(43) *Abramzik -v- Brenner* (1967) 54 D.L.R. (2d) 639 and 65 D.L.R. (2d) 651.



SOLICITOR'S IMMUNITY WHEN ACTING AS AN ADVOCATE

A recent decision of the UK Court of Appeal, Civil Division, *Somasundaram -v- M. Julius Melchior & Co. (a firm)* [1989] 1 All ER 129 should be of interest to solicitors in this jurisdiction. The plaintiff had brought an action for damages for negligence against his solicitors, alleging, *inter alia*, that he had been over-persuaded by them to change his story in a criminal trial by suggestions that a guilty plea would improve his position in matrimonial proceedings between him and his wife. The Court of Appeal held, *per curiam*, that immunity from suit in respect of advice given to a client as to his plea in criminal proceedings is so intimately connected with the conduct of the cause in court that it is covered by the immunity applying to the conduct of litigation and such immunity extends not only to barristers but also to solicitors when acting as advocates. But it does not apply to solicitors when a barrister has also been engaged to advise, although in practice a solicitor's advice on plea which results in a decision of the court or which is subsequently confirmed by counsel could not give rise to liability on the part of the solicitor.

The Court referred, *inter alia*, to the speech of Lord Reid in *Rondel -v- Worsley* [1967] 3 All ER 933 at 1001, [1969] 1 AC 191 at 232 when he said:

"But the case for immunity of counsel appears to me to be so strong that I would find it difficult . . . . to justify a different rule for solicitors. I have already shown that solicitors have the same absolute privilege as counsel when conducting a case. So my present view is that the public interest does require that a solicitor should not be liable to be sued for negligence in carrying out work in litigation which would have been carried out by counsel if counsel had been engaged in the case".

FINANCE COMPANY BOUND BY ITS UNDERVALUATION OF DEBT DUE

In *Lombard North Central plc -v- Stobart, The Times,* March 2, 1990 the Court of Appeal held that a finance company which understated to the purchaser of a motor car under a conditional sale agreement the amount of the settlement figure, and accepted a payment of that amount, could not thereafter recover the full amount due.

The unequivocal representation by the finance company, believed and acted on by the purchaser, estopped it from enforcing its legal rights under the contract.

The Court of Appeal dismissed an appeal by the company, Lombard North Central plc, from the judgment of Judge Galpin in June 1989 in Southampton County Court in favour of the purchaser, Vincent Stobart.

The facts of the case were that in 1985 the purchaser entered into a conditional sale agreement with the company for a Volkswagen Kamper. The cash price was £7,600 and the total price including interest was £10,946 payable over five years by 60 monthly instalments of £157.00.

The Court stated that the purchaser paid 23 instalments and then wanted money to go on holiday and decided to sell the car. In May 1987 the plaintiff enquired of the company how much he owed. He was told on the telephone that the amount outstanding was £1,044 and had that confirmed in writing. On June 4, 1987 the purchaser sold the car for £5,100 and paid the settlement fee then £1,003 to the company. On June 8, the company realised its mistake: the true amount outstanding was £5,814.

The judge in the lower court had made two important findings: first, that the purchaser had genuinely believed that only £1,044 was outstanding and second, that he would not have sold the car had he known the true settlement figure. Thus, by selling the car when he would not otherwise have done, the purchaser had acted to his detriment.

The Court of Appeal stated it was of the essence of equitable estoppel that a plaintiff was prevented from insisting upon his strict legal rights. In every case it was a question whether it would be inequitable to allow a plaintiff to enforce his legal rights inconsistently with his representation.

The Court of Appeal considered that the question might have been answered either way – but there was no reason to disagree with the way it was answered by the trial judge.

PUPIL INJURED DURING RUGBY MATCH: WAS THE SCHOOL LIABLE?

The issues raised in *Van Oppen -v- Clerk to the Bedford Charity Trustees* [1989] 1 All ER 273 are of interest to parents, school authorities and their legal advisers.

The plaintiff was seriously injured in 1980 when he tackled another pupil in a game of rugby at school. In the previous year, the school had received a report from the school medical officers' associ-

ation recommending that schools take out accident insurance for pupils playing rugby, but at the time of the plaintiff's accident the school had not decided on what sort of insurance was required and how it was to be obtained. The plaintiff brought an action against the school's trustees alleging that the school had been negligent in failing (i) to take reasonable care for the plaintiff's safety on the rugby field, in that the school had failed to coach or instruct the plaintiff in proper tackling techniques, (ii) to insure the plaintiff against accidental injury and (iii) to advise the plaintiff's father of the risk of serious injury in rugby, of the need for personal accident insurance for the plaintiff and of the fact that the school had not arranged such insurance. The plaintiff claimed damages for pain, suffering and loss of amenity, loss of earnings and the cost of future assistance.

The Queen's Bench Division dismissed the plaintiff's claims. The court held that on the facts the school was not negligent in its coaching or teaching of rugby and it was not liable for the plaintiff's injuries since they were the result of an accident rather than negligence on anyone's part. The Court held that there was no general duty arising simply from the relationship between the school and its pupils requiring the school to insure its pupils against accidental injury or to protect the pupil's economic welfare by insuring them because such a duty would be in excess of the school's obligation to educate and care for pupils and would be wider than the duty imposed in a school in its position in *loco parentis*. Similarly, a school was under no duty to advise a parent of the dangers of rugby football or of the need for personal accident insurance, just as a parent was under no duty to insure if he was advised to do so. Furthermore, the plaintiff's school had never assumed legal responsibility for advising on the need for insurance or for insuring its pupils, since it did not hold itself out as having the expertise to advise parents on insurance or to deal with insurance itself, and there was no evidence that the plaintiff's father had relied on the school for such advice.

FREE LEGAL AID: DAIL MOTION

Mr. Kavanagh TD moved a motion in the Dail on Private Members' Business on February 20, 1990 that Dáil Éireann should condemn the failure of the Government to provide adequate resources to enable the civil legal aid scheme to be properly developed and expanded. He called on the Government to enact the relevant legislation to place the civil legal aid scheme on a statutory basis, based on the principle that all those in need of civil legal aid but who cannot afford it would have access to it.

Mr. Kavanagh referred in his speech to the Pringle Committee, and the *Josey Airey* case. He stated that there never was a truly national legal aid service; the service had been strangled at birth. The public service recruitment embargo had a disastrous effect on the operation of the legal aid scheme, according to Mr. Kavanagh, which prevented the Free Legal Aid Board from maintaining even the limited level of service which the Board initially achieved.

The Minister for Social Welfare, on behalf of the Minister for Justice, stated that the Government had made provision to increase the grant-in-aid to the Free Legal Aid Board by some 25 per cent – which should enable the Board to recruit 20 additional staff including seven solicitors and 13 administrative staff.

The Minister stated that the main reason why cases before tribunals are excluded under the scheme was to discourage a growing trend towards "legalism" in tribunals which were originally and deliberately designed to be informal and "non-legal" for settling disputes.

On the use of private practitioners, the Minister stated that he was not totally opposed to the use of private practitioners and there were situations in which it may be possible to make use of private practitioners in the operation of the scheme. Cases involving adjournments of legal aid proceedings and the more efficient use of money and staff resources in servicing the Legal Aid Board's 19 part-time law centres were instanced as examples where the private practitioner could contribute.

A considerable amount of drafting work had in fact been done in relation to the establishment of a statutory civil legal aid scheme but the Minister regretted that it had not been possible up to now to introduce a Legal Aid Bill. Legislation was promised "as soon as possible".

Mr. Flanagan TD asked the Minister to put a time scale on the placing of legislation before the House. He referred to the concept of a small claims court which would deal with cases more quickly and less expensively.

Mr. Shatter TD stated that the record of how the Government had dealt with the civil legal aid scheme was utterly appalling.

Mrs. Fennell TD referred to the fact that the lack of the legal aid service meant that couples often with dreadful emotional marriage problems had no means of escape or relief. Mr. O'Dea TD stated that the motion overlooked the fact that three was another legal aid system in operation – the criminal legal aid scheme – which cost the State £2.5 million in 1989 and would cost £2.75 million in 1990.

Mr. D. Ahern TD stated that one of the major flaws of the scheme was the fact that no provision was made for the taking of test cases on various issues which came up from time to time.

Mr. P. McCartan TD argued that legal aid as an institution and as a right was essential to the fight against poverty in this State. Mr. Rabbitte, TD, saw the civil legal aid scheme as a method of formulating an attack on poverty. Mr. Sherlock TD argued that every person should have the opportunity to assert his or her right.

Mr. Power TD, Mr. Spring TD, and Mr. Kemmy TD also spoke.

The Government's amendment which noted, *inter alia*, the increase in the grant-in-aid to the Civil Legal Aid Scheme, was carried.

FAIR TRADE COMMISSION: REPORT ON LEGAL SERVICES

The following comments made by Mr. D. O'Malley, Minister for Industry & Commerce, at the Annual Dinner of the Limerick Bar Association, 9th March, 1990, will be of interest to members of the profession.

"I have very recently received the report of the Fair Trade Commission on its study of the legal profession. This study is one of a number into various professions. The reports on the engineering and accountancy professions were published some time ago and I expect to receive the report on surveyors and auctioneers within the next couple of months.

It is usual with these reports that their publication is deferred until firm decisions are made in relation to their recommendations. There are a number of reasons for dealing with the report on the legal profession differently.

While the study has been in progress, and particularly more recently, there has been some public comment on what it might and should contain. Some of these comments were factually inaccurate and speculative.

There appears to be a misunderstanding in some quarters that the situation in relation to the legal profession is the same in Ireland as in the United Kingdom. The degree of controversy which surrounds the proposals for reform of the legal profession in the United Kingdom may be the basis for the ill-informed comment and speculation but it does not excuse it.

There are significant differences between the situation in the United Kingdom and Ireland. I need mention only two here to illustrate the point. In Ireland, since 1971, solicitors have a right of audience in all courts whereas in the UK this is not the case. In the UK barristers organise themselves in chambers and in Ireland this type of organisation does not operate.

I feel that the early publication of the report would go some way towards ensuring that debate and comment on the subject is at least based on the facts.

It would, incidentally, help focus the public relations campaigns of certain interest groups on what the Fair Trade Commission has actually recommended rather than on what it might be about to recommend.

The Fair Trade Commission Report is a lengthy one – running to almost 700 pages – and it makes recommendations that would, if accepted, not only require amendments to a number of existing statutes but might also involve completely new legislation. Clearly such a complex of issues cannot be disposed of lightly or quickly.

I consider it desirable that the contents of the report be publicly available while examination of the report proceeds. It may well be that the responses to the report will assist the process of examination and improve the quality of decisions that will eventually be taken by me and the government.

I will, as is usual in such cases, be presenting the report to government before it is published."

AN tOIREACHTAS
List of Measures enacted by the Oireachtas during the year 1989

Title of Act	Number
Garda Síochána Act, 1989	1 of '89
Landlord and Tenant (Amendment) Act, 1989	2 of '89
Insurance Act, 1989	3 of '89
Social Welfare Act, 1989	4 of '89
Jurisdiction of Courts (Maritime Conventions) Act, 1989	5 of '89
Judical Separation and Family Law Reform Act, 1989	6 of '89
Safety, Health and Welfare at Work Act, 1989	7 of '89
Electoral (Amendment) Act, 1989	8 of '89
Bord na gCapall (Dissolution) Act, 1989	9 of '89
Finance Act, 1989	10 of '89
An Blascaod Mór National Historic Park Act, 1989	11 of '89
Social Welfare (No. 2) Act, 1989	12 of '89
Shannon Free Airport Development Company Limited (Amendment) Act, 1989	13 of '89
University of Limerick Act, 1989	14 of '89
Dublin City University Act, 1989	15 of '89
Central Bank Act, 1989	16 of '89
Building Societies Act, 1989	17 of '89
Children Act, 1989	18 of '89
Prohibition of Incitement to Hatred Act 1989	19 of '89
Údaraś na Gaeltachta (Amendment) Act, 1989	20 of '89
Local Government Provisional Order Confirmation Act, 1989	**1 (Private) of '89**
Trustee Savings Banks Act, 1989	21 of '89
Video Recordings Act, 1989	22 of '89
Appropriation Act, 1989	23 of '89

In the matter of John J. O'Reilly, a solicitor carrying on practice under the style of T. J. Fitzpatrick & Co. and under the style of Duffy Black & Co. and in the matter of the Solicitors' Acts 1954 and 1960.

TAKE NOTICE that by Order of the President of the High Court made the 12th day of March 1990, it was ordered pursuant to the provision of 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 John J. O'Reilly or the firm T. J. Fitzpatrick & Co., 7 Farnham Street, Cavan, or the firm Duffy Black & Co. at The Diamond, Clones, Co. Monaghan and by further Order of the President of the High Court made the 15th day of March, 1990, it was ordered that the current Practising Certificates of the said John J. O'Reilly be suspended.

Signed: James J. Ivers,
Registrar of Solicitors.

ASSOCIATION OF PENSION LAWYERS

REPUBLIC OF IRELAND

REGIONAL GROUP INAUGURAL MEETING

Thursday 17th May 1990

Further details available from:
Raymond Kelly (Tel. 720288)
Michael Lane (Tel. 717077)
Joan Flanagan (Tel. 767591)

James Nash F.S.S. Dip.

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Thomas G. Baldwin

Members and friends of the 18th Professional Course relaxing on the steps of The Cathedral of the Assumption in the Kremlin, Moscow, during their recent trip to the USSR in November, 1989.

Justin McKenna, Solicitor (left) speaker at the seminar on Buying and Selling Property, with Ms. Angela Canavan of the ILAC library staff.

Matthew Hassett, Solicitor, Principal of the firm of James O'Brien & Co., Castle Street, Nenagh, Co. Tipperary, making a Presentation on behalf of the office staff to James Cleary (right) to mark sixty years' continuous service as a Solicitor's Assistant with the firm.

Coyle Hamilton All Ireland Law Students Tournament, 1990, (left) Dermot Cahill (Gerard O'Keefe & Co.) and Joseph Kelly (A.&L. Goodbody), who represented SADSI at the recent Debate. The motion was "That this House believes that in Defamation Proceedings Finance is Prejudicial to Justice." The SADSI Team won the Debate.

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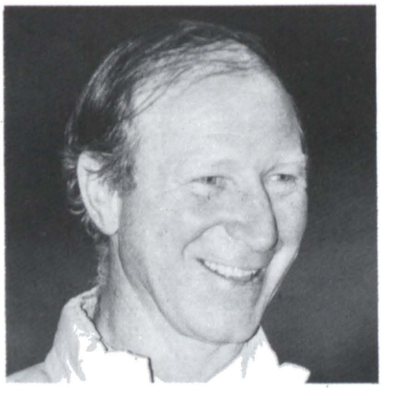
ANNUAL CONFERENCE

3-6 MAY, 1990

HOTEL EUROPE, KILLARNEY

Speakers:

MR. EAMONN BARNES
Director of Public Prosecutions.



MR. JACK CHARLTON,
Manager, Republic of Ireland Soccer Team.

MR. BRIAN COYLE,
FRICS, FIAVI, FSVA.
Senior Director, James Adams & Sons.

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Practice Notes

Barristers' professional indemnity insurance

As and from 1st May 1990 all members of the Law Library will be required to have Professional Indemnity Insurance for a minimum prescribed amount, initially to be a minimum of £100,000

The Code of Conduct for the Bar of Ireland has been amended accordingly, by the insertion of a new paragraph (numbered 2.13) as follows:

"Every practising barrister is obliged to have professional indemnity insurance for a minimum amount, which amount shall be prescribed from time to time by the Bar Council. It shall be professional misconduct for any barrister who is not so insured to advise on the law, draft legal documents or pleadings, or act as an advocate, for a fee.

The scheme for professional insurance arranged by the Bar Council shall not be available for those who are not members of the Law Library. Those who are not members of the Law Library and who intend to practise must satisfy the Bar Council that they have appropriate insurance in force".

*With reference to the second paragraph, virtually all practising barristers, whether Dublin-based or on Circuit, are members of the Law Library and therefore will be part of this new compulsory insurance scheme. All barristers listed in the Society's 1990 Law Directory are (as of November 1989) members of the Law Library. □

VALUE ADDED TAX
STATEMENT OF PRACTICE (VAT/1/90)
4th SCHEDULE AND OTHER SERVICES RECEIVED FROM ABROAD

1. The Revenue Commissioners have prepared an explanatory leaflet in regard to the VAT liability of recipients of certain services received from abroad. The leaflet describes the tax liability of persons in respect of such services and outlines the requirements with regard to registration and payment of tax. Copies of the leaflet and further information are available from -

The Office of the Revenue Commissioners (VAT Branch)
Castle House,
South Great George's Street,
Dublin 2,
(Tel. 01-792777 Extns. 2440, 2441, 2442, 2443)

or from any local Tax Office.

2. Any person who incurs a VAT liability in respect of services received from abroad and who fails to notify the local Tax Office of the liability or who fails to comply with the obligations in regard to registration and payment of tax will be subject to the pursuit of the tax due with any attendant interest and penalties under the statutory powers which are at the disposal of the Revenue Commissioners. Any person who has not discharged a liability in respect of the payment of VAT on services received from abroad in the past should contact the local tax office with a view to regularising the position. The Revenue Commissioners will deal constructively with such cases.

March, 1990. Dublin Castle, Dublin 2.

If any problems arise in relation to the above please contact the Secretary of the Taxation Committee, Ms. Eileen Brazil. One instance would be Irish solicitors, involved in extracting an English Grant of Probate, would pay the English solicitors costs, say £200 – net of VAT. The Irish solicitors should bill his client for that £200 together with Irish VAT at 23%, total £246.00.

□

INHERITANCE TAX
Policies issued under Section 60 F.A. 1985. As amended by Secion 84 F.A. 1989.

WARNING

Proceeds of policies of life assurance issued under the above sections are exempt from inheritance tax when they are payable in connection with the death of the life assured.

From on and after the 30th May, 1985, it became the practice to issue two contingent policies in the case of a husband and wife, each life insured to survive the other. Since the 24th May, 1989, the same cover was available under a joint life and life of survivor policy, whereby the proceeds became payable on the death of the survivor, who was then deemed to be the disponer of the proceeds.

The *standard Will*, and that recommended by the Law Society, in the case of a husband and wife contains a fixed period (28 days/30 days) survivorship clause. In the event of that clause becoming effective by the surviving spouse dying within the period, the exemption benefit of a Section 60 Policy is lost because the claims for tax will arise under the Will of the first spouse to die, as disponer, while the proceeds are payable on the death of the survivor, the deemed insured and disponer in respect of those proceeds – the exempting connection is broken.

For example:- H & W by their identical Wills leave everything to each other provided the other survives 30 days with a giftover to their only child, C absolutely. They put in place a joint (or contingent) policy under the provisions of Section 60 F.A. 1985 as amended to cover the tax exposure on the death of the survivor. They are involved in a car accident. H dies on the 28th day of February and W dies on the 28th day of March.

H's estate = £350,000
W's estate = Nil
Policy Cover = £74,000

By reason of the death within 30 days, the provisions of *H's* Will take effect and the proceeds became payable on W's death and pass under *her* Will. There is, accordingly, no exemption.

Inherits:-
from H £350,000 Tax £74,000
from W £74,000 Tax £40,700
C has lost £40,700 by reason of the events.

(Contd. on p.66)

Psychological Trauma

It is a truism to say that there is not much empathy or understanding for the invisible problems of mental distress and emotional turmoil experienced by some individuals following road traffic accidents and other personal injuries. In Irish society stigma, taboo and a conspiracy of silence have always been closely associated with "mental conditions". To be labelled as having one is seen by many as an epitaph. Consequently, it is not uncommon even in the face of genuine concern and offers of help for individuals to deny any problems, even to the point of becoming hostile, when questioned about their feelings and or behaviour.

By
Dr. Michael Corry
Consultant Psychiatrist

I contend that psychiatric sequelae are a silent epidemic and cause immeasurable suffering for the individual and families concerned. In spite of this underground activity, observers are uniformly agreed that psychiatric disturbance are a permanent cause of incapacity for work, and together with cognitive impairments, far outstrip physical sequelae as obstacles in rehabilitation and of reintegration into society.

The organic orientations of most medical professionals persist and most accident victims are informally divided into two groups, namely those with legitimate injuries and those with problems which are out of proportion to the tissue damage or else are "all in the mind". Historically it was with the latter group, particularly when compensation was an added variable, that the pejorative and cynical terms emerged such as "traumatic hysteria", "compensationitis", "unconscious malingering", "neurotic neurosis", and "Greek disease". Even the term "compensation neurosis" while used in some quarters of psychological medicine to describe particular dynamics of the unconscious is now best abandoned as it too has degenerated into pejorative and disparaging terminology.

" . . . psychiatric sequelae . . . far outstrip physical sequelae as obstacles in rehabilitation and of reintegration into society."

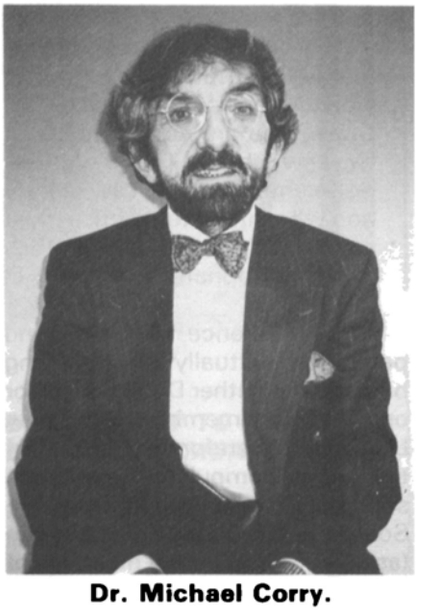
The impact of a personal injury can call into question every aspect of an individual's life. The loss of bodily and personal integrity, not to mention the threat of mutilation and death, violently dislodges the individual from habitual attitudes and patterns of behaviour. The individual is forced to face a series of personal and social convulsions which may turn them into grotesque caricatures of themselves.

Many victims of personal injuries experience grief for what they have lost. They grieve for the loss of health, mobility, control, confidence, self-esteem, automatic behaviour, emotional control, memory, intellectual functioning, family life, social life and their place in the world of work. Rage, bitterness, anxiety, alienation, despair, hopelessness and depression are common experiences. The more seriously disabled may have to come to terms with permanent paralysis, intellectual impairment, disfigurement, sexual dysfunction and other complications.

Where individuals escape physically unscathed from a life threatening accident, intense emotional reactions can be aroused. In these situations the very core of the individual is threatened with extinction and primal instinctive processes such as fear, rage and hostility can surface. Because the feelings can be so intense, they give the perception that the personality will be overwhelmed. In the fear of total disintegration of the "self" the individual attempts to "bottle it up". And they get caught between the fear of expression and the difficulty of repression. The strain involved in this balancing act is expressed as hyper-arousal, emotional blunting or numbing, poor concentration, irritability, emotional lability, intrusive disturbing thoughts, flashbacks, nightmares, avoidance reactions, social withdrawal and depression. In essence the process of "bottling it up" is a primitive instinctive survival strategy known as "freezing" or "playing dead". The other two options being "fight" or "flight". While the external threat has long gone, it remains vividly on the internal screen of perception and fails to be "worked through", out of "sight" int' ngterm memory. This traumatic ess response is known as "post traumatic stress disorder" and is paradoxically an unexperienced experience.

"Where individuals escape physically unscathed from a life threatening accident, intense emotional reactions can be aroused."

Those that experience primarily physical disabilities may after running the hospital gauntlet of traction, plaster casts, naso gastric tubes, intravenous fluids, parallel



Dr. Michael Corry.

bars, walking frames, face a long rehabilitation and recovery phase. Many experience irritability, high levels of anxiety, frustration and depression. For the brain-damaged individual, absorbing and retaining new information, remembering names, faces, appointments and having to put the effort into making laborious lists, checking and re-checking, anticipating problems, rehearsing situations, can lead to an enormous strain, triggering off explosive reactions. The families and friends of those with personality changes as a result of frontal lobe damage may have to adapt and accept at best the coarsening of a previously sophisticated personality, at worst, extreme, gross and disabling alterations.

It is now widely recognised that after minor head injuries, almost all patients complain for a time of headaches, dizziness and some reduction in mental capacity and that these symptoms are based on subtle microscopic changes in brain tissue. Concussion used to imply that there was no structural damage only transient functional disorders. Middle ear dysfunction is not uncommonly associated and explains more readily the phenomenon of dizziness, vertigo and where high frequency hearing loss is also established, undue sensitivity to noise. With respect to closed head injuries, as a result of the phenomenon of contre-coup, the brain is literally knocked about, twisted and stretched within the skull. Like a ship in a storm contained in a small harbour, the brain in pulled and dragged along the floor of the skull and knocked against various parts of its walls.

What the various phenomena of post traumatic injury reveal is that the human being is an indivisible integrated coherent bio-psycho-social organisation which is intimately connected to and dependent on the organisation of the external environment in which it dwells. Having said that, in the context of medico-legal proceedings, there is a need for precise and to some extent, absolute views. In this context the issue of "predisposition" amongst others is hotly contested. In this instance an individual is seen to have been, or not to have been, "a normally constituted individual," with or without various pre-dispositions to emotional or mental instability prior to the unfortunate accident. To assume that there is a "normally" constituted individual who is different from one of "neurotic or insecure" constitution may be necessary in legal work, but it does not conform to a wholistic framework of human behaviour. I feel it is easier, safer and indeed more acceptable to assume that psychopathology and normality are a matter of degree, not kind. That normality/sanity is a relative, rather than an absolute state and that the predisposition to an emotional or mental disorder is on a continuum that is extremely difficult to evaluate. To exclude vulnerability as a predisposing factor is erroneous as it introduces the notion of "superman" living in an "ideal" world.

Malingering is a conscious simulation of illness in order to achieve some gain or purpose. It was a term used to describe the behaviour of soldiers in the 18th centruy who concocted medical complaints to escape the misery and horrors of war. Abuses surely occur, malingering and other types of fraudulent exaggeration and prolongation of symptoms are possible. However in psychiatry a diagnosis of malingering is rare and it is usually more likely found if at all, in other branches of medicine. Given the negative connotations, stigma, and culture of silence associated with mental distress, it is more likely that Psychiatrists encounter not so infrequently individuals who sham health in an effort to deny its existence to both self and others.

Few would dispute the necessity for new machinery to meet the needs of the multidisabled following personal injuries. Too many individuals are left floundering after they leave the hospital milieu with no adequate aftercare, continual assessment, compensationary educational programmes, adequate rehabilitation and vocational training opportunities, remedial equipment, designed living environments for unique disabilities, financial support, counselling and easy access to specialist requirements. Coping and living with permanent disablement is a lifelong process and not a single event.

Even within the existing structures multi-disciplinary communication, co-operation and demystification can ease frustrations, save time and prevent individuals from getting lost through the "safety net". Involvement of the General Practitioner and ancillary community supports at an early stage is crucial and can be facilitated by case conferences in the primary care centres.

With respect to medico-legal cases, unnecessary suffering could be prevented with a shorter time-span between injury and settlement. This could be facilitated if more thought was given to the easy access and availability of medical data, streamlining appointments between the various parties and a spirit of co-operation and goodwill.

One of the most essential developments, particularly where liability is not an issue, should be the immediate availability of monies to those who have lost their earning capacity. It is tragic to see individuals in needless financial hardship which not only compounds their difficulties but creates new ones, where family and other commitments are involved.

"The costs of specific rehabilitation and vocational programmes should also be met in order to facilitate early recovery and use time constructively."

The costs of specific rehabilitation and vocational programmes should also be met in order to facilitate early recovery and use time constructively. In this crucial area, Insurance Companies could do a lot more and in the longterm cut their own costs.

□

ISLE OF MAN & TURKS
& CAICOS ISLANDS

MESSRS SAMUEL Mc CLEERY

Solicitors, Attorneys-at-Law of the Turks and Caicos Islands, Registered Legal practioners in the Isle of Man of 1 Castle Street,Castletown, Isle of Man, will be pleased to accept instructions by their senior resident partner , Mr. Samuel McCleery from Irish Solicitors in the formation of resident and non-resident I.O.M. Companies and exempt Turks and Caicos Island Companies.
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PRACTICE NOTES

(contd. from p.63)

This problem dates back to the 30th May, 1985 and strong representations will be made to the Government and the Revenue Commissioners for amending legislation back-dated to the 30th May, 1985. In the meantime, solicitors should take account of the dangers in all future Wills and policies.

With regard to past Wills and *Policies*, solicitors should rectify the position by correcting the *Wills* in case the representations do not bear fruit. □

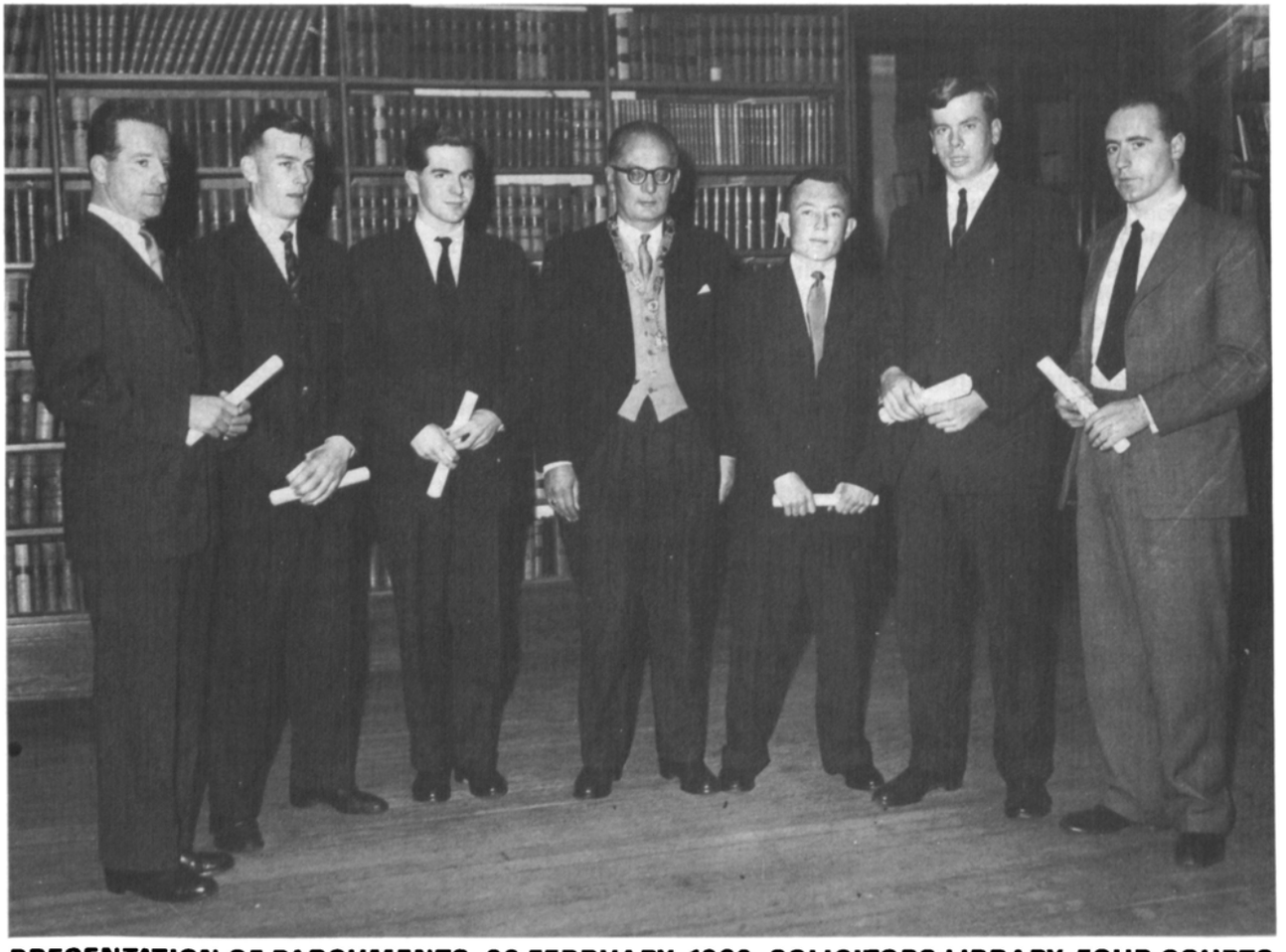
THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT, 1989

The Sections of this Act which appear to affect the Conveyancer are contained in Sections 15, 16, 17, 18, 19, 20, 22 and especially 29.

By virtue of Section 29 of the above Act which came into operation on 19th October last, the Court may review any transaction effected by a spouse with the intent of decreasing the amount of assets available to the other spouse on an Application under the Act. Under this provision a Conveyance or Transfer of property could be set aside. The Act provides, however, that no such Order would be made in respect of a disposition to a *bona fide* purchaser for Valuable Consideration without Notice. It is well established that to be a *bona fide* purchaser without Notice enquiries should be made. The Conveyancing Committee are presently considering the extent of enquiries required and it is hoped to issue detailed recommendations at an early date. As an interim measure it is recommended that the following additional requisitions be raised on all purchases.

"Have any orders been made (or are any proceedings threatened or pending) under the Judicial Separation and Family Law Reform Act 1989 affecting the property for sale or does this sale constitute a disposal for the purposes of defeating a claim for financial relief under section 29 of the Act."

The Standard Form of Family Home Protection Act Declaration or Certificate should contain an averment in the following words "The property is not subject to any application or order under the Judicial Separation and Family Law Reform Act, 1989 and is not a disposal for the purposes of defeating a claim for financial relief under S.29 of the Act". □



PRESENTATION OF PARCHMENTS, 22 FEBRUARY, 1960, SOLICITORS LIBRARY, FOUR COURTS. (Left to right): James O'Connor, Gary McMahon, John Fish, John J. Nash (deceased), Barry O'Connell, Donal Stuart, Paddy Madigan.

In the Jan/Feb 1990 Gazette, Mr. Thomas F. O'Connell (otherwise known as Barry O'Connell) was described incorrectly in the above photograph as being Mr. Barry O'Reilly, deceased. The Gazette apologises for the above error and any inconvenience caused.

Law Society Annual General Meeting

EDUCATION MAJOR TOPIC AT AGM

The future of education of entrants to the Profession was a major topic at the Annual General Meeting of the Incorporated Law Society of Ireland held at Blackhall Place, Dublin, on November 15th, 1989, under the chairmanship of the President, Mr. Maurice R. Curran.

After the formal business had been accepted the President invited comment on the Report of the Council.

Mr. Raymond Monahan said that he had been asked for a full debate on the Law School and the general issue of Education. Fundamental decisions, which represented a complete overhaul of the system operated by the Law School since 1978 were needed, said Mr. Monahan, and there was no doubt that the consequences would be felt by the Profession for many years to come.

Having reviewed the establishment of the Law School and subsequent four High Court decisions, he said that since 1986 the Education Committee had been effectively controlled by the Courts and the Committee had no choice but to ease such controls as existed. The Committee could previously justify the results of this system, which year after year gave an approximate 150 students as being sufficient to satisfy the requirements of both the profession, the aspiring students and the public.

> ''Today we have 400 students attempting to gain access into our Law School and pressure on the system is inevitable''.

This pressure, commencing with the Court cases which proved that the system was vulnerable, was continued through the Press, where the Committee and the Society had been subjected to an unprecedented campaign. Politicians not only questioned the system as it operated but the right of the Law Society to retain any control over its own education. The Committee had already put into train a detailed reappraisal and the question at issue was the extent of change and the method of dealing with the circumstances existing.

Side by side with this development the President had inaugurated a series of meetings with the universities where the depth of feeling against the Law Society's system was plain and the disadvantages of it pointed out. It became clear that the only possible Examination exemption would be one to apply to all law graduates from recognised Universities in Ireland provided they had covered the six core subjects required in the Society's Examination.

The Society now had a clear-cut, open and progressive system in which discretion is removed from the Committee and in which compensation rules are a thing of the past. The rules are clear, easily applied and enforced and can be readily defended.

Standards Control

To maintain control over standards the Society had been instrumental in establishing a Council for Legal Education involving representatives from all the faculties of the universities which is to oversee the alignment of subjects within the courses offered in the universities and examined in the Society, and to monitor and align the examination to ensure that a proper standard is maintained. The Society decides on what basis and in what circumstances its exemptions will apply and in this way controls standards.

The Education Committee intends inviting a representative from the Ombudsman's Office to attend its meetings and, in particular, the Declaration of Results Meeting. In this way, the Society's system will be above reproach, acceptable to the profession and students alike and can be recommended to both Government and Dail Eireann, particularly with a view to the Solicitors' Bill which may well be published in 1990. In this respect the Society has been in correspondence with the Minister for Justice who pointed out that it was inevitable that there would be pressure for changes in the entry requirements when the proposed Solicitors' Bill is introduced in the Oireachtas unless steps are taken before then to meet reasonable demands for reform and he requested that the Society's proposals for change be made known before the Solicitors' Bill came before the Dail.

To cater for the resultant influx of entrants to the Law School, the Committee has reorganised the professional course so that four separate courses will be commenced in 1990 with 95 students in each and will run a further three courses in 1991 in similar fashion. It is anticipated that the present influx of 450 students will gradually decrease to between 250 and 270 per annum in future years. This is a 30% increase having regard to the numbers coming into the Law School under the old system in 1988.

Mr. Monahan concluded the report of the Education Committee by requesting the co-operation of the profession in the case of consultants and tutors in the Law School and in the provision of apprenticeship by Masters throughout the country.

Commenting on the Education Committee's report Mr. Quentin Crivon asked if the Society was in dereliction of its duty if it was merely educating solicitors for unemployment. Between 1983 and 1987 young solicitors were forced to emigrate. The heavy competition which obtained today would reduce standards and the profession would become merely a money-making exercise. He asked if the Society had yielded to pressure and if there was any reason as to why the solicitors' profession had been singled out for such treatment. No other profession was under the same pressure. Certainly the Bar was not under pressure. He was very unhappy over the loss of control over standards.

Mr. Laurence Shields agreed that the Council of the Society had to yield to pressure. It had, however, shown determination to keep control of the quality of training and still had that under control. A lot of what had been done was unacceptable to a large number of solicitors, according to Mr. Barry Galvin, who said that the issue of the re-organisation of the training system had been debated at a recent meeting of the Southern

Law Association and in his view – and the view of others – it was nonsense to say that the Society maintained control. If an intending solicitor got a Law degree he got into the profession. From this it could be said that the Universities had absolute control.

He was not satisfied with the quality of many recently qualified solicitors. Mr. Galvin added that there was a general feeling that a number of decisions were being made without adequate consultation and rushed through the Council.

He did not accept that it was not the business of the Profession and the Council of the Law Society to protect the well-being of solicitors and of family practice. Mr. Rory O'Donnell agreed with Mr. Galvin that the Council had lost control. There was agreement also from Mr. Frank O'Donnell who said that he felt that unwittingly those present at the AGM may have got the impression that the Education issue was fully debated at both the July and October Council meetings. This was not the case. The matter first came up before the Education Committee on the morning of the Council meeting in October. He did not agree that the radical new policy of the Law Society, as stated by the President, was generally well received.

Pressure on the Law School

The Education Committee had come under very great pressure and the decisions it made were made in good faith, said Mr. Michael Greene. He was not worried about the numbers seeking jobs; as far as he was concerned, the best ones survive. What really worried him was the pending situation in the Law School. How would it cope with the numbers? At the moment it was producing very high quality apprentices and he wondered if that quality would be affected. There should have been soundings from the people who were giving their time to training. Remuneration was not the issue, it was the time out of the office. He personally would find it impossible to double his commitment. How many not involved in teaching would come forward to meet the new demands?

Automatic right of entry to the Law School was not an automatic right of exit into the profession, remarked Mr. Adrian Bourke.

Mr. John Buckley, who added his support to the views expressed by Mr. O'Donnell and Mr. Greene, said that the problem of the future was widening the automatic right of entry to all graduates. This would create an impossible situation in the finding of Masters for Apprentices – by 1991 there would be up to 1,000 apprentices.

As a member of the Education Advisory Committee, he had known how lucky the Society was to find Masters for Apprentices in recent years. One problem which the Society would now face was that of giving entry to people who had failed spectacularly in the examination since 1982. He expressed concern that the Society had opened the door too wide.

U.S./Australian Solution

The President said that some firms were good on apprenticeships, whereas others did not take any. At the moment the Society had less than 500 apprentices in the system and there were 1,400/1,600 firms. It was the ethos of a Profession that it trained its own members. If the Society could not do this, then it would have to face the possibility of the abolition of apprenticeship and accept a system such as that which obtained in Australia and in the U.S.A. where solicitors on entry to the Profession from College were given a limited Practising Certificate.

Mr. Donal Binchy said that he had opposed the decision, but the decision had been taken. In the future it might be open to the Council to change its position if the Universities did not co-operate.

Replying to the discussion the Chairman of the Education Committee, Mr. Ray Monahan, said that the Profession was losing control over numbers, but it was not losing control over standards. It was proposed to introduce a complete new system of assessment. With more coming in for training, there would be more resources which would have to be used to produce the best possible system. The Committee was under obligation to have a system of control of standards and to ensure that those going out into the Profession had achieved a satisfactory standard. With the implementation of the E.C. Directive in the next 18 months, there would be competition from both increased numbers of new solicitors and from lawyers in other areas. He agreed with speakers who had emphasised that the whole system of training was dependent on solicitors participating. Up to 400 were already helping as both tutors and consultants, but certainly for the next two years the training system would have a serious problem and the Education Committee would be dependent on the support of the Profession.

Council's Strong Support

The President commented that, notwithstanding what had been said from the floor, he had to make it clear that there was a very large majority in the Council in favour of the change in the Education system.

COMPENSATION FUND

Mr. Laurence Shields, dealing with the Compensation Fund, said that the outlook was bleak in view of the number of claims which the Society had received in the year in question and the number of further claims which had been received during the current year. One issue which the Society would have to consider was the question of undertakings being given by a solicitor in respect of himself as a client. The Compensation Fund Committee was considering a proposal to employ a solicitor to push the matter of obtaining injunctions to prevent solicitors from practising where they were in arrears with their Accountants' Certificates.

AUDITED ACCOUNTS

Introducing the accounts, Mr. F. Daly, Chairman, Finance Committee, indicated that they were as presented in the Annual Report. In response to Mr. Galvin, he indicated that, to date, £59,000 had been spent in legal fees in respect of actions taken by Law Students against the Society. A final figure was not available in that one case was still before the Supreme Court. Adoption of the accounts was proposed by Mr. A. Ensor, seconded by Mr. B. McMahon, and approved unanimously.

ELECTION OF AUDITORS

The meeting accepted the proposition, by Mr. F. Daly, seconded by

Mr. L. K. Shields, that Messrs. Coopers & Lybrand be re-elected as Auditors for the coming year.

OTHER BUSINESS

Advertising: Mr. Desmond Moran referred to recent advertisements in a national newspaper claiming experience in particular areas. The matter is to be taken up with the Professional Purposes Committee.

Premises: To date £1.6 million has been spent on the acquisition and refurbishment of the Blackhall Place premises said Mr. Frank Daly, Chairman, Finance Committee.

Litigation: Mr. Galvin said he did not want any alteration in the present system of litigation without consultation. Mr. Ernest Margetson clarified the situation regarding meeting between the Bar, the Federation of Insurers and the Society; no proposals had been put forward to the Department of Justice. He added that litigation solicitors in the area of the Southern Law Association had a representative on the Litigation Committee.

Mr. Paul Guinness suggested to the incoming Council that it might consider the problem faced by solicitors in their later years due to the increasing complexity of the work of the profession. He suggested that the idea of interviewing solicitors qualified prior to, say, 1945 should be considered.

Mr. Crivon asked if in regard to the loss of documents, the matter had been reported to the Garda Siochana, contrary to press reports. The President confirmed that the matter had been reported.

ELECTION RESULTS

Mr. Ernest J. Margetson was deemed to have been elected.

The following candidates were declared elected, by the number of votes appearing after their names.

	Deemed Elected
1. Margetson, Ernest J.	
2. Quinlan, Moya	1163
3. Shaw, Thomas D.	1127
4. O'Donnell, Rory	1097
5. Ensor, Anthony H.	1094
6. Binchy, Donal G.	1064
7. Neary, Anne	1044
8. O'Donnell, P. Frank	984
9. Clarke, Geraldine M.	958
10. O'Connor, Patrick	950
11. Bourke, Adrian P.	948
12. O'Mahony, Michael V.	941
13. McMahon, Brian M.	926
14. Collins, Anthony E.	909
15. Irvine, Michael G.	896
16. Monahan, Raymond T.	884
17. Binchy, Owen M.	884
18. Lynch, Elma	858
19. Daly, Francis D.	855
20. Shields, Laurence K.	843
21. Curran, Maurice R.	830
22. Daly, Patrick J.	819
23. Mahon, Brian J.	815
24. Smyth, Andrew F.	812
25. Griffin, Gerard F.	811
26. Pigot, David R.	754
27. Glynn, Patrick A.	752
28. Cantillon, Ernest J.	746
29. O'Sullivan, Eugene	718
30. Joyce, Philip M.	716
31. Donegan, James D.	697

There was a total of 39 candidates. The total number of valid papers was 2,069.

As there were but four candidates for the four seats for provincial delegates there was no election and the four candidates for these seats were returned unopposed:

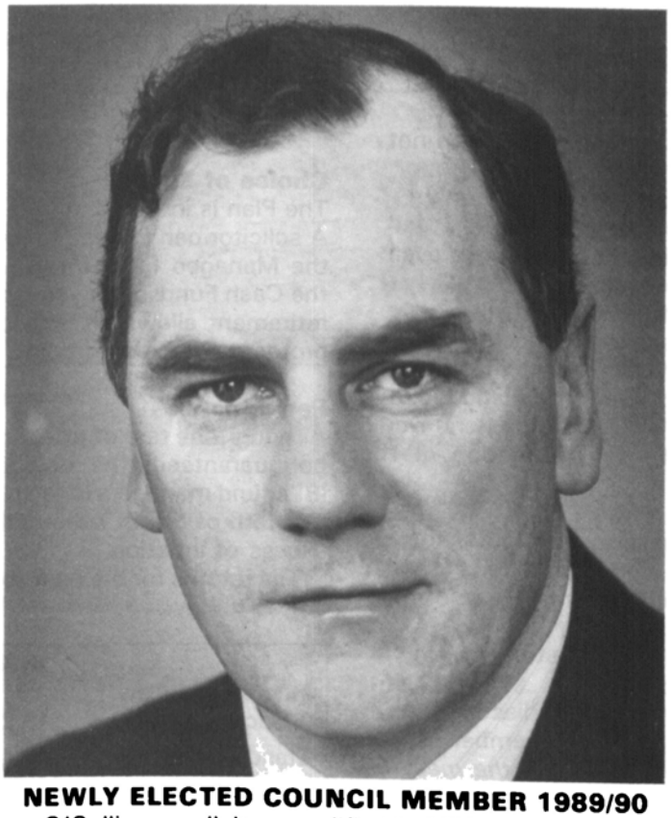
Connaught – McEllin, Ward M.
Leinster – Lanigan, Frank
Munster – O'Connell, Michael G.
Ulster – Murphy, Peter F.R.

BENEVOLENT ASSOCIATION

The chairman of the Solicitors' Benevolent Association, Mr. John M. O'Connor, thanked the Bar Associations, practising solicitors and others for their efforts in procuring additional funds for the Association. Annual subscriptions of members brought in £65,000/£70,000 a year, whereas the need was for well over £100,000. He emphasised the urgent need for funds and support for the Association.

At the request of the Senior Vice-President, Mr. E. J. Margetson, the vote of thanks to the President was proposed by Mr. Desmond Moran who complimented the President on his conduct of business throughout the year and his stamina in attending Bar Association meetings and overseas meetings. The vote of thanks was seconded by Mr. William Fallon and passed with acclamation.

The Senior Vice-President then declared the meeting closed.



NEWLY ELECTED COUNCIL MEMBER 1989/90

Eugene O'Sullivan, solicitor, qualified in 1974, and practises with John J. McDonald & Co., Palmerston Road, Dublin 6.

(Photographs of other newly elected Council members were published in the Jan/Feb issue).

Law Society retirement plan – Now is the time to get in

Most people would agree that planning for retirement is common sense. The tax break on pension contributions also makes financial and economic sense.

Like most forms of savings and investments, there are a number of choices as to where you should invest. Few professional bodies have their own group schemes in which to contribute. The legal profession is one exception.

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.

Unfortunately at the present time only a small percentage of solicitors support their own scheme. Only a quarter of qualified solicitors are members of the Retirement Plan.

Why?

This is due to a number of factors.-

- Membership of the Plan not promoted.
- Strong performance only known to members.
- Significant advantages over other schemes not highlighted.

Agreement was reached with the Finance Committee that The Investment Bank of Ireland Limited, who are the fund managers, would undertake the promotion of the Plan.

The objective is to:-

- Increase awareness of the Plan among solicitors.
- Provide information on the Plan.
- Highlight the strong performance.
- Be available to discuss the Plan with any member.

and overall *increase the membership.*

Main Advantages

The entry and ongoing costs of the RAP are lower than those of many of the plans available through life insurance companies.

The initial charge, 2.5% of each sum invested, is to cover administrative charges.

The ongoing managment fee is only 0.5% per annum.

The Plan does:-

- Not charge the normal bid/offer spread.
- Not reduce contributions by use of allocations.
- Not create "initial" or "capital" units which attract 5/7 times the normal annual management fees.

By
Harry Cassidy,
Senior Manager,
Investment Department
The Investment Bank of
Ireland Limited

- Not charge for switching between funds.
- Not charge an annual fee for administration.

Choice of Funds

The Plan is invested in two funds. A solicitor can choose to invest in the Managed Fund for growth or the Cash Fund in the years prior to retirement allows an individual to protect accumulated gains.

Performance

Although the rate of return cannot be guaranteed, the objective of IBI's fund managers is to achieve a real rate of return substantially in excess of inflation.

The returns for the past six years are as follows:-

	1989	1988	1987	1986	1985	1984
Incorporated Law Society Scheme	19.2%	25.9%	7.1%	24.3%	26.3%	5.9%
Standard Life	16.4%	29.0%	14.1%	20.8%	31.2%	3.2%
Irish Life	19.8%	26.1%	10.9%	22.1%	24.9%	5.4%

The Law Society Scheme has performed favourably alongside two of the large life offices.

Time to Invest?

The tax year is rapidly coming to a close. This is normally the time to consider making payments or increasing contributions to a Plan.

Why not consider the Law Society Retirement Plan for your next contribution. Even if you are contributing to another scheme, you can make contributions to the Law Society Plan.

- Minimum contribution £500.
- Not committed to making payments every year.
- Choice of retirement date.

Please contact me for further details at:-

The Investment Bank of Ireland Limited, 26 Fitzwilliam Place, Dublin 2.
Tel: (01) 616433, Ext. 1215.

Harry Cassidy

CASES RELATING TO MILK QUOTAS

I would be very interested in assembling reports on such cases if possible and would be most grateful if practitioners would let me know from time to time of any pending or decided cases at any level (including disputes referred to the new Tribunal).

Also, I would like to hear from any practitioner who might like to be circularised with particulars of such reports from time to time (would such people please send an S.A.E.)

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Younger Members News

In the January/February 1990 issue of the Gazette, a notice was published about the launch of a German-Irish Lawyers Association at a reception to be held in the Incorporated Law Society on Wednesday, 28th March, 1990. The reception is very kindly sponsored by the German Wine Promotion Board.

Both the President of the Law Society and the Ambassador of the Federal Republic of Germany will attend at the reception, invitations to which have now been issued by the Association's Committee.

The Committee has been very encouraged by the amount of interest shown in the Association by Irish lawyers. This is no doubt due to the increased level of awareness amongst lawyers that cross-country links should be established in the run-up to 1992 and beyond. The timing of the Association's launch is particularly good in view of recent political developments in Germany and in Eastern Europe as a whole.

Details about a forthcoming seminar to be held by the Association will be given at the reception. It is hoped to publish full details about the Association's objectives and programme for 1990 in the April 1990 issue of the Gazette.

□

YOUNGER MEMBERS COMMITTEE

in association with the

DUBLIN SOLICITORS BAR ASSOCIATION

IRISH PERMANENT BUILDING SOCIETY

QUIZ NIGHT - GRAND FINAL

• PRIZES GALORE •

WEDNESDAY, 11th APRIL 1990

at the Royal Marine Hotel,

Dun Laoghaire at 8 p.m. sharp

Hosts: Moya Quinlan and Gerry Griffin

Subscription:

£25 per team (5 persons per team)

Contact:

Sandra Fisher, The Law Society,
Blackhall Place,
Dublin 7. Telephone: 710711

SADSI DEBATE WEDNESDAY, 25 APRIL, 1990

Motion for Discussion:

"That all Europeans are equal; but some are more equal than others."

Chairman:

The Chief Justice, The Honourable Mr. Justice Thomas Finlay.

Speakers:

Mary Robinson, S.C., Director, Irish Centre for European Law.
Proinsias de Rossa, T.D.
The Hon. Mr. Justice Liam Hamilton.
Nial Fennelly, S.C.
John Cooke, S.C.

All are welcome.

The debate starts at 8.00 p.m. in the President's Hall, Blackhall Place.

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Bandon, Co. Cork.

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8-17 JUNE 1990
LA GRANDE MOTTE-FRANCE

FOOTBALL-GOLF

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4 DAYS COMPETITION

4 DAYS OF RACE

8 DAYS TOURNAMENT

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With the kind participation of :

For further information and details concerning enrolment formalities, complete and return the bulletin below to :

Me Vincent PINATEL - WORLD LAWYERS SPORT ASSOCIATION
8,rue Aude 13100 Aix-en-Provence - FRANCE Tel : 42 26 13 27- Fax 42 26 37 50

NAME ..... First Name.....
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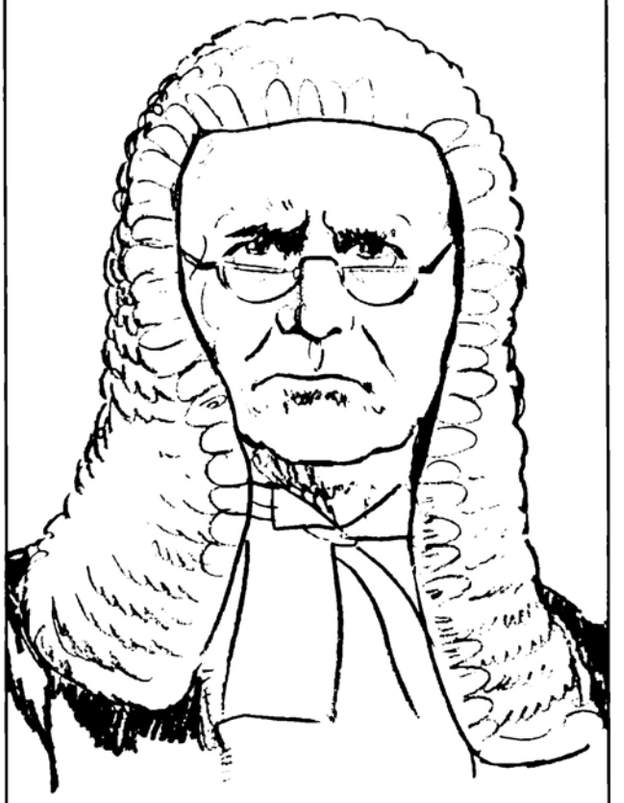

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BOOK REVIEW

JUDICIAL DISCRETION.
By Aharon Barak. [London: Yale Universtiy Press. 1989. xiv and 266 pp. £22.50 sterling, hard-back.]

In court, Christian witnesses swear *by* Almighty God. However, the declaration which each judge in Ireland makes on his or her appointment is made *"in the presence of* Almighty God". The newly-appointed judge promises that he or she will to the best of his or her knowledge or power 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" (Article 34.5 of Bunreacht na hÉireann). The sacredness of the judicial office is emphasised by the fact that the declaration is made in the presence of Almighty God. Further, at the end of the declaration, God is invoked to "direct and sustain" the newly-appointed judge. The upholding of the Constitution and the laws of the land leaves a reservoir of discretion to the Irish judge.

Aharon Barak has been a former law professor at the Hebrew University Law School, dean of the Law School, Israel's Attorney General and since 1978 has been a member of the Israeli Supreme Court. The central issue in this book is how should the judge exercise his or her discretion when he or she is faced with a legal problem that has more than one lawful solution. The thesis of the book is that judicial discretion is not absolute. Judicial discretion is limited. The zones of lawful options are narrow – but they do exist. Justice Barak discusses the manner in which judicial discretion is exercised and concludes that it is the judges' judicial philosophy – the product of their experience and worldview – that determines their choices. He argues that judges should realise that they operate within a legal system that has a life of its own and that their decisions should fit the organic growth of the system and develop its fundamental values within a framework of continuity and consistency.

Justice Barak has been deeply influenced by Justice Benjamin Cardozo's trilogy – *The Nature of the Judicial Process* (1921), *Growth of the Law* (1924), and *Paradoxes of Legal Science* (1928). There are indications in the book that Justice Barak is attempting to provide a modern supplement to Justice Cardozo's seminal classic, *The Nature of the Judicial Process.* In his classic study, Justice Cardozo, from 1932 to 1938 Associate Justice of the United States Supreme Court, described in simple and understandable language the conscious and unconscious processes by which a judge decides a case. Justice Cardozo discussed the sources to which the judge appeals for guidance and analysed the contribution that considerations of precedent, logical consistency, custom, and standards of justice and morals have in shaping the judge's decision. Justice Barak's contribution is a worthy sequel to that of Justice Cordozo. Justice Barak writes with balance, restraint and clarity.

One issue which fascinates those who take an interest in the process of adjudication is how the judge makes a choice when he or she has a number of reasonable options. Justice Barak argues that the reasonableness of the choice is determined by the judge's world-view. This, in turn , is based on his or her human experience and on social principles and policies which establish his or her conception of the judicial function. Further, Justice Barak argues that a decisive component in the determination of the reasonableness of the choice is the judge's personal experience: his or her education, personality and emotional makeup. Some judges are cautious; others are less cautious. Some judges will insist on a heavy burden of proof before deviating from the existing law; others are satisfied with a light burden of proof. Some judges are more impressed than others by the writings of authors, scholars and other judges. Every judge, noted Justice Barak, has a complex human experience that influences his approach to life and therefore his approach to law.

In writing on the zone of reasonableness and judicial objectivity, Justice Barak asks who is the reasonable judge? Every judge seems to think that he himself or herself is the reasonable judge. When a judge describes the reasonable person, in most cases he or she is thinking of himself or herself. Justice Barak argues that just as every person is not a reasonable person, neither is every judge a reasonable judge. The author argues that reasonableness should be an objective matter. For example, when the judge is required to identify the values of society, he or she should look for those values that are shared by the members of the society, even if they are not his own. The judge should avoid imposing on society his or her subjective values, to the extent that they are inconsistent with the articles of faith of the society in which he or she lives.

Coke wrote of "the gladsome light of Jurisprudence". Cardozo said that he was not aware that men resort to the opinions of the courts as a spiritual elixir in the hours of depression. Nevertheless, Justice Barak has written a monumental work which will be of benefit to those interested in the process of adjudication – an essential element in a democracy.

Eamonn G. Hall

WIN A WEEKEND FOR TWO AT KILKEA CASTLE! JUST ANSWER THESE THREE QUESTIONS!

1. Which famous Irish family had its seat at Kilkea Castle?
2. Name the builder of Kilkea Castle.
3. In which Court Circuit is Kilkea Castle situated?

Post your entry to:
The Editor
The Gazette of the Incorporated Law Society of Ireland
Blackhall Place, Dublin 7.
The first correct solution opened wins the prize of a weekend for two at Kilkea Castle.

The Irish Society For European Law

Founded in 1973
Irish Affiliate to the
Fédération Internationale
Pour le Droit Européen (F.I.D.E)

President: The Hon. Mr. Justice Brian Walsh
Chairman: Mr. Eamonn G. Hall, Solicitor

Programme for Spring/Summer 1990

1. **Thursday, April 5th, 1990:**
   The Hon. Mr. Justice Brian Walsh, Judge of the European Court of Human Rights, President of the Society – *The Right to Privacy: Irish and European Law.*
2. **Wednesday, April 25th, 1990:**
   The Hon. Mr. Justice Donal Barrington, Judge of the Court of First Instance of the European Communities – *The Court of First Instance of the European Communities.*
3. **Thursday, May 10th, 1990:**
   Nuala Butler, Barrister, National Rapporteur, FIDE (Madrid – 1990) Congress – *Fiscal Harmonisation:*
   Jeremy Maher, Barrister, National Rapporteur, FIDE (Madrid – 1990) Congress – *Impact of European Communities Merger Control on Ireland.*
4. **Tuesday, July 17th, 1990:**
   Mary Robinson, Senior Counsel, Director Irish Centre for European Law, National Rapporteur, FIDE (Madrid – 1990) Congress – *Public Procurement.*

Lectures take place at 8.15 pm 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 Committee and guest speakers for dinner at the Club at 6.15 pm on the evening of each lecture. Members intending to dine must communicate with the Membership Secretary, Jean Fitzpatrick, Solicitor's Office, Telecom Eireann, Harcourt Centre, 52 Harcourt Street, Dublin 2. (Tel. 01 714444 ext. 5929. Fax. 01 793980, Electronic Mail (Eirmail) (Dialcom) 74: EIM076) not later than two days before the dinner, as advance notice must be given to the Club.
Membership of the Society is open to lawyers and to others interested in European Law. The current annual subscription is £15.00 (£10 for students, barristers and solicitors in the first three years of practice). Membership forms and further details may be obtained from the Membership Secretary.

CORRESPONDENCE

The Editor,
The Gazette,
Blackhall Place,
Dublin 7.

Dear Colleague,

Re: Association of Personal Injury Lawyers

Last October a meeting was held in London to see whether or not there would be a demand for the inauguration of a new Association known as the Association of Personal Injury Lawyers.

The impetus for the creation of such an Association came about following the Winter Convention of the Association of Trial Lawyers of America who held their Convention in London in January of 1989. Such was their inspiration that a founding group of practitioners prepared a preliminary discussion document which was unanimously adopted by a meeting of practitioners from all over the United Kingdom last October.

The meeting elected a Steering Committee to bring the new Association into being and it is intended that it will represent practitioners and other interested participants in England, Scotland, Wales and Northern Ireland, the Republic of Ireland, the Channel Islands and the Isle of Man.

I was asked to represent "the Irish connection" on the Steering Committee and part of my responsibility is to ensure that members of the Solicitors' Branch of the Profession, together with Barristers, Academics and Student Members are properly advised of the proposed existence of the Association.

I outline, in brief, the objects of the Association which are:-

(a) The promotion of proper and fair compensation for all types of personal injury.

(b) To foster the role of the legal process in the promotion of safety, particularly safety for consumers in the workplace, in the use of products and transport, and in all places of public meeting.

(c) To promote and develop expertise i n the practice of personal injury law by education and the exchange of information and knowledge.

The Association is intended to represent Lawyers who practise predominantly in matters relating to the well-being of the Plaintiff and others whose views are sympathetic to the proposed objects.

It is envisaged that the inaugural meeting of the new Association will take place in April of 1990 and it is hoped that there will be a strong Irish representation in its Membership.

The intention is to have an organisation which, in principle, is not dissimilar to that of the American Trial Lawyers Association which, I am sure, many of you will appreciate is a substantial organisation responsible for many advances in the areas of Law Reform and the Administration of Justice. It is felt by the Steering Committee that the new Association will blossom into a powerful force for those objects outlined herewith.

Mundane matters such as subscription rates etc. together with a comprehensive list of the benefits will be made available at the inaugural meeting in April. However, in the interim, it would be of great benefit to the Committee if we had, at least, some indication of the volume of support we would be likely to achieve throughout the various regions in the home Countries, therefore, all you are required to do in the first instance is to write to me simply indicating an interest and thereafter you will be properly advised and kept informed of developments as they occur.

It is right for me to say, having been involved in preliminary discussions, that plans are both exciting and innovative and would well merit the support of as many of our colleagues as are sympathetic to the aims of the Association.

On hearing from you, I will keep you advised of developments as they occur and take this opportunity of thanking you in anticipation of your support.

Yours faithfully,
FRANCIS J. HANNA
Solicitor,
Hampton House,
53 High Street,
Belfast BT1 2AB,
Northern Ireland.

Mr. James J. Ivers
Director General,
The Law Society,
Blackhall Place,
Dublin 7.

17th January 1990

Re: Social Insurance Contributions for the Self-Employed

Dear Mr. Ivers,

One of the issues which you raised in your letter is the question of self-employed persons who were over 56 years of age when social insurance became compulsory for the self-employed in April 1988. Self-employment contributions provide cover for old age (contributory) pension and for widow's and orphan's (contributory) pensions. One of the qualifying conditions for the old age (contributory) pension is that the claimant must have commenced paying social insurance contributions at least 10 years before reaching pension age i.e. before they reach 56 years. This requirement has applied since the old age (contributory) pension scheme was introduced in 1961 and is applied equally to employed contributors and to self-employed contributors.

Self-employed persons who are over the age of 56 years on entering insurance will, however, be able to build up entitlement to widow's (contributory) pension after three years insurance. Furthermore, their insurance as self-employed persons can also be combined with any previous insurance they may have had as employees and as voluntary contributors to establish entitlement to either the old age or widow's pension.

The question of making special provision to enable self-employed contributors who commence paying social insurance contributions after reaching 56 years of age to qualify for old age (contributory) pensions has been examined within the Department but the potential costs of such provisions would be prohibitive.

Under the existing arrangements employed contributors who enter insurance after reaching 56 years of age are entitled to a refund of the old age (contributory) pension element of the PRSI contribution. In the course of introducing the scheme of social insurance for the self-employed the Minister for

Social Welfare announced that, in future, refunds of the old age (contributory) element of the PRSI contribution would be made to both employed and self-employed contributors who enter insurance after reaching 56 years and who do not qualify for a non-contributory old age pension. The necessary regulations are currently being drafted and the question of the payment of interest on the amounts refunded is being considered in this context.

Finally, you also refer in your letter to the tax treatment of self-employment contributions. In determining the rate of self-employment contribution the Government had regard to the views of the National Pensions Board in the matter. A majority of the members of the Board recommended that, on grounds on equity, the rate of contribution should be the same as the combined employer/employee rate for old age and widow's and orphan's pensions – that is a rate of 6.6%, when allowance is made for the tax relief on the employer's contribution. The Board recognised, however, that in setting the rate of contribution the Government would have to take into account the ability of the self-employed to pay the rate recommended. In the event the Government set the contribution rate at 5% and this rate is being phased in over a three-year period from April 1988 to April 1990.

It should also be noted in this regard that making contributions tax deductible would be regressive in that it would benefit only those on higher incomes who pay tax and would be of most benefit to those on higher incomes who are liable for tax at the higher rates. To maintain existing net levels of PRSI contribution income it would be necessary to either increase or abolish the present income ceiling for PRSI purposes, which is currently £16,700, and/or increase the percentage rates of contributions. The first option could effectively cancel out the net benefit to many of those on higher incomes of having contributions tax deductible. The effect of the second option would be to shift part of the burden of financing social insurance benefits from those on higher earnings, who would be paying a reduced amount of PRSI because their contributions would be tax deductible, to those on lower earnings, who would not have any tax liability.

Yours sincerely,
Enda Flynn,
Planning Unit,
Department of Social Welfare,
Store St.,
Dublin 1.

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The topic to be discussed
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Speakers: Ray Jackson, Rory O'Ferrall, Frank Sowman, John Glackin.

Anyone interested please contact:
John Glackin
Gerrard Scallan & O'Brien,
Hainault House,
69-71 St. Stephen's Green,
Dublin 2.
Tel: 780699.

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30th May – Legal Aid
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VENUE/TIME:

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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.
28th day of March, 1990.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

William Barr, Dodsboro Cottages, Lucan, Co. Dublin. Folio No. DN013043; Lands: Townland: Dodsboro, Barony: Newcastle. County: **DUBLIN.**

Coleman Keane, Bridge Street, Gort, Galway. Folio No: 56894; Lands: (1) Ballyhugh (2) Glenbrack (3) Glenbrack (4) Glenbrack; Area: (1) 13A.2R.13P. (2) 8A.3R.10P. (3) 8A.1R.1P. (4) 9A.1R.16P. County: **GALWAY.**

Daniel Sherwin, Holly Lodge, Ballyboghill, Co. Dublin. Folio No: 14866F; Lands: Townland; Damestown. Barony; Balrothery West. County: **DUBLIN.**

Paul O'Dwyer, c/o Colgan & Smith, Solicitors, 12 Warrington Place, Dublin 2. Folio No: 31604; Lands: Cloneen; Area: 0A.2R.5P. County **MAYO.**

Delia Smith, Shanbally, Williamstown, Co. Galway. Folio No: 27811 & 14256; Lands: (1) Pollaneyster (2) Monasterowen (3) Pollaneyster (4) Pollaneyster (Part) (5) Monasterowen (Part); Area: (1) 8A.3R.25P (2) 1A.0R.2P (3) 1A.0R.0P (4) 7A.3R.26P (5) 1A.0R.16P.

John M. Harkin, Gortnor Abbey, Crossmolina, Co. Mayo. Folio No: 3497F, Lands: Gorteen; Area: 0A.1R.11P. County: **MAYO.**

Michael Keane, Rathea, Listowel, Co. Kerry. Folio No: 2978; Lands: Rathea; Area: 127A.3R.39P. County: **KERRY.**

Martin John O'Callaghan, Carrickmore, Ballyhaise, Co. Cavan. Folio No: 3493F; Lands: Cornapaste; Area: 0.550 Acres. County: **MONAGHAN.**

Paul Byrnes, c/o Mrs. Ellen Byrnes, 54 Fairgreen, Limerick. Folio No: 460F; Lands: Singland; Area: 1A.2R.5P. County: **LIMERICK.**

Peter F. Duggan, Shanavagh, Ballydehob, Co. Cork. Folio No: 58886; Lands: Shanavagh; Area: 0A.1R.36P. County: **CORK.**

Patrick McNulty, of Upper Dunmore, Falcarragh, Letterkenny. Folio No: 15515; Lands: Tullaghobeghy Scotch; Area: 37A.0R.37P and 96A.0R.22P. County: **DONEGAL**

Francis Dolan, Shercock, Co. Cavan. Folio No: 324F; Lands: Wardhouse; Area: 0A.1R.30P. County: **LEITRIM.**

John Kiernan, Boyne Road, Navan, Co. Meath. Folio No: 8735F; Lands. Abbeyland South; County: **MEATH.**

Robert Guest Baker, c/o Thomas Montgomery & Son, Solicitors, 29 Wicklow Street, Dublin 2. Folio No: 28982; Lands: Drummaan East; Area: 1A.0R.0P. County: **CLARE.**

Michael Mahon, Folio No: 4665, Lands: Ballynakill, Barony of Philipstown Upper. County: **OFFALY.**

Evelyn Grealish, Fairhill, Galway. Folio No: 2850F; Lands: Pollagh, Area: 0A.2R.8P. County: **GALWAY.**

Timothy Woulfe Keatinge, Frankfort Lodge, Dundrum, Co. Dublin. Folio No: 11765L; Lands: Ballally; Area: 0A.0R.18P. County: **DUBLIN.**

Lost Wills

KELLY, Michael Joseph, deceased, late of 12 Ramleh Villas, Milltown Road, Dublin. Would any person knowing the whereabouts of the Will of the above named deceased please contact Arthur O'Hagan, Solicitors, 9 Harcourt Street, Dublin 2 (ref/3668/42). Tel (01) 758701/3.

LEONARD, Thomas deceased, late of 7 North Portland Street, North Circular Road, Dublin 1. Would any person knowing the whereabouts of the Will of the above named deceased please contact Sergeant Con O'Halloran, Fitzgibbon Street Garda Station, Dublin 1.

GILLIGAN, Winifred, deceased, late of Taugheen, Claremorris, Co. Mayo. Will any person having knowledge of a Will of the above named deceased who died on the 26th day of September, 1989, please contact Messrs. Michael Moran & Co., Solicitors, Castlebar, Co. Mayo. Tel: (094) 21053.

O'DWYER, Mary (otherwise Susan), deceased, late of 62 Blackthorn Drive, Caherdavin Heights, Limerick. (Formerly "Elmira", North Circular Road, Limerick). Will any person knowing the wherabouts of the Will of the above named deceased please contact Mr. David Casey, of Messrs. John Casey & Co., Solicitors, Bindon House, Bindon Street, Ennis, Co. Clare. Telephone (065) 28763.

O'KANE, Charles, late of 17 Slemish Way, Andersonstown, Belfast. Will any person knowing the whereabouts of the Will of the above named deceased please contact Murphy & O'Rawe, Solicitors, 41 Arthur Street, Belfast BT1 4PX, Northern Ireland.

CROWLEY, John, late of Doon, Dunderrow, Kinsale, County Cork and the Military Police Corp., Collins Barracks, Cork, retired soldier. Will any person having knowledge of the whereabouts of a last Will and Testament of the above named deceased who died on or about the 3rd February 1990, please contact Murphy & Long, Solicitors, Lower Kilbrogan Hill, Bandon, Co. Cork. Telephone (023) 44420.

O'CONNELL, Thomas, late of Cooliney, Charleville, Co. Cork. Will any person having knowledge of the whereabouts of a Will of the above named deceased who died on the 17th December, 1989, in Victoria, Australia, please contact Messrs. Nagle & MacCarthy, Solicitors, Charleville, Co. Cork. Tel (063) 81243.

Miscellaneous

ORDINARY SEVEN DAY LICENCE wanted. Please reply to John Casey & Co., Solicitors, Bindon House, Bindon Street, Ennis, Co. Clare.

NEW PRACTICE New firms and sole practitioners (in first three years of practice) may acquire *Irish Law Reports Monthly* 1978-1989 (12 bound volumes) at a special concessionary rate. For details and application form please contact The Round Hall Press, Kill Lane, Blackrock, Co. Dublin. Tel: 892922; Fax: 893072.

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Lost Title Deeds

MR. CHARLES O'KANE, deceased, late of 17 Slemish Way, Andersonstown, Belfast. It is understood that Mr. O'Kane was the owner of property at Bavan, Omeath, Co. Louth. Would any person knowing the whereabouts of the Title Deeds of the property please contact Murphy & O'Rawe, Solicitors, 41 Arthur Street, Belfast, BT1 4PX, Northern Ireland.

The Profession

PATRICK J. DALTON, BCL., Solicitor wishes to announce that he has changed address from 3 Lower Cecil Street, Limerick, to 119 O'Connell Street, Limerick. The telephone number remains (061) 47288.

JAMES HANLEY, Solicitor, is pleased to announce that he has commenced practice under the style of James Hanley & Co., Solicitors, The Mall, Westport, Co. Mayo. Tel: (098) 26076, 26822.

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 84 No. 3 April 1990

LAW SOCIETY COUNCIL DINNER, 1990
The President of the Law Society, Ernest J. Margetson, with the Hon. Mr. Justice Liam Hamilton, President of the High Court.

- Solicitors Charging Lien — Priorities and Practice
- Medical Negligence Claims
- Arbitration — The Expert Witness and Compensation

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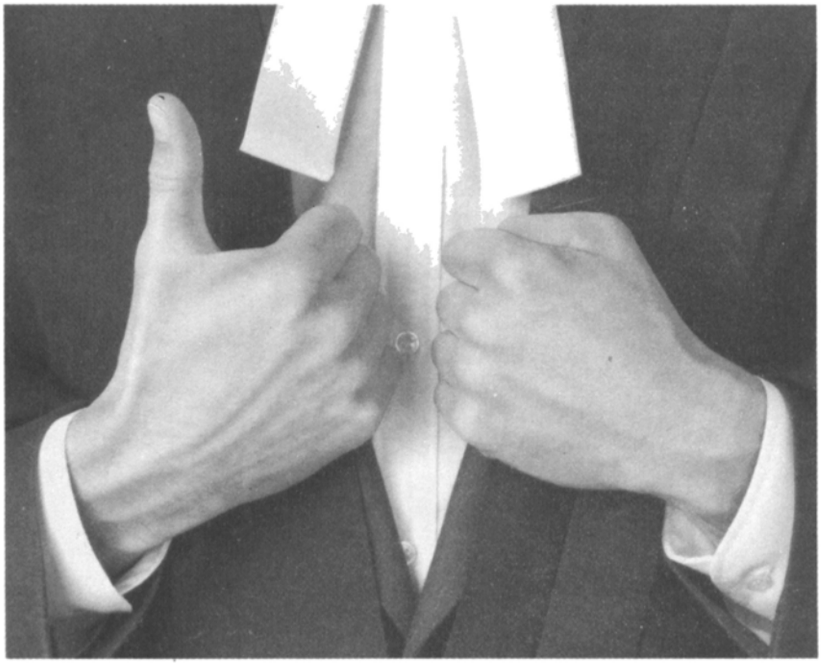

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 84 No. 3 April 1990

Viewpoint

The report of the Committee to enquire into certain aspects of criminal procedure is exactly what one would expect from a Committee chaired by Judge Frank Martin, speedy, brisk and very much to the point. The Committee was appointed on 29th November last and its report was published before the end of March, the Committee having devoted, according to its Chairman's note, a considerable part of their Christmas holidays to the task. In passing, a comment should be made as to how fortunate the State is that busy people from all walks of life are prepared to devote their time and expertise on a purely voluntary basis, to serve on Ad Hoc Committees of this sort. Would that their generosity was always matched by the speedy implementation of recommendations.

While the first of the topics considered by the Committee, the examination of whether there was a need for a procedure for persons who had exhausted normal appeals procedures to have their cases further reviewed, has attracted most of the comment on the report, in the long term it is clear that the recommendations in relation to safeguards for statements made to the Gardaí by accused persons will be of much wider import.

The Committee has concluded that there is a real need for a procedure for the review of cases where new evidence raises questions about the earlier verdict. While noting that such cases were rare, it also concluded that the use of the normal Courts procedure was not appropriate for any such review. Apart from the fact that a Constitutional amendment would almost certainly be required to enable our Courts to re-open a case which had been taken to the Supreme Court it is far from clear that our adversarial system is suitable for examining fresh evidence, even it were of an admissible nature, years after the original trial.

Suggestions have been made both in this country and in the U.K. that where further evidence becomes available a re-trial should be ordered. It is very doubtful if it would be at all in the interests of justice to attempt to re-try cases many years after the events in question. The Committee's recommendation of an Enquiry Body to which cases could be referred by the Attorney General seems admirable though perhaps the Houses of the Oireachtas could be given power by joint resolution to refer a case to an Enquiry Body. While the Attorney in normal circumstances would clearly be the most appropriate person to make such a recommendation it might not be appropriate for him to be faced with such a task if, for instance, he had participated as Counsel in the trial, the outcome of which is to be questioned.

The Committee's second recommendation should receive widespread support. It is disappointing to find spokesmen for sections of the Gardaí suggesting that the introduction of compulsory Audio Visual Recording of the questioning of suspects in Garda stations or by Gardaí generally should be accompanied by removal of the right to silence.

Various commentators have over the years expressed reservations about the practice of taking statements from persons suspected of involvement in crime. It is clear that what is eventually produced, having been signed by the suspect, as a record of his statement, is not strictly such, but a conversion into narrative form of replies given by the suspect to the questioners. There have been so many challenges to "voluntary statements" made in police stations that the proposed procedures, already used in other common law countries, of video recording would seem to be very welcome.

(Contd. on p.87)

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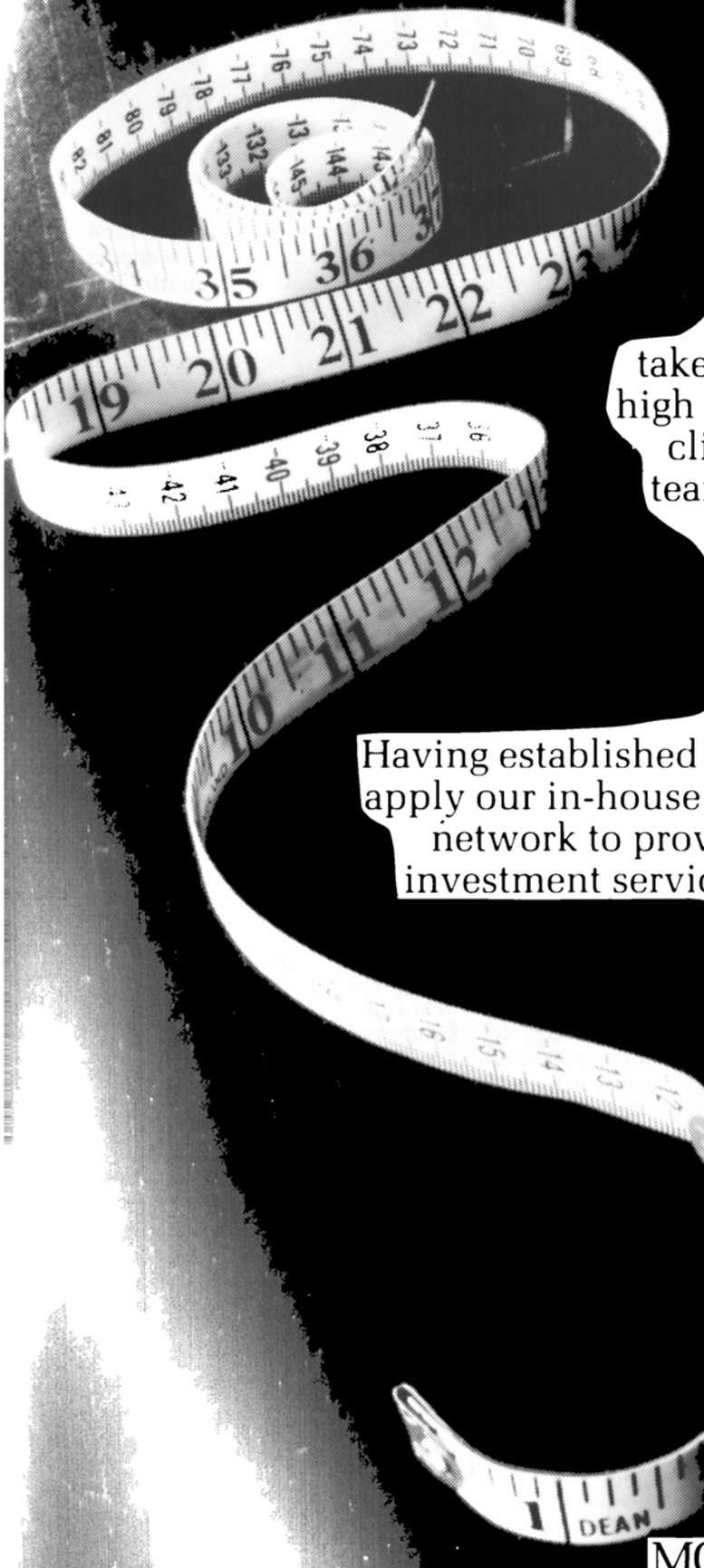

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Solicitor's charging lien – priorities and practice

The solicitor's general retaining lien – to hold documents of a client until paid his costs – is a straightforward form of security. The only real risks lie either in parting with possession without expressly preserving the solicitor's rights or, as in the recent case of *Re Galdan Properties Ltd.*,[1] a Court finding as a matter of law that no lien was created. Far more problematic is the charging lien: the right to apply to the Court to charge with the solicitor's costs property recovered or preserved through the solicitor's efforts. Two recent Irish cases *Fitzpatrick -v- DAF Sales Ltd.*[2] and *Larkin -v- Groeger*[3] illustrate the risks involved in failing to act swiftly to preserve such rights and the danger of losing priority even if swift action is taken.

By
Christopher Doyle
Barrister-at-Law

Statute and Common Law

The matter is somewhat complicated by the fact that there are two separate bases for the solicitor's right: (i) the inherent jurisdiction of the Court at common law to protect the solicitor: (ii) the statutory right contained in Section 3 of the Legal Practitioners (Ireland) Act, 1876 to apply to the Court for a Charging Order. In *Re Born; Curnock -v- Born*[4] it was held that the statutory right should be regarded merely as a convenient method of enforcing the common law lien. It is not the only method of enforcement: *In Campbell -v- Campbell*[5] the solicitor's claim was so vaguely worded that it could be regarded either as a claim under the statute or at common law: the Court of Appeal treated the application as one at common law and granted the relief sought. Whether the two forms of relief can be regarded as identical is doubtful: for example, it has been held that Section 3 is wide enough to cover property of every kind, including real property, which could not be charged at common law.[6] In practice, however, any application to enforce a lien would probably be treated as an application under Section 3.

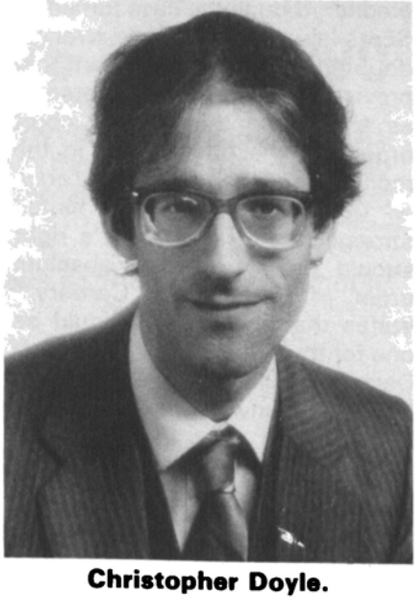
" . . . there are two separate bases for the solicitor's [lien] . . . ."

When the Right Arises

It has been stated[7] that the term lien in respect of a solicitor's charge for costs is misleading, in that lien implies possession, whereas the solicitor, without the Court's intervention, may have no fund or property in his possession. As a logical extension of this, it has been held that no right comes into existence until the solicitor seeks the Court's assistance. *In James Bibby Ltd. -v- Woods and Howard*[8] a judgment debtor appealed against the making of a garnishee order absolute on the ground that his solicitor at the hearing claimed (through the Debtor) that his lien for costs had priority. The appeal was dismissed on the ground that at the time the absolute order was made the solicitor had neither sought nor been granted a charging order and accordingly had no right to set against the judgment creditors. *In Fitzpatrick -v- DAF Sales Ltd.,* O'Hanlon J. followed *James Bibby* in making a conditional order of garnishee absolute notwithstanding the judgment debtor's objection that his solicitor's lien had priority.

These judgments raise a number of difficulties. In the first place, the solicitor was not a party to the hearing in either case, and each Court had grave doubts as to whether the judgment debtor had any right to be heard. If the solicitor had appeared in his own right, would the result have been any different? *James Bibby* appears to hold that a solicitor who had not applied for a charging order could not be heard at all. It was argued in *Fitzpatrick* that *James Bibby* conflicts with earlier English authorities, but in fact nearly all of these were cases where the solicitor had been granted, or at least applied for, a charging order. However, there are two Irish Circuit Court decisions, *Fleming -v- Ironmonger and Lord Herbert*[9] and *Temple Press Ltd. -v- Blogh*[10] where a conditional order of garnishee was discharged on a solicitor's objection that his lien for costs had priority, although from the reports it does not appear that either had applied for a charging order. On the face of it, these cases cannot be reconciled with *James Bibby* and therefore must be taken to have been overruled by *Fitzpatrick*. As a further complication, in *Fitzpatrick,* O'Hanlon J.

" . . . a solicitor who seeks to intervene without having obtained a charging order is on grave risk . . . ."



Christopher Doyle.

appeared to accept that formal notice to a creditor that one intends to claim a lien is enough to secure priority. The law now seems to be vaguer than one would wish; but it is safe to say that a solicitor who seeks to intervene without having obtained a charging order is on grave risk of being found to have no right to be heard.

Priorities

Assuming the solicitor takes the precaution of applying for a charging order, how good is the security? Section 3 of the 1876 Act provides:

> "All Conveyances and Acts made to defeat or which shall operate to defeat such charge or right shall unless made to a bona fide purchaser for value without notice be absolutely void and of no effect as against such charge or right".

It is clear that any assignment of the debt or mortgage of the property by the client will be void as against the solicitors[11] and it is well settled that the solicitor has priority over a judgment creditor with a conditional order of garnishee. Far more difficult is the case of a solicitor who seeks a charging order after a garnishee order has been made absolute. In *Johnston -v- MacKenzie*[12] and *Cole -v- Eley*[13] it was stated that the solicitor could discharge the garnishee order, but the fact that the judgments do not clearly distinguish conditional from absolute orders obscures the ratio. In *North -v- Steward*[14] the House of Lords refused a charging order after execution had issued to a judgment creditor; though the case turned on Scots law, the Law Lords strongly doubted whether the statutory provisions should be interpreted so as to reverse a perfected court order. On the other hand, in the most recent Irish decision, *Larkin -v- Groeger*, Barrington J. hinted strongly that the solicitor's right should prevail over an absolute order of garnishee.[15] Cordery[16] states that the matter should be one for the discretion of the Court. Despite the dictum of Barrington J., it would be unwise for the solicitor to wait until after the garnishee order had been made absolute.

The "bona fide purchaser for value" provision has been intrepreted restrictively: in *Cole -v- Eley* it was held that it does not protect a purchaser who has notice of the proceedings, even if he is unaware that the solicitor intends to claim a lien. In *Dallow -v- Garrold*[17] and *Larkin -v- Groeger* it was held that a creditor with an order of garnishee is not a purchaser.

Apart from Section 3, a solicitor's claim may be defeated by the inherent jurisdiction of the Court to do justice between the parties. In *Larkin -v- Groeger* the plaintiff, who had an arbitration award against the defendants, failed in a High Court action to have the award set aside; Barrington J. ordered the defendants to pay the amount of the award but gave them their costs of the proceedings. He was then faced with three conflicting claims: (i) an application by the defendants to deduct their costs of the High Court action from the arbitration award; (ii) an application by the plaintiff's solicitors for a charging order over the award for their costs of the arbitration; (iii) an application by a judgment creditor of the plaintiff to garnishee the award. As between the judgment creditor and the solicitor, Barrington J. held that the charging order gave the solicitor priority; significantly, he stated that even had the garnishee order been made absolute, this would not have given the creditor the protection of a bona fide purchaser.[18] As between the defendant and the solicitor, however, he found that the Court had an inherent discretion to allow a set-off of judgments in distinct actions without regard for the solicitor's lien; relying on *Puddephatt -v- Leith*[19] and *Young -v- Meade,*[20] he said:-

> "It is sad when one has to decide which of two innocent people is to bear a loss but it appears to me that the Defendants have considerable merits in the present case. They may not have been completely happy with the Arbitrator's award but they were prepared to accept it. They were put to the expense of defending the award in High Court proceedings in which they were successful and in which they got an Order for Costs. They have no chance of recovering their Costs unless they can deduct them from monies payable by them to the Plaintiff on foot of the Arbitration award. They owe no duty to the Plaintiff's solicitors and in all the circumstances it appears to me that it would be unjust to them not to allow them to set off their costs when taxed and ascertained against the amount payable by them to the Plaintiff on foot of the Arbitrator's Award notwithstanding the Plaintiff's solicitor's lien".[21]

" . . . even prompt application for a charging order will not always defeat another claim . . . ."

Therefore a charging order may not be an absolute protection where there is more than one set of relevant proceedings.

Conclusion

Between them *Fitzpatrick -v- DAF Sales* and *Larkin -v- Groeger* illustrate both the strength and the weaknesses of the charging lien. Clearly it is essential, for a solicitor to protect himself, to use the statutory procedure for a charging order; and despite the apparently retrospective language of Section 3 of the 1876 Act, an application should be made before any other party has obtained a final order over the same fund. As *Larkin -v- Groeger* shows, even prompt application for a charging order will not always defeat another claim, but in most cases it should be sufficient to obtain priority. □

NOTES

1. [1988] ILRM 559, [1988] IR 213.
2. [1988] IR 464.
3. Barrington J. 8th July, 1988, Unreported.
4. [1900] 2 Ch. 433.
5. [1941] 1 All ER 274.
6. *Shaw -v- Neale* (1858) 6 HL Cas 581, 108 RR 205; *Birchall -v- Pugin* (1875) LR 10 CP 397.
7. *Mason -v- Mason* [1933] P 199.
8. [1949] 2 K.B. 449.
9. (1935) 69 ILTR 175.
10. [1955/56] Ir Jur Rep 53
11. *Cole -v- Eley* [1894] 2 Q.B. 250.
12. [1911] 2 IR 118.
13. [1894] 2 Q.B. 350.
14. (1890) 15 App Cas 452.
15. Unreported, 8th July, 1988, at p. 10.
16. Cordery on Solicitors, 8th Edition (1988) at p. 260.
17. (1884) 14 Q.B.D. 543.
18. At page 10 of his Unreported Judgment.
19. [1916] 2 Ch 168.
20. [1917] 2 IR 258.
21. At pages 8/9 of his Unreported Judgment.

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VIEWPOINT

(Contd. from p.83)

Such procedures would allay the fears of innocent persons on their first experience of questioning by Gardaí and would lessen the opportunities given to more experienced members of the criminal fraternity to set up a situation in which successful challenges to the statement can be brought at the subsequent trial.

It is to be hoped that both recommendations will be implemented quickly.

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Arbitration - the expert witness and compensation

In this article I want to discuss two related subjects. Firstly, the Expert Witness with which I will deal at some length and then Compensation which I will briefly touch on.

I think it would be best if I start by saying a little about Arbitration and the post of Property Arbitrator – before we look at the Expert Witness in the Arbitration Context.

I may cover ground with which some of you will be familiar, but I have found that Arbitration generally, and in particular the Property Arbitrator's function, is something of a mystery to most professionals apart from those who have been involved in a few cases.

Arbitration is a method of settling disputes where the dispute is referred to a third party to determine after a Quasi Judicial hearing. Generally, the subject matter of the Dispute will be of a technical nature, and the Arbitrator will almost invariably be a person with some expertise in the particular technical field. Examples are disputes arising under building contracts, insurance contracts, rent reviews in leases and matters of that nature.

In most cases reference to arbitration will **by agreement**, generally contained in the original contract, but the arbitrations with which we are primarily concerned are **directed by statute**.

These will include cases arising under the Compulsory Purchase Code, Planning Compensation, Arterial Drainage, Gas Pipelines etc. Practically all will involve the assessment of compensation payable to the owners and occupiers of property as the result of the action of a Public Authority.

We have to go back to the middle of the last century to trace the origins of our compensation code. In the late eighteenth and the first half of the nineteenth centuries compulsory purchase powers were given on a large scale to statutory undertakings such as canals and railways which, although in the national interest, were carried out by private enterprise. To obtain these compulsory powers, the promoters had to present a Private Bill to parliament for each scheme and the resultant Special Act would spell out how the compulsory

By
John R. Shackleton
A.R.I.C.S.
Property Arbitrator

powers were to be implemented and the provisions for the assessment of compensation. Owing to the special nature of the process, and the need for expert technical knowledge to arrive at a just estimate of compensation, Arbitration was regarded as a very convenient method of settling Disputes arising, and in 1845 the Land Clauses Consolidation Act was passed. This Act provided a complete Code of Law covering Compulsory Purchase procedures, and the rights of the parties, and provided that, in default of agreement, in most cases compensation was to be assessed by Arbitration.

" . . . The Land Clauses Consolidation Act [1845] . . . provided a complete Code of Law covering Compulsory Purchase . . . "

Subsequently, the rapid and uncontrolled growth of manufacturing towns greatly increased the necessity for compulsory acquisition of lands for public health purposes, until today when a wide variety of State and Semi State agencies have the right to acquire land compulsorily for purposes as diverse as the construction of power stations, the development of bogs and slum clearance. In 1919 The Acquisition of Land (Assessment of Compensation) Act was passed. This was the second most important statute as it provided a basic framework of rules for the assessment of compensation and also established the position of the Arbitrator and the machinery whereby the Arbitrator was appointed. Subsequent legislation in 1925 and in 1960 modified the provisions slightly to accord with conditions in the independent State, and now, of course, the Planning and Housing Acts have amended the Code. The Arbitration Act 1954 is the principal act governing matters relating to arbitration.

"[The 1919 Act] provided a basic framework of rules for the assessment of compensation . . . "

The Property Arbitrator, for that is his statutory title (not Official Arbitrator as often quoted), is appointed by a body known as the Land Values Reference Committee. This Body comprises the Chief Justice, the President of the High Court and the Chairman for the time being of The Republic of Ireland Branch of The Royal Institution of Chartered Surveyors. It is a full-time post, and the basic qualification for it, set down in the 1919 Act, is "that the person should have a special knowledge in the valuation of land", has been little changed. Prior to 1979 there had been four previous holders of the office since 1922. Due to the increase in the number of cases being referred it was decided to appoint a second Arbitrator. The two property Arbitrators cover the

whole country and both are Chartered Valuation Surveyors.

Once a Notice to treat has been served and no agreement is forthcoming either party may apply for the appointment of an Arbitrator. The application is normally made on a special form, available from the Reference Committee. This form, completed, signed and stamped (£3), together with a copy of the C.P.O., the Ministerial Confirmation order, the Notice to Treat, a copy of the Statement of Claim (if received/made) and any relevant maps is lodged with the Reference Committee in the Four Courts. The Committee then nominate an Arbitrator and notify the parties of his name. The Arbitrator will then communicate with the parties to fix a date, time and place for the Hearing.

I mentioned earlier that the Arbitrator makes his decision after a Quasi Jusicial Hearing. This means not alone that there will be a hearing, as there is in Court, with witesses giving evidence under oath, but also that the arbitration and the Arbitrator's Decision, known as his Award, have a number of characteristics in common with a Court Hearing and Judgment.

". . . there is no financial limit to the Property Arbitrator's jurisdiction, nor is there an appeal from his award except on a point of law."

The Arbitrator acts, as does a Judge, only on the evidence and argument submitted to him, and basis his Decision solely on that evidence and argument. The Arbitrator cannot make a decision unless he receives evidence or unless he is appointed solely because of his expertise and this is expressed in the Arbitration Agreement. Thus, where one party only to an arbitration submits evidence, and nothing to the contrary is put forward by the other side, the award must be in accordance with the evidence given.

The Arbitrator can, through the courts, if necessary, compel disclosure of documents. Normally, it is not necessary to resort to the Court to compel discovery, as the knowledge that the power exists is generally sufficient to ensure that documents required are produced. Of course it is only where one of the parties might not comply with the Arbitrator's direction to produce the required documentation that the Arbitrator would seek the assistance of the Court. The same applies to witnesses where any party to a reference may subpoena a witness.

The Arbitrator's Award, i.e. his decision, may be enforceable as a Judgement of the Court. This is an important provision, particularly in private arbitrations, but it can also be important in Statutory Arbitrations. For instance, in times of acute shortage of public finance such as we are at present experiencing, Public Authorities can, understandably, be reluctant to implement the Award and have been known to make haste very slowly.

It is important to note that there is no financial limit to the Property Arbitrator's jurisdiction, nor is there an appeal from his award except on a point of law. This means that even if one of the parties disagrees violently with the Award he has no appeal against it unless he can show that the decision was arrived at through misinterpretation or misapplication of some legal provision or, of course, if he can show misconduct on the Arbitrator's part. Misconduct is used in the sense of mistaken conduct in the course of the reference. If such an appeal were upheld, the Court would not amend the award more to the Appellant's liking, but would direct that the matter be referred back to the Arbitrator for reassessment on the correct legal basis. It is unusual for this situation to arise, because when a point of sufficient legal importance arises during a Hearing, and a measure of agreement is not reached on it, it will be referred to the High Court for a decision using the Special Case procedure. In extreme cases the Court may direct the award to be set aside instead of being remitted.

The Arbitrator may, at any stage during the proceedings, state a case for the decision of the High Court. This would arise where there is a question of law arising in the course of the Hearing. This does not often arise except in compensation claims under the Planning Acts where there have been a considerable number of cases stated to the High Court. The decision on whether or not to state a case is entirely at the discretion of the Arbitrator but he can be compelled by the High Court to state a case. As a matter of interest I have twice refused to state a case and been taken to Court. In both cases the Court upheld the absolute discretion of the Arbitrator in deciding that he did not require the assistance of the Court on the points raised. Needless to say, the decision to refuse to state a case was not taken lightly.

"The Arbitrator may . . . state a case for the decision of the High Court."

As we have seen, assessment powers can arise in a wide range of cases and in default of agreement will be determined by the Property Arbitrator. Apart from these cases the Property Arbitrator also deals with Planning Compensation, Stamp Duty Appeals, and Capital Acquisition Tax Appeals. The common thread is that all disputes relate to the valuation of land or interest in land and related matters such as disturbance.

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It follows that the expert witness will be drawn from the Disciplines dealing with land and structures e.g. Architects, Engineers, Planners and Valuers. Accountants and Agricultural Experts will also be called in for Expert Evidence in appropriate cases.

The arbitration hearing itself is like a hearing in Court. It is open to the public and while it is essential to maintain a reasonable degree of formality, the atmosphere will not be nearly so inhibiting as it can be in court. Except in small cases, both parties will be represented by counsel with their instructing solicitors. Ideally, the venue should be a neutral one, to allay the suspicions which perhaps some claimants have that the Arbitration might not be impartial. In Dublin, most cases are now heard in the R.I.C.S. at 5, Wilton Place or at the Incorporated Law Society Headquarters in Blackhall Place. However, outside Dublin the local Courthouse or Council Chamber is generally an acceptable venue and indeed is very often the only suitable one in the locality.

The room will normally be laid out for the hearing as for, say, a board meeting. The Arbitrator will occupy the chairman's position and the opposing parties will face one another across the table. It is essential that the top table should be big enough to take any documents or maps which will be produced in evidence, and that there will be space for the witnesses to sit and handle their documentation.

Before the case commences, the Arbitrator may know a certain amount of what is in dispute. He will know the type of case, he may know how much land is involved and its location, and he should have seen a copy of the claim, assuming one was submitted. Clearly he requires considerably more information before he can begin to assess the case. The first function of the expert witness is to provide the technical facts and information which the Arbitrator needs; being an expert he can make logical deductions from the facts he presents, and, based on these deductions, he can arrive at a conclusion.

"The first function of the expert witness it to provide the technical facts and information which the Arbitrator needs; . . . ."

For instance take a five acre field on the outskirts of a provincial town, what facts will the Artibrator require? Firstly, he will want to know the claimants title, the location of the property, access to roads, configuration, whether it can be serviced and at what cost. He will want to know if it can be developed and if so whether development will cost more than normal due to the nature of the subsoil or similar problems. Next, he will want to know what demand there is for development land in that particular area, what sales can be offered as evidence of comparable value, and whether the comparisons put forward have any characteristics of which he should be aware to evaluate their relevance.

The engineer should be able to deal with most of the first points regarding the physical characteristics of the land and, based on his firsthand factual knowledge, he should be able to give his expert opinion that the land can, or cannot, be developed as the case may be. Armed with this information, the valuer should be able to give his expert opinion as to whether or not there will be a market for the land and conclude that its market value is X pounds.

In describing the location and configuration it should be borne in mind that the Arbitrator may only have a very superficial knowledge of the general area. Therefore it should be described in detail i.e. the site is x miles from the town of Nod on the road leading to Zed, it is on the North (right) as you leave the town, it is easily identified as it lies between the graveyard and the creamery.

As you know, the expert witness differs from the lay witness in that, because of his professional training and experience, he is permitted, unlike the lay witness, to include in his evidence the opinion he has formed and the conclusions he has drawn.

Before he begins his evidence he will take an Oath or Affirm. The form of Oath is as follows: "I swear to Almighty God that my evidence to this Arbitration shall be the truth, the whole truth and nothing but the truth". This solemn undertaking must be observed as strictly by an expert witness as by a lay witness. If, for instance, he is a valuer it is probable that there were negotiations before the parties decided to go to arbitration. These negotiations may have taken the form of bargaining by the valuers, where they quite legitimately inflated or deflated the figures, which they proposed as a basis for settlement, in the hope of achieving a fair compromise. But once that valuer enters the witness box as an expert

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his status changes, he is no longer a negotiator but a witness on oath. There is no room for two standards here. A lay witness who consciously distorts the facts commits perjury. In the same way an expert witness who, from any motive, states an opinion which he does not genuinely hold, also commits perjury.

" . . . the expert witness differs from the lay witness in that . . . he is permitted . . . to include in his evidence the opinion he has formed . . . ."

The expert witness will, of course, have done a lot of homework before the actual hearing of the case. Let us look at what the valuer for the Local Authority should do. Firstly, he will inspect the site armed with a map and will note all the relevant physical characteristics. He will check the zoning with the planning officer and see whether the land is affected by road widening or some such burden. He will arrange that the engineers check out the physical development problems. He will get details of comparable sales, inspect the properties concerned and, if at all possible, verify at first hand the details of the transactions. He will then re-inspect the site, prepare his valuation and incorporate his findings and his conclusions in a Proof of Evidence.

Lastly the expert should get in touch with his opposite number and agree as much as possible with him so that, at the subsequent hearing, time is not wasted proving points which are not at issue, i.e. the cost of a wall is in dispute. It should be possible to agree the height and length or even a specification. One important point: where a dimension or an area or any ascertainable fact is material to the case the witness should check it himself and, if possible, on the ground. It should be kept in mind that any step taken in the course of a job may have to be justified **long afterwards** to a third party and that anything written down or left unrecorded may be exposed to examination and criticism. He should never rely on what someone else has told him, nor should he assume that a fact is true just because it is recited in an official document.

" . . . the expert should get in touch with his opposite number and agree as much as possible with him . . . ."

I give you two examples: an engineer being cross-examined on drainage problems relating to a proposed housing development, being questioned as to why he saw no problem with drainage when the Local Authority plan showed clearly that he could not get into their sewer because of the invert level. His reply was that the invert level was "V" and so was readily accessible, he had measured it again yesterday as he felt this was a matter that might be controversial. On another occasion an expert witness was asked the date of the Development Plan from which he was quoting. He looked at the front page for the answer which of course was not there. Attention to the smallest detail always pays off.

I referred to the proof of evidence. This is a written statement, prepared by the witness in advance of the hearing, of what he intends to say in the witness box. It is generally prepared for the information of counsel who is to call him, but in arbitrations it takes the form of a Precis of Evidence which the witness will hand to the arbitrator when he takes the stand, and a copy will be furnished to the other side. It should contain all the salient facts and conclusions and the witness will have the opportunity of elaborating on it when giving evidence. It serves a number of purposes. It ensures that his Counsel will know the evidence he is going to give, and that he does not leave out anything of importance; it gives the Arbitrator a record of the main points of the evidence, without having to write it all down laboriously in longhand and it helps the opposing side to assimilate quickly what the burden of his evidence is, and gives them a record of it. As well as the facts we referred to before, the Proof should state clearly the Witness's name, professional qualifications and position. It can be very irritating having to check through documents some time later in an attempt to identify otherwise anonymous reports.

Next we will deal with such items as maps and photographs. In the nature of things, during the course of an Arbitration, the number of maps and plans put in in evidence tends to proliferate, and the unfortunate Arbitrator will have to sort the lot out when he gets back to his office and starts to sift the evidence. It goes without saying that any map or plan submitted should have a title, scale and a north point. It will be helpful if the title is also shown so that it is legible when the map is folded. Colouring should also be bold and where possible as much information as possible should be shown on one map e.g. the subject property outlined boldly in red, road improvement line in blue, line of sewer and nearest manhole in green etc. So often this vital information will be shown on three different maps, where for instance the particular evidence might have been given by engineers from different disciplines or departments.

"[An expert witness] should never rely on what someone else has told him . . . ."

Some Counsel like to have numerous photographs put in in evidence. Normally photographs are not necessary unless, for instance, in a case where the premises have been demolished between the Notice to Treat and the hearing or a new road built or some such circumstance. Where they are put in they should be numbered on the face of the photo-

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graph and accompanied by a map showing the point from which they were taken and the direction. The reason they are not generally necessary is that the Arbitrator will invariably inspect the site, and he will have been put on notice in the course of the evidence as to what to look out for. One can, of course, have the situation where both sides insist on presenting a set of photographs, the Claimant's invariably taken in brilliant sunshine, and the Acquiring Authority's in the rain with some rubbish carefully strewn in the foreground. This tends to reduce considerably the impact the photographs may have been designed to make, and will almost certainly result in both sets being consigned to their envelopes and not looked at again.

When the witness is called by his Counsel he will walk to the witness box, or the position indicated by Counsel or the Arbitrator, and he will be handed the Bible. He will hold the Bible in his right hand and repeat the Oath, or he may affirm. The Arbitrator will then ask him to state his full name and invite him to sit down. His Counsel will ask him to hand in a copy of his report or Precis of Evidence and will give a copy to the other side. He will then start by establishing the witnesses' credentials and take him through his evidence.

It is a matter for arrangement beforehand between the Counsel and the Witness as to how this evidence (known as the evidence in chief) will be given, whether it will be on a question and answer basis or whether it will be on the lines of a request to read through his report and elaborate if necessary on what he has written there. A lot can depend on the relevant expertise and the experience of Counsel and Witness.

There are a number of general points which I would like to make as to how the witness should give his evidence and his general deportment in the witness box. Most, if not all, witnesses will feel nervous when called to give evidence. This can affect different people in different ways; some hide it well, some cannot, some allow it to affect their performance while in others it merely gets the adrenalin going and helps their concentration. It is pointless saying there is no need to be nervous. But bear in mind that if one has done one's homework, and if one restricts oneself to telling the truth and stating opinions that one honestly holds there is little need for worry. Perhaps the main reason for nervousness is the fear that one will suffer at the hands of cross-examining Counsel, and certainly this worry is well founded where a witness is perhaps not being totally truthful or is illprepared. However, most Counsel, and in particular the experienced ones, are courteous and have no wish to belittle or embarrass a witness if they are satisfied that he is not trying to pull the wool over their eyes. It is generally only the inexperienced Counsel who will ask unnecessary questions, and depend on the bludgeon rather than the rapier which the experienced man will use to far greater effect.

The witness should remember that he has sworn to tell the whole truth. Apart altogether from the risk

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of committing perjury, it is very often in his client's interest that he should not seek to conceal some material fact because it could be damaging to his case. It can be a far better tactic for the witness to disclose such a fact, state clearly

"The witness should remember that he has sworn to tell the whole truth . . . "

that he has taken it into account, on the assumption that he has, and why he thinks it should be given no more weight than he has given it. Remember that it is the witness's duty to tell the full truth, but the weight he attaches to various aspects is a matter of professional judgement. Sometimes a witness will deliberately exaggerate what he has to say in the mistaken belief that he is helping his client's case. This, of course does not accord with the oath which he has taken, and quite apart from that, it overlooks the fact that the Arbitrator, because of his technical knowledge, is well qualified to evaluate the evidence. Where it is clear to the Arbitrator that the witness is exaggerating, he has to decide whether the witness is misguided or dishonest. At all event it will raise a query in the Arbitrator's mind as to what reliance can be placed on the evidence and clearly this does not help the client's case.

It is important to remember that the purpose of the expert witnesses' evidence is to provide the Arbitrator with the fact and expert opinion on which he can make his decision. As I mentioned before, the Arbitrator makes a longhand record of the principle points of evidence. Therefore, it is essential that the witness speak clearly and does not rush. It is useful when giving evidence to keep an eye on the Arbitrator's notebook and if he is writing furiously, pause until he is ready.

It is essential to remain calm during cross-examination. When asked a question, the witness need not be in too much of a hurry to reply. He sould take his time, if he wants to think, but in the meantime remain silent, because it is easier to think that way. The interval between Counsel's question and the Witnesses' answer will not seem so long to the Arbitrator as it may to him. If he is self conscious about the delay he can always begin with a brief apology "I am sorry for taking so long to reply to your question but I wanted to be quite sure that my answer was accurate". He should resist the temptation to score off Counsel with a smart reply to his questions. A witness may get away with this when it is done with obvious good humour or when he and Counsel know one another reasonably well. Otherwise, bear in mind that Counsel may be much more proficient at that game, and if he is so minded, the witness may end up getting much the worse of the contest.

The expert witness should recognise his professional limitations and admit them. He should not be afraid to admit that some matter may be outside his professional competence, either because it is outside his particular field or because he does not have adequate experience in the particular area. Above all, he

"The expert witness should recognise his professional limitations and admit them."

must not think that because he is giving evidence as an expert he must appear to be infallible. If he makes an error he should admit it, not compound it by seeking to justify it. Remember that the expert witness has no monopoly of knowledge, he can be wrong or make a mistake like anybody else, the main difference being that when he is wrong it is generally for more sophisticated reasons.

It sometimes happens that due perhaps to nervousness or in the cut and thrust of cross-examination a witness may be led into saying something which on reflection he recognises is not precisely true or could be misleading. He should not be afraid to mention that to his Counsel and ask that the matter be put right. Certainly nobody will think the worse of him doing so, and it will give an indication that he is both conscientious and honest.

I consider it essential that the various engineers, architect, valuer and solicitor should have a briefing, with Counsel, should one be retained, well in advance of the actual hearing. This will give an opportunity to co-ordinate the evidence to be presented and to consider the strengths and weaknesses of the case to be presented.

I would like to make a particular point. Sometimes an expert witness will feel a conflict of loyalties between the interest of his client or employer on the one hand, and the interest of truth on the other. For example, questions regarding the capacity of a sewer to take additional drainage could be of great significance in assessing the value of a parcel of land being acquired and the temptation for the Local Authority Expert to give an answer which will favour the Acquiring Authority is obvious. It can take courage in a situation like that to tell the whole truth, particularly when there are pressures, real or imagined, to perhaps, bend the truth a little. But really there should be no conflict of loyalties. Once the witness has entered the witness box, his duty, like that of any witness, is clear enough. The opinion of an expert witness, whether on value or cost, or sewer capacity, is the same opinion irrespective of the party who called him. Once in the witness box he must be completely objective: the effect of his evidence on the Arbitration, and the extent to which his opinion may appear to favour one side or the other, is irrelevant.

I have dealt with the origins of compulsory purchase and the Arbitration process at some length. The actual assessment of compenstaion is another matter which could be the subject of a lecture in its own right. It is really a matter of preparing a much more detailed valuation within the framework of the legislation contained in the Lands Clauses Act 1845, the Acquisition of Land (Assessment of Compensation) Act 1919, the Local Government (Planning and Development) Act 1963 and the Housing Act 1966.

There are there four main headings to be considered:

(1) Value of Land.
(2) Damage due to Severance.
(3) Damage due to Other Injurious Affection.
(4) Disturbance and other matters.

I can do no better than quote from two of the major decisions in Compulsory Purchase.

Scott L. J. in *Horn -v- Sunderland Corporation* (1941): the owner compelled to sell has "the right to

(Contd. on p.96)

PRESENTATION TO PATRICIA BREEN
Pictured at a presentation to Patricia Breen on the occasion of her retirement from the firm of Frank Lanigan Malcomson & Law, Solicitors, Carlow, after 55 years service are (left to right) John P. Aylmer, Patricia Breen, Frank Lanigan and Ronald J. Cleary.

PRESENTATION OF CHEQUE TO SOLICITORS' BENEVOLENT ASSOCIATION
Sean Ó hOisin of Oisin Publications presents a cheque to Ms. Rosemary Kearon and Ms. Sheena Beale, Metropolitan Directors of The Directors of The Solicitors' Benevolent Association. The cheque represents 50% of the profits from the *Lawyers Desk Diary 1990.*

SOUTHERN LAW ASSOCIATION ANNUAL DINNER
Ernest J. Margetson, President of the Law Society, with Frank O'Flynn, President of the Southern Law Association, and Margaret Elliot, President of the Law Society of Northern Ireland.

COUNTY GALWAY SOLICITORS BAR ASSOCIATION DINNER DANCE, ARDILAUN HOTEL, GALWAY
(Front row, left to right): Mrs. Nanette Ivers, Ms. Eva Tobin, Hon. Secretary, Mrs. Ruth Margetson, Mrs. Geri Silke, Ms. Hilary Molloy, Committee Member, Ms. Emily Waters, Committee Member, Mrs. Daiden Ó hEocha and Mrs. Zelie Driscoll.
(Back row, left to right): Mr. James J. Eivers, Director General of the Law Society, Mr. Dennis Driscoll, Dean of the Law Faculty, UCG, Mr. Ernest J. Margetson, President, Incorporated Law Society of Ireland, Mr. Leonard Silke, President, County Galway Solicitors Bar Association, and Dr. Colm Ó hEocha, President, University College, Galway, and Chairman of the Arts Council.

(Contd. from page 94)

be put so far as money can do it in the same position as if his land had not been taken from him, in other words he gains the right to receive a money payment not less than the loss imposed on him in the public interest but on the other hand no greater''.

Romer L. J. in *Harvey -v- Crawley Development Corporation* (1957): ''The authorities establish that any loss sustained by a dispossessed owner (at all events one who occupies his house) which flows from a compulsory acquisition may properly be regarded as the subject of compensation for disturbance provided, first, it is not too remote and, secondly, that it is the natural and reasonable consequence of the dispossession of the owner''.

So in preparing a claim there is a lot for the valuer to do.

1. Receive instructions.
2. Inspect Property.
3. Check Planning.
4. Draft Report.
5. Reinspect and complete report/ compensation claim.

All that sounds rather simple but there is a lot of work involved. The actual valuation should not be that difficult. It is the other matters that must be considered as to what may and may not be taken into account. There are sixteen rules in the 1919 and 1963 Acts as well as the third schedule of the 1966 Housing Act to be considered. These rules are straighforward but still need to be considered; most have been the subject of case law down through the years. I would, however, draw your attention to Rule 12 which has come up in several recent cases with which I have had to deal. This is the matter of unauthorised use; this really should emerge when the planning is being checked. If the owner of property has been using all or part of his property without proper planning permission it could be considerably to his detriment if the local authority ever sought to use their compulsory purchase powers.

On the question of disturbance the following are the sort of items to be considered in the case of a private house.

1. The costs of dealing with the Notice to Treat.
2. Costs of acquiring an alternative premises.
3. Time and trouble of seeking an alternative.
4. Removal costs.
5. Carpets and curtains – new for old.
6. Post office/telephone change of address.
7. Adaptation and repair to new premises.

Generally speaking this is not claimable. It is assumed that the want of repair or decoration was reflected in the purchase price and that the purchaser got value for money.

The disturbance will be of a different nature where say part only of a premises is taken and will include a claim for reduction in value under severance and injurious affection apart from matters dealt with under accommodation works. He will, of course, be entitled to compensation for the interference with the enjoyment of his property during the course of the works.

These general principles apply whether the property taken is agricultural, industrial or commercial although clearly a number of items will be different. A farmer whose land is being traversed by a major new road may have very serious problems of stock management, access to fields for cultivation, disruption of drainage and water supply etc. A dispossed manufacturer must move his enterprise into new premises inevitably involving double overheads for a period, reduced output, temporary loss of profitability, removal and reinstallation of machinery, problems with staff, notification of customers etc.

The matter of compensation is long and complex and I have only touched the tip of the iceberg but I hope I have given you something to think about. □

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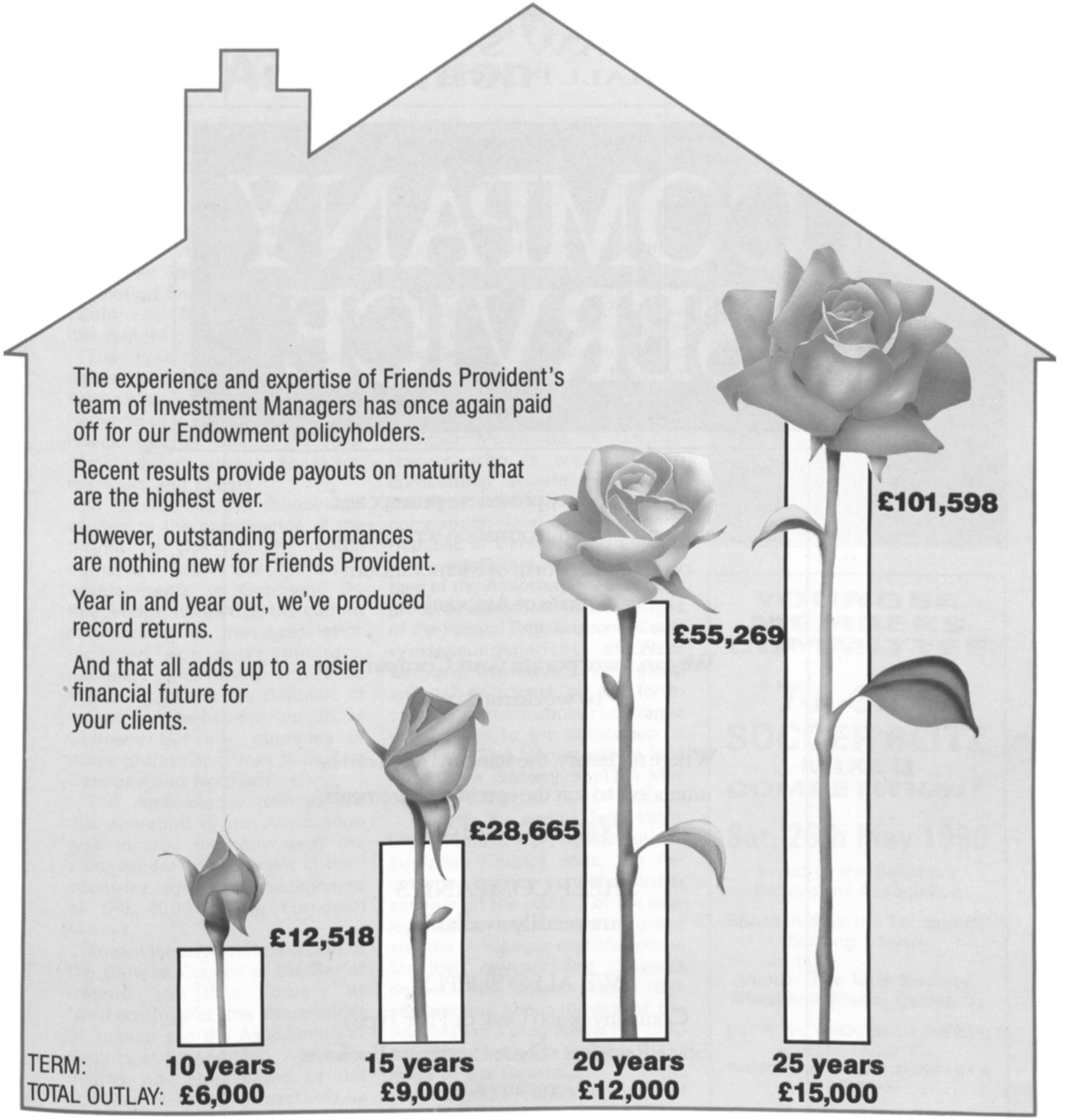

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Younger Members News

German-Irish Lawyers Association

On Wednesday 28th March 1990, the German-Irish Lawyers Association was successfully launched at a reception in the Law Society. Over 140 members of the Association and guests attended the reception, which was kindly sponsored by the German Wine Promotion Board and Furstenberg (Guinness Brewery, the Irish distributors of Furstenberg).

The President of the Incorporated Law Society welcomed the Ambassador of the Federal Republic of Germany, Dr. Helmut Rueckriegel, as well as the other distinguished guest speakers, members and guests.

In his address, Dr. Rueckriegel alluded to the significance of the timing of the launch, which coincided with the historical developments in Germany. Dr. Rueckriegel noted that the current membership of the Association included not only solicitors, barristers and Patent and Trade Marks Agents in the Republic of Ireland and the Federal Republic of Germany but also members of those professions from both East Germany and Northern Ireland.

The Ambassador pointed out that the spirit of the Association was in true harmony with the cross-border development in both countries, against the background of the 1992 Single European Market.

The importance of the support of the General Council of the Bar of Ireland, the Law Society of Northern Ireland, the Department of Justice and the Association of Patents and Trade Mark Agents in Ireland was emphasised by the contributions made respectively by Nial Fennelly S.C., Colin Haddock, Timothy Dalton and Andrew Parkes. The formal part of the reception concluded with a short speech by the Executive Director of the German-Irish Chamber of Industry and Commerce, Mr. Heinrich Zimmermann and Elmar Conrads-Hassel, the President of the German-Irish Lawyers Association.

The Committee was very encouraged by the amount of interest shown in the Association by Irish lawyers from both north and south of Ireland. The Committee now hopes to build upon the goodwill established at the launch and its first seminar will be held on Thursday, 31st May 1990. The seminar will be addressed by Dr. Juergen Moellering, a German lawyer who is an expert in competition law. He will address the seminar on various aspects of competition law in the Federal Republic of Germany and Ireland.

Preceding this event the members of the Association will meet a group of assistants to the Judges of the Federal Constitutional Court (Verfassungsgericht) of West Germany. Two lawyers of this group will deliver papers on the forthcoming constitutional changes with regard to the unification of Germany. This lecture will be held in the Law Society on 17th May 1990 at 6.30 p.m.

Towards the end of June 1990, before Ireland's presidency of the European Council ends, the Association intends to hold a further seminar on the subject of the new legal framework in Eastern Europe and the challenges that this poses for Irish lawyers and business people. Full details about this seminar and about the rest of the Association's programme for 1990 will be published in the May 1990 issue of the Gazette.

For further details on the Associations' aims, membership and seminar programmes please contact: German-Irish Lawyers Association, 46 Fitzwilliam Square, Dublin 2. Tel: 01-789344/789404. Fax: 762595.

On *Thursday, 31st May 1990 at 6.30 p.m.* Dr. Juergen Moellering will address members and friends of the newly founded German-Irish Lawyers Association on the topic of

German Competition Law and the Common Market

Dr. Moellering, one of the leading German experts on this topic, is a lawyer in Bonn and works with the DIHT, the German Association of Chambers of Industry and Commerce. He obtained his degree in Muenster/Germany and a Master degree in law at the University of New York. He spent 10 years working abroad in English speaking countries, four of which were in London.

For further details please contact the German-Irish Lawyers Association, 46 Fitzwilliam Square, Dublin 2. Tel: 789344/789404.

YOUNGER MEMBERS COMMITTEE

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OFFICIAL OPENING OF NEW STUDENT FACILITIES AT BLACKHALL PLACE
The President, Ernest J. Margetson, opening the new lecture hall, with (left to right) Chris Mahon, Director, Professional Services, Professor Richard Woulfe, Director of Education, and Adrian P. Bourke, Chairman of the Premises Committee.

Lawyers' Fishing Club (see page 108): John Jermyn, Senior, Ernest Williams and Bill Tormey.

LAW SOCIETY COUNCIL DINNER
Patrick Glynn, Junior Vice President of the Law Society, His Excellency the Most Reverend Emmanuel Gerada, Apostolic Nuncio, Ernest J. Margetson, President of the Law Society, and Donal G. Binchy, Senior Vice President of the Law Society.

VISIT BY THE PRESIDENT OF THE EUROPEAN COURT OF HUMAN RIGHTS
The President of the European Court of Human Rights, Judge Rolv Ryssdal (2nd left) recently delivered a talk on the work of the Court of Human Rights. Photographed with him are (left to right) The Hon. Mr. Justice Brian Walsh, Judge of the European Court of Human Rights, The Hon. Mr. Justice Thomas A. Finlay, Chief Justice, and Donal G. Binchy, Senior Vice-President of the Law Society.

LAUNCH OF GERMAN-IRISH LAWYERS' ASSOCIATION
(See Page 99)
(Left to right) Elmar Conrads-Hassel, President of German-Irish Lawyers' Association, with His Excellency Dr. Helmut Rueckriegel, German Ambassador, Ernest J. Margeston, President of the Law Society, and Nial Fennelly, S.C.

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Photographed at a presentation function in the Greville Arms Hotel, Mullingar, to mark the retirement of former State Solicitor, Mr. Kevin P. Wallace. He was State Solicitor in the Mullingar area for over 34 years from 1954 to 1989. His colleagues in the legal profession presented him with a holiday voucher and a caricature of himself at work. In our photograph are, from left, Justice Mr. Thomas Finlay; Mrs. Ita Wallace, Mr. Kevin Wallace and Mr. Aidan O'Carroll, Athlone, President of Midland Solicitors' Association.

Anthony Quinn signs a copy of his book on the co-operative movement *"The Golden Triangle – the AE Commemorative Lectures"* at a reception in the Irish League of Credit Unions' Offices, Rathfarnham, Dublin. From left in photo: Gus Murray, League Director; Alan Shatter, T.D., Solr.; Anthony Quinn; Pat Fay, Deputy Gen. Sec. of League and Norman Murphy, League Director. The book was sponsored by the Irish League of Credit Unions and is available from leading bookshops and from the publishers. The Society for Co-Operative Studies in Ireland, The Plunkett House, 84 Merrion Square, Dublin 2. Phone: 764783. Price £4.95; £5.65 post paid.

Medical negligence claims – some practical observations

Sooner or later most Irish solicitors who engage in personal injury litigation will be asked to handle a claim for alleged medical negligence. The solicitor so consulted for the first time will be in at the deep-end trying to learn as he goes. Does a solicitor's experience in general personal injury litigation help or hinder him in this developing area?

The bulk of a litigation solicitor's work usually involves car accident claims and employer's and occupier's liability claims. Obviously there is much procedural similarity between these types of claims and the medical negligence claim; but there are practical differences – and it is important to be conscious of them.

Most of the problems which a solicitor taking on a medical negligence claim will experience arise in the initial stage after receipt of instructions. The major practical differences between personal injury litigation generally and the medical negligence claim can be essentially listed under seven different headings:

Client;
High Failure Rate;
Obtaining Professional Witnesses;
Initial Letter of Complaint;
Obtaining Hospital Records;
Statute of Limitations; and
Cost.

by
John Schütte,
Solicitor

Client

Frequently, the type of client who approaches a solicitor with a medical negligence claim is one who feels strongly that he has already suffered at the hands of one profession, and, therefore, needs early reassurance that he will be listened to and his interests properly represented. The typical client might relate to the solicitor a story of doctor(s) who have refused to discuss his complaints, of misrepresentations and 'white-washing'. In short, a client pre-occupied with 'finding-the-truth'. It is ironic to observe that a percentage of medical negligence claimants would be content, at this intitial stage, if the doctor(s) concerned explained to them what had gone 'wrong' and 'apologised' to them. However, once the legal process takes over, the situation between former patient and former doctor(s) tends to become polarised. One of the questions that arises at this early stage is – would it be cheaper for the client to have effective remedial surgery or other treatment carried out rather than to embark on a High Court action? If objective medical opinion is readily available that such an option exists the client should be asked to consider it seriously and to call it a day at that.

"... the client should be asked to consider seriously [the option (if it exists) of effective remedial surgery or other treatment]."

High Failure Rate

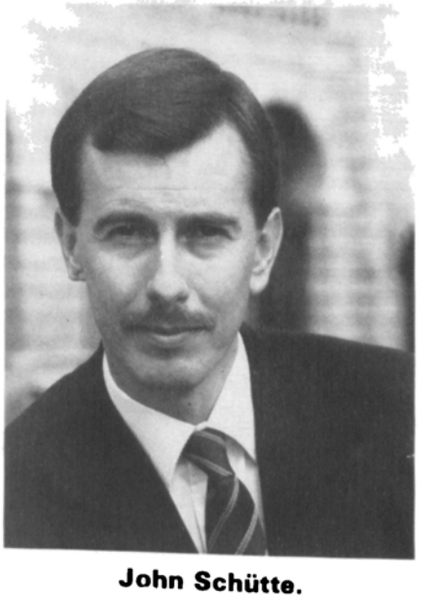
Offering the client any reasonable alternative option to the legal process is important in such cases as it is difficult to succeed in a medical negligence action. Unlike other forms of personal injury claims where the plaintiff may be 'successful', to some degree, more than 80% of the time, recent statistics from the Medical Defence Union (MDU) and the Medical Protection Society (MPS) (who between them carry the professional indemnity insurance of most doctors in the UK and here) indicate that only 33% of claims are settled in favour of the plaintiff without going to court; only 5% of claims initiated actually continue to a court hearing; and the remainder simply stop after proceeding a distance. Of such claims which have gone to a hearing only one plaintiff in five has been successful.

The client in such cases should be warned at an early stage of the low plaintiff-success rate, as, understandably, the client may feel (wrongly!) that because he came out of a medical procedure worse than he went in he is automatically entitled to compensation.

"Of ... claims which have gone to a hearing only one plaintiff in five has been successful."

Obtaining Professional Witnesses

With an ordinary personal injury claim, the plaintiff's solicitor writes to the treating doctor(s) to obtain a medical report(s) on his client's condition. With rare exceptions, such reports are furnished promptly. However, this is not the normal scenario in medical negligence cases. It tends to be difficult to find a specialist doctor who wishes to become involved as a professional witness 'against' a colleague –



John Schütte.

Ireland being a small place, everyone tends to know everyone else in the medical profession. It is not unusual for a potential plaintiff's solicitor to have to seek medical expertise from abroad, thus increasing the cost of the initial report(s) and advice. Because one doctor will tend to be reluctant to allege blame against a colleague, the doctor approached will be careful and painstaking in his examination of the facts and of the plaintiff, thereby giving rise to delays which in turn can cause stress in the solicitor/client relationship.

In recent years obtaining independent medical advice from Engalnd has become a lot easier thanks to the efforts of an organisation called the Action for Victims of Medical Accidents (AVMA). It is a company limited by guarantee and registered as a charity in the UK. AVMA provides a service to solicitors by making available to them names of doctors who are prepared to act for plaintiffs pursuing such claims and also by providing solicitors with information from its resource service and by means of its conference on medical negligence.

"In recent years obtaining independent medical advice from England has become a lot easier. . . . "

Initial Letter of Complaint

The claimant's solicitor should give due consideration to the content of the first letter of complaint to the doctor(s) concerned. The tendency might be to use the standard type of warning-letter appropriate for a car accident case in which little information is given of how the accident occurred and which makes a demand for an immediate admission of liability coupled with a threat of legal proceedings if liability is not so admitted.

Pursuing vigorously the client's claim does not necessarily preclude a balanced approach to writing to the doctor(s) concerned. The initial letter is not any the less effective if it does not directly allege negligence and does not threaten legal proceedings. It is not a sign of weakness that the tone of such letter is personal. My own preference is to address a doctor by name; to outline the injuries or condition complained of by the client; to indicate that the purpose of the letter is to give the doctor an opportunity of offering an explanation to the client to enable the client to be reassured as to the treatment received and to the benefit of such treatment; and to conclude by pointing out that, in the absence of a satisfactory explanation, the client would no doubt wish to pursue the matter further.

This more subdued initial letter to the doctor is more likely to elicit a rational and reasonable response. Although no doctor wants to receive "a solicitor's letter", with all the meaning that that conveys, he would prefer to receive one framed in a courteous way and giving as much detail as possible of the client's complaint.

Obtaining Hospital Records

Presuming that the solicitor has obtained a detailed statement from the client and procured the services of one or more medical advisers, it will then be necessary, where the client had received treatment in hospital, to obtain a copy of the hospital records. This is an area where difficulties can arise, and frequently the hospital concerned will not make such records available to a plaintiff's solicitor on a voluntary basis. This, in turn, would mean that, if not already done, proceedings must be issued and a statement of claim delivered (which, at least in general terms, must set forth the plaintiff's allegations of negligence), before a motion for discovery can be brought to the Master of the High Court. If the hospital is a co-defendant with the doctor(s) concerned then such a motion would be an ordinary 'inter-partes' motion; but if the hospital is not a co-defendant, then it would be a third-party discovery motion.

Once commenced, court proceedings tend to take on a life of their own. If hospital records were made available voluntarily at an early stage then, in the light of the 'success' statistics provided by the MDU and MPS, referred to earlier, it would seem that the issuing of proceedings in up to 60% of medical negligence cases could be avoided. This is a good reason, viewed from both sides, why a full copy of the hospital records should be made available voluntarily to the complainant's solicitor and medical adviser(s) immediately it is requested and before proceedings are (or have to be) instituted.

"Once commenced, court proceedings tend to take on a life of their own."

Statute of Limitations

A number of clients who have approached me with potential medical negligence claims have done so late-in-the-day, from the Statute of Limitaitons standpoint. Faith in the medical profession is still, quite justifiably, very strong in this country and even the contemplation of suing one's doctor(s) does not come easily. Delay also comes about because the client finds it difficult to locate a solicitor prepared to undertake a medical negligence action, particularly where (because of the client's lack of means) it is to be on a 'no-win-no-fee' basis.

A further problem regarding the Statute of Limitations can arise where the client has been treated by a number of doctors and might only know the name(s) of one or two of them. There is then the risk that in issuing proceedings the name of the doctor who might actually be at fault is omitted, that fact possibly only coming to light at a later stage by which time the claim against such doctor might be statute-barred. Detailed early enquiry as to the identity of all the doctors concerned in the client's treatment will obviate this risk.

Cost

In Ireland, there is one final practical difficulty for potential medical negligence plaintiffs – the cost. The cost of processing a medical negligence claim is always potentially high, because of the professional witness involvment. However, in the UK, civil legal aid is much more available than here; and, in the US, plaintiffs' lawyers are entitled to undertake such cases on a contingency fee basis, with a high percentage charge (from 25% up to as high as 40% 'right-off-the-top' of any ultimate damages' recovery) if ultimately successful, but usually 'zero' if unsuccessful. In this country, the reality is that the very limited law centre-based civil legal aid scheme is not open to a person with a

potentially difficult medical negligence claim; and the charging of fees on a contingency basis is not at present permitted.

On the other hand, doctors (almost all insured with the MDU or the MPS) and hospitals have always got an experienced team of insurers' lawyers available to defend such claims. In addition, the State, indirectly, funds the defence of most such claims, either because a public hospital is a co-defendant or because the doctor concerned is a consultant in such a hospital and the hospital refunds (as part of its arrangement with each of its consultants) all or a substantial part of the consultant's annual professional indemnity insurance premium.

To address that inbalance, either a proper State system of legal aid for potential medical negligence plaintiffs should be put in place, or, to encourage more solicitors to undertake such cases, the legal rules prohibiting the charging of percentage fees should be removed or modified.

The Hon. Mr. Justice Ronan Keane, Liam McKechnie, S.C., Arnold Simanowitz, AVMA, Professor Simon Lee and John Schütte, Solicitor.

(Left to right): Professor Thomas Duckworth, Consultant in Orthopaedics, Professor John Robinson, Emeritus Professor of Anaesthesia, Mr. Roger, Clements, Consultant in Obstetrics and Gynaecology, Arnold Simanowitz, Executive Director, AVMA, Mr. J. A. Dormandy, Consultant Surgeon.

AVMA Medical Negligence Conference – a Report –

Medical negligence is a complex and emotive area of the law. The recent cases of *Dunne* (now concluded) and *Best* (judgment pending) have illustrated the difficulties faced by all parties involved in litigation arising out of medical accidents – be they plaintiffs or defendants, doctors or lawyers. In the light of this, the two-day Conference on the subject of medical negligence organised by a U.K. based organisation called Action for Victims of Medical Accidents (AVMA)* held in Dublin on 16/17 February 1990 was both timely and worthwhile. The Conference, sponsored by BDO Binder Hamlyn, was attended by approximately 100 doctors and lawyers.

The Conference's opening address was given by Mr. Justice Ronan Keane, President of the Law Reform Commission. In setting the parameters of the two-day debate, Mr. Justice Keane outlined the difficulties faced by the judiciary in attempting to strike a balance between the need for the continuing development of medical science and a duty to compensate patients who receive inadequate medical care. He emphasised the very real dangers of the practice of defensive medicine and reiterated the broad approach to deciding medical negligence cases laid down by the Chief Justice in the Supreme Court decision in the *Dunne* case where he stated:

> ''The development of medical science and the supreme importance of that development to humanity makes it particularly undesirable and inconsistent with the common good that doctors should be obliged to carry out their professional duties under frequent threat of unsure legal claims. The complete dependence of patients on the skill and care of their medical attendants and the gravity from their point of view of a failure in such care, makes it undesirable and unjustifiable to accept as a matter of law a lax or permissive standard of care for the purpose of assessing what is and is not medical negligence. In developing the legal principles (in medical negligence cases) and in applying them to the facts of each individual case, the courts must constantly seek to give equal regard to both of these considerations''. (per Finlay C.J. in *William Dunne (an infant) -v- The National Maternity Hospital and Jackson* [1989] I.R. 91 at 110).

by
Michael Kealy,
Solicitor

This was, Mr. Justice Keane continued, the supreme challenge to the Irish legal system in this area.

In remarks which received considerable publicity in the national press Mr. Justice Keane commented on the ''obvious and notorious'' inadequacies of civil legal aid in this country and expressed his concern that such inadequacies may have led to sustainable medical negligence claims never reaching court. He went on to discuss the question of whether ''no fault'' insurance would be an appropriate way of deciding medical negligence cases.

The opening address was followed by an English Solicitor, Arnold Simanowitz, Director of AVMA, on the Role of AVMA, and then three Irish lawyers, John Schutte, Simon Lee and Liam McKechnie.

John Schutte, Solicitor, discussed the running of medical negligence cases from the standpoint of a solicitor in practice (see his article in this issue).

Professor Simon Lee, Queens University, Belfast, attempted to predict trends in the law of medical negligence in the 1990s. He expressed the view that the doctrine of informed consent would take on an even greater significance and that the ''monolith'' of the medical negligence actions would disintegrate in the next decade with more specific and separate aspects of the area receiving greater attention.

Liam McKechnie, S.C., (one of the plaintiff's counsel in the *Dunne* case), conducted a review of the current law of medical negligence in Ireland. Mr. McKechnie referred to the six general principles of law which should be applied to such cases as laid down by the Sumpreme Court in the *Dunne* case. A detailed analysis of these principles included a review of the case-law underlying them and the extent to which, by formulating them, the Supreme Court may have changed the existing law, particularly with regard to the definition of ''general and approved practice'' among medical practitioners.

Mr. McKechnie also drew attention to the impact on medical negligence cases of the general law of professional negligence. Mr. McKechnie argued that *Roche -v- Peilow* (a solicitor's negligence case) could have a major impact on the question of whether a doctor can escape liability in negligence simply by showing that he followed a practice approved of and followed by other medical practitioners. Emphasis was also placed on the importance of interlocutory procedures in medical negligence cases and, more particularly, the necessity for the lawyers involved to follow up on particulars which have not been adequately replied to and to pursue discovery of documents with vigour and direction. Mr. McKechnie stated that interrogatories are a much underused but effective weapon in the armory of

both plaintiffs and defendants in this area.

Perhaps the most surprising aspect of Mr. McKechnie's presentation was the forcefulness with which he argued for a 'no-fault' system of compensation for those who suffer injury as a result of medical treatment. The case for it was, he said, ''so strong as to be virtually unanswerable''. This is certainly a major issue for the future.

The other Irish legal contributor to the Conference was Adrian Glover, Solicitor, who presented the defence viewpoint. He expressed the opinion that the level of damages in medical negligence cases may have reached a plateau and he stated that, on behalf of his medical clents, he did make informal discovery of all records and X-rays at an early stage, when requested to do so. He made some interesting observations on the gap in communication between doctor and patient, on the drop in applications to medical schools and on the staggering increase in subscription rates paid by doctors to the Medical Protection Society, who, together with the Medical Defence Union, are the main professional indemnity insurers for doctors in the UK and in this country. Mr. Glover pointed out that the two medical defence organisations are not commercial insurance companies and do not settle cases on the ground of expediency, even if, by reason of the high costs involved, it would be far cheaper for them to do so; and if they believed that their doctor member has not been negligent in a particular case, that case would be fully defended, whatever the cost.

Other legal contributors were Ann Alexander, London Solicitor, and Roger Brosnahan, Minnesota lawyer, on respectively the English Experience and the American Experience; and, Robert Mackrill, Accountant of BDO Binder Hamlyn, on Assessing Quantum – and the Use of Forensic Accountants.

The medical speakers at the Conference, dealing with problems in the areas of anaesthesia, general surgery, obstetrics and gynaecology, and orthopaedics were Professor John Robinson, Emeritus Professor of Anaesthesia, Birmingham University; Mr. J. A. Dormandy, Cnsultant Surgeon, St. Georges & St. James' Hospital, London; Mr. Roger Clements, Consultant in Obstetrics and Gynaecology; and Professor Thomas Duckworth, Professor of Orthopaedics.

To conclude on a light note, the following description was given by one of the medical contributors of the troubled relationship between the surgeon, the anaesthetist and the patient – ''the half-awake being dealt with by the half-asleep being half murdered by the half-wit''.

By comparison, the relationship between solicitors and barristers seems extraordinarily untroubled!

*Action for Victims of Medical Accidents (AVMA), Bank Chambers, 1 London Road, Forest Hill, London SE23 3TP; Tel London (01) - 291-2793.

THE J. P. O'REILLY MEMORIAL FUND

Founded by Dr. A. J. F. O'Reilly to honour the memory of his late father, the Fund provides a

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The Fund seeks to promote knowledge of Commercial Law and Corporate Finance among young Irish solicitors.

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(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 the 18th May; completed essays by the 30th June, 1990. It is hoped that the successful candidate will commence the study programme in autumn 1990.

Telephone or write to Professor L. G. Sweeney, Director of Training, Law Society, Blackhall Place, Dublin (710711).

Lawyers Fishing Club

During the Summer of 1988, a letter from Mr. Frank Wickham-Smith, Solicitor, on behalf on the Lawyers Fishing Club in the UK was published in the Law Society Gazette inviting the formation of a similar club for the purposes of promoting contact between the professsions within the islands by means of angling competitions.

A number of people responded and an invitation was received in Ireland to participate in a friendly "International" in England in September, 1989.

Shortness of time and the intervention of holidays proved something of a handicap so that, in the event, the team consisted of Bill Tormey, Ernest Williams and John Jermyn (Senior) from the South, two barristers from the North and a Welsh barrister whose sole claim to the right to fish for Ireland lay in the fact that he had once advised An Bord Bainne in a case in England!

The competition was fished on a still water fishery at Church Hill Farm, Mursley, Buckinghamshire, about 35 miles north of London on the 30th of September 1989. The southern half of the team stayed near Mursley in a very comfortable B & B where we were made very welcome.

Next morning we presented ourselves at Church Hill Farm where we had our first sight of the fishery. This consisted of two "put and take" lakes, one of two and a half acres and the other a little larger. It was a rather different proposition from Lough Corrib and Lough Mask!

Fishing started at about 10.00a.m. and continued until 7.00p.m., when it was almost dark, with a break for drinks and a large lunch at about 1.00p.m.

Each rod was allowed to choose his own section of the bank of the lake, which he flogged all day, fishing long casts with dreadful leaded nymphs fished deep at the end. The southern representatives distinguished themselves only by their consistency; none of them rose a single fish all day, although we were informed that 100 trout of two and a half pounds each had been put into the lake the previous day. Our northern friends caught two fish between them but, of course, we were all beaten to a frazzle by the English who had a very nice bag of trout, almost all of which had been caught between 6.30p.m. and 7.00p.m.

After the weigh-in at which we were presented with a bottle of champagne, we adjourned to the local pub where our English friends provided sandwiches and we passed a very pleasant evening.

The normal charge for the Church Hill Farm Fishery is £40.00 per rod per day. Whilst this is somewhat reduced in the case of a block booking such as ours, our hosts paid all our fees and paid for all our drinks and a three-course lunch at the fishery as well as food at the pub. It was not until we reached the bar that we were allowed to put our hands in our pockets. We could not have been treated more kindly or made to feel more welcome.

Before we broke up, it was agreed unanimously that the fishing contest should be established as an annual event to be fished in each country in turn. Scotland has already expressed a desire to be involved and Bord Bainne's advisor has promised to raise a team from Wales. It is also hoped that the North of Ireland Bar Angling Association may also field their own team.

With the timely ending of the Rod Licence Dispute, arrangements are at present being made to have the first of these full internationals fished on Lough Corrib in September next. A formal meeting to establish the Lawyers Fishing Club of Ireland has been arranged for Tuesday, 15th May, 1990, at 8.00p.m. to be held at Blackhall Place, Dublin. There can be no more haramonious way to promote contact and fellowship between the professions than through angling and all those interested are asked to volunteer their support to this worthy and highly enjoyable proposal.

For further information please contact Adrian P. O'Gorman at DunLaoire Corporation.

The Irish Society For European Law

Founded in 1973
Irish Affiliate to the
Fédération Internationale
Pour le Droit Européen (F.I.D.E.)

President: The Hon. Mr. Justice Brian Walsh
Chairman: Mr. Eamonn G. Hall, Solicitor

Programme for Spring/Summer 1990

1. **Thursday, May 10th, 1990:**
   Nuala Butler, Barrister, National Rapporteur, FIDE (Madrid – 1990) Congress – *Fiscal Harmonisation;*

   Jeremy Maher, Barrister, National Rapporteur, FIDE (Madrid – 1990) Congress – *Impact of European Communities Merger Control on Ireland.*

2. **Tuesday, July 17th, 1990:**
   Mary Robinson, Senior Counsel, Director Irish Centre for European Law, National Rapporteur, FIDE (Madrid – 1990) Congress – *Public Procurement.*

Lectures take place at 8.15 pm 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 Committee and guest speakers *for dinner* at the Club at 6.15 pm on the evening of each lecutre. Members intending to dine must communicate with the Membership Secretary, Jean Fitzpatrick, Solicitor's Office, Telecom Eireann, Harcourt Centre, 52 Harcourt Street, Dublin 2. (Tel. 01 714444 ext. 5929, Fax. 01 793980, Electronic Mail (Eirmail) (Dialcom) 74: EIM076) not later than two days before the dinner, as advance notice must be given to the Club.

Membership of the Society is open to lawyers and to others interested in European Law. The current annual subscription is £15.00 (£10 for students, barristers and solicitors in the first three years of practice). Membership forms and further details may be obtained from the Membership Secretary.

Investing on the Stock Market

There need be no great mystery about investing on the stock market. If you have a few thousand pounds to invest any stockbroker would be glad to buy shares on your behalf. His charge is relatively small and the gains can be considerable. But, of course, you have to pick the right shares and you should know a bit about what you are doing.

by Colm Rapple

The memory of the stock market crash of October 1987 is beginning to fade. It was traumatic for many at the time. Having soared in value during the earlier part of that year shares took a sudden tumble. The overall value of shares on the Dublin exchange were nearly halved in value. But the recovery got underway quickly enough and since then those losses have been recovered. Although some shares are still below the highs they hit just before the crash, the overall market is above its pre-crash level. Developments in Eastern Europe have increased the level of uncertainty about the future but no-one is predicting another crash. There is always some uncertainty, of course, and some shares are riskier than others. Shares in either of the main banks are not likely to fall too rapidly in value while those in some of the oil exploration companies can jump around all over the place in response to the wildest of rumours.

Between the two there is a wide choice offering something for everyone – whatever their attitude to risk. There is always some risk, of course.

But how do you go about it?

It can be argued that the small investor is better advised to invest indirectly in the stock market through unit trusts or equity linked bonds. That way he gets the benefit of skilled management for his investment. However, it can be expensive to invest indirectly. The set-up costs of investing in a unit linked fund are considerably higher than the commission payable on a share purchase. The funds do provide a spread of investments, of course, but it can be interesting to play the market yourself provided you appreciate the risks you take and can afford to accept some losses.

"The set up costs of investing in a unit linked fund are considerably higher than the commission payable on a share purchase."

WHETHER YOU go it alone, or invest indirectly, some knowledge of the stock market will not go amiss. Investing in a company on the Stock Exchange gives you a part ownership in the company concerned. The return on this part ownership depends on the performance of the company so, together with the prospect of a high return, goes the risk of no return. The degree of risk varies with the company.

Buying ordinary shares makes you a part owner of the company carrying the full risks of ownership and the full prospects. If the company makes no profits, you get no dividend; if it prospers, you get all the cream. To the outsider a certain aura of mystery surrounds the Stock Exchange, but the fact is that one can buy shares as easily – perhaps more easily – than lodging money in the bank. A number of stockbrokers now have walk-in shops where it is possible to buy shares at the counter – and sell them just as easily.

The first question which enters the heads of most potential Stock Exchange investors is: "How much do I need?" There is no hard and fast answer. Some stockbrokers would put the minimum at about £1,000, some would accept a lower figure.

Assuming that you have this money, how should you go about it?

The person to contact is a stockbroker. You could use your bank manager as an intermediary, but it's probably better to deal direct. A list of stockbrokers may be obtained from The General Manager, Irish Stock Exchange, Anglesea Street, Dublin 2.

IN ADDITION to buying or selling your shares for you, the stockbroker will also give advice on what and when to buy and sell. His commission is relatively small – about one and a half per cent of sale or purchase price. There is no fixed commission so it may pay to shop around. Some brokers charge a minimum commission as a means of discouraging the very small investor. Commissions are often lower on bigger deals – £10,000 or £20,000 or more. But the one and half per cent is about par for smaller deals, with the minimum set at around £20. There is also a Government stamp duty of 1 pc on all deals.

In order to give you the best possible advice, the broker will need to know something of your income and capital position; your tax liability and your investment objectives. Do you want a high income now? Are you trying to maintain or increase your capital against the day when your pension is worth less in real terms? Brokers may not get over-enthusiastic about small investors, but a potential investor who can give a brief outline of what he requires will always get a sympathetic hearing.

With exchange controls eased it is now possible to buy shares in foreign companies. Those exchange controls still apply to putting money on deposit abroad but you can buy shares provided the deal is done through an approved agent – stockbroker, bank or solicitor – and a return of the transaction is made to the Central Bank.

Investing abroad, of course, brings another risk element into place. The investment has to be made in the local currency and there is always the risk that that currency will devalue against the Irish pound. If that were to happen investments in British shares would

"With exchange controls eased . . . you can buy shares [in foreign companies] . . . through an approved agent – stockbroker, bank or solicitor . . . ."

lose some of their value in terms of Irish pounds.

But if you want to invest in overseas shares, your stockbroker or bank can handle the deal. But it is not sufficient just to make the settlement through the Irish agent. Payment has to be made through the Irish Agnet too. Individuals are not allowed to send Irish pound cheques to non-residents in payment for share purchases. Dividends have to be repatriated immediately although it is permissible to keep the sales proceeds from foreign shares abroad for up to three months if it is intended to reinvest them.

SHARES ARE NOT the only investment which are bought and sold on the stock exchange. The very name comes from government stocks, or Gilts – as they are sometimes called. These can be an attractive investment for the ordinary investor. They are not something solely for the high flyer. There need be no great mystery about them. No DIRT tax is stopped on the inverest paid on Government stocks so they can be particularly attractive to the non-taxpayer who being under 65 years of age and not incapacitated is unable to reclaim the DIRT tax stopped on normal deposit interest. Those liable for income tax are supposed to declare the interest received from the investment in Government stocks and pay the relevant tax. But those outside the tax net have no more worries.

Although the price of Government stock can move up and down, the investor who can hold on until the redemption date of the particular stock takes no risk. So it is possible to invest on a no-risk basis. Unfortunately many people are put off by the very idea of investing on the Stock Exchange – either in shares or Gilts. But there is no need to be. It is all quite simple. First an explanation of what a Government stock is.

When the Government borrows from the public, the financial institutions, or the banks on a long-term basis it does so by "selling" new Government stock. The stock can be thought of as an IOU. In return for the loan the Government gives out this IOU promising to pay the lender so much interest every six months and to repay the full amount of the loan at some time in the future. Usually the repayment date is left a little flexible. It may be set as between 2000 and 2005, for instance. In such a case it is usually assumed that the loan will be repaid at the later date i.e. 2005.

The person, or institution, who initially made the loan now owns a valuable IOU which gives the bearer the right to an interest payment every six months and a lump sum at some date in the future. It is those IOUs which are sold on the Stock Exchange. But their value can vary from day to day and from week to week. Let us see why that should be the case.

Suppose someone lent the Government £100 some years ago, say by buying a 6 per cent Stock redeemable in 2005. What he got was one of our IOUs promising to pay him 6 pc a year up until 2005 and then to give him back £100. How much is that IOU worth now.

" . . . it is possible to invest [in Government stock] on a no-risk basis."

It only entitles the bearer to £6 a year in interest payments but with interest rates at about 12 pc, a would be purchaser can get an annual income of £6 by investing £50 in a bank. Of course, he also knows that he will get £100 in 2005. But that is a long way off. So the purchaser may not be willing to pay much more than about £55 for the IOU at this time. If he buys it for £55 he will get an interest return of a little under 11 pc on his investment (£6 interest on £55 investment) and he also has the certainty of getting more than his £55 back in 2005. If he holds the Government stock – or the IOU as we have been calling it – until 2005, he knows for certain what his return will be and he takes no risk. If he has to sell the IOU before then, he can not be sure what it will fetch. Its price will always be determined by the alternative investments available and that will be determined by the general level of interest rates.

There are so many Government stocks, however, that the small investor should always be able to pick one with the right number of years to go to redemption to suit his particular requirements. It can be an ideal investment for someone with a redundancy lump sum who knows that he is going to be out of the income tax net and wants to get a good income on his money which is not going to be subject to DIRT tax.

In addition to their attractions for non-taxpayers government stocks may also be attractive inivestments for high taxpayers. The return can come in two ways: there is the annual interest; and there is the capital gain which can be made if you buy stock at one price and sell at a higher price. As mentioned above, if interest rates in general fall, the price of stock goes up. While the interest is liable to income tax, the capital gain is not. It is not considered income and it is exempt from capital gains tax. This provides some attractions for the high tax payer.

A person paying tax at more than the standard rate finds any tax free return attractive. If he can buy a stock which comes up for repayment in the near future, he can be sure of making a capital gain without any risk, and his after-tax return can be relatively high. He will not be paying tax on a large portion of that return. For that reason this type of stock is much in demand by high income tax payers who will bid up the current market price. Because the price is bid up, they are generally less attractive to low income tax payers. Very often, indeed, they are unobtainable since there are no sellers. □

The 1990/91 edition of Colm Rapple's book "Family Finance" from which this article has been extracted is now on sale. It has been updated for the 1990 budget.

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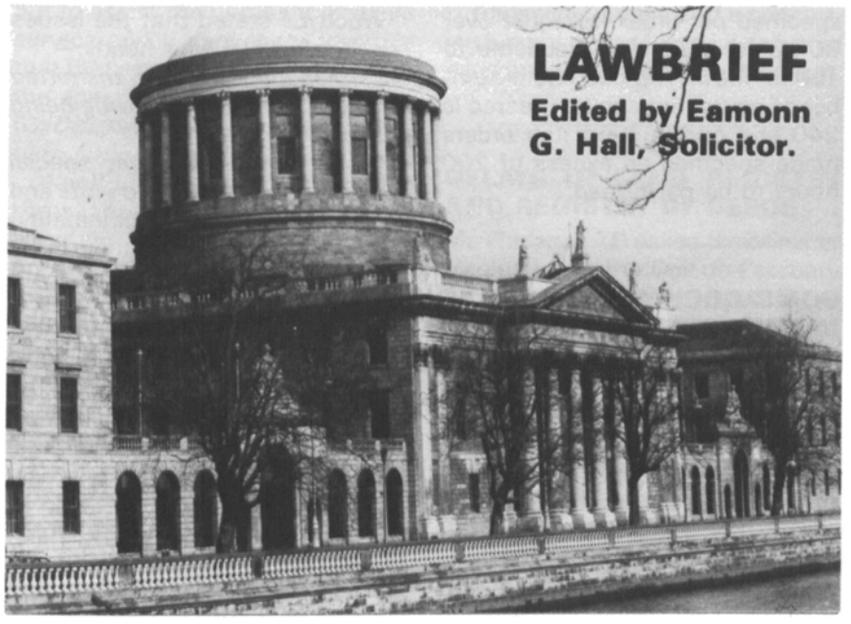

IS A CLUB LIABLE FOR A MEMBER'S INJURIES?

The difficult issue of liability of members of an unincorporated club arose in the case of *Robertson -v- Ridley* [1989] 2 All ER 474. The plaintiff, a member of an unincorporated members' club, was riding his motorcycle out of the club grounds when he failed to see a pothole in the driveway, fell off and was injured. He brought an action against the chairman and secretary of the club as officers of the club, claiming that they were liable for the injuries he had sustained by reason of the condition of the club's premises, on the ground that the rules of the club, which provided that the chairman and secretary "were responsible in law . . . for the conduct of the club", gave rise to a duty to maintain the premises in a reasonable state of safety and repair. The judge of first instance dismissed the claim, holding that the club rules merely provided that the two officers were to be responsible for those legal obligations already imposed on members' clubs before the rules came into existence and did not give rise to any new duty, with the result that the rules as such did not qualify the general common law rule that individual members could not sue a club to which they belonged.

The plaintiff appealed. The Court of Appeal (May, Nourse and Woolf LJJ) held that in so far as the rules of the club provided that two of its officers were to be responsible in law for the conduct of the club then, in the absence of an express provision that the officers were to be responsible for the condition of the club premises, the rules did not give rise to a duty of care towards individual members to maintain the club premises in a reasonable state of safety and repair and did not qualify the general common law rule that there was no liability between a club or its members on the one hand and individual members on the other. Accordingly the plaintiff's claim failed and his appeal was dismissed.

The issue of liability in negligence of members of a private club arose in the Irish case of *Murphy -v- Roche (No. 2)* [1987] IR 656. There, the plaintiff was a member of an unincorporated members' club which was managed by a committee which worked without remuneration.

While attending a dance at the club premises, to which he had paid an admission fee, the plaintiff was injured as a result of a fall which he attributed to the negligence of the persons who organised and ran the dance. The monies collected for admission to the dance were applied to the general purposes of the club. The plaintiff commenced proceedings for damages against the defendants as representing the club. The defendants were the trustees of the club in whom its property was vested and the plaintiff did not attribute any personal responsibility for negligence to any of them. The defendants disputed the plaintiff's claim on the grounds, *inter alia,* that the plaintiff as a member of the club could not maintain an action against the club.

Gannon J. held that the club had no separate legal character distinct from its members. He held that the duty, upon which the plaintiff's action was founded, to observe suitable standards of care in the organisation and running of the dance, was a duty shared equally by all the members of the club, including the plaintiff. Further, the only liability which might attach to the club for breach of that duty was the vacarious liability of all the members, including the plaintiff, as principals, for the wrongful acts or defaults of their agent, whether a member or servant of the club. Gannon J. held that the plaintiff's contribution to the admission receipts did not avoid his share of the responsibility for observing suitable standards of care. Accordingly, Gannon J. held that the plaintiff's action was not maintainable at law.

Raymond Byrne and William Binchy in their *Review of Irish Law 1987* at pp 336-338 analyse the decision of Gannon J. in *Murphy -v- Roche.* The authors comment that Gannon J's analysis of the principle issue is somewhat subtle. The rule that in general there is no liability at common law between a club or its members on the one hand and individual members on the other does give rise to considerable difficulty and practitioners should be aware of the issues involved.

THE PROBATION AND WELFARE SERVICE

The Report of the Probation and Welfare Service with statistics for the year 1988 (PI 6843, price £3.10) recently published by the Stationery Office makes interesting reading. The principal function of the Probation and Welfare Service is to supervise offenders in the community with the specific intention of reducing offending behaviour and offering established programmes of supervision which enable offenders to take responsi-

bility for changing their behaviour and for complying with the conditions and requirements of the various court orders.

The group considered most at risk of engaging in criminal activity – 16-20 year olds – increased in 1988 by two percentage points. This group now accounts for almost half (47.8%) of all referrals to the Probation and Welfare Service.

A feature of sanctions applied during the year was that some court areas used compensation as an integral part of community-based sanctions. Section 1 (3) of the *Probation and Offenders Act, 1907* and section 3 (3) (d) of the *Criminal Justice (Community Service) Act, 1983* empowers courts, when placing persons on probation or directing them to do community service, to make an order for compensation. During the year, the court ordered a total sum of £3,735.00 to be repaid in compensation. Of this amount, £2,039.00 was collected by the Probation and Welfare Service and refunded to various injured parties.

An interesting facet of the Report is the success of the Community Service order system. When determining the penalty for an offence which merits an immediate custodial sentence, courts may instead order that the offender perform a number of hours of unpaid work for the benefit of the community. Before making such an order, however, the *Criminal Justice (Community Service) Act, 1983* requires that the offender consents and that the court is satisfied both that he is a suitable person to perform community service work and that there is work available to be undertaken.

There were almost 1,500 referrals for community service work by courts in 1988, while, for the first time, over 1,000 such orders were made within a 12 month period. This represents a 55% increase in the volume of orders made in 1985, the initial year of the Act's operation. The number of hours ordered exceeded 130,000, equivalent to 70 persons working full time for a year and represented a one third increase on the 1987 figure. This results not alone from a higher volume of orders made but also from a rise in the average number of hours specified per order from just over 80 at the start of the scheme to 120 in 1988. The maximum number of hours that can be ordered is 240 and one in every ten orders made specified an excess of 200 hours to be performed.

SOME DOCUMENTS CAN BE VALIDLY SERVED BY FAX

The Court of Appeal (Lloyd, Glidewell and Woolf LJJ) in *Hastie and Jenkerson -v- McMahon, The Times,* April 3, 1990, delivered an important judgment concerning the use of facsimile transmission of documents. The present writer has already dealt with that issue in this jurisdiction in "Service of Documents by Fax" in the *Law Society Gazette*, September 1989, p 318. In *Hastie* the Court of Appeal held that the use of facsimile transmission of a document (other than one required to be served personally or an originating process) constituted good service provided that it could be proved that the document, in a complete and legible state, had in fact been received by the person on whom service was to be effected.

The Court of Appeal held that Order 65, rule 5 (1) of the *Rules of the Supreme Court* which is identical to Order 121, rule 2 of the *Rules of the Superior Courts* in this jurisdiction, (being permissive rather than exhaustive), did not outlaw modes of service not there specified.

Woolf LJ said that judgment had been entered by the defendant on the ground that the plaintiff had failed to comply with the consent order made by Master Hodgson on November 28, 1988. The order had required that: "the plaintiff serve on the defendant by 4.30p.m. on December 19, 1988 a list of documents pursuant to the order of Mr. Registrar Greenslade dated February 12, 1988, or that they be debarred from defending this action".

The court of first instance had allowed the plaintiff's appeal because the judge concluded that they had complied with the order of Master Hodgson by causing a clearly legible list of documents to be transmitted by fax to the defendant's solicitors by 4.10p.m. on December 19, 1988.

Woolf LJ stated that the issues raised fell under four heads:—

(A) *Could a document transmitted by fax be regarded as having being served?*

His Lordship said that special considerations applied to writs and other documents used for initiating legal proceedings and nothing in his judgment was intended to apply to such documents. Similar considerations applied to the service of documents in this jurisdiction. However, Woolf LJ posed the question whether, with the exception of that class of documents, there were any legal reasons why advantage should not be taken of the progress in technology which fax represented to enable documents to be served by fax, assuming that that was not contrary to any of the rules of the Supreme Court. He stated that the purpose of serving a document was to ensure that its contents were available to the recipient and, whether the document was served in the conventional way or by fax, the result was exactly the same.

What was required was that a legible copy of the document should be in the possession of the party to be served. His Lordship therefore concluded that service by fax could be good service subject to any requirement of the order requiring service of a particular document and any requirement of the *Rules of the Supreme Court.* The problem from the point of view of parties using fax as a means of service other than by agreement was that is might be difficult for a party to prove that a legible copy of the document had in fact been printed at the recipient's premises.

(B) *If the document could be served by fax, did that conflict with the Rules of the Supreme Court?*

Order 65, Rule 5 (1) stated that apart from documents falling within the special categories of those required to be served personally or those in the nature of an originating process: "service of any document . . . may be effected – (a) by leaving the document at the proper address of the person to be served; or (b) by post . . . or (d) in such other manner as the court may direct". This rule is equivalent to Order 121, rule 2 of the *Rules of the Superior Courts* in this jurisdiction.

The purpose of the Order was not to restrict methods of service

but to assist the parties to achieve service and if necessary to prove that that service had taken place in the specified circumstances.

(C) *Did that form of service comply with Order 65, rule 5?*

Woolf LJ considered that rather than the Courts seeking by adopting an extended interpretation of the rule to apply the existing rule to service by fax, it was better to leave to the Rules Committee the task of re-drafting or otherwise amending the rule as they had done in the case of the Document Exchange.

(D) *Was the quality of the document produced by fax acceptable?*

Counsel argued that a document produced by a fax machine was not appropriately regarded as a document because the majority of the documents now produced by the use of fax were not as durable as documents printed on ordinary paper. Counsel also relied on Order 66, rules 1 and 2 of the U.K. *Rules of the Supreme Court* which dealt with the quality and size of paper and the printing of documents "prepared by parties for use in the Supreme Court". His Lordship strongly suspected that those rules were not intended to deal with the quality of documents served on other parties but the quality of documents prepared for use in court. Bearing in mind that in the ordinary course of events copies of the document were going to be made by the recipient if it was a document which was going to have to be referred to in the proceedings, his Lordship did not consider that there was any substance in that point.

Glidewell LJ delivered a concurring judgment and Lloyd LJ delivered a judgment concurring in the result.

DELAYS IN LAND REGISTRY AND REGISTRY OF DEEDS

Mr. Flanagan TD asked the Minister for Justice in the Dail on February 27, 1990 that, having regard to the content of the recently published annual report of the Land Registry and Registry of Deeds, if he would accept that delays in both registries were chronic and unacceptable; and if the Minister would outline positive proposals to address the matter.

The Minister for Justice, Mr. Burke, replied stating as a preliminary matter that he must point out that in accordance with normal procedures the annual report in question had not been published. The Minister stated he had indicated to the House in the course of the debate on the Provate Members' motion on 14 November last, that he was concerned at the level of delays in the service being provided by the Land Registry and Registry of Deeds. These delays were due mainly to an increase in the intake of work and a shortage of staff. Indeed the Minister stated that there had been an increase of 18.7 per cent in 1989 over 1988 in dealing with applications which comprise the bulk of Land Registry work.

The Minister stated that shortly after taking up office he initiated a general review of the operation of the registries and while he had not completed that review he had taken some steps to alleviate the situation. He had obtained sanction for an additional 35 staff for the Land Registry in 1990. Eleven of these had already been recruited and had taken up duty. Every effort was being made to have the remaining staff recruited as quickly as possible. As a short term measure, the Minister stated that some senior staff had been diverted from other work to deal with the kind of cases where the worst delays were occurring.

The Minister stated that he had also made arrangements for the filling of the post of Registrar of Deeds and Titles and he had obtained agreement from the Minister for Finance for an appointment of a number of staff at senior level.

In addition, the Minister stated that he had provided for an increase in computerisation expenditure of the order of 32 per cent over 1989. A programme of computerisation of the abstracts in the Registry of Deeds would start early this year and the computerisation programme in the Land Registry, which was already well under way, would be extended further.

The Minister concluded by stating that the measures he had outlined were initial steps which he had taken in tackling the problem of delays in the Land Registry and Registry of Deeds. He was continuing to review the operation of the registries and would take whatever steps were necessary to resolve the problems there.

COURT HEARINGS

Mr. Taylor T.D. asked the Minister for Justice in the Dail on February

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27, 1990 if he was satisfied that there were no undue delays in having a case heard by either the District Court or the Circuit Court; and if the Minister would make a statement on the matter.

The Minister for Justice Mr. Burke stated that he was satisfied that the very wide range of business coming before the District and Circuit Courts was being disposed of within reasonable time-scales.

COURT RE-ORGANISATION

Mr. Gilmore T.D. asked the Minister for Justice in the Dáil on February 27, 1990 when it was intended to initiate the process of court re-organisation, including the establishment of a new civil court of appeal, which was promised in *The Programme for Government 1989-1993;* and if the Minister would make a statement on the matter.

The Minister for Justice (Mr. Burke) stated that work had commenced in his Department on proposals for the necessary legislation to establish a court of civil appeal.

The review of District Court venues, which he mentioned in the House already, was almost completed and he expected to announce proposals shortly for the closing of a number of venues.

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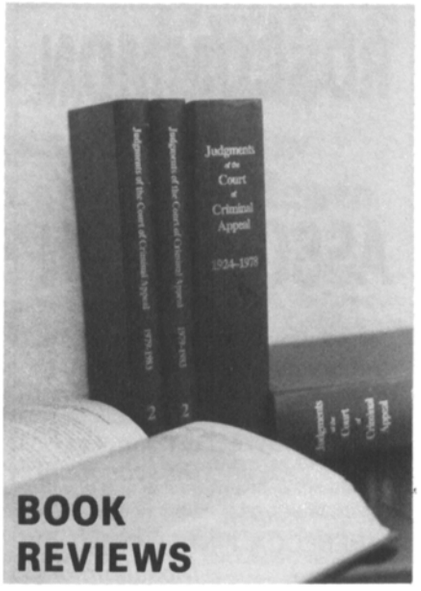

IRISH BUILDING AND ENGINEERING CASE LAW
Edited by John M.E. Lyden and Michael MacGrath. [Society of Chartered Surveyors in the Republic of Ireland, 1989, xii, 595pp. IR£95.00]

Irish Building and Engineering Case Law is a very welcome addition to the increasing number of books available dealing specifically with Irish Law. Many recent important decisions relating to the laws of contract and tort in the U.K. have been handed down in construction-related cases. Whether or not these decisions will be followed by the Irish courts remains to be seen, but insofar as the law here and in the U.K. diverges, a book such as the one under review, becomes all the more valuable.

Described by the Editors John Lyden, Chartered Quantity Surveyor and the Consultant Editor, and Michael MacGrath, Barrister at Law, as "An Index and Digest of Irish Cases relating to Building and Engineering Law and other matters of interest to surveyors, architects, contractors and engineers" the work should also be of considerable interest to both barristers and solicitors.

The Editors record major Irish cases on building and engineering law decided since 1890. Also included are references to other cases relevant to construction law in Ireland. Generally, however, cases dealing with arbitration, personal injuries and planning have not been included. I hope that in preparing future editions the Editors will give consideration to the inclusion of Case Notes on such topics.

The layout of the work is admirable. Case Notes of over 320 decisions are set out, and in addition there are more detailed "Digest" notes of 35 judgments, together with the Editors' commentary. The Introduction includes a helpful guide on how to use the book. Where appropriate, Case Notes or Digests are cross-referenced to other relevant decisions, textbooks, articles etc. A very comprehensive subject index is included.

The Digest deals with many important decisions, recent and old, having relevance to those involved with the construction industry including:

Curley -v- Mulcahy (professional negligence – architect's duty and standard of care in contract and tort);

Egan & Sons -v- John Sisk (negligence – damages – remoteness – economic loss);

Glow Heating Ltd. -v- Eastern Health Board (trust rights – payments to nominated sub-contractors).

Two of the decisions included in the Digest, namely, *John Sisk & Son Ltd. -v- Lawter Products* (decision of Mr. Justice Finlay) and *P. J. Hegarty & Son Ltd. -v- the Royal Liver Friendly Society* (decision of Mr. Justice Murphy) were considered by Mr. Justice Costello in the case of *Rohan Construction Ltd. -v- Antigen Pharmaceuticals Ltd.* which was decided in January of last year. All three cases dealt with the contractor's right to receive payment on foot of certificates in circumstances where the Employer claimed the right of set-off in relation to claims for damages. Mr. Justice Finlay decided that the provisions of the RIAI Conditions of Contract (1966 Edition) were not consistent with the right of set-off. Mr. Justice Murphy came to a different conclusion in the *Hegarty* case (which concerned the 1977 RIAI edition). There is in fact no material difference between the two editions of the RIAI Conditions. Mr. Justice Costello in the case before him decided that the contractor (Rohan Construction) was entitled to payment on foot of interim certificates issued by the Architect, notwithstanding his acknowledgement of the fact that the Employer (Antigen) had a bona fide claim for damages.

One small quibble with this otherwise excellent work: The Digest includes notes on the judgement of Mr. Justice Gannon in the High Court in the case of *Priority Construction Ltd. -v- Ennis Urban District Council* but omits to state that the judgement was subsequently vacated by the Supreme Court.

The Editors are to be applauded for the extensive research that they have undertaken in preparing this work and the Society of Chartered Surveyors in the Republic of Ireland are to be congratulated for the support given by them. This book is recommended to all lawyers who may from time to time be called upon to advise on building or engineering matters.

Timothy Bouchier-Hayes

GCSE LAW.
By W J Brown. [London: Sweet & Maxwell. 1989. xix + 298 pp Stg£6.95]

The aim of this book is to help candidates prepare for the GCSE examination in law. Accordingly, the book is of limited usefulness in this jurisdiction.

The authors provides a simple overview of the law in the United Kingdom. The fourth edition has been updated to include recent developments in the law. Written in a clear style, the text covers many wide-ranging topics including topics such as the nature of law, the administration of law, legal personality, civil liberties, contract, the law of torts, criminal law and welfare law. There is an emphasis on the practical aspects of the application of law to everyday situations. Students are helped to understand fundamental legal concepts by extracts and illustrations, such as a case report and a statute. Revision questions, specimen examination questions and suggested coursework titles are included at the end of each chapter to assist progress through the course. The book concludes with a section on examination technique, sample examination papers and lists of addresses from which useful

source materials and background information may be obtained.

Hopefully the writer of this brief notice may be excused for referring to the helpful advice which William Fulbeck (1560-1603) gave to law students. Fulbeck was writing only a hundred years after the introduction of printing:

> "Neither ought it to trouble us, that the law books are so huge, and large, and that there is such an ocean of reports, and such a preplexed confusion of opinions, because the science itself is short and easy to one that is diligent, according to that saying; Industriae omnia serva fiunt, All things are servants to diligence, or come at her command, and [the law] is not to be esteemed by the greatness or smallness of the books, but the goodness of their rules".

(*Fulbeck's Direction, or Preparative to the Study of the Law (1599).*

Eamonn G. Hall

IRISH COMPANY AND PARTNERSHIP LAW. (Study Text) [BPP (NI) Publishing, 1989, xxxiv + 434 pp £16.95 stg.]

The publishers state that *Irish Company and Partnership Law* is a manual designed to equip the reader to meet the challenge of the subject and to achieve success at degree or professional level. The publishers acknowledge the contribution of Gerard McCormack, BCL, LLM (NUI), Barrister, lecturer in the Faculty of Law, Universtiy of Southampton, who acted as general editor of the text, David N. N. Tomkin, MPhil, PhD, lecturer in Company Law at Dublin City University and a consultant solicitor, and Máire Whelan, BA, LLB (NUI), LLM (Lond), Barrister, former chairperson of FLAC (Free Legal Advice Centres) who is a practising barrister in Dublin.

The relevant syllabi of a number of professional bodies are set out before the main text together with a commentary, where appropriate, and a review of past examination papers. The syllabi covered ralate to the Institute of Chartered Accountants in Ireland, the Chartered Association of Certified Accountants, the Chartered Institute of Management Accountants, the Institute of Chartered Secretaries and Administrators, the Institute of Certified Public Accountants in Ireland and the Institute of Accounting Technicians in Ireland. The syllabi of the professional law schools in Ireland are not included.

There are references in the text to both Irish and UK decisions as well as to decisions in cases from other jurisdictions. The law is stated as of December 1989. The law as stated in the manual is divided into six parts and twenty-eight chapers: part A deals with company formation and records; part B relates to share and loan capital; part C is concerned with the management and administration of a company; part D relates to company reconstructions, take-overs and mergers; part E deals with liquidation and dissolution and part F relates to partnership. An index of cases and a general index are also provided. The year of the decided case is cited but no reference is made to where the case is reported. This omission is regretted by the writer of this notice.

The manual, written in a lucid and attractive style, does provide a comprehensive coverage of topics examined by the professional accounting bodies in their company law paper. This work was not intended for practitioners. Yet the manual is a useful aide-mémoire for anyone interested in company law.

Eamonn G Hall

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Joseph Waldron, Main Street, Headford, Co. Galway. Folio No: 9405F; Lands: Cloghmoyne; Area: 3,488 acres. County: **MAYO.**

Thomas Killeen, Folio No: 22635; Lands. (1) Caherloughlin, (2) Caherloughlin, (3) Caherloughlin, (4) Killimor; Area: (1) 3a.3r.4p., (2) 16a, 2r, 23p., (3) 8a.1r.33p., (4) 9a.1r.10p. County: **MAYO.**

James P. Ryan, 17 Malahide Road, Dublin, **Elizabeth Ryan,** 2 Donnycarney Road, Dublin; Folio No: 22609; Lands: Wotton; Area: 0a.1r.31p. County: **MEATH.**

Desmond Walker, Folio No: 9839; Lands: Carrowmullin; Area: 14a.0r.29p. County: **DONEGAL.**

Desmond Sweeney, Mulranny, Westport, Co. Mayo. Folio No: 31954; Lands: (1) Mulranny, (2) Six undivided one hundred and fiftieth parts of Mullaranny; Area: (1) 2a.0r.15p., (2) 704 acres. 0r.36p. County: **MAYO.**

Michael J. O'Connor, Bottle Hill, Barrack Road, Doon, Co. Limerick. Folio No: 1060F; Lands: Cooga Upper; Area: 0a.0r.19p. County: **LIMERICK.**

Camillus Kenna, 24 Elmcastle Green, Kilnamanagh, Dublin 24. Folio No: 39745L; Lands: Townland: Kilnamanagh, Barony: Uppercross; Area: 0.051 Hectares. County: **DUBLIN.**

Patrick Joseph Doherty, Folio No: 31707, Lands: Keeloges; Area: 32.650 acres. County: **DONEGAL.**

Edward Casey, Folio No: 7335, Lands: (1) Gaddaghanstown, (2) Gaddaghanstown, (3) Robinstown, (4) Friarstown; Area: (1) 25a.1r.5p., (2) 17a.2r.22p., (3) 16a.1r.22p. (4) 1a.3r.4p. County: **WESTMEATH.**

John McMorrow, The Scalp, Kiltiernan, Co. Dublin. Folio No: DN017072; Lands: Townland: Kingston Barony: Rathdown; Area: 0.134 Hectares. County: **DUBLIN.**

Michael Mahon, Folio No: 4665; Lands: Ballynakill, Barony of Philipstown Upper. County: **OFFALY.**

Patrick J. Gallagher, Folio No: 19867; Lands: Tullynaskeagh West; Area: 0a.1r.1p. County: **MONAGHAN.**

Charles Gallagher, Ballynakilly, Inch, Co. Donegal. Folio No: 32997; Lands: Ballynakilly; Area: 0a.2r.0p. County: **DONEGAL.**

Stephen Fox, Folio No: 8347F; Lands: Stranorlar. County: **DONEGAL.**

Frederick Bradfield Moore, Folio No: 63410F; Lands: 18 Thormanby Lawns, Howth. County: **DUBLIN.**

James Patrick O'Toole and Catherine O'Toole, Folio No: 21563F; Lands: Coolroe. County: **CORK.**

Cloyne Clay Company Ltd., Folio No: 13893; Lands: 1a.0r.0p. County: **CORK.**

Margaret Brady, Folio No: 1285F; Lands: Clones Upper; Area: 0.425 acres. County: **WEXFORD.**

Captain Charles Wyndman Robertson, 3 Fitzwilliam Square, Dublin 2. Folio No.: 472; Lands: Townland of Rathmichael, Barony of Rathdown; Area: 1.694; County: **DUBLIN.**

Lost Wills

CURRAN, Jane, late of 9 Ave Maria Road, Maryland, Cork Street, Dublin 8. Would anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 30th day of December, 1989 please contact Porter Morris & Co., Solicitors, 10 Clare Street, Dublin 2. Tel. 761185.

SMYTH, James, late of Coolalough Cottage, Hospital, Co. Limerick. Widower and retired bus conductor. Ob. 18th February, 1990. Would anyone having knowledge of the whereabouts of a Will of the above named deceased, please contact T. V. O'Sullivan & Co., Solicitors, St. Michael Street, Tipperary. Tel: 062-51986 or 51387.

SHORTEN, John (Jack), deceased, late of Keelnacranagh, Enniskeane, Co. Cork. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 25th day of January, 1990, please contact Murphy & Long, Solicitors, Kilbrogan Hill, Bandon, Co. Cork. Tel: 023-44420.

FLEMING, Maurice, deceased (Detective Garda), late of 5 Grange Mews, Waterford City. Will anyone having knowledge of the whereabouts of Will and or papers and or files of the above named deceased who died on the 9th of November, 1989, please contact Purcell & Cullen, Solicitors, 21 Parnell Street, Waterford City, reference W/P/3872.

SHEVLIN, John, deceased, late of 8 Harbour View Terrace, Limerick. Will anyone having knowledge of the whereabouts of a Will of the above named deceased, who died on 12 August, 1989, please contact Tynan, Murphy, Yelverton & Co., 16 William St., Limerick.

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GALLAGHER MCCARTNEY, Solicitors. We have moved to New Offices at Main Street, Donegal Town. Fax and telephone numbers remain unchanged. Tel. (073) 21753 & 21597. Fax (073) 22279.

PATRICK J. D'ALTON, BCL., Solicitor, wishes to announce that he has changed address from 3 Lower Cecil Street, Limerick, to 119 O'Connell Street, Limerick. The telephone number remains (061) 47288.

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Vol. 84 No. 4 May 1990

The President, Ernest J. Margetson, with Jack Charlton at the Law Society's Annual Conference, 1990.

- The Mortgage by Deposit for present and future advances
- Striking off the Register and S.12 Companies (Amendment) Act, 1982

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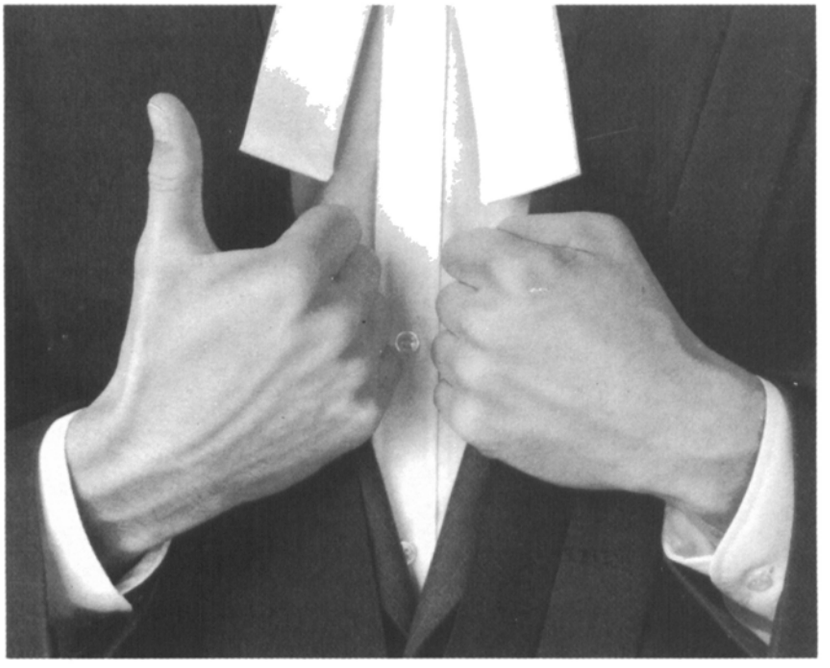

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INCORPORATED LAW SOCIETY OF IRELAND
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Viewpoint

The proposal emanating from Mr. Desmond O'Malley, Minister for Industry and Commerce, of a Tribunal to assess compensation for motor accident claims seems, with great respect, not to have been fully thought out. The insurance companies having persuaded the present Government's predecessor that the abolition of juries in personal injury actions would significantly reduce the level of awards to plaintiffs have been proved wrong, to the surprise of few in the legal profession. Some insurance offices apparently persuaded by their own arguments aggressively sought additional motor business and have apparently suffered severe losses as a result of the allegedly high awards.

The Minister by now should surely be persuaded that it is accepted in our culture that victims of accidents, whether in motor or industrial accidents, are entitled to a more generous level of compensation than might be available in some, though certainly not all, other jurisdictions. Such awards have been made by juries and now by judges, the large percentage of the former and all of the latter are presumably payers of motor insurance premiums and therefore the ultimate bearers of the load.

There are of course, serious defects in the present system, the most obvious being the large number of uninsured drivers. It is unfair on the insurance companies that they have, through the Motor Insurers Bureau, the obligation to pay for the effects of the problems caused by these uninsured drivers. If the Government wants to get insurance premiums down, then it must take all steps to ensure that the level of uninsured drivers is reduced to as near nil as is feasible.

It is also clear that our level of road accidents is intolerably high. Road discipline is, particularly in urban areas, most noticeable by its absence. There seems to be very little enforcement of traffic laws; one particularly dangerous practice rampant in our urban areas is the ''crashing'' of traffic lights. A serious effort should be made to enforce our traffic laws. If it is possible to assemble large numbers of Gardaí for security duties on the occasion of international meetings in Dublin Castle then might it not be possible to arrange to devote the attention of those Gardaí on other days to the enforcement of our traffic laws?

It should be borne in mind, if comparison is to be made with the Stardust Tribunal, that that excellent body was created to assess levels of compensation where there was no doubt that the plaintiffs would have succeeded in civil actions but where grave doubts existed about the availability of funds to compensate them. Is Mr. O'Malley proposing strict liability for motor accidents with the State compensating the victims? If not, then perhaps he should think again about suggesting a tribunal as an alternative to our courts. He might also ponder whether such a tribunal might not be unconstitutional. □

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Striking off the Register and Section 12 of the Companies (Amendment) Act, 1982

Under sections 125 and 126 of the Companies Act 1963 ('the Principal Act'), every company is required to make annual returns[1] to the Registrar of Companies. Failure to do so may result in the company and every officer who is in default being liable to a fine not exceeding £500.[2] Apart from the question of criminal sanctions there is also the possibility that in such circumstances the Registrar of Companies may exercise his power under Section 12 of the Companies (Amendment) Act 1982 ('the 1982 Act') to strike the name of the company off the register. This power, which is being used with an increasing frequency, is only exercisable where the company in question has failed for three consecutive years to make such annual returns.

The purpose of this article will be to examine the procedure whereby such companies are struck off, the problems that this may cause for the shareholders, employees and creditors, and finally, the procedure for restoring the company to the register.

By
Lyndon MacCann B.A. (Mod.), M.Litt., B.L.

Procedure for Striking off[3]

The Registrar will send to the company by post a registered letter inquiring whether the company is carrying on business.[4] This letter must state that if an answer is not received within one month from the date thereof, a notice will be published in *Iris Oifigiuil* with a view to striking the company's name off the register. If he receives an answer that the company is not carrying on business or if within that month the company fails to reply to the letter, or fails to deliver all outstanding returns, then the Registrar may publish in *Iris Oifigiuil* and send to the company by registered post, a notice that at the expiration of one month from the date therof, the company's name will be struck off and will be dissolved, unless cause is shown to the contrary or all outstanding returns are made.

Effect of striking off

If the company is then struck off the register, a notice of this fact must be published in *Iris Oifigiuil* and from the date of publication of this notice the company is deemed to be dissolved.

During the period when the company was on the register it existed as a separate legal person, distinct from its members.[5] However, once it has been dissolved, it ceases to exist in the eyes of the law. This can have serious consequences not only for its members, but also for its creditors and employees.

The Position of Shareholders

It is a well established principle of law that because of the separate and distinct legal personality of the company, its members do not have any form of proprietary interest in its assets and other property.[6] Accordingly, upon dissolution, such assets and property will not automatically vest in the shareholders. Rather, it has been held in some early cases, that in such a situation, where the company has been dissolved, its property devolves upon the State as *bona vacantia.*[7]

In Ireland the doctrine of *bona vacantia* has been abolished.[8] However, Section 28 of the State Property Act 1954 expressly provides that where a company has been dissolved all real and personal property (other than land held by it upon trust for another person) automatically vests in the State, subject, in the case of land only, to such charges or incumbrances as affected the land immediately before dissolution. According to the Act, the Minister for Finance then holds the property on behalf of the State. It would seem, therefore, that as a result of this section the shareholders will not have any claim to what was formerly the property of the company.

This may in turn give rise to further problems. For example, prior to dissolution, the company may have been intending, for one reason or another, to issue proceedings against some other party. Whatever the nature of the intended cause of action, as the company ceases to exist upon dissolution such proceedings certainly cannot be

Lyndon MacCann.

issued in its name. Neither can all the shareholders, in their own names issue the intended proceedings. Such right of action, if any, which subsisted constituted an asset of the company and therefore under Section 28 it is now vested in the State. Proceedings would accordingly have to be issued in the name of the Minsiter for Finance.

" . . . Section 28 of the State Property Act 1954 expressly provides that where a company has been dissolved all real and personal property . . . vests in the State . . . . "

The Position of Creditors

The adverse effects of dissolution are potentially even more serious for the company's creditors. Just as the company can no longer sue after dissolution, similarly all personal rights of action against the company are lost. Consequently, the company's unsecured creditors can expect to receive no payment in respect of monies owing to them.

The position of the secured creditors is, however, somewhat better. After dissolution, such land as belonged to the company will vest in the State, subject to the same charges, encumbrances, etc as existed prior to dissolution.[9] In other words, the State can claim no better title to the land than that which was previously held by the company. This protects the position of creditors whose security was represented by the company's land.

However, as regards other creditors whose security was over pure personalty, they would no longer appear to have a right of recourse against any particular assets. This would include for example, the creditor who had a floating charge over the stock-in-trade of the company. Upon dissolution his security, in effect, ceases to exist and he is placed in the same position as an unsecured creditor, in that he cannot expect to receive any payment in respect of monies owing to him.

Re Kavanagh and Cantwell[10]

The circumstances of this case were that certain property was held on trust by one company for another pending the transfer to the latter of the legal title. The first company went into liquidation and was ultimately dissolved. However, owing to an oversight, the legal title to the property was never transferred to the second company.

In proceedings before Costello J. the question was raised as to whether the title to the property had vested in the State subsequent to the dissolution. However, the Attorney General wrote to the Court indicating that the State did not claim the property. This, it is submitted is the correct view. In Section 28 of the 1954 Act it is expressly stipulated that property subject to a trust does not vest in the State.

Having determined that the State had no interest in the land, the issue that was presented to the court was how to convey the legal title to the second company. The answer, according to Costello J, was to be found in Section 26 of the Trustee Act 1893. This section provides that where a trustee entitled to any land 'cannot be found', the court may make a vesting order vesting the land in 'any such person in any such manner and for any estate as the Court may direct'. Costello J. held that as the first company no longer existed in the eyes of the law and as the Attorney General had stated that no claim to the premises was being made by the State, this was therefore a case in which the trustees of the trust could not be found. He accordingly made an order, pursuant to Section 26 of the 1893 Act, that the legal title to the premises should vest directly in the second company.

" . . . the company's unsecured creditors can expect to receive no payment . . . "

Presumably, if the facts had been slightly different, and prior to dissolution, the property had been held by the company subject to a mortgage or charge rather than subject to a trust, the property would have automatically vested in the State. In such a case, the legal title could then have been quite simply conveyed by a deed of transfer, executed by the Minister for Finance. Alternatively, the company could have been restored to the register pursuant to Section 12(6) of the 1982 Act (as to which, see below) and the company itself could have then effected the transfer.

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The Position of Employees

An interesting point arises in relation to the company's employees. Where a company is being wound up, the employees may rank to an extent as preferential creditors.[11] Indeed, they may also be entitled to payment out of the Redundancy Fund pursuant to the terms of the Protection of Employees (Employer's Insolvency) Act 1984.

Different consideratiaons arise where the company has not been wound up prior to dissolution. The contracts of employment undoubtedly constituted property of the company. But do they vest in the State after the company has been dissolved? Contracts of employment are personal contracts of service, and the authorities indicate that once either party to that contract dies (dissolution being after all, the legal death of the company) then that contract automatically terminates.[12] If these cases represent the law, then the employees will lose their jobs upon dissolution, perhaps being owed arrears of wages.

Winding up of company struck off the register

If the company has been struck off the register in circumstances where it owes monies to its trade and other creditors, (such as employees and the Revenue), it may still be possible to have it wound up. Such a course of action will, however, only be worthwhile if it had any assets immediately prior to dissolution.

Under Section 12(5) of the 1982 Act it is expressly envisaged that a company whose name has been struck off, may yet be wound up. Nonetheless, it will still be necessary to apply beforehand to have its name restored to the register.[13] This seems to be quite logical. If the company were not restored to the register, its assets would technically belong to the State (the company being dissolved) and accordingly there would be no property or other assets for the liquidator and accordingly there would be nothing to distribute among the creditors. Furthermore, if the company were not restored to the register, the court would in effect be asking the liquidator to wind up something which did not legally exist!

Liability under Section 12(4)

Although it is clear that as a result of dissolution, no action may be taken by or against the company, Section 12(4) of the 1982 Act provides that the liability, if any, of every director, officer and member of the company shall continue and may be enforced as if the company had not been dissolved.

Liability under this section might for example, include criminal liability of directors for past breaches of the Companies Acts.[14]

"Liability [of every director, officer and member of the company] under [Section 12(4)] might . . . include criminal [or civil] liability of directors for past breaches . . . . "

Similarly, under various other statutes, the directors and officers may have incurred criminal liability for past acts and omissions of the company itself.[15]

These individuals may also have incurred civil liability prior to dissolution. For example, the directors will have stood in a fiduciary relationship to the company[16] and may have acted in breach of their duty to it. Such breach of duty will have given rise to a possible cause of action by the company, witha consequent remedy in damages against the wrongdoers. Section 12(4) keeps the liability of such directors alive and as the cuase of action is now vested in the State, proceedings may be issued against them by the Minister for Finance.

More importantly, a number of recent cases have suggested that, at least where the company is insolvent or threatened with insolvency, the directors owe a duty to consider the interests of the company's creditors[17] and some of these decisions have suggested that this duty is owed directly to the creditors themselves.[18] If such is the case, the otherwise unpaid unsecured creditors may, in appropriate circumstances, have a right of action against the directors for damages, despite the fact that the company has since been dissolved.

It should be noted, however, that Section 12(4) only continues in force such liabilities of the directors, officers or members which existed prior to the dissolution of the company. The section does not create any new liabilities. Accordingly, personal liability for the company's debts will not be incurred solely on the ground that the company has now been dissolved.

Restoration to the register

As has been seen, the dissolution of a company as a result of it being struck off the reigster, can create potentially serious difficulties for various parties. In practice, however, where the company has been trading or has owned property prior to its dissolution, the normal course will be to apply to have it restored to the register under Section 12(6) of the 1982 Act. This subsection provides that if any member or creditor of the company feels aggrieved by the company having being struck off, the court may upon application order that the company be restored to the register. Any such application must be made within 20 years from the publication in *Iris Oifigiuil* of the notice striking the company off the register.

The application, if any, may be made by a member or creditor of the company, or the company itself. It seems to defy logic that a company which, by virtue of its own dissolution has ceased to exist in the eyes of the law, may apply to the court to have itself restored to the register! If an order is made restoring the company to the register, then upon an office copy of that order being delivered to the Registrar for registration, the company is deemed to have

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continued in existence as if its name had not been struck off.

Large amounts of tax may have been owing at the date of dissolution of the company. In such cases the Revenue Commissioners may be the most interested parties in having the company restored to the register. However, it has been held that they are only creditors of the company if, and to the extent that they have raised assessments on the company prior to the date upon which its name was struck off, then the Revenue Commissioners will not constitute creditors of the company for the purposes of an application for restoration under Section 12(6).[19]

Any application to the court under Section 12(6) must be on notice to the registrar. In practice the court will require a letter from the Registrar stating that all outstanding returns have been made and that they are in order. This is presumably to comply with the requirement of Section 12(6) that the court may only order that the name of the company be restored to the register 'if satisfied that the company was at the time of the striking off carrying on business *or otherwise that it is just that the company be restored to the register'* (emphasis added).

What is to happen then in the case of a company which is struck off at a time when it has either temporarily ceased trading or, indeed, has yet to commence trading? It should be noted that under Section 11 of the 1982 Act the Registrar may (but is not obliged to) strike off the register the name of a company which is not trading. Presumably however, if the company can prove that it wishes to resume or commence trading, the court may then, in its discretion, make an order restoring it to the register.

Although not expressly required by Section 12(6), the Court in practice stipulates that no order for restoration will be made unless the Minister for Finance has been put on notice and his consent has been obtained to the making of such an order. Presumably, the reason why the Minister's consent must be obtained is that the company's property will have vested in him from the date of dissolution. If however, the name of the company is restored to the register the company is deemed to have continued in existence as if its name had not been struck off and accordingly the Minister will be automatically divested of the company's property which then reverts to the company itself. Notably under Section 28(3) of the State Property Act 1954, the vesting of property in the State upon dissolution is expressly made subject to any order restoring the company to the register.

The Minister's consent is usually obtained as a matter of course and will be received by way of letter written on his behalf by the Chief State Solicitor. This letter will normally also contain a consent to the application on behalf of the Minister for Industry and Commerce and on behalf of the Registrar of Companies.

Effect of registration

As was mentioned above, in the event of the company's name being restored to the register, the company is deemed to have continued as if its name had not been struck off. Its property is returned to it and it may once again sue and be sued. From the point of view of pre-dissolution creditors, their debts are revived and interest will run as if the company had never been struck off. This will be important, not only in respect of trade debts, but more importantly in respect of revenue debts, where arrears may be large and interest rates are high. Where such arrears of interest prove to be excessive, the shareholders may not regard it as commercially wise to revive the company. If they do so they may find that the company has become hopelessly insolvent with liquidation as the only real prospect. In such circumstances it may be commercially more prudent for a new company to be formed instead.

Special directions in restoration order

If the court makes an order restoring the company's name to the register, it may under Section 12(6) give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off. For example, in *Re Donald Kennyon Ltd.,*[20] Roxburgh J., in the order restoring the company to the register, provided that in the case of creditors who were not statute-barred at the date of dissolution, the period between that date and the date upon which the company was restored to the register should not be counted for the purposes of the Statute of Limitations.

In *Re Boxco Ltd*[21] particulars of a charge were delivered within 21 days of its creation, to the registrar under the English equivalent of Section 99 of the Principal Act. It was only at this stage that it was discovered that the company had been struck off the register. In restoring the company to the register the court directed that the delivery of particulars of the charge should be regarded as having been properly made. This avoided the necessity of an application subsequently for leave to extend the time within which to register the charge.[22]

Conclusion

As we have seen, the striking of the company's name off the

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register can have potentially serious consequences both for its shareholders and also for those dealing with it. Upon dissolution, the State takes over ownership of all property which had previously been vested in the company. Strictly, therefore, there is no longer a company to which creditors or employees can turn for payment.

Despite this fact, the former controllers may purport to carry on business in the name of the company. One must presume that during this period they are incurring personal liability in respect of any transactions effected by them. Furthermore, they would also apopear to be wrongfully interfering with and even dissipating, the property of the State, thereby running the technical risk of actions in trespass, detinue and conversion.

" . . . the striking of the company's name off the register can have potentially serious consequences both for its shareholders and also for those dealing with it".

In view of the difficulties incurred in such circumstances, it would appear that the only possible solution is to apply to have the company restored to the register, whereupon it is deemed to have continued in existence as if its name had never been struck off.

NOTES

1. Only S.125 applies to companies having a share capital (which are by far the most common type of company currently on the register). The matters in respect of which a return must be made under S.125 are set out in Part I of the Fifth Schedule of the Principal Act as amended by S.22 of the 1982 Act. The return must be in the form set out in Part II of that Schedule as amended by S.22 of the 1982 Act. See generally Keane *Company Law in the Republic of Ireland* (London 1985) Chapter 29.
2. Sections 125 and 126 as amended by S.15 and the First Schedule of the 1982 Act.
3. See S.12(1) – (3) of the 1982 Act.
4. Under Section 12(7) any letter or notice sent to the company may be addressed to its registered office, or, if no office has been registered, to the care of some officer of the company, or if there is no officer of the company whose name and address are known to the Registrar of Companies, may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.
5. *Salomon -v- Salomon & Co.*[1897] A.C. 22.
6. *Attorney General -v- Jameson* [1904] 2 I.R. 644; *Short -v- Treasury Commissioners* [1948] 1 K.B. 116; *Macaura -v- Northern Assurance Co.* [1925] A.C. 619.
7. *Re Higginson & Dean, ex parte Attorney General* [1899] 1 Q.B. 325; *Re Henderson's (Nigel) Co., Ltd.* [1911] W.N. 159; *Re Home & Colonial Insurance Co* (1928) 44 T.L.R. 718.
8. See S.73(1) of the Succession Act 1965.
9. S.28(2) of the State Property Act 1954. Arguably on the terms of s.28(5) personal property is taken unencumbered.
10. High Court, 23 November 1984.
11. S.285 of the Principal Act as amended by S.10 of the 1982 Act.
12. *Boast -v- Firth* (1868) L.R. 4 C.P. 1; *Farrow -v- Wilson* (1869) L.R. 4 C.P. 744; See Hepple & O'Higgins *Employment Law* (4th Ed) (London, 1981) p.231. It would not seem that the employees would be protected by the European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980 (S.I. No. 306 of 1980). These Regulations implement Council Directive No. 77/187/EEC of 14 February 1977. The purpose behind these instruments is to ensure, *inter alia* that when a business is transferred as a going concern, the transferee will take over the transferor's obligations under contracts of employment with the workforce. It is submitted that there is a number of reasons why the Regulations do not apply. First, the State acquires the company's property not by way of transfer but rather by way of transmission. Art.1 of the Directive and Reg.3 only apply to transfers. Secondly, if the contracts of employment automatically terminate upon dissolution of the company, then the State presumably acquires no obligations thereunder. Finally, the Regulations and Directive apply to the transfer of a business as a going concern: *Spijkers -v- Gebroeders Benedik Abattoir CV* [1986]E.C.R. 470. Upon an objective reading of S.28 of the State Property Act 1954, it could scarcely be argued that when the State acquired the company's pre-dissolution assets, that it was subsequently to run the company's business itself!
13. *Re Cambridge Coffee Room Association Ltd.* [1951] W.N. 621.
14. Eg. under Ss.125 and 126 of the Principal Act.
15. For example, the controllers of the company may be guilty of an offence under Section 19 of the Consumer Information Act 1978 where, on the evidence the company is itself deemed to have committed an offence under the Act.
16. *Re City Equitable Fire Insurance Co. Ltd.* [1925] Ch 407.
17. *Walker -v- Wimborne* (1976) 137 CLR 11; *Lonhro -v- Shell Petroleum Ltd.* [1980] 1 W.L.R. 627; *Winkworth -v- Edward Baron Development Ltd.* [1987] B.C.L.C. 193; *Nicholson -v- Permakraft (N.Z.) Ltd.* [1985] 1 N.Z.L.R. 102; *Kinsella -v- Russell Kinsella (Pty) Ltd.* [1960]A.C. 1526; *West Mercia Safetywear Ltd. -v- Budd* [1988]B.C.L.C 250.,
18. *Nicholson -v- Permakraft (N.Z.) Ltd, loc. cit. at n.13.*
19. *Re Nelson Car Hire Ltd.* (1973) 107 I.L.T.R. 97; *Re Supatone (Eire) Ltd.* (1973) 107 I.L.T.R. 105.
20. [1956] 3 All E.R. 596.
21. [1970] Ch 442.
22. Under the equivalent of S.106 of the Principal Act.

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Practice Notes

THE HIGH COURT

In the matter of Owen Carty, a solicitor, who formerly practised under the style and title of Owen Carty & Co., at Irishtown, Athlone, and Moate, Co. Westmeath, and in the matter of the Solicitors Acts 1954 and 1960.

By Order of the President of the High Court on Monday, the 23rd day of April 1990, the name of Owen Carty was struck off the Roll of Solicitors.

Dated this 27th day of April 1990.

PATRICK JOSEPH CONNOLLY,
Registrar of Solicitors

Architects' Certificates of Compliance

A recommendation was published in the *Gazette* in December 1979 whereby the profession was advised that Architects Certificates of Compliance with the Conditions in the Planning Permission and/or Bye Law Approvals should not normally be sought prior to 1970 and in the *Gazette* of August 1989 it was suggested that the date be changed to 1975. It has come to the attention of the Conveyancing Committee of the Law Society that a number of practitioners are unaware of the fact that this recommendation does not refer to the following:

(a) Commerical or industrial properties.

(b) Any alteration or extension to *any* premises since 1st of October 1964 which would require Planning Permission and/or Bye Law Approval.

It is not clear from General Condition 36 of the current edition of the Law Society Contract for Sale that this recommendation does not relate to commercial properties. The contract is currently under review and the condition will be suitably amended in the next edition. □

Conveyancing Committee

The Companies (Amendment) Act, 1986 ("the Act") Guarantee of subsidiary company's debts/Section 17

A private limited company which is a subsidiary of another body corporate formed and registered in a Member State of the EC is exempted from the requirement of filing accounts with the Registrar of Companies provided that the following conditions are satisfied:—

1. Every shareholder at the time of the next Annual General Meeting of the Company after the end of the financial year must agree to the exemption.
2. The parent company must irrevocably guarantee the liabilities of the company and each shareholder of the company must be so notified. In this regard, it should be noted that a guarantee would extend to all liabilities and losses which have arisen or are likely to arise in respect of the financial year to which the accounts relate.
3. The annual accounts of the company for the financial year must be consolidated into group accounts prepared by the parent company. The exemption must be disclosed in a note to the group accounts.
4. The company must attach to the annual return a note stating that it has availed of the exemption, a copy of the guarantee and notification to shareholders together with a declaration by the company in writing that paragraph 1 (shareholders consent) has been complied with. Such documents must be annexed to the Annual Return for that financial year made by the company under the Companies Act, 1963.
5. The group accounts must be drawn up in accordance with the 4th EC Directive.
6. The group accounts for the parent company must be attached to the Annual Return and must be audited in accordance with the auditing terms set out in Article 51 of the 4th Directive.

It should be noted that the Minister may make such orders as necessary to enable provisions regarding subsidiaries to have full effect.

The Company Law Committee obtained an opinion from Senior Counsel in regard to the difficulties which have arisen under Section 17 of the Act.

The difficulties may be summarised as follows:—

1. When should the guarantee be executed by the parent company?
2. Is a guarantee valid if not addressed to any particular party? The concept of the global guarantee.
3. The text of the guarantee.

In regard to 1, Senior Counsel's opinion states as follows:—

> "So far as the timing is concerned, therefore, I do not consider that it is necessary that the guarantee should already be in existence prior to the commencement of the financial year. Nor do I think it has to be executed during the course of the financial year. It can, in my view, be given even after the end of the financial year".

In regard to 2, Senior Counsel is of the general opinion that one must take into account that Section 17 of the Act owes its origin to the 4th Council Directive on Company Accounts (78/660/EEC) of 25th July, 1978 and particularly to Article 57 of that Directive. Senior Counsel believes that what will probably happen in the event of a guarantee becoming applicable would be that the Court in Ireland would look

"at the aim or objective sought to be achieved by the provisions of the Directive and then as it were invent a solution or mechanism which would enable Section 17 to be implemented so as to fulfil that objective".

Senior Counsel, therefore, does not believe that it is necessary that the form of guarantee be addressed to any particular person.

In regard to 3, Senior Counsel has suggested the following wording for the guarantee:—

"by this guarantee X Limited (registered office etc.) as the holding company of Y Limited and for the purposes of the exemption referred to in Section 17 (1) of the Companies (Amendment) Act, 1986 and not otherwise, hereby irrevocably guarantees in respect of the whole of the financial year of Y Limited ending on 31st December, 19 , all of the liabilities of Y Limited referred to in Section 5(c) of the said Act provided that this guarantee shall not extend to any liability or commitment of Y Limited which shall arise or may have arisen otherwise than in respect of that financial year or which shall not constitute a liability or loss within the meaning of Section 5(c) aforesaid".

The Company Law Committee have, in conjunction with the Institute of Chartered Accountants in Ireland, been in discussion with the Registrar of Companies who has accepted the form of guarantee set out herein.

Company Law Committee.

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GERMAN/IRISH LAWYERS ASSOCIATION

On Thursday May 17, 1990, the German/Irish Lawyers Association invited members and friends to meet a group of assistants to the Judges of the Federal Constitutional Court (Verfassungsgericht) of Karlsruhe, Federal Republic of Germany, in the Law Society. Two lawyers from the Group delivered papers to the meeting on the forthcoming constitutional changes which will arise in the context of the unification of Germany.

The papers were very informative and gave the participants an insight into the high level of intellectual and political debate about constitutional reform which is currently taking place in the two Germanys. The meeting was well attended by both German and Irish lawyers and ended with a successful informal reception afterwards in the members' lounge.

The Association's next Seminar will be held on Thursday May 31, 1990, in the Law Society at 6.30 p.m. The Seminar topic is "German Competition Law in the Common Market" and it will be addressed by Dr. Juergen Moellering.

For further details please contact the German/Irish Lawyers Association, 46 Fitzwilliam Square, Dublin 2 — Telephone: 789344/789404 and telefax: 762595.

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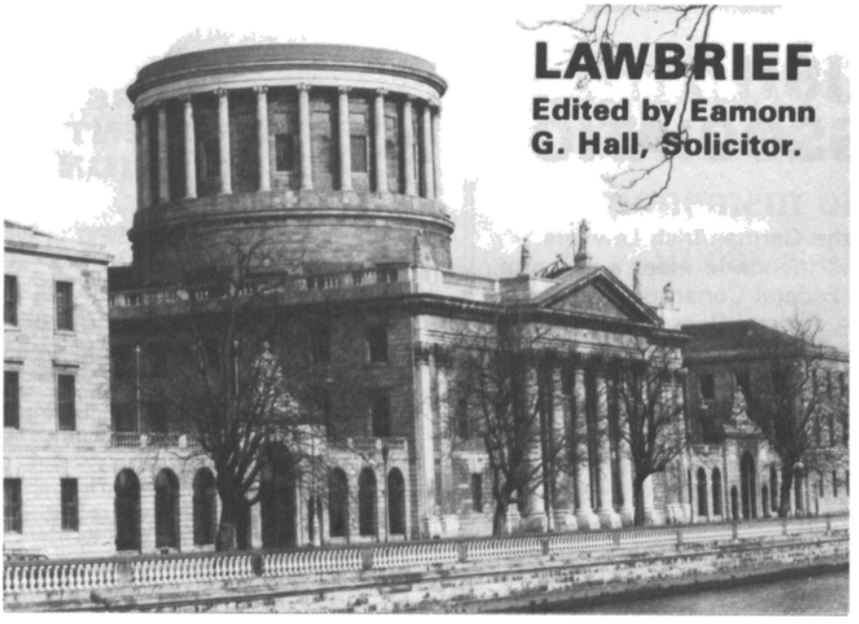

DATA PROTECTION

The first annual report of the Data Protection Commissioner, Mr. Donal C. Linehan for the period ending 31st December 1989 is available from the Office of the Data Protection Commissioner, Earl Court, Adelaide Road, Dublin 2, (telephone 01-765622). In the report Mr. Linehan states that unlike many national data protection laws, which require *all* who keep or process personal data to have a licence or to be registered, the Irish Act opts for a system of selective registration under which only certain selected categories of persons have to register. These include public sector bodies, financial institutions, insurance companies, data controllers whose business consists wholly or mainly in direct marketing, providing credit references or collecting debts, data controllers who keep personal data relating to racial origin, political opinions, religious or other beliefs, physical or mental health, sexual life or criminal convictions. Data processors whose business consists wholly or partly in processing personal data for data controllers are also required to register. The information in the public register includes, in general, the kind of personal data kept, the purposes for which they are kept and the persons to whom the data may be disclosed.

Members of the public are entitled to inspect the register free of charge at the Office of the Data Protection Commissioner, Earl Court, Adelaide Road, Dublin 2 at any time during office hours.

Any individual person who believes that a data controller keeps personal data on computer (the data need not necessarily refer to him) is entitled to ask that data controller if he keeps such data. If he does, the individual is entitled to be given a description of the data and to be told the purposes for which the data is kept. This information must be supplied free of charge within 21 days.

The main access provision relates to the right of an individual to ask a data controller if the data kept by him includes personal information about that individual and, if that be the case, to be given a copy of such information within 40 days. The data controller can ask for any reasonable information to satisfy himself about the identity of the individual. He is also entitled to ask for information to help in locating the information sought.

The Data Protection Commissioner emphasised that many people felt that only those required to register are subject to the **Data Protection Act, 1988**. The Commissioner states that the Act applies to all who keep personal data on computer. Thus, for example, all data controllers must obtain the information they hold fairly, ensure that it is accurate and up to date, and respond to access requests from those about whom they keep such information.

The Data Protection Commissioner states that, so far, the number of formal complaints received is small. The approach the Commissioner has adopted is to deal with each complaint as informally as possible in the first instance. This means contacting the data controller concerned, requesting his observations and asking him for assistance in resolving the complaint. The pattern of most of the complaints received for the period ending December 31, 1989 indicates a misunderstanding of the law rather than any deliberate policy of infringing privacy rules. However, the Commissioner has stated that some complaints reveal that certain data controllers are rather casual about their obligations. This was particularly the case in the area of credit information and credit ratings. **The Data Protection Act, 1988**, the Commissioner stresses, has as important a role to play in the area of credit as in any other areas as a means of ensuring that personal information kept about individuals is obtained and processed fairly, is accurate, relevant, and up-to-date.

REPORT OF MARTIN COMMITTEE TO ENQUIRE INTO CERTAIN ASPECTS OF CRIMINAL PROCEDURE

The Committee appointed by the Minister for Justice and Minister for Communications, Mr. Ray Burke T.D. in November 1989 and chaired by His Honour Judge Frank Martin published its report in March 1990. The members of the Committee were Mr. Henry Abbott BL, Mr. Edwin Alkin BL, Office of the Attorney General, Mr. Hugh Sreenan, Assistant Commissioner, Garda Síochána, Mr. Patrick Terry, Department of Justice, and Mr. Frank Ward, Solicitor. Mr. Paul Murray, Department of Justice, acted as secretary to the Committee.

The Report states in its introduction that it is an unfortunate but undeniable fact that over the years miscarriages of justice have taken place from time to time. As long as human nature remains fallible, there can be no guarantee that no miscarriages of justice will occur in the future.

The Committee was of the view that where substantial doubts may arise as to the propriety of a conviction the establishment of an independent body with statutory powers of inquiry was by far the most effective manner of dealing with the situation. The independent Inquiry Body should be established by statute with evidential powers similar to those at present given to Public Inquiries by the **Tribunal of Inquiry (Evidence) Acts 1921 and 1979**. The Committee considered that the Inquiry Body might consist of one or more than one person, sitting with or without an assessor or assessors. It was considered by the Committee that the Attorney General was the appropriate person to whom application should be made in the first instance by an aggrieved party. It would be for the Attorney General, having considered the documentation presented to him, having sought such clarification as might be necessary and having made any enquiries which to him appeared desirable, to decide in a particular case whether the matters presented to him were such as to warrant investigation by the Inquiry Body, and in that event to advise the Government accordingly. The Committee considered that the terms of reference of the Inquiry Body would be to inquire into all the available facts and circumstances surrounding the conviction and to express its opinion as to whether doubt existed as to the propriety of the conviction giving full reasons for such opinion. Having considered and received the opinion of the Inquiry Body it would then be a matter for members of the Government and for them alone to decide whether the case called for action on their part and, in that event, the nature of such action.

The Report also stated that additional safeguards were needed to ensure that inculpatory admissions by accused persons were properly obtained and recorded. The Committee strongly recommended, as a safeguard towards ensuring that inculpatory admissions to the Garda Siochana are properly obtained and recorded, that the questioning of suspects take place before an audio-visual recording device. The Committee also recommended an amendment to the **Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987 (SI No. 119 of 1987).**

The Report of the Committee is available from the Stationery Office at £3.10.

PRINTOUTS ADMISSIBLE AS REAL EVIDENCE

The Court of Appeal (England and Wales) has held in the case of *Regina -v- Spiby (The Times* March 16th, 1990) that where a computer installed in a hotel recorded, by mechanical means and without the intervention of a human mind, information about telephone calls made by hotel guests, evidence of printouts from that computer was admissible as real evidence. In the absence of evidence to the contrary, courts would presume that such a computer was in working order at the material time.

The Court of Appeal (Taylor LJ, Mars-Jones and Waite JJ) so held when dismissing an appeal of John Eric Spiby against his conviction on February 24 1989 in Portsmouth Crown Court (Mr. Recorder Moriarty QC and a jury) of an offence contrary to section 170(2) of the **Customs and Excise Management Act, 1979** of being knowingly concerned with others in the fraudulent evasion of the prohibition on importation of a class B controlled drug, cannabis resin, imposed by section 3(1) of the **Misuse of Drugs Act 1971**. He was sentenced to two and a half years imprisonment.

Taylor LJ in his judgment stated that for the purposes of the appeal the most important evidence in the case related to some telephone calls made from a hotel in Cherbourg, in which was fixed a computerised machine which metered guests' telephone calls, recorded them and worked out the charges.

Evidence was given by a manager at the hotel who produced copy printout sheets from the machine, covering a period of days during which it was shown that eight calls had been made to the appellant's home number, and two to the number of his club.

Taylor LJ stated that some of those calls were made from a room occupied at the time by a particular guest, some were made from another room to which that guest had moved and one was made from the public telephone box in the foyer of the hotel.

The manager gave evidence that he was familiar with the function of the machine. He did not profess to be a computer engineer but said that the machine had been working satisfactorily and no one had complained about the resulting bills.

The recorder ruled that the evidence was admissible saying that in the light of *Castle -v- Cross* [1984] 1 WLR 1372 he concluded that the documents were real evidence. Reference was made in the judgment of the Court of Appeal to Professor J.C. Smith's article "The admissibility of statements by computer" ([1981] Crim LR 387,390) where he had said:

> "Where information is recorded by mechanical means without the intervention of a human mind the record made by the machine is admissible in evidence, provided, of course, it is accepted that the machine is reliable . . . . The computer differs from [a thermometer or a camera] only in that it can perform a variety of functions instead of only one. For that reason, it is necessary to have evidence, such as that which was admitted in *R -v- Pettigrew*, (1980) 71 Cr App R 39 to establish the nature of the operations which the computer had been programmed to perform. It performs those operations just as mechanically as the thermometer or the camera.
>
> "Of course the programmer may make a mistake but so may

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the person who, for example, devised the scale on the thermometer. This consideration goes to weight rather than admissibility. In any event it certainly has nothing to do with the hearsay rule . . . ''

The Court of Appeal adopted that helpful explanation of real evidence and considered that the recorder was right to conclude that the computer printouts from the machine were real evidence.

Taylor LJ stated that the computer printouts did not depend for their content on anything that had passed through the human mind. All that had happened was that when somebody in one of the hotel rooms lifted the receiver from the telephone and pressed certain buttons, the machine made a record of what was done and printed it out. Their Lordships considered that they were justified in applying the principle set out in *Cross on Evidence* (5th edition, 1979, page 47) and adopted in *Castle -v- Cross* that, if the instruments were of a kind as to which it was common knowledge that they were more often than not in working order, in the absence of evidence to the contrary the courts will ''presume that [mechanical instruments] were in working order at the material time''.

The present case went further because of the positive evidence of the manager that the machine had been working properly. The recorder had been right to admit this evidence. □

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SADSI takes on the world

A SADSI team has just returned from Washington DC where it took part in the World Semi-Finals of the Philip C. Jessup Moot Court Competition. This is the largest moot competition in the world and attracted 39 teams from the Americas, Asia, Australia and Europe (East and West).

The SADSI team represented Ireland and the national squad was composed as follows: Rosemary O'Farrell and T. P. Kennedy both of McCann FitzGerald; Monika Leech of Liam Lysaght & Co.; Dermot Cahill of Gerard O'Keeffe and Co.; and Joseph Kelly of A&L Goodbody.

The format of the competition was that teams were asked to consider a fictional situation in which waste was dumped in Antarctica. An international dispute developed between the country responsible and another state which sought to enforce international law prohibiting such dumping. Each team which qualified for the semi-finals was required to submit detailed written pleadings for both the applicant and respondent states.

The teams were then required to travel to Washington D.C. to present their best arguments, twice on behalf of the applicant state and twice on behalf of the respondent state before a "court" of three judges. The judges were lawyers or academics with a background in international law and we soon discovered that there was one sadistic pleasure that they found irresistible — the use of their extensive legal knowledge in frequent questions. We soon came to relish this battle of wits and even from time to time gained the upper hand.

On arrival, we found that we had been drawn against Australia, Greece, Japan and one of the American teams. The Australian team (from the University of New South Wales) were devastating and gained the advantage over our duo of Rosemary and Joe, with Monika acting as Counsel.

However, we were somewhat more fortunate to win more decisive victories against Greece (the University of Thrace) and Japan (Rikkyo University). Unfortunately, in our last round we lost to the U.S. team (University of IOWA) on a split decision by the judges.

We were very pleased to have ended up in the middle of the points classification table, most especially when we were placed above our near neighbours from the United Kingdom. Is this a good omen for June? The contest was won by an American team from the Georgia School of Law who beat the team from the University of Toronto in the final.

The rest of the week was given over to receptions and parties, seeing the sights and attending sessions of the Conference of the American Society of International Law and the Congress of International Law Journals. One highlight was a seminar given by the U.S. State Department on the Legal aspects of the recently declared "War on Drugs". The chairman of the Drugs Enforcement Agency spoke as did one of the legal advisors to George Bush.

Of equal interest was a reception given by Covington and Burling, one of the largest U.S. law firms. The size of their offices made a large impression, comparable to Liberty Hall.

Of more importance to some of our team were the parties and more informal events. The Irish contingent maintained the national reputation for sociability and tall tales. In the course of the week, some of the team members attained a startling proficiency in Papuan and Greek drinking songs, an accomplishment they were anxious to display to their sleeping colleagues at an early hour of the morning. We departed Washington with pleasant memories of international gatherings and an increased confidence in our ability as Irish Lawyers to compete with the best of our counterparts from other jurisdictions.

In conclusion we would like to thank the many people who enabled us to enter the competition and to compete effectively. Our very special thanks go to Liz Heffernan of the Law Reform Commission and Eanna Mulloy, B.L. for their invaluable assistance and unfailing enthusiasm in coaching the team. It is undoubtedly due to their persistence and constant encouragement that the team managed to advance as far as we did and we are most grateful to both of them.

We would also like to express our gratitude to our respective employers who were all most generous in their personal encouragement as well as their practical assistance.

Finally, we would like to pay tribute to our sponsors without whose contributions our trip to Washington D.C. would not have been possible: The Incorporated Law Society of Ireland; Liam Lysaght & Co., Solicitors; McCann FitzGerald, Solicitors; A&L Goodbody, Solicitors; Gerard O'Keeffe & Co., Solicitors; Eugene F. Collins & Son, Solicitors; William Fry & Sons, Solicitors; British Midland Airways; Eugene Magee Travel; Eagle Star/ Shield Life; The General Council of the Bar of Ireland; First National Building Society; Bank of Ireland-Stoneybatter; Bord Telecom Eireann; Telecom Eireann Information Systems; Black Tie; Round Hall Press; Diarmuid O'Donovan, S.C.; T. V. Davy, S.C.; T. K. Liston, S.C.; Eoghan Fitzsimons, S.C.; Feichin McDonagh, B.L.; Peter Charleton, B.L.; Maurice Gaffney, S.C.; Ultan Stephenson, Solicitor; Paul Kearney, Solicitor; Kevin Hoy, Solicitor; Dr. Carmel Heaney.

We would also like to thank the following persons for their most gracious support in the run-up to the contest. Thank you to one and all: Mr. Charles J. Haughey, T.D., President of the European Council; Eamonn G. Hall; Professor Richard Woulfe; Ernest J. Margetson; Ms. Sandra Fisher; Rayprint; SADSI; Radio 2000/98FM; Mr. David Ensor (Eugene F. Collins & Son); Ms. Siobhan Williams; Ms Adrienne Lougheed (Liam Lysaght & Co.) Ms. Ruth Hutchinson-Blake; Ms. Aiffric Egan and Ms. Carmel Kearney.

T. P. Kennedy.

PEOPLE AND PLACES

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SADSI at Philip C. Jessup International Law Moot Court Competition, Washington DC. (see p.137). The team members were Rosemary O'Farrell and T. P. Kennedy, both of McCann FitzGerald; Monika Leech of Liam Lysaght & Co.; Dermot Cahill of Gerard O'Keeffe & Co.; and Joe Kelly of A. & L. Goodbody.

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SADSI Debate: "That all Europeans are equal; but some are more equal than others". Gerry Hogan, B.L., Eileen Roberts, Auditor, SADSI, Mary Robinson, S.C., and the Hon. Mr. Justice Thomas A. Finlay, Chief Justice.

Jack Charlton, Guest Speaker, addressing the Law Society Annual Conference in Killarney, Co. Kerry.

Jack Charlton with Paul Pierse, Listowel, Co. Kerry, at the Law Society Annual Conference.

Siamsa Tire entertaining at the Annual Conference.

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The mortgage by deposit for "present and future advances"

Probably the commonest form of mortgage in Ireland is the equitable mortgage by deposit of title deeds to secure "all present and future liability" of the mortgagor. The great advantage is simplicity; the great drawback is the vagueness of what is agreed. If, as frequently, a memorandum stating that the mortgagor is depositing the deeds to secure "all his liabilities present and future whether as principal or surety" (or some such phrase) accompanies the deposit, some assistance can be gained from it, but where no such memorandum is produced, the agreement is a matter of implication and convention.

(The practice of making such deposits without any written agreement apparently originated in order to avoid a need for having a document requiring registration in the Registry of Deeds, and came to be extended to deposits of registered land also.)

Normally this works against the mortgagor. In *Bank of Ireland -v- Macaura*[1] Kennedy C.J. remarked drily that:—

> "In matters of this kind very wordy documents which were not very explicit were supposed when read to or by persons making deposits to be understood by them but the effect often was that the depositor gave a larger security than he intended to give. Depositors should have what they were doing brought to their minds. Everything depended upon agreement and the intention between the parties".[2]

There are however circumstances in which the vagueness of the agreement may work against the mortagee. The first problem which may arise is whether any mortgage is created at all. If no written document exists and the customer (as frequently occurs in a mortgage suit) denies the existence of the mortgage, in theory the creditor could face a considerable difficulty in proving its claim. It is doubtless true as Wylie states[3] that the deposit of title deeds creates a presumption of an equitable mortgage: in *National Bank -v- McGovern*[4] Meredith J. referred (in a somewhat oracular fashion) to "the eloquence of an unexplained possession";[5] however, since the presumption can be rebutted by the simple claim that the customer had another purpose (normally safe-keeping) its practical value in a contested mortgage suit is probably nil. Where there is a conflict of evidence, the weight of probability will usually be with the mortgagee; in addition, the fact that such securities are required as a matter of course from a propertied customer making a borrowing works in the mortgagee's favour. One interesting exception is the deposit by a wife as security for her husband's liabilities. In *Northern Banking Co. -v- Carpenter*[6] and *National Bank - v- McGovern* claims by the mortgagee that the wife (in each case sole owner of the property) had voluntarily deposited deeds to secure her husband's liabilities were rejected. In each case two grounds can be seen for the decision: (i) that where there is a conflict of evidence and the circumstances of the deposit are ambiguous, the mortgagee may be unable to satisfy the Court that on the balance of probabilities the wife freely consented to the deposit. (ii) that in such a case, particularly where the wife is not independently advised, the Court may infer that she was unaware of the nature of the agreement.

By
Christopher Doyle, B.L.

This raises another problem – in such transactions, where often so little is expressed either in writing or orally, what are the terms of the agreement? Further, if the parties dispute the existence of a fundamental term, can it be said that they are *ad idem*? In the passage from *Bank of Ireland -v- Macaura* quoted above, Kennedy C.J. set out the central difficulties in such cases: that while in theory a mortgage is a matter for express agreement, in practice the mortgagor usually hands over the deeds while a rather vague formula is recited to or by him, often leaving him completely blank as to what has been agreed. Two common problems are (i) the extent of the liabilities secured (ii) the continuing nature of the security. As to the first, the phrase "all liabilities" would probably cover liabilities at different branches of a mortgagee bank. However, if no such formula is expressed, it may be held that the liabilities secured are only those at the branch where the deposit took place. In *Bank of Ireland -v- Macaura* a mortgagee's claim that a deposit of title deeds was security for all liabilities of the mortgagor at any of its branches was rejected by both High Court

Christopher Doyle.

and Supreme Court on the grounds (i) separate securities had been given at each branch, so it followed logically that each was for a separate loan; (ii) the mortgagee's request for the deposit referred to one loan only.[7] Clearly the Court will not infer additional terms favourable to the mortgagee. As to the continuing nature of the security, the position is somewhat more complicated. An express agreement to secure "present and future advances" is clearly a continuing security. However, it has also been held that such mortgage may be inferred simply from the circumstances.[8] In practice, even where there is no written evidence, it is invariably assumed that an equitable mortgage by deposit is for all continuing advances; presumably it is the formula recited by the mortgagor at the deposit which creates this term. In *Bank of Ireland -v- Coen & Coen*[9] the mortgagors expressly conceded that the mortgages were to secure "all liabilities present and future"; Lynch J. in finding for the mortgagee nonetheless stated that the mortgagors appeared to have no understanding of the nature of a continuing security. This raises interesting questions about the need to bring to the mortgagor's mind the precise nature of the agreement, especially in the light of the views expressed in *Macaura*. Clearly if the mortgagor signs a memorandum he is bound by its terms; but if a mere oral formula is employed, can it be said that the mortgagor has had the terms sufficiently brought to his attention? Further, what would be the position if a mortgagor claimed to have understood that the mortgage was to secure present liabilities only, and the mortgagee could neither produce a written memorandum nor swear positively that it had explained to the mortgagor that the transaction was to secure future advances also? If the mortgagee maintained that in its view the transaction covered future advances, it might plausibly be argued that the parties were not *ad idem* and that no mortgage agreement existed.

At this point it is appropriate to mention a curious practice which existed at least until very recently known as the "withdrawal from correspondence". Certain lending institutions were in the habit of preparing a letter prior to the deposit binding the borrower to certain terms; in itself this would appear reasonable enough since it would have the advantage of setting out clearly the terms of the agreement. However, curiously, at the time of the deposit the borrower was often required to sign a document entitled the "Memorandum of Withdrawal from Correspondence" the effect of which was normally that the terms of a security would henceforth be oral only and that all previous written terms agreed were abandoned. It is not easy to see either the purpose or the effect of this arrangement. If the lending institution was worried that there might be a document which would require registration, it would surely have been more sensible to dispense with the letter altogether. If on the

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other hand the institution regarded it as advantageous to have written terms set out in such a letter, it is difficult to see the point of withdrawing the letter at the very point where it would become operative. As far as the writer is aware the practice of "withdrawing from correspondence" has largely died out in recent years; it would be interesting to know how it grew up and what its precise purpose was.

The most problematic question raised by the security for present and future advances is that of redemption and discharge. Whereever there is a long-running banker/customer relationship, there is the likelihood that at times there will be an overall credit balance on the customer's accounts. Where the borrowings are secured by a deposit of deeds, can it be argued that the paying off of the borrowing redeems the mortgage and that a fresh agreement would be necessary to recreate the security? If not, what precisely is the nature of the mortgagee's interest where there is no debt?

"The most problematic question raised by the security for present and future advances is that of redemption and discharge."

There is a suprising lack of authority on these points. There is authority that an equitable mortgage is discharged by a receipt (or more strictly that the receipt is evidence of discharge)[10] but as this presupposes that *all* money advanced has been repaid, it does not get us very far. As to the nature of a mortgage by deposit, the classic statement is that of Kenny J. in *Allied Irish Bank -v- Glynn*[11]:—

> "The deposit as security of documents of title to land which is not registered gives the person with whom it is made an equitable estate in the lands until the money secured by it is repaid: the remedy for securing payment is to apply to the Court for a declaration that the deposit has given a charge on the lands. The right created by the deposit is not limited to keeping the deeds until the money has been paid but gives an equitable estate in the lands".[12]

This could be taken to suggest that the repayment of a loan amounts to redemption and that the mortgagor is entitled in such a case to ask for the deeds back. However, the crucial phrase here is "the money secured by it". If the security is for "all present and future advances" it would appear that the agreement is that so long as the deeds remain with the mortgagee, any sum advanced at any time is secured until repayment. In *Bank of Ireland -v- Coen & Coen* Lynch J. stated:—

> "The mere fact that at certain times no debt may be owing to the Bank does not alter the position that the lands remain as security when the account runs into overdraft again".[13]

This is noteworthy as being one of the very few definite pronouncements on the point, though it takes the form of an assumed fact rather than a statement of principle. In *Bank of Ireland -v- Purcell*[14] it was held that where a mortgage for present and future advances is created, each further advance is a separate conveyance of an interest in the mortgaged property for the purpose of Section 3 of the Family Home Protection Act, 1976. Of wider interest is the description there of an equitable mortgage as an estate of fluctuating size. In the High Court Barron J. stated:—

> "In the case of a mortgage the extent of the estate depends upon the amount which has been borrowed. Even in the case of a legal mortgage where there is a conveyance of the fee simple the interest of the mortgagor and of the mortgagee in the lands so mortgaged will depend at any given time upon the extent of the monies lent and borrowed. No doubt so long as any monies are charged on the lands the fee simple estate will be in the mortgagee. However, that of itself does not mean that thereafter the mortgagor cannot purport to convey a further interest to the mortgagee but that in that situation the value of the equity of redemption is being altered on the occasion of each further advance. The same situation arises in the present case. Each time there is a further advance the amount which is being charged on the lands is altered and accordingly the interest of the mortgagor in those lands is altered".[15]

" . . . where a mortgagee for present and future advances is created, each further advance is a separate conveyance of an interest . . . for the purpose of Section 3 of the Family Home Protection Act, 1976."

The Supreme Court approved this reasoning and added:—

> "Thus the transaction contemplated further charging of the interest in the land in question by way of mortgage. If at any time no monies were due on foot of the mortgage then for the purpose of Section 3 the property was unencumbered notwithstanding the deposit of deeds and the bare equitable interest therein by the deposit of deeds was not the substantive interest in the property contemplated by Section 3. If such was the position on the date the deposit was made then the family home was not encumbered. If some monies

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were due on that date then the family home was encumbered only to that extent''.[16]

It is clear from the Supreme Court's judgment at least that a mortgage by deposit is not redeemed simply by the fact that no money is owing at a particular moment; however the mortgagee's interest in such a case is reduced to the point where it ceases to be a mortgage and becomes a ''bare equitable interest''. It appears that the mortgage will be revived automatically if a further advance is made (a conclusion also reached by Lynch J. in *Bank of Ireland -v- Coen*) and the rights of a mortgagee may thereafter be enforced as before. The law on this point now appears to be settled, though not with the clarity one would wish for.

The other issue raised by *Bank of Ireland -v- Purcell* is how far the definition of a further advance as a ''conveyance'' would be extended. By bringing such advances within Section 3 of the Family Home Protection Act, 1976, the decision has already had the effect of rendering void a very large number of equitable mortgages; if the further advance is a conveyance for other purposes also, it is not easy to foresee the consequences. For example, in *Purcell* the Plaintiff relied on the doctrine of ''tacking'' i.e. that for the purpose of priority in registration further advances under a Mortgage for present and future advances are part of the original mortgage; the doctrine was considered by Barron J. but found to be inapplicable. Since the further advance is now a separate conveyance for some purposes, will this alter the priority of mortgages? On balance the answer is probably no; in *Purcell* the Supreme Court drew a sharp distinction between remedial and conveyancing statutes and held that the former must be interpreted as widely as necessary to give effect to their purposes; by implication therefore, a conveyancing statute may be intrepreted literally. This suggests that the settled law of mortgages will not be disturbed further than necessary to give effect to any relevant remedial statute.

Overall one's main impression of the law of equitable deposit is its informality and lack of settled rules. In theory this accords with the notion that such deposits are a matter for agreement between the parties. In practice, given that such agreements are normally weighted heavily in favour of the mortgagee, the failure to spell out the terms puts a havey burden on the mortgagor especially as such mortgages rarely, if ever, contain any express provision for redemption. Where clear written terms are not agreed, it is advisable, as Kennedy C.J. thought[17] that the transaction be explained as clearly as possible to the mortgagor.

NOTES

1. (1934) L.J.Ir. 89.
2. [1934] L.J.Ir 89 to 90.
3. Irish Land Law (2nd Edition) paragraph 12-44.
4. [1931] I.R. 368.
5. [1931] I.R. 368 at 373.
6. [1931] I.R. 268.
7. It should be said that both Ryland's Digest and Wylie's Irish Land Law seem to be in some confusion as to what the case actually decided; in particular one might gather from Wylie (Note to paragraph 12:44) that the decision went the other way.
8. See Fisher and Lightwood on Mortgages (10th Edition) at p.67 and the cases there cited.
9. Lynch J., 11th November, 1988, Unreported.
10. *Firth & Sons Ltd. -v- Commissioner of Inland Revenue* [1904] 2 K.B. 204.
11. [1973] I.R. 188.
12. [1973] I.R. 188 at 191/2.
13. At page 5 of his Unreported Judgment.
14. Supreme Court 24th July, 1989, Unreported, affirming [1988] I.L.R.M. 480.
15. [1988] I.L.R.M. 480 at 482.
16. At page 7 of the Judgment of Walsh J. (nem dis.) 24th July 1989 Unreported.
17. See *Bank of Ireland -v- Macaura* above.

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Society of Young Solicitors Third Joint Conference

The third Young Solicitors' Joint Conference which was held at the Great Southern Hotel, Eyre Square, Galway, on 6th/8th April, 1990 was a resounding success. The City of the Tribes was the perfect venue for the first Joint Conference to be held in this jurisdiction and attracted over 350 young solicitors from Ireland, Scotland, England and Wales.

Despite the rigours of the disco and bar extension on Friday night, there was an excellent attendance for the very comprehensive lecture given by Gerald FitzGerald on the Saturday morning which was followed by a very lively and stimulating European Forum at which the contributors were Greg Myles (from Northern Ireland), Michael Dean (a Scottish solicitor practising in London) and Finbarr Murphy.

Most delegates took advantage of the fine weather and took part in the activities organised during the Saturday afternoon which included a bus tour around Connemara, a pub crawl/walking tour of Galway and a tennis tournament. Some delegates were also lucky enough to back the winner of the Grand National.

The blood stream received further sustenance at a pre-banquet reception which was generously sponsored by the Bank of Ireland Group, followed by the social centre-piece of the weekend, the Gala Banquet, which took place in the Ballroom. The Banquet, which was attended by approximately 350 people, was regarded as being the best for many years and lasted until the not so small hours of the morning!

Our guest of honour, Judge Donal Barrington, attracted a very good attendance on Sunday morning for his entertaining and illuminating talk on the Court of First Instance of the European Communities. The Conference ended with a farewell lunch for our overseas visitors. The Society's thanks are due to our main sponsors, the Bank of Ireland Group together with Butterworths, Sweet & Maxwell, Law Placements and Rochford Brady. In addition to the Sub-Committee who toiled to make the weekend such a successful one, our thanks are also due to Eva Tobin who did so much work on the ground in Galway and to Richard Devereux, Brian MacBride and Brian Speers who managed to persuade so many young solicitors to travel to Galway and also organised their travelling arrangements.

The next SYS weekend is also a Joint Conference, this time with Members of the Young Bar, to be held at Jury's Hotel Cork on 9th-11th November, 1990.

(Left to Right): Colin Sainsbury — Vice Chairman, Society of Young Solicitors; Brian Lindermann — President, Scottish Young Lawyers Association; Katherine Delahunt — Chairman, Society of Young Solicitors; Brian Speers — Chairman, Northern Ireland Young Solicitors Group.

(Left to Right): Katherine Delahunt — Chairman, Society of Young Solicitors; Mr. Justice Donal Barrington — Judge of the Court of First Instance of the European Communities; Eva Tobin — Solicitor; Joe Daly — Investment Bank of Ireland, Galway.

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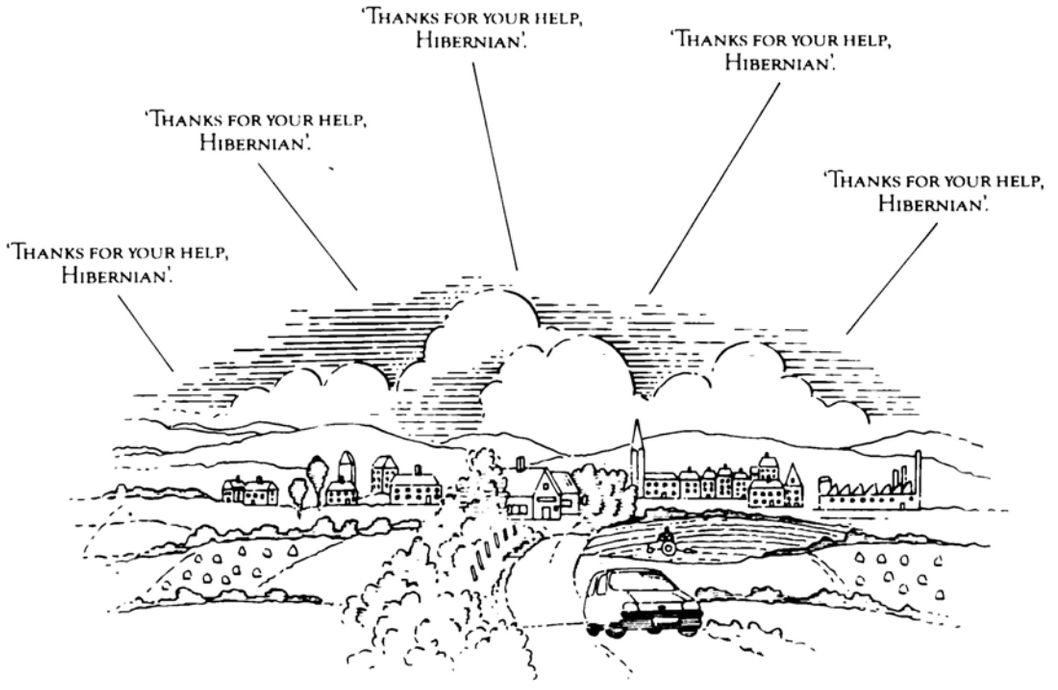
The President of the Law Society, Ernest J. Margetson, making a presentation to Roderick Tierney on his retirement as a Law Society Election Scrutineer. Mr. Tierney served as a scrutineer for 51 years.

Mr. Eamonn Barnes — Director of Public Prosecutions, Guest Speaker, Ernest J. Margetson — President of the Law Society, Mary O'Halloran — Secretary of the Kerry Law Society and James J. Ivers — Director General of the Law Society.

Jack Charlton, Guest Speaker, addressing the Conference.



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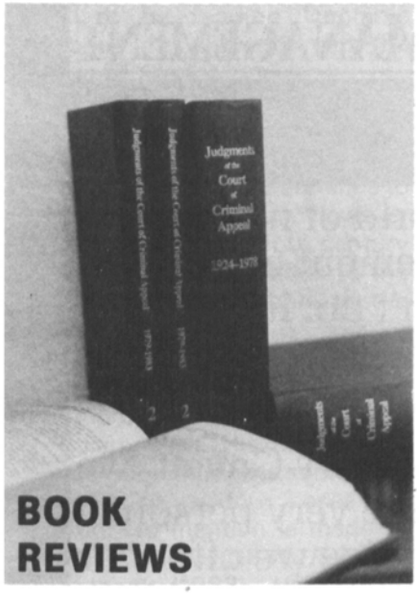

A Casebook on Irish Business Law
by Brian Doolan B.L. Published by Gill and Macmillan.
Paperback, £19.99

Although a number of books have been written about "Irish Business Law", it is not clear exactly what constitutes Irish Business Law. Some topics occur in all publications, but equally other topics are covered only in some.

Mr. Doolan in his Casebook has confined his 90 cases to four topics and in doing so has avoided falling into the trap of trying to cover too much at too superficial a level. The topics covered are Agency, Sale of Goods, Hire Purchase and Insurance. As such the publication might have been more appropriately entitled a Casebook on Irish Mercantile Law. Presumably the term "Business" is more attractive than "Mercantile".

As with his casebook on Irish Contract Law, Mr. Doolan has uncovered a number of unreported judgments as well as reported ones and set them out in an easily readable and helpful manner.

Twenty cases are devoted to the topic of Agency and this is most welcome as there is a paucity of published material on this often ignored but highly important subject. The question of ostensible authority might however have been more adequately dealt with by including *Kett -v- Shannon & English* (1987) and *Thomas Williamson Limited -v- Bailieborough Co-operative Agricultural Society Limited* (1986).

Mr. Doolan discusses over 40 cases under the Sale of Goods heading. The most important of these are those relating to reservation of title. Although the significant reservation of title decisions are set out, the opportunity was missed to put the decisions into the context where the reader could understand as to how a reservation of title clause could be ineffective for failure to register particulars in the Companies Registration Office. In this context it would have been useful to have had a note on the distinction between *Kruppstahl AG -v- Quitmann Products Ltd.* (1982) and *Uniacke -v- Cassidy Electrical Supply Co. Ltd* (1987). The Casebook discusses the former but not the latter. Since publication of the Casebook we now have the benefit of Mr. Justice Murphy's decision in *Carroll Group Distributors Ltd. -v- G. and J.F. Bourke Ltd and Bourke Sales Ltd* (1989).

Mr. Doolan states correctly that the first requirement for an effective reservation of title clause is that the clause must have been incorporated into the contract – he distinguishes *Sugar Distributors Ltd -v- Monaghan Cash & Carry Ltd* (1982) and *Frigoscandia (Contracting) Ltd -v- Continental Irish Meat Ltd* (1982).

Although pointing out, with supporting cases, that a simple reservation of title clause is effective, the author might have highlighted the importance of the intention of the parties, as illustrated by Mr. Justice Barron in *Uniacke -v- Cassidy Electrical Supply Co. Ltd* (1987).

The diminishing importance of Hire Purchase is reflected in the fact that of the ten cases discussed the most recent is the 1980 unreported decision in the case of *Murphy -v- Industrial Credit Co. Ltd.*

Nearly 20 Insurance cases are included, particular attention being given to the duty of disclosure. In his introduction on the duty of disclosure the author points out that "what is material in each case is not a matter for the insurer or an expert but for the courts". This is fine so far as it goes and has presumably been taken from Mr. Justice Kenny's judgment in *Chariot Inns Ltd -v- Assicurazioni Generali SPA* (1981). But to give a clearer picture it might have been worth mentioning from Mr. Justice Kenny's judgment that what is to be regarded as material, "is a matter or circumstance which would reasonably influence the judgment of a prudent insurer in deciding whether he would take the risk and, if so, in determining the premium he would demand".

Any person studying the topics covered by this publication (Agency, Sale of Goods, Hire Purchase and Insurance) will find his or her task much easier by purchasing a copy of this Casebook. It will save the reader many hours in tracking down judgments, both unreported and reported, and having to extract the relevant parts from the judgments. The publication should prove also to be a useful addition to a practitioner's library.

WILLIAM JOHNSTON

A Casebook on Irish Contract Law
by Brian Doolan B.L. Published by Gill and Macmillan.
Paperback, £24.99.

The backcover of this Casebook states that it is a "comprehensive Irish contract law casebook . . . designed for students and practitioners of law . . . the natural companion to the contract textbook".

This work contains summaries of and extracts from 160 decisions of the Irish courts involving contract law. Many of the judgments are otherwise unreported.

Any person studying Irish contract law, particularly for an examination, would be well advised to purchase this very useful casebook, which sets our not only the relevant decisions, but also summarises in a very clear and simple manner the decisions on each subject within the law of contract. This enables the reader to distinguish without difficulty between a number of cases dealing with the same subject matter.

This casebook is ideally suited to be read in conjunction with Robert Clark's Contract which gives a comprehensive outline of the principles of the Irish law of contract without elucidating on case law. As Clark's Contract is tightly written (due no doubt to his desire to pack as much information as possible into the available space), a student may obtain a clearer understanding

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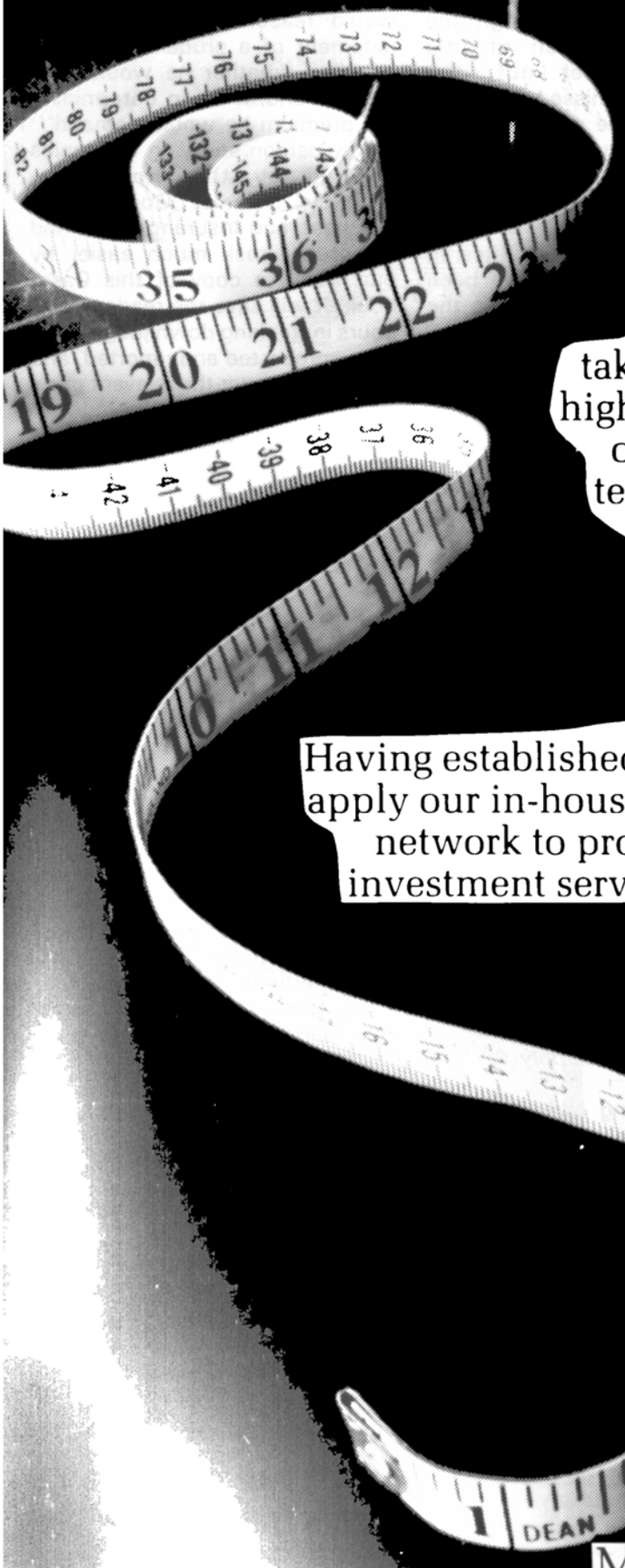

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of Clark by reading Doolan's Casebook in conjunction with the reading of Clark.

For the practitioners of law, the casebook is a useful guide for quick reference purposes, but obviously should not be used in preference to the Reports themselves. However the number of nineteenth century judgments discussed adds to the usefulness of the casebook for the practitioner.

The author's exposition of the principles of offer and acceptance, with appropriate case law, is done particularly well. His handling of consideration though is somewhat disappointing – four cases are reported. No mention is made of *Ferrar -v- Costelloe* (1841), *Kennedy -v- Kennedy* (1983), *Hassard -v- Smith* (1872), *O'Donnell -v- O'Sullivan* (1913), *Hibernian Gas Company -v- Parry* (1841) and *Blanford & Houdret Ltd. -v- Bray Travel Holdings Ltd & Hopkins* (1983). These cases illustrate respectively the concept of consideration, that consideration need not be adequate, that there may be circumstances where the adequacy of consideration might be relevant, where a compromise will not be upheld, the recording of consideration in a written memorandum and forebearance. The author states that "it is a complete defence in an action in contract to prove that no consideration was given". In his desire to keep the publication uncomplicated the author has surely misled the reader. The author could have mentioned the Irish decision of *Drimmie -v- Davies* (1899) as an illustration that a contract under seal is an exception to the general rule that consideration must be present.

In dealing with evidentiary requirements, the author makes no mention of the requirements for contracts for the sale of goods in excess of £10. The recent Irish case *(Tradax (Ireland) Ltd -v- Irish Grain Board Ltd* (1984)) on this point is discussed only in another context.

In contrast to these inadequacies, the author's handling of the difficult area of "subject to contract" and the manner in which he distinguishes the four decisions covered is both refreshing and helpful. His illustration of exemption clauses is also commendable.

In dealing with capacity, curiously no room is made for drunkenness. However the inclusion of the judgment in the diplomatic immunity decision of *Saorstat & Continental Streamship Co. Ltd -v- De Las Morenas* (1945) is helpful to any lawyer faced with a client who has entered into a contract with a member of the diplomatic community.

No room is given for negligent misrepresentation and therefore no mention is made of *Securities Trust Ltd. -v- Hugh Moore & Alexander Ltd.* (1964), *Bank of Ireland -v- Smith* (1966) or *Stafford -v- Keane Mahony Smith* (1980).

Although eight cases are devoted to damages (including *Hadley -v- Baxendale*) the principles of *Hadley -v- Baxendale* might have been illustrated more effectively by either including *Stoney -v- Foley* (1897), *Lee and Donoghue -v- Rowan* (1981) and *Malone -v- Malone* (1982) or by setting out more stridently the application of the two limbs of *Hadley -v- Bacendale.* No mention is made of mitigation of damages – an important area in practice.

To conclude, Mr. Doolan must be commended for putting together so many forgotten reported decisions as well as modern unreported ones in a very readable casebook. Although certain topics, as indicated above, could be expanded, I would recommend the casebook as essential reading to any student of Irish contract law. It comes at a price of a good evening's drinking and is therefore affordable by any student.

WILLIAM JOHNSTON

Correspondence

The Editor,
The Gazette,
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20th April 1990

Re: **Solicitors Voluntary Levy for the Free Legal Advice Centres**

Dear Sir,

Through the courtesy of your letter page I would like to express my sincere thanks, on behalf of the Free Legal Advice Centres, to the many solicitors who contributed generously to the voluntary levy for the support of the FLAC.

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I again thank you for the many contributions and look forward to continued support in the future.

Yours sincerely,
EILIS BARRY
FLAC,
49 South William St.,
Dublin 2.

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Irish Affiliate to the
Fédération Internationale
Pour le Droit Européen (F.I.D.E.)

President: The Hon. Mr. Justice Brian Walsh
Chairman: Mr. Eamonn G. Hall, Solicitor

Programme for Spring/Summer 1990

1. **Tuesday, July 17th, 1990:**
Mary Robinson, Senior Counsel, Director Irish Centre for European Law, National Rapporteur, FIDE (Madrid – 1990) Congress – *Public Procurement.*

Lectures take place at 8.15 pm 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 Committee and guest speakers for dinner at the Club at 6.15 pm on the evening of each lecture. Members intending to dine must communicate with the Membership Secretary, Jean Fitzpatrick, Solicitor's Office, Telecom Éireann, Harcourt Centre, 52 Harcourt Street, Dublin 2. (Tel. 01-714444 ext. 5929, Fax. 01-6793980, Electronic Mail (Eirmail) (Dialcom) 74: EIM076) not later than two days before the dinner, as advance notice must be given to the Club.
Membership of the Society is open to lawyers and to others interested in European Law. The current annual subscription is £15.00 (£10 for students, barristers and solicitors in the first three years of practice). Membership forms and further details may be obtained from the Membership Secretary.

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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.
25th day of May, 1990.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Daniel Kelleher and Catherine McCarthy, Folio No. 305L; Lands: Hill Crest, Clifton Road; County: **CORK.**

Michael J. Ryan, Folio No. 60094; Lands: Lisgoold East; Area: 1a.0r.9p. County: **CORK.**

Anne Teresa Maher, Folio No. 316; Lands: Duagh; Area: 77.663 acres. County: **WATERFORD.**

John Flood, Folio No. 2035L; Lands: St. Peter's. County: **LOUTH.**

Rosaleen McKnight, Flora Farm, Naul, Co. Dublin. Folio No. 4820F; Lands: Townland: Damastown Barony: Balrothery West; Area: 0.202 Hectares. County: **DUBLIN.**

Peter Carroll, Folio No. 11874; Lands: Knockieran Lower; Area: 0a.1r.33p. County: **WICKLOW.**

Denis Gallagher & Christina Gallagher, Folio No. 11502F; Lands: Rathmacullig. County: **CORK.**

Jane Finnerty, c/o T.J.C. O'Keeffe, Solicitor, Abbey Street, Roscommon. Folio No. 3075F; Lands: (1) Coolderry (2) Coolderry; Area: (1) 0.313 Acres (2) 0.263 Acres. County: **ROSCOMMON.**

Shannon Free Airport Development Co. Ltd, Shannon Airport, Co. Clare. Folio No. 14863; Lands: (1) Drumgeely (2) Ballyblood (3) Derrymore West; Area: (1) 1.691 hectares (2) 0.326 hectares (3) 0.367 hectares. County: **CLARE.**

Kevin Keane, 191 Griffith Ave., Drumcondra, Dublin 9. Folio No. 409L; Lands: The property known as 191 Griffith Avenue, situate on the north side of the said Avenue in the Parish of Clonturk and District of Drumcondra. County: **DUBLIN.**

Owen Treanor (otherwise Owen Treanor Junior), Folio No. 1360; Lands: Brackagh; Area: 16a.0r.34p. County: **MONAGHAN.**

William Reville, Folio No. 4637F; Lands: Tottenhamgreen; Area: 4.894 hectares. County: **WEXFORD.**

John Murray, Folio No: 1284; Lands: Holmestown Little; Area: 81a.0r.24p. County: **WEXFORD.**

Desmond O'Connor and Marian O'Connor, Folio No: 3636F; Lands: Marshes Lower. County: **LOUTH.**

Patrick Molony, Folio No: 26540; Lands: Clongower; Area: 15a.0r.7p. County: **TIPPERARY.**

Thomas & Bridie Kirrane, Folio No: 3014; Lands: Parts of the lands of Lurgan, containing together 19a.0r.1p or thereabouts, statute measure, situate in the Parish of Addergoole, Barony of Dunmore, Co. of Galway. County: **GALWAY.**

Anthony Campbell, Folio No: 5762; Lands: Ardloughill; Area: 5a.3r.27p. County: **DONEGAL.**

James P. Ryan of 17 Malahide Rd., Dublin and **Elizabeth Ryan** of 2 Donnycarney Rd., Dublin. Folio No.: 26209; Lands: Wotton; Area: 0a.1r.31p.; County: **MEATH.£**

John McManus and Anne McManus, Folio No.: 1700F; Lands: Knockdomny; Area: 11a.2r.24p.; County: **WESTMEATH.**

Lost Wills

RYAN, Catherine, late of 3 Upper Barrack Street, Wexford in the County of Wexford, Spinster. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 25th day of February 1988 please contact Doyle Lowney & Co., Solicitors, 12 North Main Street, Wexford.

CUNNINGHAM, Catherine Laboure Mary, deceased. Will any person having knowledge of the whereabouts of any will or codicil of the above named deceased late of 12 Llewelyn Close, Grange Valley, Rathfarnham in the County of Dublin please contact Messrs. Greg O'Neill, Solicitors, of 21 Clare Street, Dublin 2. Tel: 612872/ 615162.

CONNORS, Terence (otherwise Thadeus), late of Leopardstown Park Hospital, Foxrock, Co. Dublin and formerly of Pill Road, Carrick-on-Suir, Co. Tipperary. Would anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 5th day of June, 1988 at Leopardstown Park Hospital, Foxrock, Co. Dublin please contact Messrs. Derivan Sexton & Co., Solicitors, New Street, Carrick-on-Suir, Co. Tipperary. Telephone: (051) 40007.

FLOOD, Patrick, late of Broomfields, Donard, Co. Wicklow and also of Donnybrook, Dublin, date of death 27th March, 1990. Will any person having knowledge of a Will of the above named deceased please contact Millet & Matthews, Solicitors, Baltinglass, Co. Wicklow. Telephone No. (0508) 81377.

McGRATH, Mary Kathleen, deceased, late of 163 Clonkeen Road, Blackrock, Co. Dublin. Will anyone having knowledge of a Will of the above named deceased who died on the 15th April, 1990, please contact Messrs. Michael E. Hanahoe & Co., Solicitors, 21 Parliament St., Dublin 2. Tel. 772353.

Miscellaneous

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FOR SALE: Set of Irish Law Times 1910-1971. Bound. 1972-1980, unbound. (1 part missing in 1978). Set of Acts of Oireachtas 1922-1958, 1971-1980 Bound. Ring Jenny Aston. Tel: 720622.

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NEW PRACTICE New firms and sole practitioners (in first three years of practice) may acquire *Irish Law Reports Monthly* 1978-1989 (12 bound volumes) at a special concessionary rate. For details and application form please contact The Round Hall Press, Kill Lane, Blackrock, Co. Dublin. Tel: 892922; Fax: 893072.

P.R.S.I. AND SOLICITORS Will members who, because of age at entry, will not qualify for pension rights, please contact the following box number, with a view to forming a Committee. No. 50.

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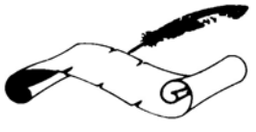

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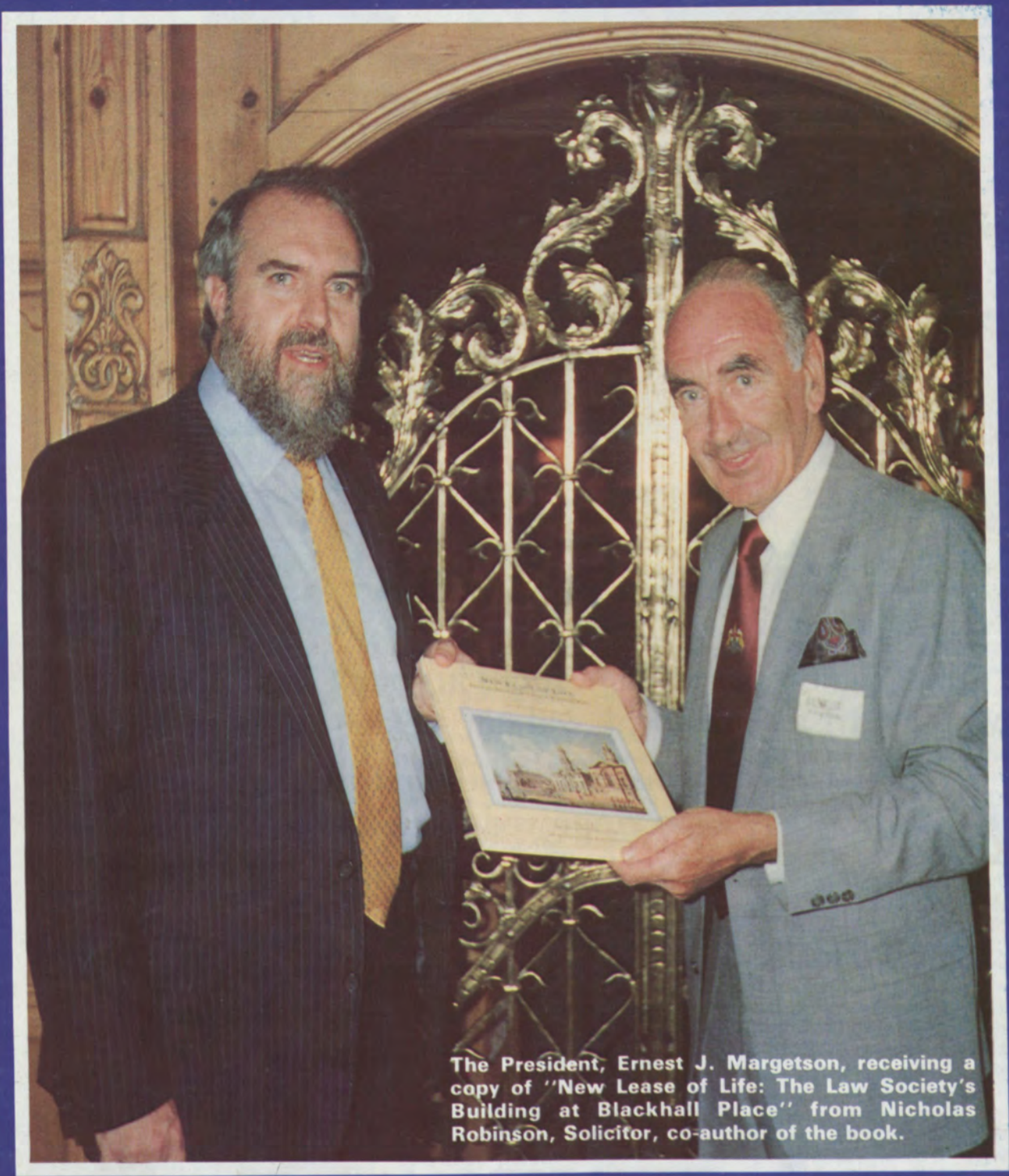
GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

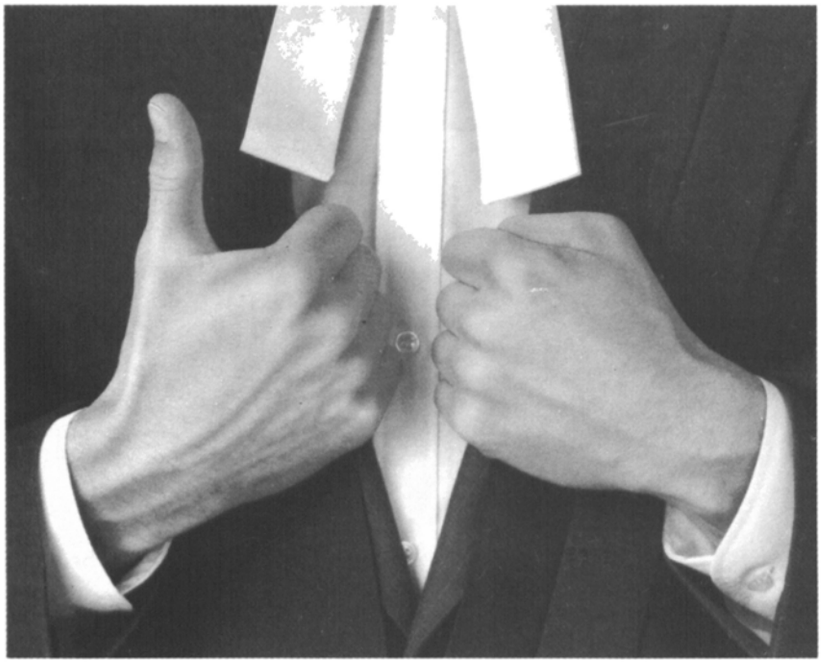
Vol. 84 No. 5 June 1990



The President, Ernest J. Margetson, receiving a copy of "New Lease of Life: The Law Society's Building at Blackhall Place" from Nicholas Robinson, Solicitor, co-author of the book.

- Does the Irish Criminal Justice System work?
- Safety, Health and Welfare at work.
- Solicitor's Costs.

Thumbs up for the Irish Permanent



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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 84 No. 5 June 1990

Viewpoint

That the horrors of the Ceaucescu Regime should lead to the highlighting of a serious lacuna in Irish Family Law is yet another example of what a small village our globe has become. The discovery of hundreds, if not thousands, of orphans languishing in institutions where most inadequate care was available has brought forth a wave of sympathy. A number of Irish couples have sought to adopt some of these unfortunate children and have, no doubt to their great surprise, discovered that Irish Law is seriously lacking in this area.

"Foreign Adoptions" fall into two distinct categories. The first where the adoptive parents go through the formalities of an adoption in a foreign jurisdiction and comply fully with the requirements of that jurisdiction. There are no formal means of recognition in Ireland for such adoptions.

The other category is where the adoptive parents, perhaps due to the absence of any proper adoption procedures in some third world countries, arrange what can only be called an informal adoption and bring a child back to ireland. They will have extreme difficulty in having that adoption recognised in this jurisdiction. Even assuming that they meet the criteria of our Adoption Board and receive satisfactory reports from an appropriate Adoption Society or local authority, there would be serious difficulties in persuading the Board that the necessary consents have been obtained from the natural mother.

As the Law Reform Commission's recent Report on the Recognition of Foreign Adoption Decrees points out, even the first of these categories presents considerable difficulties. It might have been thought that it would be easy to draw up a list of "first world countries" whose adoption procedures might have been assumed to be similar to ours. Unfortunately it is the position that some of these countries permit adoption in circumstances which would not be in accordance with our legislation. Some permit unmarried persons to adopt. Some permit adults to be adopted. Others have no restriction on the adoption of legitimate children. It was for that reason that the Commission in its Report recommended giving the Minister for Health power to designate individual countries whose adoption orders would be recognised in Ireland.

The Commission also recommended that the High Court be given jurisdiction to make a declaration that an applicant is or is not the adopted child of a named person by virtue of a foreign adoption. This would be in ease of persons adopted in a jurisdiction where some of its adoption rules might be similar to Irish ones but others differ.

The Commission was not of course considering the more difficult problem of "Third World" adoptions where it is doubtful whether adoption procedures of a quality which either our Minister or our Courts would be likely to approve exist.

Is there then to be no way in which adoptive parents can ensure the proper legal status of children whom they have, in all good faith, brought from a Third World country to Ireland? There are few more difficult problems than that of Third World adoptions. Many would argue that the success of such adoptions must be doubtful given the serious culture clash between the adoptive parents and the child. On the other hand it has to be admitted that not all the children of mono-cultural marriages avoid serious psychological problems.

One of the strongest arguments for instituting a regime which would permit Irish adoptive parents to go through adoption procedures in Ireland is that it may go some way towards stopping the trafficking in children which is unfortunately a feature particularly of adoptions of South American children. This has already been recommended by the Report of the Review Committee on Adoption Services published in 1984. Some action leading to the introduction of legislation dealing both with the recognition of foreign adoptions and the adoption in Ireland of foreign children is clearly called for.. □

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Dylan Thomas

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Abbey Life

Does the Irish criminal justice system work?

It seems to me that with a captive audience of lawyers, it would be a pity to miss the opportunity of riding one or two of my hobby horses, of reminding ourselves of the nature and structure of the Irish criminal justice system and of seeking to identify its strengths and its weaknesses. The question I am going to consider is – "Does the Irish criminal justice system work?"

by
Eamonn M. Barnes
Director of
Public Prosecutions

In an address such as this it is obviously not possible to give a comprehensive description of the system or an all embracing answer to the question. Some aspects of the system obviously do work. I propose to refer only to two of the main elements in the system and to examine briefly whether or not they are adequate to their task. In doing so, I will not enlarge on what is arguably the most important observation that can be made about the Irish criminal justice system – that, sadly, it is not in fact Irish at all in any real sense. The reason for my silence on that point is that I have already spoken at some length about it on more than one occasion, notably in an address which I had the honour to give at the Cearbhaill O'Dalaigh Memorial Dinner in 1988 and in addresses last year to the American Bar Association and to the University College Galway Law Graduates Association and I don't wish to become repetitious on the matter.

I would however urge upon this Society, which collectively is such a repository of jurisprudential wisdom and experience, the pressing need for a justice system which is the product of native genius and responsive to native needs and conditions. The system we have was not designed for and never suited the problems it was supposed to address in Ireland. In my opinion it no more suits them today than it did in the middle of the 19th century. In so urging, I am not of course suggesting that we should not be responsive to legal thinking and developments in other jurisdictions and systems. Even if that were desirable, which it is not, it would not be possible in this day and age. Indeed the more cross-fertilisation there is between legal systems the better. But the basic system should accurately reflect both the nature and the needs of the society which it serves. Regrettably, I believe that that is not the case. That general comment made, let us look a little more closely at two of the constituent parts of the system.

The first of these is the criminal law itself. From the prosecutor's point of view, and I suggest from that of the citizen also, the criminal law is in urgent need both of modernisation and of codification. A very great deal of the day to day commerce of my office is concerned with imprecise and ancient common law concepts and offences, some described in Norman French or Elizabethan English by Messrs Coke, Hale and Blackstone, or else with overly precise definitions and delineations by that extraordinary animal, the mid-19th century legislative draftsman. It is difficult to fathom what he might have been trying to achieve as he conjured up a hundred different circumstances in which the same basic offence could be committed. 1861 as we all know was one of the vintage years in the mother of parliaments. Luckily there have not been too many such years. Among the allegedly reforming and consolidating measures inflicted upon us in that year and with which we still have to struggle daily were a Larceny Act, a Forgery Act, an Accessories and Abettors Act, an Offences against the Person Act and a Malicious Damage Act. Above all a Malicious Damage Act. Did you know that under Section 3 if you were over 16 years you could be awarded penal servitude for life or not less than three years or (a common alternative provision in Victorian statutes) imprisonment for not more than two years with or without hard labour and solitary confinement, for setting fire to a hopoast or a hovel or a fold. I might mention that if you were un-

Eamonn M. Barnes.

**Address by Mr Eamonn M. Barnes, Director of Public Prosecutions, to the Incorporated Law Society on May 4, 1990 in the Hotel Europe, Killarney.*

fortunate enough to be a male under 16 years, in addition to getting it in the neck as aforesaid you could be awarded a good whipping as well. Precisely the same sanctions would be applicable to you under the same Section 3 were you to fire any stable, coachhouse, outhouse, house, warehouse, office, shop, mill, malthouse, barn, storehouse, granary, shed or farm building. Again the same range of punishment was applied to you under Section 1 if you fired a church, chapel, meeting house or other place of divine worship, or under Section 2 for firing a dwelling-house, or under Section 4 for igniting stations or other specified buildings belonging or appertaining to a railway, port, dock, harbour or canal or under Section 5 if you burned any of a wide and meticulously specified range of public buildings. Given that the penalty for each and every one of these precisely and minutely described outrages is exactly the same it is difficult to understand why the draftsman could not have given us a one-liner providing that anyone who sets fire to a building is liable to be punished up to the stated maximum. It is only fair to say that Section 6 provides for a somewhat less severe maximum period – 14 years – for firing any building "other than such as are in this Act before mentioned". That section however is rarely if ever used, the reason being that even legal ingenuity could not conceive of a building that hadn't been specified in the five previous sections. Perhaps the one-liner kind of drafting would rapidly have made the draftsman and his colleagues redundant. Or perhaps in the pre-television age one had to occupy

"the criminal law is in urgent need both of modernisation and of codification . . . "

oneself at something and thinking up new circumstances for arson or forgery or fraudulent conversion was a popular parlour or office game in the long winter evenings. Whatever the reason, we continue to live with the results in the 1990s and if a prosecutor has the misfortune to say malthouse in the indictment when of course he should have said hop oast, or hovel when clearly he should have said fold, the result can be catastrophic. When I tell you that there are 50 sections dealing with various forms of damage to property, and two wrapper uppers – Sections 51 and 52 – covering anything that might conceivably have been missed in the earlier 50, you will get some idea of the nature and extent of the problem. Consider, for example, Section 39 which I regard as a splendid, if not particularly unusual, example of the genre. It is headed "Injuries to Works of Art", and reads "whosoever shall unlawfully and maliciously destroy or damage any book, manuscript, picture, print, statue, bust or vase, or any other article or thing kept for the purposes of art, science, or literature, or as an object or curiosity in any museum, gallery, cabinet, library, or other repository, which museum, gallery, cabinet, library, or other repository is either at all times or from time to time open for the admission of the public or of any considerable number of persons to view the same, either by the permission of the proprietor thereof or by the payment of money before entering the same, or any picture, statue, monument, or other memorial of the dead, painted glass, or other ornamental work of art, in any church, chapel, meeting house, or other place of divine worship, or in any building belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or to any university or college or hall of any university, or to any inn of court, or in any street square, churchyard, burial ground, public garden or ground, or any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping provided that nothing herein contained shall be deemed to affect the right of any person to recover, by action at law, damages for the injury so committed."

It would I think be hard to beat that for unrestrained verbosity, particularly when you remember that the whole exercise results in the creation of a cluster of rather unlikely offences carrying a maximum sentence of only six months. You may well think however that if sections such as that do little good, they do no harm. But you would be wrong because if a particular act of damage could be held to fall within that or any other section from 1 to 50 it precludes a prosecution under the relatively straightforward section 51. It is over such weighty matters that the brains of prosecutors are constantly exercised. And the Malicious Damage Act is only one of dozens of similar enactments. While with experience a criminal lawyer can find his way with reasonable confidence through the jungle, the criminal law remains an impenetrable mystery to the average citizen. And this should not be so, particularly when one of the fundamental propositions on which we operate is that *ignorantia juris neminem excusat.* The law, especially the criminal law, should be clear and accessible to all if all are liable for breaches of it. The scourge of legislative amendments, of amendments of amendments, of substitutions, insertions and deletions and of cross referenced definitions has made the task of ascertaining the current status of some offence and penalty sections a nightmare. When I was called to the bar, this was still, in most cases, a relatively simple exercise. Now there are not enough fingers on one's hands to keep open the various pages to be consulted. I believe that there is a pressing need for codification of the criminal law. Apart from the obvious advantages to both citizen and practitioner, codification, and the simplification which should accompany it, would make a substantial contribution to the effectiveness of the criminal process and therefore to the deterrent effect of law enforcement.

" . . . the criminal law remains an impenetrable mystery to the average citizen".

The need for Law Reform

The law of course also requires constant updating to keep pace

with developments in society. This need, common to all countries, has become more pressing in recent years. The world has changed a lot since 1861 – even since 1916 the year of the last substantial enactment dealing with the criminal law of dishonesty. The intervening years have encompassed many happy hours spent by criminal lawyers identifying the essential distinction between larceny by a trick and obtaining by false pretences, or between embezzlement, fraudulent conversion and larceny by a clerk or servant. These questions, however fascinating and gripping, seem to provoke a certain impatience in the general citizenry, particularly when some obvious crook is acquitted as a result of a difference of opinion between judge and prosecutor regarding them. Now, since the advent of automated banking, of electronic book keeping and vast credit transfers, of cheque guarantee cards and walls which speak money, the old dishonesty laws are frequently inadequate or irrelevant and it is possible to obtain large sums or credits dishonestly without breaking the criminal law, at least in a provable way. I am aware that the relevant authorities here and in many other jurisdictions are tackling this problem as a matter of urgency. But at present many undoubtedly dishonest actions cannot be made the subject of criminal proceedings. It may be that we need a different approach to the problem than that traditionally offered by the Larceny Acts or more recently in Britain by the Theft Acts, one in which the general concept of dishonesty would be the dominant factor, criminally actionable in addition to some individually listed and specific examples of dishonest dealings. I do not know if it would be possible to draft or enact such legislation. What I do know is that the average citizen can recognise dishonesty when he sees it, and that without such a general concept offence, there will always be many who succeed in achieving their dishonest purposes while technically remaining just outside the scope of a system composed only of rigid and precise prohibitions. If therefore we look at the question does the system work – in the context of the substantive criminal law, I think that we would answer "yes", but that it would work far better and constitute a much more effective deterrent to those inclined to break the law if it were simplified, modernised and codified.

Review of Criminal Legal Process

The question – does the system work – comes into somewhat sharper focus in the context of the Irish code of criminal procedure. I do not here propose to describe and contrast that system and the inquisitorial system which is used throughout continental Europe. Again, having already done so on more than one occasion, I would simply call to mind and fully endorse the observation of the distinguished Scots writer, public affairs commentator and passionate fighter for justice, Mr Ludovic Kennedy, when he stated that the inquisitorial system seeks to find the truth whereas the accusatorial system seeks to find a winner. While most, probably all, of you are familiar with our accusatorial system, it may be worth while to recall a couple of its principal features. First, it starts with an accusation, which can be made properly and lawfully only if the prosecutor has sufficient evidence upon which a court could conclude beyond a reasonable doubt that the accused is guilty, i.e. evidence which is incompatible with any reasonable hypothesis other than his guilt. Now this is an extraordinarily heavy handicap on the prosecutorial process before it can begin at all, one which does not exist in the inquisitorial system. Its significance is not properly appreciated or debated, because it operates out of public sight and the public are almost entirely unaware of it. There is a dangerous complacency about how effective our system is, based on the misleading impression which is created by the cases which go to court. Undoubtedly there is a high conviction rate. This is precisely because a thorough filtering process has taken place before the cases get to court at all. In very many cases, the gardai do not even bother to submit a file to us, knowing what the inevitable decision will be. In many others we have to direct that there be no prosecution, or that a prosecution already initiated be withdrawn. Yet in a great number of these cases, neither the gardai nor my office is in the slightest doubt as to the guilt of the suspect.

The second feature of the system of procedure to which I want to refer is that the same suspect, with one or two exceptions which are of very limited significance, is under no obligation whatever to participate at all in the search for the truth of the matter

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or to contribute to such search in any way. He can pick a spot on the wall and stare silently at it for the period of any questioning or detention and he can do so with almost total immunity from adverse consequences including comments by the prosecutor in court. Now this may be a very good thing. There is the feeling that somehow it isn't cricket to expect, still less oblige, anybody to tell the truth if by doing so he may disclose that he has broken the law. I repeat that this may be the correct approach for us to adopt. There are however two points which I would make about the related topics of the burden of proof and the right to silence during an investigation or trial. The first is that as far as I am aware there has been no serious examination of them at academic, judicial or political level since the foundation of the State and that therefore we are, almost without question or thought, operating an inherited, indeed an imposed, system designed for circumstances elsewhere which may or may not have any relevance here. The second point is that there is little public awareness or means of awareness of the price paid in unsolved or unpunished serious crime by the continuation of our present system. All too often, and I mean very frequently indeed, cases stop dead at a desk in my office which would in another system proceed to a judicial investigation designed to seek and keep seeking for the truth.

I do not wish to appear to be an extreme right winger, whatever that is. By personal inclination I would put a very high premium on personal freedom and the importance of ensuring that no innocent person suffers. In the eyes of some, my office seems obsessed with doing precisely that and nothing else. Yet we merely operate, and faithfully operate, the system which we are given. But if that system fails, and is seen to fail, in its primary purpose – the deterring of crime and its swift punishment when it is committed – then there is an obligation on us all to look hard at it and see if it can be improved or if perhaps it may need to be changed fundamentally and radically. The first duty of the political entity known as the State – its primary *raison d'etre* – is the protection of its citizens. I fully appreciate that the cause of crime, particularly those crimes accompanied by senseless violence, are complex and varied and that we should beware of simplistic solutions of them. My point is, however, that while those causes are being identified and eliminated by other agencies, it is the business of the criminal justice system efficiently to detect and convict offenders so that they can be temporarily prevented, and others deterred, from committing further serious crimes. Failure to do this must inevitably exacerbate the problem whatever its social causes may be. And we have a very serious problem. The most basic rights, to walk the streets, to park a car, to the inviolability of one's own home, are regularly and brutally invaded, and can no longer be taken for granted as they were a few short years ago. As a society, we have become almost resigned to this state of affairs. Meanwhile, the chances of the robber and the burglar and the rapist beating the system and escaping scot free are in my view simply too high to be acceptable.

In these circumstances, I regret that from my perspective I have to answer "no" to the question "does our system of criminal procedure work?"

Conclusion

Finally, could we spare a thought for the victims of crime, particularly of violent crime. I am not here referring to the question of compensation for victims of these crimes which we are unable to prevent. That is a matter for other authorities who have to consider difficult questions of priorities of demands on limited public funds. Meanwhile, however, all of us involved in the criminal justice system should bear in mind constantly the extraordinarily traumatic

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effect a crime has on its victim, not just the elderly or infirm or very young, but on all victims. The evidence for this is now overwhelming. Yet they are frequently the forgotten participant in the system. The Garda Siochana, let it be said, have been quietly compassionate to victims long before it became fashionable. Perhaps this is because they are truly a people's police force or simply because they are, in my experience, an organisation of very decent men and women. More recently the Association for Victim Support is doing tremendous work within the limits of their numerical strength and financial resources. But decency on the part of the gardai or dedication by voluntary workers are not enough. We need to structure our concern for the victim. This need not involve any diminution in impartiality or objectivity on the part of the prosecution. It is mainly a question of communication, of involving the victim more in the criminal process, of informing him or her of the progress of the case, even perhaps of canvassing his or her views before a particular plea is accepted from an accused. I am currently studying ways and means in which this would be achieved as a matter of course in every case, and hope, through the co-operation of the gardai, the prosecutorial service and other interested parties that it will become a reality shortly.

There is nothing very new or revolutionary about this. The victim was an important participant under the Brehon Code, as is the *Partie Civile* today in France. It seems to me that if our law and procedure provided, in a formal and structured way, for the payment of compensation by a transgressor in addition to or substitution for any penalty which society, through the courts, required to be imposed, it would go a long way towards assuaging the victim's trauma and sense of alienation, and might well have a powerful deterrent effect on offenders as well. □

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From the President . . .

Since my last column two months ago I have done a considerable amount of travelling. Firstly, I attended the Commonwealth Law Conference in Auckland, New Zealand. Whilst we are not a member of the Commonwelath, the Conference was held in conjunction with the New Zealand Triennial Conference. It was a very successful and well attended conference – somewhere is excess of 2,500 people attended. It was interesting to hear the views of the various speakers from the various Commonwealth countries and to find out that their problems in may spheres are very similar to our own. One topic which is causing very considerable concern is professional indemnity insurance and in particular the number of claims that are arising and the considerable increase in the amount of these claims. An interesting paper was read by Lord Mackay under the title of "The role of the profession in securing access to justice". This, of course, dealt almost entirely with the recent developments in England and Wales to improve the existing legal aid system. Even though the system of legal aid there is vastly superior to our system, they still consider there are many grounds and areas for improvement. Let us hope that something may be learned from this by our government.

Some weeks ago I had the pleasure of attending the meeting of the heads of Bar Associations in Venice which was organised by the International Bar Association. One of the principal topics at this conference was the political and economic independence of the profession. This was considered under many headings, mainly in relation to the method of appointment of the judiciary, comparisons between the large firm and the individual practitioner and the whole question of the multi-disciplinary practice and/or partnership. One of the messages which came through was that whilst lawyers had to become very conscious of commercialism in running their practice, at the same time at all costs the high standards of professionalism must be retained. The lawyer has a duty to his client and to the cause of justice and both of these are imperative.

At home we had our Annual Conference in Killarney which attracted record numbers and I think was very successful. Certainly we benefitted from the most wonderful weather and I would personally like to express a word of thanks to our three speakers, Eamonn Barnes, Director of Public Prosecutions, Brian Coyle of James Adam & Sons and Jack Charlton, Manager, Irish Soccer Team. I think that everybody present enjoyed their contributions which in all cases were humourous and informative. At the time that I dictate this we are due to play this evening in our first match against England in the World Cup but at the time you read it, our fate will be known.

I also had the pleasure of attending the Northern Ireland Conference in Dumfries & Galloway, Scotland, where the principal speaker was Mary Robinson, S.C., who delivered a most interesting address on European Community Law.

The report of the Fair Trade Commission on the legal profession in Ireland has not yet issued. However, from information which we have received, I understand that it should be published before the end of June.

From reports which I received at a meeting of Presidents and Secretaries of Bar Associations it appears that the Wills Week was very successful in many parts of the country.

In conclusion may I just remind all golfers that my prize will be played for at Mullingar Golf Club on Friday, 27th July, 1990.

□

Ernest J. McCann.

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Practice Notes

Exempted Developments

An Exempted Development is a development for which planning permission is not required.

The categories of exempted developments are defined in:

a) Section 4 (I) of the 1963 Act and,

b) In Planning Regulations made by the Minister for the Environment pursuant to Section 4 (II) (VIII) of the 1963 Act. The current regulations made pursuant to this Section are:

1. The Local Government (Planning & Development) Regulations 1977 S.I. No. 65 of 1977 – Third Schedule and Article II thereof.
2. Local Government (Planning & Development) (Amendment) Regulations 1981 S.I. No. 154 of 1981.
3. Local Government (Planning & Development) (Postal & Telecommunications) (Exempted Development) Regulations 1983 S.I. No. 403 of 1983.
4. Local Government (Planning & Development) (Exempted Development & Amendment) Regulations 1984 S.I. No. 4348 of 1984.

A development occurring after 1/10/84 which is not an exempted development and for which planning permission has not been obtained is an unauthorised structure or use and it should be noted that although a development may be an exempted development and not require planning permission it may involve works that require building bye-law approval pursuant to the provisions of the Public Health (Ireland) Act, 1878. It should also be noted that Article II (VIII) of the 1977 Regulations provides that any extensions, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use is not exempted.

The Conveyancing Committee has received a number of queries in relation to whether or not floor area exemption limits are cumulative. The following examples, it is hoped, will clarify the position:

1. In the case where a dwelling-house has been extended and the extension is up to the exemption limit of 23 square metres and the extension has been erected without planning permission, then any subsequent extension will require planning permission.
2. Reference is made in the Regulations to the original floor area not being increased by more than 23 square metres. What is meant by the "Original Floor Area" can cause confusion. The better argument appears to be that the "original floor area" is the original floor area of the house *excluding* any additions for which planning permission *was* or *was not* required.

   Accordingly, if an extension which uses up the 23 square metre allowance is erected on foot of a planning permission, then the Exempted Development Regulations cannot be used to extend the extension beyond that size and any such further extension will require planning permission.
3. If a garage is converted into a habitable area, then the floor area of the garage is deducted from the floor area available for development under the Exempted Development Regulations. □

Conveyancing Committee

VAT Group Scheme

With effect from the 1st day of September, 1989 a revised scheme for extended group registration was introduced on a trial basis allowing exempt and partially exempt corporate bodies to become members of a VAT Group. Section 8(8) of the VAT Act, 1972 (as amended) allows for the treatment of two or more taxable persons as one taxable person.

Under Section 8 a person who engages in the supply of the taxable goods or services, that will exceed the exemption limits giving rise to a liability to VAT, in the course or furtherance of a business or profession shall be a taxable person, and as such shall be accountable and liable to pay the VAT in respect of such supply.

The Revenue Commissioners are empowered, in the case where there are two or more taxable persons who are so interlinked that it would be expedient, and in the interest of the efficient administration of tax, deem the two parties to be one and those persons may be made jointly and severally liable.

The new regime however, does not apply to the supply of immovable goods, inter group transfers in relation to exempt and partially exempt bodies of moveable or immovable goods or leasing services and transfers of a business or part of a business to a group containing an exempt or partially exempt body. Up to this a limited form of group treatment was permitted between partially exempt and exempt bodies in so far as the VAT was insignificant. The new regime is more flexible but there are conditions.

1. It applies only to corporate bodies established in the state although branches of foreign companies also qualify.
2. All members of the group must come under at least 50% control.
3. The members must be bound by financial, economic and organisational links.

The Revenue Commissioners can cancel the registration by notification in writing which is effective from the date specified in the said notification.

Advantages of this scheme

a. Inter group transfers can now be VAT free.
b. Additional VAT may be recoverable on the whole group.
c. Financial companies which heretofore kept inter group management under strict control can now charge for inter group services without worry.
d. In certain circumstances it may be necessary to register before joining a VAT group.
e. Cash flow benefits.

Disadvantages of this scheme

a. Input credit may be reduced depending on the mix of the group.
b. Registrtaion on input VAT and general overhead group depend on the group turnover rather than the individual company turnover.
c. Each member is jointly and severally liable for the Tax although only one member is liable to deliver the statutory returns.

Taxation Committee

Solicitors (Practice, Conduct and Discipline) Regulations, 1990 S.I. No. 99 of 1990.

The above regulations came into force on 1 June, 1990. They require that a solicitor instructed to make a personal injuries claim on behalf of a person who is not of full age shall not settle that person's claim without first issuing proceedings in the appropriate court and having the terms of such settlement approved by that court.

The full text of the Statutory Instrument is printed hereunder.

The purpose of this Regulation is to ***prohibit*** *what has been loosely called a 'parent indemnity' settlement, that is, a settlement of a perceived non-serious infant case by payment of an agreed amount to the parent(s) of the infant by the defendant's insurance company, (without proceedings being issued and without court approval, or the lodging of the amount in court), in consideration of which the parent(s) give a written indemnity to the defendant/insurance company concerned in the event of the infant suing the defendant after reaching full age.*

The Incorporated Law Society of Ireland, in exercise of the powers conferred on it by Sections 4, 5 and 71 of the Solicitors Act, 1954 (No. 36 of 1954) hereby makes the following regulations:

1. (1) These regulations may be cited as the Solicitors (Professional Practice, Conduct and Discipline) Regulations 1990.
   (2) These regulations shall come into force on the 1st day of June 1990.
2. (1) In these regulations unless the context otherwise requires —
   "the Act of 1954" means the Solicitors Act, 1954;
   "the Act of 1960" means the Solicitors (Amendment) Act, 1960;
   "Court" means any court established and for the time being maintained by law pursuant to Article 34 of the Constitution;
   "the Disciplinary Committee" means the Disciplinary Committee appointed pursuant to Section 6 of the Act of 1960;
   "full age" shall be construed in accordance with the Age of Majority Act 1985 or any amendment or modification thereof;
   "personal injuries claim" means a claim by a person arising from an act, omission or default of another or others which causes personal injuries to that person;
   "solicitor" means a solicitor qualified to practise pursuant to Section 54 of the Act of 1954; and includes a firm of solicitors and any partnership or association of solicitors;
3. A solicitor instructed to make a personal injuries claim on behalf of a person who is not of full age shall not settle that person's claim without first issuing proceedings in the appropriate court and having the terms of such settlement approved by that court.
4. The failure of a solicitor to comply with Regulation 3 of these regulations may, upon due enquiry by the Disciplinary Committee, be deemed by the Disciplinary Committee to be misconduct within the meaning of the Act of 1960.

Signed on behalf of the Incorporated Law Society of Ireland this 6th day of April, 1990.

Ernest J. Margetson,
President of the Incorporated Law Society of Ireland.

Local Government (Multi-Storey Buildings) Act 1988

Practitioners are referred to the pre-contract requisitions relating to the Local Government (Multi-Storey Buildings) Act 1988, which were published as a supplement to last months *Gazette*. Please note that the word "specified" on the first line of requisition 6 should read "multi-storey".

Ms. Catherine Treacy, Barrister, has been appointed Registrar of Titles and Deeds.

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IRISH CENTRE FOR EUROPEAN LAW — ENVIRONMENTAL PROTECTION AND THE IMPACT OF EUROPEAN COMMUNITY LAW — APRIL 1990

(Left to right): Geraldine Clarke, Chairman of Law Society's Public Relations Committee; Mary Harney, T.D., Minister of State at the Department of the Environment; The Hon. Mr. Justice Niall McCarthy and Rolf Wagenbaur.

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Solicitors costs

J. J. Bourke, Inspector of Taxes -v- W. G. Bradley & Son. Counsel's Note of the Judgment of Blayney J., delivered on 26 January, 1990.

Our correspondent from W. G. Bradley & Sons, Solicitors, who has brought the following case to the *Gazette*'s attention notes that he understands that this case is of primary importance to solicitors for the following reasons:

(a) It acknowledges that a solicitor acting in his own cause can recover his/her costs from the losing party.

(b) It establishes that an agreement by a solicitor's client to pay the solicitor's costs does not prejudice recovery of those costs from the losing party.

(c) This appears to be the first case to consider a situation where the costs of a successful party are paid in the first instance by a non-party to the proceedings.

This is an interesting and unusual case. I have to start with some basic facts. Firstly, there is the fact that in the case stated and on the appeal to the High Court Lardner J. granted an order for costs in favour of Bradleys, the respondents on that appeal. Bradleys were respondents and also acted as the solicitors for the respondents but it is accepted by counsel on both sides that the fact that Messrs Bradleys were acting as solicitors does not alter the position in any way. It follows that the position in law would have been exactly the same if Bradleys had retained a different firm of solicitors to act for them.

Secondly, it seems to me that, *prima facie,* Bradleys were liable to the solicitors retained by them for the costs of the proceedings. The *prima facie* position is that Bradleys, by virtue of the order for costs in their favour, would be entitled to recover their costs from the appellant.

What are the normal requirements which have to be satisfied in order that a party recover their costs? They are set out by Walsh J. in *Attorney General (McGarry) -v- Sligo County Council,* Supreme Court, unreported, 5th May 1989,* at page 2 of the Transcript of his judgment as follows:

"A. That the Court has made an Order for costs in favour of the party;

B. That the matters claimed had been properly incurred; and

C. That the party in question is under legal liability to pay them."

The requirement at A is fulfilled in this case. As to B, that is a matter for the Taxing Master to decide whether the items in the Bill are reasonable if I should come to the conclusion that the Respondents are entitled to their costs from the Revenue.

This case falls to be decided in relation to the third issue, that is Item C. One starts with the *prima facie* position that a party represented by a solicitor in litigation is responsible for the costs of that solicitor even if he has been retained by a third party to act on the client's behalf. The fact that he acts means that the client becomes liable. As has been set out in a number of the cases cited to me by Mr. McDonald, the party to the litigation, even though his solicitor is retained by someone else, is still the party liable because he will be personally liable for the costs of the other side should he lose; while, if he is successful, the costs of the solicitor acting for him are *prima facie* recoverable from the other side. (See for example *Lewis -v- Averay (No. 2)* [1972] 2 All E.R.229.) There the Automobile Association instructed solicitors to act on behalf of a party who wished to appeal a case which had gone against him. The appeal was successful and the appellant was given an order for his costs. It was held that costs were incurred by the appellant even though the solicitors were instructed by the Automobile Association.

However, Mr Quinn says that in the present case the situation on the facts is that Messrs Bradley & Sons, in their capacity as a party to the litigation, did not incur any liability to their solicitors. I have to look at the position as if Messrs Bradleys had instructed a different firm of solicitors to act for them. If they had done that then quite clearly *prima facie* they would have incurred liability to their solicitor for the costs of the proceedings. But Mr Quinn submits that on the particular facts Bradleys never had any liability to their solicitors. Mr Quinn submits that Messrs Bradleys at no time had any liability to their solicitors. The main reason advanced for this is that the Taxing Master was entitled to infer from the fact that Lloyd's agreed to pay Messrs Bradleys costs, and agreed to pay them on a solicitor and client basis, that Bradleys *prima facie* liability was excluded.

The principle is not in dispute; Mr Quinn accepted that this is so only if there is an agreement that under no circumstances whatever is the client to be responsible to the solicitors for their costs. The case Mr Quinn has to make is that I must infer that under no circumstances were Bradleys in their capacity as clients to be responsible to their solicitors for costs. Two grounds are advanced for that case:

1. Lloyds agreed to pay the costs on a solicitor and client basis, and
2. The real clients were not Bradleys but were in fact Lloyds.

In regard to the second matter, the party to the litigation was Bradley & Sons and it may be that in addition to them being instructed by themselves they were also being instructed by Lloyds. But that would not entitle me to infer that Bradleys (as clients) were not to be under any liability to Bradleys (as solicitors) for the costs incurred. *Prima facie* they were liable.

The real question is whether I should infer from the fact Lloyds agreed to pay Bradleys costs on a solicitor and client basis that Bradleys were to have no libaility in regard to costs. The situation is unusual in that Bradleys had two roles but I have to consider it on the basis of a position as if they had retained another firm of solicitors to act for them. Assuming that Lloyds had agreed to pay these costs on a solicitor and client basis, it seems to me that there would be nothing in such an agreement which would exclude the primary liability of Messrs Bradleys to pay the costs of the solicitor acting for them. That is shown by *Lewis -v- Averay (No. 2).*

It seems to me that the fact that Lloyds agreed to pay the costs is something which is not particularly unusual – it occurs regularly in cases where a party to litigation is entitled to be indemnified in relation to costs by an insurance company – it does not prevent the person entitled to the indemnity from recovering costs from the other side.

Also, there is another matter of practical importance in this. When this case was stated and appealed and even before that when the assessment to Value Added Tax by the Revenue Commissioners was being disputed, it was clearly of very considerable interest to Lloyds and to Bradleys to get a favourable finding in the matter and obviously it seems to me that Bradleys would not have been inclined to do anything in connection with that litigation which would prejudice Lloyds. In those circumstances, it is very difficult for me to imply an agreement of such a nature which would prevent Bradleys from recovering their costs from the other side. It is very difficult to imagine that any capable and competent solicitor would enter into an agreement which would quite clearly be so prejudicial to his client.

The Revenue are asking me to do that. I do not think that any sensible and competent solicitor would enter into an agreement of that kind. But that is merely a subsidiary reason. My main reason is that the agreement by Lloyds to pay the costs is not sufficient to exclude the *prima facie* liability, which every client has, to pay the solicitor who acted for him in the litigation, and it is for that reason principally I must find that in my opinion the Taxing Master was incorrect in coming to the conclusion he did and I consider that the matter should go back to him to have the original notice of objections by Bradleys adjudicated upon.

Eamon Quinn BL for the Revenue; Denis McDonald BL for W. G. Bradley & Sons.

DENIS McDONALD

• Now reported at [1989] ILRM 795. – Ed.

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Solicitors Golfing Society Spring Meeting – Captains Prize

The Spring Meeting of the Society was held at Portmarnock Golf Club, Dublin, on Friday the 18th of May 1990.

Unfortunately, because of tight restrictions on numbers, it was not possible to accommodate all who wished to play; nonetheless, there was a full turnout and seventy members of the Society competed for the Captains Prize.

The results were as follows:—

Captains Prize: Noel Tanham
Winner – Kevin Byrne (nine) 38 points
Runnerup – Patrick Reidy (eight) 36 points
Third Prize – Cyril Osborne (fourteen) 36 points

St. Patricks Plate: (12 & under)
Winner – Owen O'Brien (eight) 35 points
Runnerup – Tom Shaw (five) 34 points

Handicaps 13 and Over:
Winner – Frank Johnson (13) 35 points
Runnerup – Noel Smyth (15) 34 points

First Nine:
James Walsh 19 points

Second Nine:
Paul Connellan 20 points

The Presidents (Ernest Margetson) Prize will take place on the 27th of July 1990 at Mullingar Golf Club, County Westmeath.

RICHARD BENNETT,
HON. SECRETARY

Section 12, Land Act 1965 & Section 45, Land Act 1965

NOTICE

Please note all applications under Section 12 of The Land Act 1965 and Section 45 of The Land Act 1965 should be addressed as follows:—

The Secretary,
Department of Agriculture and Food,
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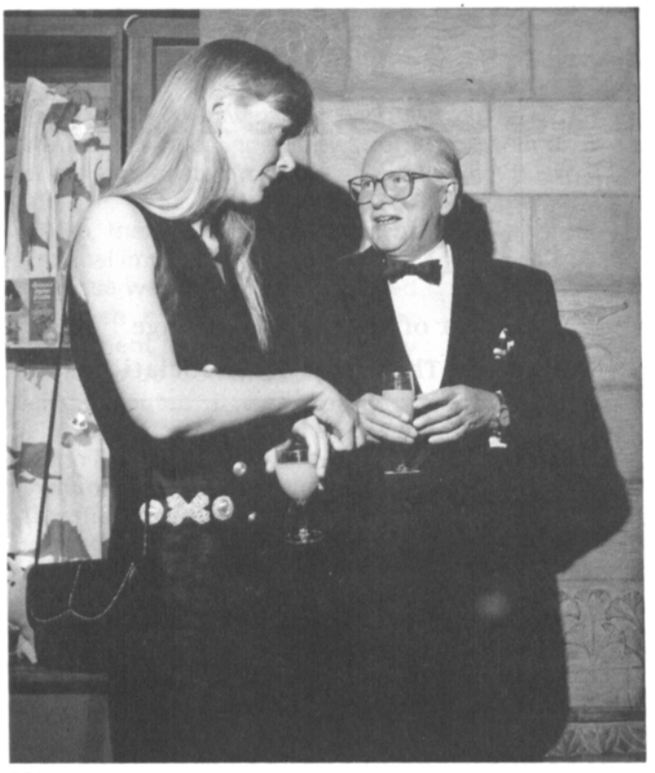
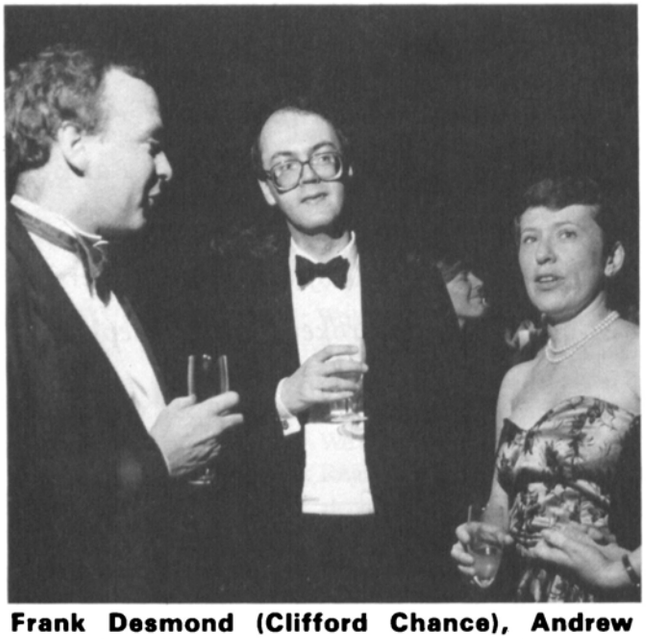
IRISH SOLICITORS IN LONDON BAR ASSOCIATION SECOND CHARITY BALL

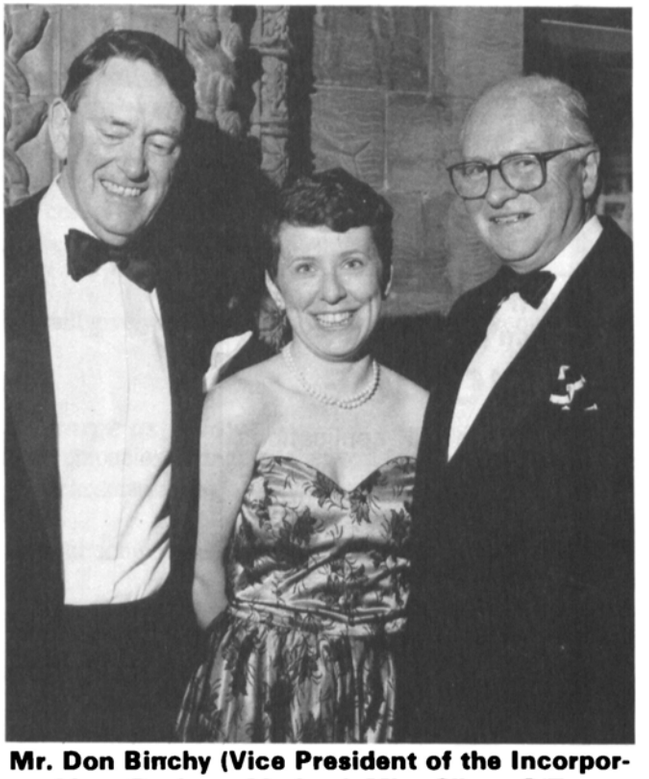


Miss Hilary Lord (Linklaters & Paines), Mr. Robert Johnston.

(Left to right): Mr. Don Binchy, Mrs. Don Binchy, Mr. Robert Johnston, Mrs. Robert Johnston, Mrs. Max Abrahamson, Mr. Max Abrahamson and Mr. John Randall (English Law Society). (Front): Miss Cliona O'Tuama.



Frank Desmond (Clifford Chance), Andrew Carmichael (Linklaters & Paines), Cliona O'Tuama.



Mr. Don Binchy (Vice President of the Incorporated Law Society of Ireland, Miss Cliona O'Tuama (President, Irish Solicitors in London Bar Association), Mr. Robert Johnston (President CFE).

The Irish Solicitors in London Bar Association's Second Charity Ball

The Irish Solicitors in London Bar Association hosted its second Charity Ball at the Natural History Museum in South Kensington, London on Saturday 12 May 1990.

We were honoured that Don Binchy, the Senior Vice President of the Incorporated Law Society of Ireland, attended the Ball with his wife Joan. We were also delighted that John Randall, the Director of the Professional Standards and Development Directorate of The Law Society (of England and Wales), who has been most supportive and helpful to our Association, was able to attend also. Robert Johnston, a retired partner of McCann FitzGerald now living in London, who is the outgoing President of the Confederation Fiscale Europeenne and a member of our Association, also attended the Ball with his wife Meeda.

Max Abrahamson, who, as the leading construction lawyer in the British Isles, is undoubtedly the Irish solicitor best known in English legal circles, delivered the principal speech of the evening, the after-dinner toast to the Association. Max, who is also a member of our Association, made a most amusing speech, which presented me with some difficulty in having to follow him when, on behalf of the Association, I proposed a toast to our guests!

In 1989 the Organising Committee embarked on the organisation of a Charity Ball with some trepidation. Fortunately our fears were ill-founded and owing to the tremendous support which we received from our members and from several Irish firms of solicitors and other Irish companies, we raised £10,500 sterling for the benefit of a very worthy cause, the then newly-established UK Branch of the Irish Youth Foundation. This was particularly encouraging and convinced us that the Ball was an event which should become an annual one. Last year's Ball had the welcome secondary result of enhancing the image and reputation of Irish solicitors in London.

The profit from the 1989 Ball was passed by the Irish Youth Foundation to the Irish Welfare Bureau in Hammersmith, which is run by Father Jim Kiely and which helps deprived young Irish people by providing shelter and counselling. It was decided that the profit from the 1990 Ball would also be given to the UK Branch of the Irish Youth Foundation and passed by them, in consultation with our Association, to a suitable charity helping deprived young Irish people in London.

By
Cliona M O'Tuama,
B.C.L. (N.U.I.), A.I.T.I.
Solicitor
(President of the Irish Solicitors in London Bar Association)

I am very honoured to have been made a Trustee of the Irish Youth Foundation (UK) last summer and to have been able to participate in a positive way in the work done by this worthy charity in overseeing the distribution of funds raised to assist worthwhile projects for the benefit of young Irish people in London and elsewhere in Britain, I am so pleased that the Irish Solicitors in London Bar Association has been able to contribute to such a worthy cause.

We were delighted to welcome to our Ball Cathal Ryan, the Chairman of the UK Branch of the Irish Youth Foundation.

As with last year, we were overwhelmed by the support which we received from Irish firms of solicitors and other Irish companies. In particular, we were delighted when AIB Bank and Aer Lingus, each of whom has a very significant presence in Britain, agreed to be joint sponsors of our 1990 Ball.

As with last year, we received tremendous support from William Earley, one of the London-resident partners of McCann FitzGerald, and that firm donated £1,000 towards our cause, as well as taking a corporate table at the Ball. William will be returning to Dublin later in the summer and will be sadly missed in London legal circles and particularly by our Association.

Other generous donations were received from Eugene F. Collins, William Fry and Matheson Ormsby Prentice.

Max Abrahamson took two corporate tables at the Ball on behalf of his Dublin office and the international partnership of Baker & McKenzie, in which he is a partner. As with last year, Murray Sweeney of Limerick and Dublin was one of the first Irish firms to offer to take a corporate table and also presented two magnificent pieces of crystal as raffle prizes. Joe Sweeney hosted their table and his guests included partners from the London firm Nabarro Nathanson, with whom Murray Sweeney now has an informal link. A & L Goodbody, whose London office has been operating for almost two years, also took a corporate table, which was hosted by one of their London-resident partners, Paul Carroll.

Other lawyers over from Ireland included Declan Moylan, a partner in Dublin firm Mason Hayes & Curran and barrister Richard Nesbitt.

Of course our joint sponsors AIB Bank and Aer Lingus also took corporate tables. Other "Irish" corporate tables were taken by Anglo-Irish Bank Corp and the British-based Irish construction companies M F Clancy & Sons Limited and J J McGinley Limited. M F Kent Limited, the Irish engineers and contractors who operate all over the world, also hosted a corporate table.

The major US bank Manufacturers Hanover Limited was another significant donor to our cause and had a corporate table too.

We are delighted that our Ball has become an annual event on the social calendar not only of Irish

(Contd. on p178)

PEOPLE AND PLACES

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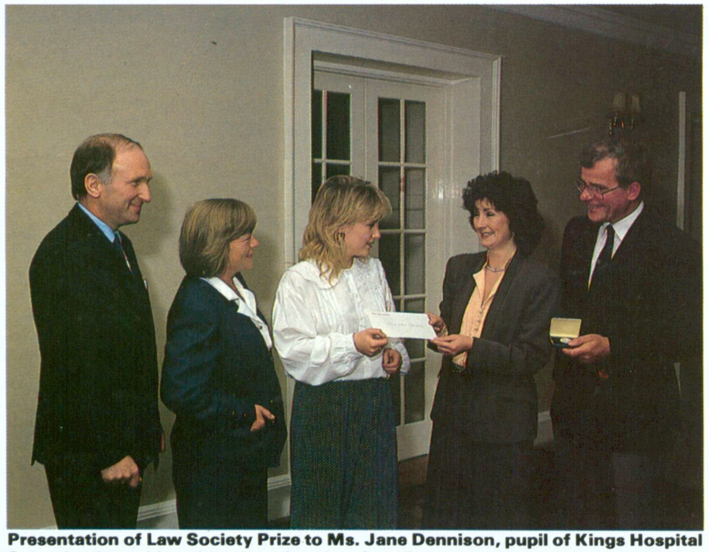

Presentation of Law Society Prize to Ms. Jane Dennison, pupil of Kings Hospital School, who achieved the best Leaving Certificate results and intends to study law. The presentation is made by Geraldine Clarke, Solicitor, Chairman of the Public Relations Committee. The photograph also includes Ms. Dennison's parents and Mr. Harry Myers, Headmaster of Kings Hospital School.

THE GOLDEN PAGES HAS LAUNCHED THE 01 DUBLIN 1990-1991 EDITION OF ITS DIRECTORY

THE FACT FILE

- The Circulation of the (01) Directory is 430,000 Businesses & Homes, thus reaching Over 1 Million People in the Dublin Area
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The Council of the Incorporated Law Society of Ireland has appointed Mr. P. J. Connolly, F.C.A., to the position of Registrar of Solicitors. Mr. Connolly has been with the Society since 1975 and in addition to his new appointment, he will also retain his current position as Director of Finance.

WILLS WEEK — 7–12 MAY, 1990

The Dublin Solicitors Bar Association, together with the Prudential Insurance Company, and the National Association of Irish Widows recently held a Wills Week. This photograph was taken at Dun Laoghaire Community Centre, and includes (back row): Helen Sheehy, representative from the P.R. Committee of the DSBA, Justin McKenna, Law Society, Caroline Barry, Prudential Insurance Co., (front row): Councillor William Harvey, who chaired the meeting, Maire Dillon, National Association of Irish Widows and Pearse Mehigan, Solicitor.

Members of the Law Society's Premises Committee at the opening of Solicitors Reading Room, Four Courts. (Left to right): Ward McEllin, Bill Jolley, Ernest J. Margetson, President of the Law Society, Stephen Maher, Adrian Bourke, Chairman of the Premises Committee, Carmel Killeen and Chris Mahon.

Launch of "New Lease of Life: The Law Society's Building at Blackhall Place" by Sean O'Reilly and Nicholas Robinson. The book is jointly published by the Law Society and the Irish Architectural Archive. (Left to right): Sean O'Reilly, Nicholas Robinson, Solicitor, Ernest J. Margetson, President of the Law Society, Mrs. Moya Quinlan and Peter Prentice.

GOLDEN PAGES®

Younger Members News

SOCCER BLITZ 1990

Freshfields are Freshest

The Younger Members Committee held its largest and most successful soccer blitz to date at the Law Society on the 26 May, last.

Approximately 450 attended the event of which 280 played soccer. Fifty people played in the tennis tournament which was organised by Anne Kelleher of Gerrard Scallan & O'Brien. Creche facilities were provided by Gateway Montessori School and afternoon music by the International Blues Band. As always, bar facilities were reliably provided by Bill and his team.

World Cup fever prevailed as Croskerrys played the English team, Freshfields. In the final, the Freshfields team (complemented by Irish female recruits) won the match and have promised to return next year to defend the Cup!

Grateful thanks once again to the Educational Building Society for generous sponsorship, and to the following YMC members, Orla Coyne (and her back-up crew), John Campbell, John Larkin, Miriam Reynolds and Sandra Fisher, Media Officer. □

Irish Solicitors in London Bar Association Second Charity Ball

(Contd. from p175)

solicitors but of English solicitors too. Corporate tables at the Ball were taken by leading London firms Clifford Chance and Barlow Lyde & Gilbert. There were partners and other lawyers present from all of the other major firms of lawyers in London, including a large presence from my own firm Linklaters & Paines.

There were also lawyers present from firms in other parts of Europe and in particular the recently-merged leading Dutch-Belgian partnership of Loeff Claeys Verbeke had a corporate table. It is good to know that in the run-up to 1992 our Ball is providing a social forum for lawyers from different countries in Europe to meet and exchange ideas in an informal manner!

Keith Oliver of London firm Peters & Peters, a prominent member of AIJA (''Association Internationale des Jeunes Avocats'') in the UK, also contributed to the international flavour of the evening by arranging a large party of London-based AIJA members. They included Tony Seddon, the former UK Vice President of AIJA, who is Chairman of the Committee which is organising the 1991 AIJA Congress to be help in London.

The evening began with a champagne reception in the Bird Hall at the Natural History Museum. The Natural History Museum is an impressive vast Cathedral-like neo-Romanesque building erected in the 1870s. The giant Central Hall has a great vaulted iron roof and a monumental stair case leads from the Hall to the upper galleries. Towering over the Hall is a huge skeleton of a dinosaur – although those who looked carefully would have seen a plaque near its feet proclaiming that it is a mere plaster-cast copy of the original dinosaur on display in Philadelphia. It would be too much to expect that revellers would be allowed to frolic around a several-million years old skeleton!

Dinner took place in the Central Hall immediately after the reception and as diners flocked in to the Hall the great dinosaur appeared to be eerily emerging from a mist, cleverly created by our lighting contractor, who had put dry ice at its feet. Our caterers served a magnificent dinner, which was followed by the speeches. Dancing then took place to a five-piece band ''Let's Dance'' led by the energetic and effervescent Gus Kahan, who tempted even the most staid on to the floor!

A raffle was held during the evening – it was ironic and particularly fitting that the first prize in our raffle, a return trip for two to Ireland, kindly donated by Aer Lingus, was won by John Randall of The Law Society. The principal aim of our Association is to press for the re-qualification of Irish solicitors in England and Wales and the progress which has been made on this front to date would not have been possible without the tremendous help which John Randall has given to me over the last two years. We were all delighted when fate rewarded him in this way. John is a great fan of Ireland and we are delighted that he will have an opportunity to visit Ireland for a reason other than to attend a meeting in Blackhall Place and have no doubt that he and Marie will very much enjoy their stay.

As well as the Aer Lingus prize and the magnificent pieces of crystal donated by Murray Sweeney, other raffle prizes were donated by the Londonderry Hotel in Park Lane, London and by Board Failte and Ryanair.

We are indebted to Ballygowan Spring Mineral Water Company, who supplied Ballygowan mineral water for the evening free of charge.

As with last year, a very special word of thanks is due to Ray Cotter of Rayprint in Dublin, who printed our invitations and programmes free of charge. Once again it amazed me how Ray and his staff tolerated, not only the fact that I sent everything to them at the last minute, but that I then proceeded to telephone them on several occasions to change the programme around!

I would especially like to thank the other members of the Organising Committee, Anne Counihan, who is Vice-President of our Association, Philip Lee and Victor Timon. Special thanks are also due to my own firm, Linklaters & Paines, for the support and encouragement which they gave to me in connection with the organisation of the Ball. I am particularly grateful to all those who attended from Linklaters and especially to Hilary Lord and Andrew Carmichael, partners in the firm, who were in my party and sat with me and the guests. Andrew in particular deserves special thanks for his patience throughout!

Everybody who was present agreed that the Ball was a tremendous success; it is now even more firmly entrenched in the London legal social calendar. Perhaps many Gazette readers who did not attend this year will consider doing so next year!

As well as providing everyone present with an evening to remember and further promoting and enhancing the position of Irish solicitors in London, the Ball has a welcome result on the financial front too. Although I am still waiting for some bills (and some funds!), from my preliminary calculations I have estimated that this year's Ball has raised just under £15,000 (sterling!) for the benefit of the Irish Youth Foundation. This certainly makes all the hard work worthwhile. □

Council of the Bars and Law Societies of the E.C. (CCBE)

First European Lawyers' Conference

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- Working groups on various aspects of E.C. law.

Brussels, 14th-15th February 1991

Safety, Health & Welfare at Work Act 1989

Under Section 12 of the Act, every employer is required, as soon as may be after the coming into operation of the Section, to prepare or cause to be prepared a statement in writing to be known as the "Safety Statement".

Section 12 is extremely far reaching. A safety statement must be written to suit the circumstances of the particular organisation in which it is to be implemented.

by
Chris Mahon
Director, Professional Services, Law Society

Why the New Act

The common law is insufficient for the provision of health and safety at work in that it does not prevent accidents. It only comes into effect after accidents.

Statute law imposes obligations and absolute duties on both the employer and employee. Existing legislation consists of the Factories and Workshops Act 1901, the Factories Act 1955, Shops & Office Premises Acts 1958 and Safety in Industry Act 1980 to name but a few.

These however could only cover about 20% of the working population. All workers are covered in the Safety, Health and Welfare Act 1989.

A few comments are necessary:

(a) Under the 1989 Act the Safety Statement requires much more information than the 1980 Act, and covers all employees even the self employed;

(b) The purpose of the statement is to help Senior Partners/Managers to redefine objectives in providing safety to all of a firm's employees;

(c) Firms are required to improve the safety awareness of employees in order to protect themselves and co-workers;

(d) A sound policy is best achieved when Safety arrangements have the full commitment of Senior Management;

(e) A Safety Statement must include the following:—

1. identification of hazards and assessments of risks within the workplace;
2. specification of how the safety, health and welfare of employees are to be secured at work;
3. specification of the co-operation required from employees as regards safety, health and welfare;
4. Inclusion of the names and jobs titles of all persons and tasks assigned to them in the Statement;
5. specification of the resources provided to secure the safety, health and welfare of all employees;
6. details regarding the extent to which the safety policy was fulfilled to be included in the company's report (under the Companies Act);
7. information to employees of the contents of the statement or policy;

(f) If required the company shall employ a "competent person" to assist or write the Safety Statement.

In order to convey the importance of the Safety Statement and all its objectives, it must be understood that the Safety Statement should actually be issued by the Board of Directors/Partners and given full support in a statement. It is desirable that the Chairman or Managing Director or Senior Partner sign the Statement. The Statement should be dated to ensure that it can be updated from time to time.

It is vital for the implementation of any Safety Statement that employees co-operate by taking reasonable care for their own safety and that of their working colleagues in both work practices and the use of protective devices provided.

General Duties of Employers and Employees under the Act

Employers

a. prevention of accidents;
b. provision of safe place of work;
c. provision of safe system of work;
d. provision of training and information to employees;
e. ensuring that all co-workers are suitably competent.

Employees

a. taking care of themselves and work mates;
b. use of protective equipment provided for their use;
c. use of protective systems set out for their use;
d. reporting of any dangerous machines or practices to the employer (via line management);

It is the duty of every employee to co-operate with the employer preferably through a Safety Committee.

Under the Act it is necessary to appoint a Safety Officer and a Safety Committee.

Suggested Safety Statement

Policy Statement

It is the policy of Bloggs & Bloggs, Solicitors to:—

a. safeguard insofar as it is reasonably practical, the health and safety and welfare of all its employees while at work and others on the premises;

b. to comply with statutory legislation and codes of practice;

The responsibility for implementing this policy rests with the Senior Partner, Mr. A. Bloggs.

Objective of Safety Statement

The Firm aims to achieve a situation where hygiene, health and

safety measures are incorporated in the normal operations of the Firm in such a way that they become second nature:
a. To define the organisation and structure of health and safety within the firm;
b. To outline measures to prevent accidents, to ensure the health and safety of employees, visitors, contractors and others on the premises;
c. To ensure the smooth and efficient operation of the practice.

These objectives will be achieved by an active policy of education/promotion of industrial health and safety as an integral part of each employee's duties.

Implementation of Health & Safety Policy
To implement the policy the following measures will be adopted:—
a. clearly defined accountability areas, under the control of supervisors, will be assigned throughout the premises;
b. an effective system of incident recording (no matter how minor) and corrective action will be operated;
c. an effective self inspection (of own accountability areas) checklist system will be operated by supervisors;
d. the Firm's safety rules to which everyone must adhere will be developed and reviewed on an ongoing basis;
e. an effective safety training programme will be developed;
f. a fire safety programme and emergency evacuation panel will be developed.
g. The general policy statement will be reviewed from time to time.

Responsibility for Safety – General
Safety is the responsibility of management. Accident prevention and safety are no less than any other managerial function. For the safety policy to be effective everyone must be involved. Each employee (including Solicitors, Clerks, Typists, Security etc) has a duty under the Health & Welfare at Work Act 1989 to exercise personal responsibility or in other words to take reasonable care for his/her own health and safety and for the health and safety of others.
a. employees must not knowingly endanger themselves or others who may be affected by their acts or omissions at work;
b. employees must co-operate with management in relation to safety and must comply with the firm's safety rules;
c. employees must never interfere with fittings or machinery or other safety devices;
d. employees must wear/use protective clothing/equipment when necessary or provided.

Responsibility for Safety – Particular
a. the Senior Partner is ultimately responsible for the execution of the above policy. He will delegate responsibility for each department to the Solicitor in charge who may further delegate responsibility to Supervisors;
b. each Solicitor will report to the Senior Partner in relation to safety and health measures;

The role of the solicitor in charge is crucial in any safety programme.

Implementation of Duties and Responsibilities of Solicitors in Charge:
a. to communicate the Firm's safety and health measures to the workforce;
b. to meet subordinates and supervisors each month to confirm that routine unsafe practices and conditions have been eliminated. To discuss the more difficult problems and agree solutions;
c. to ensure that adequate safety training where necessary is provided by the firm for employees;
d. to ensure that new employees are properly briefed in safety and health procedures;
e. to carry out occasional hazard spot checks using self inspection checklists.
f. to enforce the safety and health rules through routine day to day supervision of personnel and processes to ensure safe practices and procedures;
g. the operation of the incident recording and corrective action technique, recording and reacting to all incidents no matter how minor.

Safety Committee
The Safety & Health Committee will consist of a Senior Partner, Partners and representatives of each Department.

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The Committee may co-opt whichever member of staff is considered necessary to the furthering of a sound safety and health policy.

The primary duties of the Safety & Health Committee are to:—
a. acquire reference material and be in a position to provide technical advice on difficult safety problems;
b. to acquire copies of relevant safety at work statutes so as to be in a position to provide technical advice and safety legislation;
c. to monitor the operation of safety and health procedures within the organisation;
d. to monitor safety performance within each Department and submit periodical reports to the Senior Partner.

General

Health & Safety of Personnel
The management will maintain a suitable first aid box for use by members of the staff. Management will provide a clean hygienic work environment for staff. Members of staff are to ensure that management are informed of any situation which could develop into a health or safety hazard.

Employees will ensure that they conduct themselves in such a way that they will not create a health or safety hazard which could be a danger to their co-workers.

Safe Working Practices
Employees must not report for work under the influence of alcohol or other addictive substance. Any member of staff reporting in such a condition will be suspended from duty for their own safety and for the safety of their co-workers.

All machines and lights should be switched off at the close of work each evening. They should also be switched off when any cleaning or maintenance is in progress.

□

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 devise and bequeath the sum of Pounds to the Irish Cancer Society Limited to be applied by it for any of the charitable objects of the Society, as it, the Society, 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.

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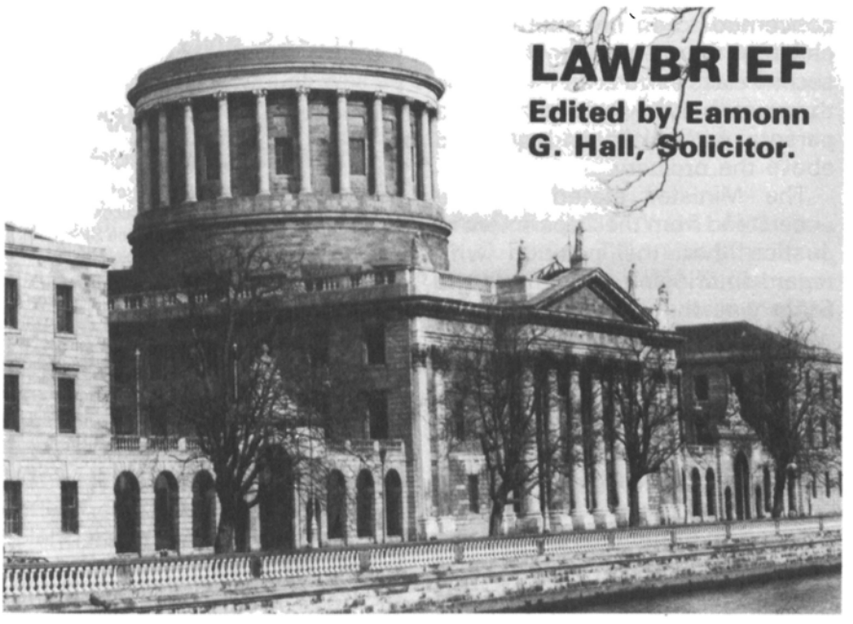

LAWBRIEF

Edited by Eamonn G. Hall, Solicitor.

SMALL CLAIMS COURTS

The Minister for Industry and Commerce, Desmond O'Malley disclosed in an unscripted session at the launching of the book *Consumer Power* by Colin Bird of the Office of Consumer Affairs and Fair Trade and Joe Hogarty of the Curriculum Development Unit of Trinity College on May 24, 1990 that a Small Claims Courts system would be established in Ireland within two years.

The Minister stated that the new courts would not be chaired by District Justices but by lay persons and would deal with disputes involving relatively small amounts of money. The emphasis would be on a speedy decision involving the minimum expense for the parties in the dispute. Mr. O'Malley stated that he would work with the Minister for Justice, Ray Burke, to establish the system and would be contacting the Finance Minister, Albert Reynolds, to seek the necessary funding.

Although legislation concerning changes in the courts systems was notoriously slow, Mr. O'Malley said he intended to bring about the setting up of the small claims courts "within one or two years".

The Minister conceded that the new court system would "cost money" but this would be recouped by more efficient functioning of the existing courts system.

Mr. O'Malley said two other measures were planned to help consumers. He intends to bring into law the provisions of the EC Directive on defective goods and a Directive currently being devised by the EC to give a better deal to consumers in the area of loans and credit will be ready, shortly, to be introduced in Ireland.

LAUNCH OF GUIDELINES ON SAFETY STATEMENTS AND GUIDELINES ON SAFETY CONSULTATION AND SAFETY REPRESENTATIVES

Guidelines on the safety statements and on the safety consultation and representation system required under the *Safety Health and Welfare at Work Act, 1989* were published on May 23, 1990 by the Health and Safety Authority ("H.S.A."). The Guidelines were drawn up by the first Advisory Committee set up by the H.S.A. and drawn from trade unions, industry, construction, safety managers, insurance interests and the H.S.A. staff. "They are based on the experience of those directly involved in the workplace" said H.S.A. Chairman, Mr. Paddy Donnelly, at the launch. "They have been drafted in simple layperson's terms and provide relatively easy access to the answers to some of the common queries or concerns which may arise".

The fundamental aim of the *Safety, Health and Welfare at Work Act, 1989* is the prevention of accidents and ill health at the place of work. The Act, which applies to all employers, employees and the self-employed, sets out general "duties of care" for each of these parties. Employers are required to identify the hazards and assess the risks in the place of work, and to draw up a written Safety Statement setting out the arrangements in place to safeguard safety and health, along with the co-operation required from employees to achieve this. The 1989 Act came into force on November 1, 1989.

Consultation on safety and health matters at the workplace is a key factor of the *Safety, Health and Welfare at Work Act, 1989*. The Guidelines on Safety Consultation and Safety Representatives are intended to assist employers and employees in utilising the consultation provisions in section 13 of the 1989 Act as fully as possible.

There is a twofold approach involved in the consultation process. Firstly, employers are required to consult their employees in establishing arrangements for securing co-operation in the workplace on safety, health and welfare. Employees have a corresponding right to consult their employers and to make representations to them on issues of workplace safety and health. Secondly, employees may also appoint a Safety Representative at their workplace who may make representations on their behalf and carry out other functions.

The Guidelines provide advice on how general consultations on Safety and health in the workplace might be conducted. The 1989 Act sets out no specific consultation mechanism but allows for flexibility so that the particular characteristics of the employment or workplace can be taken into account.

The Guidelines outline the overall function of Safety Representatives, their role in relation to investigating accidents and dangerous occurrences, carrying out inspections and consulting with Health and Safety Inspectors. Key issues such as information for and training of Safety Representatives are also covered.

Copies of the Guidelines on (a) Safety Statements and (b) Safety Consultation and Safety Representatives are available free of charge from the Health and Safety Authority, Davitt House, Mespil Road, Dublin 4. (Telephone

(01) 765861) or from its Regional Offices in Athlone, Cork, Drogheda, Galway, Limerick, Sligo and Waterford.

IRISH LAW AND ADOPTION OF ROMANIAN CHILDREN

Mrs. Owen, T.D., asked the Minister for Health in the Dáil on May 22, 1990 (398 *Dail Debates* cols. 2367-2370) the position regarding the adoption of Romanian babies by Irish parents, as there was a grave risk that great hardship and heartbreak could occur if the proper rules are not complied with; and if the Minister would make a statement on the matter.

The Minister for Health, Dr. O'Hanlon, stated that there was nothing in Irish law to prevent Irish people from going abroad to adopt. The first essential for persons wishing to adopt from abroad was to satisfy the requirements of the foreign country. While adoption law varies from country to country, most countries require a home study report i.e. as assessment of the prospective adopters suitability undertaken by the appropriate agency in their home country. The Minister stated that he understood that the Romanian authorities required such reports.

While the registered adoption societies and health boards undertake assessments of persons wishing to adopt in Ireland, they have no specific role in adoptions outside the State. The Minister stated that it was a matter for each adoption society to decide whether to undertake home study reports for foreign adoptions as there was no obligation on them to do so. He understood that some of the societies had decided not to become involved in this work. The Minister stated in relation to the health boards that there was a question mark over their authority to deal with foreign adoptions but, in any event, their social work staffs had a heavy workload already and they could not take on additional work in this area.

Where, however, an adoption society decides to undertake home study reports for foreign adoptions, the adoption board expected that standards of assessment would be the same as if the persons were being considered for the adoption of an Irish child. The board was concerned to ensure that foreign children were not regarded as second class citizens and had made the point that they require adoptive parents with skills and qualities above the ordinary.

The Minister stated that he understood from the Department of Justice that the position with regard to bringing a child into the State was that a child under the age of 16 years adopted abroad by Irish citizens did not require a visa to enter the State and would in the ordinary way be admitted provided he/she was travelling in the company of his/her adoptive parents and the parents were in possession of the foreign adoptive papers and a passport in respect of the child for presentation to the immigration officer at the port of entry.

On arrival home, there was no requirement under Irish law that the child be adopted here. However, some foreign countries attached a condition to that effect to their adoption decree. In other cases, the adopters themselves seek to have the child adopted under domestic law so as to avoid any future difficulties about their parental rights in relation to the child. The Minister stated that this was so because there was no statutory procedure yet in place here for the recognition of adoption orders made abroad. The Minister stated that he was advised that an adoption order made abroad was entitled to recognition here only if the adopters were domiciled in the foreign country at the time the order was made. This would not be the situation in relation to Irish people going abroad to Romania or elsewhere for the sole purpose of adoption.

The Minister stated that where an application was made to adopt under Irish legislation, the adoption board must process the application in accordance with the usual requirements of the *Adoption Acts*. The same consent procedures applied irrespective of the nationality of the child. The natural mother or guardian of the child must give consent to the making of an adoption order under Irish law in the prescribed form and must also complete a questionnaire with a person authorised by the adoption board.

The question of the child's eligibility for adoption under Irish law would also arise. Generally, a child may only be adopted here if the child is an orphan or was born outside marriage.

The Minister stated that the adoption of children outside these categories was governed by the *Adoption Act 1988*. The legislation permitted in certain circumstances the adoption of children whose parents were deemed by the courts to have failed in their constitutional duty to care for them. It appeared from reports that some of the children being offered for adoption in Romania were neither orphans nor were they born outside marriage. It was uncertain whether such children could be adopted under the 1988 Act and the question would not be clarified until it came before the courts for decision in a particular case.

The Minister stated that he would urge persons thinking of adoption abroad to carefully consider the life-long implications for themselves and the children involved before entering into any firm arrangements.

MOTOR INSURANCE CLAIMS

The Minister for Industry and Commerce, Mr. Des O'Malley, stated in the Dáil on May 22, 1990 (398 *Dáil Debates* cols. 2248-2253) in reply to a Parliamentary Question that the fundamental cause of high motor insurance prices in Ireland was the high claims rate, which regrettably was on the increase, allied to the high cost of individual claims which was

TURKS AND CAICOS ISLANDS AND THE ISLE OF MAN
Samuel McCleery
Attorney - at - Law and Solicitor of PO Box 127 in Grand Turk,Turks and Caicos Islands, British West Indies and at 1 Castle Street, Castletown, Isle of Man will be pleased to accept instructions generally from Irish Solicitors in the formation and administration of Exempt Turks and Caicos Island Companies and Non - Resident Isle of Man Companies as well as Trust Administration
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Fax: 0624 823799

also rising. These factors bore on the level of insurance premia quoted to young drivers as well as on those quoted to more mature motorists. The Minister stated that one could not reasonably expect the price of motor insurance to reduce, or even to stablise, when the claims rate and the cost of claims was increasing. The international comparisons that were available suggest that this country has a very high accident rate and that the claims rate in Ireland is considerably above that in other European countries.

The Minister said that unless and until the claims experience in Ireland mirrored that obtaining in other European countries there would be divergences between motor insurance premia in Ireland and those applying in other European countries.

The Minister said that both he and his colleagues in Government would continue to do what they reasonably could to improve the environment for insurance. The Minister stated that he was, of course, aware that, despite initiatives already taken, for example, the *Courts Act, 1988,* motor insurance premia had continued to rise. The ultimate decisions, however, rest with society itself. The Minister posed the question whether we were prepared to tolerate a high accident rate and abnormally generous compensation for victims of accidents or whether we wanted to see a real reduction in the cost of motor insurance. The Minister proposed to stimulate public debate on the question of which alternative our society wished to adopt and also to suggest for discussion and implementation where possible initiatives which might assist in the attainment of the adopted alternative. Thus, for example, the Minister cited his recent references to the need to give consideration to the establishment of a tribunal for personal injury claims. The Minister's Department was examining the feasibility of such a tribunal in conjunction with other Government Departments and the insurance industry.

The Minister had recently suggested that the insurance industry itself should propose and support a road safety campaign in conjunction with the Government and the Minister stated that he was encouraged at the response he had had from the Irish Insurance Federation in that regard.

LAND REGISTRY DELAYS

Mr. D. Spring, T.D., raised the issue of delays in the Land Registry on the Adjournment Debate in the Dáil on May 22, 1990 (398 *Dáil Debates* cols. 2546-2552). Mr. Spring stated that unfortunately there was still a major crisis in the Land Registry which had been caused solely by Government cutbacks and in particular by the Government's early retirement scheme. The consequences had been the virtual collapse of the services offered by the Land Registry with enormous delays in house and land transactions. In fact, the most recent information he could get was that the backlog of work now stood at 50,000 cases to be processed, the highest figure ever. The figure had risen by 10,000 over the past number of months, an increase of almost a quarter on the previous year.

Mr. Spring stated that the average delay transferring a site was now two years. Occasionally there were mapping difficulties and he stated that this arose in particular in rural Ireland. There was an additional delay of about 20 months because a site transfer should take place within a four month period given normal working practice. There were also 12,000 Land Commission vestings in arrears and it took approximately 11 years to complete any such vesting. The figures spoke for themselves. Mr. Spring said that urgent action was needed to be taken if we are ever to come to grips with these problems.

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Mr. Spring said that the Land Registry had been seeking computerisation for a number of years but to the best of his knowledge only a very rudimentary system had been provided.

One of the most ludicrous problems in the Land Registry according to Mr. Spring was the fact that the Land Registry was more than capable of standing on its own feet. This year Mr. Spring said that the office is expected to contribute £10.3 million to the Exchequer through Land Registry fees and other sources of income. This represented a profit in the region of £1 million to the Exchequer. Mr. Spring also referred to a well established common practice that, in 90 per cent of the times that solicitors contact the Land Registry, they include in their letter to the client a request to make sure that they contact their local TD or public representative. Mr. Spring said that this contributed to the clogging up of work in the Land Registry by virtue of the number of phone calls and the correspondence involved. It was unfortunate that we had put ourselves into this position. Mr. Spring concluded by saying that he hoped that the Dail would not have to come back again in six or seven months time seeking an improvement in the service. He suggested to the Minister that the target for the year's end should be to reduce those dealings to 20,000 or 25,000 which would be a welcome achievement.

The Minister for Justice, Mr. Ray Burke, in reply stated that the economic upturn in recent years and the consequent increase in the number of property transactions in the State had placed considerable pressure on the Land Registry and Registry of Deeds. The Minister said that the total number of applications annually exceeded 250,000 and this had increased steadily since 1985. Dealing applications, which comprise the bulk of the Land Registry work increased by 18.7 per cent in 1989 compared with 1988 and the overall volume of the main categories of work lodged in the Land Registry in 1989 showed an increase of 4 per cent when compared with 1988.

The Minister stated that shortly after taking office he initiated a general review of the Land Registry

and Registry of Deeds. He visited the registry offices on two occasions and had discussions with the management and staff with a view to gaining a first-hand understanding of the office and the problems being experienced there. While the review was not yet completed, the Minister stated that he had taken some steps which he hoped would bring about some definite improvements in the service. Firstly, the Government had agreed to provide money in 1990 for an additional 35 staff, 13 of whom had already been recruited and had taken up duty, and every effort was being made to have the remaining staff recruited as quickly as possible. As a short term measure, because the Minister stated he was very conscious of the backlog of work currently in the Land Registry, some senior staff had been diverted from other work to help deal with cases where the worst delays were occurring. These measures, together with the appointment of additional staff, should make a substantial impact on the arrears according to the Minister.

The Minister stated that he was pleased to inform the House that the Government had acceded to his request for a greater investment in computerisation, a matter which was highlighted by Deputy D. Spring. In 1990 in this area of computerisation alone there would be an increase in expenditure in the order of 32 per cent over 1989. A programme of computerisation of the abstracts in the Registry of Deeds would start this year and when completed this system would provide for immediate access and fast, accurate search facilities. The computerisation programme in the Registry which was already under way would be extended considerably over the coming years according to the Minister. On the matter of computerisation, the Minister was considering a number of alternatives to the computerisation that was being carried out within the Registry.

The Minister stated that he had held discussions with the newly appointed Registrar during which he expressed his concern about the delays being experienced in dealing with the Land Registry and Registry of Deeds. The Minister asked for an assessment of the additional steps that needed to be taken to relieve the arrears situation and to provide an efficient and speedy service to the Registry. The Minister stated that he was expecting that response very shortly from ''the new lady Registrar''. The Minister assured the House, subject to adequate finance being provided for which he would fight very hard as Minister for Justice, that he would do everything he possibly could to improve the unacceptable level of delays in the Land Registry. □

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Correspondence

The Editor,
Law Society Gazette,
Blackhall Place,
Dublin 7.

13th February 1990

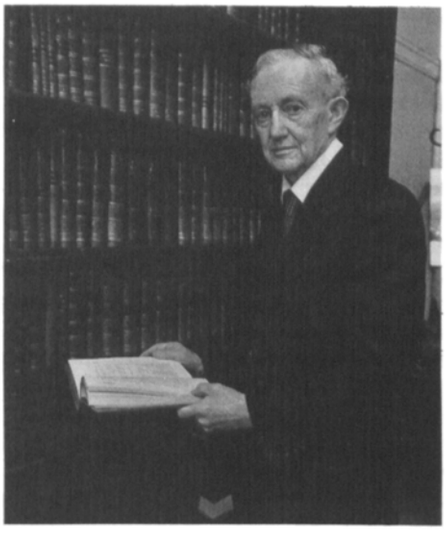
Saga of a Closing

Dear Sir,
I wish to recount the story of a particular closing with Dublin County Council where a house was being sold to my client by way of a new Transfer Order under the Tenant Purchase Scheme, with my client funding the purchase by means of a building society loan. My hope is that the telling of the tale may result in a change for the better.

1. Accompanied by my client I attended at the Council's offices for a 9.30a.m. appointment to complete the transaction. I was in possession of the building society's loan cheque which I held in trust pending completion. The Council's requirements were that they would attend to the stamping and registration of both the Transfer Order and the mortgage of the building society and to furnish the appropriate letter of undertaking to that effect.
2. The Council official requested sight of the building society loan cheque which was made out in my client's favour. I explained that my client would endorse it to the Council but the official felt he should check the suggestion with the Council's Cash Office. He left the room and returned shortly afterwards to say that the Cash Office would not take such an endorsed building society cheque but they would take a building society cheque drawn directly in favour of the Council. I pointed out the legal reality that this amounted to the same thing – to no avail.
3. I then went to the Council's Law Agent's office to see if the legal ramifications of the Bills of Exchange Acts could be conveyed to the Cash Office, but despite the good offices from that quarter it appeared that no one in the Cash Office seemed to have the power to make a decision to accept an endorsed building society cheque.
4. As I was holding the building society cheque in favour of my client in trust pending completion I was not in a position to negotiate it for a bank draft in favour of the Council without prior approval of the building society. Unfortunately, my initial efforts to contact the building society solicitors by telephone from the Council's offices were not successful, as the solicitor concerned was not in.
5. My stunned client was by now very upset. We left the Council's offices together and went directly to the building society solicitors' offices where they took the building

MR. JUSTICE PETER O'MALLEY
New President of the Circuit Court

Mr. Justice Peter O'Malley has been appointed President of the Circuit Court in succession to Mr. Justice Frank Roe, who retired in May. Mr. Justice O'Malley has been a judge of the Circuit Court since 1971 and for many years was on the Midland Circuit before moving to the Dublin Circuit four years ago. He was born in Galway where his father was professor of surgery in UCG. He was called to the Bar in 1944 and took silk in 1963. He is married with six children.



MR. JUSTICE T. F. ROE

Mr. Justice T. F. (Frank) Roe retired as President of the Circuit Court in May, and many tributes were paid to him when he sat for the last time in Dublin on Friday, 18th May 1990. Ernest Margetson, President of the Law Society, and Nial Fennelly, S.C., Chairman of the Bar Council, both referred to Mr. Justice Roe's humanity, compassion and understanding and to the efficient manner in which the business of the Circuit Court had been administered under his Presidency.

Tributes were also paid by representatives of the Dublin Solicitors' Bar Association, the Court Registrars, the Chief State Solicitor's Office, the Gardaí and the Probation and Welfare Service.

In responding, Mr. Justice Roe thanked everyone who worked and co-operated with him over his years as a Judge including barristers, solicitors, registrars, the Gardaí, stenographers, Four Courts' maintenance and supervisory staff, and, particularly, by name, his court crier, Mr. Paddy Nugent.

(Photographs – courtesy Irish Times)

society cheque as endorsed by my client, brought it to their bank and exchanged it for a bank draft in favour of the Council. My client and I now believed all our difficulties were overcome and we made our way back to the Council's offices complete with bank draft in the Council's favour, which was duly inspected by the official concerned. It was now 11.30a.m.

6. The Council official then proceeded to write out a receipt document which he requested me to bring to the nearby Cash Office together with the bank draft and the cheque for the small balance of the purchase monies. I was then to return with the receipt when the Transfer Order could then be signed.
7. My client and I went to the Cash Office and waited patiently in a queue to pay the money, which was received and the document receipted. We then brought back the receipt to the official in the sales office, (this official did not actually 'conduct' the closing), which he inspected and accepted. The official then informed us that he would now get the Transfer Order typed – a procedure which he said would take about 15 minutes, during which we could wait outside in the hall.
8. There being no seats readily available my client and I sat on the stairs, with nothing to do but to ponder the Kafkaesque events of the morning. We were now at the stage of having paid over a substantial sum of money but were still awaiting the typing of the document of title to the property being purchased.
9. The 15 minutes passed and we returned to the door marked 'Sales' to enquire how much longer might be the wait and we were told "another 15 or 20 minutes". I bit my tonguewhen I was told that: "after all there were people before us who were on time for their appointments!" Another half-an-hour later we were called to a different room! It was now 12.30p.m. We were attended to by a pleasant young official who had a file and a typed Transfer Order which my client signed. I handed over the mortgage documents, the family home declaration and a cheque for the stamp duty and registration fees on the mortgage. I then requested a written undertaking by the Council to attend to the stamping and registering of my title and the building society mortgage and to the furnishing of a copy folio. The response was: "no problem", it would be sent to me in the post that evening. However, I insisted on receiving it then, as it would represent the only security for the completion of the legal formalities that either my client or the building society would have. I then drafted the appropriate form of undertaking and offered to type it if a typewriter was made available to me. The pleasant young official thought I was joking; it was then 12.45p.m. The official went off to find a typist and I told my client that she could now go but I would have to wait for the written undertaking. With obvious relief my client departed. I waited and continued to wait. At 1.10 p.m. the official returned with the undertaking typed and in order, which he then signed and offered apologies for the delay, and I took my leave at 1.15p.m. The transaction, which I had naively assumed would take about 10 minutes, being finally concluded in four hours.

Final observation

The Council knew in advance (I had discussed it with them per telephone) that the purchaser's lending institution would be a building society; that the cheque tendered would be a building society cheque drawn in favour of the borrower; that the Transfer Order would be a standard form other than the specific details of purchaser and property; that it would have to be signed by the purchaser; and that a letter of undertaking as to stamping and registration would have to be given. If my experience on this occasion has been unique, so be it. If not, surely a more efficient procedure can be devised without insurmountable difficulty!

Yours sincerely,
MARY HEDERMAN
Solicitor,
30 Marlborough Road,
Donnybrook,
Dublin 4.

26th April 1990

Mr Ernest Margetson,
President,
Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7.

Dear Mr Margetson,

I am writing to inform you of my appointment as Registrar of Deeds and Title with effect from 22nd of April.

Whilst the task before me in running both Registries is quite formidable, I am looking forward to your co-operation and that of your members in achieving what I am setting out to do, that is to provide *the* most efficient registration system possible.

With this in mind, I am planning a number of meetings with various bodies, including your good selves, in the near future.

Perhaps you would confirm with my secretary, Ms Anne Lennon, your willingness to participate in any such meetings.

Yours sincerely,
CATHERINE TREACY
Registrar of Deeds and Title,
Land Registry,
Chancery Street,
Dublin 7.

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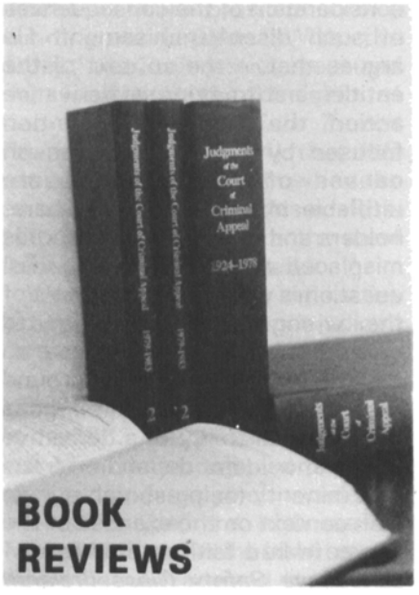

THE IRISH LEGAL SYSTEM

[By R. Byrne & J.P. McCutcheon. Butterworth (Ireland) Limited. 374pp + xxxix. Price: IR£25.00]

This is the second edition of this cases and materials book, which has already proved its value to Irish students of commerce and law.

It covers a wider range of topics than its predecessor.

The first edition concentrated on an overview of the organisation and structure of the Irish legal system, with chapters on precedent, legislation, and constitutional judicial review. This edition deals in a more extensive fashion with the legal profession, court systems and procedures, access, remedies, tribunals and adjudicative bodies, and the impact of EC and international law.

This edition also appears to attempt a greater degree of comparison between emerging trends in Irish law by contrast with developments in English and, to a lesser degree, other jurisdictions. Independent of this project, the two authors have published extensively on a variety of topics of Irish law, and their familiarity with judicial and legislative developments, acquired in other scholarly ventures, contributes to the authority of this book.

The first eleven chapters set the legal scene by describing the outline of Irish law. The last three chapters deal with precedent, interpretation of legislation and the Constitution and Constitutional rights. These each comprise (1) a concentratedly-written introduction to the subject, (2) comprehensive and erudite pointers to further reading (could these be inserted in a more systematic way in the third edition – "further reading" at the end of each section with a ten or twenty word synopsis of what the student should take from the article in question?) and (3) selected extracts from what the authors consider important, up-to-date cases.

Are the cases selected appropriate and useful? Yes they are. Is the commentary helpful and accurate? Again, yes. Do the cases and the commentary combine together, enabling the reader to make informed judgments about the judicial process? In general, yes, but I think that in places there are gaps between the commentary and the cases, gaps so wide that the reader is left on his own to work out the connections between the commentary and the cases.

Consider the treatment of *McGee, Norris* and *Murphy*. Behind the issues in these cases, the authors diagnose on p. 27 a conflict between the utilitarian and natural law principles in Constitutional interpretation. They mention this again later, posing a number of stimulating questions for the discerning student to ask in considering the extracts. Case-law germane to the judicial resolution of the claims of interventionism and personal liberty is quoted extensively.

The effect of this spread between commentary and case-law is peculiar. It stresses the shortcomings of the Irish decisions, their arbitrary and *ad hoc* bases. It does not demonstrate how each case achieves a sophisticated judicial reconciliation of these particular opposing claims. One wonders whether all the judges have posed such intelligent questions to themselves as the authors of this textbook recommend to the reader.

Whether more could have been achieved by re-arranging the commentary and the judgments, or by the inclusion of more extensive comment, or by taking judgments from other jurisdictions which deal in a more sophisticated judicial manner with these problems, or by a combination of all three is a vexed question. Suffice to say, the reader sees shortcomings without being guided to better solutions. The comment that "the Murphy case illustrated that . . . [the principles of natural law] . . . may lurk in a corner waiting to spring" is insufficient elucidation of this particular aspect of judicial Constitutional interpretation.

A slightly different example of the way in which the cases and commentary do not match is evident in the discussion of the contemporary Irish judicial attitude to the role of equity, noted briefly on p. 12. It cannot be said that this authorial perception informs the selection of cases to be found later on, yet surely this issue is of practical importance in the formation of a view of Irish judicial method.

Misprints, omissions from indices, and other shortcomings in the physical production of books are too often facilely ascribed to hapless writers rather than to those responsible for the commercial production of the fruits of authorship. In each of these respects, this text deserved better from its publishers than it got. The book has more than its fair share of quite spectacular (and in one case, obscene) typographical errors, omissions etc. This is not an insuperable impediment to the usefulness of the work.

The work is however the most up-to-date, useful introduction to the major features of the Irish legal system, and no student beginning law should be without it.

DR. DAVID TOMKIN

MODERN LAW OF PERSONAL PROPERTY IN ENGLAND AND IRELAND

[By A.P. Bell. Butterworth (Ireland) Ltd. & Butterworth & Co. (Publishers) Ltd. ixiv + 546 + 12pp. Price IR£49.50]

This book aims to examine in the context of English and Irish law what interests may exist in personal property.

It is in three parts. The first is devoted to an analysis of property and property rights and a definition of personal property. The second part deals with interests in personal property, and is subdivided into an analysis of possession, legal ownership, bailment, possessory security, equitable ownership, non-

possessory security and other equitable rights. Part three deals with transfers of interests: this is subdivided into (a) gifts *inter vivos*, transfers of tangible property for value (sale of goods, other contracts of transfer, transfers on credit, assignments of choses in action, negotiable instruments) and (b) other transfers including transfers on death and upon insolvency. Part four deals with the persistence of interests, specifically tracing, title conflicts, priorities, and limitation issues.

This book is a scholarly achievement of a very high order. In stating the law in both Irish jurisdictions, and in England, the author refers to an enormous wealth of case and statute law. The Irish material is particularly valuable to practitioners here, since very little of it is referred to elsewhere. The book is not only useful as exposition, it is also a genuinely comparative work, explaining how and why the law in England, Northern Ireland, the Republic, and to a lesser degree, in Scotland, is the same or is different as the case may be. With the advent of the single market, and the fact that already trade with the U.K. constitutes such an important part of our export and import relationships, this is a particularly useful aspect of the book. This comparative element in no way detracts from the author's ability to present the law clearly and critically.

A caveat to these plaudits follows.

I do not feel that the practitioner can rely on this work for a complete answer to questions which may arise in the areas covered. Thus, for example, although the book has an extensive chapter on the sale of goods, this chapter is too narrow in scope and detail to provide anything other than an outline solution to many practical problems on the sale of goods which may face the practitioner. Likewise, although the work has many references to pledges and pawns, and cites many interesting and important cases, it does not deal comprehensively with this field. The insolvency section is narrow in scope. This is not to suggest that the book has any particular failures in these areas; they are cited purely to exemplify the deficiencies inherent in painting a picture of so many different areas of law. The positive side of this is that the reader can from the confines of this book obtain a state of the art picture of the whole of personal property.

Granted that there is such a topic as personal property, and granted that personal property comprehends so many separate fields, and again granted that each of these fields is already covered by a multiplicity of monographs and textbooks and articles, I would have thought that the next edition of this work might be a collaboratively written multi-volume synopsis of the law in each of the areas covered in the present book.

However, to return to the note of unqualified praise with which this review commenced, the book remains a marvellous achievement: beautifully produced, well-indexed, clearly and elegantly written, and an example of legal scholarship for those of us in this particular trade to study, admire and strive to emulate.

DR. DAVID TOMKIN

MINORITY SHAREHOLDERS' RIGHTS

By Robin Hollington
(London: Sweet & Maxwell, 1990). IR£32.25.

A dilemma which has to be addressed by all those concerned with rules governing the functioning of groups of all kinds is that of defining the limits of majority power. This problem in the context of modern company law is the focus of Robin Hollington's attention in this book. Starting with the familiar rule in *Foss -v- Harbottle* the author first examines the efforts made by the courts to limit majority excesses before the intervention of legislators. By dealing with equitable exceptions to the principle of majority rule without mingling the discussion with a consideration of the English equivalent of Sections 205 and 213 (f) of the Companies Act, 1963 (hereafter "the 1963 Act") he gives it a clarity of isolation not commonly encountered. There is a very useful discussion of the circumstances in which votes of particular shareholders will be disregarded and more valuably a consideration of the consequences of such disenfranchisement. He argues that in the context of the entitlement to bring a derivative action the exclusive attention focused by many authorities on causes of action which are ratifiable by a majority of shareholders and those which are not is misplaced and that another vital question is whether the conduct of the wrongdoers is such as to disenfranchise them on a vote to initiate proceedings. With sound logic but little authority he argues that the availability of a derivative action should not depend on fraud on a minority (or, presumably, in an Irish context on the exercise of the power in bad faith as in *Nash -v- Lancegaye Safety Glass (Ireland) Ltd.*) but should be available in any case where a company suffers loss even as a result of the mere negligence of controlling directors. He speculates that on the authority of the decision by Megarry V-C in *Estmanco -v- G.L.C.* (1982) a court might at an interlocutory hearing regard an attempt by controlling directors/shareholders to stifle proceedings against themselves as an abuse of power thus bringing the motives of those controllers under scrutiny even in the case of ratifiable wrongs. Interesting as this speculation may be, Irish readers should bear in mind the decision of the Supreme Court in *P.M.P.S. Ltd. and Moore -v- A.G.* (1984) concerning the constitutional implications of an individual shareholder's voting rights. He goes on to discuss the meaning, relevance and significance of control in derivative actions and the question of costs. This entire chapter (Chapter 2) is well ordered, clear and stimulating and while all the cases examined are English the Irish reader would derive considerable benefit from this treatment of them as in this area the law on each side of the Irish Sea has not yet significantly diverged.

In the next chapter he considers the English equivalent of our Section 213 (f) of the 1963 Act – winding-up on the just and equitable ground.

He examines, inter alia, locus standi, requirement of tangible interest in the winding-up, examples of the most common circumstances in which these petitions are successful and the

procedure in the prosecution of a winding-up petition. With the exception of this last element and not forgetting the decision of Kenny J. in *Re Irish Tourist Promotions Ltd.* (1974) that this remedy is available even when the company is insolvent, this analysis and discussion would be the most valuable to the Irish reader.

While there are many similarities between the "unfair prejudice" remedy in England and the remedy for oppression and disregard of interests provided by Section 205 of the 1963 Act, the differences are still of such an order as to make chapter 4 largely of academic interest only to the Irish reader. Those interested in the Irish remedy would be best advised to consult any of the Irish textbooks of which, happily, there is now no shortage.

In chapter 5 the author turns to a consideration of the personal rights of shareholders based on the English equivalent of Section 25 of the 1963 Act. The implications of the contracts implied by this section have received considerable attention in recent years and this contribution provides a sound assessment of the current state of the law. The author also examines in this chapter duties owed by directors to shareholders personally, particularly in the context of contested takeovers. Both these subjects are developing rapidly and the author provides a reliable chart by which to navigate.

The book concludes with a look at some miscellaneous rights and a useful appendix containing provisions which might be inserted in a company's memorandum or articles to protect minority shareholders.

The author has managed to present a difficult area of the law in a clear and eminently readable style and his book is recommended to all those interested generally in company law and particularly those interested in the protection of minorities.

GERARD J. MEEHAN

IRISH LANDLORD AND TENANT LAW

[By J.C.W. Wylie, LL.M., LL.D – Butterworth (Ireland) Limited – (pp. Tables: 100 – Text: 750 approx. – Index: 38) IR£95.00 (including binder)]

In prefacing the above, the author, Professor J.C.W. Wylie, indicates that its aim "is to provide Irish practitioners with a comprehensive statement of the law of landlord and tenant". To say that this objective has been achieved is an under-statement of such magnitude as to border on insult. That achievement per se is almost a sufficient recommendation of the merits of a book whose pedigree and title must have mantled it with best seller status from inception. Such recommendation does not, however, lie solely in expectation. The work itself is one upon which eulogical superlatives may be lavished in abundance, and with ample justification.

Legal publication with an Irish dimension has developed significantly over the past few years, and this volume serves as a reminder of the huge debt of gratitude owed to the Professor and to those who introduced him to our needs. Here, he has collaborated with a Consultant Editor in the person of John Farrell M.A., S.C. – a most able and highly regarded expert in the titled field.

The book, which is published by Butterworth (Ireland) Limited, is presented most attractively in loose-leaf format, and its undertaking is to be continued with periodic supplies of up-dating material. The textual paragraphs throughout have been numbered, and combine readily with excellent footnotes and cross-references. The Index and very full Tables of Statutes, Rules and Cases have been carefully prepared.

So much could be said about this work that it is, perhaps, best to start with the basics. It encompasses a wonderfully researched and stimulating treatise on the named subject as applied in this jurisdiction with a considerable relevance apropos Northern Ireland, the law being stated as at 1st October, 1989. The contents (whether shaped as text, discussion or footnote) are informative and authoritative, and there is such a profusion of detail that one tends to forget that the book does not pretend to be specialist in all phases. As ever with John Wylie, the refreshing clarity and simplicity of expression belie the depth and breadth of the underlying material.

Notwithstanding the proliferation of enactment over recent years, it is quite astounding to be reminded that so much of our landlord and tenant law is still governed by legislation emanating from the last century, or, alternatively, stems from decisions of equal or greater antiquity. This book deals with these historical aspects – including a full treatment of the relevant provisions of Deasy's Act – in a manner both interesting and practical, and invariably then views them in the current context. Likewise, the relevant legislation of the past two decades or so is explained in detail, while there is (where appropriate) ample discussion on lesser known and discarded statutory provisions. Additionally, the work is virtually bursting with references to decisions handed down by the Irish Courts with copious excerpts from judgments

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and a plenitude of absorbing commentary thereon. Lest all of this might denote an over-academic leaning, such is far from being the case. The main thrust of the book is in the practical direction, as can be perceived from an examination of its Contents.

Messrs. Wylie and Farrell have negotiated admirably the labyrinths of Notices to Quit and Ejectments, and dispel much of the confusion which has incumbered their incidental procedures. Here and elsewhere the litigation lawyer will find plenty of fodder.

In addition to the foregoing, readers will be interested in the attention given to constitutional implications, and the observations derived from the workings of the Law Reform Commission. At this stage, one wonders whether the helpful recommendations of the latter are ever going to be implemented.

I do not subscribe to the veiw that a critic is little short of worthless, unless he goes some way towards castigating his subject. This book has not left itself open to such an attack, but, in the area of personal choice (though certainly not of censure), some points may merit mention:—

(1) I would, within Chapter 31, have preferred a slightly different approach whereby the respective topics of reversionary leases, sporting leases and freehold acquisitions would be discussed separately with appropriate cross-references, rather than on the basis of single texts to cover their common incidents.

(2) Some Chapters might have devoted more space to non-Irish Cases and developments. This, of course, runs counter to our normal plea, but there are subjects (as for instance, rent reviews and repairing covenants) where, thankfully, there is a paucity of case law here as measured against the unhappy abundance elsewhere. However, commentary on the more vital issues not experienced here could provide useful guidelines, in addition to identifying unsuspected minefields. The fact that the text (so far as the same is pertinent to recent developments) has more or less been confined to Irish case law may be a recognition of the strength and independence of our own Courts, coupled with the simple and practical objective that the book had to be kept within manageable limits.

(3) The oft-recurring problems faced by a landlord whose tenant goes into liquidation could, perhaps, be ventilated in future supplements.

(4) Without launching into the complexities of the Value-Added Tax code, some space might conceivably be devoted to the manner in which this tax is assessed on the supply represented by the granting of a Lease.

The foregoing are merely a few passing thoughts, and, on reflection, these may be beamed towards specialisations, which are beyond the intended scope of the above Volume. The latter eschews detailed commentary on such peripheral matters as Stamp Duties, Taxation and Land Registry procedures nor does it contain the full texts of Statutes, Rules or precedents.

Somewhat surprisingly, the very informative comments on Insurance make no reference to the decision in Mark Rowlands Limited -v- Berni Inns Limited – a non-Irish case, but one whose outcome seems to have met with general approval here.

This review has been dictated to meet a deadline, and I have not checked statutory and like references. Given the exceptionally high standards manifested throughout, I see no reason to doubt their adequacy. The misprint gremlin has a number (comparatively few) of minor successes, which can be sorted out readily, as can the one or two instances where there may be a lack of cohesion in cross references.

Of undoubted value to academics, practitioners and students, this splendid addition to our bookshelves will have a lasting impact, particularly if the up-dating service is maintained to as high a standard as the original.

PATRICK FAGAN

Clerk & Lindsell on Torts
16th Edition (1989, Sweet & Maxwell. Stg.£135.00.

When one looks at the 16th Edition of Clerk & Lindsell and all it contains that is new, it is hard to visualise the contents of the First Edition published 100 years ago in 1889. Where were such pivotal cases as *Dulieu -v- White* (1901), *Donoghue -v- Stevenson* (1932) and *Junior Books -v- Veitchi* (1983); and what about the *Mareva* and the *American Cyanamide* decisions of 1975?

Whatever the First Edition contained, practitioners and law students alike throughout those 100 years of organic judicial development of the law of torts, have come to know Clerk & Lindsell as the seminal English work on the subject. The Irish law student learns very early on how to make maximum use of English law books – take everything on board except the post-1922 statutes. Now, at least for torts, since McMahon & Binchy was first published in 1981, both student and practitioner in Ireland better know what is 'wheat' and what is 'chaff' before seeking more detail from English sources.

However compact one's legal bookshelves might be, there should be room made for this new edition of Clerk & Lindsell, with all its 1,700 pages and notwithstanding its relatively high cost. The Irish common law practitioner in possession of McMahon & Binchy & Clerk & Lindsell can confidently confront the researching of any tort problem.

This edition is, as with previous editions, well laid out in numbered chapters/paragraphs – with the contributions of the various members of the editorial team (under the general editor, R.W.M. Dias) being indicated in the Table of Contents. The 16th Edition was substantially completed by October 1988, but subsequent changes have caused additions and modifications in proof up to mid-1989. As heretofore, Sweet & Maxwell will publish Cumulative Supplements at intervals to keep this monumental work up to date.

MICHAEL V. O'MAHONY

McMahon and Binchy, Irish Law of Torts
Second Edition (1990). Butterworth (Ireland). IR£49.50.

The second edition of McMahon & Binchy is to be welcomed nine years after its first publication. This time round, this unique Irish work on Torts has a new publisher, Butterworths, (which acquired Professional Books in the interim), and is considerably changed, both in chapter lay-out and in size – from some 600 pages to more than 850 pages; with overall presentation and quality of printing and binding much improved.

The second edition contains the law on the subject up to April 1989, with the important Supreme Court medical negligence decision of that month in *Dunne -v- National Maternity Hospital* forming a large part of the preface.

In legal content, as before, this edition is both readable and prepared to the highest standard, and it contains a lot that is new. Since 1981 the Supreme Court has delivered judgments on a number of topics relevant to a book such as this, including solicitors' and medical negligence, defamation and injunctions; the Oireachtas has passed the Animals Act 1985, the Control of Dogs Act 1986 and the Data Protection Act 1988; and the EC Directive on Products Liability, after a very long gestation period, has now been born and will soon form part of our domestic law. All are dealt with in this new edition.

Of the authors, William Binchy B.L. remains a vital cog in the ever rotating wheels of the Law Reform Commission, while Dr. Bryan M. E. McMahon, solicitor, has recently bravely sallied forth from the halls of pure academia to almost full-time legal practice in Ennis, combined, for old times' sake, with a part-time law professorship in UCG. Since 1981, their respective considerable publishing energies are represented, jointly, by their *Casebook on the Irish Law of Torts* (Professional Books, 1983) and, severally, by McMahon & Murphy (Finbarr) *European Community Law in Ireland* (Butterworths, 1989); Binchy, *Casebook on Irish Family Law* (Professional Books, 1984); Binchy, *Irish Conflicts of Laws* (Butterworths, 1988); and, Byrne (Raymond), and Binchy, *Annual Review of Irish Law*, 1987 and 1988 (Butterworths) – forming a sizeable proportion of the entire complement of modern Irish legal works.

With this new edition of McMahon and Binchy, further impetus has been given to the option for our law of torts to develop its own special Irish character, without necessarily following the thinking of English text book writers or English judicial precedent.

Your reviewer has been given the opportunity of reviewing, in tandem, both the second edition of McMahon & Binchy and the sixteenth edition of Clerk & Lindsell (*q.v. infra*). Therefore, with confidence, one can conclude by advising that it is *essential* that every Irish common law practitioner and law student should have within easy reach the former and *most desirable* that every such practitioner should have ready access to the latter. One instance of practical legal inspiration acquired from the pages of either would more than justify the acquisition cost of both.

MICHAEL V. O'MAHONY

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Registration date is **15 July, 1990.** Registration forms and further information can be obtained from Michael Irvine, Matheson Ormsby & Prentice (Tel. 760981) or Petria McDonnell, McCann FitzGerald (Tel. 765881).

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.
25th day of June, 1990.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Peter Leacy, Folio No.: 16458; Lands: (1) Craane (2) Macmine; Area: (1) 38a.2r.38p. (2) 21a.3r.36p. County: **WEXFORD.**

John Fox, 15 St. William Street, Dublin. Folio No.: 7122; Lands: Townland: Drimnagh Barony: Uppercross; Area: 0.965 Hectares. County: **DUBLIN.**

Angela Brady, Folio No: 7427; Lands: (1) Togher, (2) Moneybeg; Area: (1) 41a.2r.9p, (2) 1a.3r.23p. County: **WESTMEATH.**

Matthew Clarke, Folio No.: 2349; Lands: Balbreask Old; Area: 13a.2r.16p. County: **MEATH.**

John Harrington & Mary Harrington, Folio No.: 21814F; Lands: Balbranagan; Area: 0.650 acres. County: **CORK.**

W. J. Piranian, Folio No.: 54440; Lands: Kilbeg; Area: 1a.0r.0p. County **GALWAY.**

John McManus, Folio No.: 1818F; Lands: (1) Davidstown, (2) Davidstown, (3) Skeagh Beg (4) Luggygalla; Area: (1) 21a.1r.18p., (2) 8a.2r.16p., (3) 14a.0r.23p., (4) 12a.3r.32p. County: **WESTMEATH.**

Joseph Costello, Folio No.: 17501; Lands: Derraulin; Area: 48a.3r.13P. County: **LIMERICK.**

Thomas Butler, Folio No.: 11311F; Lands: Dublin Road. County: **LIMERICK.**

William Murphy, Folio No.: 2884F; Lands: Knockane; Area: 1a.0r.0p. County: **CORK.**

John Ennis, Folio No.: 4720F; Lands: (1) Newtown, (2) Lugacaha; Area: (1) 18.219, (2) 4.188 acres. County: **WESTMEATH.**

Mill Sections Limited, Folio No.: 6174F; Lands: Ballindud. County: **WATERFORD.**

Liam Ryan, Folio No.: 1409; Lands: Clonkelly; Area: 34a.3r.28p. County: **TIPPERARY.**

Michael Vincent Grady (O'Grady), Cloonloo, Boyle, Co. Roscommon. Folio No.: 1623; Lands: Cloonloogh; Area: 26a.3r.29p. or therabouts, statute measure, situate in the Barony of Coolavin and County of Sligo. County: **SLIGO.**

William Bennett, Folio No.: 10045; Lands: Cornagran; Area: 18a.2r.20p. County: **CAVAN.**

Frances Murphy, Folio No.: 12622; Lands: Rathrolan; Area: 63a.2r.30p. County: **WEXFORD.**

Patrick Joseph Donohue, Folio No.: 5701F; Lands: Talbotsinch. County: **KILKENNY.**

James Mansfield, Keatings Park, Rathcoole, Co. Dublin. Folio No.: 24077F; Lands: Townland: Bustyhill Barony: Newcastle; Area: 0.635 Hectares. County: **DUBLIN.**

David Foran, Folio No.: 415; Lands: Glenhouse; Area: 21a.0r.23p. County: **WATERFORD.**

Bridget Langan, c/o C.E. Callan & Co., Solicitors, Boyle, Co. Roscommon. Folio No.: 4683F; Lands: (1) Billa, (2) Billa; Area: (1) 0.206 acres, (2) 0.006 acres. County: **SLIGO.**

Peter Duggan, The Square, Scariff, Co. Clare. Folio No.: 19892; Lands: Townland: Ballyminoge; Area: 30a.0r.25p. County: **CLARE.**

Patrick Massey Limited, 106 The Coombe, Dublin. Folio No.: 10882; Lands: Townland: Crumlin Barony: Uppercross; Area: 0.208 Hectares. County: **DUBLIN.**

Steward & Curry Ltd., (Limited Liability Company) 9/11 Railway Street, Dublin. Folio No.: 11255F; Lands: Newtown, Barony – Coolock, Premises known as Unit 1 Coolock Industrial Estate, Malahide Road, Dublin 5. County: **DUBLIN.**

Reverend Patrick Finegan, Reverend Patrick O'Connell and Reverend Patrick McGauran, Folio No.: 10805; Lands: Doocassan; Area: 0a.1r.15p. County: **CAVAN.**

Patrick Dillon, Folio No.: 1499 revised to 3898F; Lands: Urglin or Rutland; Area: 7a.2r.15p. County: **CARLOW.**

John Ryan, Folio No.: 9276F; Lands: (1) Glassdrum, (2) Glassdrum, (3) Glassfield, (4) Glassdrum; Area: (1) 10.694 acres, (2) 6.313 acres, (3) 9.838 acres, (4) 7.500 acres. County: **TIPPERARY.**

John Ewart, Folio No.: (1) 8597, (2) 5470; Lands: (1) Cordevlis, (2) Aghabrick; Area: (1) 13a.1r.20p, (2) 23a.0r.35p. County: **MONAGHAN.**

John McCormack, Folio No.: 2382; Lands: Fearboy; Area: 12a.2r.0p. County: **KINGS.**

Noel O'Halloran, Folio No.: 16245; Lands: (1) Cappalodge, (2) Cappalodge; Area: (1) 16a.0r.18p, (2) 18a.1r.13p. County: **CLARE.**

Gerard Hamilton, Folio No.: 12906 and 1718; Lands: Folio 1718: Part of the lands of Coolready containing 18a.2r.35p. Folio 12906: Lisbarreen Area: 0a.2r.19p: Clonmoher Area: 15a.1r.0p: Clonmoher Area: 4a.2r.28p. County: **CLARE.**

Maurice Condon, Folio No.: 5585F; Lands: (1) Boolahallagh, (2) Boolahallagh, (3) Boolahallagh, (4) Garryduff, (5) Boolahallagh; Area: (1) 38.350 acres, (2) 150.413 acres, (3) 2.125 acres, (4) 487.275 acres, (5) 21.413 acres. County: **TIPPERARY.**

Joan Tighe, of 153 Griffith Avenue, Drumcondra, Dublin. Folio No.: 392L; Lands: Property known as No. 153 Griffith Avenue situate on the north side of the said avenue in the parish of Clonturk and district of Drumcondra. County **DUBLIN.**

James Grant, tenant in common undivided moiety. **Patrick Grant,** tenant in common undivided moiety. Folio No.: 4234; Lands: Smithstown; Area: 28a.2r.20p. County: **KILKENNY.**

RULE 125 NORTHERN IRELAND LAND REGISTRY RULES

Re: Application for missing Land Certificate Folio No. 13328 of the register Co. Fermanagh.

Registered owner Patrick Cassidy late of Monesk Blacklion, Co. Cavan, townland of Killykeeghan.

Take notice that any person having custody of the Land Certificate, relating to the above mentioned folio should forthwith produce same to the Registrar of Titles, Land Registry, River House, 48 High Street, Belfast BT1 2PT.

And further take notice that unless the said Land Certificate is so produced within 3 weeks of publication of this notice, a duplicate Land Certificate may be applied for.

O'Donovan-Mackey & Co.,
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Church Street,
Cavan.

Lost Wills

Maher, Michael, deceased, late of Clonmore North, Cashel, Co. Tipperary. Date of death 25th October 1987. Will any person having knowledge of the whereabouts of a Will for the above named deceased please contact Chris O'Shea, c/o Donal T. Ryan & Co., Solicitors, Castle Street, Cahir, Co. Tipperary. Tel: (072) 41244/41506/41029.

Lonergan, Mary, deceased, late of Drumcannon, Tramore, Co. Waterford. Will any person having knowledge of the Will of the above named deceased who died on the 18th day of November, 1989, please contact Messrs. Kenny, Stephenson & Chapman, Solicitors, Newtown, Waterford. Tel: (051) 75855.

O'Donnell, William, late of 90 Cherryfield Road, Walkinstown, Dublin 12. Would anyone having knowledge of the whereabouts of a Will of the above-named deceased who died on the 14th day of January, 1981, please contact Patrick J. Farrell & Co., Solicitors, Charlotte Street, Newbridge, Co. Kildare. Telephone (045) 31542.

Teer, Nora, deceased, late of 35 Beechwood Gardens, Newcastle West, Co. Limerick. Will anyone having knowledge of a Will of the above named deceased, who died on 19th September, 1989, please contact Messrs. Culhane, Judge & Co., Solicitors, The Square, Newcastle West, Co. Limerick. Tel: (069) 62969 or 62510.

Hogan, Michael, deceased, late of Thomastown Village, Golden, Cashel, Co. Tipperary. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 25th May, 1990, please contact Cullen Tyrrell & Co., Solicitors, Woodville, Herbert Rd., Bray, Co. Wicklow.

Hogan, Catherine, deceased, late of Thomastown Village, Golden, Cashel, Co. Tipperary. Will anyone having knowledge of the whereabouts of a Will of the above named deceased who died in or around 15th March, 1990, please contact Cullen Tyrrell & Co., Solicitors, "Woodville", Herbert Rd, Bray, Co. Wicklow.

Iremonger, Mary, late of 47 Vernon Park, Clontarf in City of Dublin, Widow. Will anyone having knowledge of the whereabouts of any Will or codicil of the above named deceased, who died on 11th January 1990, please contact McCann Fitzgerald, Solicitors, 30 Upr. Pembroke St., Dublin 2. Tel: 765881. Ref. PTRC.

Miscellaneous

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 5AU. Telephone 03-0483-726272. Fax 03-0483-725807.

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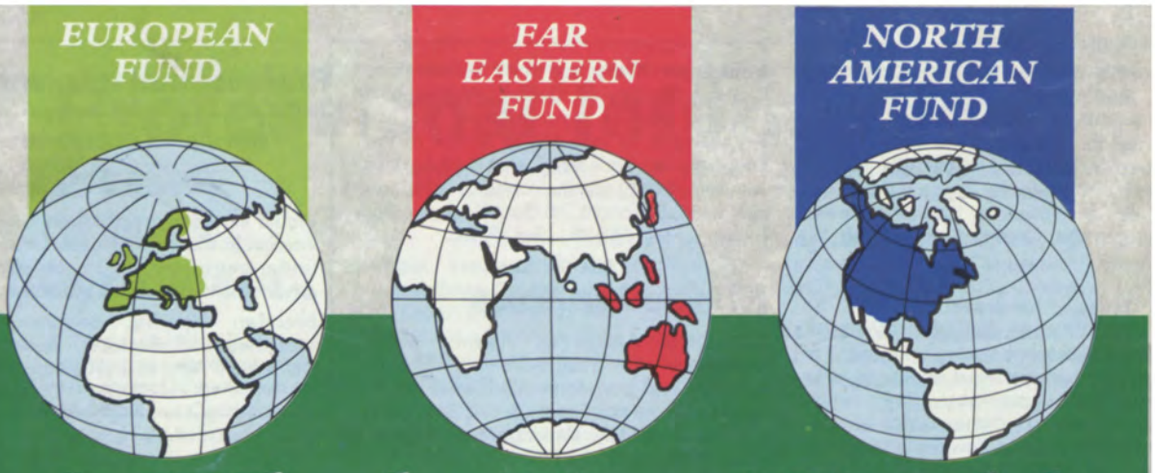

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GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

Vol. 84 No. 6 July/August 1990

President's Garden Party, Blackhall Place
The Director General, James J. Ivers (left) with Peter Prentice, Past President of the Law Society.

- UNIX and Networking Explained
- Entitlement to Damages for breach of Community Law under English Law

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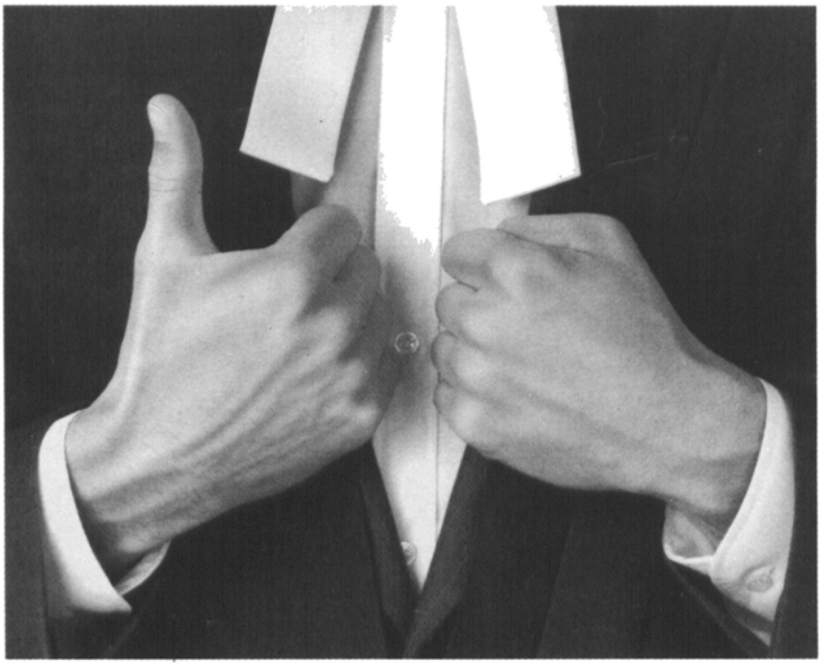

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Viewpoint

Detailed comment on the Report of the Fair Trade Commission into Restrictive Practices in the Legal Profession must await the deliberations of the Committee which the Council of the Society has appointed to collate the responses of members to the recommendations. Some general thoughts on the Report may however be expressed at this stage. It is disappointing to observe the failure of the members of the Commission to agree on some fundamental points and its efforts to resolve the conflict between the theory of pure competition and the need to protect the public.

Perhaps the most curious aspect of the Report is that in which the Chairman argued against Professional Indemnity Insurance being made compulsory for members of the legal professions. The need to ensure that there is adequate insurance based compensation available to members of the public for acts of negligence was seen almost 60 years ago in relation to traffic and transport on our roadways. A client who has suffered loss as a result of a solicitor's negligence should not have to rely solely on that solicitor's assets. If this were the case a wise client would not instruct any young member of the professon which is hardly what the Commission would wish to encourage.

It is however, in the area of conveyancing that the Chairman is impossibly optimistic. He envisages that appropriate action to reform the law to reduce its unnecessary complexity and to bring the procedures and methods of the Land Registry up to date "may take five to seven years". It is difficult to avoid the conclusion that the Chairman has not grasped the size of the problem which exists here.

Even where resources have been devoted on a significant scale, as in the UK or to a more limited extent in Northern Ireland, it necessarily takes a number of years to bring about statutory reform in the area of land law and conveyancing. Equally even if any significant resources were devoted to the improvement of the Land Registry or if it were to be converted into a public corporation as the Law Society has recommended, it would certainly be a great deal longer than five to seven years before the combined effects of statutory reform and improvement of the registration system could bring about any lessening of the present complexity in the law relating to conveyancing and the registration systems. In passing it may be remarked that the complexity of the law will not be improved if there is to be a continuance of ill-drafted, though socially desirable, legislation. Commencing with the Family Home Protection Act and continuing on to the Judicial Separation and Family Law Reform Act, it has unfortunately been the case that the effects of this legislation on conveyancing practice have been to make matters more difficult for the solicitor and the client and to slow down the process of transfer.

It is to be hoped that the Report will have some impact in government circles on the need to do something about our outdated legal and administrative structures in the areas of land transfer. Improving infra-structure in a country does not only mean building more and bigger roads it means providing a modern legal infra-structure if a country is to be seen to be a modern efficient democracy. □

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Entitlement to damages for breach of community legislation under English Law

PART I

The impetus for this article arose out of a question posed by Nial Fennelly SC in a paper delivered by him to the Irish Centre for European Law on 10th February. The question was whether it is possible to obtain a remedy of damages in the UK for breaches of Articles 85 or 86 of the Rome Treaty. I thought it would be interesting to expand the question and look at the position not just under Articles 85 and 86 but under other Articles of the EEC Treaty and also secondary legislation. The question should be particularly relevant for Irish lawyers and their clients since nearly 40% of Irish exports still go to the United Kingdom and problems constantly arise where the services or goods being supplied are in some way restricted by acts of either the Government or competitors some of which may be infringements of either primary or secondary Community legislation.

The following are examples of different categories of situations where this question arises:-

CASE 1 – **Abuse of a dominant position.**
You are a trader of a commodity (for example butter or cement) and your supplier who has a monopoly of the product refuses to continue to supply to you or discriminates in his pricing policy to your disadvantage. You argue that the supplier is in breach of Article 86 of the EEC Treaty. Do you have a remedy in damages for your loss?

CASE 2 – **Import/Export Restrictions**
You are an exporter to the UK and there is a UK Government decision which either restricts your right to export on the grounds that it does not meet the health requirements or restrictions are necessary for reasons of public policy. If such decisions are in breach of the EEC Treaty do you have a right to damages against the Government?

CASE 3 – **Unfair award of public contracts**
You are a contractor in the UK and you tender for a UK Local Authority contract which you do not win because your goods do not comply with British standards and also you think there was some discrimination in the award of the tender. The tender has been awarded, you think unfairly; can you seek recovery of your loss of profit?

CASE 4 – **Illegal state aid**
You are a manufacturer competing in an international market. One of your competitors receives a substantial UK Government grant. This allows him to sell at a cheaper price than you. You suffer a loss in sales. The Government grant was not notified to the Commission. Can you sue that relevant Government for the damages or loss of profits you suffer?

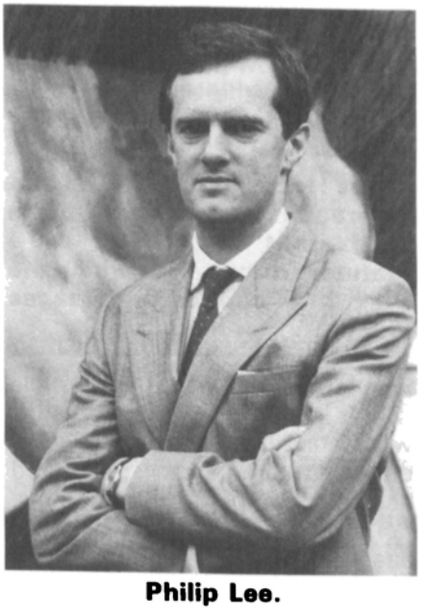
By
Philip Lee
Solicitor*

The above situations occur in varying forms not infrequently. I shall try and indicate the grounds on which damages can be awarded by an English Court. Where damages or an injunction are not available, the clients only remedy may be for a declaration by way of an application for judicial review under the recent Order 53. Order 53 has severe limitations and time constraints which an Irish practitioner must consider.

The possibilities of damages for breach by individuals and Government bodies of Community law raise some of the most complex, and in some cases still unanswered, questions in English law. This itself is most surprising since potential claims under these provisions have been in existence since 1973 when the UK and Ireland joined the Common Market. The fact that some of these issues remain unresolved points perhaps to the slowness with which lawyers have informed their clients of their rights and remedies.

"The fact that some of these issues remain unresolved points perhaps to the slowness with which lawyers have informed their clients of their rights and remedies."

Because the position is so complex I think it will be appreciated by the reader if I try firstly to give a simple answer to the four situations. In the second half of this article I discuss the



Philip Lee.

jurisprudence that lies behind my earlier conclusions. The answers, however, must be taken in the context that the law is still developing in this area and that there has not been a definitive House of Lords pronouncement on any of the areas.

CASE 1 – **Abuse of a dominant position**

This is the most straightforward of the four situations. Article 86 of the Rome Treaty was incorporated into the domestic law of the UK by sections 2(1) and 3(1) of the European Communities Act 1972. Article 86, which outlaws any abuse of a dominant position within the Common Market, has been found to be a Treaty provision which is directly applicable and has direct effect.[1] This means that the legislation can be relied upon by nationals of the Member States before their national courts. In the decision of *Garden Cottage Foods Limited -v- Milk Marketing Board*[2] the House of Lords had to consider, in interlocutory injunction proceedings, whether it was possible to make an award of damages for breach of Article 86. They held that a breach of these provisions is equivalent to a breach of a statutory duty. This breach of statutory duty is a private law right for which the Plaintiff is entitled to damages and/or the discretionary entitlement of an injunction. The decision is qualified by the fact that it was decided on an interlocutory application and Lord Wilberforce gave a strong dissenting judgment stating that such an important issue should not be decided at this stage. It is interesting to note that under the new proposed competition laws of the UK there will be introduced a "domestic" version of

"[The House of Lords] held that a breach of [Article 86] is equivalent to breach of a statutory duty . . . for which the Plaintiff is entitled to damages and/or . . . an injunction."

Article 86 (and eventually Article 85). It is envisaged that damages will be available to the individual under these new proposed domestic competition regulations.

Thus in cases where your client has evidence of an abuse by a competitor of its dominant position (Article 86) or of a concerted practice (Article 85) or agreement which may restrict competition he would be well advised not only to complain to the Commission but most importantly to issue a writ for an injunction and/or damages caused by the unlawful acts. This is the case even if the undertaking or competitor is controlled by the Government.

CASE 2 – **Import/export restrictions**

Any quantitative restrictions on imports and measures having an equivalent effect are prohibited between Member States (Article 30). However, a Government is, in certain circumstances, entitled to restrict imports or exports on the grounds inter alia of public morality, public policy, public security or the protection of health and life of humans, animals or plants, provided such restrictions are not arbitrary (Article 36, EEC). In *Bourgoin -v- Minister of Agriculture Fisheries and Food*[3] the UK Government restricted the import of French turkeys (just prior to Christmas) without consultation and on the basis of a change in the method of testing turkeys for certain diseases. The restriction was found by the EC to be unsuccessful and illegal. The French importers sued the English Government for their losses. The English Court of Appeal considered the ban on restrictions contained in Article 30 to be a qualified ban. The Court held that if a Member State adopts a provision restricting imports which is incompatible with the limited derogation under Article 36 then that provision will be considered an ultra vires measure or a simple excess of power. This the Court of Appeal held was a question not of private law rights but of public law and there was no obligation on the Member State under EEC law to provide a remedy of damages. Accordingly the Plaintiffs were not entitled to damages unless it could be shown that the measure constituted a misfeasance or an abuse of power.

The Court of Appeal did however concede that there would be a right of judicial review by anyone with sufficient interest and such a person should be able to obtain a declaration as to the invalidity of the measure and possibly on order of mandamus against the relevant officials to permit the importing of the goods concerned.

I examine some of the complexities of judicial review later in this article. However, by way of introduction, it must be noted that judicial review is still a relatively undeveloped concept under English law, when compared either to Irish law or indeed European Civil law systems.

Amongst other things, to commence an action for judicial review leave must firstly be granted by the Court and the Writ must be issued in accordance with the stringent conditions of the recent Order 53 of the Supreme Court Rules.

According to Parker LJ in the *Bourgoin* case only if it can be shown the official did not act in good faith would there be a remedy entitling the applicant to damages.

". . . only if it can be shown the official did not act in good faith would there be a remedy entitling the applicant to damages."

Leave was granted to appeal to the House of Lords. However, the matter was settled on the payment of a substantial sum of damages to the Plaintiff. (Several millions).

Even if this more restrictive interpretation of the right to damages for breach of Article 30 is not altered by a later decision of the House of Lords the possibility of showing bad faith or misfeasance is a real possibility where the restriction or ban on import may

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have been clearly the result of lobbying or public pressure and not genuine concern on public health grounds. (There could of course be an issue here of Crown privilege in applications for discovery).

This therefore suggests that an importer who believes the restrictions on his right to import infringe European law has good reason to commence proceedings to recover all or part of his losses.

CASE 3 – **Unfair award of public contracts**

Local Authorities when awarding public works or public supply contracts are subject to the provisions of Article 7 of the Treaty (which prohibits any discrimination on the grounds of nationality) and various EC directives. Article 7 has been found to have direct effect and therefore can be relied upon by individuals in the national Courts. This means for instance that if a local authority includes in its tender for goods or works a specification requiring compliance exclusively with a national specification and therefore effectively excludes equivalent goods from another Member State which do not formally comply with the national specifications, it will be in breach of Article 7.[4]

For public contracts over a certain value the EEC has laid down "Procurement Directives" which provide detailed procedures to be followed by public bodies in the advertising and selecting of tenders. In the case of public works contracts the value must exceed ECU 1 millions (ECU 5 million from July 1990) and for public supply contracts ECU 200,000. Member States were obliged to implement the original directives in the 70s but to date the United Kingdom has failed to adopt them properly into national law. It has instead attempted to implement them by Government administrative circulars. This of course causes confusion as to their status in English law and to what extent they can be relied upon by individuals before English Courts.

Does a breach of Article 7, or of the Procurement Directives, entitle the innocent party to damages?

Recent decisions of the European Court of Justice have found various provisions of the Procurement Directives to be directly applicable and of direct effect.[5] This means that parts of directives may be relied upon by individuals despite the fact that they have not been properly adopted into the UK legislation.

" . . . in all cases of discrimination on the grounds of nationality and in cases of breaches of certain provisions of the [public procurement] directives, it is open to an applicant . . . to seek judicial review . . . ."

Thus in all cases of discrimination on the grounds of nationality and in cases of breaches of certain provisions of the directives, it is open to an applicant, at a minimum, to seek judicial review and a declaration of the illegality of the award procedure. However, this may be of little consolation to a contractor where the award has already been made, unless he also has a remedy in damages. Such an issue has not yet been litigated in England. The first question to be addressed will be whether the award is such an act as to bring the matter into the area exclusively of public law.

If the award is not so considered then the unsuccessful tenderer can rely on the principles established by the House of Lords in the *Milk Marketing Board* case and seek damages as for breach of statutory duty.

If however, the award procedure is considered to be in the public law domain then the doctrine applied in the *Bourgoin* decision will come into play. That a Court may consider an action against a Local Authority in such circumstances to be an action under public law and as such therefore subject to the exclusive procedures required for judicial review under Order 53 of the Supreme Court Rules is of

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major concern to the practitioner. This is an enormously complex and unsatisfactory area of English law.

If is perhaps worth adding that the protection given to a legislative act of the Government by the Court of Appeal decision in the *Bourgoin* case was later extended to cover not simply legislative acts but also administrative acts which are ultra vires.[6]

In this situation (unless or until the Court of Appeal decision is challenged in the House of Lords) it may therefore be necessary to show that the administrative act was the result of a "misfeasance" or an "abuse of power".

The Court of Appeal in the *Bourgoin* case held that a simple excess of power is a matter of public law giving rise only to injunctive relief, whereas an abuse of power or misfeasance was a matter of private law giving an entitlement to damages. Whilst the Court of Appeal also stated that there was no particular merit in the use of the phrase "public law rights" or "private law rights" this does seem to ignore the enormously important implications of *O'Reilly -v- Mackman*[7] in which the House of Lords held that if it is a question of public law then the rigours of Order 53 apply.

"... it would ... as a general rule be contrary to public policy and as such an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means evade the provisions of Order 53 for the protection of such authorities" – per Lord Diplock.

Consequently, where a person seeks to enforce his public law rights by starting an action by writ, the proceedings will be struck out and leave to apply for judicial review will have to be sought. This may however, be too late, as Order 53 provides *inter alia*;

> "No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule . . .(53(3)). An application for leave to apply for judicial review shall be made promptly and in any event within 3 months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made". (0,53 R4.1).

I am afraid this public law/private law issue is unresolved: "the dividing line between them is impossible to draw with certainty" (per Wade, Administrative Law, p677). It is extremely important from both the procedural and substantive points of view to know whether your action is in the public or private law domain. Unfortunately Parker LJ, who threw breaches of Article 30 into this particular area in his *Bourgoin* decision, does not offer any serious guidance of when a matter is public and when it is private.

Depending on the exact nature of a breach of Article 7 of the EEC Treaty or the Public Procurement Directives it can be argued that in the particular breach concerned there was no discretion left to the public authority and that the public body were therefore obliged to follow certain procedures. If such an argument is successful I believe it may bring it out of the public law and into the private law area where the remedies for a breach of statutory duty apply. I discuss this theory in a little more detail in the second half of this paper.

If it has been accepted that the issue is one of private law not public law, one must then examine whether the breach of duty is one for which damages can be expected as a remedy. The English law on when there is an entitlement to damages for breach of statutory duty is itself complex. However, most Irish legal advisers will be familiar with these concepts.

The criteria for deciding when an individual is entitled to damages for breach of statutory duty are very similar to the criteria under which the European Court of Justice will hold Community provisions to be of direct effect. Provided it is in the private domain, it can be argued that if a directive or treaty provision is found to be of direct effect then this, by its very nature, means that a breach of it will give an individual a right to damages for breach of statutory duty.

From a practitioner's point of view, it is important to bear in mind that one of the elements of the decision in *O'Reilly -v- Mackman* is that a Court may transfer judicial review proceedings from the public law to the private law channel but not vice versa. Thus, it is always safer to commence an action by way of judicial review applying inter alia for an award of damages. It is the normal practice in judicial review proceedings to attach a claim for damages. It may seem a bit confusing but if the Court considers the matter to be exclusively public law, then (subject to misfeasance) damages will not be awarded. If the Court holds the matter to be a mixture of public and private law, then they have the discretion to award damages. If it is held to be exclusively private law, then the matter will be transferred out of the judicial review sphere to an ordinary Writ for damages.

" ... if the Court holds the matter to be exclusively public law ... damages will not be awarded."

CASE 4

There is little doubt that the existence of state aids can have a material influence on the market in any particular sector giving considerable financial assistance to the beneficiaries but equally disadvantaging their competitors. Article 92 of the EEC Treaty prohibits aid granted by a Member State or through its resources in any form whatsoever unless it complies with certain specific exemptions. Article 93 (3) obliges Member States to notify the Commission in sufficient time of any plans to grant or alter existing aid.

The question arose in *AG -v- ICI PLC*.[8] ICI claimed the method of valuation for tax purposes used by the Government with respect to inter company transfers of ethane by Shell and BP were so advantageous that they amounted to state aid. The case failed on the substantive issues but in an obiter statement Woolf LJ expressed the view that had Article 93(3) been breached then ICI would have had a cause of action similar to the *Garden Cottage Ltd.* case. This, however, was before the *Bourgoin* decision and the vicissitudes of public law. Article 93(3) has been found by the ECJ to be directly

effective.[4] The approach of the court of Appeal in the *Bourgoin* case suggests that a decision to grant state aid is an exercise of executive discretion. However, the case concerning State aids and Article 93 is, I believe, very different from *Bourgoin* and Article 30.

The reason for this is that considerable assistance is found in Article 93(3) which requires the Commission to be notified in advance by each state of its proposed state aids. Where there is failure to notify, the state aid is clearly a prima facie infringement. Therefore this, it can be argued, is not an act within the discretion of a Member State. I would argue that in such a case this is a breach of statutory duty which must fall outside the principles enunciated by Parker LJ in the *Bourgoin* case. If this analysis is correct, then the failure to notify an aid, which itself was later found to be incompatible with Article 92, would entitle an injured party to recover damages before an English

"the failure [by a member state] to notify [to the Commission] a [state] aid, which itself was later found to be incompatible with Article 92 would entitle an injured party to recover damages . . . "

Court. However, a cautious appraoch is called for here as the whole area of the distinction between public law and private law is one in which "plenty of problems remain": per Wade, Administrative Law.

NOTES

(1) Case 127/73 *Belgische Radio en Televisie -v- SV Sabam,* (1974) ECR 51.
(2) *Garden Cottage Foods Ltd. -v- Milk Marketing Board* [1983] 2 All ER 770.
(3) *Bourgoin -v- Minister of Agriculture, Fisheries and Food,* [1986] ICMLR 267.
(4) *Commission -v- Ireland* [1987] 2 CMLR 563.
(5) *Fratelli Constanzo -v- Comune di Milano* Case 103/88 and *Beentjes -v- Netherlands Land Commission* Case 31/87.
(6) An Board Bainne Co-operative Limited -v- Milk Marketing Board [1988] 1CMLR 60.
(7) *O'Reilly -v- Mackman* [1983] 2 All ER 124.
(8) *AG -v- ICI plc* [1985] ICMLR 588.
(9) *Russo -v- AIMA,* [1976] 1 ECR 52.
(10) Damages in the National Courts for Breach of Community Law 1987 Eur Y B Act 63.
(11) Reply to Question No. 887/87 by Poetschki O.J.C. 303/3 28.11.88.
(12) Reply to written Question No. 2433/88 by de Vries.
(13) *Bayerische HNL -v- EC Council and Commission,* [1978] 3 CML S.66.
(14) *Koninkljke Scholten Honig NV -v- EC Council and Commission,* [1982] 2 CMLR S.90.
(15) *Defrenne -v- Sabena,* [1976] 2 CMLR 98.
(16) *Application Des Gaz -v- Falks Veritas Ltd.* [1974] Ch 381.
(17) Valor International [1976] 3 CMLR 87.
(18) *Per Lord Wilberforce – Davey -v- Spelthorne BC,* [1984] *AC 262 at 278.*

The author wishes to thank his former colleague Philip Wareham of Bristows Cooke & Carpmael's EEC Department and Christopher Vajda, Counsel, for their helpful comments on this paper. The views however remain exclusively the author's.

□

* *Philip Lee is a Solicitor based in London working as a consultant. He holds a law degree from University College, Dublin, and a Diploma in European Law from the College of Europe in Bruges, and is an Associate of the Chartered Institute of Arbitrators. The author is currently writing a book on the European Public Procurement Directives.*

† *Editorial Note: but see now the decision of the European Court of Justice in the matter.*

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CORRECTION

PRACTICE NOTES
— June issue —

EXEMPTED DEVELOPMENTS
(Page 168)

Line 2 of the 3rd paragraph should read . . .

"A development occuring after 1/10/64 . . ."

NOT 1/10/84.

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Law Society Minutes of the Half-Yearly Meeting held at the Hotel Europe, Killarney, Co. Kerry on Friday, 4th May 1990.

1. ADDRESS AND WELCOME BY KERRY LAW SOCIETY

Addressing the meeting on behalf of the Kerry Law Society, Ms. Mary O'Halloran, Secretary, welcomed the members of the profession attending the Conference to Kerry. Ms. O'Halloran extended a special word of welcome for the Society's official guests and delegates who had travelled from abroad to attend. She also expressed her thanks to the Bank of Ireland in Killarney who had supported the Conference and the activities of the Kerry Law Society.

2. NOTICE CONVENING THE MEETING

The Director General read the Notice convening the meeting which had been circulated to the profession prior to the meeting.

3. MINUTES OF THE ANNUAL GENERAL MEETING HELD IN BLACKHALL PLACE, DUBLIN 7, ON 15TH NOVEMBER 1989.

The minutes of the Annual General meeting which had been published in the March 1990 issue of the *Gazette* were signed by the President, Ernest J. Margetson.

4. APPOINTMENT OF SCRUTINEERS OF BALLOT FOR COUNCIL ELECTION 1990/91

The meeting approved of the appointment of the following to act as Scrutineers for the Council Election 1990/91:

Walter Beatty	John Maher
Laurence F. Branigan	Donal O'Hagan
Terence Dixon	Hugh O'Neill
Andrew Donnelly	Peter Prentice
Eamonn Hall	John C. Reidy
Clare Leonard	William Young

The President availed of the opportunity to pay tribute to Roderick Tierney who had been associated with the Council Election for over 50 years as a Scrutineer and who was now retiring. On behalf of the profession he thanked Mr. Tierney for his enormous contribution to the profession over the years. The President then presented Mr. Tierney with a tie pin to mark his retirement. In accepting the presentation Mr. Tierney expressed his thanks to the Council of the Society. He put on record his own appreciation of the work undertaken by the Council on behalf of the profession. Mr. Tierney indicated that in matters relating to the Council Election he had reservations as to the efficacy of some of the changes which had been made in recent years. If the Council decided at some date in the future to reveiw the manner in which the Election is conducted he asked that it draw on the experience of the Scrutineers in undertaking its review.

5. ADDRESS BY THE PRESIDENT, ERNEST J. MARGETSON

In his address to the delegates, the President referred to the changing nature of the profession. Already such topics as multidisciplinary partnership and limited liability for solicitors firms were being considered. At the moment the profession was awaiting the report from the Fair Trade Commission on the legal profession. The President said he would like to "assure the profession that the Society will use its utmost endeavour to maintain the status quo and in fact seek improvements as long as what is being done is for the benefit of the public".

The President welcomed the recent appointment of a Registrar to the Land Registry. Referring to the deficiencies in the service provided by the Land Registry the President described the delays and arrears as "scandalous" and said it was an area "in which as a profession we must continue to keep pressure on the Government to provide a reasonable service for relatively simple matters which affect so many members of the population, namely the transfer of property". The President said that the work of the Courts was also subjected to delays because of staff shortages. At the same time, he accepted that the staff operating the Court Offices and the Land Registry work hard to provide the best service they can with the limited resources at their disposal. The President called on the Government to provide a proper service which would support the administration of justice and not impede it, which was the case at present.

The President urged the profession to support the Solicitors Financial and Property Services Company. Members of the profession should be conscious of the fact that solicitors, especially family solicitors, are generally fully au fait with the financial situation of their clients and thus are in the best position to advise. Members of the profession should avail of the services of the Solicitors Financial and Property Service which puts the requisite financial expertise at the immediate disposal of the solicitor advising a client.

The President stressed the need for all members to carry Indemnity Insurance. The Society now had its own company the Solicitors Mutual Defence Fund. The Fund was in a position to offer cover to members at the same premium as in the initial year of operation and with increased limit of cover.

Concluding his address, the President said that 1992 presented the profession with a challenge. The profession had to "be prepared to face that challenge and to go forward in an efficient and competitive approach but at the same time always remembering the high standards of the profession to which we can all be proud to be members".

6. REPORT ON THE RETIREMENT FUND

The Director General informed the meeting that the Fund which had been established in 1975 now had a current Value of £14.2m. This figure represented an 18.6% increase on last year. The Unit value of the Fund stood at 273.432. While the investment performance for 1989 was satisfactory with Irish Equities doing particularly well predictions were that 1990 would be a difficult year. Increases in membership were at a satisfactory level. Benefits such as an income continuance plan and life assurance cover together with tax savings made up some of the benefits which membership conferred on members.

7. SOCIETY'S ACCOUNTS FOR THE YEAR ENDED 31 DECEMBER 1989

The Director General referred to the Society's Accounts for the Year ended 31 December 1989 which disclosed a slight surplus. The figures were subject to audit.

8. SOLICITORS BENEVOLENT ASSOCIATION

Mr. John O'Connor addressed the meeting on behalf of the Solicitors Benevolent Association. Mr. O'Connor said that the Association was organised on a 32 county basis. Those who are assisted by the Association ranged in age from 4 to 80 years of age. The Association greatly appreciated the support which the profession gave it. Mr. O'Connor also thanked the Director General, James Ivers and Chris Mahon, Director, Professional Services, for their assistance. Mr. O'Connor asked that the profession continue to support the Association and reminded members not to forget the Association when they made Wills either for themselves or for clients.

This concluded the business of the meeting and the President declared the meeting closed.

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Law Society Survey of the computerisation of Solicitors offices

Last year the Technology Committee carried out a very detailed survey of computerisation in solicitors' offices. Approximately one sixth of the firms answered all of whom had computerised except one firm which intended to. The firms were on average small firms with three secretarial staff. There were some major changes from the previous survey. Phillips had fallen from being a leader to quite a low position. The lead equipment had now become IBM and IBM compatible Personal Computers, with Wang very closely behind. The other manufacturers were widely spread, with Olivetti emerging as a name trying to catch up with Phillips.

Operating Systems

The number of users tied into proprietary operating systems had fallen to approximately 25%. The majority used the personal computer operating system PCDOS/MSDOS. A good percentage had switched to Unix/Xenix – just over 6%. The conservatism (or satisfaction of the users) of the profession was shown by the fact that 7% of users used an operating system (and obviously the original equipment) that has not been current for seven years. Networking was also making headway with 4.5% of users.

Accounting Systems

Less than a quarter of those who had computerised had installed accounting systems. Of those who had, only a third had time costing and a quarter had payroll or spreadsheets. Apart from the numerous enquiries to the Society, the results show that there is obviously a need for accounts packages to be further developed to meet the needs of the profession as the profession perceives them. There appears to be dissatisfaction or ignorance of what is available to the smaller and medium sized user.

"Less than a quarter of those who had computerised had installed accounting systems".

Benefits to the profession

Over two thirds of those who replied stated that they intended to upgrade and buy new equipment within the next few years. It would appear that the profession is about to go through a second phase of computerisation. This must be good news for suppliers who are keenly aware that the next time around, users are much easier to deal with as they are more computer literate, and tend to buy a lot more equipment than the first time. Three quarters of the users stated that they had benefitted from computerisation, and nearly half of those had reduced staff ratios as a result of it. The firms had an average of 2.1 computers, one computer for each 1.47 of staff.

" . . . the profession is about to go through a second phase of computerisation".

The day where every member of the staff has his own computer is fast approaching.

Regional results

Some of the regional results were surprising. There was a very poor response from County Dublin; Wicklow, Kerry, Meath, Limerick, Wexford and Waterford (in fact most of the seaboard counties) being highly computerised, some with one computer for every member of staff, and some inland counties such as Cavan, Leitrim, Monaghan and Offaly having only one computer to three or four members of staff. There were two counties that didn't appear to have any computers at all.

Other results

The above are only some of the result of the survey. There were very detailed questions on training, support, maintenance, and reliability. There were also questions on software such as case processing, litigation support etc. The results of the survey have been fed into a database, and reports on particular aspects of interest can be generated on a national basis, and also on a local county basis. The suppliers who are accredited to the Law Society can obtain these reports on request. □

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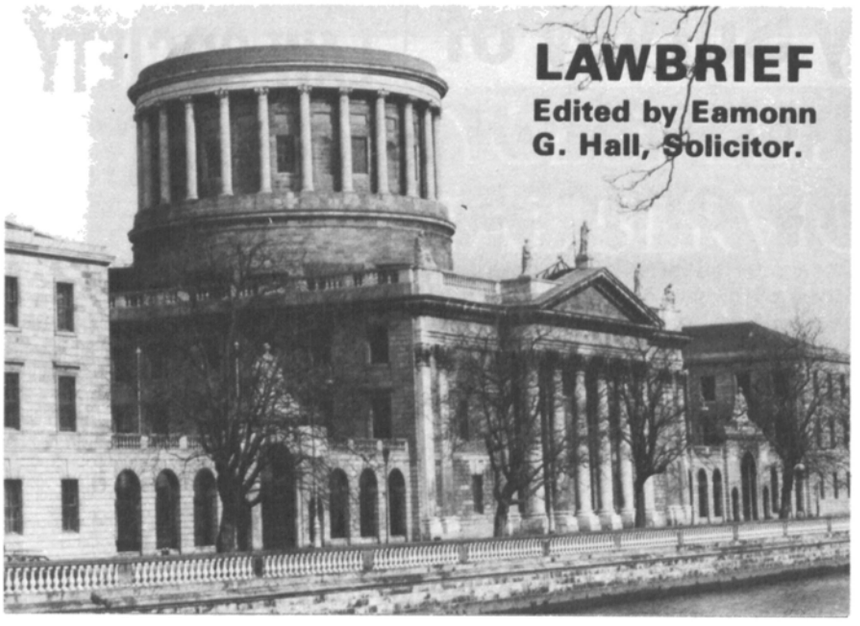
STAMP DUTY ON NEW LARGE HOUSES

The attention of the Revenue Commissioners has been drawn to a newspaper report which could be read as suggesting that the new stamp duty legislation affecting the purchase of new large houses will not affect people entering into contracts prior to 1 September, 1990.

The Commissioners are concerned that arising from this report, people may enter into contracts for the purchase of new houses without being fully aware of the implications of the new legislation. In particular, the Commissioners wish to draw attention to the fact that contracts, involving the purchase of houses in this category, will come within the scope of the new legislation if they are concluded (i.e. if the sale is closed) after 1 September irrespective of the date on which the contract is signed. The application of the new provisions will be determined, not by the date of the contract, but by the date on which the conveyance of the property is completed.

Revenue Commissioners



Fair Trade Commission Report

The **Report of Study into Restrictive Practices in the Legal Profession** was published by the Fair Trade Commission on July 5, 1990. The report will be studied by the Council of the Law Society and, after canvassing the views of members, a submission will be made in due course to the Minister for Industry and Commerce.

In a statement on July 6, 1990, the Law Society stated that it reserved its views on the report but made the following comments:

"The Law Society shares with the Commission and the Minister a concern that the public have access to a modern, efficient and effective legal service at reasonable cost. This has been reflected in the many changes implemented by the Law Society on behalf of its members in recent years.

These changes include freedom by solicitors to advertise their services as well as advances in the education and training of solicitors – there are now four times as many solicitors as there were in the 1970s.

The Law Society has also called for an increase in the jurisdiction of the District and Circuit Courts, subject to the provision of the required back-up services. The Law Society has, for many years, sought the establishment of a Small Claims Court.

The Law Society is on record as welcoming lay representation on its Disciplinary Committee.

In addition to its Compensation Fund to protect the public, the Society has been successful in ensuring that the vast majority of solicitors carry Professional Indemnity Insurance.

Solicitors by their actions have shown that the interests of the public are their primary concern and therefore can be counted on to participate wholeheartedly in all positive changes in the law and the practice of the law".

Certain communications between a lawyer and client are not privileged.

The case of *Smurfit Paribas Bank Limited -v- AAB Export Finance Limited,* (*The Irish Times Law Report*, 11 June, 1990) raised important aspects of the law and practice relating to privilege and discovery. The Supreme Court (Finlay CJ, Walsh and McCarthy JJ) held that communications between a lawyer and his client for the purpose of seeking or obtaining legal assistance – as distinct from legal advice – were not privileged from disclosure.

The Supreme Court so held in dismissing an appeal by the defendant against an order made by Costello J in the High Court on March 13, 1989 directing the further discovery of all correspondence or other instructions passing between the defendant and the solicitors then acting for the defendant in relation to the defendant's floating charge which was in issue in the proceedings.

Finlay CJ agreed with Costello J's conclusion that the documents in respect of which privilege had been claimed did not request and did not contain any legal advice about the proposed transaction, that they contained references to the instructions which the defendant's solicitors received from the defendant and further instructions and clarifications of instructions given by the defendant and the solicitors and that these instructions were given to enable the defendant's solicitors to draft the documentation necessary to complete the transaction or later to advise on draft documents which other parties to the transaction might prepare for their consideration.

In his judgment, Finlay CJ said that in order to determine whether documents were privileged from disclosure it was necessary to ascertain what were the underlying principles of the doctrine of privilege of communications between a client and his lawyers. The question as to whether a party to litigation would be privileged to refuse to produce particular evidence was a matter within the sole competence of the Courts. It was for the Courts to decide which was the superior interest in the circumstances of the particular case and to determine the matter of privilege from disclosure accordingly. The existence of a privilege or exemption from disclosure for communications made between the person and his lawyer clearly constituted a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which, in the interests of the common good, was desirable for the purpose of ascertaining the truth and rendering justice. Such privilege should, therefore, only be granted by the courts in instances which had been identified as securing an objective which, in the public interest in the proper conduct of the administration of justice, could be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts.

The Chief Justice stated that for

the expansion of the privilege from cases of actual or contemplated litigation to cases of communication seeking legal advice and/or assistance to be justified, it was necessary that it should be closely and proximately linked to the conduct of litigation and the function of administering justice in the Courts.

A communication made between a person and his lawyer as such for the purpose of obtaining from such lawyer legal advice whether at the initiation of a client, or the lawyer, should in general be privileged or exempt from disclosure except with the consent of the client. However, communications made to a lawyer for the purpose of obtaining his legal assistance other than advice were not privileged as they could not be said to contain any real relationship with the area of potential litigation. There was insufficient public interest or feature of the common good to be secured or protected which could justify an exemption from disclosure of such communications.

Walsh J concurred with the judgment of Finlay CJ. McCarthy J also agreed that the appeal should be dismissed.

Subjective standard for references

The Court of Appeal (England and Wales) Mustill, Ralph Gibson and Nicholls LJJ (*The Times*, June 25, 1990) held in the case of *Wishart -v- National Association of Citizens Advice Bureaux Ltd.* that where an offer of employment was made "subject to receipt of satisfactory written references", the question whether the references were satisfactory was likely to be one for the prospective employer to decide subjectively, without the application of an objective standard.

The Court of Appeal so stated in allowing an appeal by the defendant, the National Association of Citizens Advice Bureaux Ltd. from Mr. Philip Cox, QC who, sitting as a deputy High Court Judge, on the application of the plaintiff, Turham Wishart, on the same day that the writ was issued and before a statement of claim had been served, had on May 11, 1990 made interlocutory orders:

(i) restraining the defendant from advertising a vacancy for the post of information officer with responsibility for welfare rights or appointing any person other than the plaintiff to such post, and

(ii) requiring the defendant forthwith to provide the plaintiff with employment in that capacity.

The order was stayed pending the defendant's appeal.

Mustill LJ stated that the plaintiff, who had worked in Citizens Advice Bureaux since 1986, applied for the post advertised by the National Association. The job, which would involve providing central expertise on welfare rights, was likely to be a demanding one which would require regular attendance.

In due course the plaintiff was offered employment "subject to receipt of satisfactory written references".

The defendant took up the references supplied by the plaintiff. Following what was said in one of the references, the defendant became concerned at what it regarded as a poor record of

Presentation to Master David Bell, Taxing Master, on the occasion of his retirement, January, 1990. (left to right) Ernest Margetson, President of the Law Society, Master David Bell, Taxing Master, The Hon. Mr. Justice Liam Hamilton, President of the High Court, Master Toirleach de Valera, Taxing Master, and Michael Neary, County Registrar (Dublin).

attendance by the plaintiff in his previous employment, which appeared to be connected with ill health. After further enquiries and discussions within the national association, the defendant on April 5, 1990 withdrew the offer of employment.

The first issue was whether an unconditional contract of employment had been concluded. The defendant contended that there was no concluded contract.

In response, the plaintiff said, *inter alia*, that it was not enough that the defendant found the references unsatisfactory. The test was an objective one, and the facts must have been such that a reasonable employer would have regarded the references as not satisfactory.

Mustill LJ said that there was no direct authority on that point, and it could be argued that cases such as *Diggle -v- Ogston Motor Co.* (1915) 84 LJ KB 2165 and *Astra Trust Ltd. -v- Adams and Another* [1969] 1 Lloyd's Rep 81, which dealt with "satisfactory" in other contexts, were distinguishable.

However, Mustill LJ's strong inclination, without finally deciding the matter one way or the other, was that "satisfactory" should be given a subjective meaning in the present context.

Mustill LJ considered that there was, however, no doubt that the Judge of first instance misdirected himself in regard to the second issue, which was whether the judge should have made the interlocutory order that he did.

Counsel for the plaintiff relied on *Powell -v- Brent London Borough Council* [1988] ICR 176. In that case, because of the special facts and, as the court specifically said, by way of exception to the general principle that specific performance of contracts of service would not normally be ordered, the Court of Appeal granted an interlocutory injunction restraining the council from re-advertising the post in which the plaintiff was already working.

The question was not whether it would be reasonable for the defendant to employ the plaintiff, but whether it should be forced against its will to employ him. Mustill LJ stated that the present case was far different from *Powell* because, *inter alia*, there was no established employment relationship in which there was trust and confidence and which all parties were happy to continue. Instead, there was a stillborn relationship to which one party objected.

The Court of Appeal considered that the plaintiff would therefore be most unlikely to obtain a final injunction at trial. For that reason, in addition to the questionable nature of the plaintiff's position on the first issue, the appeal should be allowed and the judge's order discharged.

Ralph Gibson and Nicholls L.JJ delivered concurring judgments.

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Criminal Proceedings Evidence

Mr. J Bruton, T.D. asked the Minister for Justice in the Dail on April 25, 1990, 397 *Dail Debates*, col. 2167, if the Minister intended to introduce legislation to implement the recommendations of the Law Reform Commission in regard to the admission of business records in evidence in criminal trials.

The Minister for Justice, Mr. Ray Burke, stated that as already announced, proposals for a criminal evidence Bill were at an advanced state of preparation. The proposals provide for the admission of business records in criminal proceedings. He expected to circulate the Bill later in the year.

Community Law Centres

Mr. R. Bruton, T.D. and Mr. P. McCartan, T.D. raised the issue of Coolock Community Law Centre and the evolution of community law centres along the lines of the Coolock Centre. Mr. R. Burke, Minister for Justice at 397 *Dail Debates*, cols. 2150-51, April 25, 1990, stated that the Coolock Community Law Centre operated outside the State scheme of civil legal aid and advice and on a different basis. The Minister stated that he was not in a position to assist in the funding of the centre because the monies that were voted by the Oireachtas for the provision of civil legal aid services were for the purposes of the State scheme exclusively. Furthermore, at a time of scarce financial resources, it was incumbent on him to channel whatever public funds were available to him to the State scheme. The Minister stated that the future improvement and development of our civil legal aid service would be based on the phased expansion of the State scheme, i.e. mainly through an increase in the number of law centres operated by and under the control of the Legal Aid Board. The Minister was satisfied that this was the proper way to proceed but, of course, progress would depend on financial circumstances.

Family Mediation Service

Mr. S. Barrett, T.D. asked the Minister for Justice in the Dail on April 25, 1990, 397 *Dail Debates*, cols. 2179-80, if he would make a decision regarding the future structure and operation of the family mediation service, arising out of the report which he received from the committee in September 1989 containing recommendations for setting up such a permanent structure.

The Minister for Justice, Mr. Ray Burke, stated that the State family mediation service was set up in July 1986 as a three-year pilot scheme and the steering committee of the service had submitted their report to him on the effectiveness of that pilot scheme. In the light of experience and the knowledge gained from the operation of the pilot scheme, the Minister considered that a number of wider issues needed to be examined before decisions were reached on the long-term future of the service. To assist the Minister in this matter the Minister proposed to appoint a committee to examine all the various possible options – having regard, among other things, to such matters as mediation services provided privately, quality of service, geographical distribution, cost-effectiveness, etc. – and to advise him accordingly. The

Minister would then put a proposal to Government in the matter.

The Minister stated that in the meantime there was provision in the 1990 Estimates to allow the family mediation service to continue in operation in its present form.

Court Fees

Mr. J. Bruton, T.D., asked the Minister for Justice in the Dail on April 25, 1990, 387 *Dail Debates*, cols. 2263-2264, the overall percentage increase in each category of court fee in Ireland over the last 20 years; and the way in which this compared with the rate of inflation over the same period.

The Minister for Justice, Mr. Ray Burke, stated that between February 1970 and February 1990 the consumer price index increased by 683.5 per cent.

The Minister stated that it was not possible to make a valid comparison for all categories of fees between 1970 and 1990 because of changes made over the years in the constituent elements of court fees. The following, however were figures for the more important items which could be validly compared:

Fee Category	1970 Fee	1990 Fee	% Increase
	£	£	
District Court Civil debt process	1.50	10.00	566
Application for liquor licensing extension	3.00	20.00	566
Circuit Court Civil bill process	3.50	25.00	614
Application for licensing declaration	11.00	60.00	445
High Court Originating summons	8.00	60.00	650
Notice of motion	0.75	10.00	1233
Setting down action for trial	6.00	50.00	733
Probate Office			
Fee on estate of £10,000	24.50	30.00	22
Supreme Court Notice of motion of appeal	7.00	50.00	614

Chief State Solicitor's Office

Mr. J. Bruton T.D. asked the Taoiseach in the Dail on May 1, 1990, 398 *Dail Debates*, col. 27-28, if the review of the staffing needs of the Chief State Solicitor's Office referred to by the Taoiseach in reply to Parliamentary Questions nos. 2 and 3 of 14 November 1989 was complete; and if there had been any reduction in the delays in producing books of evidence since that date.

The Taoiseach, Mr. Haughey, stated that the recruitment of 15 additional solicitors and 13 extra law clerks to improve the staffing position in the Office of the Chief State Solicitor had been approved. Of these, six solicitors and three law clerks had taken up duty and the recruitment of the remainder was in hand.

Since the assignment of the additional staff, the Taoiseach stated there had been a progressive and substantial reduction in delays in the production of books of evidence. The Taoiseach stated that most books of evidence were now being prepared within the normal time limits regarded by the courts as appropriate for that purpose. □

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MEETING OF SECRETARIES OF LAW SOCIETIES OF IRELAND, SCOTLAND, ENGLAND AND NORTHERN IRELAND

Front row, left to right — Ken Pritchard (Scotland), Sue Bryson (Northern Ireland), Ernest J. Margetson (President, Law Society), Sandra Fisher (Media Officer, Law Society), James J. Ivers (Director General, Law Society).

Back row, left to right — Michael Davey (Northern Ireland), Andrew Lockley (England), John Hayes (England), Pat Riddell (Scotland), John Randall (England), Prof. Richard Woulfe, Prof. Laurence Sweeney, Chris Mahon, P. J. Connolly and Noel Ryan (Law Society).

SOLICITORS AND BARRISTERS OF THE MIDLAND CIRCUIT AT ROSCOMMON COURTHOUSE, OCTOBER 1989

Front row, left to right — Margaret Nerney B.L., Colm Smith B.L., Fergus O'Hagan B.L., His Honour Judge Matthew Deery, Mr. Anthony McCormack, County Registrar, Ray Groarke B.L., Olive Buttimer B.L., Edward Walsh B.L.

Second row, left to right — John Phelan B.L., John Shortt B.L., Cormac Cawley B.L., Chris Meehan B.L., Mary Faherty B.L., Dara Foynes B.L., Eileen O'Leary B.L., Suzanne Nerney B.L. and David Gilvarry B.L.

Third row, left to right — Liam Brandon, Marie McManus, Dermot Neilan, Paul Connellan, Delia Flynn B.L., Clare Duignan, Val McCrann, Esmond Keane B.L., Lorraine Scully, Brian Neilan and John Sweeney.

Back row, left to right — Peter Jones, Kieran Madigan, Roderick McCrann, Robert Potter Cogan, Hugh Sheridan, Gerard Gannon, Dermot MacDermott, Rebecca Finnerty, Gerry Neilan, John Dillon Leetch, Padraig Kelly and Terry O'Keeffe.

SOLICITORS FINANCIAL SERVICES

Presentation to Mr. Frank Gleeson, Solicitor, Thurles, Co. Tipperary, to mark his achievement as the highest earner under the Scheme in the period ending 30 June, 1990. Left to right — Peter Prost, Sedgwick Dineen, Ernest J. Margetson, President, and Frank Gleeson, Solicitor.

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LAND REGISTRY:

Memorandum of meeting which took place at the Law Society on Thursday, 31st May 1990

Attendance:

Ms. Catherine Treacy,
Registrar of Deeds and Titles.
Ms. Maeve Hayes, Chairman of the Conveyancing Committee.
Mr. Rory O'Donnell.
Mr. William Fallon.
Mr. Thomas D. Shaw.

The meeting was convened at the request of the new Registrar of Titles to consider the position in the Land Registry and Registry of Deeds, and to establish a good working relationship between the Law Society and both Registries.

Mr. Shaw gave a resume of the position at the Law Society end including the preparation of the paper on the proposed reconstitution of the Land Registry as a Public Corporation which had been prepared in November 1988 and the meetings and negotiations which had taken place with the Department of Justice since that date. The Registrar indicated that she was familiar with and had read the paper.

Mr. Shaw reiterated that the Law Society saw their interest with that of the Registrar as being identical namely of providing a cost effective and efficient registration of title service for the public of Ireland. The Registrar agreed that this was her intent as well.

The Registrar then carried out a review of what had been happening during her first month in office:

(1) She was in the process of carrying out a review of all the different sections of the Land Registry.

(2) She had seen the arrears in each of the Departments and was setting targets as to how the arrears might be reduced.

(3) She was carrying out a review of the existing computer and the services which it could provide in the Land Registry.

(4) She had given the go ahead to a meeting, which had since taken place, between senior personnel in the Dublin Region with the Dublin Solicitors Bar Association through their representatives Mr. David Walley and Ms. Christine Scott to review the existing situations.

What she was setting about doing was having a strategic plan for the future of the Land Registry drawn up. In this she would take into account the existing capacity of the computer system in the Land Registry, the progress which had been made in relation to the Law Link which had been envisaged, and the future as she saw it for registration of title in the country. She confirmed that outside consultants were to be involved in the drawing up of this plan.

She was of the opinion that she would be in a position to talk to the Law Society representatives in the Autumn and she indicated that she welcomed any in-put that they had to make from their expertise. Mr. Shaw indicated that he would request Mr. Frank Lanigan, who had done very considerable research into the Land Registry, to contact her and to make available any information that he had at his hand and she said that she would welcome this.

The meeting then considered the position in relation to the existing problems which were arising in the Land Registry and the Registrar's proposals for the alleviation of these problems. Amongst the areas discussed were as follows:

(1) **Folios and File Plans:** Delays in the issuing of File Plans were discussed. The Registrar indicated that she had carried out a review of this area. An enormous number of applications had to be rejected or queried because of incorrect information disclosed on the application, most notably name of registered owner stated not compatible with County and Folio Number stated. The Registrar's proposal was to introduce a new type application form. The name of the registered owner would not appear on this form. The folio number and County on the application form would be the one issued. The Conveyancing Committee were in total agreement with this. As a result of this and other changes which she had brought into effect, she hoped that within a six to eight week period a folio and file plan would be available within one week of being bespoken. This time span applied to 80% of the File Plan applications. In the remaining 20% of cases where the reconstruction of a map was necessary before the issue of a file plan could take place, obviously it was harder to give a definite time turnover. The Committee totally welcomed this.

(2) She had considered the suggestion of the Society that a float or direct debit system be in place so as to enable 25% of dealings which were rejected because of incorrect fees to be dealt with within the Registry without having the total dealing rejected. This aspect would form part of the overall review by the consultants mentioned above.

(3) She was aware of the existing requests for priority service for commercial transactions or for building estates. She saw problems with creating a priority service but indicated that this was a matter which could be looked at at a later stage. In the meantime she accepted the commercial reality that the building estate which was going to provide 500 houses should be registered as soon as possible.

(4) She was quite prepared to look at an increase of the amount for which title could be certified. Mr. Shaw pointed out that 80% of the profession were insured at this stage and anybody insured with the Solicitor's Mutual Defence Fund had cover of £250,000 for each and every act of negligence. This could be taken into account on the same basis as the Building Societies and Banks who readily accepted Solicitor's Certificates provided that they were so insured. The Registrar pointed out of course that this covered Solicitor's errors only and that

she had to be concerned with any errors which the Land Registry might make and the Registry's responsiblility for these because of the principle of a guaranteed title by the Registry. Again further discussion on this particular area could arise at a later date.

Mr. Shaw raised the issue of delays in issuing Land Certificates. Again the Registrar explained that there were problems in relation to this because of various difficulties including locating folios when dealings are pending and issuing the Land Certificate. She was having this reviewed. Mr. O'Donnell indicated that he saw no reason why Land Certificates should be bespoken at the completion of dealings for either Banks or Building Societies and also indicated that certificates of charge were not really necessary on the completion of dealings.

Mr. Shaw raised the issue of Section 49 applications and applications for first registration. The Registrar made the point that Solicitors were tardy in replying to queries in relation to this matter. Mr. Shaw also raised the issue that it should be possible to issue a check-list of what would be required for a Section 49 application and with increased use of the Solicitor's certificate that delays could be lessened to a greater extent.

Delays in connection with the Land Commission were discussed. Mr. Shaw suggested that because the title had already been investigated by the Land Commission Solicitor's Branch that such applications for Land Commission documentation was not necessary. The Registrar asked that Mr. Shaw should submit a paper to the Land Registry on this aspect.

The Registrar admitted that there were delays in connection with the registration of Schedules from the Land Commission but stated that it was a question of prioritising the work taking into account the availability of staff to deal with it.

The meeting also considered the delays in the Registry of Deeds which were currently running at ten weeks. At the moment there are 52,000 dealings per annum being registered but with a reduction in staff. Delays were therefore inevitable. The output in the Registry had however increased by over 5% in 1989 over 1988. The Registrar pointed out that there was an enormous number of inaccuracies arising on memorials. It was agreed that Ms. Hayes would prepare a short memorandum stating the necessary requirements for a memorial that should be circulated to all practitioners with possible precedents of memorials to lessen delays and having documents rejected because of inaccuracies. The Registrar pointed out that the intended early computerisation of the Abstracts in the Registry of Deeds will enhance the service provided.

Mr. Shaw on behalf of the Society welcomed the meeting which he found both refreshing and encouraging. The Registrar had clearly shown a very deep insight into the problems arising in the Land Registry and Mr. Shaw indicated his total and absolute support for her efforts. Equally he indicated that if representations were required to the Department of Justice he was quite prepared to make them as it seemed to him to be axiomatic that the Department would supply the necessary funds to enable the improved procedures to go ahead. The Registrar however expressed an optimism as to the future of the Registries and the resources which would be available to them based on the commitment and calibre of her staff in both Registries and her Minister's expressed committment to an improvement of the service provided in both Registries.

It was agreed that this meeting would serve as a forerunner to a number of meetings with a view to improving the Land Registry and all parties agreed to co-operate to try and achieve this improvement as soon as possible.

Roscommon Bar Association

Roscommon Bar Assoociation enjoyed its annual golf outing at Boyle Golf Club on the 30th May last. Held in ideal weather, the outing was extended to spouses of members and this year attracted almost 30 participants. John Sweeney, Roscommon, who acted as M.C., thanked all who took part and Boyle Club President Tom Callan presented the following prizes:

(a) BEST OVERALL:–
Christopher Callan (Boyle)

(b) BAR ASSOCIATION:–
Justice James Gilvarry, Judge Matthew Deery, Joseph Caulfield (Castlerea).

(c) LADIES COMPETITION:–
Mrs. Rosemary Callan (Boyle), Mrs. Olivia Kelly (Boyle).

(d) BEGINNERS COMPETITION:–
Ms. Marie Connellan (Strokestown).

(e) GUESTS COMPETITION:–
Donald Binchy (Clonmel).

A very enjoyable meal and evening followed organised by Ladies Club President, Siobhan Carlos and Joan Kelly.

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Younger Members News

YMC raises £3,000 for Solicitors Benevolent Association

The YMC has completed the annual programme of events in aid of the Solicitors Benevolent Fund, and has raised £3,000 for the fund.

The programme of events consisted of a series of table quizes in Cork, Limerick, Kilkenny and Dublin and the annual soccer blitz which featured in the June *Gazette*.

The grand final held in Dun Laoghaire was attended by the winners of the Cork and Kilkenny regional quizes. For the second year running the Kilkenny team took first place and once again proved their generosity by redonating their winnings to the fund. Further generous gestures come from Dowling Butler and Co. (second place) and Arthur Cox & Co. (third place). As tradition would have it, the final was hosted by Gerry Griffin and Mrs. Moya Quinlan both of whom contributed to the success of the event.

Many thanks to the Irish Permanent Building Society for their sponsorship, to the sponsors of the raffle prizes particularly Alan Benson of Easy Travel and finally to Sandra Fisher, Colette Carey and the Younger Members Committee. □

LIMERICK QUIZ NIGHT
(left to right) Rose Bennett, IPBS, Gerry Tutty, IPBS, Frances Twomey, YMC, and Dominic O'Keeffe, IPBS.

Limerick Quiz

The Limerick Quiz took place in Jury's Hotel on Thursday 5th April. There were thirty four teams representing all aspects of Limerick Business Life. Whilst the Irish Permanent Building Society was the National sponsors in all locations throughout the country, local sponsorship was also exceedingly generous. Jury's donated the use of their function room free and Pat Enright, Solicitor (William A Lee & Sons) was exceptional once again as Quiz-Master. Bord Telecom and Limerick Corporation tied for first prize and the Revenue Commissions came a close second. The Westair Helicopter Ride as the individual prize in the raffle was also won by a member of the Revenue. The prizes were presented by the President of the Limerick Bar Association, Margaret O'Connell. We are very grateful to her for coming along. Margaret however appeared a bit uncomfortable presenting prize money to the Revenue! A most enjoyable evening was had by all with special thanks to the IPBS for its sponsorship.

DUN LAOGHAIRE QUIZ NIGHT – GRAND FINAL
Catherine Duffy, A. & L. Goodbody and Alan Benson, Easy Travel.

DUN LAOGHAIRE QUIZ NIGHT – GRAND FINAL
WINNING TEAM (KILKENNY)
Top Row: Michael Buggy, Karl Johnston, Daniel McDonald, Gerry O'Toole (IPBS).
Front Row: Eoin McDonald, David Dunne.

Solicitors Financial Services Interim Report

The Facts:

1. Membership – 254 Firms.
2. Number of enquiries dealt with – 1,365.
3. Total commission generated £440,000.

The above is a thumbnail sketch of our position on our first birthday. After a somewhat slow start we are now pleased to report that many firms of Solicitors are availing fully of the Scheme and are generating substantial income for themselves.

Regrettably that is not true of all Members. Many still believe that business will be self generating. This is not so. The Solicitors successfully participating in the Scheme are those who have taken the opportunities available to them to sell the products to their clients and have reaped the rewards accordingly.

The Company's subscription year ends in September next so we hope that if you have not used the service already, or not enough, you should get value before the end of September.

FRANK DALY
Chairman,
Solicitors' Financial Services.

Insurance Act 1989 Code of Conduct for Insurance Intermediaries

Status of Intermediary:

An Insurance Intermediary shall:

1. Act with the utmost good faith and to the highest standards of professional integrity in his dealings with clients, insurers, fellow insurance intermediaries and members of the public.
2. Observe all statutory and other legal requirements.
3. Ensure that the interests of the client are paramount and in particular:
   (a) ensure that the advice given in relation to proposed contracts of insurance is appropriate to the needs and full resources of the client;
   (b) ensure that the client is given promptly information as to the suitability, scope and limitations of any insurance contract under negotiation;
   (c) recognise the privileged nature of the relationship with the client;
   (d) assist the client, where requested, in the completion of insurance proposals drawing his attention to the necessity of full disclosure of all relevant facts and explaining the consequences of non-disclosure;
   (e) ensure that any contract of insurance recommended to a client is in the best interest of the client and disclose any potential conflicts of interest to the client and the insurer;
   (f) furnish the contract of insurance and all documentation relating thereto to the client forthwith on receipt thereof from the insurer;
   (g) not impose any charge on the client in addition to the insurance premium without disclosing the amount of such charge;
   (h) where notification of a claim is accepted from a client inform the insurer, without delay, thereof and advise the client promptly of the insurer's requirements concerning the claim.
4. In dealing with insurers:
   (a) observe the privileged nature of the relationship between insurer and intermediary;
   (b) remit to the insurer premiums collected from the client in strict accordance with the terms agreed between the insurer and the intermediary.
5. Ensure that all advertisements are legal, honest and truthful and comply with the Advertising Standards Authority of Ireland general code on advertising and the specific codes on advertising and illustrations agreed by the insurance industry.
6. Ensure that the separate client bank accounts required under Section 48 of the Insurance Act, 1989 are properly maintained.
7. Ensure that this Code of Conduct is displayed in a prominent position in the public area of all his business premises.

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Incorporated Law Society of Ireland Apprenticeship Procedures

The Law School of the Incorporated Law Society gives notice to the Profession that as and from Monday 5th March 1990 the following procedures will apply in respect of application for permission to become Apprenticed and the Lodgment of Indentures.

All applicants to enter into Indentures of Apprenticeship, in order to be eligible to become apprenticed, must submit to the Law School the following:

1. A formal application for permission (standard form obtainable from the Law School).
2. Evidence of having passed the First Irish Examination.
3. Original Birth Certificate.
4. Character Reference.
5. Evidence of Degree or of having passed or been exempted from the Society's Preliminary Examination. (This is an Arts type Examination not to be confused with the Final Examination – First Part).

On receipt of this formal application the Law Society administration will request the prospective apprentice to attend for interview.

Subject to such interview, and any inquiries which need to be made, being satisfactory, a letter will issue from the Society granting permission to the applicant to enter into Indentures of Apprenticeship.

Not later than six months from the date of such letter of consent the apprentice must lodge with the Society the following:

1. The executed Indentures of Apprenticeship.
2. A copy of the letter of consent.
3. A remittance in the amount of £350 for the Registration fee.

It should be noted that before any person can be considered for a place on any Professional Course such applicant must either have passed or been declared to be exempt from the Final Examination – First Part and also have entered into Indentures of Apprenticeship.

University graduates are advised to apply for permission to enter into Indentures of Apprenticeship as early as possible provided they have passed their First Irish Examination.

BECOMING APPRENTICED

In order to become apprenticed applicants must satisfy the following requirements:

1. They must be over the age of seventeen years.
2. They must have obtained the written consent of the Society to enter into Indentures of Apprenticeship.
3. They must by a degree holder in Law or Arts from an Irish or United Kingdom University or be the holder of an equivalent degree acceptable to the Education Committee.

   or

   They must be a Law Clerk of not less than seven years and have received written confirmation from the Education Committee that their status as a seven year Law Clerk has been recognised.

   or

   They must have passed the Law Society's Preliminary Examination or have been exempted from that Examination upon application to the Education Committee. The Preliminary Examination is an Arts type examination in the use of English (with an English essay), General Knowledge, and Government and Politics.
4. Most applicants for apprenticeship are degree holders, and, accordingly, any degree holder who has also passed his or her First Irish Examination is strongly encouraged to make arrangements for an apprenticeship as soon as possible.
5. Applicants must have passed the First Irish Examination unless they were born prior to 1st October 1914.
6. The Indentures must be lodged not later than six months from the date of the consent and also not later than six months from the date of execution. Unless the Education Committee otherwise directs, service under Indentures of Apprenticeship which have been lodged more than six months from the date of their execution will be deemed to commence from the date of lodgment and not the date of execution.

NOTE: Masters and prospective masters of apprentices are reminded of the Education Committee's initiative in seeking to have each apprentice spend at least three months in the office before embarking on the Professional Course.

UNIX and Networking explained

1989 was the 20th anniversary of UNIX. Why is it that it is only now gaining acceptability and becoming such a buzz word? The main reason is that when US legislation released Bell Laboratories, the research wing of AT&T, from restrictions imposed because of their monopoly position with telephones and allowed them to license it commercially to other companies they went about marketing it widely, spending huge amounts of money. There was no great secret about what Unix did and how it operated as it was in free use in most of the American Universities for years. It was a very shrewd move by Bell Labs to license it for a nominal fee to the American Universities as when it was eventually launched on the market there were thousands of graduates who had used it.

By
Donal O'Lochlainn*

In the period leading up to the release of UNIX, most computer manufacturers were developing their own versions under licence for their own equipment. At the same time Intel were lauching their 80286 and 80386 microprocessors on the market and they wanted an operating system to work on these. Software houses were quick to see the opportunity to develop an operating system for the new cheaper hardware. Microsoft was one of the first to do this with its version called Xenix. SCO (Santa Cruz Operation) was another company which brought Microsoft's Xenix a stage further and called it SCO Xenix (Microsoft have a large share in SCO). At this stage most computer manufacturers have their own version of UNIX. This means the "new standard operating system" has many different flavours so it is not really a standard at all. IBM has Aix,

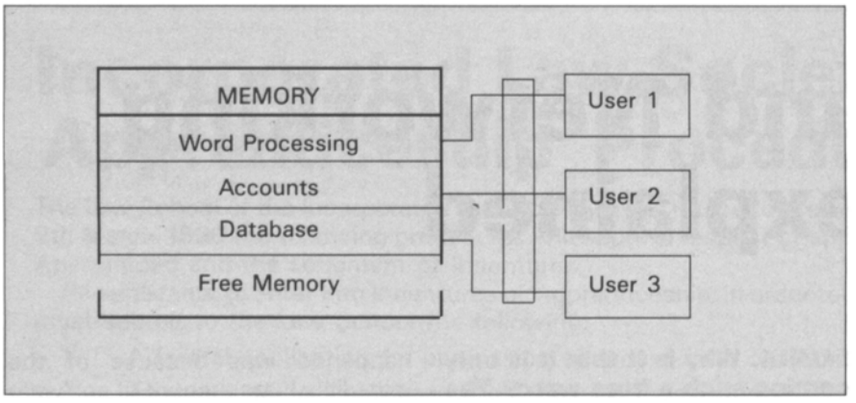
"At this stage most computer manufacturers have their own version of UNIX."

Digital has Ultrix, SCO has Xenix, Wang has Inix. My own product TOPS legal will run on both MS-DOS and Xenix, but will not run on some of the other versions of Unix. The problem with Unix is that the standard is at a lower level and really interesting features have been added to the standard operating system by the manufacturers. This is how the manufacturers gain their competitive edge. So when a software company makes use of one of these features, for example windows, in say an accounts program, then the accounts program will only run on that manufacturer's computer. So much for standards. However, life would be very boring if all computers were the same.

Prior to the release of Unix, other software houses were developing other operating systems to take advantage of the 8086 and then for the later 80286 and 80386 microprocessors. The main contender here was of course IBM in association with Microsoft with MS-DOS (MicroSoft – Disk Operating System). This operating system was very quick to establish itself as the standard. Any computer manufacturers who developed computers or operating systems which did not conform to the "IBM" standard perished or changed course. Wang is a notable case here. Even though, in my view, Wang made a far superior computer, it was forced in the end to adopt the "IBM Compatibility" tag. The main reason that this happened was because of the incredibly huge amount of software being developed for the IBM standard. These packages included word processing, spreadsheet, project management, ideas processors, databases, communications, desktop publishing, . . . the list is endless. Wang users were deprived of all these packages except in a relatively small number of cases. On the hardware side also, manufacturers were making pieces of equipment that did weird and wonderful things like read books directly into the computer, talk, make telephone calls, control machines . . . etc. Here also these were not available to unfortunates, myself included, who did not buy the standard.

So today where do we stand at the microprocessor end of the computer market? Should we go for UNIX or should we go for MS-DOS? Before I answer that question let us look at how the two operating systems differ.

UNIX is a multi-tasking system. Most people will tell you that this means that several tasks or programs run at the same time. However, this is not the complete truth. What happens is that UNIX allows several programs to be in memory at the same time, but they do not all run at the same time. What UNIX does is "visit" on each program in memory and perform a few instructions before visiting on the next program and perform its next few instructions. If the number of programs is small and if the computer is fast enough, the user will not notice any delay as his turn comes around so often he thinks he has the whole computer to himself. So on a UNIX computer you could have a person using word processing, another person using accounts and someone else using database all at the same time. All programs are in memory at the same time and the computer cycles



around visiting on each application doing all the work required of each user.

MS-DOS works differently. It was designed as a single user system with only one application program in memory at any one time. This means that if you want to run word processing and accounts at the same time you require two computers. It means that if you have a legal precedent on one computer it is not available to someone on another computer unless it is copied from one to the other by means of a floppy disk. Single user PCs have serious disadvantages in a legal office when it comes to office integration, as a user's work is 'marooned' on his computer. However, they have one great advantage – they are very much cheaper and systems of working can be developed in an office to reduce if not overcome the integration problems.

" . . . on a UNIX computer . . . all programs are in memory at the same time."

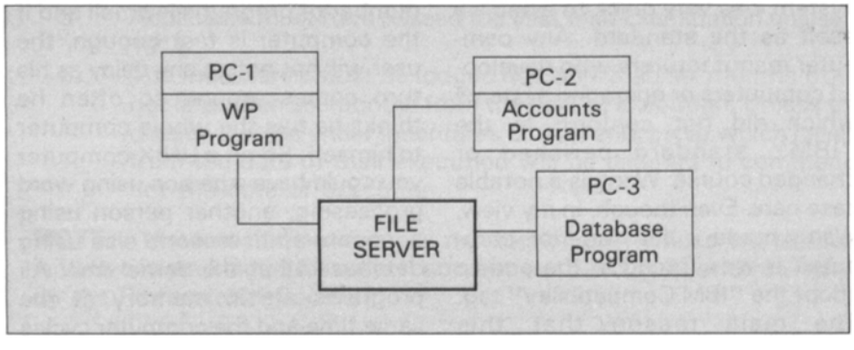
One man's problem is another man's opportunity. The solution to this isolation problem was NETWORKING. Digital Equipment Corporation (DEC) was one of the first to do this with its very popular PDP and VAX range of mini computers and others used the idea for the PC. With the most straight-forward networking system you have a central computer which stores all the data called a "FILE SERVER". You then link each PC to the file server. Data on the file server can now be shared by all PCs linked to the file server.

From a user's point of view there is no real difference between a networking system and a UNIX system as the operating system is transparent to the user. This means that the user, for example a typist, only sees the word processing package and rarely sees anything of the operating system. However, the main difference between the two is that the networking system has a vastly superior choice of software. This is beause it is MS-DOS based and there are literally millions of MS-DOS users all over the world. In general, any program that runs on MS-DOS will run on a network.

" . . . the main difference between the two is that the networking system has a vastly superior choice of software."

If you require two users to use the same data concurrently, purchase the multi-user or networking version of the package. If this is not a requirement, you can use the single user version happily without any problems.

It is not correct to say that an MS-DOS based networking system does not handle file and record locking. This problem only occurs when two or more people try to use a single user version of a program designed for use on a single PC (like Lotus 123) on a network. Most software companies now provide both a single user and a multi-user verison of the programs. However, single user versions can be used by several people only if one person is allowed to use it at a time. If this can't be done you must purchase a multi-user version of the package.



Solicitors Golfing Society Spring Meeting – Captains Prize

The Spring Meeting of the Society was held at Portmarnock Golf Club, Dublin, on Friday the 18th of May 1990.

Unfortunately, because of tight restrictions on numbers, it was not possible to accommodate all who wished to play; nonetheless, there was a full turnout and seventy members of the Society competed for the Captain's Prize.

The results were as follows:–

Captains Prize: Noel Tanham
Winner – Kevin Byrne (nine) 38 points
Runnerup – Patrick Reidy (eight) 36 points
Third Prize – Cyril Osborne (fourteen) 36 points

St. Patricks Plate: (12 & under)
Winner – Owen O'Brien (eight) 35 points
Runnerup – Tom Shaw (five) 34 points

Handicaps 13 and Over:
Winner – Frank Johnson (13) 35 points
Runnerup – Noel Smyth (15) 34 points

First Nine:
James Walsh 19 points

Second Nine:
Paul Connellan 20 points

RICHARD BENNETT,
HON. SECRETARY

How do the two operating systems compare from a performance point of view? To explain this we will use an example of someone typing a document on both systems.

As the typist presses each key, the computer is continually monitoring the keyboard to see what key the typist presses, so when the typist presses "W", the computer interprets this and then displays a "W" on the screen, and so on for all letters in the document. The computer also watches for when the typist reaches the end of a line (by counting the number of letters on a line) and automatically reformats so that the start of the word goes onto a new line. A lot more work is done by the computer as the typist corrects mistakes, displays different parts of the document and formats the document. Now let's assume that there are five typists.

On a UNIX computer all this work is done by the one computer. This means that:—

there are five copies of the word processing program in memory;

there are five different documents in memory;

the computer cycles to each typist and gives each a slice of time to keep his screen up to date with his typing;

the limiting factor is the memory size of the computer and the number of typists.

On a network each typist has a whole PC to himself. This means that:—

there is less work being done collectively by each PC;

the processing is going on independently and simultaneously;

there is no delay on one computer keeping all the other typist's screens up to date as each PC keeps its own screen up to date;

the limiting factor for each typist is the speed of his PC;

What happens when the typist decides to write the document to disk?

Here both systems have approximately the same amount of work to do. However, new limiting factors come into play. On a network it is the speed with which the PCs can send data to the file server and the speed with which the file server can write to disk. On the UNIX computer the limiting factor is the speed with which it can write to disk and the number of users using the computer requiring their screens to be refreshed.

One person writing to disk on a network will not affect the typing on another person's PC. However, on a UNIX system the computer has to wait for the physical movements of writing to disk, which is slower than keeping screen displays refreshed so there is a degradation in performance whenever there is disk reading and writing on a UNIX computer.

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Ask anyone which is the best word processor and the answer will invariably be his own. It is the same with operating systems. UNIX users swear by UNIX and networkers do likewise. However, when comparing you must compare like with like. There is no point in saying that a particular network is slow if you have a super fast file-server and the PCs attached to it are slow when the PC's speed is the limiting factor. Similarly, you cannot say UNIX is slow if the computer is not fast enough or there are too many users competing for the resources of the one computer.

"My own view is that networking is the way to go."

My own view is that networking is the way to go. The range of software is by far the greater and the economies of scale mean less expensive software. If the file server is fast and the PCs are chosen carefully for their use, the unit user cost is less. Also you can build now for a network by choosing stand-alone PCs and coping with the integration problem in the short term. (I have just ordered a networking system using a Digital VAX mini computer as a file server with three 80286 single floppy workstations).

In a recent article in this *Gazette* Mr. Frank Lanigan was very dismissive of Networking systems claiming they were single user in concept and that everyone using them acts independently. This is completely untrue as I am aware of several firms of solicitors (among them some of the largest firms in Dublin) who use networks and use them very well and efficiently and are very happy with them. Indeed, they would be very offended if anyone thought they experienced any of the problems outlined by Mr. Lanigan. On any system, single-user, networking, UNIX or any other, you will have chaos if everyone is allowed to operate in ignorance without structure and discipline.

When I want legal advice, I go to my solicitor. When I want accounting advice, I go to my accountant. When I want computing advice I ask my colleagues, whom I know to be independent. However, my experience, shows that less than 2% of solicitors consult with an independent computer consultant and that most solicitors choose their computer systems from recommendations by other solicitors.

" . . . less than 2% of solicitors consult with an independent computer consultant . . . ."

This is not entirely wrong, but your plans for your firm are not necessarily the same as your colleague's plans for his.

On a recent visit to the Cebit Computer Fair in Hanover, I was very interested to learn that the majority of German lawyers purchasing computer systems (not simply PCs for word processing) were going for networking solutions rather than UNIX as they believe simply that one processor could not work as fast as several processors on a network. They are planning for the day when every person in the firm will have a PC or terminal on his desk, from the most senior partner to the most junior clerk; when they can take their work home, to court, to a client or abroad on a portable PC and simply report back to base over a modem whenever necessary. Despite their high spending power, less than 10% of German lawyers have gone beyond the PC word processing stage as yet. However, with the coming of 1992 and the social charter, German secretarial costs are set to rise and as a consequence office automation systems are becoming more common. The systems being chosen are on networks rather than UNIX.

* *Donal O'Lochlainn has an M.Sc. in Computer Science from Trinity College, Dublin. He is a computer consultant and specialises in software solutions for the legal profession. His software product TOPS Legal is now installed in 20 firms in Ireland. He is M.D. of TOPSOFT Ltd., Fermoy (025) 32344.*

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Medical Research is also an important element of the College's activities. Cancer, Thromboses, Blindness, Blood Pressure, Mental Handicap and Birth Defects are just some of the human ailments which are presently the subject of detailed research.

The College is an independent and private institution which is financed largely through gifts, donations, and endowments. Your assistance would be very much appreciated, and would help to keep the College and Ireland in the forefront of Medical Research and Education.

For tax purposes, the R.C.S.I. is regarded by the Revenue Commissioners as a Charity. Therefore, gifts and donations may qualify the donors for tax relief.

For further information about the College's activities, please contact:

The Registrar, Royal College of Surgeons in Ireland, St. Stephen's Green, Dublin 2.

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 devise and bequeath the sum of Pounds to the Irish Cancer Society Limited to be applied by it for any of the charitable objects of the Society, as it, the Society, 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
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.

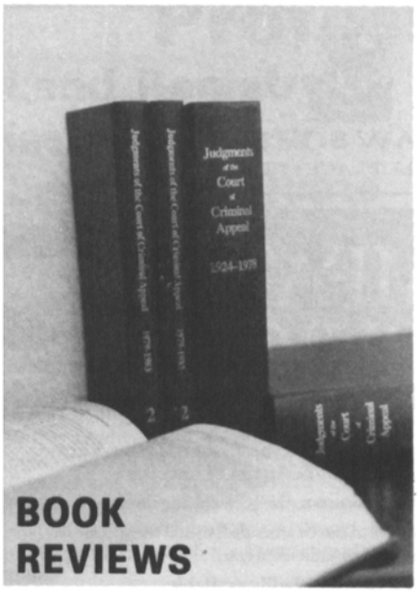
Emma, a bright-eyed, chatty, two-year-old, is one of our younger members awaiting a kidney transplant.

'WHEN YOU HAVE A TRANSPLANT YOU ARE ABLE TO LIVE'

Bequests/Donations, however small to:

IRISH KIDNEY ASSOCIATION, DONOR HOUSE, BALLSBRIDGE, DUBLIN 4.
Phone: (01) 689788/9

or **Account 17193435, BANK OF IRELAND, 34 COLLEGE GREEN, DUBLIN.**



TELEBANKING, TELESHOPPING AND THE LAW.
Edited by V. Poullet and C.P.V. Vandenberghe [Kluwer. 1988, xi + 388 pp. DFI.162 or US Dollars 86]

FREEDOM OF DATA FLOWS AND EEC LAW.
By Paul Hansen and others. [Kluwer.1988. x + 131pp. DFI 101 of US Dollars 57]

ADVANCED TOPICS OF LAW AND INFORMATION TECHNOLOGY
Edited by C.P.V. Vandenberghe. [Kluwer. 1989. xii + 260 pp. DFL. 138 or US Dollars 74]

KNOWLEDGE BASED SYSTEMS IN LAW
By A.W. Koers and Others. [Kluwer. 1989. xvi + 191 pp DFL. 76 or US Dollars 41]

We are in the throes of a silent revolution. The integration of computers in the telecommunication network described as digitisation – the encoding, transformation and transmission of any information, voice, data, and visual messages as bits – is transforming the way people communicate. Transaction services, such as home shopping, home banking, and electronic mail, will shortly be available via the telephone.

The Commission of the European Communities, Directorate General X111 (Telecommunications, Information, Industries and Innovation) has established a Legal Advisory Board on the Information Market comprised of a number of experts from each Member State. The Legal Advisory Board was given the task of analysing the legal conditions pertaining to the creation and development of a real common information market taking into account the possibility of specific Community action and the barriers which have arisen due to diverging national legal approaches.

In December 1985, D.G. X111 of the Commission requested the Centre de Recherches en Informatique et Droit of the Facultés Universitaires de Namur in Belgium and the Computer/Law Institute of the Vrije Universiteit, Amsterdam, to carry out a study of the legal aspects of consumer-oriented telebanking and teleshopping and to bring recommendations for action by the Community to the attention of the Legal Advisory Board on the Information Market. *Telebanking, Teleshopping and The Law* is the fruit of this study which is also the first in a new series of books called Computer/Law, published by Kluwer Law and Taxation Publications.

Prof. Guy P.V. Vanderberghe in the preface to *Telebanking, Teleshopping and The Law* states that the importance of the study lies in the fact that consumer-oriented telebanking and teleshopping create a set of new legal problems, which present themselves in a similar way in all Member States but which are tackled differently in such a way that might cause a barrier to the Common Market.

Telebanking, Teleshopping and The Law sets out the factual context of telebanking and teleshopping. Then the legal issues relating to evidence, signature, liability, contractual problems, privacy, competition, fraud and private international law are discussed. A questionnaire presented to experts in every Member State and their replies are published in an annex. The expert consulted in Ireland was Dr. Robert Clark, Lecturer in Law, University College, Dublin – but described as belonging to the University of Dublin. In fact, Dr. Robert Clark is on the International Board of Editors and is jointed (inter alia) by the United Kingdom Editor, Professor Colin M. Campbell, Professor of Jurisprudence at the Queen's University in Belfast.

Freedom of Data Flows and E.E.C. Law contains the proceedings of the 2nd Celim Conference. The aim of Celim (The European Committee Lex Informatica Mercatoriaque) is to bring together lawyers from all spheres and all types of training working on issues concerning business law, information science law in its widest sense and specifically international law in the European context.

Advanced Topics of Law and Information Technology deals in part with the interaction between law on the one hand and the gathering, storage, distribution and reporting of data, especially, but not exclusively, by making use of computer and telecommunication technology on the other. In his contribution, "Privacy and transborder data flow", Prof. Poullet examines some recent legal issues in this area, especially in the light of the fact that through telecommunication, computer networks are borderless. In his paper, Mr. Kaspersen examines the "Standards for computer crime legislation". Professor Vivant writes on "The Challenge of Computer Law". Professor Spoor examines "Expert Systems and Copyright". Mr. Meijboom contributes "Legal Rights to Source Code". "Product Liability for Software in Europe – a Discussion on the E.C. Directive of 25 July 1985" is the title of the chapter contributed by Mr. Stuurman. "The Law of the Books and the Law of the Files" (Professor Bing), "Legal Expert Systems" (Professor Martino), "Knowledge Representation and Legal Expert Systems" (Mr. Oskamp), "Hypo: A Precedent – Based Legal Reasoner" (E.L. Rissland and K.D. Ashley) are among the titles of the remaining chapters.

The aim of *Knowledge Based Systems In Law* is to report on research concerning theories and methods for developing knowledge-based systems in law which were conducted at the Faculty of Law, University of Utrecht, the Netherlands. This is the most technical of the four books in the present series. However, the authors state honestly in the preface that it is their intention to

share the expertise and results of about two years of work with the larger community of researchers in the field so as to foster critical dialogue. There is no claim that the book presents any final conclusions or final results.

Apart from *Knowledge Based Systems In Law,* there is no index provided in any of the texts. There is no table of cases or table of statutes in any of the books. This is regretted by your reviewer.

Francis Bacon stated that "Knowledge is power". Alvin Toffler in *Future Shock* translated Bacon's dictum into contemporary terms as "Knowledge is change". Accelerating knowledge-acquisition which fuels the great engine of technology means accelerating change. To survive, the lawyer must become more adaptable and more capable than ever before. To paraphrase Toffler, much of our old law is now shaking under the hurricane impact of the accelerative thrust. The Computer/Law series published by Kluwer will assist the modern lawyer in understanding how the effects of acceleration are transforming everyday life and posing challenges to the sacred cows of the law.

EAMONN G. HALL

THE LAW SOCIETY
BLACKHALL PLACE • DUBLIN 7

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The Law Society provides a prompt and efficient company formation service based on a standard form of Memorandum & Articles of Association.

We can incorporate your Company in 10 working days.

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at Competitive Rates

PHONE CARMEL OR RITA FOR DETAILS TELEPHONE: 710711, EXT 224, FAX: 710704

Once again the **Lawyer's Desk Diary** has been a great success and arrangements are already underway for the**1991** issue.

The co-operation of both the Incorporated Law Society and the Solicitors' Benevolent Association helped to make the Diary an invaluable reference book for members.

Orders are now being accepted for the diary, which is in two formats,

Page-a-Day and **Week-at-a-Glance** as follows:-

Pre-Publication Order for the Lawyer's Desk Diary 1991. Date.....

ORDER BEFORE SEPTEMBER 1ST AND AVAIL OF THE SPECIAL PRE-PUBLICATION OFFER.

Please supply:.....**Lawyer's Page-a-Day Diary** @ £10 (+ £2.30. V.A.T.) P.&P.£3.20. = £15.50. each.
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Orders to : Oisín Publications, 4 Iona Drive, Dublin 9. Telephone: 305236. Fax: 307860.

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.
1st day of August, 1990.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

LOST LAND CERTIFICATES

Peter Curley and Maureen Curley, Folio No.: 1126L; Lands: The Long Avenue; County: **LOUTH.**

William Schofield, Folio No.: 2254 closed to Folio 25874; Lands: (1) Newtown North (2) Greenfield (3) Newtown North; Area: (1) 3A.1R.11P. (2) 5A.1R.26P. (3) 0A.3R.21P. County: **TIPPERARY.**

John Christopher Moloney, Folio No.: 43503; Lands: Townparks; Area: 0A.1R.39P. County: **CORK.**

Rose Davis, Folio No.: 6012; Lands: Woodlands; Area: 3A.2R.22P. County: **WICKLOW.**

Helena Breen, Folio No.: 8046F; Lands: Drommoher; Area: 0.327 Hectares. County: **LIMERICK.**

John Mannion, Moyloughmore, Moylough; Folio No.: (1) 8426F, (2) 8427F, (3) 8309F; Lands: (1) Part of the townland of Cloonreleagh situate in the Barony of Killian. (2) Part of the townland of Cloonreleagh situate in the Barony of Killian. (3) Part of the townland of Cloonreleagh situate in the Barony of Killian. County: **GALWAY.**

John O'Reilly, Folio No.: 16512 (revised); Lands: (1) Dromore (2) Drumacarrow (3) Drumacarrow; Area: (1) 30A.1R.20P. (2) 6A.2R.26P. (3) 0A.1R.9P. County: **CAVAN.**

James F.C. Hogg, Folio No.: 13747; Lands: Haynestown; Area: 4A.1R.38P. County: **KILDARE.**

Patrick O'Sullivan, Folio No.: 86L; Lands: Kilcoolaght; County: **KERRY.**

Herbert Fagan and Majella Fagan, Folio No.: 17004F; Lands: Castleroberts; Area: 0.540 acres. County: **LIMERICK.**

John Doyle, Folio No.: 21681; Lands: Coolballow; Area: 0A.2R.16P. County: **WEXFORD.**

Michael Fitzgerald, Folio No.: 23266; Lands: Cordal East; County: **KERRY.**

William Bell as limited owner, Folio No.: 1754F; Lands: Fontstown Lower; Area: 1A.2R.12P. County: **KILDARE.**

Patrick McGrath, Seehan, Gort, Co. Galway. Folio No.: 17040; Lands: (1) Sheeaun (Parts) (2) Sheeaun (1 undivided 1/6 part of other part) (3) Ballysheedy (Part); Area: (1) 51A.2R.19P. (2) 35A.0R.30P. (3) 13A.2R.20P. County: **GALWAY.**

Kathleen Timmins, 3 Dunluce Road, Dublin. Folio No.: 2781L; Lands: Property known as 3 Dunluce Road situate on the north side of the said road in the Parish of Clontarf and District of Raheny. County: **DUBLIN.**

Padraic O'Cathain, Carraroe, Co. Galway. Folio No.: 49690; Lands: Townland: Carrowroe South; Area: 2A.1R.24P; County: **GALWAY.**

Desmond & Catherine Hodson, Hodson Bay, Athlone, Co. Roscommon. Folio No.: 37185; Lands: (1) Barrymore (2) Barrymore; Area: (1) 2A.0R.12P. (2) 0A.0R.39P. County: **ROSCOMMON.**

Nuala McElhone, Folio No.: 5404F; Lands: Part of the Townland of Crocknamurleog. County: **DONEGAL.**

Stephen Hannon, Abbey Street, Roscommon. Folio No.: 8995F; Lands: (1) Ardnanagh (2) Ardnanagh (3) Ardnanagh (4) Lisnamuff (5) Lisnamuff; Area: (1) 0.620 hectares (2) 0.557 hectares (3) 0.177 hectares (4) 4.325 hectares (5) 0.286 hectares. County: **ROSCOMMON.**

Thomas Francis Sheehan, Folio No.: 356F; Lands: Beladd; Area: 0A.1R.5P. County: **QUEENS.**

Thomas Aherne, Folio No.: 19172; Lands: Ashfort; Area: 1A.0R.10P. County: **LIMERICK.**

Mary Woods, Folio No.: 11128F; Lands: Galbally (E.D. Ardcavan); Area: 0.456 hectares. County: **WEXFORD.**

Sean Edward McEvoy, 1 Wyattville Park, Ballybrack, Dublin. Folio No.: 6473L; Lands: Townland: Loughlinstown, Barony: Rathdown; Area: 0.061 hectares. County: **DUBLIN.**

James Dunne, Folio No.: 53; Lands: Kildangan; Area: 24A.2R.17P. County: **MEATH.**

Patrick Whyte, Folio No.: 9505; Lands: Dungooley; Area: 0A.2R.0P. County: **LOUTH.**

Olive Lambert, Dysertmore, New Ross, Co. Kilkenny. Folio No.: 8901; Lands: Newgrove; Area: 232 acres. County: **KILKENNY.**

Patrick Ryan, Folio No.: 6908F; Lands: Ballyboe Glencar; County: **DONEGAL.**

Michael Buckley (Junior), Folio No.: 2716; Lands: Doonasleen South; Area: 39A.3R.32P. County: **CORK.**

Patrick Massey Limited of 106 The Coombe, Dublin. Folio No: 48719F; Lands: Property situate to the south of Crumlin Road in the parish and district of Crumlin, City of Dublin. County: **DUBLIN.**

Peter Valentine Naughton, Abbey Park, Clontuskerb, Ballinasloe. Folio No.: 35471; Lands: Townland: Kill; Area: 72A.2R.1P. County: **GALWAY.**

John Robert Roundtree, Folio No.: 2427 closed to Folio 22860; Lands: 1. Gartnaneane, 2. Tanderagee, 3. Lisball, 4. Bracklin; Area: 1. 17A.0R.18P, 2.0A.0R.13P. 3. 1A.1R.12P. County: **CAVAN.**

GAZETTE INDICES

Indices for the Gazette for 1988 and 1989 are now available.

Cost £2.00 each (incl. postage).

Philip Craughwell, of 2 Kingston Green, Dundrum, Dublin 16. Folio No.: 63967F; Lands: Townland of Kingston, Barony of Rathdown. County: **DUBLIN.**

Seamus & Imy Kerrigan of Killimore, Kilrush, Co. Clare. Folio No.: 1372F; Lands: Townland of Burrane Lower; Area: 0a.2r.15p. County: **CLARE.**

IN THE MATTER OF THE REGISTRATION OF TITLES ACT 1964 AND OF THE APPLICATION OF PATRICK JOSEPH MARMION AND MARGARET MARMION, IN RESPECT OF PROPERTY FORMERLY KNOWN AS SITE NO. 216 LANDY'S ESTATE NOW KNOWN AS NO. 84 ORCHARDSTOWN DRIVE, TEMPLEOGUE, COUNTY DUBLIN.

TAKE NOTICE that Patrick J. and Margaret Marmion of 84 Orchardstown Drive, Templeogue, Co. Dublin have lodged an Application for registration on the Leasehold Register free from encumbrances in respect of the above mentioned property.

The original documents of title specified in the Schedule hereto are stated to have been lost or mislaid.

The Application may be inspected at this Registry.

The Application will be proceeded with unless notification is received in the Registry within one calendar month from the date of publication of this Notice that the original documents of Title are in existence. Any such notification should state the grounds on which the documents of title are held and quote Reference No. 85DN03037. The missing documents are detailed in the schedule hereto.

Dated the 11th June, 1990.

M. Ó'Neill
EXAMINER OF TITLES

SCHEDULE

Original Lease dated 27th May 1960 Manor Estates Limited to Patrick J. Marmion.

Correspondence

The Editor,
Incorporated Law Society
Gazette,
Incorporated Law Society,
Blackhall Place,
Dublin 7.

8th June 1990

Dear Sir,

I would be grateful if you would bring the following matter to the attention of members of the profession.

As part of an overall plan to improve efficiency in the issuing of copy File Plans, a new form of application has been designed. This form is being distributed to Solicitors via their Town Agents and is also available directly from the Registry free of charge. The revised form must be completed *in full* by applicants or their Solicitors, and the members co-operation in this matter will contribute to a quicker and more efficient service in the future.

Yours sincerely
CATHERINE TREACY
Registrar
Land Registry
Chancery St.,
Dublin 7.

Lost Wills

KILKENNY, Brigot, deceased, late of The Two Mile, Clonbrusk, Athlone, Co. Westmeath. Will any person having knowledge of a Will of the above named deceased please contact Tormey & Company, Solicitors, Castle Street, Athlone.

McHUGH, Thomas, deceased, late of 541 Iveagh Flats, Kevin Street, Dublin 8. Date of death 6 February, 1990. Will any person having knowledge of the whereabouts of a Will for the above named deceased please contact Messrs. Daire M. Murphy & Co., Solicitors, 8 Lower Kevin Street, Dublin 8. Tel: 01-757132.

McGLYNN, Mary Anne, deceased, late of 34A O'Molloy Street, Tullamore, Co. Offaly. Would any person having knowledge of a Will of the above named deceased who died on the 15th day of March 1990, please contact Messrs Conway & Kearney, Solicitors, Tullamore, Co. Offaly. (AW/P), Telephone (0506) 21201 or 51241.

Miscellaneous

WANTED to purchase: 7 Day Ordinary Publicans Licence. Reply to Box No. 70.

MAHOGANY furniture (reproduction chippendale) hand-made by Dublin craftsmen for sale by retired Dublin solicitor. Box No. 71.

ACCOMMODATION to rent in Dublin is required by solicitor commencing post-graduate course from beginning/mid September, 1990. Box No. 72.

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 5AU. Telephone 03-0483-726272. Fax 03-0483-725807.

Professional Information

MARY T. MORRISSEY, SRN SCM Dip. in Hospital Admin. & Health Services, has commenced practice as Rehabilitation Consultant at: "Exeter", 39 Clashduv Estate, Glasheen Road, Cork. Phone (021) 543956.

Employment

REQUIRED: One Solicitor for large country practice. Ability to work on own initiative essential. Excellent working conditions. Accommodation provided for suitable applicant. Salary fully negotiable – commensurate with experience and ability. Apply with C.V. to George V. Maloney & Co., Solicitors, 6 Farnham Street, Cavan.

SOLE PRACTITIONER, Dublin 2, with established client base, seeks merger with similar or larger firm with view to further expansion. Replies in strictest confidence to Box No. 73.

SAMPLE

LAND REGISTRY

REQUISITION FOR A SEALED AND CERTIFIED COPY OF A FOLIO WITH FILED PLAN ATTACHED

Copy Map Ref

PARTICULARS OF HOLDING REQUIRED

Folio No..... Entry No.....(for omnibus folios)

COUNTY .....

DETAILS OF APPLICANT Your Ref.....

Date.....

PLEASE WRITE IN BLOCK CAPITALS

Name.....

Address.....

.....

Please tick if document is to be collected

IN THE EVENT OF A DEALING PENDING ON THE FOLIO (✓ As appropriate)

I require the filed plan to issue with a note of the pending dealing

I require that the filed plan not be issued until completion of the dealing

Commonage and appurtenant rights (if any) will not be shown on copy maps unless specially requested

FEES PAYABLE

Sealed and certified copy of folio with Filed Plan attached £5.00

Certified copy of a map, showing appurtenant rights of way and/or other special features, relating to the lands in one folio or the case of a Schedule Folio to any part of such lands £5.00

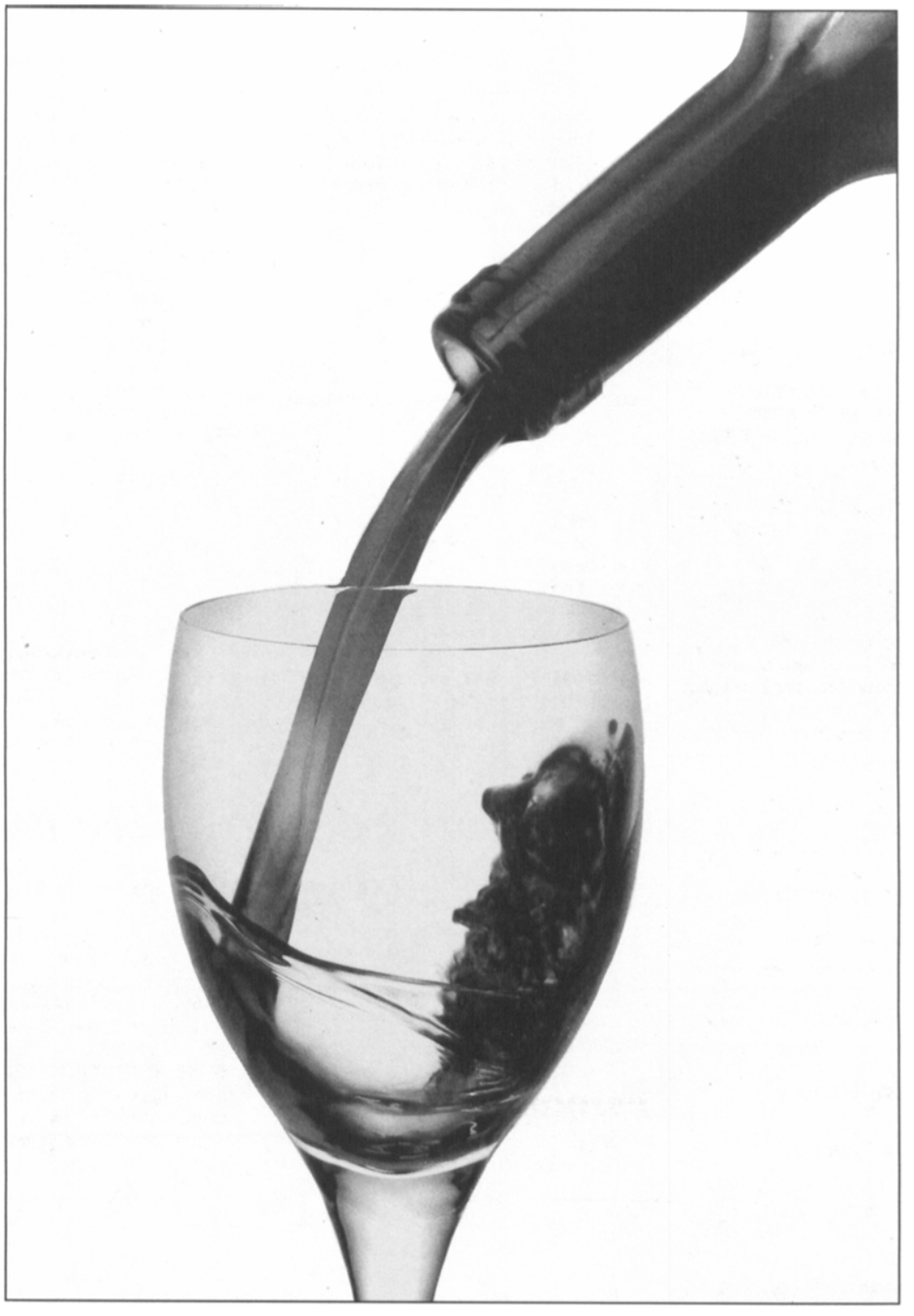
Fees are payable in cash, or by means of banker's draft, money order, postal order or cheque drawn to the order of the Registrar

RECEIPTING BOX

ACCOUNTS (Please tick ✓)

AMOUNT	METHOD OF PAYMENT			
£	B/Draft	M/Order	Cheque	Cash

* ALL SECTIONS OF THE FORM MUST BE COMPLETED *
* INCOMPLETED FORMS WILLBE RETURNED TO THE APPLICANT *



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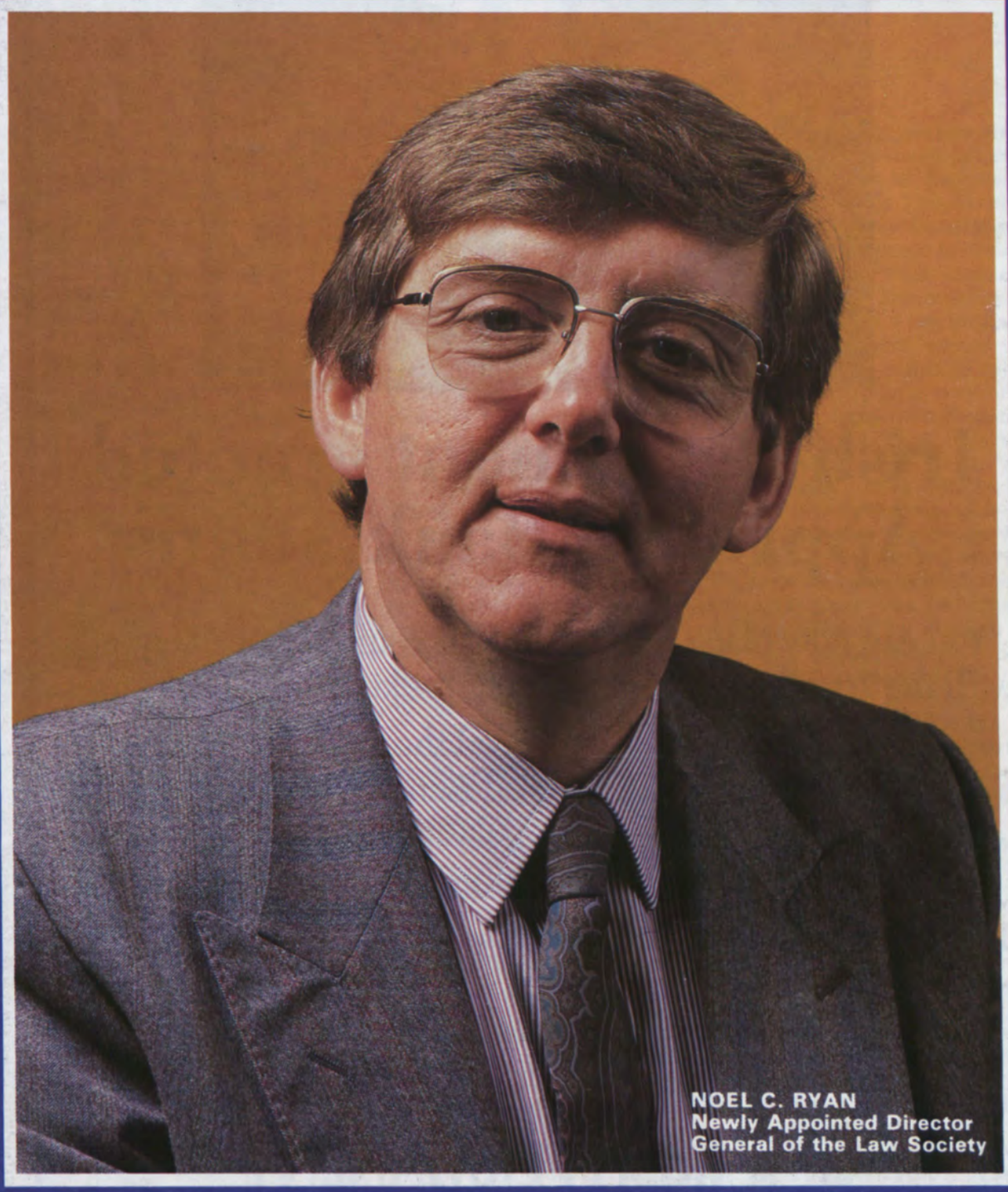
Unit Values may fall as well as rise

GAZETTE

INCORPORATED LAW SOCIETY OF IRELAND

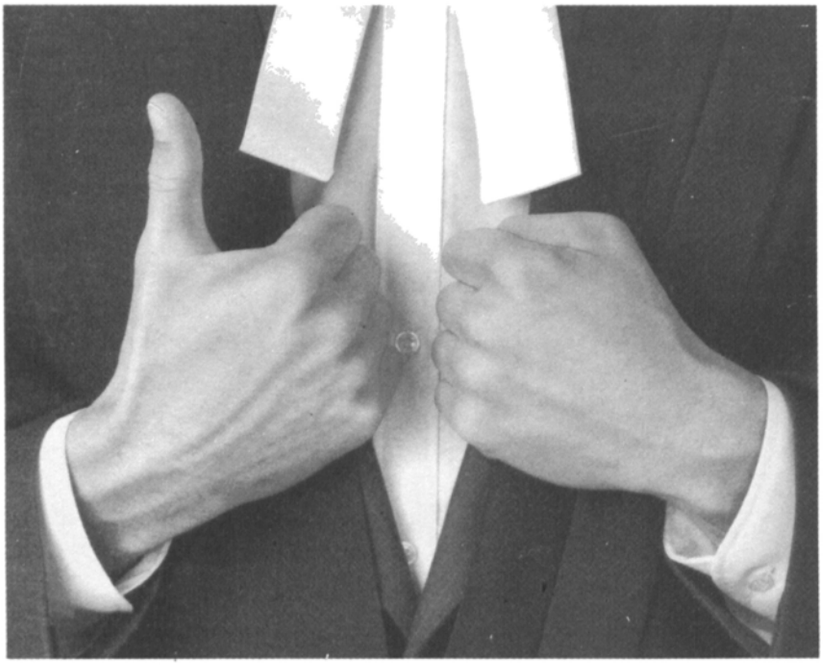
Vol. 84 No. 7 September 1990



NOEL C. RYAN
Newly Appointed Director General of the Law Society

- Add Back Calculations in Intoxicated Driving Offences
- Unit-Linked Funds
- The First Women Lawyers

Thumbs up for the Irish Permanent



Irish Permanent granted 'Approved Bank' status

You can now place Client funds in your 'Client Account' with the Irish Permanent, without seeking any permissions.

The Law Society has approved the Irish Permanent Building Society as an 'Approved Bank' within the meaning of the Solicitors' Accounts Regulations No. 2 of 1984 with effect from December 7th, 1989.

The Irish Permanent pays a higher rate of interest than the major banks, and it has an office near you. Ask your local Branch Manager for further details.

IRISH PERMANENT
BUILDING SOCIETY

GAZETTE
INCORPORATED LAW SOCIETY OF IRELAND
Vol. 84 No. 7 September '990

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The appearance of an advertisement in this publication does not necessarily indicate approval by the Society for the product or service advertised.

Published at Blackhall Place, Dublin 7.
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Viewpoint

Only in a community where media hype appears from time to time to over-ride rational discussion and relevant facts could there have been a demand for a Constitutional amendment to restrict the availability of bail at this time. Almost contemporaneously with the revelation that persons had taken part in an armed robbery while on bail for similar charges came the publication of the statistics showing the enormous effect of the provisions of the *Criminal Justice Act, 1984* requiring Courts to impose additional sentences where a convicted person had committed offences while on bail. These showed a dramatic decline in the number of offences committed while persons were on bail.

We have recently seen in two well-publicised cases involving Irish people in France and Germany what enormous delays there can be in a judicial process once the accused are safely imprisoned. In passing it may be commented that it is one of the more astonishing aspects of the European Charter on Human Rights and the administration of it that there does not appear to be any sanction on states which do not process criminal procedures rapidly or any recompense for those ultimately found not guilty.

It seems clear that the message about committing offences while on bail has got through to those petty criminals who commit the greatest number of offences. An area where the position may be less satisfactory is that of juvenile crime but no change in bail regulations will solve the major problem in this area, namely the absence of proper detention centres for those who are convicted.

So long as it remains a tenet of our judicial system that a person is innocent until he is proved guilty then he has a prima facie entitlement to remain at liberty until the question of his guilt has been determined. That is not an absolute right and the Supreme Court have never said that it was nor has it ever said that there should not be conditions attached to bail.

There may be a case for imposing more stringent conditions on the granting of bail, particularly to those charged with serious offences such as requiring them to report to Garda Stations or officials of the Probation Service. Whether it would be sensible to try to impose an obligation on the surety who goes bail for the good behaviour of the accused may be more doubtful. Such a provision might in one sense be counter-productive if sureties were unwilling to take on the task of ensuring that the accused kept out of further trouble since that might discourage people from acting as sureties.

One of the poorer arguments that has been directed at the question is the absence of prison facilities for persons who might not be allowed bail in the future. The truth is that the absence of sufficient facilities for those who have been convicted of offences is a national scandal which admittedly would be worsened by the addition of the number of persons who might be refused bail under different guidelines. It might be interesting to focus enquiry on whether those who are given early release from jail are subsequently found to have committed offences during the unexpired periods of their terms. □

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Entitlement to damages for breach of community legislation under English Law

PART 2

By
Philip Lee
Solicitor*

DEVELOPMENT OF THE JURISPRUDENCE ON THE AWARD OF DAMAGES FOR BREACH OF COMMUNITY LEGISLATION

The incorporation of Community law into the UK national legal system has not been a smooth task. It has been complicated by the fact that many of the concepts are derived from the continental civil code system. The relative newness of concepts such as administrative law and judicial review in a jurisdiction where, until recently, the Crown was immune from many types of actions, combined with a reluctance to accept a shift of power to Brussels and the European Court of Justice has posed its own problems. Charting some of the development of this jurisprudence will, I hope, serve as an explanation of the summaries to the factual cases considered in the first part of this paper.

An appropriate starting point is to look at what Community law itself requires of member states in the protection of Community law. In particular, is there an obligation deriving from Community law to award damages for breaches of Community law?

Article 5 of the EEC Treaty "obliges Member States to provide a system for the protection of individual rights created by Community rules".

> "With regard to the extent of the protection, the principles of efficiency and of the uniform application of Community law require that this protection should be appropriate and effective, without prejudice to the neutral stance of Community law with regard to the procedure chosen".[9]

In the *Russo* case the Court also stated:

> "The existence of such an obligation was confirmed by the Court when, in its judgment of 19th December 1968 in case 13/68 *Salgoil*, [1968] ECR 543 it ruled that such rules require the authorities and in particular the relevant Courts of the Member States to protect the interests of those persons subject to their jurisdiction who may be affected by any possible infringement of the said provisions".

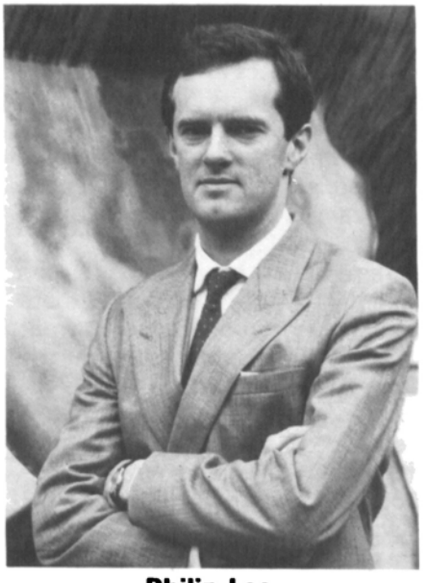
However the Court affirmed that the nature of the remedy must be left to National law:

> "It is for the national Court to decide on the basis of the facts of each case whether an individual producer has suffered damage. *If such damage has been caused through an infringement of Community law the state is liable to the injured party for the consequences in the context of the provisions of national law on the liability of the state" (emphasis added).*

Nicholas Green and Ami Barav[10] consider this the nearest to an authority for the proposition that national courts must award damages, within the framework of national procedural rules, to individuals harmed by a breach of a directly applicable provision of community law. However, their conclusion that "in the context of the provisions of national law" is the same as "within the framework of national *procedural* rules" is not so clear.

The Commission's position on the right to compensation appears to have changed in recent years. In 1988[11] the Commission in an answer to a written question in the European Parliament said:-

> " . . . Community law makes no special provision for the compensation of persons adversely affected by actions conflicting with the free movement of goods. However, the Commission considers that Article 5 of the EEC Treaty and the general principles of Community law oblige the Member States to provide for a system of compensation for private individuals in cases where the Member States are responsible for damages caused them in violation of



Philip Lee.

Community law. In order to obtain possible compensation the undertakings concerned are therefore invited to pursue the matter in accordance with the national legal procedures in the Member States in question''.

However, in a later reply to a question in 1989[12] they were less confident and said:-

''Compensation of private individuals for damage caused in violation of Community law is a matter for national law''

and went on to say:

''The principle that the State is liable is acknowledged in all Member States. Everywhere, there is a condition that the damage must have been caused by the authorities in the exercise of their function. Under no national legal systems is liability arising from acts in the nature of secondary legislation automatically excluded''.

This particular question was also examined in some detail by Parker LJ in the *Bourgoin* case. Parker LJ pointed out that:

''So far as Community law is concerned there is nothing in the decisions of the European Court which positively or specifically requires that, for a breach by a Member State of Article 30, a remedy in damages must be available to an individual who suffers damage by the breach''.

He goes on to say, though without quoting his authority, that:

''Indeed the decisions of the European Court point forcefully to the conclusion that a remedy in damages in not required by Community law for breach by a Member State of an Article having direct effect where such breach consists in the imposition of a legislative or quasi legislative measure involving the exercise of judgment unless the breach is of a particularly serious character''.

Parker LJ in his judgment was anxious to make it clear that there was already an open door in front of him for the proposition that the Crown need not be liable in damages. He pointed to the decisions of the European Court of Justice in *Bayerische HNL -v- The Council*[13] and *Koninklijke Scholten Honig -v- The Council.*[14] In both these cases the European Court of Justice held that the Community Institutions themselves may not be liable in damages for the illegality of their legislative measures unless ''the Institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers''.

Parker LJ also drew some comfort from the *Defrenne -v- Sabena*[15] case concerning Article 119 of the Treaty and rights to equal pay for equal work between men and women. In this unusual case,

'' . . . the European Court of Justice held that the Community Institutions themselves may not be liable in damages for the illegality of their legislative measures . . . . ''

because of the enormous economic impact of the judgment the Court stated that the right to damages could not be awarded to people who had not by the date of the judgment commenced proceedings.

In the light of all the above decisions, Parker LJ felt under no compulsion to provide an award of damages, though he did of course recognise that some form of remedy must be available.

Parker LJ's interpretation of the decisions of the Court of Justice may not be a very ''European'' interpretation and may not fully reflect the spirit of the decisions, in particular the statements in the *Russo* case. However, they are certainly justifiable in the light of the failure of the Treaty and the decisions of the Court of Justice to categorically state that Member States must be liable in damages to individuals for breaches of the Treaty.

It is therefore necessary to look at the form in which the Community legislation has been adapted into English law and whether using existing legal doctrines a right to damages can be claimed.

This question first arose in *Application Des Gaz -v- Falks Veritas Limited*[16] where Lord Denning MR decided that Articles 85 and 86 of the EEC Treaty created new torts:

''So we reach this important conclusion: Articles 85 and 86 are part of our law. They create new torts or wrongs. Their names are ''undue restriction of competion within the Common Market'', and ''abuse of dominant position within the Common Market''. Any infringement of those Articles can be dealt with by our English Courts. It is for our Courts to find the facts, to apply the law and to use the remedies which we have available''.

However, later, the majority of the House of Lords in the *Garden Cottage Foods* case did not accept Lord Denning MR's theory. Their view was that it was unnecessary to invent a new and novel form of action in the English legal system. There was already in existence a suitable vehicle for such situation. Lord Diplock quoted Roskill LJ in *Valor International*[17] who stated that there were ''Many questions which will have to be argued in this Court, or elsewhere in this country or at Luxembourg, before it can be stated categorically . . . that Articles 85 and 86 create new torts or wrongs . . . . ''

In the *Garden Cottage Foods* case the majority felt that it was inarguable that there would be a right of action for a breach of Article 85 or 86 which did not give a remedy in damages. It is their view that the remedy will be available for a breach of statutory duty.

Following the *Garden Cottage Foods* case the law as it then was seemed reasonably straightforward, namely that a breach of a community regulation would be considered a breach of statutory duty for which damages may be available in accordance with the existing principles of English law.

However, a major turnabout occurred in the later Court of Appeal decision in the *Bourgoin* case. This case concerned re-

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strictions on the import of French turkeys imposed by the UK Minister of Agriculture. The prohibition was imposed in the exercise of a power conferred by Section 24(1) of the Diseases of Animals Act 1950 which enabled the relevant authorities to prevent the introduction of diseases into the United Kingdom. The Plaintiffs whose imports were restricted claimed approximately £19 million damages. By the time of the hearing of this action in the House of Lords it had already been held by the European Court of Justice that the prohibition imposed by the UK authorities was invalid.

The Plaintiffs, following the line of argument developed by Lord Diplock in the *Garden Cottage Foods* case, sought recovery of their damages for breach of statutory duty. Oliver LJ in a long and very comprehensive dissenting judgment agreed that damages should be awarded. However, Parker LJ in the majority judgment distinguished this case from the *Garden Cottage Foods* case on the basis of a distinction between private law and public law. Parker LJ's view was that this was a matter of public law. His rationale for this appears to be the fact that it would be unacceptable in a situation when, for instance, a Minister must make a decision regarding the danger to the public of a product, where there might also be strong scientific evidence both pro and con and that an incorrect decision on the dangers would open the Government to a large liability for damages.

Parker LJ read Article 30 and Article 36 as one provision and accordingly considered that there did not exist a total prohibition on the restriction of imports. Rather, it was a question of a discretion left to the relevant Minister under Article 36. In this particular case it was found that the exercise of his discretion was ultra vires. As has already been stated, the distinction between private and public law is one that is most unclear. Nevertheless, despite these unfortunate attributes of public law and the very strong majority decision of the House of Lords in the *Garden Cottage Foods* interlocutory application, Parker LJ distinguished the *Garden Cottage Foods* case as one dealing with private law.

Parker LJ's view was that unless there was misfeasance or a manifest abuse it was merely an ultra vires action by the relevant Minister and as such was an action which should properly be pursued by way of an application for judicial review and not a private writ for damages.

> "An individual right may be a right in private law or in public law; Article 30 in my judgement creates individual rights both in public law and private law. A breach simpliciter of the Article sounds only in public law. A breach amounting to abuse of power sounds in private law.
>
> Neither can be categorised as, or be regarded as being of the nature of a breach of statutory duty in any sense known to English law", per Parker LJ.

Leave to appeal to the House of Lords was granted, but the matter was settled.

Parker LJ's decision in *Bourgoin* certainly raises more questions than it answers. Now if a client has suffered due to an act of Central or Local Government which infringes Community law, there is the danger of the matter falling within the public law domain. However, it should not need to be pointed out that not every action against the Government is a matter of public law. The traffic accident involving a local authority driver is not a matter of public law.

> "Before the expression 'public law' can be used to deny a subject a right of action in the Court of his choice, it must be related to a positive prescription of law by statute or by statutory rules", per Lord Wilberforce.[18]

I believe there may now be made the argument that if the legislative or administrative act was not simply a case of an error in the use of an administrative discretion, but was an act in an area where there was no such discretion available, that it may be claimed that it is not a matter of public law but of the enforcement of the private law right for a breach of a statutory duty.

" . . . if a client has suffered due to an act of Central or Local Government which infringes Community law, there is the danger of the matter falling within the public law domain."

Where does all this leave the legal adviser or practitioner? Well, as the law stands, if a client has a problem which appears to arise from a breach by an individual or a public authority of a provision of community legislation, the

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practitioner would be advised:

(a) firstly to check that the relevant provision breached is directly applicable and of direct effect;

(b) to analyse whether the act or conduct is in the public sphere or the private sphere;

(c) if there is any doubt regarding the public/private issue, (and I would suggest that if it involves a public body exercising its legislative or administrative discretion then the practitioner should err on the side of caution) immediately apply for judicial review of the decision in question. If the action arises out of a legislative act and the three month limitation period has expired, remember that an application for judicial review can be based on the subsequent implementing decision of the piece of legislation. This can result in removing the severe consequences of the three month limitation.

(d) (i) If the action is clearly in the private law domain then proceed by way of writ as if applying for damages for breach of statutory duty.

(ii) Under Order 53 of the Rules of the Supreme Court the application for judicial review can be combined with an application for damages. If the Court finds that it is in fact a right actionable as in private law then the Court has discretion to transfer the action to a private law writ.

(e) You may be well advised to seek the assistance of the European Commission in a separate simultaneous action against the relevant Government under Article 169.

(f) If the action is clearly one of public law then there is a problem in that damages may not ultimately be recoverable. Following the jurisprudence of the House of Lords† in the Spanish Fisheries cases, it appears that the English Court will not temporarily suspend an Act of Parliament alleged to be incompatible with Community Law pending the outcome of either an Article 169 procedure or an Article 177 reference to the Court of Justice. Whether that approach is itself compatible with Community Law is currently before the European Court in Case 213/89 *Factortame*. This could leave your clients in the unfortunate position of not being able to obtain an injunction against the public authority for a considerable period of time following which, if the application is successful, there may be no retrospective entitlement to damages. The ultimate question that may have to be faced in this situation is should you advise your client to breach the existing national legislation (in so far as this may be possible) in the belief that there may not ultimately be an award of damages. This of course is highly precarious but must be considered.

NOTES

(9) *Russo v AIMA* [1976] 1 ECR 52

(10) Damages in the National Courts for Breach of Community Law 1987 Eur Y B Act 63.

(11) Reply to Question No. 887/87 by Poetschki O.J.C. 303/3 28.11.88.

(12) Reply to Written Question No. 2433/88 by de Vries.

(13) *Bayerische HNL -v- EC Council and Commission,* [1978] 3 CMLR 66.

(14) *Koninklijke Scholten Honig NV -v- EC Council and Commission,* [1982] 2 CMLR S.90.

(15) *Defrenne -v- Sabena,* [1976] 2 CMLR 98.

(16) *Application Des Gaz -v- Falks Veritas Ltd.* [1974] Ch 381.

(17) *Valor International* [1976] 3 CMLR 87.

(18) Per Lord Wilberforce – *Davey -v- Spelthorne BC,* [1984] *AC 262 at 278.*

† Editorial Note: but see now the decision of the European Court of Justice in the matter.

* Philip Lee is a Solicitor based in London working as a consultant. He holds a law degree from University College, Dublin, and a Diploma in European Law from the College of Europe in Bruges, and is an Associate of the Chartered Institute of Arbitrators. The author is currently writing a book on the European Public Procurement Directives.

NOEL C. RYAN
Director General (designate)

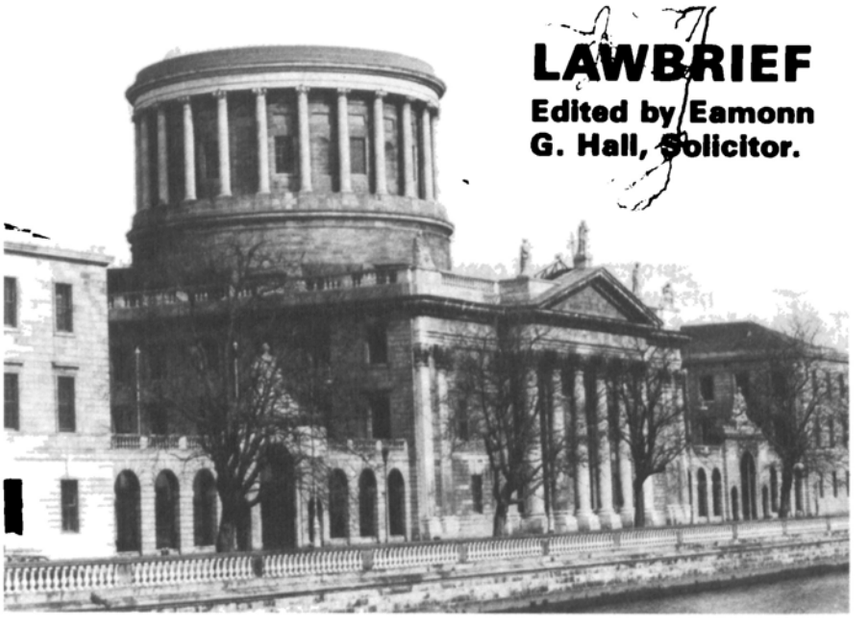
Mr. Ryan joins the Law Society as Director General from the senior ranks of the Civil Service where he has been an Assistant Secretary in the Department of Justice and, since 1985, in the Department of Foreign Affairs on the staff of the Anglo Irish Secretariat at Maryfield, Belfast.

Mr. Ryan has had wide-ranging experience in the Civil Service in a number of Government Departments over the past 30 years. He joined the staff of the Department of Defence in 1960 and served in the Department of Finance and the Department of the Public Service before joining the Department of Justice as an Assistant Principal in 1973.

He worked at senior level in a number of Divisions in the Department of Justice in the 1970s and early '80s and was closely associated with legislation in the criminal justice field, including the 1983 Criminal Justice Bill and the Garda Siochana Complaints Bill. He has had extensive international experience in the field of criminal law and extradition policy in both the European Community and the Council of Europe.

Mr. Ryan was appointed Assistant Secretary in charge of the Garda Siochana and Security Division of the Department of Justice in 1984. He joined the staff of the Secretariat of the Anglo Irish Inter-Governmental Conference in 1985 where he took charge of legal and security matters, including administration of justice in Northern Ireland and extradition policy.

Mr. Ryan is a graduate in law of University College Dublin and was called to the Irish Bar in 1979. He is aged 47 and is married with six children. He lives in Palmerstown, Co. Dublin. □



LAWBRIEF

Edited by Eamonn G. Hall, Solicitor.

ONUS OF PROOF OF STRAYING CATTLE IN ROAD ACCIDENT

The recent case of *O'Reilly -v- Lavelle, The Irish Times Law Report*, July 2, 1990 has important implications for the owner of animals straying on a public road.

In *O'Reilly,* Johnson J held that the doctrine of **res ipsa loquitur** (the thing speaks for itself) does not have to be specifically pleaded before a plaintiff may rely on it, if the facts pleaded and the facts proved show that the doctrine is applicable to the case. Where a plaintiff gives evidence that his motor vehicle collided with animals straying on the highway and is able to identify the owner of the animals, there is a prima facie case to be answered by the owner to rebut the presumption of negligence created by section 2(1) of the *Animals Act 1985.*

Johnson J so held in allowing an appeal from the decision of Judge Sheehy who, in the Circuit Court in Castleblayney, Co. Monaghan, had dismissed the plaintiff's claim on the grounds that the plaintiff had failed to discharge the onus of proof and that the doctrine of **res ipsa loquitur** could not be relied upon in that it had not been specifically pleaded.

Section 2(1) of the *Animals Act, 1985* provides that so much of the rules of the Common Law relating to liability for negligence as excludes or restricts the duty which a person might owe to others to take such care as is reasonable to see that damage is not caused by an animal straying on to a public road was thereby abolished.

Johnson J said that this was an action taken by a motorist who, at about 10pm on 25 June 1987 at Tullybrack in the County of Monaghan, had collided with a Friesian calf. The animal was killed and the plaintiff's motor vehicle was seriously damaged. The defendant claimed that the accident was caused by the negligence or contributory negligence of the plaintiff.

Counsel for the plaintiff submitted that, while he had not specifically pleaded the doctrine of **res ipsa loquitur,** he was entitled to rely on the doctrine provided his pleadings were adequate and the facts proved showed the doctrine to be applicable. This was strenuously opposed by counsel for the defendant but Johnson J was satisfied that the plaintiff's submissions were correct and that the law had been well stated by Griffin J in *Mullen -v- Quinnsworth Ltd (Irish Times Law Report* 28 May 1990) when he had said that the doctrine did not have to be pleaded before a plaintiff might rely on it. If the facts pleaded and the facts proved showed that the doctrine was applicable that was sufficient.

The appellant in evidence stated that he was driving along the main Castleblayney/Monaghan road at about 50m.p.h. with full headlights on. Suddenly, from the left hand side, eight to ten cattle darted across his path. Although he immediately applied his brakes, a collision occurred in which one Friesian calf was killed. Counsel referred to section 2(1) of the *Animals Act 1985*, and submitted that there was no evidence that the defendant had not taken reasonable care.

Counsel for the plaintiff further submitted that as there had been no reported decision either in the Circuit or High Court on the *Animals Act, 1985* he was obliged to refer to an article by Gerard J. Needham in the *Gazette* of the Incorporated Law Society of Ireland, July/August 1988 at page 171 dealing with the only reported case on the matter by District Justice Patrick F. Brennan in District No. 3 (1988 6ILT NS 245) who held that Section 2 (1) of the 1985 Act created a **res ipsa loquitur** presumption and who stated:

> ''Where a plaintiff gives evidence that his motor vehicle collided with animals straying on the highway and is able to identify the owner of the animals, then there is a prima facie case to be answered by the landowner to rebut the presumption of negligence on his part. The burden on the landowner is, of course, not one of strict liability, but it would be necessary for him to prove that he exercised reasonable care that he maintained his gates and fences in stock proof condition and had taken all reasonable steps to ensure that his stock did not stray on the public highway. In such an example the burden should shift from the plaintiff because of the impossibility in many situations of the plaintiff ascertaining the conditions of the landowner's fences which knowledge is peculiar to the landowner''.

Johnson J said that District Justice Brennan was absolutely correct in his view of the law. The 1985 Act had brought about a long overdue change in the law. Cattle properly managed could not wander on the road and therefore the burden of proof shifted in this case to the defendant to show that he took reasonable care of his

animals. He added that there was no matter more appropriate for the application of the doctrine of **res ipsa loquitur** than cattle wandering on the highway.

The defendant then gave evidence, which was corroborated by his son, that he had passed the accident spot just prior to the accident and that there were no cattle on the roadway and that all his cattle were then in the field. His fences and gates were in sound condition and he could give no explanation as to how his animals escaped from and returned to his field. A neighbour gave evidence that in the last ten years the defendant's cattle had never broken on to his land and that he had never known of the defendant's cattle being on the road in that period.

Johnson J having found on the balance of probabilities that eight to ten of the defendant's cattle had strayed onto the highway, that it was highly improbable that some stranger opened the gate of the field and remained there until the animals returned at their leisure and then closed it, and that the defendant failed to discharge the onus of proof that his fencing was not defective, allowed the plaintiff's appeal and awarded him the damages claimed in the Civil Bill.

APPEAL COSTS FOLLOW THE EVENT UNLESS UNUSUAL REASONS

The Supreme Court (Finlay CJ, Walsh, Griffin and Hederman JJ: McCarthy J dissenting) held in *The Society for the Protection of Unborn Children Ltd -v- Diarmuid Coogan and Others, The Irish Times,* Law Report, July 2, 1990 that it was necessary for very substantial reasons of an unusual kind to exist before the Supreme Court should properly depart from the general principle that costs follow the event on the hearing of appeals before it.

The Supreme Court, (McCarthy J dissenting) so held allowing the plaintiff the costs of its successful appeal against the order of Carroll J dated 7 September 1988 in which she had refused an application made by the plaintiff for an interlocutory injunction against the defendants restraining them from distributing certain information with regard to abortion in breach of the Constitution.

RECKLESSNESS: ASSAULT

The issue of recklessness in the context of an offence under section 47 of the *Offence Against the Person Act 1861* (which is still law here) has been considered in two recent English cases. The first case was *DPP -v- K* (a minor), [1990] 1 All ER 331.

The facts of *DPP -v- K* (a minor) may be stated. A schoolboy experimenting in school toilets with some concentrated sulphuric acid taken from a chemistry lesson was disturbed by footsteps outside, panicked and poured the acid into a hot air hand and face drier. He then went back to his class intending to return later and remove the acid. Before he could do so another pupil used the drier and had acid blown on his face causing permanent scarring. The schoolboy was acquitted of assault occasioning actual bodily harm contrary to section 47 of the *Offences Against the Person Act 1861* because the justices found that he had not intended to injure the other boy.

The prosecution appealed by way of case stated. Parker LJ (Queen's Bench, Divisional Court) said that the boy would be guilty of assault if he had acted recklessly. Tudor Evans J agreed and the appeal was allowed. However in *R. -v- Spratt, The Times,* May 14, 1990, the Court of Appeal considered that *DPP -v- K (a minor)* was wrongly decided. The Court of Appeal, Criminal Division, (England and Wales) (McCowan LJ, Tudor Evans and Brooke JJ), held in *Spratt* that a defendant who failed to give thought to the possibility that his actions might give rise to a risk of causing another person actual bodily harm was not guilty of an offence under section 47 of the Offences Against the Person Act 1861.

The Court held that the test of recklessness under section 47 was that laid down in *R. -v- Cunningham* [1957] 2 QB 396, where the accused had foreseen that the particular kind of harm might be done and yet had gone on to take the risk of it.

The Court of Appeal upheld the appeal of Robert Michael Spratt against his conviction on June 6, 1989 at Inner London Crown Court (Judge Pryor, QC) for assault occasioning actual bodily harm.

McCowan LJ, giving the judgment of the court, said that the appellant had pleaded guilty to one count of possessing a firearm and ammunition for which he was given six months imprisonment, and for one count of assault occasioning actual bodily harm for which he was given a 30 months consecutive term. The appellant had pleaded guilty to the second count on the basis that his conduct was reckless in that he failed to give thought to the possibility of a risk that he might cause actual bodily harm.

The facts were that the defendant had fired an air pistol from his flat and two of the pellets had struck a girl aged seven playing outside. At trial his counsel had made clear he was pleading guilty on the basis that he was reckless in that he had failed to give thought to the possibility of a risk.

The defendant had not realised there were people there at the time he fired the airgun and was adamant that he would not have fired the shots if he had known there were children in the area.

By accepting his plea on that basis, the trial judge had by implication ruled that it did amount in law to the offence charged. On his appeal against sentence, the Court of Appeal had suggested that the hearing be adjourned so that a submission could be made that the ruling was wrong in law.

Counsel for the Crown submitted that the judge's decision to accept the plea on the basis

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tendered was not wrong in law because it fell within the definition of recklessness in *R. v- Caldwell* [1982] AC 341 which he submitted was applicable to a charge of assault occasioning actual bodily harm. Counsel for the appellant submitted that it had no application to such a charge. "Recklessness" in the *Cunningham* sense meant that the accused had foreseen that harm might be done and yet had gone on to take the risk.

In *R. -v- Venna* [1976] QB 421, a case of assault occasioning actual bodily harm, the Crown had sought to distinguish offences which were assaults and offences like unlawful and malicious wounding contrary to section 20 of the 1861 Act whose statutory definition contained the word "maliciously", where recklessness sufficed to support the charge. The Court had held, following *R. -v- Bradshaw* (1878) 14 Cox CC 83, that the element of *mens rea* in the offence of battery was satisfied by proof that the defendant intentionally or recklessly applied force to the person of another.

The Court in *R. -v- Venna* had said:

> "We see no reason in logic or in law why a person who recklessly applies physical force to the person of another should be outside the criminal law of assault. In many cases the dividing line between intention and recklessness is barely distinguishable".

Counsel for the Crown argued in *Spratt* that that no longer applied to cases under section 47, although it still applied under section 20 and section 23 (unlawfully and maliciously administering a noxious thing).

R. -v- Venna had been approved in the House of Lords, by Lord Elwyn-Jones, Lord Chancellor, in *DPP -v- Majewski* [1977] AC 443 and by Lord Diplock in *R. -v- Caldwell* [1982] AC 341 as authority for the proposition that recklessness was enough to constitute the necessary mens rea in assault cases.

Counsel for the Crown had relied on *Seymour* [1983] 2 AC 493, where Lord Roskill had said:

> " 'Reckless' should today be given the same meaning in relation to all offences which involve 'recklessness' as one of the elements un-less Parliament has otherwise ordained."

Their Lordships could not believe that by the use of those words the House of Lords had intended to cast any doubt either upon the decision in *R. -v- Cunningham* or more importantly the decision in *R. -v- Venna*.Their Lordships considered themselves bound by the decision in *R. -v- Venna*, and the appellant's conviction was accordingly quashed.

Henchy J in *The People -v- Murray* [1977] IR 360 at 403 considered the issue of recklessness in the context of Irish Criminal Law. Henchy J stated that he did not consider it proper to construe either section 38 of the *Offences against the Person Act 1861* or section 1 of the *Criminal Justice Act, 1964* in such a way as to make those sections hardly ever applicable to assaults on or murder of policemen in plain clothers. In the case of such an assault or murder the required mens rea as to the victim's occupation and activity was a matter of intention or, in the alternative, recklessness. Henchy J stated that just as a person who does not intend an assault may be held guilty of an assault if he has been reckless as to whether his physical activity would have that effect (*R. -v- Venna* [1976] QB421), so a person may be found guilty of the capital murder of a Garda if it is shown (a) that he murdered the Garda and (b) that he was reckless as to whether his victim was a Garda acting in the course of his duty.

Henchy J considered the test of recklessness in that context was well stated in the Model Penal Code – s 2.02 (2) (c) – drawn up by the American Law Institute:

> "A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree."

In dealing with whether simple ignorance will displace recklessness, Henchy J referred to Professor Glanville Williams (Criminal Law; The General Part; 2nd ed. p. 152) where he had written:

> "A person who does not know for certain whether or not a fact exists may think that its existence is probable, or only possible; or he may have given no thought to the question of probability or possibility. The last will be particularly likely if he does not know the criminal law and so does not realise the relevance of the fact

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to his legal responsibility. The proposition to be maintained is that in each of these situations there is recklessness for legal purposes. Simple ignorance is not enough to displace recklessness. It is only where the actor's mind is filled with mistaken knowledge that the act is not reckless (though it may be negligent) as to that circumstance.''

CAR VANDALISM

Mr. Currie asked the Minister for Justice in the Dáil on May 30 1990, 399 *Dail Debates*, cols 814-15, the number of cars reported stolen or broken into in each year for the past ten years; the number in each year in Dublin city and county; the estimated cost of such crime in this period; and if he will make a statement on the matter. The Minister for Justice, Mr. Burke, replied that the information sought, in so far as it is readily available, was set out in a tabular statement. It was assumed that the question was intended to include vehicles taken without the owner's consent even though this does not constitute stealing in the strict legal sense. Information in relation to the cost of the crimes in question was not readily available and could not be compiled without the expenditure of Garda time and effort to an extent that would not be warranted.

The following is the table:

Larcenies from unattended vehicles for years 1980-89.

Year	Dublin Metropolitan Area Recorded	Country as a Whole Recorded
1980	11,072	14,729
1981	13,976	18,159
1982	15,761	20,523
1983	14,999	19,434
1984	13,727	17,953
1985	11,155	15,049
1986	10,767	14,638
1987	12,092	15,749
1988	14,705	18,640
1989*	13,682	18,399

* Figures for 1989 are provisional.

PERSONAL INJURY ACTIONS

Mr. Enright asked the Minister for Finance, Mr. A. Reynolds, in the Dail on June 27 1990, 400 *Dáil Debates*, col. 1064, if he would outline (a) the tax consequences of structured settlements in personal injury actions in view of the changes to the *Finance Act*, 1990, arising out of the Dunne case, (b) the potential liability of a plaintiff to pay income tax on the whole or any part of the sums paid to him by the casualty insurer pursuant to a structured settlement agreement and (c) if his attention had been drawn to the fact that the Association of British Insurers had recently agreed with the United Kingdom Inland Revenue that structured settlements can be provided in the United Kingdom in such a way that the liability to income tax which had previously been assumed to apply, does not arise; and if he would make a statement on the matter.

The Minister for Finance replied that he was aware of an agreement between the Association of British Insurers and the United Kingdom Inland Revenue in relation to structured settlements. He said that his understanding was that structured settlements do not exist in this country at present. The question of the tax treatment of such settlements, if introduced, had been raised with his Department by representatives of the insurance industry and the matter was currently under examination.

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REMINDER

ADVOCACY

CLE Residential Course, Bellinter, Navan, Co. Meath. 7.00 p.m., Friday, 28 September, to 1.00 p.m., Sunday, 30 September, 1990.

For further details contact G. Pearse. Tel.: 710711.

Vehicles subject of Larceny and Unauthorised Taking for years 1980-89.

Year	Dublin Metropolitan Area			Country as a Whole		
	Number of Vehicles Subject of Larceny	Number of Vehicles Subject to Unauthorised Takings	Total	Number of Vehicles Subject of Larceny	Number of Vehicles Subject to Unauthorised Takings	Total
1980	681	15,161	15,842	807	21,005	21,812
1981	902	16,050	16,952	1,036	21,896	22,932
1982	1,091	16,237	17,328	1,207	20,729	21,936
1983	1,377	15,071	16,448	1,531	19,484	19,637
1984	1,237	14,672	15,909	1,375	18,735	20,110
1985	1,341	11,317	12,658	1,546	14,844	16,390
1986	1,315	9,280	10,595	1,775	12,514	14,289
1987	1,168	7,257	8,425	1,523	9,955	11,478
1988	1,198	7,104	8,302	1,507	9,408	10,915
1989*	1,110	7,033	8,143	1,350	9,923	11,273

GOVERNMENT PUBLICATIONS

Code	Title	Price IR£	Post
1/201	Fair Trade Commission Report of Study into Restrictive Practices in Legal Profession	11.00	1.75
Bill/90/17	Statute of Limitations (Amendment) Bill, 1990 (as initiated) (The purpose of this Bill is to amend and extend the *Statute of Limitations* 1957 by making new provision as regards the date from which the period of limitation is to run in respect of actions for personal injuries, and to amend related provisions in other statutes and to provide for other matters connected therewith).	0.70	0.34
S/I/89/079	Rules of the Superior Courts (No.3) 1989. (These Rules take account of the administrative and procedural changes required by the coming into operation of the *Bankruptcy Act, 1988*. These Rules came into operation 24 April, 1989).	4.00	0.67
S/I/89/164	Capital Gains Tax (Multipliers) (1989-90) Regulations, 1989	0.60	0.34
J/116	Committee on Public Safety and Crowd Control – Report February 1990.	3.55	1.12
J/115	Report of the Committee on Fundraising Activities for Charitable and other Purposes (Pl. 7028).	5.75	1.12
CB/55/89/552	Community Law 1988 (EC Publication)	3.10	0.67
Act/89/19	Prohibition of Incitement to Hatred Act 1989.	1.80	0.34
Act/89/22	Video Recording Act, 1989.	3.55	0.34
X/06/614	Treaty Series 1988 No. 9 – European Agreement on the Transmission of Applications for Legal Aid	0.70	0.34
1/023/62	Report of the Registrar of Friendly Societies 1985-86	4.00	0.67
X/06/617	Treaty Series No. 2 1990 – Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms.	0.70	0.34
M178/02	Civil Service Motor Mileage Rates 1989.	0.20	0.34

These publications may be purchased for the Government Publications Sales Office, Sun Alliance House, Molesworth Street, Dublin 2. The catalogue number of the publications should be stated when ordering. If publications are to be sent by post, the amount of the postage should be added to the price. □

DAY SEMINAR

RETIREMENT

13 October, 1990 at Law Society, Blackhall Place.

Topics covered will include (1) Coping with change – Family Relationships, (2) Social Welfare Benefits, (3) Health Considerations, (4) Personal Security, (5) Wills & Estate Managagement, (6) Pension Schemes, (7) Investments.

Members wishing to attend should **write** to Chris Mahon, at the Law Society, Blackhall Place, Dublin 7.

Unit Linked Funds

Some individuals prefer to manage their own investments but it requires time and expertise. Paying someone to manage your own personal portfolio could prove very expensive. A more attractive option is the investment fund in which individuals can pool their investments and jointly hire professional management.

Such pooled funds are nothing new. They first became formalised in Ireland in the guise of insurance linked funds managed by life insurance companies. They still remain the most popular of the pooled funds but they now face a lot of competition from other similar options. Prompted by some tax changes and the easing of exchange control, the range of options has grown rapidly over the past year. In addition to a growing number of insurance linked funds, investors have now a choice of domestic and overseas based unit trusts and investment trusts.

There can be no certainty in choosing the best product. But the range of choice can be limited by consideration of tax, personal attitudes to risk, and some view on the likely future performance of various types of investment.

The taxes applied to the various types of pooled investments differ – which is best depends on an individual's circumstances. Some types of funds carry a higher risk than others and, even within a certain category of fund, the risk element can vary greatly. The

". . . choice can be limited by consideration of tax, personal attitudes to risk and . . . likely future performance . . . . "

riskier funds may, in fact, perform better but some investors can not afford to take that risk and so may have to be content with a more certain but potentially smaller return. And the third element in making up the choice is a view of the investment potential of different funds. That must be based on a subjective view of investment trends both at home and abroad. That includes a view of likely changes in exchange rates.

It is not easy – few, for instance, predicated that the IR£ would so quickly move down to 90p sterling when it was up at 98p recently. Indeed most commentators were forecasting a return to parity.

But many investors are able and willing to take a risk in order to secure a somewhat greater return than is available on a deposit account and they for long recognised the advantages of pooling their investments with others of like mind in order to spread the cost of managing their portfolio. The insurance linked funds were for long the most popular investment medium. The insurance element has been very small – so small, in fact, that many investors in these

By Colm Rapple

funds possibly do not even realise that it exists. It is not really there as a selling point but rather because it was easier to set up such funds under the aegis of an insurance company.

Such unit linked funds are essentially pooled investments. Each individual investor's money is pooled with that of the other investors and the whole fund is managed on their behalf by professional managers. Each investor has so many shares – or units – in the fund. The units go up, or down – in value as the value of the underlying investments go up and down.

Irish companies have been offering a wide range of funds for many years. There are funds solely invested in property; others invested in shares; others in government funds. Then there are managed funds with investments in all of those areas. Within the category of managed funds there are some which invest in riskier ventures than others, thereby offering the possibility of greater return but matched with a greater risk of loss.

And in response to the fears generated by the 1987 stock market crash there are some funds which at least guarantee to give you your money back at the end of three or five years.

In recent years the bulk of the funds available to Irish investors were offered by life insurance companies. But now the exchange

". . . exchange controls have been eased . . . . [and] a growing number of foreign funds are opening up for . . . Irish investors".

controls which made it illegal to invest in funds abroad have been eased as we move towards the free EEC market of post 1992. The result is that a growing number of foreign funds are opening up for investment by Irish investors. Irish investors can now invest in unit trusts based abroad and also in foreign investment trusts. These investment trusts are basically companies quoted on the stock market whose sole function is to management investment. The increased competition has caused Irish companies to take a fresh look at what they have on offer.

Many insurance companies and other financial institutions here are now offering unit trusts in addition to the insurance linked funds. They are similar products but with essential and important differences. But first the similarities. Both insurance linked funds and unit trusts are pooled investments of the type mentioned above. The bank, insurance company, or other financial institution simply manages the fund on behalf of the individual investors each of whom has so many units in the total fund.

In Ireland the managers generally charge an annual management fee and also impose a spread between "offer" and "bid" prices for the units. That simply means that at any one time there is usually a five per cent spread between the price at which units are sold to investors and the price at which they are bought back from investors wanting to cash them in. So if you invest now and want to cash in in a hour's time you have lost five per cent of your money.

Some funds offer units at a discount to large investors while others operate a smaller spread and a higher annual management fee.

The Irish Society for European Law

Founded in 1973

Irish Affiliate to the
Fédération Internationale
Pour le Droit Européen (F.I.D.E.)

President: The Hon. Mr. Justice Brian Walsh.

Chairman: Mr. Eamonn G. Hall, Solicitor

PROGRAMME FOR AUTUMN 1990

1. Wednesday, October 17, 1990:
   Mr. Finbarr Murphy, Barrister, Legal Advisor, Bank of Ireland
   A past Chairman of the Society – ***Consumer Policy in the European Communities: Its Effects in Irish Law.***
2. Thursday, November 15, 1990:
   The Hon. Mr. Justice Ronan Keane, Judge of the High Court, President of the Law Reform Commission – Community Law and Irish Law: A Fruitful Tension.
3. Thursday, December 13, 1990 at 6.15p.m.
   The Annual General Meeting of the Society – ***To be held in the main Reception room of the European Commission Office, 39, Molesworth Street, Dublin 2. The meeting will be followed by a Wine Reception.***

Lectures take place at 8.15 pm 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 Committee and guest speakers *for dinner* at the Club at 6.15 pm on the evening of each lecture. Members intending to dine must communicate with the Membership Secretary, Jean Fitzpatrick, Solicitor's Office, Telecom Eireann, 52, Harcourt Street, Dublin 2. (Tel: 01-714444 Ext. 5929, Fax: 01-679 3980, Electronic Mail (Eirmail) (Dialcom) 74: EIM076) not later than two days before the dinner, as advance notice must be given to the Club.

Membership of the Society is open to lawyers and to others interested in European Law. The current annual subscription is £15.00 (£10.00 for students, barristers and solicitors in the first three years of practice). Membership forms and further details may be obtained from the Membership Secretary.

But for the most part investors can assume that the investment is costing them an initial five per cent of the sum invested plus a small annual management fee. So obviously he or she should be thinking of investing for the medium to long term – say three, or preferably five, years as a minimum.

Up until this year's budget the investor is insurance linked funds had to pay a three per cent stamp duty which was not applicable to unit trusts but that anomaly has been ended and the stamp duty now applied to both. But some important tax changes still remain.

Gains on the traditional insurance linked funds are not taxable in the hands of the investors but the fund managers do have to pay capital gains tax on their transactions in managing the fund. With unit trusts, the fund managers do not pay any tax but the individual investor may be liable for capital gains tax. But the operative word is "may" for the average investor should be able to avoid the tax quite legitimately. For those who can avoid that capital gains tax the unit trust approach is better since the investments within the funds are not liable to gains tax either and th fund should therefore grow faster than a similar insurance linked fund.

Each individual is allowed to make up to £2,000 in capital gains each year – £4,000 for a married couple. With a bit of care the average investor should be able to keep his gains to below that amount. Gains are only made when the investment is actually cashed in or when funds are switched from one fund to another. The trick is not to cash in or switch too many units in any one tax year.

The other major difference between the insurance linked funds and unit trusts concerns confidentiality. The insurance linked funds are confidential. Investment in unit trusts is not. The Revenue Commissioners can have access to the records of investors in unit trusts. □

THE SOLICITORS BENEVOLENT ASSOCIATION

Concert & Buffet Supper

In aid of the association will be held in the

President's Hall,
The Law Society,
Blackhall Place, Dublin 7

on

Friday, 12th October, 1990

at 7.30 p.m.

GUEST ARTISTS:

The Band of An Garda Siochána
(By kind permission of Mr. E.C. Crowley, Commissioner)
Nanette Ivers: *Mezzo Soprano*
Marie Askin: *Pianist*

Subscription: £25.

Tickets: Available from Catherine Kearney, The Law Society. Phone: 710711. Fax: 710704.

Younger Members News

The Society of Young Solicitors

The Society of Young Solicitors held its Annual General Meeting on the 21st July 1990. The Minutes of the previous meeting were duly read and approved after which the following officers were appointed for 1990/91:

Chairman: Colin Sainsbury
Vice Chairman: James McCourt
Treasurer: Paul White
Secretary: Owen O'Sullivan
Public Relations Officer: Jennifer Blunden.

Katherine Delahunt, the outgoing Chairman, then addressed the meeting. She thanked all Committee Members for their help during the year and, in particular, gave special thanks to the new Chairman and his sub-committee for their hard work and dedication in organising what was generally agreed to be a most successful international conference in Galway on 6th to 8th April, 1990. A special tribute was then paid to Norman Spendlove who retired from the Committee after twenty five years. A presentation was made to Mr. Spendlove by the outgoing Chairman on behalf of the Committee. It was noted that his many years of printing and providing lecture scripts to the Society amounted to a major contribution to the efficiency and success of the many seminars held by the SYS.

The new Chairman, Colin Sainsbury, then addressed the meeting. On behalf of the Committee he thanked the outgoing Chairman for her work on behalf of the Society. She was to be congratulated on a most successful year which heralded the start of the champagne express (Killarney) and saw the introduction of 8 AM meetings for the sub-committee organising the International Conference (Galway). The new Chairman acknowledged that the future of the scripts was in a state of flux due in no small measure to the fact that Norman Spendlove's personal time and effort in this area had been taken very much for granted. In addition Mr. Spendlove had very kindly agreed to give the new script-provider a hand to get started. The new Chairman also thanked Terence McCrann for his valued contribution to the work of his Committee as he retired after five years.

Norman Spendlove then addressed the meeting briefly, informing members that the first SYS meeting had been held in Buswell's Hotel in May 1965. It was at that meeting that the Society name was chosen, the word "Society" being considered more appropriate than "Institute" which was then the "in word". The word "Young" was intended to represent the Society as being young in outlook though not necessarily in age. There can be no doubt that that particular definition has earned its place in the Society name and it is to be hoped that members of the profession continue to ensure that the Society lives up to its name at least in spirit!

Apart from the above mentioned officers, the current Committee members are Katherine Delahunt, Mary Hayes, Maureen Walsh, Gavin Buckley, Brian O'Connor and Miriam Reynolds. The Committee notes with regret the resignation of Caroline Crowley for personal reasons. The meeting then adjourned.

The next seminar will be held in Jury's Hotel, Cork, from the 16th to the 18th November 1990. It is to be a joint conference with the Bar on topics ranging from Personal Injuries to the Future of the Profession.

Jennifer Blunden/PRO

Publications

Gregg Myles, one of the speakers at the Joint Young Solicitors Conference which was held in Galway in April, 1990, has produced a short booklet entitled "Essential EEC Directives — Current and Pending", based upon the address which he gave at the Galway Conference.

The booklet is a useful yet succinct summary of all Directives of which Solicitors should now be aware, and, even more importantly, those upon which Solicitors will require to be in a position to advise their clients from 1992.,

Amongst the areas covered in the booklet, are banking, free movement of capital, company law, construction of products, environment, health and safety at work, public procurement, residence, road transport, and standards.

Copies of the booklet are available from Colin Sainsbury, Chairman, Society of Young Solicitors, c/o A & L Goodbody, 1 Earlsfort Centre, Hatch Street, Dublin 2, at the price of only IR£6.00 (including postage and packaging). □

Younger Members Committee
in association with
The Institute of Chartered Accountants and
The Society of Chartered Surveyors

BOWLING NIGHT

PRIZES

to be held at Stillorgan Bowling Alley, Dublin on Thursday, 20th September, 1990 (7.45 p.m.)

Subscription £6.00 per person.

Limited number of places available.

For registration please contact *Sandra Fisher, Media Officer, The Law Society, Blackhall Place, Dublin 7 (Tel: 710711, Fax: 710704).*

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3. Sports and leisure activities
4. Community Services

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ASSOCIATION INTERNATIONALE DES JEUNES AVOCATS

The Young Lawyers Association is a non-profit-making association constituted under Luxembourg law, which was founded in 1962 in Toulouse and Luxembourg. The objects of the Association include the promotion of co-operation and mutual respect between young lawyers from countries around the world.

The Association holds a week-long annual congress usually held at the end of August or beginning of September and publishes an annual Directory containing a list of members. The 28th AIJA Congress will be held in Barcelona from 17/21 September 1990.

TRAINEE EXCHANGE PROGRAMME

To enable young lawyers to obtain experience of daily professional practice in a foreign country the SPES Committee of AIJA will assist applicants in finding a host firm with whom they can spend three months. The host office will ensure that the lawyer's work within the firm involves both international and local legal matters. He/she will thus have the opportunity to compare legal practice in two jurisdictions and become familiar with a legal culture other than his/her own.

Applications are accepted from young or almost qualified lawyers under the age of 45, with a minimum of six months post-qualification experience in their own country and at present working in a law office. Good knowledge of English, French or the language of the host country is required.

Solicitors interested in joining AIJA or taking part in the Trainee Exchange Programme should contact Michael Irvine at Matheson Ormsby Prentice, telephone (01) 760981.

Add back calculations in Intoxicated Driving Offences

By
Robert Pierse,*
B.C.L., LL.B.,
Solicitor

1. **Question**
In a prosecution for "intoxicated" driving can evidence be admitted in Irish Law to show that the driver's alcohol level was at the time of driving (or attempting to drive/or in charge) higher than that shown in the analysis of a specimen taken sometime after the alleged offence?
This question is important and will be more important in view of the fact that Ireland is likely to have a reduced limit in the early 1990's due to E.E.C. norms being introduced.

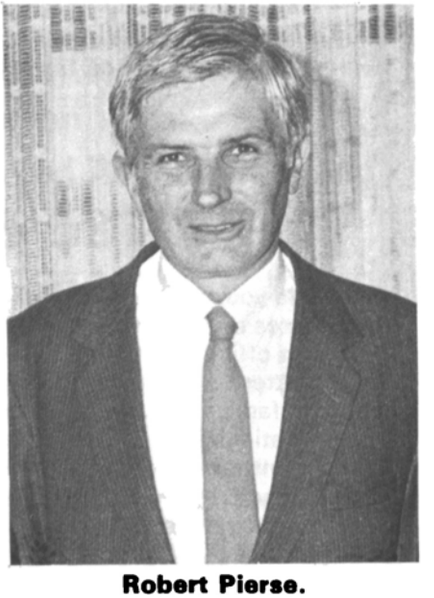
2. **English Answer**
It has received a positive answer in England in *Gumbley -v- Cunningham* [1989] 1 All ER 5. However, that decision is one on the specific wording of the English S 6(c) 7510(2) of the Road Traffic Act 1972 (as both substituted by Transport Act 1981). The vital wording being "Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by the accused shall, in all cases, be taken into account, and it shall be assumed that the proportion of alcohol in the accused's breath, blood and urine at the time of the alleged offence was not less than in the specimen", the alleged offence being that the proportion of alcohol (intoxicant) exceeds the prescribed Limit (80mgs/100ml blood in England; 100/100 in Ireland).

3. **Possible Irish Answer**
No Irish Decision on the point is known to the author as yet.
In view of the importance of the question a likely answer in Ireland is suggested here. It must be remembered that we are dealing with the law of evidence primarily as there is no statutory provision, as of yet, directing a court to add back on a specific basis.

The central criminal law criterion in Sections 49 & 50 of the 1961 Road Traffic Act (as substituted by the 1978 Act) is that a person shall not drive, attempt to drive or be in charge "while there is present in his body a quantity of alcohol such that, within three hours after so driving (attempting/in charge) the concentration of alcohol in his blood/urine . . ." will exceed the prescribed limit (100/100 blood or 135/100 urine).

It will be seen from this provision there is a "carry forward" provision or a "related back" provision already in existence in Irish Law. In view of the fact that the human body *stimulates* alcohol faster than it eliminates it this could produce somewhat unusual results. Thus if one drove a short distance immediately after 4 – 5 quick ones (fluid oz of whiskey/gin) and was tested (particularly a urine test) one might escape; but not so an hour later, when one is more likely on test to exceed the limit. There is also inbuilt in the present legislation the "anti-hip flask" provision of Section 18 of the 1978 Road Traffic Act. That section eases the prosecution's path by providing it is unnecessary for them to show no alcohol was consumed after the alleged offence and before the specimen is provided. The section further provides that if the defence produces the evidence of such consumption it must be disregarded, unless the court is satisfied by or on behalf of the defendant that, but for such consumption, he would not have exceeded the prescribed limits – a view also taken in *Patterson -v- Charlton* [1986] R.T.R. 18. In *Rowlands -v- Hamilton* [1971] 1 All ER 1089 the defence succeeded but the court put a strict construction on the then English provision in S 1(1) of the Road Safety Act 1967. This strict construction led to a similar dismissal (on

". . . there is a "carry forward" provision or a "related back" provision already . . . in Irish law."



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appeal) in R. -v- Richards [1975] I W.L.R. 131 where again the prosecution brought in Back Calculations.

However S.18 of 1978 Irish Act is an effort to make these back calculations difficult to sustain a defence.

Section 18 reads as follows:-

" (1) On the hearing of a charge for an offence under section 49 or 50 of the Principal Act, it shall not be necessary to show that the defendant had not consumed intoxicating liquor after the time when the offence is alleged to have been committed but before the taking of a specimen under Sections 13, 14 or 17.

(2) Where, on the hearing of a charge for an offence under Section 49 or 50 of the principal Act, evidence is given by or on behalf of the defendant that, after the time when the offence is alleged to have been committed but before the taking of a specimen under Section 13, 14, or 17, he had consumed intoxicating liquor, the court shall disregard the evidence unless satisfied by or on behalf of the defendant:-

(a) that but for that consumption the concentration of alcohol in the defendant's blood (as specified in a certificate under Section 22) would not have exceeded a concentration of 100 milligrammes of alcohol per 100 millilitres of blood, or

(b) that but for that consumption the concentration of alcohol in the defendant's urine (as specified in a certificate under Section 22) would not have exceeded a concentration of 135 milligrammes of alcohol per 100 millilitres of urine.

(3)(a) A person shall not take or attempt to take any action (including consumption of alcohol, but excluding a refusal or failure to provide a specimen of his breath or blood) with the intention of frustrating a prosecution under Section 49 or 50 of the Principal Act.

(b) A person who contravenes this subsection shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or, at the discretion of the court, to a fine not exceeding £500, or to both.

(4) Where, on the hearing of a charge for an offence under Section 49 or 50 of the Principal Act, the court is satisfied that any action taken by the defendant (including consumption of alcohol but excluding a refusal or failure to provide a specimen of his breath, blood or urine) was so taken with the intention of frustrating a prosecution under those sections, the court may find him guilty of an offence under subsection (3)".

Section 18 goes further in two respects:-

(i) By providing a prohibition on taking or attempting to take any action, including the consumption of any alcohol, with the intention of frustrating a prosecution – Subsection (3). To so do is an offence.

(ii) By providing in Subsection (4) if on the hearing of a charge under S. 49 or S. 50 a Court is satisfied that any action taken by the defendant, including the taking of alcohol, was with the intention of frustrating the prosecution that Court can convict him of an offence under (i) above and also of the main offence under Sections 49 or 50.

There is a further hazard for the hip flask drinker in that he is more likely to fail a breath test and so be arrested i.e. give evidence to ground a lawful arrest – *Hobbs -v- Hurley* (H.C. 10/6/1980) and *D.P.P. -v- Donoghue* [1987] I.L.R.M. 129) or indeed this very conduct of the defendant may give the Garda sufficient ground of reasonable suspicion – *D.P.P. -v- O'Connor* [1984] I.L.R.M. 333.

The above analysis shows that there is definitely in the contemplation of the Legislation time factors

(i) to enable the prosecution to succeed within three hours where limit exceeded

(ii) to prevent the defence succeeding by "Deduction back" factors in certain circumstances.

4. The Main Questions

What then of the driver arrested within the three hours but with a result of less than the prescribed limit? Can the prosecution "Add back" to the time of the alleged offence the alcohol eliminated or likely to have been eliminated?

Again the tentative answer would appear to be "yes". The background decisions of drunk driving offences allowed for the introduction of "Opinion" evidence in such cases. The main Irish case was *The State (Ruddy) -v- Kenny* (1960) 94 I.L.T.R. 185 which held a Garda or ordinary person could give evidence that in his opinion that defendant was unfit to drive. In the *Richards* case (supra) Lawton J. commented in relation to Back Calculation that evidence of this kind "always had been admissible at Common Law". Therefore evidence from experts regarding back calculation would appear to be clearly admissible in Irish Law. The qualification and experience of the expert should be questioned, as obviously difficult questions of an individual's metabolism, food intake etc., would have to be examined.

There is possibly one other question that should be addressed – what if the specimen is taken more than three hours after the alleged incident (e.g. accident). It would seem on principle that there is no reason to exclude expert evidence on the three houre basis. It should be remembered that the old "incapacity test" provision still exists. That is the test of "proper control" – see Ss. 49(1) and S. 50(1) of the 1961 Act (as substituted by S. 10 and S. 11 of the 1978 Act). In proper circumstances a Court could allow the add back to be done as probably corroborative evidence that the driver had not the capacity for proper control of the vehicle. The *actus reus* in this type of case is driving without proper control; in the other type it is driving over the limit.

In neither case it appears is there any prohibition on evidence by the prosecutor showing beyond reasonable doubt that the alcohol level at the time of the offence was more than the specimen.

". . . it appears [that there is no] prohibition on evidence by the prosecutor showing beyond reasonable doubt that the alcohol level at the time of the offence was more than the specimen."

5. What is the "Add Back"?

The human body eliminated alcohol from itself by natural process and therefore the test results will vary depending on the time factors involved.

The scientific evidence produced in *Gumbley -v- Cunningham* [1989] 1 All ER 5 was to the effect that a male of the age, height, build, and state of health of the applicant would eliminate alcohol at a rate between 10mg – 25mg/100 mls each hour, the likely rate in that case being 15mg/100ml per hour. This was so even though he had vomited before the specimen taken. He had his blood sample taken four hours 20 minutes after the fatal accident he was involved in. It had a result of 59mg/100 mls. The prosecution sought to show the level must have in the region of 120 – 130mgs/100 mls. They also argued that even if the elimination rate was as low as 6 mgs/100 mls per hour, which was unheard of, the appellant's blood-alcohol level would have been in excess of the limit at the time of the impact. The appellant was convicted and the matter went all the way to the House of Lords where the conviction was upheld.

It would seem that the normal add back factor would be 15 mgs/100ml per hour in blood samples. Thus under the present Law in Ireland a driver who has his level at 90 mg/100 ml two hours after an accident is likely to be convicted.

It should be remembered that the add back will have to be proved beyond reasonable doubt and the burden of that proof may not always be easy.

6. Warning

In the *Gumbley* case the following advice was issued by the Divisional Court ([1987] 3 All ER 733, per Mann J:) which is worth noting.

"In our view the prosecution should not seek to rely on evidence of back-calculation save where that evidence is easily understood and clearly persuasive of the presence of excess alcohol at the time when an accused person was driving. Moreover, justices must be very careful especially where there is conflicting evidence not to convict unless on the scientific and other evidence which they find it safe to rely on they are sure an excess of alcohol was in the defendant's body when he was actually driving as charged".

7. Defence Perspective

From a Defence point of view there is an obvious corollory position but it presents more difficulty for the Defence than the prosecution. This is because the assimilative speed with which alcohol is assimilated is greater than the exit curve that arises. No doubt it would be possible to get expert evidence to show what the assimilative capacity is, as such a defence may arise where a defendant wishes to say that his blood alcohol level would have been below the legal limit but for the length of delay in taking the sample/ specimen. The writer is not aware that such a defence has been raised to date and as stated there would be obvious difficulties in proving it but it should not be impossible.

□

* Robert Pierse, Solicitor, is the author of *The Law of Road Traffic in the Republic of Ireland*, published in 1989 by Butterworth (Irl.) Ltd. Cost £29.50.

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The first women lawyers

By
Henry G Button

On 22 September 1989 the new offices of the Attorney-General of Ontario in Toronto were dedicated and named the Clara Brett Martin Building to commemorate "the first woman lawyer in the whole British Empire". I happened to be in Toronto at the time, and the mention of her achievement prompted a search for the first women lawyers in other parts of what was once the British Empire.

Clara Martin was called to the Bar and became a solicitor in Ontario on 2 February 1897, but she had had many obstacles to overcome on the way. As early as 1891 she had applied to the Law Society of Upper Canada for permission to become a lawyer, but her application had been rejected by the Special Committee on the Admission of Clara Brett Martin as a Student-At-Law. The *Canada Law Journal* welcomed the decision not to admit women and commented: "We know of no public advantage to their being admitted to the bar. As a matter of taste it is rather a surprise to see a woman seeking a profession where she is bound to meet much that would offend the natural modesty of her sex".

Nothing daunted, Clara Martin enlisted the help of Sir Oliver Mowat, the Attorney General of Ontario at the time. Thanks largely to his support, the Ontario Legislature passed an Act in 1892 that gave the Law Society the right to admit women as solicitors, and Clara was articled to a Toronto law firm in 1893. An Act of 1895 obliged the Law Society to admit women to the Bar, but technical wrangles kept her from claiming her victory until February 1897. She practised law in the City of Toronto until her death in 1923.

" 'As a matter of taste it is rather a surprise to see a woman seeking a profession where she is bound to meet much that would offend the natural modesty of her sex'. "

New Zealand was hard on Canada's heels. By courtesy of the Deputy Registrar of the District Court at Dunedin I can report that Miss Ethel Rebecca Benjamin "was admitted as a barrister and solicitor in this Court before Mr. Justice Williams on 6 April 1897". This was only two months after Clara Martin had been admitted in Toronto. One wonders if the two ladies ever compared notes about their experiences.

Miss Benjamin too had had difficulties to contend with. When she applied to the Council for permission to use the library, the Council resolved that she could be given "a permit to read in the Judge's Chamber Room, there being no rule applicable to her case" (*Portrait of a Profession* by Robin Cooke Q.C., pp.336-7). It was also suggested that the Judges should be asked to prescribe suitable dress for the women lawyers "as prescribed by the Ontario Law Society", but nothing seems to have come of this. (In February 1990 it was announced that Dame Catherine Tizard was to be New Zealand's first woman Governor-General. In this field too Canada had led the way).

The Assistant Archivist of the Law Society of Upper Canada has drawn my attention to the "Rules respecting women" to be found on pages 378 and 379 of the *Central Law Journal* of 1919. One rule runs: "Every such woman appearing before Convocation upon the occasion of her being admitted to practise as aforesaid, shall appear in a barrister's gown worn over a black dress, white necktie, with head uncovered".

The other colonies and even the mother country were slow to follow the example of Canada and New Zealand. Decades rather than years went by before, in the nineteen-twenties, these other countries too began to admit women lawyers. In Australia, for instance, Miss A.E. Evans was admitted as a barrister by the New South Wales Full Court on 12 May 1921, but she did not practise in the courts. The first *practising* lady barrister in New South Wales was Mrs. Sibyl Munro Morrison, admitted on 2 June 1924.

A few years later, on 17 March 1931, Enid Marjorie Russell became the first woman to qualify in law in Western Australia and to be admitted as a practitioner of the Supreme Court of Western Australia. She had been born in 1904 and died in 1958, having worked almost until she died. In 1950 she had written much of "A history of the law in Western Australia and its development from 1829 to 1979", which was edited and completed by F.M. Robinson and P.W. Nichols and published by the University of Western Australia Press in 1980. This work included a brief biography of Miss Russell by Sheila McClemans.

In South Africa, aspiring lady lawyers encountered the same kind of obstacles that had beset the path of Clara Martin in Canada. In 1909, for instance, a lady named Sonya Schlesin brought an application before the Transvaal Provincial Division to compel the Incorporated Law Society of the Transvaal to register her articles. The judge ruled against her, on the ground that the

Henry Button.

legislature had had men only in view when framing the Administration of Justice Proclamation, "because it used the words 'him' and 'he' throughout". Miss Madeleine Wookey similarly failed to secure admission in Cape Province in 1912.

Eleven years later the Women Legal Practitioners Act (7 of 1923) was passed. In 1926 a lady named Constance Mary Hall became the first woman to be admitted as an attorney in South Africa. (See *DE REBUS* of July 1989, pp.461-2).

Three years earlier, in November 1923, Miss Mithan Tata became the first lady-advocate in Bombay. P.B. Vachha, in *Famous Judges, Lawyers and Cases of Bombay,* quotes an article from the *Times of India* which hailed her appointment and went on to remark that "the association of the fair sex with law and litigation began from times immemorial, going back to the period when Eris threw the apple of discord among the Olympian goddesses". Almost ten years later, on 24 March 1933, Miss Cecilia Clementina Ferreira became the first lady solicitor to be enrolled in the Bombay High Court.

"Ladies in England and Ireland had to await the passing of the Sex Disqualification Act of 1919 before the doors were opened to them."

In Scotland, the first lady advocate – Miss (later Dame) Margaret Kidd* was admitted on 13 July 1923. After more than four hundred years the W.S. Society admitted its first lady member on 6 December 1976. (The Law Society of Scotland cannot say who was the first woman solicitor in Scotland, as their records do not go back far enough).

Ladies in England and Ireland had to await the passing of the Sex Disqualification Act of 1919 before the doors were opened to them. In the following year Miss Helena Earley became the first lady solicitor in Ireland. On 1 November 1921 the Lord Chief Justice of Ireland, Sir Thomas Molony, called twenty students to the Irish Bar, and the first name on the roll was that of Miss Frances Kyle, the fifteenth was Miss Averill Deverell. Miss Frances Elizabeth Moran was the first woman to take silk, on 9 May 1941.

In 1922 a former student from Girton College, Cambridge, Miss Carrie (or Carol) Morrison became the first woman to be admitted as a solicitor in England. Harry Kirk refers to this development in *Portrait of a Profession.* He remarks that the *Gazette* made no mention of Miss Morrison's achievement.

Miss Morrison had been born in 1888. She attended Manchester High School for Girls and was a student at Girton College, Cambridge, from 1907 to 1910. Her entry in *Who Was Who* shows that she was an articled clerk and Law Society student from 1920 to 1922 and among the first four women to pass the Law Society's final examination in 1922. She described herself as "Solicitor since 1922 – first woman admitted".

Miss Morrison was not the first woman to address herself to the Law Society. An Oxford student from St. Hugh's College, Miss G.M. Bebb, now immortalised in *Bebb - v- Law Society* – [1914] 1 Ch. 286 – had notified the Society in December 1912 of her intention to present herself at the preliminary examination in February 1913, with a view to becoming a solicitor. She enclosed the usual fee. The Society returned the fee and told her that she would not be admitted to the examination. She thereupon brought an action against the Law Society, claiming to be a "person" within the meaning of the Solicitors Act of 1843.

Miss Bebb had studied law at Oxford. The 1911 class list for the examination "In Juriprudentis" shows Miss Bebb as the only woman in Class I, while there were no women in Classes II, III and IV. This, however, did not help her with Mr. Justice Joyce, who dismissed her action on July 2, 1913. The case then went to the Court of Appeal, where Lord Robert Cecil K.C. appeared for Miss Bebb and three K.C.s for the Society. The account of the case makes interesting reading nowadays.

It was argued on behalf of Miss Bebb that women were allowed to serve as Queens, and were permitted to practise as solicitors "in many of our colonies". But the three judges were unswayed by such arguments. The Master of the Rolls (Cozens-Hardy) admitted that the applicant was "a distinguished Oxford student", but Lord Coke had said 300 years ago that a woman was not allowed to be an attorney, and no woman ever had been an attorney. Swinfen-Eady, who was to succeed Cozens-Hardy as Master of the Rolls in 1918, said that the argument had entirely failed to convince him that the profession of a solicitor was open to women. W.G.F. Phillimore, who had just been made a Lord Justice of Appeal, agreed with the other two and said that the office of attorney "has never been, in the view of the Courts, suitable to women". For good measure he added that, if a woman was admitted and then married, difficulties could arise because married women were not free to enter into binding contracts, as solicitors sometimes had to do.

In 1922, the year in which Miss Morrison had been admitted as a solicitor, three other Girtonians were among the first women to be called to the Bar in England, making 1922 an *annus mirabilis* for the college. Sybil Campbell, Naomi Wallace and May Wheeler were all called to the Bar at the Middle Temple on 17 November 1922. (Sybil Campbell later became the first woman Stipendiary Magistrate). An Oxford don named Ivy Williams, by some tricky footwork, had stolen a march on the Cambridge ladies and had been called to the Bar, at the Inner Temple, in the summer of 1922, making her the first woman barrister in the country. Another Girtonian, Theodora Llewelyn Davies (later, Mrs. Calvert) was also

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called to the Bar at the Inner Temple, in November 1922. In England the first woman to take silk was (Dame) Rose Heilbron in 1940 and in Scotland (Dame) Margaret Kidd in 1948*. In Northern Ireland no woman took silk until 1989 (Miss Eilish McDermott).

Finally, let us pay tribute to the pioneering women lawyers in the United States. A learned friend in Philadelphia has kindly supplied me with a list of the first women lawyers in each of the individual states. Iowa, perhaps surprisingly, led the way.

Mrs. Arabella Mansfield, who had been born on May 23, 1846, had begun her study of the law by "reading" in a law office in Mt. Pleasant, Iowa. In June 1869 she was admitted to the Iowa State bar. In 1881 she moved to DePaul University in Indiana, where her husband had been appointed Professor of Chemistry. Until her death in 1911 she served there in various capacities, as Dean of Women and Professor of History. Mansfield Hall in the university is named after her.

Other states were not slow to follow Iowa. A lady named Lemma Barkaloo was admitted in Missouri in 1870, followed by eleven more states in the eighteen-seventies and nine in the eighteen-eighties. Alaska brought up the rear, Mildred Herman having been admitted there in 1950.

By 1893 there were enough women lawyers in the States to hold a Congress in Chicago, during the World's Fair. Some controversy had arisen over the claim of Arabella Mansfield to be the first woman lawyer in the whole of the United States, and the Congress appointed a committee to investigate the dispute. The committee duly awarded the title to Mrs. Mansfield but noted that a lady named Ada Kepley had been the first woman in the States to be graduated from a law school when she earned her degree in 1870 from Union College in Chicago. Mrs. Mansfield, as we saw, had not attended a law school when she was studying law.

Mrs. Mansfield had been born Arabella Babb. She had met a friendlier reception from the law then her near namesake Miss Bebb, the lady from Oxford who had been rebuffed by the Court of Appeal. An article about Mrs. Mansfield in *The Iowan Magazine* of Summer 1967 notes that the judge who presided over the official proceedings admitting Mrs. Mansfield to practise had interpreted the statue reading "any white male person" and another section which allowed "words importing the masculine gender only" to be extended to females quite liberally for his generation.

As a fitting coda to this account of feminine achievement, one might quote from a report on the legal profesion in *The Times* of 13 March 1990 according to which "approximately one-third of those called to the Bar, and over half of admitted solicitors, are women". □

**Editor's Note: Later QC and for many years a distinguished editor of the* Scots Law Times.

* *Henry G. Button lives in Cambridge, England, where he is Secretary of The Old Members' Club of his College. He is an author, a great letter writer and a part-time tour guide.*

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Attitudes of apprentices to computers

1. **Introduction**

It has become apparent to everybody involved in the legal profession in the past few years that new technology and in particular computers are becoming more important in Solicitors' offices. The Technology Committee arranged for an informal survey in order to gauge the level of knowledge of Solicitors' Apprentices on Computers and their attitude to the use of Computers in the legal profession.

A sample of 60 apprentices were polled in the course of the survey. The sample includes apprentices at each stage in the education cycle. The size of the office in which the apprentice worked was also considered to be an influencing factor and therefore the sample was chosen so as to include apprentices from practices of varying sizes. (Small, up to four Solicitors, Medium, 5-10 Solicitors, Large 10+ Solicitors).

2. **The Survey**

The participants were asked questions not only relating to computers but also on other topics which might be viewed as relevant to their further education and professional development. The questions and the responses are shown below.

(a) Have you received any formal education in computing? 61% of those polled had received no formal education of the 39% remaining; knowledge was acquired as part of their second or third level courses or alternatively as a result of short courses.

(b) Are there any computers in your office?

Every participant responded that computers were in use in their office.

(c) Have you used any computers in your office?

Sixty per cent of the respondents had used a computer, to some extent. Of those who had not used a computer in the office the majority had been shown how to use them but as yet had not taken the opportunity to do so.

"Sixty per cent of the respondents had used a computer to some extent . . . . "

(d) the Participants were then asked if they could type and if not would they like to learn?

Seventy per cent responded that they could not type, the remaining 30% had some level of typing ability. Sixty three of those surveyed said that they would like to learn.

(e) Do you have a business qualification?

Twenty two per cent of the respondents had some form of business qualification whether it be a primary degree or as a result of post graudate studies.

(f) Is a business qualification relevant?

Forty three felt that such a qualification was relevant, those who offered a view felt that is was relevant only if one was dealing with commercial matters.

(g) The participants were next asked which subjects should be included in the final course syllabus. When asked if computers should be part of the course, 78% felt they should. On the question of management skills, 73% agreed that this would be a worthwhile subject for the course. Only 40% felt that typing would be a worthwhile subject for incorporation in the syllabus.

(h) The participants were then asked which of the following did they consider the most useful skill?; Accountancy, Foreign Language, Computers, Typing. They responded as follows:— 47% felt that Accountancy was the most useful, 38% indicated foreign Languages, and the remaining 15% selected Computers.

(i) The participants were then asked which of the following they would most like to pursue:— Accountancy, 48% selected this; Foreign Languages 22%; EEC Diploma 17%; Computers 13%.

(j) On the subject of extra curricular courses they undertake Accountancy/ Business 13%; Foreign Languages 13%; Tax 17%; EEC 4%; Typing 4%; Computers 6%. Forty three per cent of those surveyed took no extra curricular courses.

Conclusions

On the issue of availability or access to computers, it appears that while there is now widespread use of new technology in the legal profession, just over half of those surveyed have used or have regular access to computers. The results indicate that there is a greater likelihood of use of computers by apprentices in the larger and medium sized offices.

The vast majority of those surveyed felt that it was helpful to use or at least be aware of how to use computers. Only 15% of those surveyed were uninterested and almost 80% felt that computers should be included as part of the training provided in Blackhall Place. Until recently students on Advanced Courses were invited, at the end of the day in the Law School, to study the use of computers in various business houses in Dublin.

"The usefulness of business skills was associated with their relevance in dealing with commercial law matters."

The Law School no longer offers this opportunity as it met with scant response.

A large number of the participants expressed the opinion that management and business skills should also be included in the

curriculum in Blackhall Place. Curiously, the majority of those surveyed did not feel that a business qualification was relevant. The usefulness of business skills was associated with their relevance in dealing with commercial law matters. There was an apparent lack of appreciation of the need for such skills in running an office; or as being essential to the running of an office.

The majority of those surveyed felt strongly enough about the need for further education to engage in further studies elsewhere. The range of subjects they chose to study is varied, as indicated in the answer to (j) above, ranging from financially orientated courses to foreign languages. The Law School has responded to this need by giving the opportunity to students on the first Professional Course in 1990 to attend lessons in oral French after normal teaching hours in Blackhall Place but interest appeared to wane despite initial enthusiasm.

The results of the survey indicate that a sizeable number of the apprentices currently in training appreciate the usefulness of knowledge of matters outside basic legal training in advancing their prospects in the profession, whether in their present firm or a practice of their own. Unfortunately, only the respondents who do recognise the advantage of these ancillary skills are those who undertake extra curricular courses.

In view of the increasing competition faced by the profession in the marketplace, it would seem prudent to acquaint those in the course of training with the rudiments of other disciplines so that they may be better prepared for the challenge they face. □

Practice Note

FAMILY LAW

The Law Society has been informed by the Office of the Registrar General that Decrees of Nullity granted by the High Court or the Supreme Court may be noted against the relevant entry of marriage in the Marriage Register Book, upon application to the Registrar General at Joyce House, 8/11 Lombard St. East, Dublin 2, subject to the requirements in that regard of the Registrar General.

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Previous study of public international law and previous debating experience would be an advantage, but are not essential.

All apprentices interested in taking part should submit their names to:

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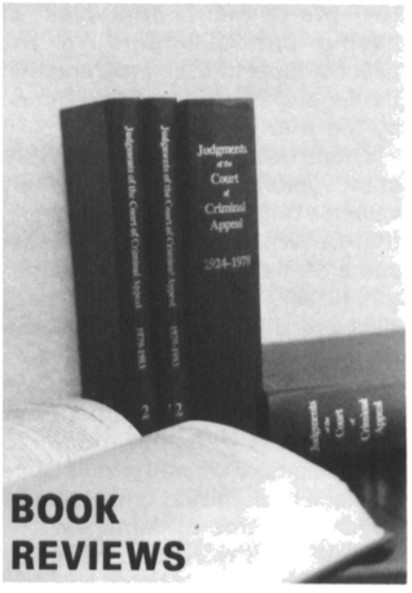

WEINBERG AND BLANK ON TAKE-OVER AND MERGERS

[Fifth Ed., by L. Rabinowitz, Sweet & Maxwell, London, 1989. 2 volumes. loose leaf UK £175.00]

This established practitioner's bible has made a welcome reappearance, the first new edition since 1979. The fifth edition is under the editorial hand of Laurence Rabinowitz, of the Middle Temple, Barrister, and is the first in which Sir Mark Weinberg has not participated.

The principal focus of the book is on bids for public companies resident in the United Kingdom. Thus, in common with other English textbooks, the Irish reader must tread warily. The need for caution in the light of legislative differences between the two jurisdictions is infinitely greater now than when the fourth edition was published because there has been a veritable plethora of major British statutes (most of them not parallelled in Ireland) over the intervening decade. The same legislative outpouring rendered imperative for English readers the publication of the present edition.

In line with other major textbooks which treat of rapidly changing subject-matter, the present work appears in loose-leaf format, but divided in two volumes. The first volume contains the treatise proper. The second volume is the repository of primary materials including UK statutes, EC materials, extracts from the City Code on Take-Overs and Mergers and the Substantial Acquisitions Rules issued on the authority of the Take-Overs Panel. The same volume also sets out extracts from the Yellow Book and some accounting materials including relevant Statements of Standard Accounting Practice. There is a comprehensive index to the work.

The objects of the book are stated to be:-

(i) to provide for practitioners a detailed and systematic book of reference on the law and practice relating to take-overs and mergers, and

(ii) to present a readable account of the subject for the many others, particularly company directors, financial commentators, investment analysts, stockbrokers and shareholders, who come into contact with or have an interest in take-overs and mergers.

While the work is not light reading in a general sense for someone who would come cold to it, the book succeeds admirably in achieving its stated objects and in maintaining the tradition of previous editions in setting forth an admirably lucid exposition of a fascinating but difficult and complex topic.

The complexity of the topic has been heightened considerably by the UK legislative flow during the 1980s: major items commanding consideration have included the Companies Act 1985, the Companies Securities (Insider Dealing) Act 1985, the Insolvency Act 1986 and fiscal legislation. But towering over all these is the Financial Services Act 1986 and the range of measures and institutions that take their place on foot of it; resulting from the Government implementation of the Report of Professor LCB (Jim) Gower, this massive Act must surely be one of the most complex ever to reach a statute book in any Common Law jurisdiction. The difficulties encountered by well-briefed Ministers in guiding the measure through Parliament gave some comfort to the writer of this notice as he attempted to comprehend some of the aspects of the Act. This and the other recent measures enumerated above are elucidated admirably in Chapter 1 of Part III A of Volume 1. Perhaps it is as well that, for the present at least, Irish lawyers advising on purely indigenous subject-matter are spared having to grapple with these complexities.

Parts I (Economic and Legal Background) and II (Forms and Mechanics of Take-Overs) of the first volume are particularly attractive and beneficial features of the work. The writer recalls deriving similar benefit as an undergraduate from Professor Gower's chapters on the History of English Company Law and on the Future of Company Law – see *Principles of Modern Company Law*, 4th ed, 1979, pp 22-95. In some quarters such material is scoffed at as being unduly historic and academic. It is submitted that, on the contrary, such material is not merely illuminating and instructive but it is an invaluable didactic tool which enables the reader to engage in an informed and appreciative study of the modern textual commentary. Long may the enlightened authors and publisher of the present work and of Gower retain this material.

Irish readers will not need reminding that the Monopolies, Mergers and Take-Overs (Control) Act 1978 bears no resemblance to the legislation governing the (UK) Monopolies and Mergers Commission. Nevertheless, some textbook guidance in Ireland to the Irish statute would be welcome.

If Irish lawyers may derive consolation at not having to address themselves to the modern UK legislation when dealing with wholly indigenous mergers and take-overs, they will be acutely aware of the ever increasing incidence of transborder commercial alliances and of rapid economic integration within the EC. Moreover, because the Stock Exchange – Irish is part of the International Stock Exchange in London many of the regulatory matters (including particularly the Yellow Book) expounded in the present work will be of considerable value to the Irish reader.

A chapter is promised (in a later release) on merger legislation in the EC. This material has presumably been withheld (wisely) so as to allow consideration of the recently agreed Merger Control Directive which had been deliberated for years in Brussels. The same

chapter may perhaps include reference also to the Commission rulings in the *Irish Distillers Group plc* takeover.

It is hoped that future releases may also refer to some recent developments in the UK including the latest chapter in the sagas of *House of Fraser* and *British Aerospace/Rover* as well as the application of the judicial review mechanism (equivalent to that under Order 84 in Ireland) to the Take-Over Panel building on such cases as *Ex p. Datafin* [1987] 1 All ER 564, CA, and *Ex p. Guinness* [1989] 1 All ER 509, CA, both of which are considered in the text.

The Fifth Edition of Weinberg & Blank does not come cheap but it is indispensable for those dealing with the subject in the UK or (as in virtually all cases) having even a connection with the UK. For the reasons enumerated above it will prove of considerable value to Irish lawyers advising even on purely domestic cases and its relevance and usefulness to Irish lawyers will increase all the more as the tide of Companies legislation inspired by Brussels gathers pace and a fortiori if there should be a major legislative reform of financial services in Ireland as has been advocated by some.

Patrick J.C. McGovern

IRISH LAW OF DAMAGES
By John P. White. 2 vols, IR£80.00. Butterworths.

There are now few areas of legal jurisprudence in this jurisdiction where the academic or practitioner cannot turn to an Irish textbook for guidance. With the publication of Dr. White's 2 volume work, the "Irish Law of Damages", this category is further reduced. Indeed there has been a virtual deluge of legal "homegrown" texts produced in the last few years and it is important that this area, which for so many practitioners is a large part of their practice, is now covered.

Dr. White's approach to the subject is to divide it into 2 volumes. Broadly Volume 1 is an examination of the philosophical tenets which underlie our law of damages and an analysis of its range and breadth in the light of this examination. His approach might be deemed "academic", in the perjorative sense, by some practitioners. However, in order to grasp the essence of, and to understand fully, such concepts as remoteness, foreseeability, and mitigation it is imperative to start from first principles. Too often, it seems, practitioners leave their jurisprudential equipment behind them when they qualify, feeling it is of little real relevance or assistance in their day to day practice. This view is rightly challenged head on by Dr. White's work.

He is not afraid to point out areas where a more coherent approach should be adopted which would necessitate, in some cases, statutory intervention to deal with glaring injustices and imbalances in the system. One such area where he argues for a new approach is that of recovery for wrongful death. Having pointed out the injustices and shortcomings of the current legal position he presents a coherent, well thought out and constructive set of solutions. As he points out, these may not all be taken on board by judges but should start a debate on the subject and indeed set the agenda for such a debate.

Volume 2 is a classified guide to the levels of quantum of damages for non pecuniary loss arising from personal injury starting with what are termed "catastrophic injuries" such as paraplegia and moving on to cover injury to various regions and parts of the human anatomy in considerable detail. In so doing, Dr. White has unearthed an amount of previously unpublished Supreme Court case law dealing, in particular, with quantum and the level of damages then considered appropriate for different types of injuries. Such decisions were largely unavailable when juries were still involved in personal injury cases in the High Court owing to the fact that the views of the Supreme Court could not be disclosed to these juries. Dr. White was allowed access to the Supreme Court records by the Chief Justice and has used these together with the few written judgments that exist.

The result is to offer real guidance in the task of trying to establish some parameters for similar types of injury and the level of damages which should be awarded. He is careful to point out the pre-eminent principles of having special regard to the peculiar facts of each case and that the facts are not fact until so found by the trial judge.

There will be a need for a constant update of this extremely valuable guide and it is to be hoped that Dr. White will devote at least some of his considerable energies to this task. What his research does illustrate is the urgency of a comprehensive and up to date system of reporting of our jurisprudence in this area as in others. Without this the system remains open to accusations of disparity, imbalance and lack of precision when setting levels of awards of damages.

Dr. White's work is to be highly recommended and should be compulsory reading for all lawyers working in the area.

Geraldine M. Clarke

THE COMMON LAW TRADITION
Edited by J.F. McEldowney and Paul O'Higgins, [Irish Academic Press. 1990. 248pp. £27.50. Hardback].

Professor Francis Headon Newark, a former holder of the Chair of Civil Law in the Queen's University of Belfast, hoped in 1947 that one day Ireland might have its Reeves or Holdsworth: (1947) 7 N.I.L.Q. 121. However, Professor Newark correctly noted that it would not be an easy task to write the legal history of Ireland. Professor Newark referred sadly to June 30, 1922, when the Four Courts was destroyed with the result that "the charred remains of the legal records were literally scattered over the City of Dublin."

The editors of *The Common Law Tradition* in their joint essay "The Common Law tradition and Irish legal history" in paying tribute to Professor Paul O'Higgins note that the O'Higgins Bibliographies help to destroy the myth that all was lost in the fire in the Four Courts in Dublin. The select bibliography in *The Common Law Tradition* further proves that many fruitful sources do exist for Irish legal historical research.

The editors refer to the lack of legal historical scholarship and decry the lack of financial and

physical resources to discover the historical heritage that has survived. Government as well as academics are criticised for the lack of financial investment in legal historical research. The writer of this notice poses the question – why should the lawyer of today study legal history? Why should the Government or others invest in such a venture? It could be argued that the lawyer must study the past so as to understand the present and make predictions about the future.

Frederick Maitland in "A Survey of the Century" in *The Collected Papers of Frederick William Maitland* (H.A.L. Fisher ed., Cambridge, The University Press, 1911, pp. 438-39) noted that the office of historical research may be seen as that of explaining and therefore lightening, the pressure that the past must exercise upon the present and the present upon the future. Maitland stated: "Today we study the day before yesterday, in order that yesterday may not paralyse today, and today may not paralyse tomorrow". Some use history like *A Mirror for Magistrates* (a collection of cautionary tales, first published in 1559 – see L.B. Campbell ed. Oxford 1938) which set out historical instances of how those who offend against the divine order always come to a bad end. There is merit, however, in studying the past for its own sake and then enquiring whether the particular study of the past has any contribution to make to the present. Professor Elton in *The Practice of History* (Fontana Library, 1969) writes of the autonomy of history and states that the study of history is legitimate in itself and that any use of it for another purpose is secondary. The writer of this notice is attracted by Professor Elton's reasoning. He argues that, like all sciences, history, to be worthy of itself and beyond itself, must concentrate on one thing: the search for truth. Professor Elton argues that history's real value as a social activity lies in the training it provides and the standards it sets. He continues

> "Reason distinguishes man from the rest of creation, and the study of history justifies itself in so far as it assists reason to work and improve itself. Like all rational activities, the study of history, regarded as an autonomous enterprise, contributes to the improvement of man and it does so by seeking the truth within the confines of its particular province, which happens to be the rational reconstruction of the past".

Put "legal" before the word "history" above, and the writer of this notice modestly suggests the justification for the law student studying legal history.

The Common Law Tradition is a collection of essays in Irish legal history edited by John F. McEldowney, Lecturer in Law at the University of Warwick, and Paul O'Higgins, Professor of Law, King's College, London. Professor Desmond Greer, Professor of Law in the Queen's University of Belfast, in his contribution traces the development of the Civil Bill in Ireland. Daire Hogan, Solicitor (author of *The Legal Profession in Ireland*) examines the cantankerous relationship between two members of the judiciary – Lord Justice Christian, who was a member of the Court of Appeal in Chancery in 1867, and Thomas O'Hagan, who became Lord O'Hagan of Tullahogue, Lord Chancellor of Ireland. Professor N. Osborough, Professor of Laws at Trinity College, Dublin, editor of the *Irish Jurist*, and the moving force behind the Irish Legal History Society, draws attention in his essay to the relationship between the executive and the judiciary, an area of constitutional importance, in the years 1836, 1886 and 1893. Dr. John F. McEldowney, one of the editors, traces the social, political and economic context in which the administration of criminal justice

Constitutional Law of Ireland (2nd edition)

DAVID GWYNN MORGAN

This book has as its main focus the institutions of government — President, Taoiseach and Ministers, the role of the Senate, the Courts and Judiciary. These and many other aspects are examined in this important book on Irish constitutional law. The author analyses the role envisaged for them in the 1937 Constitution and gives a detailed account of their practical workings to date.

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240pp ISBN 0-947686-58-4 pb £14.95

The Round Hall Press
Kill Lane, Blackrock, Co. Dublin, Ireland
Tel: 892922; Fax. 893072

was carried out in nineteenth century Ireland. In his essay, Colm Barry, Solicitor, examines the development of the police in Dublin from 1786 to 1840. Clare Jackson, barrister, traces the attempt to introduce into Ireland changes in the rules of criminal evidence already introduced in England, Wales and Scotland by the *Criminal Evidence Act, 1898*. Finally, the editors, Professor Paul O'Higgins and Dr. J. McEldowney, in their essay on Irish legal history and the nineteenth century, consider the contribution of Irish lawyers to the common law in general and to law reform in particular.

The Common Law Tradition is historical reading at its best and most accessible. The readable style of the authors breathes life into historical aspects of the Common Law in Ireland.

Eamonn G. Hall

BOOK NOTICE

EQUALITY IN LAW BETWEEN MEN AND WOMEN IN THE EUROPEAN COMMUNITY; COLLECTION OF TEXTS ON NATIONAL LAW; IRISH LAW

By Rosheen Callender, B.A. (Econ.) (Dublin University) and Frances Meenan, B. Comm., M.B.S. (N.U.I.), Solicitor Series edited by Michel Verwilghen, Professor at the Faculty of Law of the Universite catholique de Louvain. Published by Commission of the European Communities.

This textbook published this year is part of a European Community series of textbooks (casebooks) which will be completed in 1990. The various Commentaries for each Member State will also be completed shortly.

It contains the first attempt to systematically index, select and summarise 'key cases' from the large body of equality case-law which has grown up in Ireland since 1975, when the EC's first equality Directive (on equal pay) came into force, the key Irish legislation being the Anti-Discrimination (Pay) Act, 1974 and the Employment Equality Act, 1977.

Whilst in some countries, equality case-law is still embryonic, in Ireland it is abundant – far too abundant to be reproduced in full. Therefore, difficult decisions had to be made about what to include and what to omit; and it is important for readers to know the basis on which the authors selected, from hundreds of cases, the ones to be included in this volume.

Generally, their approach was to refer to all equality cases which have come before the Irish High Court, the Irish Supreme Court and the European Court of Justice. As regards the many Recommendations of Equality Officers and the Determinations of the Labour Court on equality cases, the authors' approach was to include at least one (whichever seemed most significant) on every topic that had arisen and that seemed worthy of a separate heading.

If a number of cases have arisen under a particular heading, then, usually, it was considered appropriate to include one in which the claim succeeded and one in which it did not. There is considerable referencing via footnotes and citation of various other cases.

Altogether, over 150 cases have been cited.

These texts with their attendant commentaries will form a major Encyclopedia of EC Employment Equality Law. In the interim, a copy of the casebook is available in the Law Society Library.

The authors wrote the casebook as Irish members of the EC's Network of Experts on the Implementation of the Equality Directives.

Frances Meenan

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SOLICITORS GOLFING SOCIETY

PRESIDENTS PRIZE (Ernest Margetson)

The Presidents Prize of the Solicitors Golfing Society was held at Mullingar Golf Club on Friday the 27th of July.

The results were as follows:

WINNER: Pat Barriscale.
15 44 Points.

2nd: Niall Cronin.
16 41 Points.

3rd: Colm Berkery.
18 37 Points.

12 AND UNDER:

1st: Robert Cussen.
6 40 Points.

2nd: Brian O'Brien.
9 37 Points.

12 AND OVER (Ryan Cup):

1st: Denis McSweeney.
14 39 Points.

2nd: Dermot Mahon.
16 38 Points.

OVER 30 MILES FROM MULLINGAR:

1st: Tom Flood (last six)
20 37 Points.

2nd: Cyril Coyle.
12 37 Points.

DIRECTOR GENERALS CUP:
(Qualified five years and under)
Harry Fehily.
10 36 Points.

FIRST NINE:
Alan McGonigle. 20 Points.

SECOND NINE:
Frank Johnson. 22 Points.

At the Annual General Meeting Mr. Colm Price was elected as Captain for 1991.

Richard Bennett & William Jolley were re-elected as Secretary and Treasurer respectively.

Richard Bennett,
Hon. Secretary.

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.
10th day of September, 1990.
(Registrar of Titles)
Central Office, Land Registry, (Clárlann na Talún), Chancery Street, Dublin 7.

SCHEDULE OF REGISTERED OWNERS

Owen McElroy, Folio No.: 10351 closed to Folio 6520F; Lands: (1) Toprass (2) Carrickrobin; Area: (1) 28.488 acres (2) 19.538 acres. County: **LOUTH.**

Margaret Murphy, Folio No.: 5607; Lands: Rathmacan; Area: 43A.3R.0P. County: **KILKENNY.**

Phyllis Creamer, Main Street, Cappamore, Co. Limerick, Folio No.: 9466; Lands: Coolbawn; Area: 0A.3R.8P. County: **LIMERICK.**

James A. Carroll, Folio No.: 19811; Lands: Castletroy; Area: 0A.2R.0P. County: **LIMERICK.**

James Roche and Kathleen Roche, Folio No.: 15233; Lands: Gortdonaghmore; Area: 68A.2R.35P. County: **CORK.**

Mary O'Sullivan is full owner as tenant in common of an undivided moiety and **Eileen Walsh** is full owner as tenant in common of an undivided moiety. Folio No.: 34613; Lands: (1) Ardagh (2) Ardagh (3) Ardagh (4) Ardagh; Area: (1) 55.637 acres (2) 1.994 acres (3) 663A.1R.11P. (one undivided 10th part) (4) 28A.0R.17P. (one undivided 10th part). County: **GALWAY.**

Dorothea Mildred Gill, Lochan Lodge, Attrappleton, Pontoon, Co. Mayo, Folio No.: 6790; Lands: Attrappleton; Area: 25A.3R.7P. County: **MAYO.**

Samsodien Logday, Folio No.: 18400 City of Dublin; Lands: 11 Larkfield Park, Parish of St. Peter, Harold's Cross and City of Dublin. County: **DUBLIN.**

St. Felim's Diocesan Trust, Folio No.: 23670; Lands: Aghatotan; Area: 0A.0R.8P. County: **CAVAN.**

Patrick Savage, Folio No.: 2490; Lands: Mullaghmoyne West; Area: 20A.2R.10P. County: **KILDARE.**

Edward Joseph Markey, Folio No.: (1) 3846 (2) 4156; Lands: (1) Kilnacran (2) Shanmullagh; Area: (1) 11A.3R.10P. (2) 29A.0R.27P. County: **MONAGHAN.**

Donald Watts & Anita Watts, 53, Maynooth Park, Maynooth, Co. Kildare; Folio No.: 16260F; Lands: Greenfield; County: **KILDARE.**

Lombard and Ulster Banking Ireland Limited, Folio No.: 18478; Lands: Maryborough; Area: 0A.0R.12P. County: **QUEENS.**

Austin Broderick, Folio No.: 4517F; Lands: Thurles; Area: 0.022 Acres. County: **TIPPERARY.**

Mary & James Cafferty, Tanfield Upper, Moygownagh, Crossmolina, Co. Mayo; Folio No.: 47264; Lands: (1) Attishane (2) Attishane (Joynt) (3) Gortnahurra Lower; Area: (1) 9A.1R.0P. (2) 8A.0R.5P. (3) 2A.1R.28P. County: **MAYO.**

Houston & Morrow Limited, Folio No.: 19793 Co. Dublin; Lands: (1) Plot of ground situate on the east side of Drury Street in the City of Dublin. (2) A plot of ground situate on the west side of William Street South in the City of Dublin; Area: (1) 0.020 hectares (2) 0.038 hectares. County: **DUBLIN.**

Canice Dunne, Folio No.: 6392L; Lands: Lands of Churchtown Upper, Barony of Rathdown. County: **DUBLIN.**

James Coen & Sara Coen, of Shamrock Lodge Hotel, Athlone, Co. Westmeath. Folio No.: 16017; Lands: Bellaugh; Area: 0A.3R.15P. County: **WESTMEATH.**

Desmond & Catherine Hogan, Hodson Bay, Athlone, Co. Roscommon. Folio No.: 37185; Lands: (1) Barrymore, (2) Barrymore; Area: (1) 2A.0R.12P, (2) 0A.0R.39P. County: **ROSCOMMON**

Patricia Freeley, Main Street, Ballyhaunis, Co. Mayo; Folio No: 22145; Lands: Townland: The part of the land of Hazelhill with the buildings thereon on the southside of Main Street in the town of Ballyhaunis shown as Plan 73 edged red on The Registry Map of the Townland (Ballyhaunis) and the part of the land at the rere thereof shown as Plan 72 edged red on the said map except the arch 9 feet 6 inches wide and 7 feet 6 inches high and the building over same situate in the barony of Costello and County of Mayo; County: **MAYO.**

William Bell as Limited Owner; Folio: 1754; Lands: Fontstown Lower; Area: 1a. 2r. 12p; County: **KILDARE.**

LOST TITLE DEEDS

IN THE MATTER OF THE REGISTRATION OF TITLES ACT 1964

AND OF THE APPLICATION OF EILEEN O'CATHASAIGH IN RESPECT OF PROPERTY IN MOUNT PROSPECT AVENUE, CLONTARF, DUBLIN 3.

TAKE NOTICE that Eileen O'Cathasaigh of 86 Mount Prospect Avenue, Clontarf, Dublin 3 has lodged an Application for her registration on the Freehold Register free from encumbrances in respect of the above mentioned property.

The original documents of title specified in the Schedule hereto are stated to have been lost or mislaid.

The Application may be inspected in this Registry.

The Application will be proceeded with unless notification is received in the Registry within one calendar month from the date of publication of this Notice that the original documents of Title are in existence.

Any such notification should state the grounds on which the documents of title are held and quote Reference No.89 DN11532. The missing documents are detailed in the Schedule hereto.

Dated the 20th day of August, 1990

Daniel C. Maher Allen & Co.,
Solicitors, 69 Merrion Square,
Dublin 2.

SCHEDULE
Lease dated 4th February 1949 Thomas Fahy of the First Part Clontarf Estates Limited of the second part and John A Casey of the third part.

Miscellaneous

FOR SALE: Seven Day Ordinary Publicans Licence contact Johnson & Johnson, Solicitors, Ballymote, Co. Sligo. Tel: (071) 83304/83486 Reference KJ.

ORDINARY SEVEN DAY LICENCE wanted. Please apply to Vincent Harrington, Henry J. Wynne & Co., Solicitors, Elphin Street, Boyle, Co. Roscommon. Tel: (079) 62083.

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SEVEN DAY PUBLICAN'S LICENCE wanted. Philip J. Culhane, Solicitor, 4 Mallow St., Limerick. (061) 43288.

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CLAREMORRIS TRAIN CRASH 24th SEPTEMBER 1989.
Acting on behalf of a party injured in the above incident, we would like to liaise with Solicitors for other Plaintiffs/ Intended Plaintiffs.
Will persons concerned please write to Taylor & Buchalter, Solicitors, Greenside House, 45/47 Cuffe Street, Dublin 2. Reference: Anthony Brady.

Professional Information

PAUL W. TRACEY, Solicitor, is pleased to announce that he has commenced practice under the style and title of Paul W. Tracey, Solicitors at 24 Marlborough Street, Dublin 1. Phone 745656; Fax: 745550.

Lost Wills

O'BRIEN, Martin deceased, late of Lismullaney/Loughcurragh, Swinford, Co. Mayo. Will anybody having knowledge of the whereabouts of any Will made by the above named deceased who died on the 24th day of August, 1989, please contact Ian Dodd, Solicitor, Abbey Street, Ballina, Co. Mayo. Telephone number (096) 21611 or Facsimile (096) 22227. The deceased may have made a Will while a patient in a Hospital in Dublin or in County Dublin during the last three years.

GAVIGAN, Michael, who died at St. James's Hospital on the 19th July, 1984. Will anybody who knows of the whereabouts of a Will made by the above named deceased please contact Assumpta Kenny of Noel Smyth & Partners, Solicitors, 22 Fitzwilliam Square, Dublin 2. Tel: 615525.

CHENNELLS, Hubert Lesley, deceased, late of 29 Bayside Boulevard North, Sutton, Dublin 13 formerly of 375 Clontarf Road, Clontarf, Dublin 3. Date of death 31st March 1990. Will any person having knowledge of the whereabouts of a Will for the above named deceased please contact Carvill Rickard & Co., Solicitors, Watermill House, Main Street, Raheny, Dublin 5. Tel: 312163.

TOBIN, Bridget, deceased, late of St. Ita's Nursing Home, Newcastlewest, Co. Limerick and formerly of 10 Castleville, Castletroy, Co. Limerick, Alphonsus Avenue, Limerick and Roches Road, Rathkeale, Co. Limerick. Would any person knowing the whereabouts of the Will of the above named deceased please contact Tynan Murphy Yelverton & Co., Solicitors, 16 William Street, Limerick. (reference SH/PR) Tel: 061-45888.

CAREY, (nee Donnelly) Mary, late of 1 Broadford Lawn, Elm Park, Ballinteer, Dublin 16. Would any person having knowledge of a Will of the above named deceased who died on 12 August, 1990, please contact Ken J. Byrne & Co., Solicitors, Blackrock, Co. Dublin. Phone: 832715.

DUNNE, Ellen, late of Prosperous, Co. Kildare. Will any person knowing the whereabouts of the last Will and Testament of the above named deceased, who died on 26 June, 1975, please contact Myles C. Murphy & Co., Solicitors, Gouldsbury House, Newbridge, Co. Kildare. Tel: (045) 31334.

ASSOCIATION OF PENSION LAWYERS
REPUBLIC OF IRELAND
REGIONAL GROUP
MEETING

ON
TUESDAY, 25th SEPTEMBER, 1990

AT
IRISH LIFE ASSURANCE PLC,
IRISH LIFE CENTRE, LOWER ABBEY STREET, DUBLIN 2

REFRESHMENTS:	5.15 p.m.
MEETING STARTS:	6.00 p.m.
SPEAKERS:	Paul Kelly, F.I.A., Chairman of The Irish Association of Pension Funds.

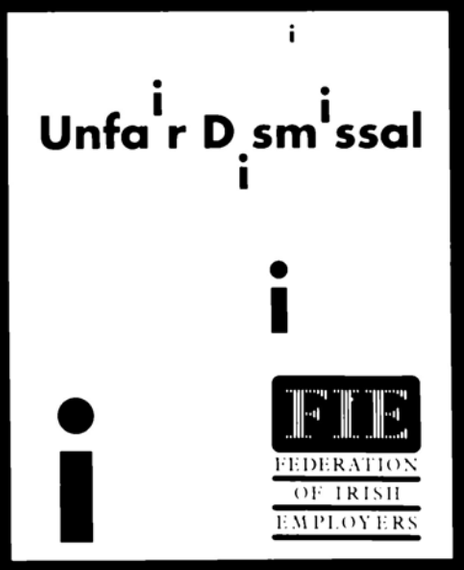
"THE PENSIONS ACT, 1990 – AN UPDATE"

MEMBERS: FREE

OTHERS: £3.00

Persons interested in joining The Association should contact Raymonde Kelly (Tel. 720288), Michael Lane (Tel. 717077), or Joan Flanagan (Tel. 767591).

1137A/21



Unfair Dismissal Cases and Commentary

An up to date and comprehensive text on unfair dismissal law has long been overdue. The Employment Appeals Tribunal has issued over 6,500 determinations in unfair dismissals cases. Most of these are unavailable to practitioners and many of them appear contradictory. In the absence of a systematic analysis of those determinations and the results of appeals to the Higher Courts it has been difficult for practitioners to give advice. This book aims to fill that gap.

The book deals with all the substantive and procedural aspects of the Unfair Dismissals Act, 1977. It draws together many hitherto unpublished determinations in a coherent form, provides guidance on the procedural aspects of bringing and defending claims and gives an assessment of the law on such issues as conduct, capability, capacity, illegality and remedies.

The authors are Declan Madden, Solicitor and Director of Specialist Services at FIE and Tony Kerr BL, Statutory Lecturer in Law at UCD.

The text costs £35.00. To order a copy please send a cheque/money order payable to FIE Sales Ltd., or contact Audrey Beasley, FIE Head Office, 84/86 Lower Baggot Street, Dublin 2. Tel. (01) 601011, Fax (01) 601717.

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INCORPORATED LAW SOCIETY OF IRELAND

Vol. 84 No. 8 October 1990

Ernest J. Margetson, President of the Law Society, presenting a set of silver wine coasters to An Taoiseach, Charles J. Haughey, T.D., to mark Ireland's recent Presidency of the E.E.C.

- Schizophrenia and the Law
- James J. Ivers, Director General 1973 – 1990

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INCORPORATED LAW SOCIETY OF IRELAND
Vol. 84 No. 8 October 1990

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Viewpoint

As part of his address to the Half Yearly Meeting of the Law Society, published in our June issue*, the Director of Public Prosecutions, Eamonn Barnes, in a characteristically thought-provoking manner, raised the question of whether our system for the investigation of criminal offences was not in need of radical review. He debated two possible changes – the providing of some form of judicial inquisitorial system along the lines of that existing in civil law countries and whether the absolute right to silence of a suspected person should continue. In a very stark way, Mr. Barnes stated that the "most basic rights, to walk the streets, to park a car, to the inviolability of one's own home are regularly and brutally invaded and can no longer be taken for granted as they were a few short years ago", and he correctly commented that " . . . . as a society we have become almost resigned to this state of affairs."

Nobody can deny that there is a serious cause for concern about the level of crime – the shuttered faces of Dublin's shopping streets at night are silent evidence of this. However, whether a radical change in our criminal legal process could offer a panacea for this is open to question.

No criminal justice system which has imprisonment as one of its principal sanctions can function effectively if the prison accommodation is totally inadequate for the numbers required to be incarcerated. The practice of releasing from prison prisoners with substantial amounts of their sentences still to run, in order to accommodate those newly sentenced, negates the imprisonment option. If prison is to have a rehabilitative function as well as a punitive one, then education and other programmes aimed at giving prisoners the opportunity to avoid crime in the future must be given time to work. For those prisoners whose recidivism cannot be cured, it is important for the credibility of the system that they remain in prison for the appropriate period of their sentence.

It is courageous of Mr. Barnes to debate the issue of diminishing a suspected person's right to preserve silence under interrogation at a time of controversy concerning the Guildford Four, Maguire Seven and Birmingham Six cases. We, in this country, are not immune from cases involving questionable confessions. In one well publicised case in recent years *(DPP -v- Lynch)*, fortunately ultimately remedied by the Supreme Court, a person had been convicted of murder on the basis of a confession which more efficient police investigation would have identified as being untenable.

However, the adoption of the inquisitorial system such as operates

(Contd. on p.275)

*"Does the Irish Criminal Justice System Work" by Eamonn M. Barnes, Director of Public Prosecutions, *Gazette*, June 1990, pp.161/165.

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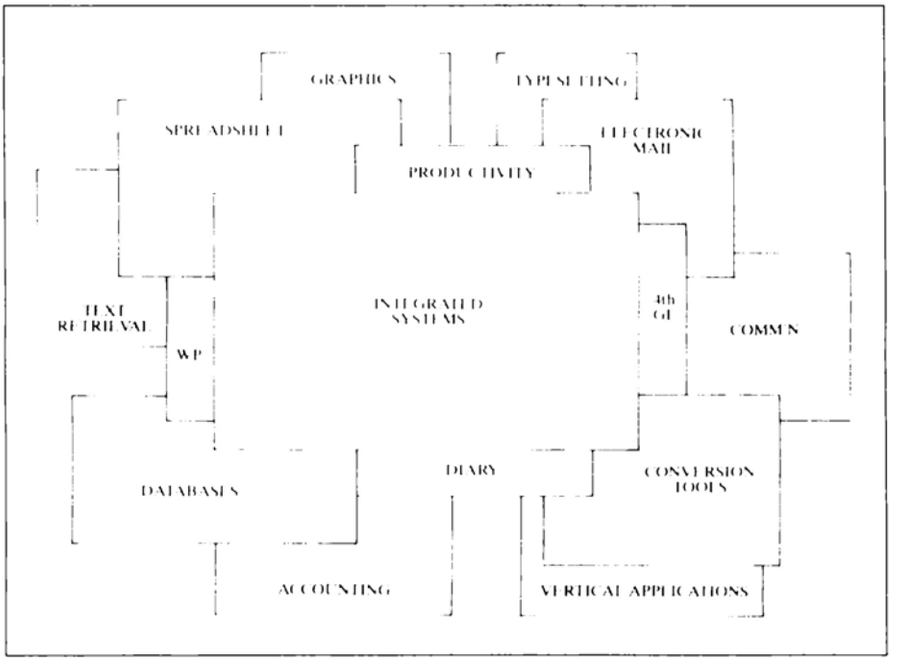

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Schizophrenia and the Law

Part I

Schizophrenia is the term applied to a group of disorders with a number of basic symptoms in common. One should probably speak of "the schizophrenias" or "the group of schizophrenias" rather than "schizophrenia" in the singular. However, that is rather cumbersome and I will use the term schizophrenia in this paper.

By
S. Desmond McGrath*
FRCPI., FRC.Psych.,
DPM,

The disorder seems to occur in all cultures with a strikingly consistent incidence of 0.8 to 1% of the population. It occurs with equal frequency in both sexes but there is a slight tendency for it to first manifest itself in females at a slightly later age. It is predominantly a disease of young people, the onset in 70% or more occurring between the ages of 15 and 25 years.

The contention that it occurs in all cultures has been borne out by a study conducted under the auspices of WHO and reported on in 1974. Psychiatrists from such diverse countries as the United Kingdom, the U.S.A., the U.S.S.R., India, China, Nigeria, Czechoslovakia and Colombia were trained in a standardised system of clinical examination known as the Present State Examination. This ensured that the trained psychiatrists achieved a very considerable degree of agreement as to what symptoms were present irrespective of the culture or language which they shared with the patient. Their findings could be incorporated in a computer programme. It was found that in each of the countries surveyed syndromes of acute and chronic schizophrenia were clearly described.

The concept of Schizophrenia

The concept of schizophrenia is a relatively recent one and it has been suggested that it may be a disorder of recent origin linked to the spread of modern civilization with a suggestion that it might be, say, of viral origin. However, in a recent paper from the National Institute of Mental Health in Washington, a group of psychiatrists quoted descriptions from ancient Indian, Greek and Roman writings which are strongly suggestive of cases of schizophrenia. There is a good deal of evidence to suggest that Henry VI, King of England in the 15th century, suffered from schizophrenia.

Recognition of what we now call schizophrenia came at the end of the 19th century. Until that time all psychosis or madness had been regarded as a common disorder with varying manifestations. A German psychiatrist named Kraepelin distinguished two major groups of disorders, one characterised by marked variations in mood from depression on the one hand to excitement or elation on the other, carrying a good prognosis, at least for the individual attacks (manic depressive psychosis), and another with an earlier onset and often with a tendency to progressive deterioration. He gave the name dementia praecox to this group in his text book of psychiatry published in 1893. Kraepelin considered the following symptoms characteristic of dementia praecox: hallucinations, a decrease in attention towards the outside world, lack of curiosity, disorder of thought, lack of insight and judgement, delusions, emotional blunting, negativism and streotypes. He stressed the importance of these symptoms being present in a setting of clear consciousness and unimpaired perception with normal memory. He recognised three major sub types of the disorder: hebephrenic, in which the most prominent symptom was thought disorder; catatonic, which was characterised by physical symptoms, such as stupor and muscular rigidity; and paranoid, in which the predominant symptom was systematised delusions, either of persecution, grandiosity or of a fantastical religious nature.

Despite the title that he gave it, Kraepelin recognised that the condition did not always have a bad prognosis and that true dementia, that is deterioration of intellectual functioning, did not occur. The patient's withdrawal into a private world of delusions and loss of initiative and drive gave the impression of dementia.

"Recognition of what we now call schizophrenia came at the end of the 19th century."

The Swiss psychiatrist, Eugene Bleuler, introduced the term "the schizophrenias" commenting "the disconnection of splitting of the

S. Desmond McGrath.

psychic functions is an outstanding feature of the whole group". He was not referring to a split personality in the sense of "Jekyll and Hyde" in fiction, or multiple personalities, such as "The Four Faces of Eve", but to a split between emotions and thought content. A gross example of this would be the patient who complains that a malign force is directing atomic rays at him from outer space in mildly aggrieved tones to a doctor instead of in more dramatic fashion to the appropriate authority.

Bleuler argued that all the characteristics could be interpreted in terms of fundamental disorders of affect, that is emotion, and thinking. Patients with schizophrenia show emotional flattening and a thought disorder based on loosening of associations. Other characteristics, such as delusions and hallucinations, were regarded by him as secondary.

In more recent times specific criteria for the diagnosis of schizophrenia have been laid down in official systems of nomenclature. The best known and probably most widely accepted for research purposes is that of the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders, usually referred to as "D.S.M.3".

Recognition & Diagnosis

Little is known about the causes of schizophrenia and in our present state of knowledge our criteria for diagnosis can only be the occurrence of certain typical clinical features. Kurt Schneider made the most influential attempt at a phenomenological definition by describing a number of symptoms which he regarded as being of "first rank" importance in differentiating schizophrenia from other conditions.

He maintained that in the absence of epilepsy, drug intoxication or gross cerebral damage, these symptoms most frequently correlated with a diagnosis of schizophrenia. These "first rank" symptoms are:

(a) Auditory hallucinations of a specific type. They may be audible thoughts, voices repeating or anticipating the patient's thoughts out loud, two or more voices discussing the patient in the third person or voices commenting on the patient's behaviour.
(b) Thought disorders of a specific type, that is thought withdrawal, or thought insertion by some external agency, thought broadcasting, so that the thoughts are conveyed to others.
(c) Feelings, impulses or acts experienced as under external control are also regarded as first rank symptoms.

Typically thought insertion is described by the patient in terms of some causal idea, such as a radio implanted in the brain or rays directed from another planet or telepathy. Delusions of control are often elaborated, the patient believing that someone else's words are coming out using his voice or that his hand writing is not his own, or that he is a zombie or a robot, as every movement is determined by some alien power.

"... in our present state of knowledge our criteria for diagnosis can only be the occurrence of certain typical clinical features."

Schizophrenia manifests itself in various forms. It often starts with an acute episode, although there may have been premonitory symptoms, for example social withdrawal, undue introspection, oversensitivity and so on. As the patient becomes more acutely ill he may manifest delusions, hear voices and show the "first rank" symptoms mentioned above. With treatment, or even as a normal progression of the illness, these symptoms may abate but the chronic condition may ensue.

There are two main groups of chronic symptoms which may be of varying degrees of severity from mild to crippling. The first is a syndrome of negative traits, such as emotional apathy, slowness of thought and movement, underactivity, lack of drive, poverty of speech and social withdrawal. These obviously severely impair the patient's functioning and present obstacles to rehabilitation.

The second group of intrinsic impairments can be even more severely disabling. There may be incoherence of speech and unpredictability of associations, long standing delusions and hallucinations, with accompanying manifestations and behaviour. The individual does not seem to be able to think to a purpose but goes off at a tangent owing to some unusual associations to a chance stimulus and thus gives the impression of vagueness, confusion and incoherence. Occasionally this may give the impression of creativity but usually the syndrome is constricting and handicapping. Most of the creative people who have been afflicted with schizophrenia have had their creativity diminished, not enhanced.

There is always a liability to further relapse with acute symptoms of the kind that we have considered already. Once an attack has occurred there remains a definite vulnerability to further breakdowns of a similar kind. Nevertheless, about half of the people first admitted to hospital with clearcut acute schizophrenic syndrome suffer no further relapse over the following five years. In about a quarter of the cases there is a relapsing course and in the remaining quarter a condition of chronic disablement is reached.

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The disease concept of Schizophrenia

Having recognised the syndrome can we regard schizophrenia as a disease? There are two essential components to any disease theory. The first is the recognition of a symptom or syndrome, which we have been able to establish, the second is the discovery of underlying biological abnormalities.

One pointer to the latter in the case of schizophrenia is the evidence for a genetic component in the aetiology of schizophrenia. The incidence of schizophrenia in the general population is of the order of 1%. The incidence where one parent is schizophrenic is 12%, where both parents are schizophrenic is 40%. The most useful information in genetic studies is derived from twins. Monozygotic twins, or identical twins, have the same genetic makeup. Dizygotic twins are no more alike than brothers and sisters. In schizophrenia dizygotic twins are found to have a concordance rate of 5%, the same as brothers and sisters, whereas monozygotic twins have a concordance rate of 40% or more in various studies. Perhaps even more convincingly, monozygotic twins reared apart have had a similarly high concordance rate.

Supporting figures have been found amongst adoptees and no higher rate of schizophrenia has been found in adoptees who have joined families in whom one of the parents has become schizophrenic.

The aetiology of schizophrenia is multifactorial and the fact that 50% or more of monozygotic twins are not concordant illustrates the fact that environmental factors play a significant part in the precipitation of the disorder. Many psychological theories have been evolved but it is reasonable to say that no specific form of psychological stress has been identified as the specific cause of schizophrenia. Individuals predisposed to schizo-

VIEWPOINT (Contd. from p.271)

in civil law countries, must necessarily also involve the adoption of a procedure which would lessen the function of the police in the investigation of criminal offences. In a recent article, Lord Scarman, writing in the context of the Guildford Four and Maguire Seven cases, argued for more judicial control at the pre-charge phase of detention and that there should be a core of trained judicial officers whose duty it would be to supervise all aspects of pre-trial preparation, to determine the rights of the defendant and to determine whether the case should go for trial. He equally strongly argued for the retention of the adversarial character of trial by jury.

One must seriously question the desirability of adopting an inquisitorial system, such as exists, for example, in France. In his paper, Mr. Barnes himself describes that system as a "judicial investigation designed to seek and keep seeking for the truth". The fundamental difficulty is, how long must this "seeking" take? If the "Eksund" defendants, now in custody in France, had been in custody in the UK for over two years still awaiting trial, would there not have been protests here about 'justice delayed being justice denied'? However, it does appear that such delays are apparently an integral part of French and other civil law judicial systems.

We, including, the DPP, are rightly proud of the fact that people are tried on indictable offences very shortly after they have been charged and our judges are most diligent in ensuring that this continues to be the case. If we are to consider any alternatives to our system for the investigation of criminal offences, let us look calmly and coldly at them in the light of the negative aspects of such alternatives.

The Law Reform Commission in its consultation Paper on Child Sexual Abuse has suggested alternative methods of obtaining the testimony of children, including the use of video recordings. Perhaps, before we give further consideration to turning our criminal procedure system upside down, ironically at a time when at least one European country, Italy, is bringing its procedures more in line with ours, we could consider what less radical improvements we can make to the system as it stands. Video recordings of interrogation of suspects is to become the norm in England and Wales. Having involuntarily inherited the inefficiencies of the 19th century statute law of the UK criminal justice system, which inefficiencies Mr. Barnes has rightly identified in his paper, we should now voluntarily adopt the more modern efficiencies of the same system. □

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"Most psychiatrists believe that there is a biological disorder underlying schizophrenia."

phrenia are probably unduly susceptible to stress in general, be it of biological, psychological or social origin.

Most psychiatrists believe that there is a biological disorder underlying schizophrenia. In recent years weight has been given to this view by the emergence of the Dopamine theory of aetiology. Dopamine is a neurotransmitter, that is one of the chemicals which convey messages through the nervous system. It is related to Noradrenaline. The Dopamine hypothesis is based partly on the evidence that amphetamine abuse produces a syndrome very similar to schizophrenia and can aggravate schizophrenia. Amphetamines are known to enhance the effects of Noradrenaline and Dopamine. Secondly, the antipsychotic drugs which relieve the symptoms of schizophrenia produce Parkinsonism as a side effect. Dopamine is known to be deficient in Parkinson's disease, which can be relieved by giving L.Dops. It is believed that the drugs exert their actions on schizophrenia by blocking the Dopamine receptors. The suggestion is that the underlying disorder in schizophrenia is some disturbance of dopamine transmission. This is clearly not the whole answer as these drugs are much more effective in treating the acute symptoms of schizophrenia than in relieving the basic chronic symptoms.

Recently CT brain scans have revealed dilated ventricles in the brains of some schizophrenics and even more recently Positron Emission Tomography has shown differences in the metabolism of the brains of patients suffering from schizophrenia when contrasted with the brains of normal control subjects.

Treatment

I will only briefly touch on the subject of treatment. For the acute phase drugs of the phenothiazine group, such as Largactil, are used to produce relief from hallucinations, delusions and disturbed behaviour. Sometimes ECT can be beneficial, but since the introduction of the drugs its use is less often required.

When the patient has become accessible the main focus of treatment is on resocialising and helping him to resume employment. This can be a long term problem requiring careful gradation of activities from simple occupational therapy in hospital through day hospital and on to sheltered workshops. Open employment is of course the goal but is not always reached. Impairment of volition or drive and difficulty with concentration may be permanent features and impossible to overcome in some cases. It is for chronic cases of schizophrenia that the whole gamut of community psychiatric care is required. Longterm maintenance drug treatment is necessary in the majority of cases. □

" . . . since the introduction of . . . drugs [the use of ECT] is less often required."

Part 2 of this article will be published in the November Gazette, and will examine the medico-legal aspects of schizophrenia.

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Practice Notes

Insurance Act, 1989 Part IV – Regulation of Insurance Intermediaries

Solicitors should be aware of the provisions of Part IV of the Insurance Act, 1989 which came into operation on 1st October, 1990 and which deals with the regulation of insurance agents and brokers (''Insurance Intermediaries'').

From that date, an insurance company may not appoint a person as an intermediary or pay any commission to an intermediary (i.e. a broker or agent) unless it is satisfied, having made reasonable enquiry, that the intermediary is either a member of a recognised representative body of insurance brokers (under Section 44 (1) (a) of the Act) or complies with the requirements of the Act.

To qualify as an insurance broker for the purposes of the Act one must be in a position to arrange insurance contracts on behalf of clients with at least five companies in non-life business or five companies in life business.

Any intermediary whose business is such as would bring him outside the definition of a broker is termed an insurance agent for the purposes of the Act. Insurance agents may not hold themselves out as such unless they state on their letter headings and business forms that they are insurance agents and the name or names of every insurance company for which they are agents and must inform their clients that they are insurance agents and of the name or names of the insurance companies for which they are insurance agents. In addition, there is provision for enabling the Minister for Industry & Commerce (''the Minister'') to bring into force not earlier than two years from the coming into effect of this Part of the Act a requirement that insurance agents may not hold more than four such appointments in respect of non-life insurance and four in respect of life assurance.

Both insurance agents and brokers must hold appointments in writing from each insurance company for which they act.

To avoid the necessity for each insurance company to carry out its own individual enquiries in respect of each of its intermediaries, members of the Irish Insurance Federation have established a separate body, the Insurance Intermediary Compliance Bureau (''IICB''), which will carry out the necessary investigations to ensure that all intermediaries comply with the provisions of the Act. This is now being done by means of a questionnaire which should be completed fully and accurately and returned as soon as possible to the IICB. The IICB proposes to create a Central Register of insurance intermediaries which will contain information in relation to the names, addresses, number of agencies and bank account details of all insurance intermediaries.

The principal obligations imposed on insurance intermediaries under the Act are:-

1. the maintenance of separate bank accounts, one relating to non-life business and the other relating to life business designated ''Section 48 – Non-Life Insurance Account'' and ''Section 48 – Life Assurance Account'' respectively;
2. the taking out of an insurance bond to the value of, in the case of non-life insurance business, IR£25,000 and, in the case of life assurance business, to the value of the greater of IR£25,000 or 25% of the intermediary's life assurance turnover in the previous accounting year with no bond being required where the turnover is under IR£25,000;
3. the issuing of a receipt to clients containing the details set out in Section 52 of the Act a precedent of which may be obtained from the IICB. This is necessary where either a completed insurance proposal is accepted or where money is accepted in respect of a renewal of a policy which has been invited by the insurer or in respect of a proposal accepted by an insurance company; and
4. observe the provisions of any codes of conduct prescribed by the Minister from time to time (see the *Gazette* of July/August, 1990).

In addition the Act provides that the Minister may, by regulation, require that policies of professional indemnity insurance in a specified form be effected by insurance intermediaries indemnifying them to such sum, in such a manner, in respect of such matters and valid for such minimum period as the Minister may prescribe. The Minister has, however, indicated that he does not intend to impose such requirements on insurance agents in the foreseeable future.

Solicitors therefore who come within the definition of an insurance intermediary should note the coming into effect of this Part of the Act (1st October, 1990) and should have registered with the IICB prior to such date.

Professional Purposes Committee

Redemption of Mortgages and Title Documents

Where a mortgage is redeemed the title documents must be returned to the mortgagor.

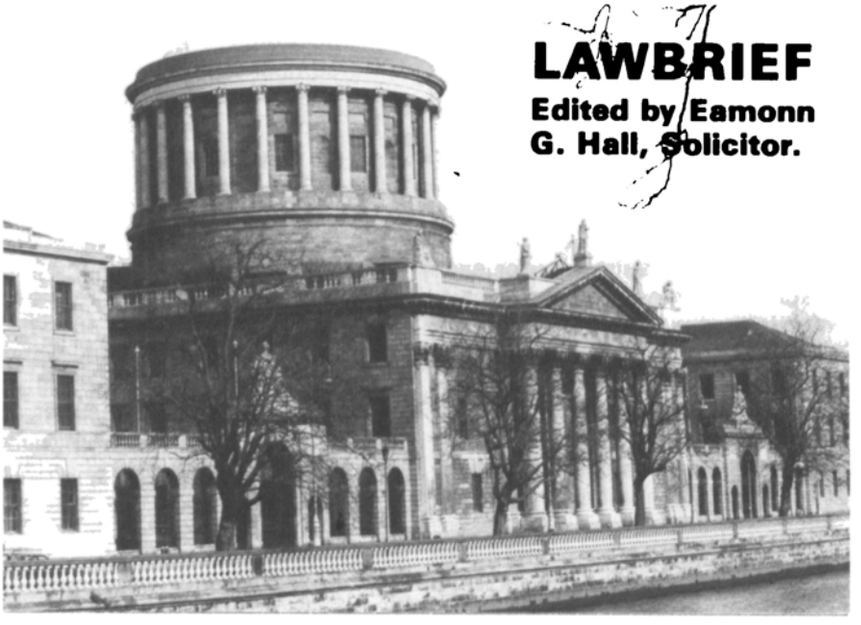
Bearing the foregoing in mind it is imperative that where a solicitor who has given an undertaking regarding the title documents redeems a mortgage on behalf of his client he includes with the cheque or draft redeeming the mortgage an authority from his client authorising the mortgagee to release the documents to him.

Unless such an authority is furnished and notwithstanding that the redemption came from the solicitor, there is no onus upon the mortgagee to deliver the documents to the solicitor or to make any comment regarding same.

Accordingly for a solicitor's own protection, the foregoing should be strictly adhered to.

Please further note that where a second mortgage is outstanding the documents would usually go to the second mortgagee and it is therefore vital that a solicitor should do a search before giving any such undertaking regarding the title documents. □

Conveyancing Committee



LAWBRIEF

Edited by Eamonn G. Hall, Solicitor.

AFFIDAVIT OF DISCOVERY SHOULD SPECIFY PRECISE GROUNDS OF PRIVILEGE RELIED ON

In *Bula Ltd. and others (plaintiff/appellants) -v- Tara Mines Ltd.* (defendants/respondents), *The Irish Times Law Report,* August 20, 1990, the Supreme Court (Walsh, Griffin and McCarthy JJ) held that in an affidavit of discovery the deponent should list and briefly describe each document over which privilege is claimed specifying in respect of each such document the precise basis or ground of privilege relied on.

The appellants' motion had sought an order that all parties to the proceedings be at liberty to make discovery on or before 2 April 1990; that all parties to the proceedings do list and briefly describe in the respective affidavits of discovery each and every document in respect of which privilege was not being claimed; and that all parties to the proceedings do list and briefly describe (without disclosing the contents thereof) each document over which legal, professional or other privilege was claimed specifying in respect of each such document the precise basis or ground of privilege relied upon.

Walsh J said that there was no good reason why the orders made by Murphy J should not be carried out exactly as he had indicated, as there was nothing to be gained by postponing exchange when documents were ready. Walsh J added that the format suggested by the appellants appeared to be, at least in effect, what the Rules of Court required because unless documents were identified and properly indicated no particular claim of privilege should be made about anything. The Rules of Court should be followed in the format envisaged by the Rules and so far as he was concerned the format sought in the motion was in effect what the Rules required.

Griffin and McCarthy JJ concurred with Walsh J.

ATTORNEY GENERAL'S OFFICE STAFFING

Mr. Dukes T.D. asked the Taoiseach in the Dáil, 401 *Dáil Debates*, col. 825, July 10, 1990, whether the Taoiseach had any plans to increase the staff resources in the Office of the Attorney General.

The Taoiseach stated that a competition was at that time being conducted by the Civil Service Commission for new posts of Assistant in the Office of the Attorney General. It was proposed to make up to four appointments. The Taoiseach stated that it was hoped that the persons appointed would take up office at the end of the summer.

Mr. Dukes enquired from the Taoiseach if he would state whether the proposed strengthening of the Attorney General's Office would improve the situation in relation to the drafting of legislation in the autumn.

The Taoiseach replied by stating that getting bills processed through the Parliamentary Draftsman's Office was a problem for all Governments. Some of the Bills then on hand were complicated and required consideration in relation to constitutional aspects. However, the Taoiseach stated that he would keep trying.

Mr. Shatter T.D. asked the Taoiseach in the Dáil, 401 *Dáil Debates*, col. 826, July 10, 1990, if the Taoiseach would indicate whether any particular person or persons in the Attorney General's Office would be given responsibility to draft legislation to implement the many outstanding reports published by the Law Reform Commission to deal with a variety of areas which demanded attention and which did not appear to have a political priority.

The Taoiseach stated that he would reply to Deputy Shatter in the same terms as he had replied to Deputy Dukes.

BUILDING REGULATIONS

Mr. Quinn, T.D. asked the Minister for the Environment in the Dáil, 401 *Dáil Debates,* col. 838, July 10, 1990, what action the Minister proposed to take to ensure that the seven local authorities, including Dublin County Council and Dublin Corporation, who currently have legal responsibility for the administration of building by-laws, to have the by-laws replaced with the Building Regulations as the standards referred to in the building by-laws were now in conflict with the recommended standards of the proposed Building Regulations, and their administration was in conflict with the achievement of efficient and good standards in the building industry; and whether the Minister would make a statement on the matter.

The Minister for the Environment, Mr. Flynn, stated that Section 22 of the *Building Control Act, 1990* provided, subject to transitional provisions, that building by-laws shall cease to have effect in any area on the day on which Building Regulations first come into operation in that area. Work was well advanced in his Department on

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preparation of Building Regulations to be made under the Act.

The Minister stated that in accordance with EC Directive 83/189/EEC, which required Member States to consult the Commission in relation to any proposed technical regulations and standards, a draft of the Building Regulations would be forwarded in the near future to the Commission. Under the Directive, the Commission and other Member States were allowed three months to consider the proposals. When the Minister's consultation with the Commission had been completed, there would be no undue delay in making regulations under the Act.

The Minister also stated that further consultation in relation to the Building Regulations would shortly be arranged. The establishment of a Building Regulations advisory body was also being considered.

GARDA LEGAL DEPARTMENT

Mr. J. O'Keeffe T.D. asked the Minister for Justice in the Dáil, 401 *Dáil Debates,* col. 985, July 10, 1990, if there was a legal department within the Garda management structure; and the recognition, if any, which was given to gardaí with legal degrees and qualifications.

Mr. O'Keeffe also asked the Minister for Justice the number of Garda officers who were studying (a) for legal degrees, (b) to qualify as solicitors, and (c) to be called to the Bar, and whether there was encouragement given to do so by way of payment of fees, study leave and otherwise.

Further, Mr. O'Keeffe asked the Minister for Justice the number of serving Garda officers who (a) hold legal degrees, (b) have qualified as solicitors, and (c) have been called to the Bar. The Minister for Justice in his reply in the Dáil, 401 *Dáil Debates,* col. 985, July 10, 1990, stated that the Garda Sióchána structure included a legal section which was located at the Garda college in Templemore. The Minister stated that he was informed that gardaí and sergeants who hold certain legal qualifications can be exempted from part of the examinations for promotion to sergeant and inspector.

The information available to the Garda authorities was that 26 members of the force were studying for legal degrees and two further members were studying to become barristers. In accordance with the arrangements that apply in the public service generally, refunds of fees may be paid to members on satisfactory completion of approved courses, having regard to available funds. The Minister stated that there were also arrangements whereby members attending approved courses could be granted study leave and time off to sit examinations.

According to available records, the Minister stated that 36 serving members of the force hold legal degrees, two have qualified as solicitors and 23 have been called to the Bar.

BARRING ORDERS

Mr. Flanagan T.D. asked the Minister for Justice in the Dáil the number of court applications for barring orders made (a) in 1987, (b) in 1988, and (c) in 1989; and the number of orders consequently granted.

The Minister for Justice, Mr. Ray Burke stated in the Dáil, 401 *Dáil Debates,* col. 986, July 10, 1990, that the information in relation to the District Court for the legal years, 1987, 1988 and 1989, that is the year from 1 August to 31 July, was as follows:

Barring Orders	1987	1988	1989
Number of applications made	3,404	2,948	3,612
Number granted	1,510	1,283	1,129

Information in relation to the Circuit Court was being compiled and would be forwarded to the Deputy as soon as it became available.

Mr. Flanagan T.D. also asked the Minister for Justice if he would extend the definition of those entitled to seek the redress of a barring order to include (a) those cohabiting, (b) brothers, (c) sisters, (d) uncles, (e) aunts, and (f) all persons living permanently on the premises with the alleged victim of violence.

The Minister for Justice stated that these matters would be considered when the report from the Law Reform Commission was received.

Mr. Flanagan, T.D. also asked the Minister for Justice if he would amend the *Family Law (Protection of Spouses and Children) Act, 1981* to extend the criteria to be met by an applicant for a Barring Order having regard to the fact that physical violence appeared to be a precondition in practice; and if he would make a statement on the matter.

The Minister said that the question suggested that the courts were reluctant to grant barring orders except in cases where there was evidence of physical violence. However, there was no such requirement in the *Family Law (Protection of Spouses and Children) Act, 1981* and the judgments delivered in the Supreme Court in the case of *O'B -v- O'B* [1984] ILRM 1, which considered the 1989 Act in depth, made it clear that there were grounds other than physical violence on which a court may grant a barring order. In the circumstances, the Minister stated that he saw no need to alter the criteria set out in the statute.

THE HAGUE CONVENTION

Mr. O'Keeffe T.D. asked the Minister for Justice the number of countries who had (a) signed or acceded to and (b) ratified The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents; the reason Ireland had not acceeded to or ratified the Convention; and whether there are any proposals to do so.

The Minister for Justice, Mr. Ray Burke, replied in the Dáil, 401 *Dáil Debates,* col. 989, July 10, 1990, that the position was that as of May 10, 1990, which was the latest date for which information was available, 18 countries had acceded to the convention and a further 18 countries had ratified it.

The question of whether legislation would be needed to enable this country to become party to the convention was due to be considered by the Law Reform Commission as part of their previous work programme but which had not then been reached.

The Minister stated that the matter was being examined in his Department with a view to accession.

GOVERNMENT PUBLICATIONS

Code	Title	Grams	Price IR£
I/O/S/90/056	Supplement to Iris Oifigiúil – 13 July, 1990. Companies Notification; Issue No. 30	150	3.75
Act/90/08	Horse Breeding Act, 1990.	20	0.40
Act/90/10	Finance Act, 1990.	275	12.90
Act/90/14	Derelict Sites Act, 1990.	20	3.10
Bill/89/Old	Local Government (Water Pollution) (Amendment) Bill, 1989, as passed by both Houses of the Oireachtas	50	2.20
Bill/89/37c	Industrial Relations Bill, 1989, as passed by both Houses of the Oireachtas	50	2.20
J/061/43	Report on Crime 1989	150	2.65
Act/90/12	Firearms And Offensive Weapons Act, 1990.	20	1.80
J/113/02	Garda Síochána Complaints Board, Annual Report 1989	50	2.20
J/113/03	Garda Síochána Complaints Board Triennial Report 1987 – 1989	100	2.20
K/143	Construction Industry in Ireland, Review of 1989, Outlook for 1990.	150	2.20
P/J/1542/1567	Trade Marks Indexes 1987. Vol. 60 (Journal Nos. 1542 – 1567)	200	6.25
1/O/S/90/60/62	Supplement to Iris Oifigiúil – 3 August 1990. Companies Notification: issue Nos. 32 & 33	300	3.75
V/007/21	Employment Appeals Tribunal, Twenty Second Annual Report. For the year ended 31 December, 1989	100	1.30

These publications may be purchased from The Government Publications Sales Office, Sun Alliance House, Molesworth Street, Dublin 2, or through any bookseller. The Catalogue Number of the publication should be stated when ordering. If publications are to be sent by post the amount of the postage should be added to the price. The postage rates are as follows:-

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□

GARDA ATTENDANCE AT COURT HEARINGS

Mr. J O'Keeffe T.D. asked the Minister for Justice the reason reimbursement was not sought by the State for the cost of Gardaí summoned to attend court hearings in civil actions for damages; and if he would give an assessment or estimate of such cost annually.

The Minister for Justice replied in the Dáil, 401 *Dáil Debates,* col. 990, July 10, 1990, that Gardaí attending court in their official capacity as witnesses in a civil case were deemed to be on duty and, accordingly, had an entitlement to their pay in respect of such attendance in accordance with the terms and conditions of their employment. The Minister stated that persons attending court as witnesses were entitled only to compensation in respect of actual loss of earnings or expenses incurred in attending. Additional costs arising where gardaí attend in such cases, i.e. travel and subsistence expenses, were borne by the litigants. The Minister stated that records were not kept in such a way as to allow the annual cost of Garda attendance in court as witnesses in civil actions to be estimated without diverting gardaí and staff of his Department from other more pressing duties. □

Younger Members News

Inter-Professional Bowling

Getting to know people in other professions took on a whole new meaning on Thursday the 20th of September in the Stillorgan Bowl. In an event organised by the Younger Members Committee, together with the Junior Organisation of the Chartered Surveyors Association and the Young Members of the Leinster Society of Chartered Accountants, members of all three professions pitted their skills against each other in another kind of fast lane!

Each profession supplied twelve teams of four members each, which brought the total number of participants to 144, representing the full capacity of the venue. The first bowl was bowled on schedule at 8 p.m. and the crashing pins endured until about 9.30 p.m., at which stage the inexperienced amongst us were feeling a little arm weary.

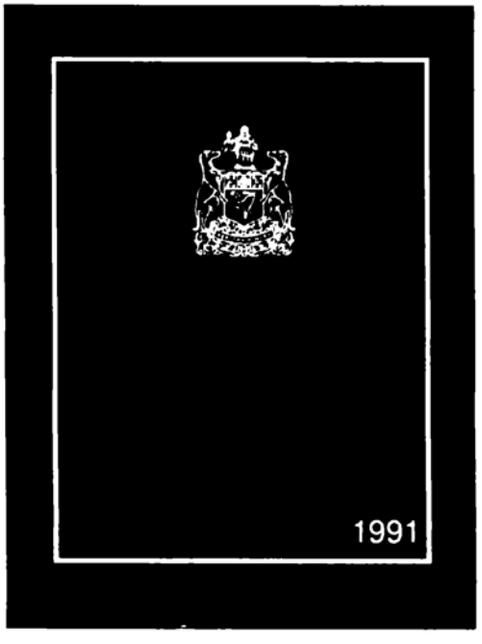
All in all, it was not surprising that the "figures" people came out on top and a team of Chartered Accountants from Ernst & Young took the first prize of a bowling trophy and a bottle of champagne each.

The best bowler amongst the legal teams proved to be Fergal Aitman of Arthur Cox & Co., who returned a score of 159 points for his best round. Other legal teams to participate in the event were A & L Goodbody, Eugene F. Collins, Hayes & Son, William Fry, Matheson Ormsby Prentice, McCann Fitzgerald, Cawley Sheerin Wynne.

The presentation of the prizes was made by Bill Phelan of the Phelan Partnership, who contributed the generous sponsorship which made the event possible. We would also like to express our appreciation to the Stillorgan Bowl for their assistance in organising the event and for the quality of their service throughout the evening.

It is hoped to run a similar inter-professional evening next year and indeed, the enthusiasm displayed by participants in this years event, indicates that such events are popular amongst all the professions. Bowl on, next year! □

(See photo p.285)



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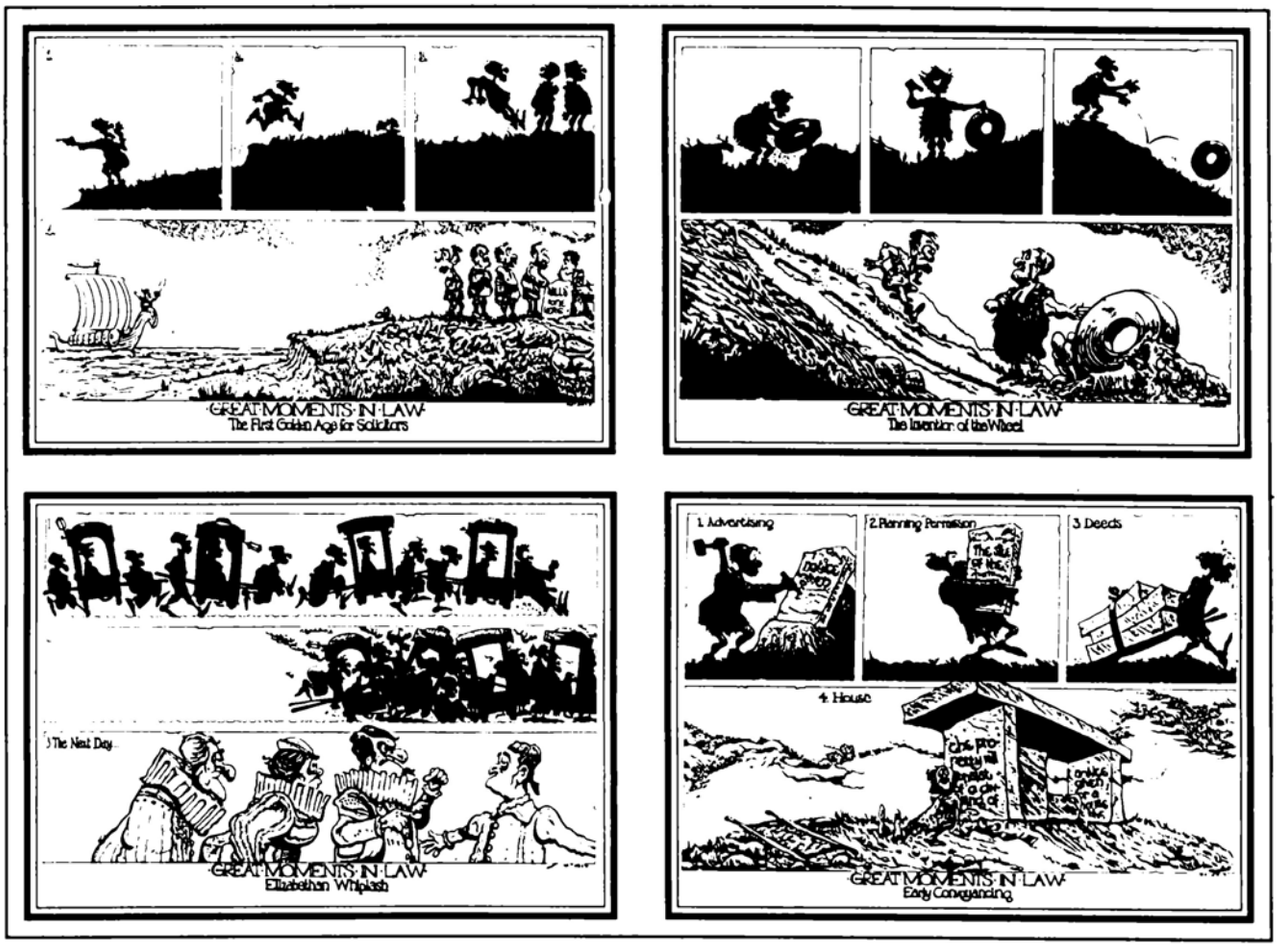

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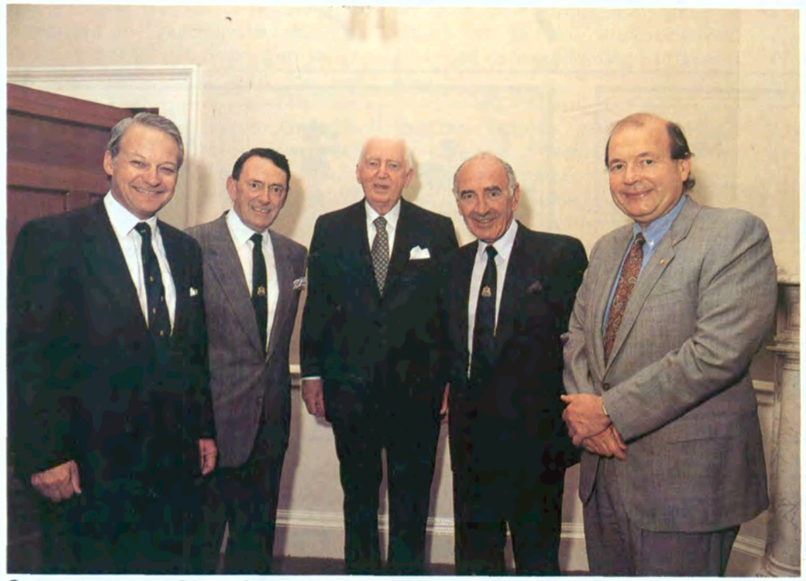

Guests at a recent Dinner hosted by the President of the Law Society were (left to right) His Excellency Nicholas Fenn (United Kingdom Ambassador), Don Binchy, Senior Vice President, Law Society, His Excellency Richard A. Moore (U.S.A. Ambassador), Ernest J. Margetson, President of the Law Society and The Hon. Brian T. Burke (Australian Ambassador).

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Attending a recent meeting of Chief Executives of European Law Societies (ESSEBA) were *(left to right):* Hanneke Heemskerk (Netherlands), Dr. Wilhelm Willemer (Germany), Ernest J. Margetson (Ireland), Dr. Max P. Oesch (Switzerland), Frederick Heemskerk (Netherlands) and Annette Kespohl-Willemer (Germany).

Presentation to James J. Ivers, on the occasion of his retirement as Director General, by Carlow Bar Association. *Back Row:* John O'Connor, Charles J. Bergin, John P. Aylmer, David Doyle, Michael Cody, Frank Lanigan, Peter Cody and Godfrey McDonald. *Middle Row:* Patrick J. Cody, Ronald J. Clery, Bernard Jordan. *Front Row:* William L. Duggan, President Carlow Bar Association and James J. Ivers.

Dun Laoghaire Solicitors Annual Dinner.

YOUNGER MEMBERS COMMITTEE BOWLING NIGHT
(Left to right): Andrew O'Kelly (Society of Chartered Surveyors), John O'Connor (Leinster Society, Inst. of Chartered Accountants), Bill Phelan (Phelan Partnership) sponsors, John Kenny (Vice-Chairman, Leinster Society), Joe Kelly (Younger Members Committee, Law Society) and Isobel O'Regan (Society of Chartered Surveyors).

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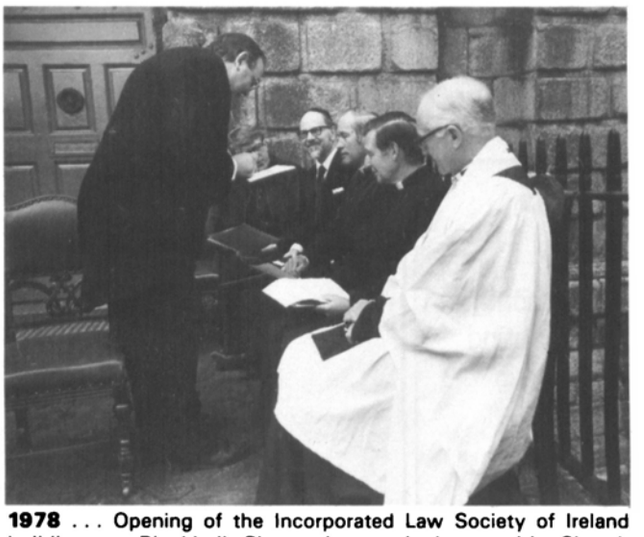
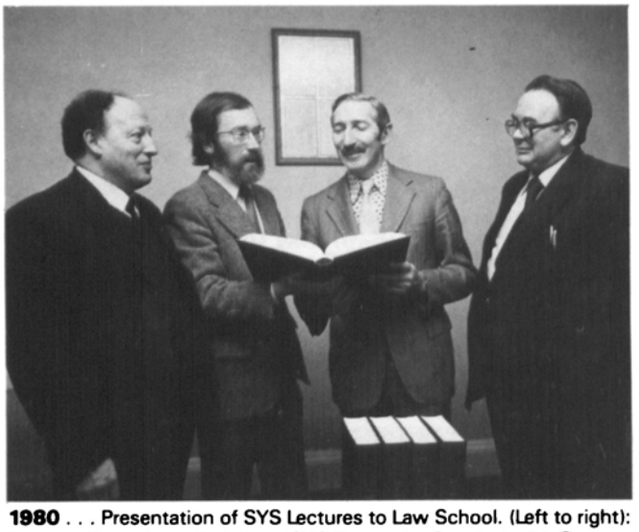
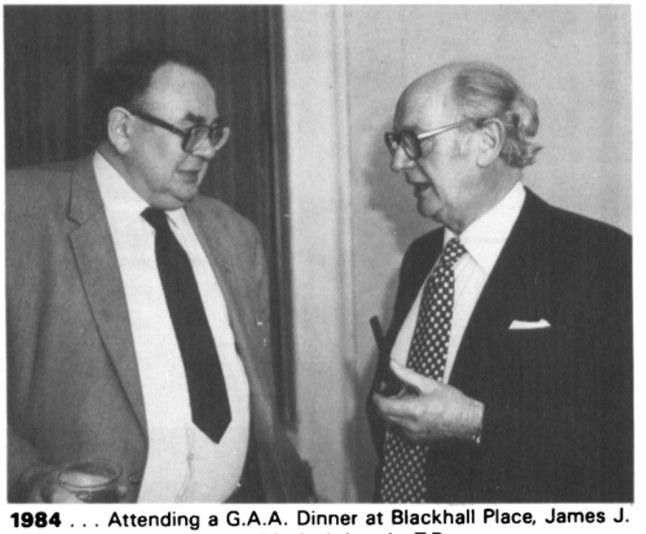
1978 . . . Opening of the Incorporated Law Society of Ireland Building at Blackhall Place. (Left to right): Mr. T. D'Arcy, Building Consultant, Mr. T. G. Nolan, Architect, James J. Ivers, Director General, and Mr. J. V. Torney, Building Contractor.



1978 . . . Opening of the Incorporated Law Society of Ireland building at Blackhall Place. James J. Ivers with Church Representatives who officiated at the Ecumenical Service.



1980 . . . Presentation of SYS Lectures to Law School. (Left to right): Norman Spendlove, Solicitor, (SYS Transcript Service) with Terence Dixon, Solicitor, presenting a set of bound volumes of the SYS Lectures to Professor Richard Woulfe and James J. Ivers, Director General.



1984 . . . Attending a G.A.A. Dinner at Blackhall Place, James J. Ivers with Jack Lynch, T.D.

1986 . . . International Bar Association Dinner at Blackhall Place. (Left to right): Professor Philip Love (University of Aberdeen), Dirk Reischauer, Germany, and James J. Ivers, Director General.

1989 . . . At the launch of the Braille edition of "A Dictionary of Irish Law" (left to right) Richard Daly, Student Law Clerk, Henry Murdoch, Author, and James J. Ivers, Director General.

JAMES J. IVERS
Director General of the Law Society
1973–1990 — IN RETROSPECT

The last day of October 1990 brings with it the retirement of James J. Ivers, universally known as Jim, from the office of Director General of the Law Society. Jim is the first holder of the office of Director General, which he holds in addition to his statutory post as Secretary.

It is difficult to believe that in the last hundred years the Society has had but three chief executives. There are still many solicitors in practice who qualified during the period that William George Wakely was Secretary, a period which stretched from 1888 to 1942. W. G. Wakely was succeeded by Eric A. Plunkett who served as Secretary from 1943 to 1973. Jim took up his appointment on 1st October 1973, having previously served as Chief Executive Officer of the North Western Health Board, and now retires 17 years later. Those 17 years have been a time of radical change across a wide spectrum and our profession owes a considerable debt of gratitude to Jim for his 'helmsmanship' during all of that time.

A solicitor qualifying today would have difficulty in recognising the Society as it was in the early 1970s. The administrative offices, the library and the council chamber were all located in Solicitors' Buildings in the Four Courts; the law school was very much a part-time affair with lectures being held anywhere and everywhere, even under psychadelic lights in ugly club premises; and the Council of the Society, concerned about the cost of its refurbishment, was giving serious consideration to the disposal of the Blackhall Place premises, which had been purchased in a run down condition in 1968. Also, accountant certificate control was extremely limited but, as a corollory, the cost of the annual practising certificate, including the Compensation Fund contribution, was much lower than it is today.

EDUCATION

Jim's appointment coincided with the emergence of pressures within the membership, notably through the Society of Young Solicitors, for improvement in the training system for intending solicitors. Seen as a priority task, the Education Committee spared no effort to bring about change within the constraints of existing legislation — the Solicitors Acts 1954/60 — still with us, but hopefully soon to be amended. The Committee was fortunate to become aware of the activities of Kevin O'Leary in Canberra, Australia, who was pioneering a unique system of hands-on teaching of trainee lawyers by professional peers. Harry Sexton, Solicitor, then an apprentice, went to Canberra on behalf of the Society to experience the system and to report back. The ultimate result, following a visit of Kevin O'Leary to Dublin, was the adoption of the same approach of using the expertise of our own legal practitioners as the teaching medium. The 1975 Education Regulations were drawn-up and solicitor, Dick Woulfe, and law graduate and teacher, Larry Sweeney, were recruited to head-up the new Law School. Participants in the first course under the new system entered Blackhall Place in 1978. The new system was designed to cater for an optimum number of 75 apprentices each half year, or 150 in a full year. At that time the number qualifying each year under the 'old system' averaged 120. The transition between the 'old system' and the 'new system' continued for some years, resulting during that period in the numbers qualifying per year reaching in excess of 300.

After the initial transition period, the Final Examination — First Part (F.E.I.) became the sole criterion for entry to the Law School and that remained the position until 1989. Since 1989, Irish law graduates have been exempt from the F.E.I. — one transitional consequence being that a greater number of students then would be the optimum from the educational standpoint are now attending each Law School course and that between 1990 and 1992, more than 700 new solicitors are likely to qualify. However, from January 1991, with the coming into effect of the EC Directive on the Mutual Recognition of Foreign Diplomas, Irish solicitors, already working as legal executives in London and elsewhere in the U.K. in large numbers will be able to fully and quickly qualify as solicitors in the U.K. and elsewhere in the E.C.

During the 1980s Continuing Legal Education (CLE) for qualified solicitors grew as a spin-off from the activities of the Law School. The importance of CLE is now obvious to the entire profession and its effectiveness lies in the whole hearted participation, as consultants, of practitioners with expertise generously imparting that expertise to their colleagues.

BLACKHALL PLACE

The need to provide adequate accommodation for the Law School ultimately led to the Council having to face the financial reality of the refurbishment of the Blackhall Place premises. In addition to Jim, the names of Peter Prentice and Moya Quinlan will be particularly linked with this courageous initiative to transform a more than 200 year old historical building into both the best of what it had been and the functional modern headquarters

necessary for our profession that it has become.

Funds were raised through the sale fo the top floors of the Solicitors Buildings to the Bar Council, from the profession itself, including the members' Prize Bond Fund and by term loan from the Society's bankers, the Bank of Ireland. The construction team was led by the late Terence E. Nolan, architect, who had previously worked with Jim on hospital building projects in the North Western Health Board. Because of the age and nature of the building, the initial major building contract negotiated with G. & T. Cramptons was on a time and materials basis and was ultimately to cost £1.25m. Building progress was carefully monitored at the monthly meetings of the Premises Committee. By 1978 the premises were ready for the final transfer of the Society's activities from the Four Courts to Blackhall Place and in that year, in the presidency of Joseph Dundon, the premises were formally opened by the then Taoiseach, Jack Lynch.

In subsequent projects, the members lounge, bar and toilet areas were expanded to facilitate the use of the premises for membership functions. In recent years up to £0.5 million has been spent in eradicating the effects of acid rain and pollution generally on the exterior of this two centuries old building and in providing for the expansion in the numbers of students attending the Law School. Ongoing work will still be required but, today Blackhall Place is insured for IR£16m, reflecting the wisdom of the original difficult decision to proceed.

While the Society's administration was transferred from the Four Courts in 1978, the facilities there have been progressively developed to provide a service for members working in the courts; further improvements are in hand.

RETIREMENT FUND

When the Finance Act 1975, made improved provisions for self-employed pensions, the Society availed of the opportunity to establish the Retirement Fund for members in private practice, with the Bank of Ireland Group as trustees and fund managers. Today, the Fund stands at over IR£14 million, and is growing every year. Jim will be particularly remembered by more senior members approaching retirement age for his constant promotion of this Fund up and down the country.

COUNCIL FUNCTIONS

Jim's main strength has been as an administrator. It requires strength of character and not a little tact and diplomacy each year to adapt to a new President, a new Council, and new Committees. Each year Jim and the rest of the administration of the Society appeared to glide effortlessly from one presidency to the next — a compliment indeed. The servicing of the various Committees of the Council, maintaining their continuity and clarifying the effect of any proposed policy changes, is a critical part of the efficient functioning of the Society. During Jim's period as Director General, the number of committees, their range of activities and their importance — in serving both the public interest and the profession itself — has grown a hundred fold.

Specialist committees have been established to deal with the areas of litigation, taxation, conveyancing and company law, which committees make representations to Government and other agencies where appropriate and issue advices to members. A distillation of fifteen years work by the Conveyancing Committee will shortly be supplied to members in handbook form. Interaction between the Taxation Committee and the Revenue Commissioners led to the introduction of self-assessment in respect of Capital Acquisitions Tax and the recent joint production of an educational video on the subject.

In 1975 there was the Lees' enquiry into conveyancing and legal costs, to be followed in the early 1980s by the Restrictive Practices Commission inquiry into conveyancing and restrictions on advertising by solicitors; and more recently by the just published Fair Trade Commission Report on Legal Services. Those inquiries required considerable involvement of Jim and his staff as well as Council members in respresenting the Society's views on the matters at issue and in commenting thereafter on the Reports when published.

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With the enactment of the Building Societies Act 1989, the solicitors' monopoly in the conveyancing area has been legislatively eroded, but the Society's representations to the Minister for the Environment were successful in ensuring that the rights of the individual purchaser/mortgagor to independent legal advice were safeguarded in the Act. The story is not yet complete in that the relevant detailed statutory regulations to be made by the Minister for Justice are still awaited.

The mid 1980s saw considerable efforts expended in bringing the Society's internal affairs up to date. The Guide to Professional Conduct was published, and the Society's Bye-Laws and Council Regulations were revised and updated. The removal of the restriction on advertising by solicitors was debated at length over three General Meetings and eventually narrowly agreed to in a ballot of members; the necessary Regulations were made (S.I. No. 344 of 1988), effective from 1 January 1989.

A major achievement in recent years was the establishment of the Solicitors Mutual Defence Fund to provide professional indemnity insurance for members at a competitive cost. The Fund is now in its fourth year, and, as of now,

some 2,228 solicitors representing 1,075 firms participate.

To encourage the generality of solicitors in practice back into the area of providing a level of financial as well as legal services, the Solicitors Financial Service was established, in association with Sedgwick Dineen; with effect from 1st May 1989. In its initial year 259 firms have participated and shared over IR£0.75m in commission. The Fund should come into its own with the implementation (from 1st October 1990) of Part IV of the Insurance Act 1989, which imposes control on brokers and agents.

PUBLICATIONS

The publication of Irish law books has been a niche area of Society activity. Prior to 1970 there was little in the way of Irish legal publishing. With the support of the Arthur Cox Foundation, the Society's Publications Committee conducted a programme of book publications, now totalling some fifteen books. All but two of the Society's publications have been financially successful, with the result that commercial law publishers now consider the Irish market a good risk and are publishing regularly. The publication by the Society in 1981 of the 5th Edition of the Garda Siochana Guide represented by far the largest publishing exercise, and the 6th Edition is due to be published in the near future.

FINALE

As Jim looks back over his 17 years with the Society by his own high standards, he will see some failures tarnishing his matrix of success. As an administrator and former civil servant Jim, from a standpoint of being able to see both sides, strove for improvement in the State services to the legal process – not least the Land Registry, the Office of the Commissioner of Valuation, aspects of the Office of the Revenue Commissioners, and the various Court Offices. Jim saw delays in these offices as being instrumental in damaging public relations for the profession itself – clients understandably tended to blame all delay on the solicitor. Despite some improvement, delay in Government agencies, particularly the Land Registry, still presents major problems for solicitors in conducting legal business expeditiously for their clients. As far as concerns the Land Registry, whether the new proposals just announced by the Minister for Justice to computerise the Land Registry and the Registry of Deeds will offer a solution only time will tell.

Jim's final challenge – the Solicitors' (Amendment) Bill – will not have seen the light of day before he leaves office. Jim and in-house solicitor, Anna Hegarty, with a small Council sub-committee under Maurice Curran, have been working in close liaison with the Department of Justice on the formulation of a number of critical changes to the Solicitors' Acts designed to reflect the reality of the Society's public interest functions as well as its internal needs. It is hoped that this Bill will be introduced before the end of 1990.

When Jim was appointed in 1973 there were some 1,500 solicitors on the Roll. Now there are in excess of 3,500, to be found not only in Ireland, but also in London and Brussels and elsewhere in the E.C., as well as the United States, Australia and other common law countries. Whether the anticipated numbers qualifying from now on can be absorbed into the traditional areas of legal practice is the big question. With the administrator's foresight, Jim, together with successive Presidents in recent times has been preaching the necessity for those now qualifying to have a wider perspective – not least reaching into the commercial world. It is perhaps of significance that Jim's period of office closes with the awarding of the first J. P. O'Reilly Memorial Scholarship to a young apprentice (Muiris O'Ceidigh) to fund his attendance at the M.B.A. degree course in T.C.D. The object of this annual scholarship, presented by Dr. Tony O'Reilly, himself a solicitor who entered the world of business, is to encourage the bridging of that very gap between the world of law and the world of finance and commerce.

As Jim retires, the thanks of the profession are due to him for his untiring zeal, effort and leadership during the past 17 years. We wish Jim and his wife, Nanette, an enjoyable and happy retirement. To Nanette also, our thanks are due for her beautiful singing on many occasions on behalf of the Society's charitable endeavours. □

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PAPER ON LITIGATION

The Society of Actuaries in Ireland would like to invite all those interested to attend a paper on litigation to be given by Peter Delany, FIA FPMI ASA, partner in Delany, Bacon & Woodrow, Consulting Actuaries on Thursday 1st November. The meeting will start at 6.30 p.m. sharp following coffee at 5.45 p.m. in the offices of Irish Pensions Trust, Hill Samuel House, Adelaide Road, Dublin 2.

Would those wishing to attend please contact Camilla McAleese at the Society's office, Telephone 612427.

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Association of Pension Lawyers Republic of Ireland Regional Group Activities update

The Association of Pension Lawyers was formed in 1984 by a group of London lawyers specialising in pension matters. These lawyers saw a need to bring together members of the legal profession (both barristers and solicitors) who provide expert services in all areas relating to pensions. Their aim was to represent their interests, to meet the needs of their clients and members of pension schemes and to provide a forum to enable government and the media to make use of their skills.

In 1989 the Main Committee of the Association of Pension Lawyers decided to promote the establishment of Regional Groups as the demand for more localised meetings was apparent. In December last the first Regional Group was formed in Birmingham. I travelled from Dublin to be at the first meeting.

Early this year it was apparent that the promised Pensions Bill would shortly be published. There had been considerable activity in the pensions area in Ireland in 1988 and 1989 with the publication of the various Reports of the National Pensions Board. There was also increasing interest in pensions as it became clear to lawyers practising in private practice, at the Bar, in the Insurance Industry and Pension Consultancy firms that the forthcoming Pensions Act 1990 would be a significant piece of legislation.

As a result of this interest two colleagues of mine in the Insurance Industry, Joan Flanagan (Solicitor) of Irish Pensions Trust Ltd., Michael Lane B.L. of New Ireland Assurance Co. plc and I decided to establish a Regional Group to promote the aims of the Association of Pension Lawyers in Ireland.

On the 17th of May 1990 we held a most successful Inaugural Meeting in the Westbury Hotel. Prior to the formal addresses given by our guest speakers there was a most enjoyable finger buffet. All of those who attended took the opportunity to chat and meet one another!

Both solicitors and barristers attended the meeting and heard Addresses given by Mr. Brian McCracken S.C., Chairman of the National Pension Board, and Mr. Jonathan Seres, Sacker & Partners, London. Jonathan spoke on "The Similarities and Differences between the Republic of Ireland's Pensions Bill and the United Kingdom Experience". Brian spoke on "The Pensions Bill 1990".

We were delighted to have at our Inaugural Meeting the Chairman of the Association of Pension Lawyers, Mr. Tony Thurnham of Linklaters and Paines, London, the Secretary of the Association of Pensions Lawyers, Mr. Ian Pittaway of Nicholson Graham and Jones, and the Regional Director of the Association of Pension Lawyers, Mr. Trevor Clarke of Simpson Curtis, Leeds. The Chairman of the Genral Council of the Bar of Ireland, Nial Fennelly S.C. also attended. The President of the Incorporated Law Society of Ireland, Mr. Ernest Margetson, sent his apologies.

There was welcomed support at the Inaugural Meeting from various organisations involved in the Pensions Industry such as The Irish Institute of Pension Managers, The Irish Association of Pension Funds and The Society of Actuaries in Ireland.

With the publication of the Pension Bill 1990 in March our Regional Group had a lot of work to do!

Immediately our Legislative and Parliamentary Sub-Committee under the Chairmanship of Michael Lane, of New Ireland Assurance Co. plc met to prepare submissions on the Pensions Bill. As a result of the Sub-Committee's work we made a submission to the Minister for Social Welfare, Dr. Michael Woods T.D., asking him to extend the ordinary membership of Pensions Board to include a representative of the legal profession. We also submitted to the Minister several technical submissions on specific sections of the Pensions Bill.

The Pensions Act 1990 became law in late July. The composite of the ordinary membership of the Pensions Board was extended to include a representative of the legal profession. Many of our technical submissions on the sections of the Pensions Bill were also included in the Act.

In late July the Minister for Social Welfare wrote to us asking us to nominate a representative of the legal profession for ordinary membership of the Pensions Board. We have replied to the Minister submitting our nominee to him. The Pensions Board will be appointed by the Minister in October.

We held our first meeting on the 25th September. The September meeting had as its theme "The Pensions Act 1990 – An Update". We were delighted that Mr. Paul Kelly F.I.A., President of the Society of Actuaries in Ireland and Mr. Paddy Gallagher B.L. Chairman of the Irish Association of Pension Funds had agreed to address us.

Mr. Paul Kelly concentrated on particular issues in the Pensions Act where a meaningful dialogue between lawyers and actuaries would be productive both for advisers on pension matters and for our mutual clients. Mr. Kelly stated that the first major challenge facing all advisers under the Pensions Act was to work within the spirit of the Act and not to seek to manipulate its provisions for short term gain. Mr. Kelly also made a plea for pragmatism and simplicity.

Mr. Paddy Gallagher dealt with the significant legal differences between the Pensions Bill and the Act itself. Mr. Gallagher made valuable comments on certain sections of the Pensions Act where there appeared to be some anomalies, lack of clarity and legal inconsistencies. Mr. Gallagher also made a plea for under regulation rather than over regulation under the Pensions Act. Mr. Gallagher felt that too much regulation could strangle the development of pensions and would only increase cost. At the end of the day the regulations might not close every loop hole.

Both papers were well received by our members and we had some interesting questions raised from those in attendance. The Society of Actuaries in Ireland and the Irish Association of Pension Funds are

(Contd. on p.296)

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President: The Hon. Mr. Justice Brian Walsh.

Chairman: Mr. Eamonn G. Hall, Solicitor

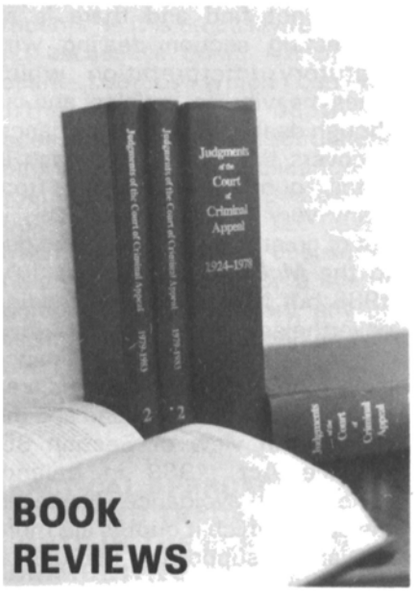
PROGRAMME FOR AUTUMN 1990

1. Wednesday, October 17, 1990:
   Mr. Finbarr Murphy, Barrister, Legal Advisor, Bank of Ireland
   A past Chairman of the Society – ***Consumer Policy in the European Communities: Its Effects in Irish Law.***
2. Thursday, November 15, 1990:
   The Hon. Mr. Justice Ronan Keane, Judge of the High Court, President of the Law Reform Commission – **Community Law and Irish Law: A Fruitful Tension.**
3. Thursday, December 13, 1990 at 6.15p.m.
   The Annual General Meeting of the Society – ***To be held in the main Reception room of the European Commission Office, 39, Molesworth Street, Dublin 2. The meeting will be followed by a Wine Reception.***

Lectures take place at 8.15 pm 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 Committee and guest speakers *for dinner* at the Club at 6.15 pm on the evening of each lecture. Members intending to dine must communicate with the Membership Secretary, Jean Fitzpatrick, Solicitor's Office, Telecom Eireann, 52, Harcourt Street, Dublin 2. (Tel: 01-714444 Ext. 5929, Fax: 01-679 3980, Electronic Mail (Eirmail) (Dialcom) 74: EIM076) not later than two days before the dinner, as advance notice must be given to the Club.

Membership of the Society is open to lawyers and to others interested in European Law. The current annual subscription is £15.00 (£10.00 for students, barristers and solicitors in the first three years of practice). Membership forms and further details may be obtained from the Membership Secretary.



THE TOLERANT SOCIETY
By Lee C. Bollinger. [Oxford University Press, New York and Oxford, 1988. viii + 295pp. paper, US Dollars 9.95, hardback US dollars 24.95].

SPEECH, CRIME AND THE USERS OF LANGUAGE
By Kent Greenawalt. [Oxford University Press, New York and Oxford, 1989. 368pp. hardback, US Dollars 45.00].

THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW
By M. Ethan Katsh. [Oxford University Press, New York and Oxford, 1989. 336 pp. hardback, US Dollars 32.50].

A DOCUMENTARY HISTORY OF THE FEDERAL COMMUNICATIONS ACT OF 1934
Edited by Max. D. Paglin [Oxford University Press, New York and Oxford, 1989 880pp. hardback, US Dollars 55.00].

The law relating to communications is a central theme in these four books, the subject of this notice. Central to the four books is the specific language of the First Amendment of the US Constitution – ''Congress shall make no law . . . abridging the freedom of speech, or of the press''. Article 40.6.1 of the Irish Constitution is much weaker in its effect. This latter Article provides that the Irish State guarantees liberty for the exercise, subject to public order and morality, of the right of the citizens to express freely their convictions and opinions. But there are further qualifications. The second paragraph at Article 40.6.1.i ordains that the State must endeavour to ensure that the organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, must not be used to undermine public order or morality or the authority of the State. In effect, interpreted in a certain way, the Irish Constitution sanctions a form of prior restraint of expression in relation to public order, public morality and the authority of the State.

Governmental action smacking of prior restraint has aroused the ire of great writers and scholars over the centuries. John Milton in *Areopagitica,* John Stuart Mill in *On Liberty*, and Walter Bagehot profoundly disliked prior restraint of verbal expression. Those writers have influenced the great free speech doctrine articulated in the powerful judicial dissent of Justice Oliver Wendell Holmes of the United States Supreme Court. In *Abrams -v- United States* 250 US 616 (1919) in one of the most powerful dissents ever written – a dissent which provides the basis of the contemporary free speech principle in the United States – Justice Holmes wrote that

> ''the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out''.

Free speech is, of course, not an absolute right. The truth-discovery justification is open to criticisms. Does free discussion contribute to the discovery of truth? There is no easy answer.

Dean Lee C. Bollinger of the University of Michigan Law School provides a defence in *The Tolerant Society* of how free speech may develop capacities for tolerance in society. Dean Bollinger analyses free speech cases and doctrines in the United States. Debate on the mertis of the free speech principle must commence with an understanding of the goals of free speech. Dean Bollinger in his introduction states that the purpose of his book is to contribute to that understanding.

Professor Kent Greenawalt, Benjamin N. Cardozo Professor of Jurisprudence at Columbia University Law School, in his book *Speech, Crime and the Uses of Language* disagrees with Bollinger's view that promoting tolerance is now the primary justification for free speech or that attention to tolerance should play the critical role in decisions whether to restrict speech.

Professor Greenawalt in *Speech, Crime and the Uses of Language* explores the three-way relationship between the idea of freedom of speech, the criminal law, and the many uses of language. Free speech is considered by Greenawalt as a political principle, and after an analysis of the justification commonly advanced for freedom of speech, he examines the kinds of communications to which the principles of free speech apply. Greenawalt addresses such questions as what should be considered ''speech'' within the meaning of the First Amendment, and what tests the courts should employ in deciding whether particular criminal statutes should be held constitutional.

Professor Ethan Katsh, Professor of Legal Studies at the University of Massachusetts in Amherst, in *The Electronic Media and the Transformation of Law*, examines how the electronic media of television and computers are forcing changes in the goals, doctrines and processes of law, in the legal profession and in the values and concepts that underlie the system of law. Professor Katsh asserts that the electronic media will have an increasingly powerful impact on all facets of American law – its methods, values, and societal role – and illuminates new challenges that will affect the operation and nature of law in the future.

The *Communications Act of 1934* is one of the basic and most important documents of US Communications Law. *A Documentary History of the Communications Act of 1934* is an exhaustive reference work. The book is a collaborative project by the Golden Jubilee Commission on Telecommunica-

tions and the Federal Communications Bar Association. In this book readers are provided with the underlying legislative components of the *Communications Act of 1934*, including texts of congressional hearings and debates, the Senate and House Committee reports, an index to the legislative materials, and a wide range of other source material. Material is carefully annotated and the book includes a series of incisive essays by senior figures in the communications field on the historical, legal and political considerations that led to the adoption of the Act.

Free speech has motivated writers to produce some of the most beautiful writing to be found in the law. These books provide a cornucopia of cases and fertile comment which are relevant to any jurisdiction which claims to value freedom of expression and opinion. There is a rich heritage to be found in the jurisprudence of the United States. Ireland's advocates and judges have often been influenced by fundamental principles in American constitutional law. These books provide further insights into freedom of speech and the principles guiding the law of communications – cruical elements in the laws of liberal societies.

Eamonn G. Hall

EASSON: Cases and Materials on Revenue Law
Second Edition by David R. Salter and Julia L. E. Kerr
Sweet & Maxwell (Published 1990).

It is unfortunate that we do not so far have an adequate book on Irish revenue law. All the sources we use are U.K. sources of which this is one stating the law as at 30th June, 1989. It is a comprehensive book incorporating nearly seven hundred cases and U.K. statutes up to and including the Finance Act, 1989 and certain Australian, New Zealand and United States statutes.

It incorporates parliamentary reports, green papers, Inland Revenue publications and other non-parliamentary reports, articles etc.

The book is in part philosophical dealing with the theory and philosophy of taxation and relying heavily on essays and articles. These chapters are interspersed through the book and although they are very important from the academic or theoretical point of view, they tend not to be practical. Essays and Articles are dealt with from Adam Smith (an Enquiry into the Nature and Causes of the Wealth of Nations, 1776) down to various budgetary speeches, green papers, reports, essays and articles taken from various sources including the British Tax Review.

The publication considers the requirements of an equitable system of taxation and in dealing with aspects of the administration of tax, Lord Keith's report.

Keith's remedies are interesting:-

(i) a general amnesty for tax evaders provided they pay arrears to the Revenue by a given date;
(ii) publication of names of taxpayers who reach settlement with the Revenue;
(iii) a tax return should be sent out to each taxpayer. They should be redesigned to emphasise the requirement to include spare time or casual earnings;
(iv) an extension of the need to make tax deductions in paying others should be considered e.g. casual employees;
(v) there should be random audits;
(vi) there should be more prosecutions.

Within those six we can see many of the "tax events" which have happened in this country in the last few years.

This particular chapter deals with aspects of obtaining information and goes in depth into the notorious *Rossminister* Case where the Revenue were heavily criticised for an excess of power.

The Section dealing with decision making is relevant, particularly now as we can envisage more tax appeals based on points of law. This Section deals with the questions of fact, dealing with Revenue law and the meaning and interpretation of that law in light of the facts. It emphasises that the burden of proof is on the taxpayer who is, therefore, at a serious disadvantage being deemed guilty unless proven innocent.

It covers the office of the Appeal Commissioners, whose decision on facts is final and whose finding on those facts will not be overturned unless they are such as a court would not find and there is an interesting section dealing with statutory interpretation which relies heavily on articles and although dealing with tax avoidance, it covers the judicial approach in detail, quoting extensively from many very familiar cases. This is not of great relevance in Ireland due to the *McGrath* decision of July, 1988 but it is interesting reading nevertheless.

It briefly deals with tax avoidance legislation both in the specific area which is common to Ireland and the UK and, in view of Section 86, Finance Act, 1989 in Ireland, general anti-avoidance. However, the cases which it quotes are more relevant to supporting the judicial approach.

The book then diverges into the various taxes and a large section of the remainder of the book is concerned with income tax. It deals with the concept of income beginning with Adam Smith's, the Wealth of Nations and the use of income as a tax base. Again it relies heavily on reports and articles. It covers the distinction between capital and income and deals extensively with the various Schedules in some detail, including, Trade, Partnership residence and ordinary residence.

It deals briefly with Capital Gains Tax but the section on Inheritance Tax is disappointing as not much detail is incorporated and although the history of this type of capital tax is dealt with, it deals only with two aspects namely:-

(a) Reservation of benefit and relies heavily on old estate duty cases and settlements.
(b) It also deals with accumulation and maintenance settlements within that context.

From an academic point of view, the book is excellent. It provides sources including non-statutory or legal sources as well as very learned and erudite quotes from various cases of varying ages from Lord Sumnar in the early part of the century to Lord Denning, Lord Wilberforce and beyond. Many of these cases will have practical importance but if the arguments are to be used in practice, it is most likely that the practitioner would go to the source viz the actual report.

The greatest benefit this book will have is in the academic field, particularly to lecturers and

students as it is an easily readable and accessible book, full of excellent sources which can be further studied in depth if necessary. From a practitioners point of view, the publication is different from other types of tax books, such as Tolly's Tax Cases (which gives facts and decisions) and although it would be a useful addition to the tax library, any of the theories and philosophies will have little use in practice.

Brian A. Bohan

PRACTICAL APPROACHES TO ENFORCING TRADEMARK RIGHTS IN THE EUROPEAN COMMUNITIES
Published by European Communities Trade Mark Practitioners Association (ECTA)

This booklet is the sixth of a series published by the European Communities Trade Mark Practitioners Association. Others in the series have been titled "Distinctiveness Requirements for Trade Marks in the EC countries", "Opposition on Basis of Non-registered Rights", "Use to Maintain Rights in EC countries", "License, Assign, but don't endanger your Trade Mark" and "The Community Trade Mark". Each publication results, in effect, from the proceedings of the annual conferences organised by ECTA, the most recent having been held in Dublin last May. The book under review results from the proceedings of the London conference in May 1989.

Pending the introduction of the Community Trade Mark, trade mark protection within the Community remains firmly based upon national law. Hence the book deals with some of the major jurisdictions such as the United Kingdom, West Germany, France, Spain and the Netherlands.

Trade mark protection in all of these countries, with the exception of the United Kingdom, derives exclusively from statute law and unregistered rights enjoy no protection at common law. In Ireland and the United Kingdom additional protection is of course afforded at common law by means of the common law action for passing-off.

The national surveys covered in the book constitute a very valuable overview for practitioners having to advise clients on how to enforce their clients' trade mark rights in the countries covered. Incidentally, protection in the Netherlands arises under the uniform Benelux Trade Mark Act so that the scope of protection enjoyed by trade marks throughout the Benelux is of a more or less uniform character.

The chapter on the United Kingdom is a particularly useful summary of the types of relief available to trade mark owners whose rights have been infringed or have otherwise suffered from third party passing-off. Apart from the normal forms of injunction, the author, William Richards, Solicitor, has a useful summary of Mareva orders, Anton Piller orders and the more recent type known as Bayer orders. Nicholas McFarlane in his contribution gives a more detailed explanation of the latter type of order.

For the common lawyer the chapters dealing with France, Germany and Spain empahsise that Courts in these countreis are organised on the basis of territorial jurisdiction. Generally speaking, the Court having jurisdiction in trade mark infringement matters is the Court of the place of business of the infringer: though, as Michael Schaeffer points out, insofar as Germany is concerned, in most trade mark infringement cases in that country it is possible to select a Court better qualified to hear such actions at least to the extent of selecting a jurisdiction where an infringement is imminent.

Another interesting aspect of the enforcement of trademark rights within Europe is the extent to which the criminal law is being utilised to prevent the more blatant forms of trade mark infringement. Indeed the recent United Kingdom Copyright, Designs and Patent Act, 1988 now contains provisions making certain more blatant types of trade mark infringement a criminal offence.

Taken together the six books so far published in this series serve as a very useful summary of the more important aspects of trade mark law within the Community. Copies of all six books are available from Florent Gevers, Secretary General, European Communities Trade Mark Practitioners Association, St. Pietersvliet 7, 6th Floor, B-2000 Antwerp, Belgium.

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THE LAW REFORM COMMISSION:
Eleventh Report (1989) Dublin. The Law Reform Commission, 1990.

The Law Reform Commission has published its eleventh report. Over the years, the reform of our laws has prompted many legal scholars to take various Governments to task for their tardiness. Law Reform has also provoked writers to use stirring words. One such example is the speech delivered to Parliament by Lord Brougham a century and a half ago. Lord Brougham spoke in support of a motion that an address be presented to the King petitioning that

> "a commission be established to inquire into the defects, occasioned by time and otherwise in the laws . . . as administered in the courts of law, and the remedies which may be expedient for the same."

Lord Brougham concluded:

> "It was the boast of Augustus that he found Rome of brick and left it of marble. but how much nobler will be our sovereign's boast, when he shall have it to

say that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left if the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.''

The writer of this notice appreciates that these rallying words are somewhat extravagant and garish.

Our Law Reform Commissioners, Mr. Justice Ronan Keane, Judge of the High Court (President), Mr. John F. Buckely, Solicitor, Professor William Duncan, Professor of Law, Trinity College, Ms. Maureen Gaffney, Senior Psychologist, Eastern Health Board, and Mr. Simon P. O'Leary, Barrister-at-Law are essentially ''assisting the Government and the legislature in reforming the law.''

In its Report, the Law Reform Commission provides an update on the year's work. The year's work is divided into several categories: child sexual abuse; sexual offences against the mentally handicapped; debt collection (retention of title); conveyancing and land law, defamation; criminal libel; contempt of court; seizure of the proceeds of crime; dishonesty; the rule against hearsay in criminal cases; offences against the person; indexation of fines; and private international law.

The Law Reform Commission deserves our support.

Eamonn G. Hall

Association of Pension Lawyers

(Contd. from p.291)

organisations with considerable depth and strength in all aspects of pensions business and our Regional Group will certainly benefit from being associated with them.

Our next meeting will be mid November. The addresses will be on technical aspects of pensions. Everyone is welcome!

Further details with regard to Membership can be obtained from: Joan Flanagan, Irish Pensions Trust Ltd, (Telephone 776591).

Information on the activities of the Regional Group can be obtained from: Raymonde Kelly, Irish Life Assurance Plc., (Telephone 7402645) and Michael Lane, New Ireland Assurance Co. Plc. (Telephone 717077).

RAYMONDE KELLY

The EEC Convention on Jurisdiction and the Enforcement of Judgments

PETER BYRNE

The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters — brought into force on 1 June 1988 — establishes a body of rules of primary importance for a significant proportion of practitioners.

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In his foreword The Hon. Mr Justice John Blayney states: *The author deserves the thanks of all practitioners who will have to grapple with this branch of the law. He has had the courage to undertake the research and arduous work required . . . and has done so admirably.*

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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.

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

SCHEDULE OF REGISTERED OWNERS

Albert Ennis, Kilcooney, Cloneygowan, Tullamore, Co. Offaly. Folio No.: 17555; Lands: Kilcooney. County: **OFFALY.**

Noel Whiston, Folio No.: 9789; Lands: Rathdown Upper. County: **WICKLOW.**

Elizabeth Shortt, Folio No.: 11594 County Dublin; Lands: Loughlinstown Commons; Area: 0.111 hectares. County: **DUBLIN.**

Mary Ann O'Sullivan, Folio No.: 10752F; Lands: A plot of ground situate to the north of Farranshone Road. County: **LIMERICK.**

James English, Folio No.: 22858 closed to 11827F; Lands: (1) Poulator (2) Garryduff (ED Ardfinnan) (3) Tullow (4) Tullow (5) Tullow; Area: (1) 4.719 acres (2) 18.131 acres (3) 25.206 (4) 21.319 acres (5) 8.000 acres. County: **TIPPERARY.**

Bernard Corroon, Folio No.: 6538F; Lands: Banagher; Area: 12.572; County: **WESTMEATH.**

James Kelly and Lillian Kelly, Folio No.: 2092F; Lands: Mountrath (north of Shannon Road) Area: 0.363 acres. County: **QUEENS.**

Patrick Joseph Ketterer and Gertrude Ketterer, 45 Broadford Close, Ballinteer, Dublin 14. Folio No.: 30093L; Lands: Property situate in part of the townland of Ballinteer, Barony of Rathdowney; Area: 0.031 hectares. County: **DUBLIN.**

Catherine D. O'Mahony, Folio No.: 41922F; Lands: Part of the townland of Curraghnalaght. County: **CORK.**

John J. Nolan, Folio No.: 2902L; Lands: Property known as Number 10 Orwell Gardens, Rathgar, situate on the south side of the said gardens in the Parish and District of Rathfarnham. County: **DUBLIN.**

Annie Fitzpatrick, Folio No.: 1256; Lands: Tullybuck; Area: 14a.2r.10p. County: **CAVAN.**

Richard Sturdy and Bernadette Sturdy, Folio No.: 15817F; Lands: Rathflesk; Area: 0.138 acres. County: **MEATH.**

Edward Nuzum, Folio Nos.: (1) 2501F, (2) 9430F; Lands: (1) Townland of Sheepmore, Barony of Castleknock, (2) Townland of Porterstown, Barony of Castleknock; Area: (1) 0.585 hectares, (2) 1.031 hectares. County: **DUBLIN.**

Eugene Boylan, Folio No.: 2436; Lands: Clonervy; Area: 32a.1r.28p. County: **CAVAN.**

Mary Sheehy, Folio No.: 16280; Lands: (1) Ballyedmonduff, (2) Ballyedmonduff; Area: (1) 0.195 hectares, (2) 0.392 hectares. County: **DUBLIN.**

Patrick Quirke, Folio No.: 34779; Lands: (1) Ballinree, (2) Grange Beg; Area: (1) 44a.3r.20p, (2) 15a.3r.2p. County: **TIPPERARY.**

Catherine Walsh, Folio No.: 17899; Lands: Leixlip; Area: 0a.0r.8p. County: **KILDARE.**

Teresa Dowling, Folio No.: 15065; Lands: Moorepark; Area: 22a.0r.35p. County: **MEATH.**

Daniel Francis Lennon (deceased), Folio No.: 438R; Lands: Oghill; Area: 5.240 acres. County: **LONGFORD.**

Vincent Conor Crowley, and **Patricia Crowley** of Grangernagh, Castleknock, Co. Dublin. Folio No.: 18883 and 19032; Lands: Carpenterstown. County: **DUBLIN.**

Thomas Sheridan and **Una Sheridan,** of 3 Croydon Park Avenue, Marino, Dublin. Folio No.: 15113; Lands: A plot of ground situated on the south side of Collins Avenue Extension in the parish and district of Santry and city of Dublin. County: **DUBLIN.**

Gerard Galvin, Folio No.: 14486F; Lands: Ballincollig. County: **CORK.**

James A Toye, Folio No.: 3875; Lands: Drumany; Area: 30a.2r.6p. County: **DONEGAL.**

Cashel Urban District Council, Folio No.: 19586; Lands: Hughes – Lot East; Area: 2a.0r.34p. County: **TIPPERARY.**

Sir George Brooke, Folio No.: 19439 & 19443; Lands: Glenbevan; Area: 66a.0r.8p, 28a.3r.12p. County: **LIMERICK.**

Lost Wills

RYAN, Thomas (Malachy), deceased, late of Coolnapisha, Pallasgreen, in the county of Limerick. Would anyone having knowledge of the whereabouts of a Will of the above named deceased who died on the 19th of December 1989 please contact Messrs. O'Donnell Dundon & Co., Solicitors, 101 O'Connell Street, Limerick. Ref. JROD. Tel: 061-48811.

BUTLER, Sarah, deceased, late of Newtown,Ferns, Co. Wexford. Will any person having knowledge of a Will of the above-named deceased, please contact John A. Sinnott & Co., Solicitors, Enniscorthy, Co. Wexford. Ref: MJ. Tel. (054) 33111.

BRADY, Joseph, deceased, late of St. Mary's Hospital, Castleblayney, Co. Monaghan, and formerly of Conaghy, Newbliss, Co. Monaghan. Would any person having knowledge of a Will of the above named deceased who died on 7 September, 1990, please contact Messrs. Murphy, Morgan & Co., Solicitors, Law Chambers, The Diamond, Clones, Co. Monaghan. Tel. (047) 51011/51615.

MARKEY, James, deceased, late of Kilreesk, St. Margaret's, Co. Dublin. Will any person having knowledge of the whereabouts of a Will of the above named deceased, who died on 4 July, 1990, please contact O'Reilly Doherty & Co., Solrs., 6 Main St., Finglas, Dublin 11. Tel: 344255.

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INCORPORATED LAW SOCIETY OF IRELAND

Vol. 84 No. 9 November 1990

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- Securing the customer's interest
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GAZETTE INCORPORATED LAW SOCIETY OF IRELAND
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Viewpoint

It is unusual for newly introduced legislation to be immediately subject to rigorous examination in and out of the Courts. Such however has been the fate of the *Companies (Amendment) Act 1990,* under which Mr. Peter Fitzpatrick was appointed Examiner of the companies in the Goodman Group. It has already become apparent that there are serious questions to be asked about the legislation, notably in relation to some of the time limits imposed for the carrying out of various functions under the Act and also the extent of the powers which remain in directors of the company during the initial period of the Examiner's term of office.

Apart altogether from those cases in which particular provisions of modern legislation have been held to be unconstitutional, which might be categorised as the ultimate failure of our legislative process, it is becoming clear that there are flaws in a significant amount of our recent legislation. The Law Reform Commission in its report on *Land Law and Conveyancing Law – 1 General Proposals,* published in June 1989, drew attention to a number of provisions in modern legislation which contained anomalies which significantly affected the operation of the legislation.

Our legislative process based as it is on that inherited from the United Kingdom, requires legislation to be impeccably drafted if it is to be effective. In order to ensure that this has been achieved, it requires diligent line by line examination. It is not the practice to publish draft Bills in advance nor to circulate them for comment and accordingly it is largely at the Committee stages of a Bill in the Oireachtas that this examination takes place. Whether our legislators are properly equipped or have sufficient skilled back-up to carry out this task may be open to doubt. What is certain is that fairly regularly they are not given a proper opportunity to do so. If the guillotine procedure is adopted or if there is otherwise perceived to be a reason for accelerating the legislative process, as in the case of Finance Bills, it is the Committee stage which suffers. Many recent Finance Bills have never had a serious Committee stage.

Two changes should be given consideration. Perhaps Dáil or Oireachtas Committees should be engaged in the line by line examination of draft legislation in more detail at an earlier stage. Presentation of draft Bills could be made to a Committee by the officials who have generated the legislation and the draftsmen who have converted it into Bill form. Circulation of the draft Bills in advance would enable interested parties to take expert advice not merely on the policy of the legislation but also on the actual wording and this could be debated before the Committee. Hopefully this might avoid some of the errors and anomalies which under the present system are likely to recur.

A more fundamental change would be in our legislative style. The ''Plain English'' movement seems to be slowly gaining ground though in order for it to be effective it will be necessary presumably for a change in legislative style to take place. Such a change has already taken place in the legislation of New York State and it does not appear that the sky has fallen in as a result. This topic is on the programme of the Law Reform Commission and it is understood that it is under active consideration.

In a legal system which does not condone ignorance of the law, it is surely important that the laws should be composed in a language that can be understood by the average primary school leaver. At the moment much of our legislation defies the average Law School graduate. □

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Schizophrenia and the Law

Part 2

By
S. Desmond McGrath
FRCPI., FRC. Psych.,
DPM.

Medico-legal aspects

Having endeavoured to give some idea of the disorder, I will now deal with some medico-legal problems that arise in relation to patients suffering from schizophrenia.

Criminal Law

In criminal law, patients suffering from schizophrenia may come to the attention of the courts through offences, such as vagrancy or related petty crime, associated with chronic schizophrenia, where the main problem is the lack of drive and affective blunting. Such patients tend to drift down the social scale and present serious social problems.

The more dramatic cases, however, are those involving violence, which are usually associated with the paranoid form of schizophrenia. Taylor & Gunn, in a recent paper, showed that among both seriously and trivially violent offenders the prevalence of schizophrenia was much higher than in the general population. Two other workers, Walker and McCabe, studied all patients subject to Hospital and Guardianship Orders under Part 5 of the British Mental Health Act and to compulsory detention under the Criminal Procedures (Insanity) Act 1964. They found that amongst males, schizophrenics were disproportionately more likely to have committed violent offences. 50% of the female violent offenders and 59% of the males were schizophrenic. No study of comparable samples in the Western World has found a lower proportion. Interestingly, violence to property was more common than personal violence.

Another report from West Germany, in which the records of all mentally abnormal offenders convicted of homocide or potentially lethal attacks over a ten year period were studied, found that 53% were schizophrenic. Despite this they calculated that the risk of such offences in a schizophrenic population was only about 0.05%, in other words, although amongst the crimes of violence committed by mentally disturbed people, the proportion of schizophrenics is very high, the incidence of violence amongst schizophrenic patients is low. Violence against the self is more common. In one 30 year follow up study, just over 4% of schizophrenic patients had died by suicide, accounting for 10% of all schizophrenic deaths. It must be emphasised, therefore, that the risk of a schizophrenic harming himself is much greater than the risk of him harming someone else.

Diminished responsibility

In this country the method of dealing with a person who has committed a murder but is insane is still not satisfactory. For well over a century the law was based on the McNaughten rules which were derived not from a legal decision but from the answers given by judges to a series of questions put to them in 1843 by the House of Lords. Their most relevant answers were to questions 2 and 3, which were in part as follows "The jurors ought to be told in all cases that every man is to be presumed sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction: and that to establish a defence on the grounds of insanity it must be clearly proved that at the time of the commiting of the act the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it that he did not know he was doing what was wrong". These guidelines are most unsatisfactory and if they were literally interpreted nobody would be found legally insane. Fortunately, following some excellent judgments the position in Irish courts has changed to a considerable extent, although the situation is still not satisfactory in that illogically a person is found guilty but insane instead of not guilty by reason of insanity.

"In this country the method of dealing with a person who has committed a murder but is insane is still not satisfactory."

The *Hayes* case which came to trial in 1968 before Mr. Justice Henchy showed the gross limitations of the McNaughten rules. Hayes was accused of murdering his wife in October, 1965. He was a fourty eight year old farmer from

Des McGrath.

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Co. Limerick. Over a period of years he developed a number of grievances. He believed that his children were being ill treated by neighbours, that a case in which gypsies trespassed on his land was not dealt with properly, and finally that he was being swindled over the sale of part of his land. He believed that he had been ill treated by a series of solicitors and an influential political family in Limerick. He decided that he must find a forum to publicise his grievances and came to the conclusion that such an opportunity would present itself if he was brought to court on some charge. He, therefore, drove his car without a licence and managed to bring the Gardaí's attention to the fact. He then refused to pay the fine and was charged. He had prepared a lengthy statement of his grievances but when he started to read it out the judge stopped him. He decided that a more serious charge and higher court was necessary and he next thought of shooting one of the solicitors and got a gun, but at the last minute could not bring himself to shoot and went to the Guards and told them the story. On their advice he was admitted to Limerick Mental Hosptial for a brief period. The general idea however had not left his mind and on 15th October, 1965, after leaving his children to school he came home, severely beat his wife about the head with a spanner or wrench and went immediately to the Guards to report the matter and gave himself up. She died the next day. He was clearly mentally disturbed and was committed to Dundrum. He was initially regarded as unfit to plead but demanded a trial of the issue by jury and was found fit to plead. I examined him before the trial and gave evidence that he was suffering from paranoid schizophrenia. He conducted his own defence.

Mr. Justice Henchy, in reply to an issue raised by Mr. Tony Hederman, Counsel for the Attorney General, stated:- "However, legal insanity does not necessarily coincide with what medical men would call insanity, but if it is open to the jury to say, as say they must, on the evidence, that this man understood the nature and quality of his act and understood its wrongfulness, morally and legally, but that nevertheless he was debarred from refraining from assaulting his wife fatally because of a defect of reason, due to his mental illness, it seems to me that it would be unjust, in the circumstances of this case, not to allow the jury to consider the case on those grounds".

A year later there was the case of James Coughlan, a young man who attacked a twelve year old boy and his eight year old sister while they were walking beside a stream at Ballyclough, Co. Limerick. He had knocked them into the river and had held the boy under water until he drowned. I examined him and came to the conclusion that he was suffering from schizophrenia, and that although he knew that the nature of what he was doing was wrong he did not have a normal control over his impulses. I gave evidence to that effect in court. Mr. Justice Kenny agreed to leave the issue of insanity to the jury in the same form in which it had been dealt with in the Hayes case. He told the jury that they could ask themselves "was the act caused by disease of the mind". They brought in a verdict of guilty but insane after an absence of ten minutes.

The subject is very well dealt with in an article called "Not Guilty Because of Insanity" by Professor Rory O'Hanlon in the Summer, 1968 issue of "The Irish Jurist".

This seems to be the present state of the law here, as it was endorsed in a judgment of the Supreme Court delivered by Mr. Justice Griffin in *Doyle -v- Wicklow County Council* in 1973.[1] This concerned a case in which a youth named O'Toole burned down some abattoirs. He admitted that he had done so as a means of protest against the slaughter of animals in the belief that he was justified in doing so because of his love for animals and his conviction that humans did not need animals for food and that nobody should kill them. He knew that his act was one forbidden by society and contrary to law.

When I saw him he was in my opinion clearly suffering from schizophrenia and was unfit to plead. At a later stage the proprietor of the abattoir, Mr. Doyle, brought an action against the Wicklow County Council claiming compensation. A Circuit Court judge submitted certain questions of law for determination by the Supreme Court, one of which was whether in deciding the issue of insanity, raised in the criminal injury application, he should apply the standards or rules appropriate to criminal trial. In the course of the judgment given by Mr. Justice Griffin in referring to the Hayes case he stated "I would adopt what was said by Mr. Justice Henchy as being a correct statement of law in this matter, and in my view it provides the correct test

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to be applied by the learned Circuit Court judge in determining whether the act of the youth who burned the abattoir in Bray was malicious within the criminal injury code . . . .''

More recently the Chief Justice, Mr. Finlay, when delivering a judgment of the Supreme Court in the case of *DPP -v- Joseph O'Mahony* in July 1985,[2] referred to the definition of the defence of insanity laid down by that court in *Doyle -v- Wicklow County Council.* He stated: ''In the instant case, if it were established, as a matter of probability, that due to an abnormality of mind consisting of a psychotic condition the appellant had been unable to control himself and to desist from carrying out the acts of violence leading to the death of the deceased, he would have also been entitled to a finding of not guilty by reason of insanity''.

An appeal had been made in this case (*DPP -v- O'Mahony*) against a conviction of murder on the grounds that the trial judge had erred in law in refusing to permit the jury to consider what was stated to be a defence of diminished responsibility and on that basis to consider the alternative of entering a verdict of manslaughter instead of a verdict of murder. In the judgment it was pointed out that ''under our law a person found not guilty by reason of insanity can only be detained so long as the court is satisfied that his mental condition persists in a form and to the extent that his detention in an appropriate institution is necessary for the protection of himself or of others. He is not, in the view of our law, a criminal nor has he been convicted of a crime. A person charged with murder, on the other hand, in our law and convicted of manslaughter may be sentenced to a period of detention in prison whether long or short and must be released at the termination of that sentence. He is of course branded a criminal''.

He added: ''It seems to me impossible that having regard to these considerations there could exist side by side with what is now the law in this country concerning a defence of insanity, a defence of diminished responsibility such as has been contended for him in this case, which would in effect leave to an accused person and his advisers the choice as to whether to seek to have him branded as a criminal or whether to seek on the same facts the more humane and, in a sense, lenient decision that he was not guilty of a crime by reason of insanity.''

It seems that progress can be reported. In any event the defence of insanity has become a less frequent issue since the abolition of the death penalty.

Civil Law

We may now move on to some aspects of civil law as it affects patients suffering from schizophrenia.

Testamentary Capacity

One practical problem is whether they are fit to make a Will. Are they ''of sound disposing mind''. Patients who are admitted to mental hospitals as voluntary patients or under temporary certificate do not lose their civil rights, and patients suffering from schizophrenia may be quite fit to make a will. The question is not whether they are sane or insane, but whether their mental capacity is adequate for the testamentary act.

The position was well put by Lord Chief Justice Cockburn as long ago as 1870, when he said ''No doubt when the fact that a testator has been subject to any insane delusion is established, a will should be regarded with great distrust and every presumption should in the first instance be made against it. When an insane delusion has ever been shown to have existed it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property, and the presumption against a will made under such circumstances becomes additionally strong when the will is an inofficious one, that is to say, one in which natural affection and the claims of near relationship have been disregarded''.

The patient suffering from schizophrenia will rarely have difficulty in knowing the nature and extent of his property or the persons who have claims on his bounty, but his judgment may not be sufficiently unclouded and free as to enable him to determine the relative strength of these claims. In other words, the problem is whether or not he has delusions concerning some close relatives who would normally have a claim on his bounty. An example would be if he had pathological delusions of jealousy regarding his wife. It would seem to me wise, therefore, that any person wishing to make a will who is known to have suffered from schizophrenia should be examined by an experienced psychiatrist as near as possible to the date on which the will is to be signed and, of course, the report should be carefully preserved.

'' . . . . any person wishing to make a will who is known to have suffered from schizophrenia should be examined by an experienced psychiatrist as near as possible to the date on which the will is to be signed and . . . the report should be carefully preserved.''

Nullity of Marriage

The next subject that I will touch on is the situation in regard to Nullity of Marriage. I will leave aside the question of divorce, as it is not relevant in our context.

Ecclesiastical Courts

I believe it is reasonable to say that the Roman Catholic Marriage Tribunals have been more progressive in regard to the relevance of psychological factors in deter-

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mining the validity of marriage than our civil courts, although progress is now being made in the latter.

Formerly decrees of nullity in ecclesiastical courts were only granted if there was some obvious defect in the contract, for example, if coercion could be proved, or if one of the parties was unable to undertake the responsibilities of marriage in such an obvious way as not to be able to consumate the marriage. In more recent times the concept of "due discretion" has been developed and enlarged.

A canon lawyer defines the concept as follows:- "In Law 'Due discretion' refers to a certain capacity which is necessary in any individual who would contract marriage. It is a two fold capacity: first, the capacity to appreciate adequately what marriage is – that is, to be able not merely to define marriage in purely theoretical terms, but to understand in a meaningful way what it is that marriage involves in practical terms; and, secondly, a capacity to undertake and to sustain the responsibilites and the obligations which must be fulfilled if a real marriage is to exist between any two given people. A person who lacks either element of this twofold capacity is, within ecclesiastical law, incapable of contracting a valid marriage."

When ecclesiastical judges are faced with the problem of deciding whether or not a given individual has the capacity which by the law of nature is a requisite for marriage, they are not primarily concerned with the precise clinical "tag" which a medical or psychiatric expert may put upon a given individual. Their primary concern is to ask the question "Was this individual, at the time of his marriage, really capable of carrying out the responsibilities and the obligations which his marriage would necessarily involve?"

Ecclesiastical judges must, therefore, address themselves to the question as to "what in fact are the essential obligations and responsibilities of the married state". Within this context ecclesiastical judges are instructed that they should obtain and carefully assess the opinion of psychiatric experts.

The Reverend Augustine Mendonca from the Faculty of Canon Law, St. Paul University, Ottawa, summarises the situation in an article on Schizophrenia and Nullity of Marriage in Studia Canonica 1983 as follows:– "For a long time, matrimonial jurisprudence centered its enquiry into a given case on an individual's capacity to consent. The jurisprudence which developed through the decades following the promulgation of the 1917 Code, contains an impressive philosophical analysis of the act of consent. However, the past two decades have witnessed a shift in emphasis within matrimonial jurisprudence which considers not only the 'consent' aspect of marriage, but also marriage as a living human, interpersonal reality. Thus, there is also a shift in emphasis in relating the effect of psychopathology to married life. Mental illnesses and personality disorders are seen as affecting not only the act of consent but also the different aspects of the interpersonal conjugal relationship. This is evident in the Rotal sentences examined in this study".

In effect it has been recognised by the ecclesiastical courts that schizophrenia is a progressive disease which involves gross disruption of the personality. It involves a split between reason and affect and may render the patient incapable of exercising "due discretion". For the granting of nullity,

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In his foreword The Hon. Mr Justice John Blayney states: *The author deserves the thanks of all practitioners who will have to grapple with this branch of the law. He has had the courage to undertake the research and arduous work required . . . and has done so admirably.*

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however, it would have to be shown that at least the prodromal symptoms of the disorder had manifested themselves before marriage. It would not be sufficient to claim that as the patient developed schizophrenia later he must have been previously predisposed.

All this is not to say that every person who has been previously diagnosed as suffering from schizophrenia is incapable of contracting a valid marriage. Such a proposition is simply not true – but it is true to say that, if schizophrenia has been diagnosed, an ecclesiastical court considers itself justified in at once having very serious reservations about the patient's capacity for marriage; and, if it is to hold for the validity of the marriage, in requiring positive proof that in the particular case the effects of the illness are *not* such as to make impossible a true "partnership of life and love". The proven existence of schizophrenia at the time of the marriage, in one or other of the partners, will itself already have made a serious inroad into the presumption of law which is stated in Canon 1014, that is "that marriage enjoys the favour of law; accordingly in a case of doubt the validity of the marriage is to be upheld".

" . . . if . . . it can be shown that the partner had at least early symptoms of schizophrenia at the time of marriage, the application [for a declaration of nullity] will probably succeed."

In summary, if an application for a declaration of nullity is made, and it can be shown that the partner had at least early symptoms of schizophrenia at the time of marriage, the application will probably succeed. It should be noted that a high proportion of schizophrenics, particularly males, do not marry, and the rate of breakdown of those marriages that do occur is very high. Some marriages, however, do apparently succeed.

Civil Courts

The position regarding nullity in our civil courts now closely parallels that in the ecclesiastical courts.

The most recent judgment that I was able to obtain was delivered in the High Court in February, 1986, by Mr. Justice Blayney in the case of *D.C. and D.W.* This was a case in which the wife, at the time that she married, against advice, and largely because she was pregnant, was under the care of a psychiatrist and was diagnosed as suffering from schizophrenia.

Mr. Justice Blayney quoted the judgment of Mr. Justice Barrington in the case of *RSJ -v- JSJ (1982)* in which he said "if therefore it could be shown that, at the date of the marriage, the petitioner, through illness, lacked the capacity to form a caring or considerate relationship with his wife, I would be prepared to entertain this as a ground on which a Decree of Nullity might be granted". In that particular case it was held that such incapacity had not been established and the petition failed. However, Mr. Justice Costello in *D -v- C* in 1984 quoted this principle and granted the petitioner a declaration that the marriage was null and void "because the respondent, at the time of the marriage, was suffering from a psychiatric illness and as a result was unable to enter into and sustain a normal marriage relationship with the petitioner".

Two further cases in 1984 were decided along similar lines and Mr. Justice Blayney stated "these cases are clear authority that a Decree of Nullity may be granted where one of the parties, at the time of the marriage, was, by reason of illness, incapable of entering into and sustaining a normal marriage relationship with the other". However, he made the point that the ground on which the petitioner relied did not make the marriage void, its effect was to make it voidable only. This was in keeping with a previous judgment by Mr. Justice Costello in *D -v- C*, to which I have already referred.

The petitioner could not accordingly rely on this ground as avoiding the marriage unless she could establish that the Respondent had previously repudiated the marriage. He accepted that in the present case this requirement of repudiation by the respondent did not create any obstacle as by seeking and obtaining a Decree of Nullity from the ecclesiastical courts the respondent had clearly repudiated the marriage and thereby avoided it.

Mr. Justice Blayney went on to refer to a matter which he said at one stage caused him some concern. This was that the petitioner had since formed an apparently stable relationship with another man and had two children by him. He concluded, however, "The Court is concerned solely with the effect of the petitioner's illness at the date of her marriage to the respondent. It is not concerned with the state of her mental health

Submission of Articles for the Gazette

The Editorial Board welcomes the submission of articles for consideration with a view to publication. In general, the most acceptable length of articles for the *Gazette* is 3,000-4,000 words. However, shorter contributions will be welcomed and longer ones may be considered for publication. MSS should be typewritten on one side of the paper only, double spaced with wide margins. Footnotes should be kept to a minimum and numbered consecutively throughout the text with superscript arabic numerals. Cases and statutes should be cited accurately and in the correct format. A fee of £75.00 is paid to authors for accepted articles.

Contributions should be sent to:

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at any other time, or her capacity at any other time to form a normal marriage relationship with any other person''. He granted the Decree.

It seems to me that the situation in the ecclesiastical courts and the Civil courts in regard to the granting of nullity in cases where mental illness exists at the time of marriage is roughly similar. My impression from experience, however, is that the ecclesiastical courts take a broader view in the case of personality problems.

''. . . the situation in the ecclesiastical courts and the Civil courts in regard to the granting of nullity when mental illness exists at the time of marriage is roughly similar.''

Head injury & schizophrenia

The last subject that I will touch upon is the relationship of trauma to the aetiology of schizophrenia. This arises most commonly when a person who has had a road traffic accident subsequently develops schizophrenia. The literature on this subject is very sparse. For example, I consulted two recently published books on the psychological affects of head injury and found no reference to schizophrenia in their indexes. The major studies have been on war time head injuries.

Lishman has summed up the situation well in discussing the possible relationship between head injury and the development of psychoses. He says ''Various possibilities exist. Organic brain disturbance may itself contribute directly to such developments; or it may act merely as a precipitant in someone already predisposed; or cerebral damage may create a proneness to psychotic disorder by altering the subject's pattern of reaction to stresses and difficulties. Alternatively, organic factors may be unimportant in themselves: the injury or its psychological repercussions may have acted as a non-specific stress to precipitate the psychosis, or psychogenic causes may lie in the changes wrought in the patient's life or the special difficulties he has to face. Finally, of course, the possibility of simple coincidence must also be considered''.

The most extensive review of the literature was carried out by Davison and Bagley (1969). Their conclusions were that the incidence of schizophrenia-like psychosis after head injury is certainly greater than chance expectation, and that the trauma may often be of direct aetiological significance rather than merely a precipitating factor. The influence of genetic or personality pre-disposition was found to be less than in the naturally occurring disease. The early onset of the psychosis was related to the severity of diffuse brain injury, and a possible special association with temporal lobe damage was suggested.

These conclusions are not very helpful in dealing with the individual case and it is probable that juries will be inclined to give the plaintiff the benefit of the doubt.

In any individual case it is essential to determine whether or not symptoms were evident before the accident. It should be determined whether or not there was a family history of the disorder, although the evidence regarding its significance is conflicting. Points in favour of the injury being of aetiological significance would be if the brain damage has been extensive and diffuse with loss of consciousness of over twenty four hours, or if the damage particularly affects the temporal lobe, especially the left. In the latter case there is often a long latency period before the onset of the symptoms, whereas in the former the onset may be early. The illnesses are usually schizophreniform rather than true chronic deteriorating schizophrenia.

Conclusion

In this paper I have endeavoured to show that schizophrenia is a very serious disorder with many forms, and that it may have serious medico-legal consequences both for the sufferer and for those dealing with them.

S. Desmond McGrath is Medical Director at St. John of God Hospital, Stillorgan, Co. Dublin. Emeritus Consultant Psychiatrist, Beaumont Hospital, Dublin.

*** A lecture delivered to the Medico Legal Society of Ireland on 29th January, 1989.**

NOTES

1. [1974] IR 55.
2. [1985] IR 517.

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From the President . . .

This is written before my election as President. While this may be tempting fate or presumptuous, editorial deadlines leave no choice.

Having observed at close quarters the extraordinary input, dedication and ability of my predecessors, I approach the year ahead with considerable apprehension. Nevertheless, I also approach the Office with hope and determination to serve the Society as best I can and to uphold the good name and high standards of our profession.

Looking back on the past year, I would first like to pay tribute to my predecessor, Ernest Margetson, who devoted himself unsparingly to all the problems that arose and in his media appearances was a very able proponent of the Society's views. He predicted that we would receive the report of the Fair Trade Commission and also that the Solicitors' Bill might be introduced during the year. He was right about the former but the latter has yet to come.

Notwithstanding the extraordinary length of the Fair Trade Commission Report – 334 pages – the Society conferred with the profession, and have responded promptly with its own submission (a copy of which is enclosed with this *Gazette*). In this regard I would like to thank Moya Quinlan and the specially appointed Committee which she chaired, for the long hours of work they spent in studying the report and preparing the Society's submission. I wish to thank the Bar Associations and all the members who sent in their own observations and whose views, I think, are reflected in the response. As a profession I do not think we have anything to fear from this report or any actions that may follow from it.

The Solicitor's Bill may prove to be a different matter if, as expected, it is introduced during the coming year. The Society has made some submissions on statutory changes that it would like to see in regard to compulsory indemnity cover, the protection of our compensation fund and also in relation to the present statutory requirements for the length of apprenticeship and the Irish language. Once published the Bill will have to be urgently examined in detail by all Bar Associations and members with a view to making prompt submissions thereon.

Still glancing backwards, there has been a very welcome breakthrough with the Land Registry and Registry of Deeds with the appointment of the new Registrar of Titles, Ms. Catherine Treacy, and the announcement that the Registries are to be converted into a semi-state body. We think there has already been a marked improvement in the Land Registry since the Registrar's appointment (the post having been vacant for much too long) and we hope that this trend will continue until there is a full satisfactory service from both Registries. This is obviously a matter that will be kept under continuing review.

Looking forward – perhaps one of the major events of the coming year is the bi-centenary of the establishment of the Law Club of Ireland in 1791. The Younger Members Committee has already expressed a wish to mark this with an appropriate celebration – I fully support this wish. The date, venue and format for this celebration have yet to be decided but it will befit a bi-centenary and we will keep the members fully informed.

The 4th January 1991 will also be a significant date because it is on this date that the E.C. Directive on reciprocity and recognition of qualification of E.C. practising lawyers must be implemented. This will open the way for all our solicitors in England to become enrolled as solicitors there and should also open opportunities for members of the profession throughout the Community. We cannot exclude the possibility of reverse traffic but I think we have much more to gain than to lose from this Directive.

I join with my predecessors in appealing for support for the Solicitors' Mutual Defence Fund and the Solicitors's Financial Services Company. It is important for all of us that we support these projects which are our own and exist for our own benefit. The importance of professional indemnity protection both for solicitor and client is self evident and I have no doubt that the long term advantages lie in supporting our own fund. The Solicitors' Financial Services Company is a new project to help our profession compete in the area of financial services and to avoid the loss of this business to other professions and financial institutions.

As a profession, I believe that we give a good service to the public. We have in the past and will in the future demonstrate our determin-

PRESIDENT 1990/1991
Donal G. Binchy

Mr. Donal (Don) Binchy has been elected President of The Law Society. He was educated at C.B.S. High School, Clonmel, and Clongowes Wood College. He qualified and was admitted as a Solicitor in 1951 having been awarded a Silver Medal in his final examination. He is Senior Partner in the firm of O'Brien & Binchy, Clonmel, and a Past-President of the County Tipperary Bar Association. He was elected to the Council in 1975 and has served as Chairman of the Parliamentary Committee, Taxation Committee and Education Committee. Mr. Binchy and his wife Joan have four children, Frederic and Donald who are Partners in O'Brien & Binchy, Mary Rose O'Donnell who is also a qualified Solicitor and Grace.

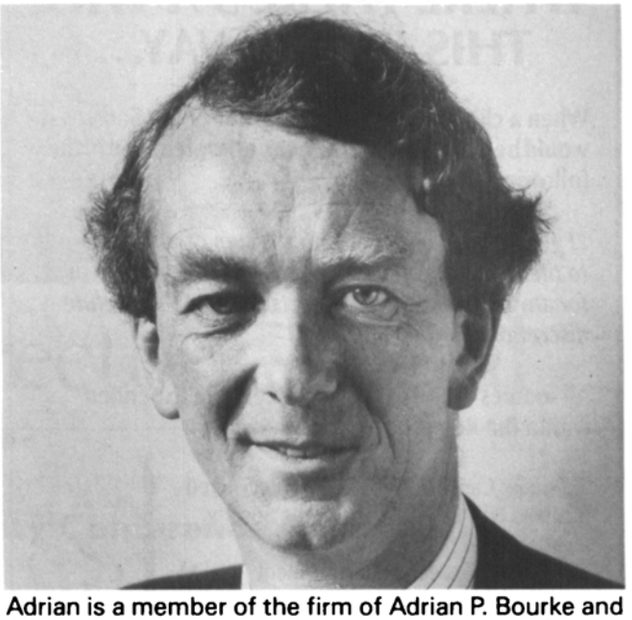
ation to ensure that when things go wrong our clients and the public generally get redress when complaints are shown to be justified.

We are living in times of rapid change, not merely in the field of technology, but also in the social and legislative fields. These changes affect our profession and we must gear ourselves to meet them. Our services must always be relevant to the needs of the community. In an age of increasing consumer awareness, practices or privileges that merely protect the profession will not survive unless they can also be shown to be in the public interest. Our profession has the training and expertise to provide a good service to the public in the principal areas of our practice including conveyancing, administration of estates, family law, criminal law, litigation, company law and taxation. Most solicitors have professional indemnity cover and we provide our clients' monies with the full protection of the Compensation Fund.

In conclusion, I would like to thank the profession for the honour of becoming its President. I know I can rely on the ongoing support not merely of the Council and its Committees, but also of the Bar Associations and members generally.

DON BINCHY

SENIOR VICE-PRESIDENT 1990/1991
Adrian P. Bourke



Adrian is a member of the firm of Adrian P. Bourke and Company, Solicitors, Victoria House, Ballina, County Mayo. He is a grandson of the late Henry C. Bourke, Solicitor of Ballina, his sister Mary and his brother Henry are Senior Counsel.

Adrian was educated at St. Joseph's School, Ballina, and at Clongowes Wood College. He attended Dublin University and obtained a B.A. in Legal Science and an LL.B. He attended the Society's Law School and qualified in 1970. Adrian has been President of the Mayo Solicitors' Bar Association, has been a member of the Council since 1975 and has served terms on all of the Society's Committees, serving terms as Chairman of the E.C. Committee, Parliamentary, Public Relations and Premises Committees. He is currently a member of the Finance, Compensation Fund and Premises Committees.

Adrian is involved in many local organisations, including Ballina R.F.C. and Lions Club. He does not play golf, but will caddy!

JUNIOR VICE-PRESIDENT 1990/1991
Andrew F. Smyth

Andrew F. Smyth is Principal of the Firm of Carter, Smyth & Co., Dublin. He was educated at St. Joseph's C.B.S., Belvedere College and University College, Dublin. He qualified as a Solicitor in 1957. He was President of The Dublin Solicitors' Bar Association 1981/82 and has been a Member of the Council since 1977 serving as Chairman of Registrar's Committee 1983, the Professional Purposes Committee 1980 and the Parliamentary Committee 1987.

At present he serves on the Professional Purposes Committee and the Arbitration Committee and has been a Member of the Disciplinary Committee since 1985. He represents the Incorporated Law Society on the Inter-Professional Group, was Captain of Solicitors Golfing Society 1986, and Captain Clontarf Golf Club 1967 and President 1987/88.

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From the Director General

The English Law Society Conference 1990

"There's a lot Glasgowing on in 1990" is the slogan of this year's European City of Culture and on my visit there in mid October (my first to the city) for the English Law Society Conference there was ample evidence that the slogan was more than just a catchy phrase. The city seemed alive and brimful of energy and activity. Undoubtedly much has been done in the past decade to improve the once drab image of Glasgow and the city is now rivalling the Scottish capital, Edinburgh, as a centre of culture and the arts. Pride of place goes to the newly opened Concert Hall, majestically standing at the end of the pedestrianised Sauchiehall Street and this magnificent building was the location for the principal sessions of the Conference.

Presidential Address

The Conference opened on Thursday, 18th October, with the keynote address from this year's President, Tony Holland, who had chosen the theme "a new decade, a new service". As the title suggested he might do, the President donned his visionary hat, grabbed his crystal ball and gave us a glimpse of how he saw the future (or at least a part of it) of the legal profession.

> "The days of cosy agreements to decide on the division of functions between the branches (of the profession) are over. 'You keep out of our patch and we'll keep out of yours' applied for the first 90 years of this century, but it will not do now. It is simply no longer true that we prepare the cases and barristers present them, or that we are the general practitioners and they are the specialists. It has not been true for some years and the Courts and Legal Services Bill will ensure this trend continues."

Here the President was outlining his view of how solicitors will compete in the future with barristers for advocacy work now that the Courts and Legal Services Bill contains a framework which will allow solicitors, on a basis of merit, to exercise advocacy rights in the Superior Courts. There will, of course, be a ***quid pro quo***, in that any legal obstacles restraining barristers from providing certain services at present will also be removed – though it remains to be seen whether the Bar Council will in the future modify its rules to enable this to happen in practice.

As far as conveyancing was concerned, the President struck an 'upbeat' note. He was confident that the profession would successfully take on the competition that will come from licensed conveyancers. A new marketing technique under the banner **TransAction** had already been launched, he said, and this had received a great welcome from the profession. The idea is that solicitors can market their own conveyancing service locally under a nationally promoted brand name.

New Business Opportunities

Tony Holland sees the Britain of the future, "with the fewest restrictions, the most entrepreneurial outlook and with lawyers who understand both the civil and common law" as the legal centre of the world; "the natural place to study as well as the place to do business". He believes the opening up of Eastern Europe offers tremendous business opportunities for lawyers with the growth of trade which that will bring with the new democracies.

There are those who will see this section of Tony Holland's address as inspiring stuff from a man who has clearly given thought to current issues affecting the profession and has developed a coherent policy of a forward-looking nature. Others, perhaps, will be somewhat less enthusiastic and may well have concerns about the direction the Law Society now seems to be taking. One way or the other, the debate will continue and we in Ireland shall watch it with more than just a passing interest.

The Sir Humphreys

The President's address was followed by a session in which three serving Secretary Generals of Law Societies, John Hayes from England, Kenneth Pritchard from Scotland and Frederick Heemskerk from the Netherlands presented personal views of the role of Law Societies in a changing profession.

John Hayes sees the task facing his Society as one of encouraging

members to face the future in a self-critical way, dedicating itself to the provision of a quality service in return for a proper reward. The next two to three years should see out "the main battles between the Bar and the Law Society". He thinks that, when this is over, serious consideration should be give to "abolishing both the Law Society and the General Council of the Bar" and replacing them with a single legal body encompassing barristers, solicitors, legal executives and maybe even licenced conveyancers. Some practitioners on this side of the water may well be surprised that a General Secretary could publicly air such views but I had the impression, from the response his address received and also knowing the reputation that John Hayes enjoys in the profession, that many endorse his view of his own role as that of an *ideas* man and a person whose job it is to act as a catalyst for new thinking.

Ken Pritchard echoed much of what Tony Holland said and called for the "fusion" of the two branches of the profession in Scotland. He predicted that there would be a united legal profession in the United Kingdom in 25 years, though regional differences might remain. The two branches of the profession should be united to face the future, to face also competition and, indeed, the Government. In an even more radical vein, from the Scottish prospective, Mr. Pritchard said distinctions between legal systems would have to be viewed in the European Community context. Conceding that this kind of talk was heresy for many Scots lawyers, he said "I know that the law is part of our Scottish National Heritage but the world is getting smaller".

He has a broadly similiar view of the role of Law Societies as John Hayes though, of course, the issues facing the legal profession in Scotland are somewhat different from those in England. Ken liberally dispensed his own keen brand of Scottish humour in the course of his contribution, which was serious though at times amusing, and rounded it off with a preview of some of the new thirty second television commercials which the Scottish Law Society will shortly be launching under the general theme of "It's never too early to consult your solicitor".

Civil Litigation in the 90s

For many, the session on Saturday morning, 20th October, chaired by the Lord Chancellor, Lord Mackay of Clashfern, on civil litigation was perhaps the most interesting. A very large proportion of the audience seemed to be lawyers who specialised in civil litigation and it appeared that few of them were disappointed with what they heard. The Lord Chancellor confined himself primarily to a few introductory remarks, presented the speakers, and chaired the subsequent open forum discussion.

The principal speaker was the Right Honourable Lord Griffiths who is a Lord of Appeal in Ordinary since 1985 and who has been a member of the Chancellor's Law Reform Committee since 1976. He has just recently been appointed to oversee the introduction of reforms to civil litigation procedures in the courts.

Outlining the shape of things to come, he said that the principal objective of the reform measures would be to outlaw the sytem of "trial by ambush" which has for so long dominated the common law approach to civil litigation. This would be achieved by having more informative pleadings, early discovery and all witness statements disclosed. "Bluff and guesswork" would be completely out, he said. The great majority of civil cases turn on issues of fact not law and, in the new order, lawyers will no longer be able to hold their cards as close to their chests as heretofore. Both sides will be able to review all the evidence before the trial and assess better their chances of success. This will also have the effect of encouraging more settlements.

The reforms will also affect existing **judicial** practices. The judge will review all evidence before the trial and will hold a brief discussion with lawyers for both sides to identify the crucial issues that will require oral argument. Lawyers will be confined to a recital of skeleton arguments citing authorities; the present practice of long, one-sided recitals of facts will be abolished.

Lord Griffiths recognised, however, that some complex cases would not readily yield to the new approach and these cases would have to continue to receive special individual treatment. The judges, he said, would be empowered to compel adherence to the new system and their principal sanction would be to disallow costs where unnecessary issues had been raised. The system would continue, however, to maintain the Socratic dialogue, recognising the value of cross-examination in elucidating the truth. Lord Griffiths said that the truth would, in the future as in the past, "leak out of a lying affidavit like water from a leaking bucket".

Other major features of the reforms would be:

- greater transfer of jurisdiction from the High Court to the County Court – the bulk of personal injury cases (up to £50,000 in damages) will be tried in the County Court in future,
- solicitors will have enhanced advocacy rights though many will continue to use the bar preferring to (because it is more profitable) concentrate on other non-contentious business,
- use of what were termed 'court controlled case management techniques'. Using modern computer technology, the aim would be to 'track' the stages of an action against a given timetable. This will facilitate intervention such as reminders to parties to 'get on with it' or risk a striking out,
- use of video links to lawyers' offices would be examined,
- greater emphasis on orderly listing and earlier trials which

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would be helped by shifting the balance towards more written evidence,
- time limits on oral argument, along the lines of the system in the European Court of Justice, will be considered.

In the subsequent open forum discussion, there seemed to be substantial support for the idea of moving towards a system of fixed dates for trials even if that meant that judges would end up with time on their hands because of cases collapsing. The judges' time, it was felt, was arguably the least costly of all the factors involved in litigation costs. There seemed to be a definite lack of enthusiasm on the part of the senior member of the judiciary present for this idea.

Lord Griffiths also had some interesting things to say about the substantive law on civil liability, predicting that the 'no fault 'system would come within 10 years. He believes that this will lead to the introduction of a ''development risk'' defence in some areas of law, particularly where new products had allegedly caused damage, as in the Thalidomide case. There would still be a need for the class action in, for example, the area of environmental tort law. If 'no fault' comes, litigants will have to accept more modest levels of compensation in return for the certainty of recovery. Retention of the common law action for negligence, as an option, was also a possibility, though Lord Griffiths would not favour this. He expressed some concern about the increase in the number of actions for medical negligence and said, in this context, that if the fault system were retained, consideration would have to be given to introducing arbitration instead of court hearings where actions would be tried before two doctors and a lawyer with a predominant emphasis on written argument.

The Guildford Case

From an Irish viewpoint, the session on the Guildford case involving a panel discussion of the issues arising out of the case, including the question of alternative appeal systems, was of special importance. The panel speakers included Sir David Napley, former President of the English Law Society and Alistair Logan, solicitor, who handled the Guildford case. Mr. Logan, in particular, presented a most comprehensive analysis of the case and what went wrong and offered his views on what changes were needed. I hope to include a full treatment of Mr. Logan's address in the next issue. □

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Meeting the Welsh!

Last November, the Associated Law Societies of Wales contacted the Law Society, expressing a desire to liase with Irish Solicitors. The Council, at the behest of Moya Quinlan, referred the matter to me.

Following an exchange of correspondence with the Associated Law Societies of Wales, a pattern emerged whereby the Gwynedd Law Society in North Wales would liase with the Wicklow Bar Association and the Dyfed Law Society would liaise with the Wexford Bar Association.

On 6 July, a party of nine Welsh Solicitors arrived and we managed to change the date and venue of our quarterly Meeting so that they could attend. They were guests at our annual Golf Outing/Dinner and attended a District Court in Bray.

Last weekend, September 14 to 16, a group of 10 from our Bray Association, including three spouses, travelled to Betwys-y-Coed where they were entertained royally by the Gwynedd Law Society. Four members participated in a golf match for a perpetual trophy kindly donated by the President of their Association. They had participated when in Ireland in our first annual J. T. Louth Memorial Trophy at Woodenbridge Golf Club. There was a Home winner on each occasion.

At a dinner held on the Saturday night, Mrs. Janet Evans, President of the Gwynedd Law Society, was hostess and Mr. Trevor Morgan, President of the Associated Law Societies of Wales attended.

Arrangements were made to have reciprocal annual visits. While the first two visits were largely social, arrangements were made to discuss in future years matters of mutual legal interest. There was a very valuable exchange of information with particular emphasis on 1992 but also on ground level arrangements were discussed for agencies, referrals etc.

It is understood that Dyfed Law Society has not yet contacted the Wexford Bar Association but it is expected they will discuss a similar arrangement. □

WILLIAM FALLON, Solicitor
President,
Wicklow Bar Association.

Back Row (left to right): Joe Buckley, Bray, Mrs. Ita Connolly, Bray, Trevor Morgan, President Associated Law Societies of Wales, Richard Cooke, Arklow, and David Tarrant, Arklow.
Front (left to right): Mrs. Lillian Cullen, Miss Mary Miley, Rathdrum, Mrs. Janet Evans, President of the Gwynedd Law Society, William Fallon, President of the Wicklow Bar Association, Mrs. Anne Fallon, and Laurence Cullen, Solicitor.

Practice Notes

CERTIFICATES OF TITLE IN RELATION TO HOUSES IN THE COURSE OF CONSTRUCTION

A solicitor who is giving a Certificate of Title undertakes to furnish an Engineer's or Architect's Declaration that the property in question has been erected in accordance with the Planning Permission granted.

In the case of house in the course of construction a solicitor cannot undertake this and where the lending institution is paying out the loan by instalments the solicitors Undertaking to the lending institution should be amended accordingly.

If the undertaking to the lending institution is not amended and if a practitioner pays out a loan cheque or any instalment of a loan to his client before the House is completed he is at risk if there is a failure by his client to comply with the planning permission granted. □

Conveyancing Committee

S. 18 Housing Act, 1988 Release of Mortgages

The purpose of Section 18 of the Housing Act, 1988 was to extend the procedure already available to Building Societies of endorsing Receipts on Mortgages in lieu of formal releases or reconveyances to all of the lending institutions. Under this Section a Statutory Receipt can now be endorsed on or annexed to the back of an original Mortgage and it is unnecessary to have either a Deed of Release and Memorial in the case of unregistered land or a Discharge in the case of registered land executed under the seal of the lending institution.

A Receipt under this Section shall operate to vacate the mortgage and shall without any reconveyance or resurrender vest the Estate of and in the property comprised in the mortgage in the person for the time being entitled to the equity of redemption.

This Receipt shall be sufficient for the purposes of registration both in the Registry of Deeds and in the Land Registry.

Section 18 will only apply however, where *all* monies secured by a mortgage or charge have been fully repaid irrespective whether the mortgage or charge is for all sums due or for a limited amount. Unless the mortgagor or chargor repays everything that is owed to the Bank by him on every account, it is not appropriate for the Bank to execute a form of receipt under Section 18 for two reasons:

(a) The fact that all monies have not been repaid and may interfere with the statutory operation of Section 18 and,
(b) execution of such a receipt might prejudice the Bank in recovering the balance of what is owing.

To ensure that all monies secured by a mortgage/charge will be included in the redemption figures provided by a lending institution, a Solicitor's letter requesting redemption figures from a lending institution should include the following:

(1) a request for up-to-date redemption figures, indicating the amount necessary to redeem the loan in question and all other monies secured quoting the loan account number.
(2) A request for confirmation that the lending institution does not hold any other mortgage or other security on the property in question.
(3) A request for confirmation that on payment of the sum indicated by the lending institution as the amount necessary to redeem the loan and all other monies secured the lending institution will release the property from all encumbrances and execute an appropriate Deed of Release/Deed of Discharge/Vacate/Receipt as appropriate.

Unless a solicitor receives confirmation of the above points in writing from the lending institution concerned, then he is not properly in a position to give an Undertaking to provide a release of a mortgage. Some lending institutions may have more than one charge on the property. A request for redemption figures quoting one loan account number only may result in redemption figures for that account only being furnished. Also, as with some Bank mortgages, the Deed of mortgage may secure not only the monies due in respect of the home loan but also monies outstanding on foot of an overdraft facility/credit card.

It is essential to obtain the correct figures from the lending institution. A simple request for the amount due on the home loan is not enough. A simple request for the amount due to redeem one loan is not adequate, if there is more than one. The lending institution must be made aware that the request is for redemption figures, which if paid, will entitle the borrower to a release of the property from all security held.

It is felt that if solicitors adhere to the above guidelines, the pitfalls experienced by some solicitors in redeeming loans will be avoided. □

Conveyancing Committee

Wills containing charitable bequests

Practitioners should note that as and from the 1/12/90 where an application is being made to prove a Will containing charitable bequests and no prior Grant has issued in the Estate an extra copy of the Will will be required to be filed with the papers of application.

In such circumstances, and in such circumstances only, practitioners when applying for a Grant after 1/12/90 should file the Original Will and 2 copies thereof in the Probate Office or if applying to a District Probate Registry file the Original Will and 3 copies thereof.

Dated the 5th day of October, 1990.

The Probate Officer.

(Practice Notes contd. on page 320)

Younger Members News

Last September/October, I was amongst a group of 22 Irish solicitors and barristers who took part in an exchange programme with Russians organised by the Youth Exchange Bureau, an authority established under the auspices of the National Youth Council of Ireland. The group comprised 16 barristers and six solicitors (including two solicitors from Northern Ireland).

The lawyers exchange programme was one of a number of Russian/Irish exchanges organised throughout the year including one for journalists and one for members of the construction industry. The programme was intended to be a ''work shadow'' exchange where we would shadow an individual Russian partner at his/her work for the two week period and stay in his/her home and in turn provide a reciprocal scenario in Ireland. The entire group was sent to a town in the Russian Republic called Tver (still Kalinin in most atlases – it reverted to its pre 1917 revolution name of Tver during the summer of 1990). Tver is a very old town situate on the Volga about 100 miles north west of Moscow on the Moscow – Leningrad railway line. The town has a population of about 500,000 and its main industry is textile manufacture.

It transpired that the standard of English of most of our partners was insufficient to enable us to pursue a genuine work shadow programme either in Russia or Ireland. (Needless to say the Russian vocabulary of the Irish group was minimal – most people improved on their ability to play acting charades by the end of the trip).

The programme provided in Tver gave us an interesting overview of the Soviet legal system, particularly in the area of criminal law. Most of our partners were either administrative personnel in the prokuratura (local state prosecutors' office), prosecution lawyers or defence lawyers. (The Soviets were amazed to discover that in Ireland barristers are entirely independent and can prosecute and defend in different cases). During the first week of our trip we had a number of lecture/question and answer sessions. Communication was made possible by means of an interpreter. One of the more novel features of the work programme was the attendance at two trials where we were afforded simultaneous translation of the proceedings. In other words, once anyone had spoken a sentence or two, the flow was interrupted whilst the subject matter was translated for our benefit. One of the trials involved a student charged with the theft of car windscreens (a far more serious offence that than the theft of car windscreens in Ireland as cars are in short supply in the Soviet Union and spare parts extremely difficult to procure). The defendant decided to plead guilty and to represent himself. The court was a district court presided over by a judge and two lay assessors. Three interesting features of Soviet criminal law emerged from this particular case namely:–

1. If a defendant pleads guilty to a charge he/she cannot be convicted on the basis of this admission alone. There must be independent evidence to support the charge. We were advised that this procedure is now always adopted in order to avoid the type of confession convictions which took place during the Stalinist period.
2. Victims of a crime have a status in court as such (not merely as witnesses) and may give evidence/comment and demonstrate how they have been affected by the crime, although it is unclear to what extent the court actually takes their views into account. In the particular case one of the victims had no qualms in telling the court that he had since replaced the windscreen stolen with a purchase on the black market (which action is itself an illegal offence).
3. Alcohol is considered to be an aggravating rather than a mitigating element when involved in the commission of an offence. This factor is symptomatic of a society which places a greater emphasis on personal accountability than is normally seen in many Western European societies.

The features referred to at 1 and 2 above are particularly interesting in the context of celebrated cases in this country in recent years where there had been an admission of guilt to a serious crime and no evidence was put to the court as to its commission. The court has confined itself solely to the sentencing of the accused. This practice has given rise to serious criticism as it leaves questions relating to the crime unanswered and grievances unremedied for the victims and their families.

In many respects the criminal law and criminal procedures in the Soviet Union are quite different to our own system. The most obvious feature of this is that the criminal trial does not promote an adversarial system of justice as most of the ground work has already been dealt with at one or more formal investigations which take place prior to the trial.

The concept of private property rights was introduced in Russia effective from 1st July, 1990 although the procedures for implementing the new laws have not yet been expounded e.g. our partners were unable to indicate to us how a straightforward transaction such as the purchase of a private dwelling would be financed in the future.

Because there is no developed system of private property there is also no developed system of contract or tort. The prosecutor's office also has a role in the civil law procedure that exists. In fact it is quite apparent that in the Soviet system the effectiveness of the local administration in administering the system is, in practice, more important than awareness and acknowledgement of individual legal rights as such.

For the very reason that there has been no developed concept of private property rights there exists no solicitor's profession although Notaries Public do carry out the function of advising people on matters such as wills and simple

business transactions e.g. the purchase and sale of cars. In the larger cities there exist private law firms although nothing like on the scale seen in the West. With the move to a market economy under the Shatalin 500 Day Plan and the introduction of private property laws however it is obvious that the Soviet political structure and legal system will undergo a startling metamorphosis and increasing numbers of civil lawyers will be required in the new system.

On a personal note, the individual exchanges worked very well, our Russian partners and their families were hospitable to the point of embarrassment – we were completely protected from the now endemic shortages of foodstuffs and other basic necessities available from normal channels.

From a legal educational view point, and more importantly, for cultural reasons, the trip was very interesting, made more so by its timing in the political history of the Soviet Union.

PATRICIA TAYLOR
YMC

PRACTICE NOTES *(Contd. from p. 318)*

Medical Fees

The Irish Medical Organisation has recently recommended an increased fee structure to its members within the context of the existing agreement with the Society. Unfortunately, the I.M.O. has done this unilaterally and without consulting the Society. Practitioners are advised to have regard only to that scale of standard fees recommended for payment to Medical Practitioners operative from 1st January, 1987.

It should be noted that this fee structure is a *'recommendation'* only and from a contractual view point it may be prudent to advise the relevant Medical Practitioner, when requesting his or her services that it is intended that fees will be paid at the 1987 agreed rate.

The Litigation Committee is continuing to negotiate with the representatives of the Medical Profession as a whole and with the Insurance Federation to reach a fee structure agreeable to all. Such a structure should hopeully be in place by the end of the year.

Litigation Committee

The Irish Society for European Law

Founded in 1973

Irish Affiliate to the
Fédération Internationale
Pour le Droit Européen (F.I.D.E.)

President: The Hon. Mr. Justice Brian Walsh.

Chairman: Mr. Eamonn G. Hall, Solicitor

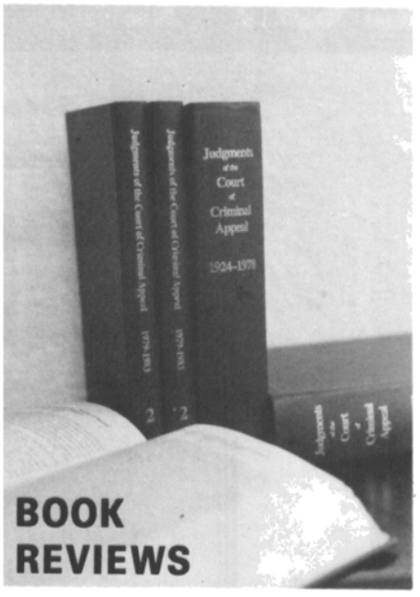
PROGRAMME FOR AUTUMN 1990

1. Thursday, November 15, 1990:
   The Hon. Mr. Justice Ronan Keane, Judge of the High Court, President of the Law Reform Commission – **Community Law and Irish Law: A Fruitful Tension.**
2. Thursday, December 13, 1990 at 6.15p.m.
   The Annual General Meeting of the Society – ***To be held in the main Reception room of the European Commission Office, 39, Molesworth Street, Dublin 2. The meeting will be followed by a Wine Reception.***

Lectures take place at 8.15 pm 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 Committee and guest speakers *for dinner* at the Club at 6.15 pm on the evening of each lecture. Members intending to dine must communicate with the Membership Secretary, Jean Fitzpatrick, Solicitor's Office, Telecom Eireann, 52, Harcourt Street, Dublin 2. (Tel: 01-714444 Ext. 5929, Fax: 01-679 3980, Electronic Mail (Eirmail) (Dialcom) 74: EIM076) not later than two days before the dinner, as advance notice must be given to the Club.

Membership of the Society is open to lawyers and to others interested in European Law. The current annual subscription is £15.00 (£10.00 for students, barristers and solicitors in the first three years of practice). Membership forms and further details may be obtained from the Membership Secretary.



COMMERCIAL LAW IN IRELAND
[By Michael Forde. Butterworth (Ireland) Limited Dublin, 1990, lix + 451 pp IR£39.50]

Mr. Justice Niall McCarthy in his Foreword to *Commercial Law in Ireland* comments on legal glasnost in Irish legal publishing. In that context, Dr. Michael Forde is described as Ireland's ''Stakhanovite''. At first, the *Shorter Oxford English Dictionary* with its vocabulary of about 163,000 words (besides combinations and idiomatic phrases), failed the writer of this notice in yielding the meaning of ''Stakhanovite''. However, the Addenda to the Dictionary yielded fruit: the term ''Stakhanovite'', (1937) derived from the name of a prodigious Russian coal-miner, A.G. Stakhanov, is now ascribed to a (Russian) worker who is awarded recognition with special privileges for extraordinary output. Dr. Forde deserves recognition for his prodigious output: the special privileges are yet to come. After the self-discipline and endurance involved in writing a book, the writer can comfort himself or herself with the knowledge that books outlive man.

Dr. Forde's objective is to give a reasonably adequate account of the principal legal problems that trouble men and women and their professional advisers engaged in commerce in Ireland. The book is divided into six chapters with the following headings: Sale of Goods; Hire Purchase and Credit Sales; Product Liability; Carriage of Goods; Negotiable Instruments; Credit and Security; Exports and Imports; Business Competition; Regulated Industries and Arbitration. Each chapter is further divided into sections and subsections each dealing with a specific topic.

Commercial Law in Ireland is handsomely bound. The reader is facilitated with tables of statutes, statutory instruments, European Community measures, International treaties and cases.

It is churlish of reviewers to point to the occasional slip in proof-reading. One must never forget the unspeakable labour that goes into writing a book. Yet, hopefully, the writer of this notice may be forgiven for mentioning an issue close to his heart. An Bord Telecom (page. 343) is not the name of the state-owned telecommunications company. The name of the state-owned telecommunications company is Bord Telecom Éireann or, in the english language, the Irish Telecomunications Board. Telecom Eireann is a registered business name. An Bord Telecom was the name of the non-statutory interim telecommunications board which ceased to exist on January 1, 1984.

Justice Benjamin N. Cardozo (1870-1938), a justice of the United States Supreme Court noted in *West Ohio Gas Company -v- Comm. (No. 1)* 294 US 63, 72 (1935) that a business never stands still. It either grows or decays. Sir Edward Coke, influential judge and writer (1552-1634) wrote in *The Institutes* that ''everyone thirseth after gain.'' Commercial law in one form or another will become increasingly important for practitioners in Ireland.

Commercial law in Ireland is an invaluable guide to understanding the complex and multiform nature of Commercial law and practice in Ireland. Dr. Forde has made a significant contribution to a topical and fast-developing area of our law.

Eamonn G. Hall

MAYO BAR ASSOCIATION

Annual Dinner

Friday, 30 November, 1990

Downhill Hotel,
Ballina,
Co. Mayo.

Tickets:
John Gordon – (096) 21644
Adrian Bourke – (096) 22055

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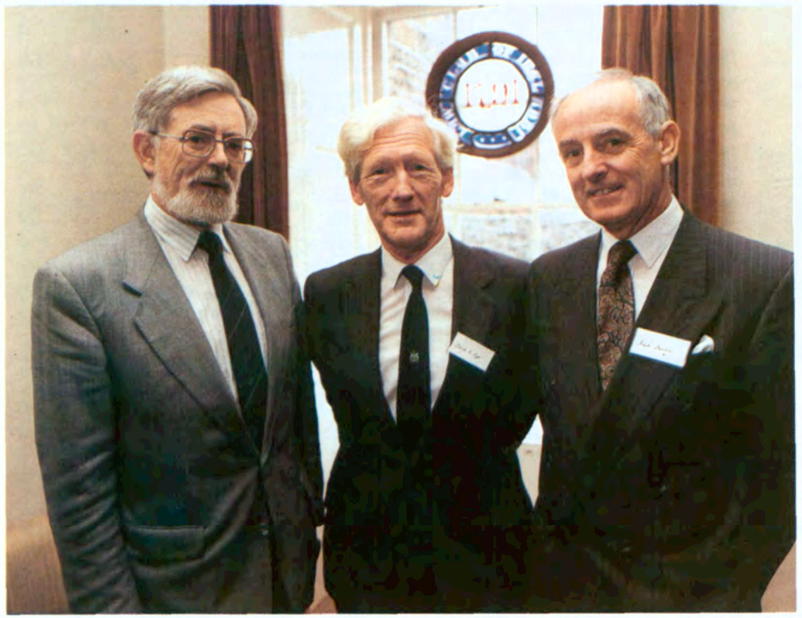

ARBITRATION SEMINAR FOR LAW SOCIETY PANEL OF ARBITRATORS — 9 OCTOBER, 1990 BLACKHALL PLACE
(left to right): John O'Reilly, Architect, David R. Pigot, Solicitor, and Fred Devlin, Chartered Surveyor of Battersby & Co.

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- BE FRIENDLY AND COURTEOUS
- DO NOT LEAVE CALLER HANGING ON – ADVISE DELAY
- TRANSFER SKILFULLY
- SUMMARISE BEFORE HANGING UP

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The President of the Law Society, Ernest Margetson, presenting a copy of *"New Lease of Life — The Law Society's Building at Blackhall Place"*, to the Lord Mayor of Dublin, Alderman Michael Donnelly. The book is co-authored by Sean O'Reilly and Nicholas Robinson and is available from the Society at £19.95, plus £2.50 post and packing.

ARBITRATION SEMINAR FOR LAW SOCIETY PANEL OF ARBITRATORS — 9 OCTOBER, 1990 BLACKHALL PLACE
Walter Beatty, Solicitor (left) with Jim Donegan, Solicitor.

J. P. O'REILLY MEMORIAL LECTURE
Dr. A. J. O'Reilly, Solicitor, delivering his lecture entitled "The Solicitor and his Business Client".

J. P. O'REILLY MEMORIAL SCHOLARSHIP AWARD
Dr. A. J. O'Reilly, founder of the Scholarship, congratulates the first scholarship award winner, Muiris O'Ceidigh, Solicitor's apprentice, with (on right) the President of the Law Society, Ernest Margetson.

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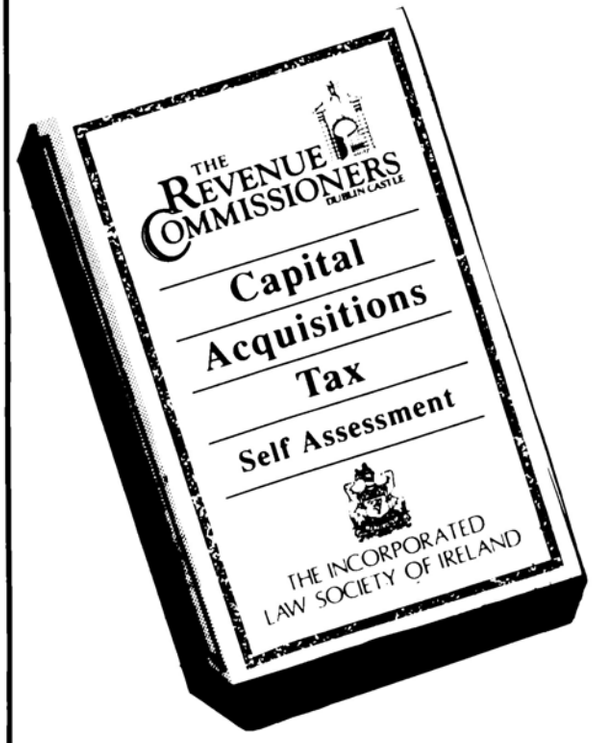

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Available from The Law Society. Contact Chris Mahon at 710711

Capital Acquisitions Tax Training Video

On 22nd October, 1990, at Dublin Castle in the presence of the Minister for Finance, the President of the Law Society and the Chairman of the Revenue Commissioners, amid a welter of publicity, the first joint venture between the Revenue Commissioners and the Law Society was launched. This is the first such venture entered into by the Revenue Commissioners, and the Law Society feels honoured that it should be the first to whom an approach was made.

The Video contains seven modules, each module dealing with a particular aspect of the Capital Acquisitions Tax Code which causes difficulty to practitioners.

The seven modules are as follows:—

1. Aggregation.
2. Indexation.
3. Agricultural Relief and Apportionment of Liabilities.
4. Favourite Nephew Relief.
5. Rights and Annuities.
6. Relief against Double Taxation.
7. Credit for Foreign Tax.

The project was born out of a spirit of co-operation which developed between the Revenue Commissioners and professional tax practitioners whether they be solicitors, accountants, Associates of the Institute of Taxation or whatever, which built up over the last number of years. About 1988, the Revenue Commissioners approached the Taxation Committee of the Law Society to undertake a pilot scheme of self-assessment for Capital Acquisitions Tax, as this appeared to be the way the tax, and tax generally, was developing. A number of named solicitors entered into this pilot scheme and it proved to be quite an outstanding success. The depth of goodwill that existed on both sides was quite amazing in view of the fact that up to then, both sides viewed each other with a certain amount of trepidation, if not mistrust.

Throughout this period, the solicitors learned not only the nuances of the tax code but also learned that there was a store of goodwill within the Revenue Commissioners which was available to smooth over difficulties arising in relation to, particularly, Capital Acquisitions Tax, and which, if exploited, would make the solicitor's, the tax payer's, and the Revenue's job that much easier. It is also to be assumed that the Revenue learned that the practitioners sitting on the other side of the fence were willing to co-operate and were not the ogres which the Revenue had long imagined.

There is no doubt that attitudes have changed on both sides where both can co-operate in certain areas and still deal with tax matters professionally.

The pilot scheme was followed by the Finance Act, 1989, which introduced statutory self-assessment. The pilot scheme has ironed out many of the ''teething problems'' which would otherwise have arisen post-legislation and so there was a smooth entry into the self-assessment system. The Finance Act, 1989, contains many of the statutory changes which made this changeover work, for example, the change from three months to four months in relation to interest charges. The goodwill that had been built up over the pilot scheme was an enormous help at this time.

Of equal importance to self-assessment as the co-operative element between both sides, is the need for a tax-payer's service. This can range from easing the individual's worries in particular cases, to the now established practice of issuing statements of practice (and now this CAT education video) and to granting certainty where commercial decisions require tax certainty before they can be embarked on.

As there is a continuing need for solicitors to assess the client's tax and pay it on the submission of the return, their knowledge of the tax has to be increased. There is no doubt that solicitors have a very good working knowledge of Capital Acquisitions Tax but the practical application into apportionments, double taxation relief etc. has to be increased. Relying on the goodwill that has already been built up, the Revenue Commissioners sent a team of officers to the Law Society with a seminar on the particular practical aspects which cause most difficulty. This has been available in the Law School, on Continuing Legal Education seminars throughout the country, and has been made available by the

Pictured at the launch of the new educational video for inheritance and gift tax at Dublin Castle, produced by the Revenue Commissioners and the Law Society were (from left), Mr. Ernest Margetson, President of the Law Society, Minister for Finance, Mr. Albert Reynolds T.D. and Mr. Cathal MacDomhnaill, Chairman, Revenue Commissioners.

Revenue Commissioners to the Institute of Taxation. In this regard, the Revenue have been generous and unstinting in the use of their manpower.

Ultimately, the joint venture was proposed and submitted to the Taxation Committee. The Taxation Committee recommended it to Council and it was readily accepted. The Taxation Committee kept a continuing brief, with early viewing of the modules, the importation of ideas and the elimination of errors. Most of the technical input, however, was that of the Revenue.

The format of the video is excellent. It is set out in most attractive colour graphics which explain, in detail, the particular areas covered and which are, as a result, very easy to remember. In this area, Murray Consultants have been an enormous help and their knowledge has been put to most effective use. Each of the modules uses very practical examples, explains in ABC form the various steps and works the examples to finality. The areas covered are very easy to understand and the personnel on the video went to great pains to remove any doubt or uncertainty as to the way to work the tax system.

It must be emphasised that this video is essential for every firm. It is essential, in particular, for those firms which have infrequent cases of Capital Acquisitions Tax or which advise on Wills or who deal in any areas of law which expose the Client to Capital Acquisitions Tax. There is no need to be an expert or a specialist in this area as having viewed the video once, it will only be necessary to view the particular module required prior to meeting the client or during the administration of an estate.

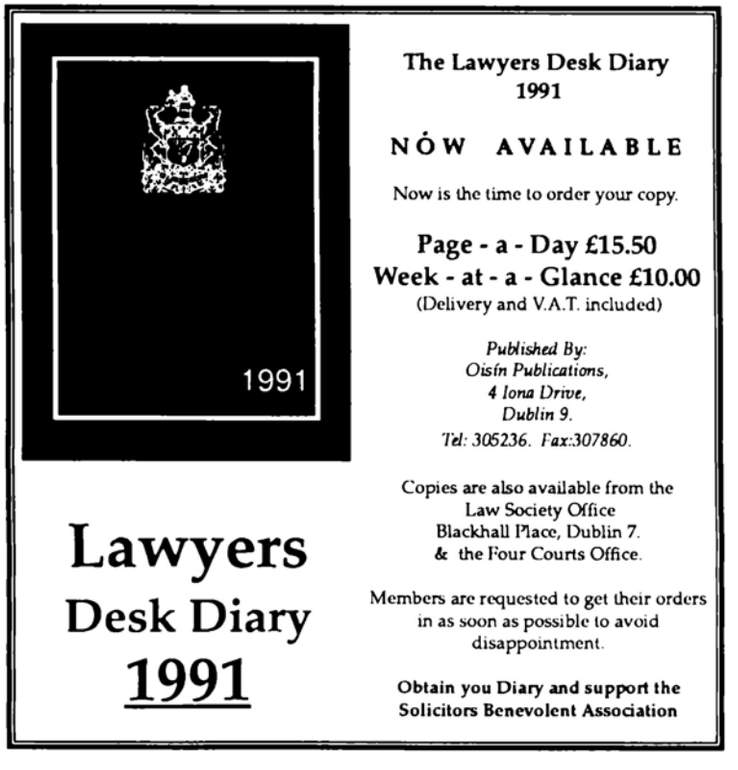
The video can be a valuable *aide memoire* and should be stored in the library of every office. It has been mentioned that offices do not have televisions or videos. This is a lame excuse as most homes have them and it does not impinge on family life to view the video for fifty-five minutes (or any particular module on the video for 5 or 10 minutes) either after the family has retired or before the night's viewing begins.

The full price is £120.00 (£95.00 to members of the Law Society), it is VAT free and is tax deductible as plant. There are discounts available where a number of videos are ordered and members should contact the Law Society in this regard.

Capital Acquisitions Tax is the solicitor's tax as it is based on legal concepts of ancient and modern generation, concepts with which the solicitor is familiar and which should make the tax, if not easy, at least familiar.

The other area which would make the requirement for this video essential is the area of professional negligence. Solicitors, by their nature, are bound, frequently, to deal with situations which have exposure to CAT. If a solicitor is not able to give the basic advice, and consequently causes loss to the client, the solicitor must look to his professional indemnity for protection. In addition, the assessment of tax, if the appropriate reliefs, advantages or whatever are not taken care of or if the solicitor makes an error in the tax assessment by either underassessing or overassessing tax, whereby the client loses interest (either to the Revenue by underpayment of tax or on the amount of overpayment, the interest being denied to the client), the solicitor would find it embarassing, to explain the situation. If the loss is substantial or capable of quantification, the solicitor may be required to make it up out of his P.E. cover or out of his own pocket.

The Law Society is making an appeal to all firms to purchase this video and to make a success of it. It is an essential element of our practice to deal with CAT situations, and unless we familiarise ourselves with the basics of the tax, we would bring both the profession and the Society into disrepute. It is hoped that this training video will be the first of many. □



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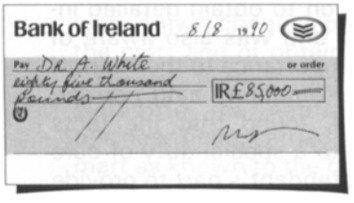
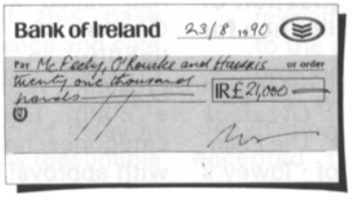
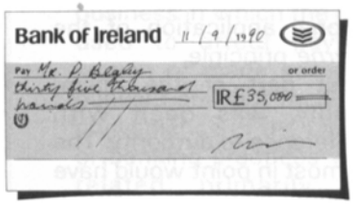


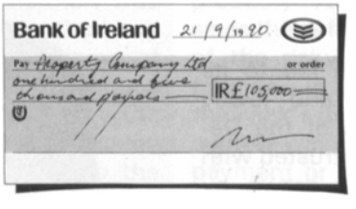
PURCHASE A PRACTICE



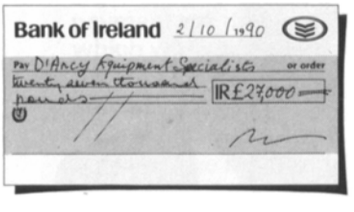
BUY INTO A PARTNERSHIP



START UP ON YOUR OWN



PURCHASE A PROPERTY



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Securing the customer's interest - The Andrew Towey Trilogy

In December 1980 Andrew Towey's apparently lucrative cattle business, centred on his factory at Ballaghadereen, collapsed. Whatever its implications for the cattle trade generally, this disaster has had a major effect on Irish Banking Law. Andrew Towey's "somewhat unhorthodox banking procedures"[1] led to three High Court actions by suppliers injured financially in the resulting collapse.[2] Each produced a judgment concerned largely or entirely with the duties of a collecting bank as to presentation and securing payment of cheques payable to its customers. The law on this topic had previously consisted largely of vaguely worded general principles: the application of these principles to the Towey disaster has now produced definite statements as to what practical steps may be required of the bank. It is, perhaps, unfortunate that while the three Judges concerned agreed as to the *rules* to be applied, it is not entirely clear that the *standard* applied was identical in each case. More generally, these judgments re-opened the question of whether the Irish Courts will ever impose liability in negligence for pure economic loss on a proximity basis.

Andrew Towey's "unorthodox banking procedures" briefly, consisted of paying his suppliers by cheques drawn on an Irish Pound Account at a Branch of the National Westminister Bank in Silloth, near Carlisle in the United Kingdom. It appears that Mr. Towey's Father (and predecessor in business) had bought land at Silloth and that his son had lived there for a time; nonetheless it was clearly quite inappropriate that suppliers living close to and supplying the Ballaghadereen factory should be pain in this fashion.

Evidence showed that the Silloth Bank was small and understaffed, and would never have enough Irish currency to meet the very large cheques drawn on Towey's Account; consequently large transfers from his account with the O'Connell Street Dublin Branch of the Ulster Bank were made through a round about route. As to presentation, cheques were normally dispatched to the Irish Bank's Overseas Department, then to the National Westminister Bank's London Office, and thence to Silloth. These extraordinary procedures contributed to the great delay in payment of cheques which was at the centre of each case.

The first case to reach resolution was *Tulsk Co-Operative Livestock Mart Ltd. -v- Ulster Bank.* The Plaintiff was a supplier of Towey's factory and supplying him made up a very large proportion of its business; his collapse led to its closure. The Plaintiff and Towey were both customers of the Defendant, which was entrusted with collection of cheques drawn by Towey on the Silloth bank in the Plaintiff's favour. The claim was for:

(i) Negligence in failing to secure payment of seven of these cheques;

(ii) Negligence in advising the Plaintiff to continue dealing with Towey at a time when the Defendant should have been aware that he was in danger of collapse.

The second part of the claim presents little difficulty. The Plaintiff had expressly sought the Defendant's advice as to whether it was safe to continue in business with Towey, who was also a customer of the Defendant; the Defendant was aware that its skill was being relied on and that it was in a position to obtain detailed information and was also aware of the vital importance to the Plaintiff of this information being correct. Gannon J. found that the facts gave rise to a special duty of care on the Defendant's part to provide accurate information and that it had failed in its duty. Though Gannon J. emphasised[3] that liability in tort depends on proximity, rather than proving that a claim falls within existing categories, he nonetheless quoted with approval from *Hedley Byrne - v- Heller*[4] and this part of his judgment can be seen as an unexceptional application of the *Hedley Byrne* principle.

The first part of the claim, interestingly, was dealt with without reference to authority. The authority most in point would have been the *obiter dictum* of Lavery J.

By
Christopher Doyle
Barrister-at-Law

Christopher Doyle.

in *Royal Bank of Ireland -v- O'Rourke* [5]:-

> "I would have no doubt that a collecting bank or a bank presenting as holder, might incur a responsibility if it failed to use diligence in requiring the paying bank to deal with a Bill presented and failed to treat a Bill as dishonoured if there was undue delay on the ground that payment could not be obtained". [6]

Gannon J.'s judgment is in effect a rather more expanisve version of this principle. He said:-

> "I infer that the mart sought and obtained from the bank the service of presenting for payment to the bank upon which were drawn cheques payable to the mart and of obtaining such payment with a promptitude suited to the nature of the business being carried on by the mart as known to the bank. This is a type of service special to the banking service but which in the circumstances of this case required more diligence and care than mere routine banking procedures. In my opinion whether the length of delay in clearing a cheque is reasonable or not must be measured by the nature and requirements of the business in which the cheque is used to affect payment as knwon or made known to the bankers and not merely by the convenience of the bank's staff or banking practices which are related primarily to the administration of the business of the bankers . . . the mart was entirely dependent on the bank in relation to the obtaining of payment of the £IR cheques drawn by A.J. Towey on the Silloth account. The bank in my view failed in the duty to the mart which the circumstances created of obtaining prompt payment on the seven cheques which were dishonoured and on the cheques for the immediately preceding months.
>
> The nature of the relationship between the bank and the mart, the nature of the business of the mart and its dependence of the services of the bank . . . all of which are disclosed by the evidence I have outlined, imposed on the bank a duty of care to the mart beyond that of a simple banker/customer relationship. The fact that there was the contractual relationship between the mart and the bank of customer/banker does not limit the duty owed to the mart by the bank if there are as in this case manifestly there were in the general relationship many other factors from which the law will impute a duty of care to avoid harm on what has come to be called "the neighbour principle" [7]".

Points worth noting in this passage are:-

(i) The duty to secure payment is not an aspect of the contractual duty to present the cheques promptly, but is a duty in tort to take reasonable care which there is with particular circumstances;

(ii) What is or is not a reasonable time for a cheque remaining unpaid also varies with circumstances, the most relevant being the importance to the payee of its being paid promptly.

As to what steps the bank should have taken, Gannon J. accepted that continuous but unsuccessful efforts were made to shorten the delay. However he criticised the bank's failure to question the reassurances from the Silloth Branch that a shortage of staff alone was responsible; since the defendant's own evidence was that it was unhappy with this explanation it should have been aware that a shortage of funds was probably responsible, especially since the defendant was well aware of the risky position of Towey's finances. In the view of Gannon J. the bank's duty in the light of what it knew was to press for immediate payment or dishonour.

The question of *which* of these two courses to adopt – to press for payment or to treat the cheque as dishonoured, is a point which caused some difficulty in the second case of the Trilogy, *Brennan -v- Bank of Ireland.* The material facts were in some crucial respects different from those in *Tulsk Co-op.* The plaintiff had only four dealings in all with Andrew Towey, although his losses were substantial enough for the defendant bank itself to describe him as being "finished"; and his claim centred on the collection of one cheque only. Andrew Towey had no account with the defendant bBank as he had had in *Tulsk Co-op.* Whereas in *Tulsk Co-op* the material facts were not seriously in dispute, in *Brennan* the plaintiff and the Defendant's local assistant manager repeatedly gave entirely different accounts of crucial events: in each dispute Murphy J. with some hesitation found in the bank's favour. In so doing he rejected the plaintiff's claim that the defendant had expressedly assured the plaintiff that his cheque would be honoured. Whereas the defendant in *Tulsk Co-op* had made repeated but unsuccessful efforts to shorten the delays, by complaining to the Silloth Branch of the National Westminister Bank, the defendant in *Brennan* had taken the matter to the London Head Office and had actually for a time succeeded in getting a quicker procedure put into place; though the original system was eventually reverted to, it appears that the relevant cheque had been presented by that time. Most significantly, the Plaintiff had never sought or been given assurances as to Andrew Towey's credit-worthiness.

As regards the law applicable to the duties of the defendant, Murphy J., while referring to *Tulsk Co-op* appeared to find that it was wholly inapplicable to the facts before him in the view of the crucial part which negligent advice had played in the earlier case. He considered the dictum of Lavery J. in *O' Rourke* quoted above and though not bound by it considered that it should be approved though not without reservation. The best statement of the Bank's duty in his view is that in Harte's Law of Banking: [8]

> "As his customer's agent in the matter, the Banker is bound to use reasonable skill, care and diligence in presenting and securing payment of the drafts entrusted to him for collection and in placing the proceeds to his customer's account or in taking such other steps as may be proper to secure the customer's interest".

As regards the first part of this passage, Murphy J. was satisfied that the defendant had done everything reasonably practicable in regard to presenting and securing

payment. Having detailed the largely successful efforts of the defendant to shorten the delays in payment he said:-

"In these circumstances I think it can be said fairly that the defendants – and in particular the officials of the Galway Branch – went to very considerable lengths to improve the payment system which had been selected by Mr. Towey and acquiesced in by his customers and for which system the defendants had no responsibility whatever;" [9]

And further:-

"It seems to me that even by the most exacting standards the defendants exercised reasonable skill, care and diligence in presenting and attempting to secure payment of their customer's cheque". [10]

An alternative argument that the defendant was vicariously liable for the alleged negligence of the Silloth bank in failing to promptly present the cheque to itself on the ground that the collecting bank in such circumstances acts as agent for the paying bank, was also rejected. In the view of Murphy J. a cheque is deemed presented 24 hours after receipt by the paying bank at which time the notional agency of the collecting bank ceases.

The remaining claim, that the defendant should have pressed for dishonour if the Silloth branch was not prepared to pay, was disposed of in a terse and perhaps rather perfunctory manner:-

"If the cheque had been endorsed and was being presented on behalf of the person to whom it was negotiated, then it would be important to obtain a prompt decision as to whether the cheque would be met. In the present case however, I cannot see how the defendants would have "secured the best interest of their customer" by inviting the drawee bank to dishonour the cheque presented to it. In my view it was the duty of the defendants to press the drawee bank to deal with the matter but it seems to me preferable that the defendants should have urged the drawee – as they did – to pay the cheque rather than to dishonour it". [11]

"... a cheque is deemed presented 24 hours after receipt by the paying bank at which time the notional agency of the collecting bank ceases."

It would be difficult to quarrel with the learned Judge's finding that the bank had exercised due care and diligence in presenting and attempting to secure prompt payment. One would further agree that it would be artificial to regard the collecting bank as agent for presentation after the paying bank had actually received the cheque. However, the question of whether in failing to demand that the cheque be dishonoured if payment could not be secured, the defendant had taken all necessary steps to secure the customer's interests, perhaps deserves more detailed consideration than Murphy J. gave it.

The following year O'Hanlon J. gave Judgment in *Towey -v- Ulster*

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Bank. The Plaintiff was a first cousin of Andrew Towey; unfortunately his relationship did not give him any greater insight into Andrew's eccentric business methods. He banked at the same branch of the defendant as the plaintiff in *Tulsk Co-op* and so it is not surprising that the evidence and the allegations made by the plaintiff closely resembled those in the earlier case. Again it was found that the plaintiff had repeatedly sought and been given assurances that Andrew Towey was a creditworthy person, and that the defendants while unhappy with the delays in securing payment, had done little to remedy the position other than repeatedly complaining to the Silloth bank.

As to the law, O'Hanlon J. approved *Hedley Byrne -v- Heller* as to the need to take reasonable care as to advice given; however, he had some reservation about the suggestion therein that a prudent man could avoid liability by keeping silent[12] or merely being honest:[13] in O'Hanlon J's view the duty of a bank advising a customer on business dealings with another customer is more clearly defined and more onerous than this. On the duty of care in presenting and securing payment of cheques, O'Hanlon J. felt that the dictum of Lavery J. in *O'Rourke* and the judgments of Gannon J. and Murphy J. in the earlier *Towey* cases, had established a clear principle:-

"I deduce that in the circumstances of the present case th obligations of the defendant towards the plaintiff in its capacity as collecting banker did not end with the due presentation in good time of the cheques for payment at Silloth, but involved a further obligation to take reasonable steps to safeguard their customer's interests in the matter of collecting payment on the cheques and crediting their customer's account with the proceeds of same".[14]

But O'Hanlon J. went further than either Murphy J. or Gannon J. in finding that the two duties – to advise and to take care in collecting and securing payment on cheques – merged into one another, at least on the facts of the present case. The defendant was aware of the vital importance to the plaintiff of his business with Andrew Towey, and they were fully aware of Andrew's gravely suspect financial position: the great delays in securing payment and the strong suspicion that funds were not available to meet them should have alerted them as to the danger in which their customer, with their encouragement, was placing himself. In the circumstances they had in effect a single duty to saveguard their client's position. As regards the advice aspect, their assurances that there was no risk were plainly in breach of a duty; as regards the collection and payment of cheques he said:-

"I am of opinion that the defendant . . . failed in its capacity as collecting banker to take the steps which were necessary to protect the interest of the customer.

I am satisfied that from the month of September, 1980 onwards, if not before that date, the defendant, not merely at the level of Branch Manager, but at all levels, was becoming distinctly uneasy about the transactions involving Andrew Towey and was in possession of information which should have made it uneasy. It was quite clear on information emanating from Silloth, that the real reason for the delays which had been experienced in clearing the cheques was traceable to difficulties on Andrew Towey's part in funding the account. That meant that he was having continuing problems in getting enough funds into the account to meet the cheques he was drawing upon it, *and* that his credit standing with National Westminister Bank was not high enough for him to be able to make the necessary arrangements with them to meet the cheques immediately they were presented for payment. If National Westminister were not willing to take that risk, why did the Ulster Bank allow their customer to take it?"[15]

"The collecting bank owes a duty to its customer to take reasonable care in securing payment of a cheque, and to take any other steps reasonably necessary to safeguard the customer's interests."

As to what the bank should have done in regard to payment, he stated that the defendants should have gone to the highest levels of the National Westminister necessary to find out what was happening. He did not however, indicate whether he thought, as Gannon J. did in *Tulsk Co-op* that the defendant should have pressed for immediate payment or dishonour.

Given that the three Judges who considered the Towey affair were essentially agreed on the legal principles, and that two of them approved (with reservations in the case of Murphy J.) the dictum of Lavery J. in *O'Rourke* and the passage from Harte's Law of Banking quoted above, it is possible to summarise the law on a

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collecting bank's duty as to payment of cheques as follows:-

(i) The collecting bank owes a duty to its customer to take reasonable care in securing payment of a cheque, and to take any other steps reasonably necessary to safeguard the customer's interests;

(ii) Such "further steps" include treating the cheque as dishonoured if payment cannot be secured within a reasonable time;

(iii) What is reasonable care and what is reasonable time to allow for payment would vary with the circumstances;

(iv) Where the bank is aware that the customer's financial position may depend upon the prompt payment of the cheque and that reliance is being placed on the Bank's skill in securing payment, the duty of care is far more onerous than that permitted by routine banking procedures;

(v) In such a case if there is an unsatisfactory delay in payment the collecting bank has a duty to press for immediate payment or dishonour.

To return to the final part of Murphy J's. judgment in *Brennan -v- Bank of Ireland* one may question the manner in which he applies the above principles to the claim that the bank should have pressed for dishonour. Lavery J in *O'Rourke* had indicated that a bank may be liable in negligence in failing to treat as dishonoured a cheque which clearly will not be paid, and Gannon J. in *Tulsk Co-op* stated that if immediate payment cannot be obtained the bank should press for dishonour. Undoubtedly there are certain crucial differences between *Brennan* and the two actions against Ulster Bank, but there are also three important similarities:-

(i) The defendant bank was aware of the critical importance to its customer of the cheque being promptly dealt with;

(ii) It had long experience of Andrew Towey's eccentric business methods and although, unlike the Ulster Bank, it had no first hand knowledge of his financial position, what it did know should have made it highly suspicious;

(iii) The plaintiff was confident that had he been promptly informed that the cheques would not be paid, he could have pressed Towey personally for payment with a fair chance of success.

In these circumstances it is submitted that the bank in *Brennan* had a duty which was beyond the observation of routine Banking procedures and that it was an appropriate case for the "other necessary steps" referred to by Harte. There was sufficient information at the bank's disposal to make it doubt that the cheque could be paid; in that case to secure its customer's interests it would have been proper to treat the cheque as dishonoured and leave the plaintiff to take what remedial action he could.

Making due allowance for the important factual differences, one cannot help thinking that a somewhat more relaxed view of the bank's duty of care was taken in *Brennan* than in the other two Andrew Towey cases. It is, perhaps, instructive to compare Murphy J.'s judgment in *Brennan* with his later judgment in *Hazylake Fashions -v- Bank of Ireland.*[16] Here the plaintiff had a contract with the defendant bank whereby the bank discounted Bills of Exchange at 90% of their face value. It was disputed whether the bank had ever agreed to discount Bills prior to acceptance; nevertheless on a number of occasions the bank discounted unaccepted Bills. On discovering this practice, the Bank immediately discontinued it, causing cash shortage which contributed to the failure of the plaintiff company. The plaintiff claimed damages for (i) Breach of contract; (ii) Negligence. Murphy J. found that there had been no contract to discount unaccepted Bills, and that there was no representation by the bank which could bring the *Hedley Byrne* principle into play. He said:-

> "The reality of the matter is that the bank acted negligently in the sense that they failed to take appropriate steps to safeguard their own interests. They did not await notification of acceptance before discounting and then they have lost the protection of the Insurance cover as a result. In my view they were making no "statement" express or implied to the company. The company was simply the beneficiary of an unfortunate administrative error made within the banking system. I accept that the correction of this error on very short notice to the company must have added to the serious financial problems which it was then undergoing, but I cannot see that the bank acted in breach of its duty by making a mistake in relation to the conduct of its own business or in correcting the error when it was identified".[17]

Duty of Care

One would agree that neither breach of contract nor negligent misstatement was proved; and of course, it is not the law that any blunder causing injury to another is actionable. The vital question is whether, in the circumstances, the position of the parties gives rise to a duty of care. Both in *Brennan* and in *Hazylake Fashions* Murphy J. appears to resist the idea that

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banker and customer, apart from the requirement of contract for the *Hedley Byrne* relationship are in such a position: in other words commercial decisions causing purely economic loss are not, in general, actionable. The Irish Courts showed no reluctance to apply the *Hedley Byrne* doctrine: indeed it may be argued on the basis of *Macken -v- Munster and Leinster Bank* [18] that they thought of it first. However, they have shown a greater reluctance to hold banks generally liable for actions which caused financial loss. In *Dublin Port and Docks Board -v- Bank of Ireland*[19] the plaintiff claimed damages for breach of contract and negligence from the defendant which as paying bank had dishonoured a cheque drawn in the plaintiff's favour, which at time of presentation there had been sufficient funds to meet; due to the long bank strike of 1970 the defendants had eventually been left with far more cheques than could be honoured and it dishonoured on a random basis. Since the Supreme Court found that the claim depended on contract only, it was sufficient to dispose of it to find that the defendant as paying bank owed no contractual duty to the payee, even though the collecting bank was another branch of the same institution. As to whether the paying bank had any duty in this regard, a majority of the Supreme Court (Henchy, Griffin & Parke JJ) felt that a duty of care in the manner of dishonouring was owed to the drawer; this however would presumably be contractual. As to liability to third parties, only Kenny J. expressed a view, which however, was most emphatic:-

> "The trial Judge decided that the defendants were liable as paying bankers because they should have foreseen that their refusal to pay the cheque would cause the plaintiff loss. Whilst the foreseeability that one's action or inaction may cause personal injury or damage to property imposes liability, it does not create any liability for foreseen economic loss unless there is a special relationship between the parties . . . commerical life would become impossible if foreseeability that one's action or inaction would cause economic loss to another were to create liability . . . if this argument is pressed to its logical conclusion, the defendants must have foreseen that their decision to dishonour some of the cheques would cause loss to each payee of each cheque dishonoured, and so they would have been bound to pay each cheque presented although there were no funds to meet it. This, with respect, is not the law".[2]

As with Murphy J.'s judgments in *Brennan* and *Hazylake Fashions* it is not the statement of the law with which one takes issue, but the implied reluctance to impose on banks a duty which goes beyond the observation of routine. Such an attitude is at odds with that of O'Hanlon J. in *Towey* and, more particularly, Gannon J. in *Tulsk Co-op.* Gannon J. emphasised that liability depends not on contract, nor on even proving an existing head of liability, but on the proof of such proximity between plaintiff and defendant as will lead the law to infer a duty of care. Clearly such a proximity can exist without contract nor does it necessarily require a *Hedley Byrne* type relationship; and it is not easy to see how in principle liability for pure economic loss can be excluded from commercial dealings. The present position is that the courts appear to be pulling in different directions: sooner or later, a firm decision will have to be taken as to whether a policy forbidding recovery for pure economic loss or one making "proximity" the key factor, is to prevail.

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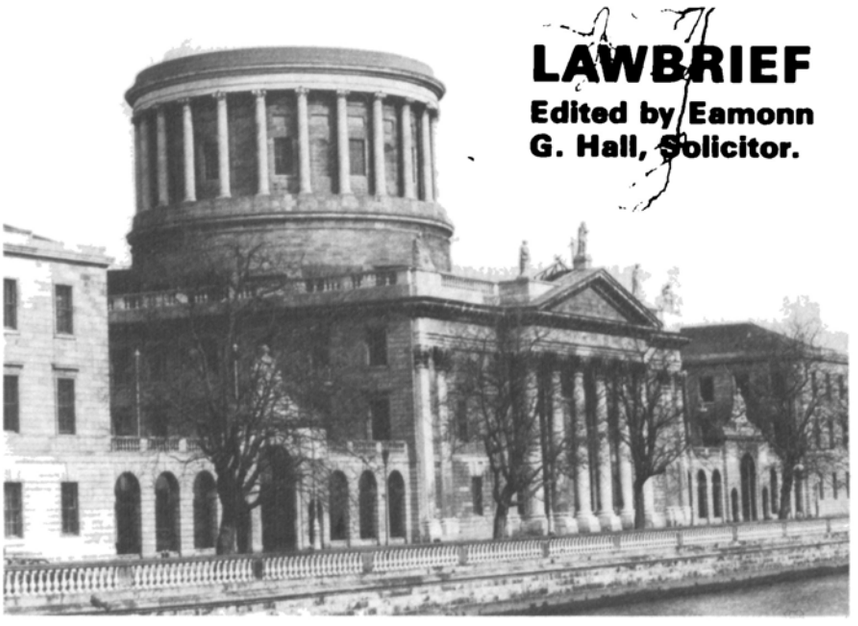
FOOTNOTES

1. Per Murphy J. in *Brennan -v- Bank of Ireland* 23rd May, 1985, unreported at p.27.
2. *Tulsk Co-operative Livestock Mart Ltd. -v- Ulster Bank* Gannon J. 13th May, 1983, unreported; *Brennan -v- Bank of Ireland,* Murphy J. 23rd May, 1985, unreported; *Towey -v- Ulster Bank* [1987] I.L.R.M. 142.
3. See pages 37 to 38 of his judgment.
4. [1964] A.C. 465.
5. [1962] I.R. 159.
6. [1962] I.R. 159 at 178.
7. At pages 42 to 44 of his judgment.
8. (4th Edition at page 532).
9. At page 16 of his judgment.
10. At page 21 of his judgment.
11. See page 25 of his judgment.
12. See [1964] A.C. 465 at 486 (per Lord Reid).
13. See [1964] A.C. 465 at 504 (per Lord Morris).
14. [1987] I.L.R.M. 142 at 152.
15. [1987] I.L.R.M. 142 at 169 to 170.
16. [1989] I.L.R.M. 698.
17. [1989] I.L.R.M. 698 ay 705.
18. [1959] 95 I.L.T.R. 17.
19. [1976] I.R. 118.
20. [1976] I.R. 118 at 141.

Medico/Legal Society of Ireland

Mary McMurrough Murphy, B.C.L., LL.B., Barrister-at-Law, has been elected President of the Medico-Legal Society of Ireland for the year 1990/1991. She is a native of Dublin, the daughter of Mrs. Una M. Murphy and the late Patrick J. Murphy, Finance Solicitor. She was educated at the Convent of the Sacred Heart, Leeson Street, Dublin; University College Dublin and King's Inns. She obtained a B.C.L. Degree in 1962, an hons. LL.B. Degree in 1963 and was called to the Bar in 1973. She is a practising barrister on the Dublin Circuit.



LAWBRIEF

Edited by Eamonn G. Hall, Solicitor.

LAND REGISTRY AND REGISTRY OF DEEDS: THE FUTURE

The Minister for Justice and for Communications, Mr. Ray Burke T.D., made several interesting comments on the occasion of the official launch of computerisation of abstracts at the Registry of Deeds on 28 September, 1990. The Minister noted that the Registry of Deeds processes some 51,000 registrations annually and handles in excess of 60,000 requests each year for searches, copy documents and certificates.

The Minister referred to the basic record in the searching process utilised by customers of the Registry of Deeds – ''the abstract'', which basically is a resume of the deed lodged for registration. Studies of the working of the Registry of Deeds indicated that computerisation of the abstract records would bring significant improvements in the service provided. The Minister authorised such expenditure and stated that he was happy to marry the old and the new. A system which had commenced with the tools of parchment and quill had not been advanced into the era of the most up-to-date technology.

The database in the Registry of Deeds would eventually cover at least forty years, with the first ten years to be completed by early 1991. The Minister stated that he had already awarded a contract for the initial data capture and work on this would commence shortly. The Minister also stated that he was considering proposals which would permit solicitors to directly access the Land Registry and Registry of Deeds database by means of computers or terminals located in the solicitors' own offices. A firm of management consultants had been requested to prepare a strategic plan for the organisation and use of information technology in the Registries. The consultants have already commenced their study and the Minister has asked them to report to him before the end of the year.

The Minister thanked the Incorporated Law Society and the Union of Professional and Technical Civil Servants for their proposals in relation to the Registries. The Minister stated that he had concluded that as long as the Registries continued to be subject to the constraints in the areas of staffing and funding that apply within the conventional Civil Service structures, it was virtually impossible for the Registries to provide the public, their customers, with the standard of service to which the public was entitled and for which the Minister believed they are willing to pay. Accordingly, the Minister announced that he had received Government approval in principle to the proposal that the Land Registry and the Registry of Deeds should be re-constituted as a Semi-State body. He was confident that by so doing, the present problem of the Registries would be overcome and the service to the public would be transformed for the better.

Much work would have to be done before the objective of transferring to Semi-State status could be achieved. Changes in legislation would be necessary, and there would be a need for consultation with the legal profession and detailed discussions with the unions and associations which represent the various staffs who work in the Registries.

NEGLIGENCE: Duty of Care: Economic Loss; Building Plans: Local Authority Approval

The House of Lords delivered an important judgment on July 26, 1990, relating to the duty of care. In *Murphy -v- Brentwood District Council,* (134 *Solicitor's Journal,* 1076) the Council had relied on the negligent advice of an independent contractor in passing under section 64 *Public Health Act,* 1936 the plans for the building of a house which the plaintiff bought and occupied. As a result of the defective design of its foundation, the house sustained cracks in the walls and leaks and fractures in the gas and waterpipes. The cost of repairing the house was estimated at £45,000. The plaintiff sold the house unrepaired for £30,000, giving a discount of £35,000 off its market value in sound condition. The plaintiff claimed damages against the Council for negligence in passing the plans. The judge of first instance held that the house had constituted an imminent danger to the public and safety of the plaintiff while in occupation and awarded him £38,777 for diminution in the value of the house and other losses. The Court of Appeal dismissed an appeal by the Council.

The House of Lords (Lord Mackay of Clashfern LC, Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Ackner, Lord Oliver of Aylmerton and Lord Jauncey of Tullichettle) held that *Anns -v- Merton London Borough Council* [1978] AC 728 had been wrongly decided and should be departed from. Lord Keith of Kinkel

in his opinion said that the judge of first instance and the Court of Appeal had proceeded on the basis that the plaintiff had a good cause of action against the Council by virtue of *Anns -v- Merton London Borough Council* [1978] AC 728. Before the House of Lords, the Council had argued that *Anns* had been wrongly decided and should be departed from. The question was whether the Council had owed the plaintiff a duty to take reasonable care to safeguard him against the particular kind of damage that he had in fact suffered, which had not been injury to person or health nor damage to anything other than the defective house itself. Lord Wilberforce in *Anns* had referred to the ''normal principle'' in *Donoghue -v- Stevenson* [1932] AC 562, but an essential feature of the species of liability established by *Donoghue -v- Stevenson* was that the product should be intended to reach the consumer with no reasonable prospect of intermediate examination.

Lord Keith of Kinkel said that in the case of a building, a careless builder should be liable, on the principle of *Donoghue -v- Stevenson* where a latent defect resulted in physical injury to any person or his property, but that principle was not apt to bring home liability towards an occupier who had known the full extent of the defect yet continued to occupy the building. Although the damage in *Anns* had been characterised by Lord Wilberforce as physical damage, it had been purely economic loss. Properly considered, Lord Keith said that *Anns* had potentiality for collision with long-established principles regarding liability in negligence for economic loss. To depart from it would re-establish a degree of certainty in this field of law that it had done a remarkable amount to upset. Consumer protection was best left to the legislature. Accordingly, *Anns* had been wrongly decided and should be departed from *Dutton -v- Bognor Regis Urban District Council* [1972] 1 QB 373, and all cases subsequent to *Anns* decided in reliance on it, should be overruled.

The other Law Lords delivered opinions agreeing with Lord Keith of Kinkel and Lord Bridge of Harwich.

Negligence: Duty of Care: Economic Loss; Whether Builder Liable for Defence to Subsequent Purchaser of Building

In *Department of Environment -v- Thomas Bates and Son Ltd.,* (134 *Solicitors Journal,* 1077, September 21, 1990) site owners had granted a lease to lessees who contracted with the defendant builders for the construction of a complex including an 11 storey tower block. In 1971, an underlease was granted to the plaintiff department of, *inter alia*, the upper nine storeys of the tower block, and the Department entered into occupation. Subsequently, it was discovered that concrete in the pillars supporting the tower block was soft and insufficiently strong enough to support the design load of the building. They were accordingly strengthened. The Department brought an action seeking to recover, *inter alia* £71,076 in respect of the cost of the strengthening. The Department pleaded its cause of action in negligence, alleging that the builders had owed it a duty to use reasonable skill and care in the construction of the tower block. The judge of first instance found that the weakness of the concrete had not given rise to imminent danger to the health or safety of the Department's employees or the public. The pillars had been strengthened to cure a defect preventing the Department from making full use of the building to the extent to which it had been designed. He dismissed the Department's claim and the Court of Appeal dismissed an appeal by the Department. The Department appealed.

The House of Lords (Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Ackner, Lord Oliver of Alymerton, and Lord Jauncey of Tullichettle) dismissed the appeal.

Lord Keith of Kinkel said in his opinion that the Department's case was founded on *Anns -v- Merton London Borough Council* [1978] AC 728. The House of Lords had held in *Murphy -v- Brentwood District Council* [1990] 3 WLR that *Anns* had been wrongly decided and should be departed from regarding the scope of any duty of care owed to purchasers of houses by local authorities in securing compliance with building regulations. The House of Lords reasoning had necessarily involved close examination of the position of the builder primarily responsible for the defects. While he would be liable, under *Donoghue -v- Stevenson* [1932] AC 562, in the event of the defect, before it was discovered, causing physical injury to persons or damage to property other than the building itself, Lord Keith said that there was no sound basis for holding him liable for the pure economic loss suffered by a purchaser who discovered the defect and had to spend money to make the building safe and suitable for its intended purpose. The loss suffered by the Department was pure economic loss. To hold in the Department's favour would involve a significant extension of the *Anns* doctrine to cover the situation where there was no imminent danger to safety or health. Lord Keith stated that such extension could be regarded as logical if *Anns* had been correctly decided and its undesirability had formed an important part of the grounds leading to the conclusion in *Murphy* that *Anns* had not been correctly decided. That inevitably led to the result that the Department's claim failed.

Lord Brandon of Oakrook, Lord Ackner, Lord Oliver of Aylmerton and Lord Jauncey of Tullichettle agreed.

PERSONAL INJURY: Structured Settlement

In *Kelly and Another -v- Dawes,* (*The Times,* September 27, 1990) the Queens Bench Division (England and Wales) held that it was acceptable for parties to a personal injuries action to agree on a structured settlement whereby the defendant's insurers invested a proportion of the total sum payable to the plaintiff in the purchase of an annuity which would provide an index-linked annual sum for the remainder of the plaintiff's life.

The Court considered that is was acceptable on the ground of the resultant tax advantages to the plaintiff, for the total sum payable to the plaintiff in such circumstances to be less than the sum which would have been payable as a lump sum.

Potter J so held in the Queen's Bench Division when agreeing to a settlement arrived at on behalf of the first plaintiff, Catherine Kelly, who suffered serious injury in a road accident in which her husband, Andrew Kelly, was killed. The second plaintiff was the father and next friend of the first plaintiff and sued also as administrator of the deceased's estate.

Potter J said that in reaching such a settlement the plaintiffs sought to take advantage of provisions of revenue law, or at least the interpretation of those provisions currently acceptable to the Inland Revenue.

Hitherto, the position had been that, while the recipient of a lump sum by way of damages had paid no tax on the lump sum itself, he had faced the prospect of taxation on any income arising from it so that, for example, if he had used the lump sum to purchase an annuity, the periodic payments had been taxable in his hands, and that would remain the position even if the annuity were purchased on his behalf rather than in his own name.

It now appeared that by reason of an interpretation confirmed in July 1987 between the Inland Revenue and the Association of British Insurers, periodic payments to a plaintiff, funded by an annuity, purchased by the insurer from a separate life office, could be treated as payments of capital rather than income, with the result that the insurer could buy for less than the lump sum he would originally have paid to the plaintiff, an annuity which would yield higher benefits than the plaintiff could have expected to derive from such lump sum, the gain to both parties being financed from the tax saving resulting.

In those circumstances an appropriate and advantageous form of settlement in cases involving large awards for future loss might be to provide for two elements: a lump sum payment to cover the financial losses incurred to date of settlement and what was, in effect, a pension in respect of future losses, designed to last for the remainder of the plaintiff's life and indexed in respect of anticipated cost of living increases.

It was such a settlement which was proposed in the instant case. Potter J was satisfied that the proper sum for settlement of the first plaintiff's claim on conventional lines would be £427,500.

The first feature to be observed was an unusual one. It had been agreed that, if the settlement proceeded, the total payment should be £410,000, whereas if it did not proceed, the sum payable would be £427,500, the appropriate figure for a conventional award.

Potter J considered that the discount or differential had been agreed on the basis that, since the benefits to the first plaintiff under the structure contemplated as opposed to a single lump sum settlement, would considerably exceed £17,500 the defendants should be permitted also to participate in the benefits resulting from the reduced levels of taxation which would be payable.

In the circumstances where the first plaintiff's interests were better protected by receipt and/or expenditure of a reduced sum which would ultimately yield a greater benefit, his Lordship could see no objection in principle to the dif-

Association of Pension Lawyers
Republic of Ireland Regional Group

Meeting
on
Wednesday, 28th November, 1990
at
New Ireland Assurance Company plc,
11 Dawson Street, Dublin 2

Refreshments: 5.30 p.m.
Meeting starts: 6.15 p.m.

Speaker:
Chetwode Hamilton,
Solicitor,
Arthur Cox & Co., Dublin.
Member, Association of Pension Lawyers

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Persons interested in joining the Association should contact Raymonde Kelly (Tel. 7042000), Michael Lane (Tel. 717077), or Joan Flanagan (Tel. 767591).

THE J.P. O'REILLY MEMORIAL FUND

Founded by Dr. A. J. F. O'Reilly to honour the memory of his late father, the Fund provides a

SCHOLARSHIP of £5,000

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.

Award is by competition, open to all apprentices and solicitors qualified within the last ten years who satisfy entry requirements (see panel below) for an approved MBA course, whether at home or abroad.

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.

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Normally a primary degree, commonly with first or second class honours or an approved professional qualification.

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Applications to participate to be made not later than the 7th January; completed essays by the 28th January, 1991. The successful candidate is expected to commence the study programme in autumn 1991.

Telephone or write to Professor L. G. Sweeney, Director of Training, Law Society, Blackhall Place, Dublin 7. Tel: (710711).

ferential proposed. Annual payments would continue for a ten-year period even if the plaintiff died before the period had expired.

In making application for approval of structured settlements in the future, Potter J thought that it would be appropriate for the applicant to place at least the following information before the court:

1. A detailed opinion of counsel assessing the value of the claim and its constituent elements on a conventional basis, and the appropriate lump sum figure or bracket for settlement on that basis. Careful consideration of the plaintiff's life expectancy, based on the medical opinions should be included.
2. A report by accountants or other financial experts as to the fiscal and investment advantages to the plaintiff of the structured settlement proposed with particular regard to the life expectancy of the plaintiff and the likely future costs of care.
3. A draft of the form of agreement proposed, together with confirmation that the Inland Revenue regarded such an agreement as within the scope of any revenue provisions or practice on which the value of the structured settlement depended.
4. Where appropriate, confirmation of the approved terms of the agreement by the Court of Protection conditional upon the approval of the settlement by the court.
5. Material to satisfy the court that there were sufficient funds available outside the structured provisions to meet any foreseeable capital needs of the plaintiff, whether by means of a lump sum element in the settlement or by reason of other resources available to the plaintiff.
6. Material to satisfy the court that the agreement involved secure arrangements by responsible insurers, whether one of the well known tariff companies or one of the syndicates operating under the rules and protection of the Lloyds' market.

The issue of structured settlements in Ireland is under consideration in the Department of Finance.

Documents must be disclosed to haemophiliacs

In *Re HIV Haemophiliac Litigation*, the Court of Appeal (Ralph Gibson, Bingham LJJ and Sir John Megaw) (The *Independent*, October 2, 1990) held that the plaintiffs in the HIV haemophiliac litigation, who had been infected with acquired immune deficiency syndrome as a result of National Health Service treatment with human immunodeficiency virus infected blood for the USA, had shown a prime facie case against the Department of Health in negligence by its breach of statutory duties and by the way it performed its statutory functions. Accordingly, the Department's claim to public interest immunity from disclosing policy documents on self sufficiency in blood products in the NHS was overridden by the public interest in the full and fair trial of the plaintiffs' claims and the documents should be disclosed to enable the plaintiffs to properly present their case.

The Court of Appeal ordered the Department of Health to produce documents for which public interest immunity had been claimed.

Ralph Gibson LJ stated the plaintiffs had set out a prima facie case that the Department knew or should have known of the risk to the plaintiffs from the use of concentrate obtained from the USA; that practicable steps could have been taken to eliminate or reduce that risk; and that if those steps had been taken the plaintiff's injury would not have been caused. By prima facie case, the plaintiffs had alleged facts which, if proved, could justify those conclusions.

Since the plaintiffs had made out an arguable case on negligence, production would not be limited to performance related matters and would include documents which concerned breach related matters. Certain documents prepared for the Minister before important meetings need not be disclosed since minutes and other records of what the Minister said would be disclosed.

The documents should be inspected by the court to decide which documents should be immediately disclosed.

Bingham LJ stated that the balancing exercise between the public interest immunity and the public interest in a fair trial of the claim made by a large body of grievously injured plaintiffs and in public recognition that the claim had been fully and openly tried came down decisively in favour of the plaintiffs.

Sir John Megaw agreed.

It is understood that in similar litigation in Ireland, an appropriate order of discovery was made.

The J.P. O'Reilly Memorial Scholarship

Dr. A.J. O'Reilly inaugurated a scholarship in memory of his late father in the Law Society on October 5, 1990.

Dr. O'Reilly, a qualified Solicitor, presented a 29 year old apprentice Solicitor, Mr. Muiris O'Ceidigh from Salthill, Co. Galway with a bursary to study for an MBA in Trinity College, Dublin.

The J.P. O'Reilly memorial scholarship, which was created following a personal gift of £100,000 to the Incorporated Law Society by Dr. O'Reilly, honours his late father, John P. O'Reilly, a barrister. The scholarship will provide an annual bursary for a young Solicitor to follow a Master of Business Administration programme of study and an annual competition will be held.

The President of the Law Society, Ernest Margetson, in his welcoming address stated that Dr. O'Reilly had been anxious that the fund should be used to promote knowledge of commercial law and corporate finance among young Irish Solicitors.

The President stated that many newly-qualified Solicitors did not have sufficient training or experience in matters of commercial law or corporate finance.

In his address Dr. O'Reilly stated that substantial defects existed in the areas of company law and securities law, and increased regulations and disclosures were in the best interest of every business in this country.

In the area of insider trading, nominee accounts and the clarification of debt obligation, Dr. O'Reilly said that he believed the law in this country was seriously deficient.

Dr. O'Reilly stated that there was an enormous and urgent responsibility to examine the best aspects

of the US where, from 1934, with the enactment of the Securities and Exchange law, a level playing field had been created.

Dr. O'Reilly said that in the US, speaking from his experience as chief executive of a major corporation, regulators were feared. He did not believe that the average Chief Executive Officer in Ireland feared the regulators in the way his US counterpart did.

The speaker believed increased regulations and disclosures are in the best interest of every businessman in the country.

We had inherited an enviable position of jurisprudence in Ireland and Dr. O'Reilly told Law Society members that they had a peremptive role to play to deliver signs of assurance to the average man in the street, that justice was manifestly seen to be done in the market place. □

We intend to found before long a new law - firm in Brussels, specialising in European Law.

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For more details, please contact in writing
Mr. A.J. De Wilde, Advocaat,
Koekelberglaan 47,1080 Brussels
(Fax 468.13.15).

At a recent Dinner hosted by Jim Ivers, Director General, for staff from the Department of Justice were left to right, Pearse Rayel, Chief Executive Officer, Legal Aid Board; Jim Ivers; George V. Hart, Special Legal Adviser; Ernest Margetson, President of the Law Society and Tim Dalton, Assistant Secretary.

Correspondence

The Editor,
Law Society Gazette,
The Law Society,
Blackhall Place,
Dublin 7.

10 October, 1990

Re: *Annual Licensing*

Dear Sirs,

We are informed by the Customs & Excise that approximately 130 Licences for the year ending September 1990 were not taken up by the Licensed Holders. These can only be picked up now provided the Licensed Holder obtains an Order from the District Court allowing him to take up his Licence. If however this has not been done before March of 1991 the Licensed Holder will have to make an Application to the Circuit Court for a new Licence which will of course be a very expensive procedure. Should a Licensed Holder not take up his Licence for five years the Licence is extinguished and there is no opportunity for applying for a new Licence since he cannot licence a premises upon which a Licence has extinguished. We believe these matters should be brought to the attention of the *Petitioners* who have any connection with licensed premises so that they can put their clients in the picture most especially so since the new Licensing Act means that most Licences are renewed without any reference to a Solicitor, that is when there is no objection to the renewal.

Yours faithfully,
Joseph Mooney,
KELLY, KENNEDY & CO.,
22 Upr. Mount St.,
Dublin 2.

The Editor,
Law Society Gazette,
The Law Society,
Blackhall Place,
Dublin 7.

21 September, 1990

Re: *Romanian Adoptions*

Dear Sir,

In my capacity as Registrar of the Faculty of Notaries Public it has come to my attention from dealing with Notaries throughout the country that persons intending to go to Romania in the hope of adopting a Romanian child or children have been coming to Notaries Public for notarisation of documentation at the very last minute. The documents usually number in excess of two dozen per application in addition to which Notaries may be asked to prepare Powers of Attorney from Husband to Wife and Wife to Husband, Statement of Irish Laws and suchlike.

Due to the sheer volume of work concerned there have been cases where intending adoptors have had to postpone or cancel flights due to leaving notarisation too late with resultant financial loss, etc. In addition, following on documents being notarised, Applicants sometimes like to have the Notary's signature attested by the Supreme Court Office and although the Staff of that office are totally co-operative and efficient, this still takes time.

Accordingly, I would be grateful if you could bring to your Members notice the need to give the local Notary sufficient notice to enable him/her to get the job done in time without unnecessary cancellation of flights, etc.

Yours faithfully,
Brendan Walsh,
Registrar,
Faculty of Notaries Public in ireland,
18 Herbert St.,
Dublin 2.

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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.

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

LOST LAND CERTIFICATES

Robert Francis Tyer, Folio No.: 9776; Lands: (1) Annacrivy, (2) Annacrivy; Area: (1) 5A.1R.35P., (2) 35.025 acres. County: **WICKLOW.**

Katie McNulty, Folio No.: 12684; Lands: Lareen; Area: 13A.1R.10P. County: **LEITRIM.**

James Feerick and Nora Feerick, Cappincurry, Ballinrobe, Co. Mayo. Folio No.: 33521; Lands: Mertonhall, Area: 49.489 acres. County: **MAYO.**

John Andrew Thompson, Folio No.: 58R & 61R; Lands: (1) Carnowen, (2) Carnowen; Area: (1) 51A.1R.22P., (2) 35A.1R.12P. County: **DONEGAL.**

John Wilkie, Folio No.: 18647F; Lands: Dromore; Area: 0.377 acres. County: **DONEGAL.**

John McCormack, Folio No.: 8406 & 16010; Lands: (1) Earlscarton, (2) Faheeran; Area: (1) 9A.3R.27P., (2) 6A.2R.10P. County: **KINGS.**

Michael Kennedy, Folio No.: 38615, Lands: (1) Carneybeg, (2) Carneybeg (an undivided moiety), (3) Carneybeg, (4) Woodpark, (5) Ballythomas; Area: (1) 14A.2R.34P., (2) 18A.1R.33P., (3) 0A.1R.2P., (4) 9A.1R.18P., (5) 2A.2R.9P. County: **TIPPERARY.**

Patrick O'Brien, Folio No.: 13388; Lands: Ballyhomin; Area: 97A.1R.30P. County: **LIMERICK.**

Mary Russell, Folio No.: 42649; Lands: Ballynoe (E.D. Queenstown); Area: 19A.0R.0P. County: **CORK.**

Gerald Joseph McGinley, Folio No.: 786F; Lands: Carrickfad; Area: 0A.1R.19P. County: **LEITRIM.**

William Broaders, Folio No.: 7736F; Lands: Mauritiustown; Area: 0.038F. County: **WEXFORD.**

Thomas Murray and Margaret Murray, Folio No.: 22129; Lands: Lisgoold East; Area: 38A.3R.37P. County: **CORK.**

Philip Greenan, Folio No.: 19316; Lands: (1) Dunsrim, (2) Dunsrim; Area: (1) 0A.2R.15P., (2) 11A.0R.16P. County: **MONAGHAN.**

Douglas John Craigie and Joyce W. Craigie, Folio No.: 26284; Lands: Cullen; Area: 7A.3R.0P. County: **MEATH.**

Valentine James Kennedy, Folio No.: 12322; Lands: (1) Baltynanima, (2) Baltynanima, (3) Baltynanima (being a plot of ground containing 20 square yards); Area: (1) 0A.0R.35P., (2) 0A.0R.38P., (3) 0A.0R.0P. County: **WICKLOW.**

Ardmore Textiles (Muff) Limited, Folio No.: 40879; Lands: Muff; Area: 1.185 acres. County: **DONEGAL.**

Francis McKenna, Folio No.: 10954; Lands: (1) Tavanagh, (2) Drumbirn; Area: (1) 13A.0R.24P., (2) 9A.0R.10P. County: **MONAGHAN.**

Catherine O'Flynn, Folio No.: 730L; Lands: The leasehold interest in part of the townland of Grange situate in the Barony of Cork and containing 10 sq. perches. Area: 10sq. perches. County: **CORK.**

Samuel H. Whitney (deceased), Folio No.: 408F; Lands: Macoyle Upper; Area: 0A.2R.0P. County: **WEXFORD.**

Edwin Love, Folio No.: 43849F; Lands: Carrigaline Middle; County: **CORK.**

Liam McArdle and Sheila McArdle, Folio No.: 3669F; Lands: Corcuilloge; Area: 0.075 acres. County: **MONAGHAN.**

Patrick Reilly, Belmullet, Co. Mayo. Folio No.: 44524; Lands: Part of the Lands of Belmullet with the cottage thereon situate in the Barony of Erris. County: **MAYO.**

John Gray, Keatin Park, Rathcoole, Co. Dublin. Folio No.: 1361; Lands: Townland: Boherboy Barony: Newcastle. County: **DUBLIN.**

James McMahon, Folio No.: (1) 19185, (2) 19309; Area: (1) 29a.3r.11p., (2) 14a.3r.0p. County: **MONAGHAN.**

Anthony Maher, Folio No.: 20232; Lands: Heatstown; Area: 0a.2r.29p. County: **WESTMEATH.**

Denis Moroney, of Ballyglass, Scarriff, Co. Clare. Folio No.: 3722F; Lands: (1) Townland of Blackwater, (2) Townland of Parkroe. Area: (1) 0.513 acres, (2) 0.369 acres. County: **CLARE.**

Maura Price, of 99 Botanic Road, Glasnevin, Dublin 9. Folio No.: 5491F. County: **DUBLIN.**

Patrick McDonagh, 16 Ardilaun Road, Newcastle, Galway. Folio No.: 1926L; Lands: The leasehold interest in the property situate in part of the townland of Newcastle to the north of Thomas Hynes Road in the borough and barony of Galway. County: **GALWAY.**

Elizabeth Agnes White, Folio No.: 18687. County: **WEXFORD.**

Sean Kearns, Folio No.: 55109; Area: 0a.0r.16p. County: **CORK.**

Michael Ryan and **Kathleen Ryan,** Folio No.: 695F; Area: 0a.0r.14p. County: **WESTMEATH.**

Lost Title Deeds

ELSIE RIORDAN, deceased, late of 5 Harringtons Row, Ballyhooley Road, Cork. Will any person having knowledge of the whereabouts of any Title Deeds to the above property please contact: James Whelan & Co., Solicitors, 20 Washington Street, Cork. Phone No.: 021-271269.

IN THE MATTER OF THE REGISTRATION OF TITLES ACT 1964 AND OF THE APPLICATION OF ANGELA DUNNEY, JAMES DUNNEY IN RESPECT OF PROPERTY KNOWN AS 2 MANOR AVENUE OR BACK AVENUE, FORTFIELD ROAD, TERENURE CALLED MANOR COTTAGE.

TAKE NOTICE that Angela Dunney & James Dunney, Manor Cottage, 2 Manor Avenue, Fortfield Road, Terenure have lodged an Application for registration on the freehold register with absolute title in respect of the above mentioned property.

The original documents of title specified in the Schedule hereto are stated to have been lost or mislaid. The Application may be inspected at this Registry.

The Application will be proceeded with unless notification is received in the Registry within one calender month from the date of publication of this Notice that the original documents of title are in existence. Any such notification should state the ground on which the documents of title are held and quote Reference 89DN11932.

P O'Brien
Chief Examiner of Titles

SCHEDULE

1. Indenture of Conveyance dated 7th December 1955 made between Burnside Society Limited of the one part and the Very Rev Patrick O'Carroll, the Very Rev Timothy O'Driscoll, the Very Rev Thomas Goe, the Very Rev Vincent Dinan and the Very Rev Walter Finn of the other part.

2. Indenture of Conveyance made 14th April 1958 and made between the Very Rev Patrick O'Carroll, the Very Rev Timothy O'Driscoll, the Very Rev Thomas Goe, the Very Rev Vincent Dinan, and the Very Rev Walter Finn of the one part and Edward Green of the other part.

3. Indenture of Conveyance dated the 1st October 1980 made between Patrick Green of the one part and Daniel O'Donovan of the other part.

4. Indenture of Conveyance dated the 27th day of September 1984 and made between Deniel O'Donovan of the one part and the Applicants of the other part.

Lost Wills

MAHON, Timothy, deceased, late of Meenogohane, Causeway, Co. Kerry. Date of death: 10 July 1986. Would any person having knowledge of the whereabouts of a Will for the above named deceased please contact M/S D.J. O'Neill & Co., Solicitors, 3 Denny Street, Tralee, Co. Kerry. Tel: 066-22800.

BARNETT, Denis, deceased, late of 4 Sans Souci Park, Booterstown, Dublin, date of death: 6 May 1986. Will any person having knowledge of the whereabouts of a Will for the above named deceased please contact James D. Aitken & Co., Solicitors, 37 Molesworth Street, Dublin 2. Tel: 765239.

McCABE, Peter, of "Auburn", Woodside, Sandyford, Co. Dublin. Will any person having knowledge of a Will of the above named deceased please contact Messrs. Vincent & Beatty, Solicitors, 67/68 Fitzwilliam Square, Dublin 2. Tel: 763721. Ref COC. (F. M203.3)

SHORTEN, John (Jack), deceased, late of "Chestnut", Keelnacrannagh, Enniskeane. Will anyone having knowledge of the whereabouts of a Will of the above named deceased, who died on 25 January, 1990, please contact Murphy & Long, Solicitors, Kilbrogan Hill, Bandon, Co. Cork. Tel: 023-44420.

O'NEILL, Ann (otherwise Annie), deceased, late of 6 Marian Place, Mardyke, Cork. Will anyone having knowledge of the whereabouts of any will made by the above named deceased, who died on 18 September, 1990, please contact Coakley, Moloney & Flynn, Solicitors, 44/49 South Mall, Cork. Tel: (021) 273133 (ref PD/OC).

McGLYNN, Dominick, deceased, late of 20 Dufferin Avenue, South Circular Rd., Dublin, formerly of 96 Palmerstown Drive, Dublin 20. Will anyone who knows of the whereabouts of any Will made by the above named deceased please contact Rochford, Gallagher & Co., Solicitors. Ballymote, Co. Sligo. Tel: (071)83309/83467.

WALSH, Annie, deceased late of 22, Maiville Terrace, Turners Cross, Cork. Will any person having knowledge of the whereabouts of a Will of the above named deceased who died on the 26th October, 1990, please contact:- Cantillon Duggan & Co., Solicitors, 39, South Mall, Cork. Telephone (021) 275673.

FARRRELL, Seamus, deceased, late of Rathstewart, Athy, in the County of Kildare. Would anybody having knowledge of the whereabouts of a Will of the above named deceased who died on the 2nd day of October, 1990, please contact Anthony & Associates, Solicitors, 12, Herbert Place, Dublin 2. Telephone number 611364/609110.

BARRY, Margaret, deceased late of Coolclougher, Clonbanin, Mallow, County Cork. Will any person having knowledge of the whereabouts of a Will of the above named deceased who died on the 22nd December 1989 please contact: Cantillon Duggan & Co., Solicitors, 39, South Mall, Cork. Telephone (021) 275673.

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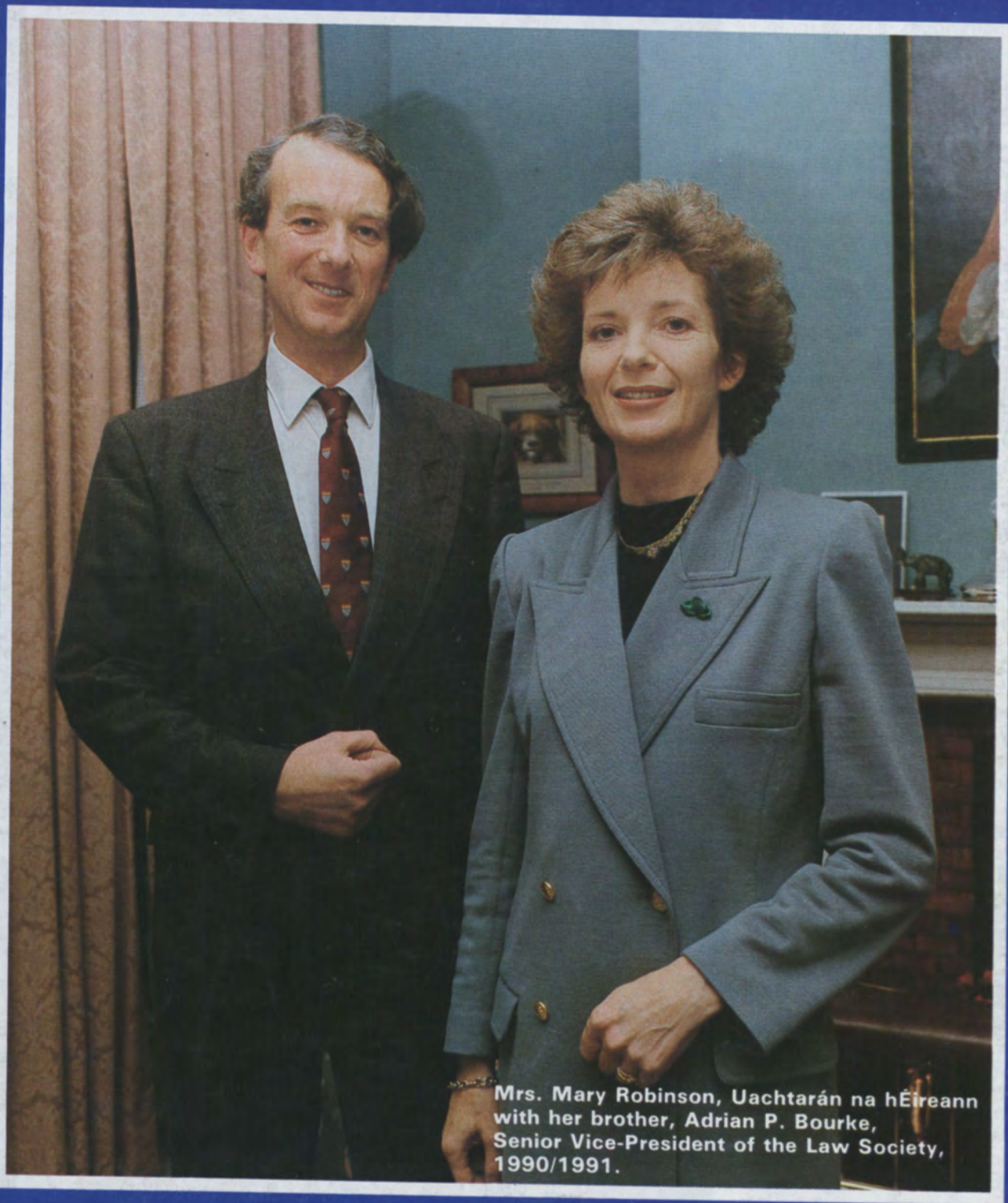
Vol. 84 No. 10 December 1990



Mrs. Mary Robinson, Uachtarán na hÉireann with her brother, Adrian P. Bourke, Senior Vice-President of the Law Society, 1990/1991.

- Statute of Limitations and Negligence Actions
- What's wrong with the system: Issues arising out of the Guildford Four case.
- The Legal Profession — Looking to the future

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GAZETTE INCORPORATED LAW SOCIETY OF IRELAND
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Viewpoint

When Mr. Desmond O'Malley spoke to the Society of Young Solicitors and the Young Bar on the future of the legal profession in Ireland on Sunday, 18th November, 1990 in Cork, he spoke as the Minister responsible in Government for competition policy and not as the Minister with responsibility for the structure of the legal profession or the legal system. Not surprisingly, therefore, the underlying theme of his address was focused from the standpoint of the economist looking at the extent to which the provision of legal services in Ireland was exposed to competitive market forces.

Lawyers are, perhaps, less used to looking at their profession in this way than other businessmen and the Minister's speech may, therefore be useful and timely especially in the context of preparations for 1992.

Important though it is, the competition angle is, however, a narrow focus and it must remain the responsibility of Government as a whole, in consultation with the profession, to look at the total picture and, in promoting change, to achieve a balanced development which serves the public interest. In this respect, it has to be borne in mind that legal services are, in some important respects, not as amenable to price competition as commodities or indeed some other services and the profession will, therefore, look very carefully at any proposals which emerge in the Minister's promised Competition Bill which could affect the Law Society's position as the body with statutory responsibility for the professional practices of solicitors. The Minister says that the Bill will seek to make all restrictive practices and agreements unlawful and he mentions, in particular, price-fixing agreements. Although he does not appear to be directing these remarks specifically at the legal profession, he says that, following full consideration of the Fair Trade Commission's recommendations, he will be taking steps to create a more competitive, efficient and modern structure in which the legal profession can work for all.

Two issues arise for consideration. The first is the setting of recommended scale fees by the Law Society for certain services provided by solicitors. The Minister describes this as a ''glaringly obvious example of anti-competitive activity and one which must be tackled now''. Is it glaringly obvious that the practice of recommending fees that members may wish to charge is anti-competitive? There are good reasons why the profession might wish to see guideline rates maintained; for one thing they provide important information not only to clients but also to new members of the profession starting up in practice or those proposing to offer a particular legal service for the first time on what would be deemed to be an appropriate rate. The corollary to the Minister's proposal, of course, is that the Government must be prepared to remove legal controls – and there are many – on the setting of legal fees and charges by the profession. This is an area which is, in any event, overdue for reform, as the Minister himself acknowledges. If both these developments took place, there would be no controls and no recommended rates so that practitioners would be free to determine their own charges for the services they are providing. In such a situation, it would be likely that solicitors would adopt the practice of agreeing fees in advance with the client – which in fact they can do at present – and thus meet the Minister's other concern about providing information to clients about fees.

The second issue is that relating to fee advertising. This is an issue

(Contd. on page 351)

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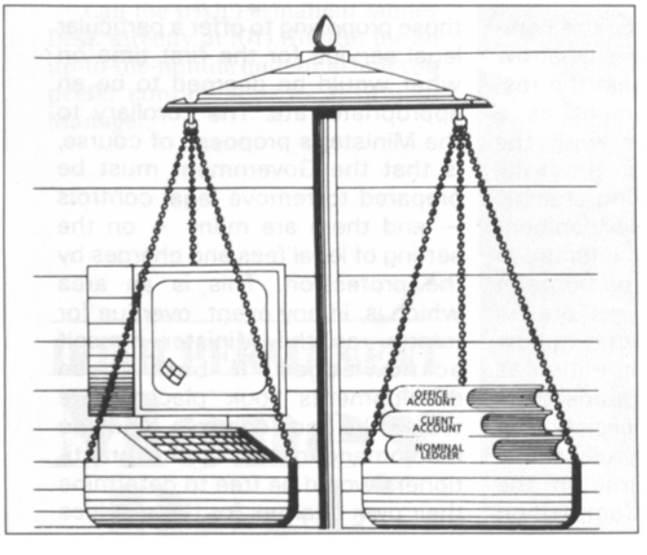

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What's wrong with the system and what are the solutions?

Issues arising out of the Guildford Four or alternative appeal systems

(The following is an edited version of a speech delivered by Alastair Logan to the English Law Society's Annual Conference, 1990)

1. **THE CASE OF THE GUILDFORD FOUR:**
The case of the Guildford Four is by now so well known that it is just as well to remind ourselves occasionally what the facts were and the important lessons that can be learned from it.

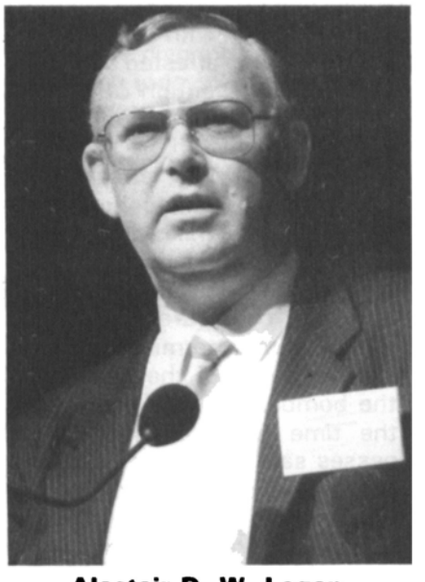
On the 5th October 1974 the IRA planted bombs in two public houses in Guildford timed to go off within half an hour of each other, without giving any warning and directed at young male and female soldiers who frequented the pubs. It was by any standards – and the history of conflict in NI has given us a frightful catalogue of violence – one of the worst offences ever committed. The operation required a small unit which could operate in the crowded pubs unseen. Good police detective work by the Surrey Constabulary established that the unit consisted of a man and a woman in the Horse and Groom and two men and a woman in the 7 Stars. The hunt for the bombers was extensive and pressure on the Surrey Police became even more intense and public opinion critical when the alleged Birmingham Bombers were apprehended within hours of the explosions there on the 21st November 1974.

The arrest of those who were to become the Guildford Four took place in the period from 28th November to 3rd December 1974 and over that period some 46 people were held in Guildford Police Station. All were held for many days without access to a lawyer some for as long as twelve days. The atmosphere was intensely hostile and off duty police officers could be found holding court in pubs and clubs describing in graphic detail the treatment being meted out to the prisoners. The confessions of the Guildford Four were obtained within the first 48 hours of their detention. All of them were later to describe the threats, physical violence, intimidation, deprivation of sleep, food, water, cigarettes, clothing, warmth, such necessaries as sanitary towels and the language and the attitude which accompanied it all.

By
Alastair D. W. Logan, LL.B.,
Solicitor

Charges of multiple murder were brought against eight people. Against four which included Mrs Anne Maguire the police had not a single shred of evidence. Against the Guildford Four all they had were the confessions. These Confessions were mutually inconsistent in over 100 respects. The DPP offered no evidence against the other four (against whom there was no evidence) but at this stage they had been held for 2½ months as Category A terrorist prisoners. The Guildford Four were committed for trial in April 1975 on the basis of evidence which treated the offences as isolated acts of terrorism unconnected with any other act either before or after.

The Trial
At trial, in his opening address to the jury, Crown Counsel claimed that he would produce eyewitnesses who would identify Miss Richardson and Mr Armstrong as the "Courting Couple" who planted the bomb in the Horse & Groom. He did not do so and there was no evidence to support such a proposition. Armed with his opening speech and a copy of the deposition the press corps left the trial and did not return in force until the verdict of the jury. They did however print stories showing the security precautions with armed police officers guarding the Old Bailey and the jury and leaving neither the jury nor the public in any doubt how dangerous the defendants were supposed to be. They also printed in full on more than one occasion the allegation made by Crown Counsel that Anne Maguire, against whom there was no evidence, who was not on trial and who had consistently



Alastair D. W. Logan.
Photo: Helen McCormack.

denied the allegation (a fact not mentioned by Crown Counsel), and who with her family awaited trial on a charge of possession of nitroglycerine, was the maker of the bombs for Guildford in her family home, thereby substantially prejudicing a fair trial in the case of the Maguire Seven. Crown Counsel was to explain away the inconsistencies in the confessions of the Guildford Four as a cunning IRA counter interrogation technique whereby the interrogatee sought to confuse the police by telling some of the truth and a lot of lies. He told the jury that Carole Richardson was lying when she confessed to bombing two pubs as she had in fact only bombed one.

Miss Richardson's alibi deserves special mention. She was in fact at the South Bank Polytechnic attending a Pop Concert on the night of the bombings at Guildford and was in the company of a large number of people. She failed to tell the police of that alibi because she could not remember where she was on that night when asked two months later. She asked the police to bring her diary so that she could tell them. The diary was destroyed. One of her alibi witnesses when he learned that she had been charged with the bombings made every effort to try to get in touch with her solicitors including going to see a solicitor himself. His attempts came to naught and he thereupon walked into his nearest police station and asked them to get in touch with the Surrey Police. He was arrested and held under the Prevention of Terrorism Act. The police took from him what he had to say and returned later to arrest him again. He tells a macabre story of the way in which he was induced to retract part of his statement so as to allow a time window the parameters of which were determined by the establishment of the time that the bombers left the pubs and the time that numerous witnesses saw her at the Concert and thus to enable the police to argue that Carole was in Guildford planting a bomb and was then rushed back to London. Crown Counsel was to tell the jury that the alibi was concocted by the IRA for her and that her alibi witnesses were willing accomplices in this. He failed to explain why Miss Richardson had forgotten about the alibi which, if he was right. had been so elaborately prepared for the very eventuality of her arrest; why it was necessary to drive at high speed from Guildford to London in the Saturday evening rush hour when the timers on the bombs were set on for 2½ hours after planting and why the IRA did not take the other participants in the bombing so that they too could get the benefit of the concocted alibi. The police were only able to travel the same journey in the time frame by using a 2½ litre patrol vehicle with headlamps blazing, a two tone horn and flashing blue lights.

At the end of the trial the jury rejected the defendants' allegations about their treatment, the coerced confessions and Carole's alibi. Mr Justice Donaldson sentenced them to the longest life sentences ever handed out in respect of the recommended terms. The Judge and press hailed the police and notwithstanding that the country was in the midst of a campaign which had by then been waged by the IRA for 13 months, the public were encouraged to feel that the police and the judicial system were equal to terrorism.

2. **What went wrong?**

Firstly, there was no protection for the detained person held on suspicion of participation in a terrorist act. The Prevention of Terrorism Act had arrived on the statute book in indecent haste. It involves extensive deprivation of rights. It uses the fear that being held incommunicado and without access to legal advice in a hostile environment, accused at least by implication of involvement in terrorism, for up to seven days will and is designed to produce confessions. It has no appeal system worthy of the name. It was and it still is an intelligence gathering facility which, as directed against most of the thousands held under it, depended as a significant factor to achieve its purpose upon the deprivation of basic human rights.

Paul Hill of the Guildford Four was probably the first person held under the Act. Since all of the confessions of the Guildford Four were made within the first 48 hours after arrest and the 1989 Act enables the police to prohibit access to a solicitor in terrorist cases for the first 48 hours we are no nearer preventing a repetition 16 years later.

It is also worthy of note that anyone who was detained under the Act and eventually stood trial on terrorist charges could have been detained in respect of substantive offences had the police chosen to do so.

Secondly, The treatment of the detained person was open to considerable abuse which assisted in producing the climate in which false confessions can be made. Since 1974 substantial progress has been made by the Police and Criminal Evidence Act 1984 (''PACE'') in protecting both the detained person and the police. It has ensured that minimum standards in conditions of detention and facilities are made available to the detained person. It does not however prevent abuse. One can see from the University of Birmingham Report to the Lord Chancellor on Advice and Assistance at Police Stations and the 24 hour Duty Solicitor Scheme that the police are still using tactics and ploys to circumvent access to a solicitor and to secure incriminating interviews in circumstances where the solicitor is excluded such as in the cell or in the car on the way to the police station.

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In some ways the advent of a detailed custody record presents a greater hurdle to the defendant who wishes to prove that he was subjected to unlawful conduct whilst in custody. In terrorist cases by and large the police are now scrupulous about observing PACE but no solicitor should assume that his access to his client in the police station in those circumstances is free from electronic eavesdropping. That is also true in relation to legal visits to remand prisoners charged with terrorist offences.

Thirdly, insufficient was known in 1974 about false self incriminating confessions and what might cause someone to confess to something they had not done. It is the case that detained people will confess without duress to crimes they have not committed – even those whose lifestyle and character do not suggest that they are likely to do so. Those who have investigated the subject will tell you that there is no such thing as an instantly identifiable false confessor. We are significantly further on that we were in 1974 as a result of work by people such as Drs MacKeith and Gudjonsson. Lawyers, judges and police as well as the Home Office and the medical profession need to be more aware of this phenomenon to guard against it. Interrogation techniques need to take account of it and there must be a greater willingness to recognise that it can happen even though to do so may be perceived in certain quarters as an attack on the inviolability of the confession.

Fourthly, in 1974 there was little chance, in the absence of an alert and experienced doctor, that someone suffering from the symptoms of drug withdrawal would be diagnosed. There was none in the context of detention for a terrorist crime. Both Miss Richardson and Mr Armstrong were in that state and neither had that diagnosis. That can still happen today. Safeguards must be created for the drug abuser and for the intoxicated. Further-

VIEWPOINT

(Contd. from page 347).

in which, as the Minister rightly acknowledges, there are arguments for and against. It is an issue upon which the Society has in the past taken a definite stand. It is to be hoped, from what the Minister said, that there will be no question of interfering with the right of the profession to decide this issue for itself in the future.

Turning to what was the main thrust of the Minister's speech – the structure of the legal profession in Ireland – Mr. O'Malley sought to dispel the notion that he was interested in coercing the two branches of the profession into a state of fusion. He said that, in any event, the term 'fusion' was misleading and he preferred terms such as rationalisation and streamlining. However, Mr. O'Malley proceeded to call into question so many of the cornerstones of the existing system that one was left with the very clear message that, call it what you will, it amounts to fusion under a different name. If the effect of the changes is to produce a situation in which there is common vocational training, unhindered mobility between the two branches, an end to compulsory membership of the Law Library for barristers, direct access by members of the Bar to the public, the introduction of partnerships between barristers and solicitors one may very well ask what will be left of the existing system?

While it is early days yet and while due allowance must be made for the fact that the Minister may not have been doing any more in Cork than raising questions, it is not too early for the profession to be sounding alarm bells. On any rational analysis, there is much in what the Minister was saying in relation, for example, to common vocational training and greater mobility between the two branches. But if the Minister accepts, as indeed it would seem that the profession in general does, that specialisation within the profession as between the advocate and what might be termed the administrative/client – based lawyer is logical and reasonable, then it must follow that the Law Library, which provides a highly skilled specialist service in advocacy at reasonable cost, is worth maintaining in its present form. The onus is clearly on those who propose such far-reaching changes to demonstrate that they will lead to more efficient and cost-effective legal services. We are entitled at this stage to say that we seriously doubt this and question, therefore, whether such moves could possibly be in the public interest. The debate may only be beginning but certain markers need be put down at this stage. □

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more, whilst the mental state of the detained person is afforded some protection under PACE there must be a greater willingness to use the medical services then hitherto in doubtful cases.

Fifthly, Police interviewed two of Gerard Conlon's alibi witnesses prior to trial whom the defence had not been able to find. The prosecution failed to reveal that they had been interviewed and alibi statements had been obtained from them. The system in operation in 1974, which those of us old enough will recall as the Bryant & Dixon List, was clearly insufficient for the defence. Nevertheless, it and its successor cannot prevent the deliberate failure to reveal documents which are of vital importance to the defence. The disclosure of unused evidence is still covered by the Attorney General's Guidelines and is not the subject of mandatory compliance. Alibi witnesses were intimidated by, for example, the police treating them as if they were at worst participators in the offences under investigation and at best as supporters of terrorism; and by the refusal of the Judge to allow them to write down their addresses in court despite the fact that prosecution witnesses had been accorded that protection.

Sixthly, it was known to the police that idiosyncratic forensic links existed to link the Guildford and Woolwich bombings to other offences which had occurred both before and after the arrest of the Guildford Four. These links were known to the Metropolitan Police officers who interviewed the Guildford Four and yet they failed to ask questions about these offences apart from a timid single question about the one which had occurred immediately before their arrest. The evidence presented the offences as isolated acts of terrorism and all the links were deliberately suppressed. The period between the arrest and trial produced other arrests, the discovery of safe houses, fingerprints, identities, terrorist paraphernalia and intelligence all of which proved the links to be with others and not the Guildford Four. These were all concealed from the Court and the defence. The same could still happen today.

Seventhly, The scientists who were called by the Crown at the trial were aware from their examinations of the evidence of these links. They had made statements which had been sent to the police and by them to the DPP making the forensic connections. They were told, so they were later to testify, to alter their statements for the trial of the Guildford Four to delete reference to these links by police officers acting, according to the police, on instructions given to them by the DPP after a conference at which Crown Counsel were present. At the trial of the Balcombe Street unit these scientists tried to repeat the exercise by excising reference to Guildford and Woolwich from their statements and evidence notwithstanding that they were forensically connected with the offences charged. There is nothing to prevent the repetition of such conduct today.

Eighthly, The scientific evidence in the Guildford case was entirely within the control of the government department by whom the scientists were employed, the police, the DPP and Crown Counsel. The decision as to whether to use or reveal it depended upon an even handed approach to the question of prosecution. It was Lord Havers who said when Attorney General that it was not the task of the prosecution to secure a conviction at all costs in a partisan manner but to place before the court all the relevant evidence. The same can still happen today.

Ninthly, the status of expert witnesses in the Guildford case shows that they regarded themselves as subject to the direction and control of the party to the trial that called them as witnesses. They were bound by the Official Secrets Act. They also had unique experience such as was not going to be acquired by any scientist called on behalf of the defence. Moreover, they knew that the evidence they were being asked to conceal would have had a dramatic effect on the course of the trial.

In the Maguire trial the scientists decided to conceal from Crown Counsel and the Court the evidence they had which contradicted the evidence they were giving. They apparently gave no thought to the duty that they owed to the Court. They believed they owed no duty to the defence and as can be seen from their evidence to the May Inquiry they believed that it was for the defence to sus them out and ask the questions that would undermine their evidence. Such a stance depended on having a monopoly of information and in relation to their position as expert witnesses and their duty to the oath they took is indefensible. Such a situation can still occur today.

In the Maguire Seven case, examination in Sir John May's Inquiry of the notebooks of the scientists who gave evidence at the trial in support of the prosecution case that the TLC test used was as specific for the detection of nitroglycerine as a fingerprint, and the notebooks of their colleagues, revealed that they were lying. The tests that they claimed to have carried out, which were used by them to negate arguments by the defence against the specificity claimed for the test, were never

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carried out or had been and had produced a result which was at variance with their evidence and, in fact, supported the defence contentions. Such a situation can occur again today. Perhaps the experience in these cases and those involving other forensic scientists will produce a willingness to examine the role of the expert witness. I for one would argue that no one should be entitled to be called as an expert witness if he is also giving evidence as to fact in the case. Further all forensic services should be placed outside the control of the government, the police and the Official Secrets Act and should be established as an independent analytical service providing its services to the Crown, the police, the defence and others. Police Liaison Officers should not be in-house to such a service as these cases demonstrate how dependent the scientist can become on information supplied by these officers and how blinkered his view of the evidence can then become. Moreover the analysis of the scene of a crime should be done by such an independent scientist whose view of the relevance of what he sees and finds is not likely to be obscured by a preconceived idea of the likely culprit or his known modus operandi and to whom the defence can obtain equal access.

Tenthly, the Appeal system failed the Guildford Four abysmally. Lords Devlin and Scarman have stated more eloquently and incisively than I could ever do how the failure of the Court to order a retrial, when even from their judgement it is clear that they believed substantial portions of the new evidence, was a denial of justice. The aggregation of the function of deciding fact, which Parliament never gave to the Court, to the judicial function of deciding the appeal at once artificially divided the trial into two parts, each tribunal hearing part only, and left the Guildford Four with no appeal against the decisions on fact of the Appeal Court.

3. WHAT CONCLUSIONS CAN WE DRAW?

The perception in Ireland or America may be that no Irishman charged with a terrorist offence can obtain justice from our Courts. That view is wrong. They can and do. It is achieved because of the professionalism of those involved in the criminal justice system. But that has not always been the case and the same circumstances could occur again and produce the same result. A National Opinion Poll conducted showed that two fifths of the population thought that the Guildford Four and similar cases were just the tip of the iceberg. The dramatic drop in confidence in the police may seem sudden and may be ascribed to the widespread reaction to the Guildford Four, Maguire and Birmingham Six cases but in reality it is the legacy of uncontrolled power and the failure to check abuses in the past. The law exists to curb the misuse of power and to protect the citizen from unlawful acts. However the checking of these abuses was hampered by the perception that it would constitute an attack on the police and that in turn would cripple the fight against crime and terrorism. The dramatic rise in recent times in the number of investigations being conducted by police forces into police – and we now have a third of the police forces investigating another third – is the inevitable result of that failure. The citizen is more aware of his rights and as a democratic society dedicated to the Rule of Law we should be proud that he is. It is our responsibility to ensure that he is and that those rights are protected. The responsibility is greater when those rights are sought by people charged or convicted of offences which offend deeply and involved the deprivation of the rights of others.

It is no easy task to be a police officer today, to walk that hard road with fairness, courage and courtesy. But if he is to enjoy the confidence of the community he serves he must not bend the law, infringe the citizen's rights or abuse the power entrusted to him. Nor is it an easy task to be a judge. The necessity of what Edmund Burke called " . . . the cold neutrality of an impartial judge" is the essence of their vocation. But they are not of another world. They must deal fairly with society in all its diverse forms. We are rightly proud of the calibre of our judges but that neutrality and the confidence of the public in it is seriously undermined when the judiciary engage in a whisper campaign as they have done in relation to the Guildford Four. If they are concerned about a lowering of confidence in the police and the judicial system then it is to be resolved not by secretly attacking those who are perceived to have contributed to it but in ensuring that the activities of the police and others are monitored and controlled so that they truly constitute the impartial public service the community both needs and desires. If there is a lessening of confidence in the judiciary then it is not restored by clandestine assertions of the guilt of those whom they have just acquitted.

I have no hesitation in recommending to my cleints that they should go to law. I am proud of our legal system. But it is not infallible nor should we allow ourselves to believe that it can be safeguarded or that we can deflect criticism of it by encouraging the user of the system to believe that it is. The May Inquiry has shown that we are prepared to examine without fear the history of these cases and that we are determined to take the steps necessary to ensure that there will never be a repetition.

The greatest concerns that arise from the case of the Guildford Four are firstly, the attitude at the time and the way that that was allowed to dictate the denial of rights and application of justice to the case both at the police station and in the court. Secondly, the fact that the willingness to look again at this case came not from the judicial system charged with that responsibility but from the tireless efforts of a handful of people in public life who were concerned about the case and its implications for our system of justice and demanded publicly that it

should be reopened. We owe them a great debt. Thirdly, the widely held belief that those who had most to do with the miscarriage of justice in the first place would resist any attempt to re-examine the case. And finally and most important of all that four young people had to spend 15 years of their lives in prison before justice was finally accorded to them. □

Presentation of Parchments — 1950

The President of the Law Society, Mr. William J. Norman, presenting his parchment to Mr. Andrew Curneen, Solicitor. Mr. Curneen was also awarded the Overend Scholarship for Conveyancing. He is currently practising at 3 Lincoln Place, Dublin 2.

Dublin Solicitors Bar Association

Conference in Rennes

The Dublin Solicitors Bar Association are arranging a Three Day conference in Rennes with the Lawyers of Brittany. The purpose of the conference is to establish links between the Professions in both Countries with the ultimate objective of establishing a network of practitioners throughout Europe. The Conference will have a Commercial aspect and introductions will be made through the Local Chamber of Commerce to businesses in the area. It is hoped that the trip will take place during the Whit Vacation at the end of May next year. There is a direct flight from Cork to Rennes and the D.S.B.A. should have further details towards the end of December. Anyone wishing to go on the trip should contact Dominic Dowling, Telephone Number 763095 or Hugh O'Neill, Telephone Number 733548.

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Practice Notes

ACCIDENT EXPENSES – UNDERTAKINGS TO VHI

The Litigation Committee following negotiations with representatives of Voluntary Health Insurance confirm an agreement whereby practitioners who give undertakings re refunds to VHI are now entitled to charge an undertaking fee to VHI of £60 plus VAT.

In exceptional cases where there are special grounds a higher fee may be negotiated. □

Litigation Committee

INDUSTRIAL RELATIONS ACT 1990

The Chairman of the Company Law Committee, Mr. Michael Irvine, has prepared a memorandum on the various sections of the Industrial Relations Act, 1990. This commentary is available to members through the Committee Secretary at 710711. □

Company Law Committee

UNDERTAKINGS IN THE AGREED FORM BETWEEN THE INCORPORATED LAW SOCIETY AND THE IRISH BANKS STANDING COMMITTEE

On the 30th of June, 1989, at Blackhall Place, there was a formal launching of agreed Forms of Undertaking which solicitors were recommended to use. A Practice note was published in the *Gazette* in the month of June and for the benefit of anybody who did not read that particular Practice Note, a copy thereof, is enclosed with this *Gazette*. Despite the fact that these forms of Undertaking were agreed between Banks and The Conveyancing Committee of the Law Society, it has come to our attention that in a lot of instances, the forms are not being used. It is in everybody's interest that the agreed form of Undertaking be used in all transactions where it would be applicable. In the event that you have a transaction wherein none of the four forms is suitable, then the form of undertaking should be agreed with the relevant Bank Manager. Once more, we are providing you with the precedent forms of Undertaking. We have now arranged that they can be collected from you local Branch, or in the alternative you may feel free to put the said undertakings up on your Word Processors provided they bear the Caveat as per the draft note which was published in the *Gazette* previously and the copy of which is enclosed herewith. The Committee takes this opportunity of cautioning you to carry out the necessary searches before completing any of these undertakings. Secondly, it would remind you that when they were printed, the Judicial Separation and Family Law Reform Act, 1989 had not come into force, and therefore the Committee suggest that you insert a clause to deal with this Act, just below the Clause dealing with the Family Home Protection Act.

If you are undertaking to furnish a good marketable title to the Bank in a situation where they have provided you with the necessary funds to acquire a property, you should ensure that your client puts you in funds to pay such stamp duties and registration fees, as are necessary to enable you to complete the registration of your client's title and in your own interests you should provide for your own fee. We hope that this note will encourage those of you who are not currently using the agreed forms to use them and avoid the difficulties which are being encountered in a number of locations throughout the Country.

□

(Reprinted from Gazette, June 1989).

Undertakings

The Law Society through the Conveyancing Committee has now agreed standard forms of Undertakings with the Irish Banks Standing Committee which are designed for use in all the normal circumstances in which Undertakings are usually given to a Bank. The wording of the forms has been agreed with the Banks after lengthy discussions and are considered to be reasonable and fair to both parties. It has been agreed that the wording of the forms shall not be subject to alteration and this should serve to eliminate the difficulties which have often occurred in the past with regard to acceptable wording for such Undertakings.

These forms may be put on a Word Processor. However, where title documents are being obtained from the Bank, the Solicitor would not be in a position to complete the Schedule to the appropriate Undertaking. It is accordingly envisaged that in those circumstances the Solicitor would apply to the Bank for the document and the Bank would issue the Undertaking with the Schedule of Documents duly completed. The documents would be released to the Solicitor on the return of the signed Undertakings.

If it is proposed to put the forms on a Word Processor the following paragraph should be added to the end of each Undertaking.

''I/We certify that this form of Undertaking is in the form agreed between the Irish Banks Standing Committee and the Incorporated Law Society of Ireland. If any discrepancy occurs between this form and the agreed form the text of the agreed form shall prevail''.

The Undertaking shall be signed by the Principal of the Firm or a Partner or by an Agent authorised in writing to do so by the Principal of the Firm. Attention is drawn to the words of caution at the bottom of the Undertaking.

STAMP DUTIES – THE FINANCE ACT, 1990

Sub-Section 5 of Section 112 of the Finance Act, 1990 provides that with effect from the 1st of September 1990 every instrument which transfers or leases land must contain a Statement in such form as the Revenue Commissioners may specify, certifying whether or not the land comes within the ambit of Section 112. The wording which was recommended by the

Revenue Commissioners in their Statement of Practice SP.SD/2/90 is as follows:

1. **In cases where the instrument comes within the provisions of the Section:**
   "It is hereby certified for the purposes of the stamping of this instrument that this is an instrument to which the provisions of Section 112 of the Finance Act, 1990 apply.
2. **In cases where the instrument does not come within the provisions of the Section:**
   "It is hereby certified for the purposes of the stamping of this instrument that this is an instrument to which the provisions of Section 112 of the Finance Act, 1990 do not apply for the reason that .... [adding the reason i.e. specifying the type of property being transferred or leased e.g. argicultural land, existing houses etc]."

Up to now the Revenue Commissioners have been fairly lenient with regard to deeds which do not contain the Certificate, but the Conveyancing Committee have now been advised that as and from the 1st of November 1990, any document which does not bear this Certificate will be returned.

Section 114 of the Act provides that no stamp duty shall be payable on any instrument whereby any property is transferred by a spouse or spouses of a marriage to either spouse or to both spouses of the said marriage.

The Conveyancing Committee has been advised by the Revenue Commissioners that they have received confirmation from both the Land Registry and the Registry of Deeds that they will not require such instruments to be adjudicated. Any instruments transferring property, whether Family Home or otherwise, between spouses which are submitted for adjudication are therefore being returned unstamped by the Revenue Office with a note explaining the reason.

□

Conveyancing Committee

NEW HOUSE GRANTS

The Conveyancing Committee's attention has been drawn to the fact that under the 1990 Housing (New House Grant) Regulations (Statutory Instrument No. 34 of April 1990), it is an integral condition of the scheme that the house in respect of which a Grant is being paid to a first time purchaser of a new house must be built by a Contractor holding a Tax Clearance Certificate or a current Form C2. When Solicitors are advising first time Purchasers of new houses who would be eligible for the grant, they should alert them to the above conditions.

The Clients should be advised that the conditions are set out in the explanatory memorandum which is issued to each applicant with the new house grant application form. Bearing in mind that most purchasers will be relying on the payment of the grant to enable them to complete the purchase, it would appear that a solicitor must advise a purchaser to check that the Builder has the necessary documentatioin before entering into the contract. If the Builder does not, then the purchasers should insist that the contract is conditional on the builder getting the necessary documentation to enable them to get provisional approval and payment of the grant prior to completion of the purchase.

□

Conveyancing Committee

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Submission of Articles for the Gazette

The Editorial Board welcomes the submission of articles for consideration with a view to publication. In general, the most acceptable length of articles for the *Gazette* is 3,000-4,000 words. However, shorter contributions will be welcomed and longer ones may be considered for publication. MSS should be typewritten on one side of the paper only, double spaced with wide margins. Footnotes should be kept to a minimum and numbered consecutively throughout the text with superscript arabic numerals. Cases and statutes should be cited accurately and in the correct format. A fee of £75.00 is paid to authors for accepted articles.

Contributions should be sent to:

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DUBLIN 7.

Annual General Meeting of the Law Society, Blackhall Place

14th November 1990

This year's meeting, which was chaired by the outgoing President, Mr. Ernest J. Margetson, was one of the longest and liveliest ever held. This was due mainly to the fact that there were three important motions before the meeting. These were on the Compensation Fund, the proposed new Education Regulations and Apprentices' pay.

Formal business

The formal business of the meeting was relatively uncontroversial though there were some questions on the annual accounts relating to the valuation of the Society's premises, the cost to the Society of legal and professional fees, the deficit on the Law School, the purchase of fixed assets and the Society's continuing overdraft. These questions were responded to by the Chairman of the Society's Finance Committee, Mr. F. Daly and the meeting proceeded to approve the Society's annual accounts. The meeting also approved of the re-appointment of Coopers and Lybrand as the Society's Auditors for the coming year.

Election of New Council

The Election Scrutineers reported the outcome of the annual election and the provincial elections for Council and declared the result as follows:—

1.	Galvin, Barry St. J.	1202
2.	Shaw, Thomas D.	1140
3.	Ensor, Anthony H.	1138
4.	Quinlan, Moya	1129
5.	Bourke, Adrian P.	1126
6.	O'Mahony, Michael V.	983
7.	MacGuill James	972
8.	P. Frank O'Donnell	971
9.	Tobin, Eva	970
10.	Clarke, Geraldine M.	962
11.	Fish, John G.	947
12.	Casey, Niall G.	945
13.	O'Connor, Patrick	930
14.	Irvine, Michael G.	927
15.	Mahon, Brian J.	912
16.	Margetson, Ernest J.	902
17.	Binchy, Owen M.	894
18.	Daly, Francis D.	894
19.	Collins, Anthony E.	891
20.	Shields, Laurence K.	877
21.	Monahan, Raymond T.	860
22.	Glynn, Patrick	831
23.	Lynch, Elma	826
24.	Murphy, Ken	826
25.	Joyce, Philip M.	815
26.	Griffin, Gerard F.	810
27.	Smyth, Andrew F.	805
28.	O'Sullivan, Eugene	787
29.	Curran, Maurice R.	780
30.	Neary, Anne	774

As there were but four candidates nominated for the four seats for provincial delegates there was no election and the four candidates for these seats were returned unopposed as follows:—

Connaught	–	McEllin, Edward M.
Leinster	–	Harte, John B.
Munster	–	O'Halloran, Mary
Ulster	–	Murphy, Peter F.R.

Report of Council for 1989/90

Perhaps, as a prelude of what was to come, the report of the Compensation Fund Committee was the one which drew the greatest amount of discussion. Concern was expressed at the high level of claims and at the notification of alleged losses during 1990. In the course of debate, the question arose as to why so few prosecutions were taken against solicitors who defrauded clients' funds and it was explained that, to some extent, this was due to the inadequacy of the existing criminal law and the difficulty of proof. This was a matter which was being addressed by the Society.

The discussion on the Education Committee report also gave an indication of some of the views that were to come later on the debate on the Education Regulations, with concern being expressed by some members that the Society had opened the floodgates to the profession. On professional purposes, concern was expressed by some members about the quality and ethical appropriateness of some professional advertising. There were some questions to the Premises Committee on the level of expenditure on the Blackhall Place premises and the Chairman explained that this had been essential to ensure that the buildings remained structurally sound. Generally, however, the meeting felt that the Society was to be congratulated on the excellence of its headquarters.

Motions

As indicated, the main business of the evening was the debate on motions before the meeting. For reasons which members will appreciate, the report on the Compensation Fund Motion has been kept brief.

Compensation Fund

There was a full debate on the Compensation Fund motion which fairly reflected the different views within the profession in relation to the Fund. Concern was expressed about the level of claims and the burden being placed on the profession. Some speakers favoured replacing the Fund by a system of fidelity bonding. Others emphasised the importance to the profession of maintaining the Fund because of the protection it afforded clients. It was said that the Fund was unique to solicitors and served the profession well. The President indicated that the Society had made representations to the Department of Justice for certain changes in the law relating to the Fund to be included in the new Solicitors Bill. The Compensation Fund was a statutory Fund and this placed a legal obligation on the Society to maintain it.

On being put to the meeting the Motion was lost (65 members voted in favour of the motion and 68 against).

Education Regulations

The President read the Motion which has been circulated to members. The motion was as follows:—

"That the proposed Education Regulations entitled Solicitors Acts 1954 and 1960 (Apprenticeship and Education) Regulations 1990, a copy of which is attached hereto and marked with the letter "A" and signed by the first named Proposer of this Motion, be considered by the members (at the Annual General Meeting of the Society to be held on the 14th day of November, 1990) for either:—

a. Approval, or

b. Disapproval, or

And that the Council be requested to revoke any previous decisions made in relation thereto."

The President said that the Regulation has been circulated in the Annual Report. The President proposed that Mr. R. Monahan, Chairman of the Education Committee, would give the meeting a brief resume of the Education Regulations.

Mr. Monahan summarised the main changes that the new regulations would make. He told the meeting that, as a result of the court actions taken against the Society on its admission procedures to the Law School, the old Regulations had been found to be defective. The new Regulations represented a "tightening up" of the admission procedures. Mr. Monahan said that it was anticipated that under the new Solicitors Bill it would be more difficult for the Society to change the Regulations. The view of the Education Committee was that the change should be made now.

In the course of the ensuing debate, some members expressed concern at what they perceived to be an "opening of the floodgates" by the Society. Unless the Society took appropriate action, there would not be sufficient work for newly qualified solicitors. The view was also expressed that the quality of education and training in the Society's Law School should be maintained and that those entering the profession should be "practical lawyers". Responding to the debate, Mr. Monahan said that the Society could not impose a numerical limit on those entering the profession. The Education Committee was very concerned with the maintenance of standards. The courses had been restructured and a lot of work had been done to try to ensure that both educational and professional standards were maintained. It was hoped that the new Solicitors Bill would contain a provision prohibiting solicitors from practising on their own until they were at least three years in practice. Entitlement to enter the Law School, without passing the entrace examination, was limited to law graduates only. Mr. Monahan said that the question of standards had been addressed by ensuring that the newly structured examination system made it possible for only those who had reached a certain standard to qualify as solicitors. There was no evidence to suggest that university law faculties would increase the numbers studying law to the point where it could be said that the Society had "opened the floodgates". The Society had retained discretion in relation to the Regulations and this included automatic admission to the Law School for law graduates only.

The President suggested that the Regulations should be approved subject to allowing members the right to submit amendments for consideration.

This was agreed, subject to the members having the right to submit amendments within fourteen days of the date of the meeting.

Apprentices Salaries

The President informed the meeting that there was a Motion from SADSI currently on the Council agenda seeking to have the salary paid to apprentices increased substantially. This Motion had been adjourned until after the Annual General Meeting. Mr. R. Monahan had suggested an amendment to that Motion to the effect that the amount paid to apprentices should be linked to the Consumer Price Index. The increase would be backdated to 1987 which was the date of the increase given to apprentices.

A new Motion had not been submitted by the Southern Law Association providing that apprentices' pay should be determined by market forces and that the Law Society should not issue any recommendation in relation to it. There was a full debate on this motion and, on being put to the meeting on a show of hands, the motion was lost.

Tribute to Outgoing President

Mr. D. Moran proposed a vote of appreciation for the Outgoing President, Ernest J. Margetson. This was seconded by Mr. Q. Crivon. Mr. Moran said the President has always served the profession well and carried out his duties with courtesy and good humour. He had chaired a difficult Annual General Meeting and had exercised great skill and patience. Mr. Moran thanked the President for the service which he had given to the profession during the year.

Conclusion

All in all, a constructive and useful debate on matters of major policy for the Society. □

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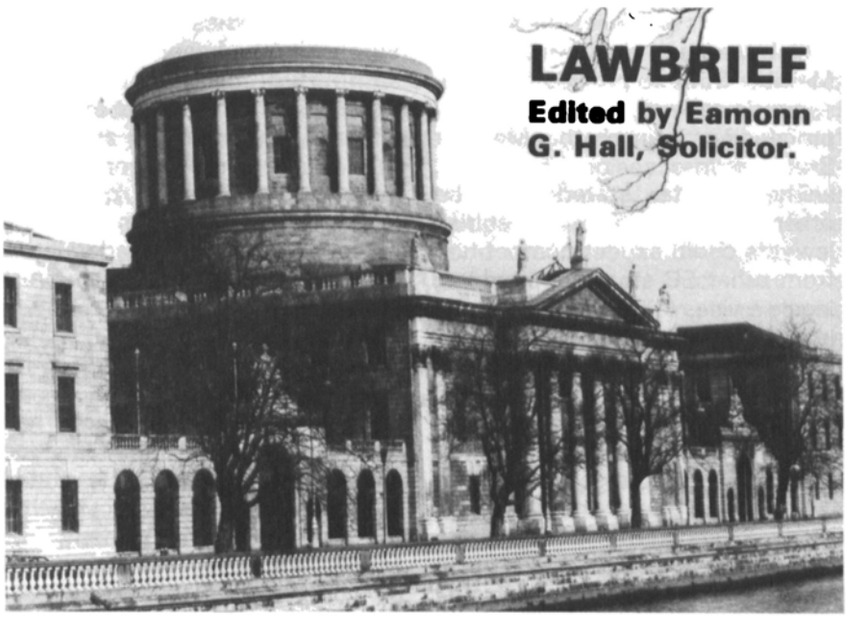

BIG BANG IN LEGAL PROFESSION!

The Minister for Justice and Minister for Communications, Mr, Ray Burke, T.D., stressed at a Conference on ''Big Bang in the Legal Profession'' on Tuesday 20th November, 1990 (sponsored by The Sunday Business Post and WANG) that he agreed with most of the Fair Trade Commission's Report on the legal profession. The Minister stated the legal profession was at a crossroads; the impetus for change came not only from the recent publication of the Fair Trade Commission's Report but also from European and international developments impinging on the provision of legal services and on private international law. These developments would present new challenges to the profession in the closing decade of the century and beyond.

Fair Trade Commission Report

Many of the changes recommended by the Commission would require legislation, and the Minister said that such legislation in the case of solicitors was already at an advanced stage of preparation in his Department. Legislation would take account of many of the Commission's recommendations affecting that branch of the legal profession including complaints machinery (incorporating lay involvement), multi-disciplinary and multi-national practices involving solicitors, fee advertising, easier interchange between the professions and consumer protection through indemnity insurance.

The Minister stated that the public was entitled to a service from the legal profession that was efficient and provided at a cost not inflated by restrictive practices or concerted price-fixing. He stated that the Fair Trade Commission visualised more flexible structural arrangements within which such a service could be provided, but the Commission did not prescribe a compulsory fusion of both branches of the legal profession though they stated that nothing should be done to frustrate such a future development.

Apart from the fusion of the two branches of the legal profession, the Minister stated that much beneficial change was possible through a reform of the present institutional structures. Solicitors could be allowed to form more flexible working arrangements with members of other professions whose service were closely linked with those provided by the legal profession. Solicitors could be permitted to incorporate, and to form partnerships with legal practices in other states to reflect the growing international dimension in legal affairs. Barristers for their part could allow persons other than solicitors to instruct them and both branches of the profession could allow much easier transfer between their respective disciplines.

Solicitors as Judges

The Minister stated that when the Government comes to decide on the changes that are needed in relation to the profession, the public interest will be kept firmly in mind. Ireland's legal system needs to be consumer-oriented. The legal system was not there to meet the convenience or practices of the profession. When changes were being decided, their impact on the financial health of the profession would not be a crucial consideration.

The Minister foresaw that radical changes would have to be made in such areas as fee determination, lawyers' complaints machinery – to introduce some lay involvement – and in the requirements for transfer between both branches of the legal profession. He also agreed in principle with the recommendation of the Fair Trade Commission that solicitors should be qualified for appointment to the bench in the higher Courts. Such a change would provide the psychological inducement that many solicitors may require to exercise the rights of audience that they have enjoyed in the High Court since 1971. Such a change would provide more competition in advocacy services, which were monopolised by one branch of the legal profession at present. The Minister stated that he had already initiated a review of the monetary jurisdiction limits in the Circuit and High Courts. The Fair Trade Commission recommended a substantial increase in the present limits which had not been changed since 1982. Anything that could be done to reduce the numbers of cases that must go to the Circuit and High Courts would have a major effect in reducing legal costs – according to the Minister.

Land Registry and Registry of Deeds

The Minister referred to the recent decision of the Government to convert the Land Registry and Registry of Deeds into a Semi-State Body. This decision was taken against the background of chronic difficulties in the Land Registry particularly. The Government was determined to see the whole operation of land registration run on an efficient and business-like basis providing a service to which the public is entitled at reasonable cost.

Internal Market 1992

The completion of the Internal Market in 1992 – which was essentially an integrated programme of new European law – would mean that increasingly business transactions in goods and services in connection with property, financing, taxation etc. would be governed by European law. This meant that the knowledge, skills and services that lawyers require to provide to their clients would change rapidly in the years ahead. Lawyers advising clients in Ireland would need to become versed in European law and acquire greater familiarity with the civil law systems that apply on most of the European mainland.

The legal profession must take account of these developments and plan for change, the Minister stated. More flexible partnership arrangements with legal practices in other EC States would no doubt help and it may be that other institutional changes requiring legislative authority should be made. The message must get through to the legal profession – together with any other economic interest group – that to wait in hope that it could absorb the changes in Europe and remain much as it was before would be very foolish and unrealistic.

Recognition of Qualifications

Mr. Burke stated that a new EC Directive on a general system for the recognition of higher-educations diplomas (89/48), which Member States of the Community were required to implement by the 4th January 1991, had particular implications for the legal profession. This Directive – which was part of the arrangements to complete the internal market – would enable lawyers who are qualified in any EC Member State to establish practices in any other Member State, subject only to an adaptation period or aptitude test that may be imposed upon them.

The Minister stated that under the Directive Irish lawyers would be able to offer their services to clients in other countries and vice versa. Obviously, expertise in European law would be essential for any move on the part of Irish legal firms to provide services in the rapidly developing European market in legal services. The recent Directive supplements an earlier one in 1977 which permits a lawyer in one Member State to provide a service – particularly in the case of legal proceedings – in another Member State on an occasional basis.

The Minister stated that the other side of the coin was that Irish lawyers could expect competition from other EC states in providing legal services to Irish clients. As the legal problems faced by individuals and commercial enterprises increasingly took on a European and international dimension, Irish clients would be offered the services of "foreign" European lawyers, in a barrier-free market. Mr. Burke stated that he was aware that discussions were taking place on liberalising the provision of legal services on a multi-lateral basis, in the context of the current GATT negotiations. The effects of the Single European Act, and the European Directive relating to professional services, would also force Member States to reassess the whole body of law and practice governing their own legal professions. Local rules restricting the way in which lawyers may practise at home may be swept away as lawyers from other Member States use their entitlements under EC law to provide services in any Member State.

Law Society Advocating Change

The Minister stated that he was aware that the Law Society in particular had been advocating major change in the profession for some time, with an eye to the developments that he had already referred to. He commended the Law Society for doing that. The Minister stated that he knew that the Law Society regularly reports on Euro-legal developments to the profession; that the Law Society had a special Standing Committee on EC and International Affairs whose aim it was to raise the consciousness of the profession and to stimulate practitioners to educate themselves on the legal implications of 1992. Among the practical steps taken, stated the Minister, was the introduction of on-line computer facilities in European community law.

The Minister stated that he was aware that some legal practices, universities and semi-state organisations and others had obtained access to the Celex European law base which is disseminated by the European Commission. These were examples of the type of thinking and effort that was required but on a much greater scale in every quarter of Irish social and economic activity to enable us to cope adequately with the vast changes that are inevitable over the next decade and beyond.

Legal Education

Mr. Burke stated that there had been concern about legal education for many years. The Minister stated that it was very unsatisfactory that the resources of so many law schools and colleges were involved in what seemed to be an uncoordinated way in the education and training of our lawyers. These was a considerable amount of duplication between the various bodies involved.

Mr. Burke stated that there was a need to co-ordinate all this activity in a meaningful and planned way, and streamline the process of legal training with a view to making economic use of the limited teaching resources that were available. The Minister stated that "it was time to devise a better and more equitable and consistent way of channelling our highly qualified law graduates into the professional streams, than the present uneven arrangements, and to avoid acrimonious litigation such as we have witnessed recently in this area."

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The Minister referred to the Commission recommendation that common vocational training should be introduced for solicitors and barristers leading possibly to the foundation of an Institution for Legal Education. The Minister stated that there was much to be said for this idea. It would help to solve the problems that he had mentioned as well as providing an adequate response to the challenge of coping with the substantial increase in the need for education in European law that current developments would make inevitable for the future training of lawyers. The Minister stated that the Fair Trade Commission also recommended that an advisory committee on legal education and training should be established by the Minister to review the education and training of lawyers at all stages and to implement the system of common vocational training already referred to.

The Minister concluded by saying that he looked forward to discussing this important matter with the bodies that are responsible at present for the training of Irish lawyers.

SOLICITOR: CLIENT SUSPECTED OF FRAUD: DUTY OF CONFIDENTIALITY: COURT HAS JURISDICTION TO GIVE DIRECTIONS

In Finers and Others -v- Miro (Court of Appeal) (England and Wales) Dillon, Balcombe and Butler-Sloss LJJ, July 25, 1990, *London Independent* (Law Report) September 9, 1990 it was held that the court had jurisdiction to give solicitors directions as to how they should continue to deal with funds and assets which they held or controlled on behalf of a client against whom there was prima facie evidence that he had obtained them fraudulently. Such directions could include notifying third parties who might have a claim against the client or his assets, notwithstanding the solicitors' professional duty of confidentiality towards their clients.

Corporate Trust

The Court of Appeal dismissed the defendant's appeal from Mummery J who, on 29 June 1990, gave the plaintiffs directions concerning the property, investments, moneys and companies they held or controlled on behalf of the defendant. The plaintiffs were, respectively, Finers, a London firm of Solicitors, Mr. Stein, one of its partners, and two companies owned and controlled by partners in Finers. The defendant was a businessman specialising in insurance who had retained the service of Mr. Stein in setting up an elaborate corporate trust structure to hold his assets.

The object of the trust exercise was secrecy, the plaintiffs being bound by a duty of confidentiality. But in the wake of allegations that the defendant had fraudulently misappropriated the assets of a US based insurance company currently in liquidation, the plaintiffs applied for directions as to how they should continue to deal with the defendant's assets, and what, if any, information they should give to the US liquidator, currently engaged in litigation against the defendant in the US. The defendant denied the allegations and applied to strike out the proceedings.

Dillon LJ said that the liquidator had not yet made a claim against any of the plaintiffs. But it was arguable that they had constructive notice of the defendant's fraud, if there had been fraud, and held their various powers over the assets in question on a constructive trust for the liquidator (see *Agip (Africa) -v- Jackson* [1989] 3 WLR 1367). It was also arguable that if Mr. Stein, with the knowledge he had, exercised his powers under the schemes he had set up, to transfer any of the assets in question to the defendant, he might be regarded by an English Court as having acted dishonestly so as to render himself or the firm liable to the liquidator for the amounts involved.

The defendant argued that the court had no jurisdiction to entertain the plaintiff's application for directions under Order 85 of the *Rules of the Supreme Court,* because there was no "relevant trust". There was no trust, constructive or otherwise, yet established in favour of or claimed by the liquidator of the insurance company. However, that did not avail the defendant if there was a trust for the benefit of the defendant against which the liquidator, on the facts known to the plaintiffs, might be entitled to claim.

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The defendant argued that a bare trust of his assets held for him absolutely would not be a relevant trust, and that in any event, on the schemes set up by Mr. Stein, the underlying assets which might be claimed to represent moneys misappropriated from the insurance company belonged absolutely to companies set up under the scheme, and the only property which could be held subject to trusts for the defendant were shares in scheme companies and not the underlying assets. As to that, however, if there has been fraud then the schemes set up by Mr. Stein had, although he did not know it, been set up to conceal the traces of fraud, and in such circumstances there would be no difficulty in piercing the corporate veil.

Court should be able to give Directions

The plaintiffs had fiduciary powers in respect of the underlying assets either directly or through their control of the scheme companies and trusts; they claimed no interest for themselves in those assets or the scheme companies or trusts, save for the proper professional costs of the firm as Solicitors acting for the defendant. In his Lordship's judgment, the court has jurisdiction under Order 85, and should be prepared to give directions in the dilemma in which the plaintiffs now found themselves. Such directions could serve no useful purpose unless sufficient information was given to the liquidator to enable him to make a claim. The difficulty was that this must breach the secrecy which was the whole object of the scheme and must breach the legal professional privilege to which the defendant was entitled as against the plaintiff.

Privilege lost by Fraudulent Intent

Dillon LJ stated that it was well established, however, that privilege was lost by the criminal or fraudulent intent of the client, whether or not the solicitor was aware of that intent. On the material before the court, it seemed probable that the defendant may have consulted Mr. Stein for the purpose of being guided and helped, albeit unwittingly by Mr. Stein, in covering up or stifling a fraud on the insurance company, of which there was a prima facie case resting on solid grounds.

It did not matter that it was the solicitor himself who sought to tear aside the client's privilege and not a third party with a hostile claim. Privilege did not compel a solicitor to continue, at his own personal risk, to aid and abet a defendant in covering up an apparent fraud.

The court was entitled to give directions enabling the liquidator to decide whether or not to make any claim on the property, investments, moneys and companies now in the plaintiffs' possession or control, or whether or not to object to the plaintiffs's transferring or releasing such property or assets to the defendant.

Balcombe LJ delivered a concurring judgment and Butler-Sloss LJ agreed. □

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Insurance Act, 1989

Queries have arisen from a number of solicitors in relation to the completion of a form of questionnaire furnished by the Insurance Compliance Bureau (I.I.C.B.) in relation to Part IV of the Insurance Act 1989 ("the Act") which came into operation on the 1st October, 1990 and which deals with the regulation of insurance agents and brokers ("Insurance Intermediaries").

Before progressing further it should be explained that from that date, insurance companies may not appoint a person as an intermediary or pay any commission to an intermediary unless it is satisfied, having made reasonable enquiry, that the intermediary is either a member of a recognised representative body of insurance brokers (under Section 44 (1) (a) of the Act) or complies with the requirements of the Act.

The I.I.C.B. was therefore set up by the Insurance Federation as an administrative body to monitor compliance by insurance intermediaries with the Act. The establishment of the I.I.C.B. was presumably the most effective way of dealing with this, the alternative being that intermediaries would have to provide information separately to each insurance company with whom they hold agencies. Accordingly it simplifies the matter, not only from the intermediary's point of view but also from the insurance company's point of view.

The form of questionnaire furnished by the I.I.C.B. asks that no more information be furnished than is necessary to enable them to confirm to their clients (namely the insurance companies) that the intermediary is complying with Part IV of the Act. Further the explanatory notes on the side of the questionnaire are most helpful and amongst other things provide explanations for seeking the specific information sought.

It appears a number of queries have been raised by solicitors in relation to the completion of the questionnaire and indeed in relation to the obligations pursuant to Part IV of the Act. Accordingly it might be helpful if some of the statutory obligations imposed on insurance agents by the Act were set out. It should be pointed out that the obligations on insurance brokers and on insurance agents are not exactly the same. However, as most solicitors are more likely to be agents as opposed to brokers it is proposed to deal with obligations imposed on agents only. For the sake of clarification an insurance agent means any person who holds an appointment in writing from an insurer enabling him to place business with that insurer but does not include an insurance broker or an employee of an insurer when the employee is acting for that insurer.

Briefly these requirements may be summarised as follows:—

1. He must hold his appointment in writing from each insurance company for which he is an Agent.
2. He must state on his letterheadings and business forms that he is an insurance agent and the name and names of every insurance company for which he is an agent.
3. He must inform any proposer of an insurance contract that he is an insurance agent and the name or names of the insurance companies for which he is an agent.
4. The Minister is empowered under Section 49(3) of the Act to bring into force not earlier than 1 October, 1922, a requirement that insurance agents may not hold more than four appointments in respect of non-life insurance and four in respect of life insurance.
5. In the case of a Tied Agent, he must state on his letterheadings and business forms that he is a Tied Agent and the name or names of every insurance company for which he is a Tied Agent. A Tied Agent means any person who enters into an agreement or an arrangement with an insurance company whereby he (the Tied Agent) undertakes to refer all proposals of insurance to that company or any person who enters into an agreement or an arrangement with an insurance company which restricts in any way his freedom to refer proposals of insurance to any other insurance company.
6. Insurance Agents must, pursuant to Section 48 of the Act, maintain separate bank accounts, one relating to non-life business and the other relating to life business designated "Section 48 — Non-Life Insurance Account" and "Section 48 — Life Assurance Account" respectively.
7. Where turnover is in excess of IR£25,000 per annum the insurance agent must take out an insurance bond to the value of in the case of life insurance business IR£25,000, and in the case of non-life insurance business to the value of the greater of IR£25,000 or 25% of the insurance agent's life insurance turnover in the previous accounting year. The Minister for Industry and Commerce ("the Minister") has specified the form of these bonds in Statutory Instrument No. 191 of 1990, which also came into operation on the 1st October, 1990.
8. Where a bond is held the insurance agent is obliged to display a copy of the bond in a prominent position in all premises occupied by him and the fact that a bond is held must be mentioned in the insurance agent's literature and business notepaper.
9. Where an Insurance Agent accepts from a client a completed insurance proposal, whether or not accompanied by a sum of money, with a view to effecting with an insurance company a policy of insurance or where an insurance agent accepts money from a client in respect of a renewal of a policy of insurance which has been invited by the insurer or in respect of a proposal accepted by an insurance company he must give to the client a receipt stating that it is issued in pursuance of Section 52 of the Act and specifying:-
   a. The name and address of the client.
   b. The amount of the said sum if any and the date of it's receipt by the Intermediary.

(Contd. on page 375)

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The President of the Law Society, Ernest Margetson, with (left to right): Mr. Cathal MacDomhnaill, Chairman of Revenue Commissioners and Brian Bohan, Chairman of the Society's Taxation Committee.

LAW SOCIETY DINNER FOR THE PRESIDENT OF IRELAND
22 OCTOBER, 1990
The President of the Law Society (1989/90), Ernest Margetson with His Excellency Patrick Hillery, Uachtarain na hÉireann, and Donal G. Binchy, Senior Vice President (1989/90).

PRESENTATION OF CHEQUE TO HAEMOPHILIA SOCIETY BY MARACYCLISTS (MIZEN–MALIN HEAD)
(Left to right): Vivian Matthews, Solicitor, Frank Bird (Organiser, Irish Haemophilia Society), Brendan Walsh, Solicitor, Frank Lanigan (Project Organiser) and Frank Heffernan, Solicitor, presenting a cheque for £11,500.00 to the Irish Haemophilia Society.

LAW SOCIETY SEMINAR ON RETIREMENT – 13 OCTOBER 1990
The Minister for Social Welfare, Dr. Michael Woods, T.D., with Mrs. Moya Quinlan (left) and Ms. Geraldine Clarke, Chairman of the Society's Public Relations Committee 1989/90.

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The Statute of Limitations and Negligence Actions

Last February, in its decision in ****Hegarty,* **a medical negligence action, the Supreme Court examined Section 11 (2) (b) of the Statute of Limitations 1957 and rejected an interpretation which would have introduced the so-called "discoverability" test into Irish law.

Section 11 (2) (b) provides as follows:

> "An action claiming damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, shall not be brought after the expiration of three years from the date on which the cause of action accrued".

This sub-section can cause hardship to potential plaintiffs in a situation where an injury caused by a negligent act does not become manifest until after the expiration of more than three years from the occurrence of the act giving rise to the injury. In most personal accident situations injuries immediately manifest themselves at the time of the alleged negligent act. The cause of action accrues when the accident takes place and the three years will start to run from that date. However, in *Hegarty*, as in many medical negligence actions, there was a considerable interval between the treatment which allegedly caused the injury and the realisation of this injury. In proceedings only issued in October 1982, the plaintiff (Hegarty) alleged negligence against two surgeons in the separate performance by them of operations to her nose. She claimed that the first defendant in 1973 had performed a "septal resection" upon her as treatment for trouble with an airway blockage in her nose and that he did so negligently, causing the septal resection to collapse following the operation. She further claimed that another operation was carried out in 1974 by the second defendant to remedy the situation arising from the first operation, consisting of a "salastic bridge inlay" upon the plaintiff. The plaintiff alleged that the inlay was initially successful and improved the plaintiff's appearance but that subsequently the same deteriorated and she claimed that the deterioration was caused by the negligence of the second defendant.

By
Margo Ford B.L.

Barron J. in the High Court indicated that had he taken the view on the facts that if discoverability was the test as to the date of the accrual of a cause of action that the claim against the first defendant would still be barred by the sub-section, since time would have begun to run, at the latest, when the plaintiff was advised in 1974 to have the remedial operation then carried out by the second defendant. With regard to the second defendant, the High Court found as a fact that the plaintiff was dissatisfied with the result of the second operation by the year 1976; that although she did speak about the matter to another doctor she did not appear to have consulted him professionally until 1978; that on balance there was no reason for her to seek legal advice at that stage; that she should have first sought legal advice in 1980; and that, accordingly, her cause of action would have been in time in respect of the proceedings actually issued in October 1982.

However, Barron J., in his reserved judgment, concluded that having regard to the decision of the Supreme Court in *Carroll -v- Kildare Co. Council* [1950] I.R. 258, that the cause of action must be taken to have accrued within the meaning of the sub-section when the act causing the damage was committed. Accordingly, the cause of action, if it existed against the first defendant, would have accrued in 1973 and the cause of action against the second defendant would have accrued in 1974. The High Court had rejected an interpretation based on objective reasonable discoverability and held that the claims against both defendants were time barred by Section 11 (2) (b).

In the main Supreme Court judgment, Finlay C.J. (Walsh and Hederman JJ. concurring) delineated three possible alternative constructions of the sub-section:

(i) The cause of action would be deemed to have accrued when the wrongful act was committed;

Margo Ford, B.L.

(ii) The cause of action would be deemed to have accrued at the time when the personal injury, allegedly arising from the wrongful act, manifested itself; or

(iii) The cause of action would be deemed to have accrued only when the injured party not only has suffered the committing of a wrongful act, but had also suffered damage (personal injury) and could, by the exercise of reasonable diligence, have discovered that such personal injury was caused by the wrongful act complained of (i.e. objective discoverability).

A construction based on the date on which the causal connection between the wrongful act and the personal injury was *actually* discovered by a potential plaintiff (i.e. subjective discoverability) was not considered by the Court.

The Chief Justice held that the second construction was the correct one. Per Finlay, C.J.:

"A tort is not completed until such time as damage has been caused by a wrong, a wrong which does not cause damage not being actionable in the context within which we are dealing (i.e. the tort of negligence). It must necessarily follow that a cause of action in tort has not accrued until at least such time as the two necessary component parts of the tort have occurred, namely, the wrong and the damage".

Later, per Finlay C.J.:

" . . . the time limit commenced to run at the time when a provable personal injury, capable of attracting compensation, occurred to the Plaintiff, which was the completion of the tort alleged to be committed against her".

Likewise, per Griffin J. (in his separate concurring judgment):

"The period of limitation therefore begins to run from the date on which the cause of action accrued, i.e. when a complete and available cause of action first comes into existence. When a wrongful act is actionable 'per se' without proof of damage, as in, for example, libel, assault, or trespass to land or goods, the Statute runs from the time at which the act was committed. Where, however, when the wrong is not actionable without actual damage, as in the case of negligence, the cause of action is not complete and the period of limitation cannot begin to run until that damage happens or occurs."

In his concurring judgment, McCarthy J. stated:

"The fundamental principle is that words in a statute must be given their ordinary meaning and . . . I am unable to conclude that a cause of action accrues on the date of discovery of its existence rather than on the date on which, if it had been discovered, proceedings could lawfully have been instituted. I recognise the unfairness, the harshness, the obscurantism that underlies this rule, but it is there and will remain there unless qualified by the legislature or invalidated root and branch by this Court."

The question of the constitutionality of Section 11 was not raised in *Hegarty* but Finlay C.J. was careful to point out that the Court's interpretation of the Section did not merit the conclusion that the Section was unconstitutional.

In rejecting a construction of Section 11 based on either 'objective' discoverability or 'subjective' discoverability, McCarthy J. (as quoted supra) recognised the potential unfairness and harshness of the construction of the sub-section the Court was obliged to make, but stated that it was a matter for the legislature to amend the statute if it saw fit.

In a legal system where liability is based on establishing fault, statutes of limitation are necessary to effect a balance between a potential plaintiff, who should be entitled to access to the courts to litigate his claim, and a potential defendant, who should not be prejudiced in preparing his defence by a plaintiff's delay in issuing proceedings. A limitation period is by its nature arbitrary and can seem unduly harsh in individual cases. Finlay C.J. identified this balancing of interests as follows:

"It is quite clear that what is sometimes classified as the harshness and injustice of a person failing to bring a cause of action to trial by reason of exceeding a time limit not due to his or her own particular fault, may well be counterbalanced by the harshness and injustice of a defendant called upon to defend himself at a time when, by the passage of years, his recollection, the availability of his witnesses and even documentary evidence relevant to a claim in tort or contract have disappeared."

McCarthy J. saw a solution in the legislature vesting a wide form of discretion in the courts in deciding whether a particular claim is time-barred. McCarthy J. favoured the addition of "a saving clause based upon whether or not the court considers in all the circumstances that it is reasonable to extend the time". Such a clause could be perceived as contrary to the public interest in finality and certainty in legal proceedings. Such an 'equitable' discretion exists in England under the Limitation Act 1980 (previously Limitation Act 1975) and has been exercised by the English courts in such a way as to avoid injustice in individual cases (see e.g. *Simpson -v- Norwest Holst South Limited* [1980] 2 All E.R. 471).

Our Supreme Court has now made it clear in *Hegarty* that such an overriding discretion cannot be read into Section 11 (2) (b) as it now stands.

In response to the *Hegarty* decision the government introduced the Statute of Limitations (Amendment) Bill 1990 to the Seanad in April. The purpose of the Bill is stated as "to amend the law on limitation of actions insofar as it applies to latent personal injuries". It follows closely the model recommended by the Law Reform Commission in its Report on the Statute of Limitations: claims in respect of latent personal injuries (LRC 21 – 1987). The Commission has recommended that the legislature should prescribe a discoverability test relating to personal injuries. The new Bill provides an alternative triggering factor causing the limitation period to run i.e. the date of knowledge. The Bill, which applies to negligence, nuisance and breach of duty actions in which a claim is made for damages for personal injuries, provides that the three

year limitation period runs from either – (a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured.

(a) reflects the existing law under Section 11 (2) (b) of the Statute of Limitatins while (b) alleviates the hardship caused by Section 11 to a Plaintiff whose injuries remain latent until after three years have passed from the date of injury.

The knowledge referred to is that of the person injured, or where that person has died, his personal representative or dependant. In the case of a person under a disability Section 5 of the Bill provides that the action may be brought at any time before the expiration of three years from the date when he ceased to be under a disability or died, which ever first occurred.

Although there is an element of discretion in the Court's decision as to when the date of knowledge actually was, the Bill does not vest in the Courts a broad discretion as envisaged by Mr. Justice McCarthy in the *Hegarty* case.

Instead the Bill lists the factors which must be considered. It appears the list is intended to be exhaustive. The question is purely one of fact. Section 2 provides that the knowledge referred to is knowledge –

(a) of the fact of injury.
(b) that the injury was significant and
(c) attributable to the causal act as alleged.
(d) of the identity of the defendant and any other person alleged to be at fault.

Although this might at first appear to be a wholly subjective test the Section goes on to provide that knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant. The individual is expected to act reasonably and is fixed with knowledge of facts observable or ascertainable by him with the help of medical or other expert advice. If he takes all reasonable steps to obtain such advice and act upon it, then delay on the part of the experts will not operate against him in the Court's assessment of his date of knowledge. Consideration is also given to the individual whose capacity to acquire the requisite knowledge has been affected by the injury itself. The onus is on the plaintiff to satisfy the Court as to the date of knowledge.

Section 4 rectifies the considerable injustice perpetrated by the existing law in cases where an injured person dies before the expiration of the limitation period. Although his cause of action survives for the benefit of his estate under Section 7 of the Civil Liability Act his dependants do not benefit from any extension of the limitation period. Under the new Bill, however, the three years will run from the date of death or the date of the personal representative's knowledge.

Sections 5 and 6 extend the new limitation period to cases of disability and fatal injury cases under Section 48 of the Civil Liability Act 1961. Surviving dependants/beneficiaries are to be judged separately as to their date of knowledge and the Bill provides that if one beneficiary is out of time this will not necessarily defeat the other beneficiaries' cause of action if they can show their date of knowledge to be within three years of the issuing of the proceedings.

The Bill is a compromise solution which introduces a mixed objective/subjective test of discoverability into Irish law and accommodates the existing Section 11 2 (b) and the interpretation put upon that Section by the Supreme Court in the *Hegarty* case within the new broader framework. Section 7 is an important section which ensures a major impact for the Bill's provisions and should be noted by practitioners. It provides that the

The Medico-Legal Society of Ireland

PROGRAMME – WINTER 1990–SPRING 1991

1. *THURSDAY, 17th JANUARY 1991:*
   Mary MacMurrough Murphy, B.C.L., L.LB., B.L.
   – "THE PRESIDENTIAL ADDRESS"

2. *THURSDAY, 21st FEBRUARY 1991:*
   Dr. Derek Freedman, M.D.
   – "AIDS – A GROWING PROBLEM"

3. *THURSDAY, 21st MARCH 1991:*
   Patrick MacEntee, Senior Counsel
   – "MURDER/MANSLAUGHTER – A CRITICAL REVIEW OF THE CRIMINAL LAW"

Details in relation to the Annual Dinner and the Annual General Meeting will be published later.

Lectures take place at 8.30 p.m. at the Union Service Club, St. Stephen's Green, Dublin 2, by kind permission.

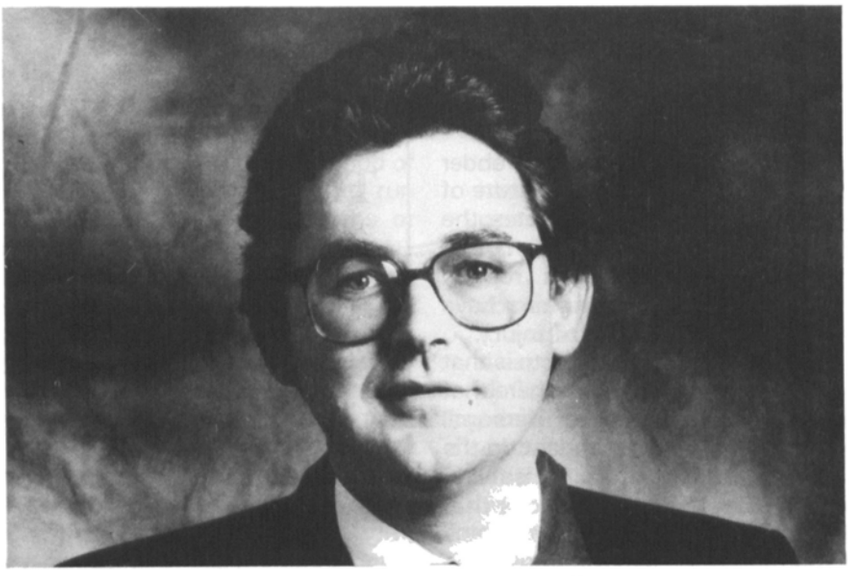
Members and their guests are invited to join the Council and guest speakers for dinner at the Club at 6 p.m. for 6.30 p.m. on the evening of each lecture. Members intending to dine must communicate, not later than the previous day, with Miss Mary MacMurrough Murphy, B.L., at 2 Whitebeam Road, Clonskeagh, Dublin 14 (Telephone 694280) or at the Law Library, Four Courts, Dublin 7 (Telephone 720622).

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. Membership proposal forms and full details may be obtained from Mary McMurrough Murphy at the above address.

Act shall be retroactive in its effect and shall apply to all causes of action "whether accruing before or after its passing and to proceedings pending at its passing".

It may take a year or more before the Bill is passed into law but if within that year a potential litigant presents with a case that is outside the limitation period as it now stands but three years have not yet passed from his "date of knowledge", practitioners should issue proceedings in any event. The Bill will undoubtedly lead to a marked increase in the number of personal injury claims during a period of adjustment and may, ironically, hasten the introduction of no fault liability by increasing pressure on insurance companies.

**Hegarty -v- O'Loughran and Edwards*; The Supreme Court (per Finlay C.J. with Walsh and Hederman JJ. concurring, with separate concurring judgments of Griffin and McCarthy JJ) – 8th February 1990 [1990] ILRM 403. □



Dominic M. Dowling was recently elected as President of the Dublin Solicitors Bar Association. Boasting almost 1,500 members the Association is the largest in the Country and was instrumental in promoting last years very successful "Make A Will Week" Campaign. Mr. Dowling qualified in 1976 and is a partner in the firm of Dowling Butler. Mr. Dowling states that in his year in office he would like to see the Profession focusing in on the need for increased client care if we are to compete in the core and peripheral areas of Legal Services which seem to be so much under attack by other professionals and institutions. He went on to say that "it is by being better that we can hope to beat our competitors thus securing and expanding the traditional areas where Solicitors provide services to the Public".

Annual Review of Irish Law 1989

RAYMOND BYRNE & WILLIAM BINCHY

This is the third volume in an annual review series which provides practitioners, academics and students with an analytical, perceptive account of work by the courts, the Oireachtas, scholars and practitioners during the year.

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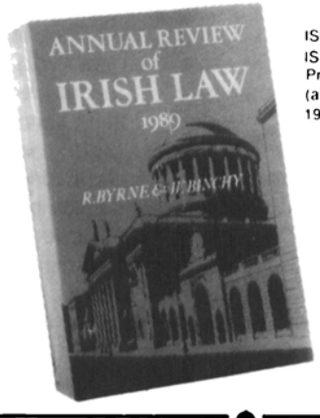

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The Disciplinary Committee Annual Report

Committee: Walter Beatty *Chairman*
W.B. Allen
Terence Dixon
Michael Hogan
Donal Kelliher
Elma Lynch
William A. Osborne
Moya Quinlan
Grattan d'Esterre Roberts
Andrew F. Smyth

Between the 1st September 1989 and the 31st August 1990 the Disciplinary Committee met on 29 occasions.

The following applications were considered by the Committee during this period: —

NEW APPLICATIONS: 54

Law Society
Prima facie cases found 36
Prima facie decision adjourned. 2

Private
No prima facie cases found. 15
Prima facie decision adjourned. 1

At Hearing
Law Society 36
Misconduct 17
No misconduct 2
Adjourned generally 3
Leave to withdraw after inquiry directed 2
Application dismissed 1
Adjourned 2
Awaiting inquiry 9

APPLICATIONS FROM PREVIOUS YEAR 19

Law Society
Misconduct 6
No misconduct 3
Leave to withdraw after inquiry directed 2
Application dismissed 1
Adjourned generally 1
Adjourned 3

Private
Prima facie decision adjourned 2
Inquiry adjourned 1

SUBJECT MATTER OF COMPLAINTS

Civil Claims
Conveyancing
Probate
Solicitors' Accounts Regulations

PRINCIPAL GROUNDS ON WHICH THE COMMITTEE FOUND MISCONDUCT

Breaches of the Solicitors' Accounts Regulations viz.

Books of Account were not maintained in accordance with the Solicitors' Accounts Regulations; Deficits were permitted to arise on Clients Accounts; Clients' funds were improperly and knowingly applied for personal benefit; False entries and attendance notes were prepared; Misleading statements were made to the Society; Assets of an Estate were dealt with unlawfully; Interests of beneficiaries were not protected.

Failure to file Accountant's Certificates.

Practising as a solicitor without a Practising Certificate contrary to the Solicitors' Acts 1954/1960.

Permitting actions to become statute barred.

Failure to comply with undertakings.

Delay in the registration of title and failure to deal with Land Registry queries.

Failure to complete the registration of a site and to take the necessary steps to perfect the client's title.

Paid purchase monies to the client notwithstanding that they were to be held in trust by the solicitor pending the authorisation of the purchaser's solicitor for their release to the Vendor.

Failure to furnish an itemised bill of costs for the purpose of taxation.

Delay in placing a sum of money on joint deposit and subsequently delay in returning the deposit receipt.

Delay in handing over a sum of money to a client and further making no effort to resolve the question of interest due on monies held by the respondent.

Delay in the processing of personal injury actions.

Delay in processing a Circuit Court Action.

Delay in the administration of an Estate.

Failure to account for interest in relation to monies held in an Estate.

Failure to reply to correspondence from the Society.

Failure to reply to correspondence or queries from complainants or advise them of the progress of their cases.

Failure to attend meeting of the Registrar's Committee.

Misled the Society.

THE HIGH COURT

Cases presented to the High Court between the 1st September 1989 & the 31st August 1990. 25

Name of solicitor struck off the Roll 1

Suspended from practising as a solicitor until the 8/10/90. 1

Suspended from practising as a solicitor for one year. 1

Respondent undertook not to engage in practice as a solicitor save under the supervision of a solicitor of not less than seven years standing. 1

Liberty was granted to the respondent to apply to the Law Society for a limited Practising Certificate – The respondent not to practise on his own or in partnership with any other person or persons. The solicitor with whom the respondent may find employment to be approved of by the Society. Costs were awarded. 1

Censured, fined and costs 2

Fined and costs 1

Censured and costs 8

Petition struck out with costs to the Society 3

Petition struck out 2

Adjourned generally 1

Adjourned 3

Cases adjourned by the President of the High Court last year 2

Practising Certificate be limited so that the respondent is enabled to practise only whilst under the supervision and in the employment of another solicitor to be approved of by the Society. Liberty to the solicitor to apply after the expiration of three years from the date of the Order. 1

Remitted to the Disciplinary Committee – Stay on Order of Suspension – Adjourned 1

Awaiting presentation to the High Court 9

Fines ranged from £1,500 to £2,000.

The Disciplinary Committee is a statutory body and is wholly independent of The Incorporated Law Society of Ireland. It is a Committee of ten and its members, who are practising solicitors, are appointed by the President of the High Court under Section 6 (1) of Part II of the Solicitors' Act 1960.

The Committee has no power to investigate complaints and its powers are largely confined to receiving and hearing complaints of alleged professional misconduct against solicitors either from the Law Society or members of the public. However, as will be seen from the above figures most of the applications received emanated from the Law Society.

Under Section 3 of the Solicitors Act 1960 misconduct 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.

All powers and functions of the Committee are set out in Part II of the Solicitors' Act 1960 and the Rules as to procedures in relation to the Disciplinary Committee are contained in the Solicitors' (Disciplinary Committee) Rules S.I. No. 30 of 1961.

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 Committee meets regularly throughout the year and has considered an increasing and varied number of substantive allegations against solicitors. It views with concern the increase in breaches of the Solicitors' Accounts Regulations and the nature of those breaches. Members of the profession should be fully acquainted with the Solicitors' Accounts Regulations and ensure that they maintain proper books of account. The importance of keeping up to date books of account cannot be overstressed for not only do they enable the solicitor's own Accountant and the Law Society's Accountant to verify the position, but they also enable the solicitor to satisfy himself that he is complying with all aspects of the Accounts Regulations.

Some of the findings of the Committee such as permitting deficits to occur on Clients Account, applying clients' funds for personal benefit, giving misleading and false information to the Society's Investigative Accountants, are of grave concern to the Committee. Members of the profession should bear in mind that the outcome of complaints of this nature may affect the continuing practice of a solicitor.

Allegations of misconduct were also proved in cases which related to the areas of litigation, conveyancing and probate. These complaints mainly relate to situations where solicitors accepted instructions to attend to certain matters and failed to conclude the particular transaction. As a corollary to these complaints there is the oft repeated allegation of failure to reply to correspondence from a client or the Society. I have raised this matter before in previous reports, and have explained that it is the duty of solicitors to reply to such correspondence, but it continues to be a factor in complaints which come before the Committee. Lack of communication between solicitor and client is obviously frustrating to clients and does nothing to enhance the image of the profession.

I would like to take this opportunity to say to members of the profession that should they find themselves in need of advice or assistance in respect of their practices they should immediately contact the Law Society. I am aware that the Law Society is only too anxious to assist members and that they have a very capable team available which would be pleased to help at an early rather than a later stage.

Before concluding I would like to thank all my colleagues on the Committee for their support, assistance and diligent work during the past year.

Dated this 20th day of November 1990.

WALTER BEATTY
Chairman

THE SOLICITORS' BENEVOLENT ASSOCIATION

A CASE IN NEED

Mrs. "X" is in her late 40's, she is the widow of a Solicitor, has five children under 21. Her only income is a widow's pension and family allowance. She has to provide for her family and maintain a home. She faces this enormous responsibility alone. Who can she turn to for help? – The Solicitors' Benevolent Fund.

The Solicitors' Benevolent Association assists such cases - and many others where the age of dependants of members of the profession ranges from "under 10" to "over eighty". The Committee of the Association meets monthly and its work covers the entire country, north and south. The Committee funds come from annual subscriptions from members of the Law Society of Northern Ireland and The Incorporated Law Society of Ireland, together with additional subscriptions received from Bar Associations, and individual Solicitors or firms of Solicitors. In recent years the calls on the Association's resources have become more numerous and this year the Committee faces a relatively large deficit. It urgently needs extra funds. Subscriptions can be sent to the Secretary, Ms Clare Leonard, The Solicitors' Benevolent Association, 40 Lr. Fitzwilliam Square, Dublin 2, or c/o The Law Society, Blackhall Place, Dublin 7.

Younger Members News

Society of Young Solicitors and the Young Bar

Sponsored by the Investment Bank of Ireland Limited, the third joint conference of the Society of Young Solicitors and the Young Bar held in Jurys Hotel, Cork, on the weekend of the 16th to 18th November, 1990 was not only the largest and most successful joint conference to date but also one of the more successful SYS weekends.

Although registration had not yet commenced, the more dedicated followers opened the conference aboard the Champagne Express from Dublin to Cork. Delegates from all over the country (including 35 from Northern Ireland who must be applauded for the strength (and spirit of their attendance) gathered in Jurys that evening and most attended the disco until the small hours.

Although short on sleep there was no shortage in attendance at the first lecture on Saturday morning given by Dr. John White, author of "Irish Law of Damages for Personal Injuries and Death". The topic – "Damages in Wrongful Death Actions" – provoked a lively question and answer session afterwards particularly on the question of whether monies expended by a surviving spouse on satisfying his or her sexual needs were recoverable! This was followed by the Personal Injuries Forum chaired by Judge Murphy. The panel consisted of Donal Binchy, Solicitor, incoming President of the Incorporated Law Society of Ireland; Nial Fennelly S.C., Chairman of the Bar Council of Ireland; Dermot Gleeson S.C.; and Neil Matthews, Solicitor, Brannigan & Matthews.

On the Saturday afternoon, there was a pub treasure hunt organised by Brian O'Connor and sponsored by Murphy Brewery Ireland Limited. The main prize was donated by Gerard O'Keeffe, Solicitor.

The highlight of the weekend was the black tie banquet held in Jurys Hotel attended by over 500 people (an extra 100 tickets being made available due to unprecedented demand). The hotel must be congratulated on the friendliness and efficiency of its staff and on the excellent meal.

Notwithstanding the lateness of the hour the night before (particularly for those entertained by Declan Doyle on piano and Eva Tobin on guitar) the lecture by Mr. Desmond O'Malley T.D. and Minister for Industry and Commerce on "The Legal Profession – Looking to the Future" was not only very highly attended but also attracted considerable publicity. (The text of the Minister's address is contained in this issue on p. 376).

The Society would like to thank those barristers who assisted in organising the conference – Mary Ellen Ring, Aileen Donnelly and Declan Doyle. Special thanks also to the hardworking SYS committee responsible for this weekend – Colin Sainsbury, Owen O'Sullivan, Maureen Walsh and Paul White. Finally, our thanks again to our main sponsors, Investment Bank of Ireland Ltd. and also to our other sponsors, Millers Insurance Brokers, Butterworths and the Irish Document Exchange.

The next SYS weekend will be in Westport, Co. Mayo on 12th/14th April 1991. Put this date in your new diary now.

JENNIFER BLUNDEN, PRO.,
Society of Young Solicitors.

LITIGATION COMMITTEE

Practice Note

RULES OF THE SUPERIOR COURTS (NO. 4) 1990 (S.I. NO. 281 OF 1990)

These Rules, which are operative from **30th November, 1990** provide for increases in the fees chargeable by Commissioners for Oaths as follows:

1. On taking an affidavit, affirmation or declaration £3.00
2. On marking exhibits therein referred to and required to be marked – for an exhibit or exhibits (irrespective of number) £1.00
3. On attesting the execution of a bond £3.00

NOTE: The existing Part VI of Appendix W of the Rules of the Superior Courts is thus deleted and substituted by S.I. No. 281 of 1990.

Insurance Act, 1959 — (Contd. from page 365).

c. The proposal, renewal or proposal accepted by an undertaking in respect of which such sum was paid.
d. The Insurance Company with which the policy has to be effected or renewed or by whom the proposal has been accepted. A precedent of the form of this receipt may be obtained from the I.I.C.B.

As will be seen from the above, correct completion of the form from the Bureau necessarily means that intermediaries are in compliance with all of the above. The only other matter to be dealt with is the code of conduct and it is understood that the copy of same submitted by the Bureau has been agreed and approved by the Department of Industry and Commerce. (See the *Gazette* of July/August, 1990).

The Legal Profession – looking to the Future

Speech by Mr. Desmond O'Malley, T.D., Minister for Industry and Commerce to Society of Young Solicitors/Young Bar Third Joint Conference in Jury's Hotel, Cork on Sunday, 18 November, 1990.

I should firstly like to congratulate the Society of Young Solicitors on their 25th anniversary which they celebrate this year. The Society, over the past twenty five years, has established an impressive record both in providing service to its members and acting as a forum for discussion. The range of subjects which have been addressed in this Society over its short history, reflects a dynamic approach in facing the challanges of the modern day.

The society which our existing legal structures support is undergoing rapid change. Our social values are changing to reflect the evolution of a more pluralist Ireland. Our business and commercial life is becoming more exposed and reacting to the greater community which we are now part of. Our administrative structures are being updated to reflect the needs of a modern and complex society. And our economy is developing to improve the employment and living standards of our people.

These developments are interdependent and can only proceed satisfactorily if each aspect of the society moves forward. If our administrative infrastructure stagnates then our whole society will suffer. It is therefore vital that our legal structures also change to reflect the new demands of the society it supports. It is vitally important for lawyers as a profession and particularly young lawyers to take the time to reflect on the great issues of the day and to analyse how we respond to them.

I am very pleased, therefore, to present my views on the Legal Profession and its Future to the Third Joint Conference of the Society of Young Solicitors and Young Barristers and I trust that these views will be received in a positive and constructive spirit.

The legal profession has a profound duty to uphold a system of legal justice for a nation. It is incumbent on lawyers to make their contribution to ensure that this system of justice meets the needs of the people it is intended to serve. To achieve this, we must look closely and critically at our system, and in particular, its structures and form, so that we respond to changing needs. We must constantly ask if we can improve the way we do things. It is primarily the responsibility of Government to provide an adequate legislative framework. It is, however, the responsibility of the legal profession itself – with its extensive self regulatory powers – to reflect in its rules and regulations, a modern, responsive profession. Legislation should not be the only source of change in legal procedures and in the provision of legal services.

1992 and the Legal Profession

My interest in discussing the future of the legal profession is prompted by two separate considerations. Firstly, as I have just outlined, because law affects everyone, we must make sure that legal services are available and accessible to all. Most people will at some stage in their life have some dealing with the legal profession; buying a house, making a will, personal injury actions or family law problems. When using a lawyer to carry out such work it is important that these services should be available at reasonable cost and follow efficient and straightforward procedures. The question is whether or not the legal profession adequately meets the needs of the clients it serves.

The second consideration relates to competition in the wake of the completion of the Single Market in 1992. Up to now attention has largely been focused on business and industry and their need to prepare for the new market situation. We have been encouraging business to think in terms of a competitive European economy and to look beyond national borders.

It is happening already. The growing volume of intracommunity trade and movement of capital within the community is a reflection of the new rules governing free and unrestricted movement between the member States. We must remember also that legislation already permits the free movement of people and the right to set up in business anywhere in the Community. The legal profession must therefore be prepared for this new competition as the prospect of foreign law firms setting up in Ireland moves closer. Although this trend is perhaps most likely in the area of commercial law there is no doubt that new specialisations and skills will be required as business and commerce is transacted in an increasingly complex multinational environment. Continuing education will play a very important role here and I know that the Law Society has been active in providing courses in specialist subjects. It is imperative that the legal profession, like business and industry, be prepared for 1992 and the new challenges it is likely to face.

I am not for a moment suggesting that the Irish legal profession will not meet these challenges or adapt to the changing environment. Most of the profession has in the more recent past shown itself receptive to new ideas and open to change. I hope this new openness will be more enthusiastic and more general in the future. The Law Society's response to demands for change in the educational requirements for solicitors is one example and the Bar Council's proposal to allow direct professional access shows that the profession is not only open to change, but to good common sense as well.

I'm sure many of you will already be acquainted with the proposals contained in the Fair Trade Commission's report entitled "Study into Restrictive Practices in the Legal Profession". When the report was published in July this year, I invited submissions on it but cautioned that I would not accept arguments whose only purpose was to defend a vested interest in practices that were detrimental to the common good. The report as you know provoked some controversy and I have received a number of submissions, both from interested groups and from private individuals and firms.

On the whole, the reaction was largely positive and the FTC recommendations have received support from a wide range of people. Some proposals of course were identified as being less desirable and there are still others that clearly require further study and examination.

Central Objective

While the FTC recommendations are wide-ranging and comprehensive, my consideration of the recommendations and submissions has been guided by one clear objective. That is, to create conditions in the legal profession that enable its users to obtain the necessary services at a cost which is not inflated by restrictive practices or inefficiencies. Each of the proposals therefore will be measured against this yardstick.

Before discussing some of the detailed recommendations in the Report, I would like to preface my comments by looking at the notion of competition in the professions. The Competition Bill, which is receiving priority attention in my Department at the moment, will seek to make all restrictive practices and agreements unlawful. This legislation will have a profound effect on business and commercial life. Price fixing agreements, for example, have a detrimental effect on competition and deprive the economy of the stimulus which a competitive environment provides. Price fixing will not be tolerated under the new legislation. It is also in the interest of the consumer that a competitive economic structure be secured firmly in law. The consumer benefits from choice, competitive pricing and competing services.

Competition between the suppliers of professional services is equally desirable. With a view to examining competition in the professions, the Fair Trade Commission was asked to undertake a special series of studies "into the rendering of certain professional and analogous services". While the Competition Bill will provide the regulatory environment in which business will be carried out, it is my objective that, following our full consideration of the Fair Trade Commission's recommendations, we will be taking steps to create a more competitive, efficient and modern structure in which the legal profession can work for all.

The first matter which I wish to discuss with you this morning is "fusion" and the division of the profession into two branches. Now, I know that this is an issue fraught with passionate and diverse views. However, is it perhaps significant that the Young Solicitors and Young Barristers Societies choose to hold a joint conference? You certainly have many interests in common and share many common problems.

The issue of "fusion" needs some clarification, I feel, before we proceed any further. Firstly, I want to dispel the view that it is my intention to impose or coerce barristers and solicitors into a fused profession or indeed that it is the intention to eliminate the specialist roles which distinguish both sides of the profession. I can assure you now that although I may use the general title of lawyers this is not at all what I have in mind. There will always be a need for specialist advocates and no lawyer could be expected to have expertise in each of the task areas and functions required of the profession.

Secondly, the Fair Trade Commission particularly stressed that they had no reason to believe that fused professions in other countries necessarily provided a better or worse service than divided professions, or that such services were less costly in a fused system. There is no compelling reason therefore to promote the fusion argument except of course where it can be seen to lead to a more efficient and cost effective service. Indeed, I have to say that the use of the word "fusion" is somewhat misleading when we really mean rationalisation and streamlining.

Mobility in the Profession

What is remarkable is the overwhelming support I have received in submissions for some degree of rationalisation and particularly measures which would lead to greater movement between both sides of the profession.

The effect of introducing greater mobility would be to give young lawyers more choice. The solicitor may find, on qualifying, that he or she would be better suited to a career in advocacy or indeed the young barristers may find court work unsuitable or unprofitable and would prefer solicitor's work. It should not be made artificially difficult or time-consuming to move from one area to the other. Movement in this direction was already anticipated as far back as 1971, when as minister for justice I introduced the Courts Act. This early and far-seeing measure which, *inter alia*, was designed to facilitate greater interchange and mobility, gave solicitors the right to be heard in all courts. It seems that this right is seldom used and I find this disappointing. It might be useful to examine the reasons behind this and to see if there are any impediments preventing the solicitor from exercising this right.

The most obvious factor which has been suggested to explain why solicitors do not exercise their right of audience is the training and education received by the solicitor. We should ask if this training equips the solicitor with the skills needed for court work. I am glad to see that the Law Society are now placing more emphasis on advocacy training both in courses for apprentices and in courses for qualified solicitors. The obvious question here is, if the need for training in this area is recognised, why not ensure that solicitors receive the same training as barristers?

It has also been suggested that the reluctance to engage in advocacy in the superior courts is grounded on a suspicion that solicitors would not have a fair chance before judges who are barristers by training and who may not take kindly to solicitors appearing before them. If this is the case perhaps the solution here would be to make sure that solicitors are considered for appointment to the Circuit and Superior Courts. The

commission also remark, and I think it a useful point, that the possibility of judicial appointment might act as an incentive for solicitors to act as advocates more frequently.

Mode of Dress

The mode of dress is another obvious deterrent. The report indicates that some feel that the distinguishing robes worn by barristers set them apart and emphasise the separate roles in court of the solicitor and the barrister. i believe that a uniform dress code for both barristers and solicitors should be introduced. It has frequently been said that the barristers' rather quaint 250-year-old attire can intimidate clients, and other lay persons and compounds any preconceived fears or suspicions about the law and the legal process. If by encouraging those concerned to change the dress code we can demystify the legal process and help make proceedings more accessible to the public, I think we will have achieved something.

Number of Legal Representatives involved

I recognise that there will always be a need for specialist advocates, be they barristers or solicitors, but surely not in every case. It is also clear that there are many court cases which could be dealt with more than adequately by a solicitor without the assistance of a barrister. I would propose that a barrister should be retained only where necessary and always with the agreement of the client. If this serves to reduce the cost to the client then it is desirable. Another problem which I will just mention here relates to the rule on the mandatory retention of junior counsel, whether their presence is needed or not. This is something which is very difficult to justify and clearly one which must be changed. Trade unions are pilloried for much less restrictive practices. The size and composition of a legal team should reflect the requirements of the actual case and those of the client – not some arbitrary rule.

It should, of course, be borne in mind that these suggested reductions in representations, would be of limited value to the client or to society, if there is not some roughly corresponding reduction in cost. I cannot but recall, what unfortunately happened to fee levels, when the superfluous second senior counsel was dispensed with in certain cases in the last year or two.

It is plain to see that each of the above suggestions would help achieve a more modern streamlined profession: closer education, common training, appointment of solicitors as judges, encouraging solicitor advocates, and abolishing dated dress codes. These suggestions make an awful lot of sense both individually and collectively. Introducing greater mobility is desirable. Does it not give those entering the profession greater choice? Greater mobility, greater choice, a streamlined education system and a more flexible and responsive service to the client would all lead to a more efficient and, I suggest, more effective provision of service. And, as a bonus, can it not but help alter the public's somewhat jaundiced view of the profession?

Education

One area which I would like to deal with a little further is education and it is also an issue which is closely bound to the question of fusion in the profession. The Fair Trade Commission, in their report, raise many questions about legal education but suggest that the detailed arrangements for the education and training of solicitors and barristers may be outside their terms of reference. The Bar Council in their submission on the Report even protested that certain issues dealt with by the commission such as legal education had ''no conceivable relevance to the subject matter of competition''.

This I must strongly refute. It requires no great stretch of the imagination to see how education plays a role here. If you restrict access to professional education to a small group of people and charge a very high price for it, you effectively control the supply of the service, reducing competitive pressures and weakening price competition. Competition is the dynamic interplay of supply and demand. I think it was unfair of the Bar Council in their submission to me to suggest that the Fair Trade Commission should not have discussed legal education in this context.

In fact, the Commission have carried out a very useful service in identifying many aspects of legal education which contribute to the restrictive nature of the profession. In this regard I wish to highlight one important proposal.

The Commission has suggested that there should be a common vocational course for solicitors and barristers and an end to the separate education provided by the Law Society and by the Kings Inns. Apart from the fact that the seperate existence of two professional law schools amounts to unreasonable duplication of resources, the Commission's argument here follows from their belief that nothing should be done to frustrate ''the possible gradual development of a fused profession''. Education has been identified as the primary vechicle for change and for bringing about greater interchange between both sides of the profession.

The Commission go on to say that one of the greatest impediments to development along this road is the perpetuation of separate legal training structures for barristers and solicitors. I agree with the Commission in their analysis and I see every merit in introducing a common vocational course for both sides of the profession. The precise arrangements in relation to the position of the Law Society and the Bar Council and indeed the content of this course need to be studied further.

With a view to pursuing this, I agree with the Commission's suggestion to entrust this task to an Advisory Committee on Legal Education and Training and I think that the profession itself should be fully involved in the formulation of policy proposals in this area.

Perhaps we could build on the existing Joint committee on Legal Education, founded by the Law Society. This is again something at which we must look carefully and on which I will be making proposals in the near future.

Access to the Barrister

Moving on to the question of access to barristers, I am very pleased to note that the Bar Council are recommending that direct professional access be permitted,

albeit in non-contentious matters and only to certain professionals. This is very much to be welcomed as a first step and I am sure it will have the effect of reducing costs to business if they can deal directly with the practising barrister without employing a solicitor to do the task.

The concomitant introduction of a contractual relationship between the client and the barrister brought about by direct professional access introduces new questions such as the need to take out professional indemnity insurance. It would also mean, however, that barristers could sue for recovery of fees, something which I suspect might be welcomed!

This is clearly a start. But why not go a little further? Why confine direct professional access to non-contentious matters only? And indeed why confine direct access to specified professionals only?

Fee Determination

I want to talk about, in some detail, the question of fee determination and costs. This is a very complex area and one which could do with certain attention and reform. The commission has come up with some very interesting findings, many of which I'm sure you will have experience of and may have given thought to already. My underlying concern in striving to introduce more competition is to achieve a fairer pricing system while ensuring adequate service from the client's perspective. For this reason I want to focus for a few moments on the practice of setting fees and fee scales and the adherence by lawyers to these scales.

There is no doubt that some fee competition already exists between solicitors. Shopping around can save money, but for much of the more common services, however, rates seem to be more or less fixed. Take conveyancing for example. There is no reasong why a straightforward conveyance should not be available to clients at less than the recommended one per cent plus £100.

The Fair Trade Commission identified the setting of fees and fee scales as anti-competitive. i think that most people would agree that it is a glaringly obvious example of anti-competitive activity and one which must be tackled now.

Related to this anti-competitive practice, and an area which has been a common focus in the submissions I have received, is the question of providing information on fees and charges. A client should know in advance what he or she is going to be charged for a service. If extra charges are to be made then the client should be informed of this and the reason explained. The lack of transparency in the charging of legal fees is a common source of complaint and it is a problem which should be avoided. This simple measure would reassure the client of the level of financial engagement entailed and would thereby reduce the possibility of dispute or misunderstanding later.

Advertising

The whole process of supplying information could of course be enhanced by permitting lawyers to advertise their fees. In 1989 the Law Society, I was glad to see, introduced new rules permitting advertising by solicitors. This was a very positive step and I hope that other professions will follow suit.

The Law Society should now weigh up the recommendation of the Commission about fee advertising. In my view there are arguments for and against. It may mislead, as one may not be comparing like with like.

Like the Commission it is my view that competition cannot exist if the consumer cannot make an informed choice. One source of the knowledge to make this choice is through advertising. The freedom to adverrtise must be subject to certain limitations in order to protect the principles and the legitimate interests of the profession.

Membership of the Law Library

A number of proposals which I have mentioned this morning would profoundly affect the function and operation of the Law Society and the Bar Council. Their role vis-a-vis education would be altered. If, for example, and I hope to look at this question closely, we permit employed barristers to carry out duties similar to practising barristers for their employers we would have to request the Bar Council to relax their rule on compulsory membership of the Law Library.

The Fair Trade Commission regard the requirement that practising barristers be members of the Law Library as restrictive, unfair and against the common good. Indeed when I look at the restrictions on employed barristers I have to agree with this view. I do not think that this "closed shop" arrangement should be permitted any longer and I will be seeking reform in this area. The Bar Council in their submission stoutly defended the Law Library.

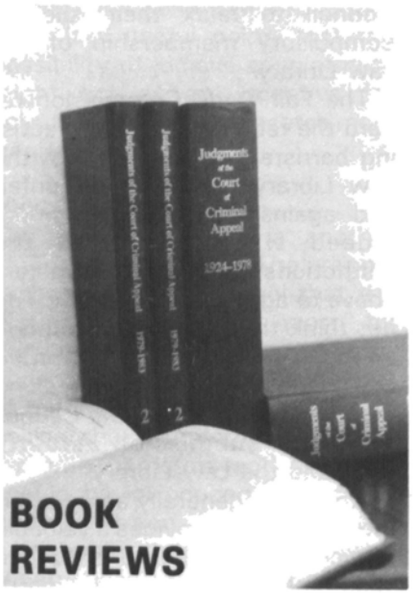
I think it is generally agreed that the Law Library provides a valuable service to its members and that the "cab-rank" system works particularly well in that clients of solicitors from anywhere in the country can have access to a leading barrister. I am certainly not arguing for the abolition of the Law Library. What I am in favour of is optional membership. I do not consider that membership of the Law Library should be essential for practice as a barrister. It is a clear restrictive practice. It is not essential at the English Bar.

Partnership and the Profession

This leads on to the question of partnership between barristers, or between barristers and solicitors, or indeed between the legal profession and other professions such as accountants or architects. I mentioned earlier one of my primary concerns was that the legal profession and, indeed all professions, as with mainstream business and industry, be prepared for 1992 and the requirements of a modern economy. I am glad to see that 1992 and the "big bang" in the professions is the subject of a forthcoming conference for lawyers.

But how can we equip the legal profession to take advantage of new opportunities and meet the competitive challenges which it will face. The Commission's Report performed a useful function in showing us the position in other countries where partnerships *are* permitted within the profession. I question whether our own rules and regulations governing the form of organisation permitted in the profession are adequate to provide the type of service required today.

(Contd. on page 387)



CONSTITUTIONAL LAW OF IRELAND
By David Gwynn Morgan. [The Round Hall Press. Second Edition 1990. 319pp. Paperback. Ir.£14.95.]

The Irish Constitution has three major objectives. Firstly, it establishes the framework or structure of government. Secondly, it delegates or assigns power to the government. Thirdly, it restrains the exercises of these powers by governmental officials in order that certain individual rights may be preserved. David Gwynn Morgan in *Constitutional Law of Ireland* examines the structure, composition, functions and interrelationships of the principal organs of state viz the Government, the Oireachtas and the Courts.

The author states that because of the exigencies of publishing economics in a small jurisdiction, he attempts to meet the needs of several types of readers, namely, students of law, public administration or civics, lawyers, public servants, and members of the Oireachtas as well as what he describes as ''that rare bird'', the ''intelligent layperson''. Accordingly, the author has adopted a compromise in his style of writing. Generous endnotes have been used containing full references. Topics adequately covered elsewhere have been omitted or summarised and lengthy quotations from Bunreacht na hEireann have been kept to a minimum.

There are twelve chapters in the book with the following headings: Introduction; Separation of Power and Rule of Law; President; Government, Taoiseach, Minister and Departments; Dail, Government and Parties; Legislation; Finance; Procedure in the Houses of the Oireachtas; Parliamentary Privilege; Dail and Senate Elections; and finally the Judicature. In addition, there are tables of constitutional articles, statutes, and Irish and foreign cases.

The second edition consists largely of the original text with supplements to each chapter updating the law in relation to each topic from 1984 – the date when the first edition was completed – to 1990. In addition, there are notes to the supplements. The writer of this notice regrets that the opportunity was not taken to amalgamate the supplement into the individual chapters thus facilitating the reader with a unified commentary.

Paragraph 12 of *Constitutional Law in Ireland* deals with the judiciary. The author argues, *inter alia,* that judicial independence is maintained in spite of, rather than because of, the rules governing appointments. Mr. Morgan points out that there is no politically-neutral appointments agency, like the Judicial Services Commission which exists in certain Commonwealth states. He notes that although Governments have usually appointed supporters of the party in power, there is no evidence that the appointees have displayed favouritism to the party which appointed them.

Judges must be selected by some person or group capable of making an intelligent choice. In Ireland, pursuant to the Constitution, judges are appointed by the President on the advice of the Government. Evan A. Evans in a scholarly review, ''Political Influences in the Selection of Federal Judges'', *Wisconsin Law Review* (May 1948), pp 330-351 noted that the hazards of the practice of making the third branch of government ''subject to the political passion and prejudice of a political party'' were obvious. The judgeships should not be in Evans's words ''choice plums for party patronage''. There should be no secrecy surrounding the appointment of judges in Ireland. There is merit in the establishment of a widely-drawn commission, which would advise the Government on judicial appointments.

Constitutional Law in Ireland is an authoritative and comprehensive guide. David Gwynn Morgan has produced a succinct and thought-provoking study of a seminal area of Irish Law.

EAMONN G. HALL

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THE LAW REFORM COMMISSION REPORT ON CHILD SEXUAL ABUSE LRC 32-1990. £7.00.

At the time of writing a controversy rages from the United States through the town of Nottingham in England and into the continent of Australia. It is alleged that children are being subjected to physical and sexual abuse in the course of ritual ceremonies which have as their object the worship of Satan. In the United States, accounts of ritual abuse have been current through the 1980s. Those sceptical of the reports have claimed that they are inspired by horror stories and point to an apparent upsurge in the reporting of these cases after the publication of Dr. Laurence Padzer's book on the experience of one of his patients, entitled *Michelle Remembers*. In Australia some hard evidence has been uncovered. The police there have taken possession of a note book which is claimed to be a directory of children who have been abused and, who apparently, were available for exploitation. The controversy is most acute in England. Children have been taken into care from the city of Nottingham and the social workers and psychologists who have interviewed these children believe the stories they have told of ritualistic abuse. One of the focal points of the alleged ceremonies was claimed to be a tunnel in a graveyard in the city. That location exists but the police remain dismissive, pointing out that the items discovered in that area are not in any real sense corroboration and that the alleged scene of other ceremonies (the back garden of semi-detached houses) is unlikely. The academic community is deeply divided. Children have independently given similar accounts of sexual abuse to foster parents. This would appear to suggest that the stories told to professional interviewers must be correct or, because of their similarities, have been suggested to, and implanted in the minds of, the children by interviewing techniques which, it is alleged, have "contaminated" the evidence. The academic community currently holds the view that children are less inclined to lie and to fantasise than adults. The question which must now be addressed is whether children are susceptible to suggestion and the suspicion arises that the accounts of abuse amount to the fantasy and suggestion of interviewers woven into the child's genuine or imagined fears. It is a problem which is almost impossible to resolve.

There was a time when people refused to believe that children were sexually abused. To some extent that attitude continues to prevail. More current is the idea, which I suspect is shared by a large number of ordinary men and women in the community, that the accounts by children of their experiences are less worthy of trust than those of an adult. I have been entrusted with the prosecution of child sexual abuse in five cases. In each, it seemed to me, there was a case on which a jury could convict. In four cases they acquitted the accused.

The Law Reform Commission Report addresses three areas. Firstly, it seeks to strengthen the civil law to facilitate the detection of abused children. Secondly, it proposes to alter the criminal law, principally, with a view to correctly labelling these horrible offences. Thirdly, and most importantly, it makes sweeping recommendations for changes in the law of evidence.

Where a child is being abused by a member of its own family the person most likely to discover that situation will be independent. The practitioner will be familiar with those incest cases where dreadful levels of abuse have been sustained from childhood, through puberty and well into adolescence, the mother of the victim claiming to know nothing of its occurrence. One wonders the extent to which, either considerations of appearance or some extraordinary psychological syndrome inhibits the mother from reporting, and often, at a later stage, allows a mother to give evidence that incest never took place. The child who is sexually abused suffers horribly. It therefore seems right that the detection of abuse should be strengthened by the creation of a legal obligation on such persons as doctors, social workers and teachers to report suspected cases. The Commission recommend a sanction for failure to report of six months imprisonment or a fine of £1,000. The person against whom the complaint has been made may react by telephoning their solicitor. This tendency to litigate is combatted by an express immunity from civil and criminal proceedings where a report has been made in good faith to the appropriate authority. The health boards are usually the first body to take up an investigation: it is proposed that they should be placed under a legal duty to take minimal investigative steps. They are balanced by a proposal that a case conference should be held where there is a supicion of sexual abuse of a child. The Gardaí would be required to attend where a criminal offence was suspected (which would occur, it seems to me, in virtually every case) and parents would be entitled to attend some parts of the case conference, in order to be informed as to the care options that are open and to give their views on any action that might be proposed. It is obviously dangerous to allow a suspected offender to reside under the same roof as a suspected victim. So it is proposed to extend the barring order procedure from spouses to members of the child's household and to persons with whom the child comes into regular contact. Both health boards and children would be entitled to apply to court for these orders, which could be made *ex parte* in circumstances of emergency. Currently, where there is a suspicion of child sexual abuse, the procedure adopted is to have a place of safety order made under the *Childrens Act, 1908*. The District Court then effectively takes the place of the parent in making critical decisions. One such decision is whether to allow an intimate examination. The Commission propose to change the law by giving the District Court power to order an intimate medical examination even while the child is living at home. The developing concept of the victim is furthered by a proposal which would allow the child a right to be heard save where it would cause harm.

The criminal law would be amended by the creation of a new offence of "child sexual abuse". I can see no reason for this change, apart from a desire to label an offence appropriately to the wrong committed. A child under fifteen cannot consent to any sexual activity and therefore any such

touching of a child will be a criminal offence. A bizarre exception occurs in cases where a child is invited to touch or fondle the perpetrator, in a sexual way, but the child is not touched by the offender. This exception has never been recognised in our law but we have yet to follow the English reform contained in the *Indecency with Children Act, 1960*. Experience shows that the law as to rape, indecent assault and buggery, works well by providing reasonably simple definitions. Complexity causes confusion especially where cases have to be tried by a jury. Confusion can be, and often is, equated with the existence of a reasonable doubt. The danger in introducing a new tier of offence is that it may require an unduly complex definition. The external elements will require a mental state of either intention or recklessness. I fear that this may cause the law to be so complex as to be outside the competence of jurors. The wisdom of this proposal is therefore to be questioned.

At present it is a criminal offence to have sexual intercourse with a girl under the age of seventeen. Traditionally, it has been considered that it is unnecessary for the prosecution to prove that the man knew the girl's age, and, that a reasonable mistake that she was above that age, does not constitute a defence. The Commission propose that reasonable mistake as to age should be a defence. Where the girl is aged between fifteen and seventeen sexual intercourse is only an offence where the male is a person in authority or is at least five years older. Homosexual offences are approached and reformed on a parallel basis. This would allow complete discretion, as to sexual conduct, to males of seventeen and over. Otherwise the offence of under-age sexual intercourse is gender neutral.

It is unfortunate that no recommendation was made as to incest. The law on incest works well. There is, however, one glaring anomaly which should have been addressed by the Commission. Relationships in the law of incest are traced through the blood. The statistics produced by the Commission in their Discussion Paper indicate that the persons most at risk from sexually predatory behaviour, within the family, are step-children. The adopted child is, however, left with only the same protection as an unrelated person. As the Commission has, rightly, shown concern with appropriately labelling offences, the failure to reform this area is inexplicable.

The Commission make their most wide ranging proposals in relation to the law of evidence. Some of these proposals are unnecessary: courts do not now insist on the use of robes in these cases; screens have been used to shield the witness from the glare of the suspected offender; informality of speech has been allowed and anatomically correct dolls have been used to allow children to mime, as opposed to describe, the offences perpetrated against them: *The People (DPP) -v- JT*, Court of Criminal Appeal, unreported, 28 July 1988. Doctors and psychologists who have been given the responsibility of treating abused children have expressed deep concern that the experience of attending court and giving evidence in chief and being cross-examined, reverses the recovery process. They see no reason why the child should be subjected to this trauma. One can have considerable sympathy with this view. As against that the criminal law has always been, and will continue to be, a blunt weapon which should be used selectively, and, in my view, only in cases where there is a reasonable prospect of success. The medical profession, have, in the light of their concern, pressed for changes in the law of evidence to be made which would allow a video recording of the child's testimony to be played at a trial in place of the child's testimony. The Commission, therefore, proposes that the ordinary depositions, taken in the District Court, should be video recorded and that the prosecution should be permitted to present this as evidence. They further propose the early interview of the child by an appropriate examiner and that a recording of this interview should be played as evidence in chief: the child would be made available only for cross-examination. It is extremely difficult for a witness to describe the core elements of a distressing experience. One of the best ways to allow a child's testimony to develop naturally, and thus be successful, is through an examination in chief which leads from background material, such as schooling and family, to the incidents of abuse. I would not be surprised if a cross-examination, coming in this fashion, out of the blue, were to elicit no response from the child. The use of video evidence can also be criticised. Experience indicates that juries are very reluctant to act on the evidence of a child in the absence of strong corroborative evidence linking the accused to the commission of the offence. If a case is to be prosecuted for the purpose of convicting a guilty offender then a case must be capable of being proved beyond reasonable doubt. That very high standard of proof cannot, in my view, be achieved merely by playing the jury a video of the child's testimony. The law cannot operate independently of the community and it is only when ordinary people are more willing to accept an account from the child that it has been sexually abused that convictions will result. I can see the sense of the Commission wishing to be in the vanguard of that change. It is also correct that these proposals, if implemented, will allow prosecutions to take place where otherwise they would have been impossible. More convictions should not, however, be expected. The Commission is

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acting from laudable motives and, if the proposals are implemented and worked in practice, it may be that, in time, a jury may convict on video evidence alone.

There is an image abroad of the belligerent and insensitive advocate who determines to achieve an acquittal by the brutal breaking down of a child's testimony, careless as to the harm he or she thereby causes. I have never seen this in operation in a child sexual abuse case. The Commission proposes that the court of trial should have the power to appoint, for special reasons, a child examiner through whom all questions would be asked. The Commission again hope for a dimunution in the trauma of giving evidence. Some people are very good at communicating with children and some are very bad. It is true that talent can be nurtured. Equally it is untrue that a particular degree or diploma can supply people with the kindness, respect for people and interest in others to which children naturally respond. There is a case to be made for the Bar Council and the Law Society to allow only those persons who have shown themselves to be sensitive and able in this kind of case to conduct them. If the "child examiner" procedure is implemented, one can foresee a plethora of appeals resulting, making complaints of mistranslation of the questions of the cross-examiner, by the child examiner. The nightmare also arises of the speech by defence counsel which seeks to raise a reasonable doubt merely on the basis that had he or she been allowed to conduct an examination in the way he wished that "the truth" might have been uncovered. Such doubts may be fanciful but it will be for the ordinary people who make up juries to state whether or not they are reasonable.

These views are personal. While other lawyers may agree with them it is obvious to me that those who work repairing the damage done by child sexual abuse do not. My natural inclination would always be to afford more respect to those who have taken up the task of repairing the harm done by evil than to those who merely seek to defend or convict the perpetrator. It is clear that some independent wisdom is called for and one hopes it is to be found in the Oireachtas. It is not inappropriate to finally comment that the earlier Discussion Paper and the current Report on Child Sexual Abuse have achieved a level of integrity of argument which is a shining example in the field of Irish legal writing, particularly because of the synthesis of the many disciplines involved in attempting to contribute a solution to this problem. □

Peter Charleton, BL

THE LAW REFORM COMMISSION REPORT ON SEXUAL OFFENCES AGAINST THE MENTALLY HANDICAPPED LRC 33 – 1990. Price £4.00.

It is an offence under Section 4 of the *Criminal Law (Amendment) Act, 1935* to have sexual intercourse with a woman or girl "who is an idiot, or an imbecile, or is feeble minded". Prosecutions brought under this section are invariably a disaster. That situation has existed since 1983. The reason could be taught to students as a prime example of how the law can go mad, giving an appearance of one of those Celtic animals which twists itself up in knots and bites through its own body at the torso.

It is not polite to refer to people by nasty names. It is usually only in moments of private anger that one would refer to anybody as being an idiot or an imbecile or feeble minded. The more appropriate term is "mentally handicapped": this term is used throughout the report.

A mentally handicapped person suffers from an arrested development of intellect, or an intellect which has been destroyed or partially removed owing to an accident. The lawyers reading this review should ask themselves if they can answer the following question: what is the difference between telling a lie (1) in a social situation and (2) in a court, an oath having being administered? The readers may be able to check their answer against the relevant legal authorities. In doing so in the calm of his or her own office the predicament of a witness who has just been called to the witness box, and faced with this legal conundrum, should be borne in mind. The answer will have to be given, and pretty quickly in the presence of strange legal personnel and the twelve members of the jury. It is a fair bet that a correct answer places one outside the category of those who are afflicted with mental handicap. The twist in the law is apparent on the realisation that only children can given evidence other than an oath, or after affirming. There is no exception for a mentally handicapped person. This is the Morton's Fork: if one cannot understand the nature of an oath one cannot give evidence as to being exploited by a predatory male; if one can understand the nature of the oath the law does not extend its protection to such a person, because she is not mentally handicapped.

The bite through the torso came in 1983 when this anomaly was clearly exposed in two Circuit Court cases which are referred to in detail by the Law Reform Commission in their Report on Sexual Offences Against the Handicapped. Two prosecutions were brought that year under Section 4. In both of them the girl failed to pass the test as to competence to take an oath and the prosecution collapsed: see [1984] DULJ 165. Since then there have been many other cases. Some of them have been reported in the newspapers. They were obvious for all to see. In so far as one can ascertain the prosecutions have all failed for the same reason. A situation now exists where males can have sexual intercourse with mentally handicapped persons and face no penal sanction. Arguably this is a disgrace in a civilised society.

The Law Reform Commission propose to reform this situation by making two basic recommendations. Firstly, where a person is under the age of 14 they may give evidence other than an oath or after affirmation. Where a person is over 14 years of age, a mentally handicapped person should be excepted from taking the oath, where they are found by the judge to be "capable of giving an intelligible account of events which he or she has observed". it is proposed to abolish the requirement of corroboration. In line with their recommendations on child sexual abuse they recommend that special court facilities should be made available, by way of the use of close circuit

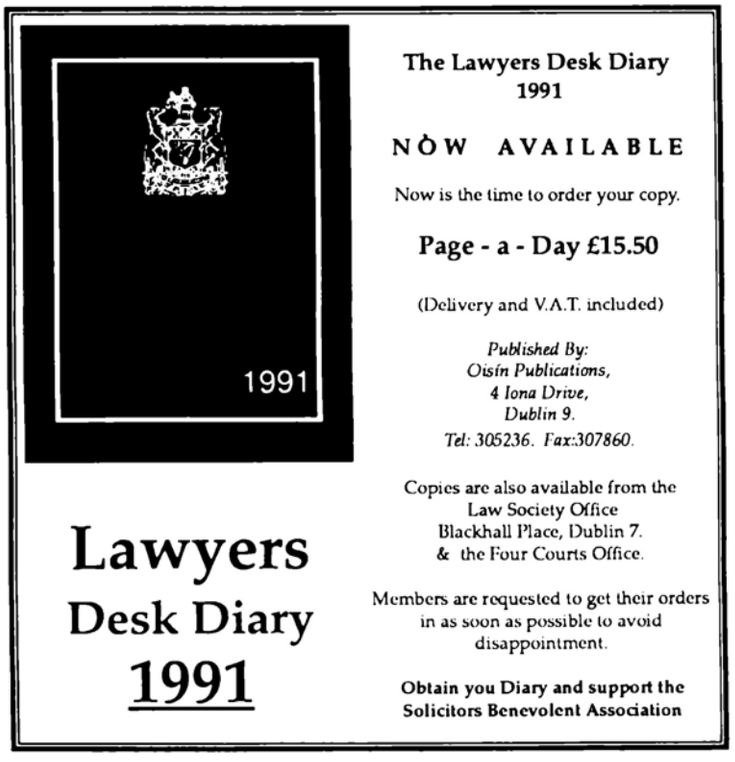
television, video recordings and the use of skilled child examiners to ease the inevitable trauma of giving evidence.

The second main recommendation is the repeal of Section 4 of the *Criminal Law (Amendment) Act, 1935*. This would be replaced by a section making it an indictable offence for any person to have unlawful sexual intercourse, or to commit indecent acts, or to commit acts of anal penetration, with a person suffering from mental handicap or mental illness which is of such a nature or degree that the person is incapable of guarding himself or herself against exploitation. In criminal law every external element of an offence must be accompanied by a mental element, which is usually cast in terms of a purpose of doing that act, or the taking of an unjustifiable risk that the protected situation exists or the forbidden act will occur. That burden of proof is always on the prosecution. The Commission feel, however, that the prosecution burden should be eased in this instance. Where the prosecution show that the victim was suffering from mental handicap or mental illness, at the time of the alleged offence, the accused is presumed to be aware of that fact. He will therefore have the balance of disproving, on the balance of probabilities, that he was unaware. It is perhaps unfortunate that the Commission did not address the anomaly of the reversed burden. Where an accused has to prove something on the balance of probability, but fails to do so and succeeds only in raising a reasonable doubt, the reversed burden may cause persons to be convicted in respect of whom there exists a reasonable doubt as to their guilt. The constitutionality of such a reversed burden is questionable.

It is proposed to increase sentences from the present two years, to seven years, and in the case of a person employed in a mental institution from five years to ten years. The definition of "mental institution" is expanded to include the increasingly common community based and residential centres.

The report is of the highest standard. Its arguments are cogent, its approach is compassionate but practicable and the level of scholarship in its production is the equal of anything produced on this subject. One turns in despair, however, to pages 31 to 34. This gives a list of Law Reform Commission publications. One reads these in increasing depression as to how long it will take, or by what mechanism it will come about, that simple law reforms are made in our jurisdiction. For example, in 1985, a report on the competence and compellability of spouses as witnesses was published. It has never been implemented. The Court of Criminal Appeal took the entire matter into its own hands in July of 1988 by declaring the incompetence of spouses to be unconstitutional where this lessened the protection of the victim of crime under Irish law: *The People (DPP) -v- JT.* What is the next step? The Rape Bill of 1988 remains unimplemented and may receive a debate in the Oireachtas at some future stage. The ludicrous rules of hearsay whereby business records are barred from both civil and criminal cases remain intact. This situation prevails twenty six years after the famous decision of the House of Lords in *Myers -v- The DPP.* It prevails ten years after the Law Reform Commission published their recommendations for reform in their paper on The Rule Against Hearsay. This report is now out of print. The Commission inform us that photocopies may be made available to those who are interested. Whatever the Dail is debating it is not law reform.

Peter Charleton, BL



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Obtain you Diary and support the Solicitors Benevolent Association

Correspondence

Noel Ryan Esq.,
Director General,
Incorporated Law Society,
Blackhall Place,
Dublin 7.

26th October, 1990

Data Protection Act, 1988

Dear Noel,

I wish to draw the attention of your members to the provisions of the above Act which require data controllers who keep certain kinds of personal information on computer to register. The term "data controller" is defined as a person who, alone or with others, controls the contents and use of personal data. Any such person who keeps personal data relating to racial origin, political opinions or religious or other beliefs, physical or mental health, sexual life, or criminal convictions, is required to register in the public register, which I have to maintain. Accordingly, a solicitor who keeps personal information on computer, relating for example, to records of personal injuries or to criminal convictions, would have to register. This would be the case even where the data are being kept on a word processor.

In the case of word processors, there is one exception which rarely arises in practice. Under the Act, the processing of personal data does not include an operation performed solely for the purpose of preparing the text of documents. In practice, this means that the Act does not apply to personal data held on a word processor if such data are used solely for the production of a paper document and, where immediately on production of the document in paper form, the electronic copy is deleted from the system and is not held for storage or subsequent retrieval. Since the Act does not apply at all in this case, the question of registration does not arise.

I have been concerned for some time that no member of the legal profession has so far registered although the Act came into operation on the 13 April 1989. The failure of a registrable data controller or processor to register is an offence of strict liability. If such a person continues to keep personal data on computer without being registered he is liable to be prosecuted. Consequently, I am anxious to ensure that solicitors are aware of their obligations under the Act and that those solicitors who are required to register should do so immediately. Any solicitor or firm of solicitors who may have doubts about the matter should get in touch with my Office immediately. I should also add that data controllers who employ more than 25 people must pay an annual registration fee of £200. In all other cases, the annual fee is £50.

I would appreciate if you would bring the contents of this letter to the notice of your members as a matter of urgency. If they should require any further advice in this matter I will be only too happy to furnish it.

Yours sincerely,
Donal C. Linehan
Data Protection Commissioner
Irish Life Centre,
Talbot St.,
Dublin 1.
Tel: 748544.

The EEC Convention on Jurisdiction and the Enforcement of Judgments

PETER BYRNE

The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters — brought into force on 1 June 1988 — establishes a body of rules of primary importance for a significant proportion of practitioners.

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In his foreword The Hon. Mr Justice John Blayney states: *The author deserves the thanks of all practitioners who will have to grapple with this branch of the law. He has had the courage to undertake the research and arduous work required . . . and has done so admirably.*

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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.

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

LOST LAND CERTIFICATES

Alexandra O'Mahony, Folio No.: (1) 28618, (2) 30451, (3) 3747F; Area: (1) 2A.0R.17P., (2) 2A.1R.3P., (3) 0A.1R.15P. County: **CORK.**

Hugh Reilly & Mary Reilly, Folio No.: 18036; Area: 31A.0R.30P. County: **CAVAN.**

Sean Meyler, Folio No.: 396; Area: 4A.0R.22P. County:**WEXFORD.**

Michael T. Connolly, Folio No.: (1) 7239, (2) 7245, (3) 19991; Area: (1) 6A.0R.3P., (2) 45A.2R.16P., (3) 30A.1R.31P. & 3A.2R.27P. County: **WEXFORD.**

Ellen Hannon, Cross Keash, Ballymote, Co. Sligo. Folio No.: 4597; Lands: Parts of the lands of Cross containing 23A.0R.10P. County: **SLIGO.**

Seamus Edwards, Folio No.: 386L; Area: 0A.0R.10P. County: **WEXFORD.**

David Weld, Folio No.: 8815; Area: 0A.2R.0P. County: **KILDARE.**

Richard Nangle, Blackstoops, Enniscorthy, Co. Wexford. Folio No.: 20518, Lands: Enniscorthy; Area: 0.751 Acres. County: **WEXFORD.**

Norman John Rock and Pauline Mary Teresa Rock, Folio No.: 8424F; Area: 0A.3R.31P. County: **CORK.**

Seamus McGarvey, Folio No.: 10654F, Lands: Bunnamayne; Area: 0.794 acres. County: **DONEGAL.**

Matthew Gill, Farnadum, Donadea, Co. Kildare. Folio No.: 7152F Co. Kildare; Lands: Farranadum; Area: 53.86 acres. County: **KILDARE.**

Agnes McCann, Folio No.: 8752; Lands: Great Connell; Area: 2A.1R.33P. County: **KILDARE.**

Joseph Kennedy, Folio No.: 15481 (now closed to 18067); Lands: (1) Killaderry (2) Killaderry (3) Island (4) Ballyowen (5) Ballymullen (6) Ballymullen; Area: (1) 4A.0R.32P. (2) 8A.3R.5P. (3) 2A.0R.18P. (4) 2A.2R.20P. (5) 17A.0R.32P. (6) 18A.1R.26P. County: **KINGS.**

Michael Lehane, Folio No.: 22816F; Lands: A plot of ground situate to the East Side of Wilton Gardens in the Parish of St. Finbar's in the city of Cork shown as Plan 1130 edged red on the Registry Map (O.S. 6382/22). County: **CORK.**

Philip Deneny and Rita Deneny, Folio No.: 4872; Lands: Part of the land of Ballinalea; Area: 1A.2R.39P. County: **WICKLOW.**

Charles Fitzpatrick and Christina Fitzpatrick, Folio No.: 4009L; Lands: 493, Collins Avenue, Whitehall, Dublin 9. County: **DUBLIN.**

Patrick J. Martin, Folio No.: 18227; Lands: (1) Mullyamly (2) Mullyamly; Area: (1) 7A.3R.35P. (2) 0A.1R.2P. County: **CAVAN.**

Patrick L. Gormley, Folio No.: 472L; Lands: The leasehold interest in the property known as 271 Oakfield in the townland of Oakfield Demesne and the Barony of Raphoe North. County: **DONEGAL.**

James White and Maureen White, Folio No.: 1356F; Lands: Moanreagh; Area: 0A.2R.39P. County: **TIPPERARY.**

Flannan Brody, of Drumcaurin, Ennis, Co. Clare. Folio No.: 1812F. Lands: Townland of Drumcaran House; Area: 0A.1R.23P. County: **CLARE.**

Patrick Oliver Coffey, Folio No.: 7711R; Lands: Castlewaller; Area: 1208A.2R.33P. County: **TIPPERARY.**

Carmel O'Shea, (1 undivided ½ share). **Teresa O'Shea,** (1 undivided ½ share). Folio No: 29520F; Lands: Rochestown Domain (the property known as 95 Avondale Road). County: **DUBLIN.**

John Clarke, Liosdarog, Shannon, Co. Clare. Folio No: 33200; Lands: Killachuna; Area: 8a.0r.22p. County: **GALWAY.**

Gysbertus Arnoldus De Jong, of Ballykea Nurseries, Lusk, Co. Dublin. Folio No.: 5939; Lands: Townland of Ballykea, Barony of Balrothery East; Area: 7.219 hectares. County: **DUBLIN.**

Patrick Fortune, of 26 Lough Atalia Grove, Renmore Park, Galway. Folio No.: 296L; Lands: The leasehold interest in the property situate on the northside of Lough Atalia Grove containing 0 acres 0 roads 10 perches in the parish of St. Nicholas and City of Galway. County: **GALWAY.**

Murtagh Davis, Folio No.: 6012; Lands: Woodlands; Area: 3a.2r.22p. County: **WICKLOW.**

David John Sweeney, Geesala, Ballina, Co. Mayo. Folio No.: 10941; Lands: (1) Gareesalia, (2) Gareesalia (four undivided thirtieth parts of other part). Area: (1) 18a.2r.31p, (2) 73a.1r.10p. County: **MAYO.**

James Fahy, Brackloon, Castlerea, Co. Roscommon. Folio No.: 1102; Lands: Part of the lands of Brackloon; Area: 10a.2r.8p. County: **ROSCOMMON.**

James Feerick & Nora Feerick, Folio No.: 33521; Lands: Mertonhall; Area: 49.489 acres. County: **TIPPERARY.**

Kathleen Fitzgerald, Folio No.: 2778F; Lands: A plot of ground situate in the part of the townland of Rathculliheen in the Barony of Kilculliheen. County: **KILKENNY.**

Kenneth P. Healy, Folio No.: 143F; Lands: Rochestown; Area: 0a.0r.31p. County: **CORK.**

Michael Truss and Fiona Kenny, Folio No.: 53857; Lands: Part of the townland of Carrigaline Middle with the cottage thereon situate in the barony of Kerrycurrhy. County: **CORK.**

Ann Byrne, of 23 Cabra Rd., Dublin. Folio No.: 4251; Lands: A plot of ground situate on the north side of Blackhorse Avenue in the Parish of Castleknock and District of Cabra. County: **DUBLIN.**

Nora King, Castlepark, Ayle, Westport, Co. Mayo. Folio No.: 14086; lands: (1) Toberrooaun, (2) Toorbuck, (3) Mace South (Part). Area: (1) 28a.2r.20p., (2) 99a.1r.14p., (3) 5a.0r.14p. County: **MAYO.**

Lost Title Documents

ALL THAT AND THOSE the lands and premises situate at Thornhill, Bray in the Barony of Rathdown and Counties of Dublin and Wicklow.

We act for the beneficial owner of the said property who is seeking registration of their title in the Land Registry. The property is subject to a lease dated the 12th day of February 1965 and made between Desmond Murphy of the one part, St. Gerards School Limited of the second part and Laurence McCabe and Pearse Gill of the third part for a term of 99 years from the 15th day of July 1963 subject to the covenants and conditions therein contained.

This lease was stamped and registered. The Lessees subsequently purchased the Lessors interest in the property. However, only the counterpart Lease is with the original title documents and the original Lease is missing.

We would be obliged to hear from any Solicitor or person who might have knowledge of the whereabouts of this missing Lease.

REDDY CHARLETON & McKNIGHT,
Solicitors,
12 Fitzwilliam Place,
Dublin 2.

Miscellaneous

SECOND-HAND photocopier, Canon NP 210, good working order. Phone Terence Lyons & Co., 724048, 718810.

FOR SALE: WANG OIS 50 with two work statins together with WANG single bin lazer printer. Would consider separate offers for work station and printer. Offers invited. Telephone Kevin O'Doherty (055) 21587.

Professional Information

WANTED from any area in the State an ordinary seven day publican's licence, free from endorsements. Please reply to Holmes O'Malley Sexton, Solicitors, 5 Pery Square, Limerick. (Ref. MJOM).

Employment

AUSTRALIAN Solicitor, 27 years of age, seeks relocation to Dublin. I have 3 years post-admission experience and 1 years practical experience in London, specialising in Corporate & Personal Insolvency and Commercial Litigation. Detailed C.V. available on request. Contact: Richard Kimber, Flat 7, Fernshaw Mansions, Fernshaw Road, London SW10 0TD, ENGLAND. Phone: 071-351 2847.

LAW CLERK with experience of civil litigation and criminal law seeks longterm position. Tel. Patrick Flynn (0405) 41195.

HONOURS LAW GRADUATE (T.C.D.), very good French, seeks apprenticeship in Dublin area or elsewhere. Tel. (01) 982016.

Lost Wills

KILBRIDE, Patrick, deceased, late of 2 Cronyhorn Upper, Carnew, Arklow in the County of Wicklow. Would anybody having knowledge of the whereabouts of a will of the above named deceased who died on the 20th day of December, 1977 please contact, Messrs. Augustus Cullen & Son, Solicitors, 7 Wentworth Place, Wicklow. ref. MPC. Tel: 0404 67412.

CRIGHTON, Roy Newman, deceased, late of 27 Fortfield Park, Terenure, Dublin 6. Would any person having knowledge of a will executed by the above named deceased, who died on 14 October, 1990, please contact Whitney, Moore & Keller, Solicitors, Wilton Park House, Wilton Place, Dublin 2. Ref JPH. Tel: (01) 760631.

CONNOLLY, Mary Veronica, deceased, late of Crowe Street, Gort, Co. Galway. Would any person having knowledge of the whereabouts of a Will of the above-named deceased, who died on 10 November, 1990, please contact Colman Sherry, Solicitor, The Square, Gort, Co. Galway. Tel. (091) 31383.

The Legal Profession — looking to the Future

(Contd. from page 379)

The business client today expects a range of services, covering many disciplines with an ability to transact business across national boundaries and at a competitive price. This type of comprehensive service is a relatively new concept here but one for which I suspect there will be an increasing demand.

The Fair Trade Commission argues that the rules governing the forms of organisation limit or restrain free and fair competition and are contrary to the common good. The Commission state that they restrain the excercise by persons of their freedom of choice as to what services they will supply and impose unreasonable conditions in regard to the provision of that service. This is not only unfair on the practitioner, but also on the client. Resources are not used in the most efficient manner and innovation is not encouraged. This results in higher costs to clients. Alternative forms of organisation, the Commission argue, offer the prospect of less rigidity in business structure and improved methods of delivering the service at lower cost. I would suggest that the profession be freed of these somewhat arbitrary restrictions and be able to response to consumer demand.

Discipline in the Profession

One final subject which I want to bring up, and one which perhaps should be treated with some sensitivity, is discipline in the profession. There has been some concern expressed in both the Commission's Report and in submissions I have received about the adequacy of disciplinary procedures in the profession.

Particular attention was drawn to the fact that the existing disciplinary bodies consist solely of members of the profession itself. It was even suggested that these bodies could be perceived as organisations for the protection of members of the profession. It was said that the subject of the complaint was being judged by the body to which he or she belonged and that there was a consequent problem of perception and feeling that complaints were not being processed with due objectivity.

Legal Ombudsman

To remedy this perceived problem it was suggested that there should be lay representation on the disciplinary committees. The idea of a legal ombudsman was also mooted. I fully accept that the profession itself should bear the primary responsibility for ensuring the maintenance of professional standards in every respect. However, the problem of public confidence in the regulatory mechanisms of the profession has to be treated seriously. Both to safeguard the integrity and responsibility of the profession and to assuage the misgivings of the public, I would like to see consideration given to the establishment of an office of legal ombudsman.

I have said before that I am committed to taking action on the recommendations of the report without delay and I will be bringing firm proposals for action to government in the coming months. I know that I will have your support for many of these ideas and I look forward to hearing your further reaction. □

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Recent Irish Cases

Edited by Gary Byrne

PRACTICE AND PROCEDURE

Order 31 Rule 29 of the Rules of the Superior Courts/Ultra Vires/Privilege/ Discovery against persons not parties to Action/Documents relevant to issue.

The second-named Defendant, an employee of the first named Defendant, acting on an anonymous telephone call obtained three Reports contained in an envelope in the car park of Harold's Cross Greyhound Stadium. The three Reports were written by an Accountant on the staff of Bord no gCon, and had been written by him following a detailed investigation made by the Bord into the affairs of the Irish Coursing Club and its two subsidiaries. The Reports were highly critical of the manner in which the affairs of the Club and its subsidiaries had been conducted.

The second named Defendant wrote two articles for the first named Defendant on 1 February 1985 containing extensive extracts from these Reports. The Plaintiff who was the Secretary of Bord na gCon instituted libel proceedings against both Defendants. After the pleadings were closed the Defendant's Solicitor issued a Motion under Order 31 Rule 29 for an Order directing Bord na gCon and the compiler of the Report to make Discovery of:

(a) Books, records and vouchers obtained by the compiler from Bord na gCon in connection with the preparation of the Reports.
(b) Documents submitted to an Bord by or on behalf of the Plaintiff responding to the matters set out in the Report and
(c) Minutes of Meetings of Bord na gCon and its Committees which considered the Report.

Order 31 Rule 29 allows a Court to make Orders of Discovery and inspection against persons not parties to an action but only in respect of documents relevant to the issues in the action. The Judge found as a matter of fact that the documents at (c) above were not discoverable as they were not relevant to any issues in the proceedings.

The Notice parties to the Motion objected to an Order being made on the ground that, firstly, Order 31 Rule 29 was invalid being *ultra vires* the powers of the Superior Courts Rules Committee, secondly because the documents were privileged, thirdly because the documents were available to the Defendant from the Plaintiff's discovery and fourthly on the grounds that if newspapers refused to disclose their sources that the Court should not require the Notice Parties to disclose theirs.

The Court did not consider that Order 31 Rule 29 was invalid as being *ultra vires* the powers of the Rules Committee. The Court stated that it did not consider the substantive law as being changed by a Rule which permitted production of private and privileged Documents of one of the Parties prior to the trial of the action.

The documents which the Notice Parties had in their possession were recorded relating to the affairs of the Coursing Club and its subsidiaries and comments on matters into which the compiler had enquired. The Court did not consider these documents to be adverse to the public interest or injurious to the proper functioning of the service which Bord na gCon was required by Statute to provide and in the circumstances the documents were not privileged and could be made the subject of an Order under Rule 29 Order 31. The Court agreed with the principle advanced by Counsel for Bord na gCon, one of the Notice Parties, that the Court should not make an Order under the Rule against a non Party to the Action, if the documents sought were otherwise available to the Party seeking the Order but felt that it did not have any relevance in this particular case.

Held: The Defendants were entitled to a limited Order of Discovery restricted to the documents at (a) and (b) above pursuant to Order 31 Rule 29 of the Superior Court Rules.

Joseph M. Fitzpatrick -v- Independent Newspapers Plc. and John Martin – High Court (per Costello J.) 19 May 1988 – Unreported.

Donal O'Kelly

CRIMINAL LAW

Warrant to search premises issued by Peace Commissioner pursuant to Section 42 (1) of The Larceny Act, 1916, is not inconsistent with Articles 33 and 40.50 of the Constitution. Warrant not invalidated where Peace Commissioner relying solely on sworn information of prosecuting Garda stating that he has reasonable cause for believing that property is to be found at certain location.

On 3 November, 1985, a member of the Garda Siochana swore an information before a Peace Commissioner. He averred that he was making enquiries into a case of larceny of electrical cookers and refrigerators and he further averred that he had reasonable cause for suspicion that all or some of the stolen property was to be found at a certain address. Finally he stated that his suspicions arose from information which he believed to be true. The Peace Commissioner issued the Search Warrant and in the course of the search of the premises certain items were found. The Applicant was charged and returned for trial before the Circuit Court and then obtained an Order granting leave to apply for Judicial Review on two principal grounds. Firstly he contended that the P.C. has insufficient information before him upon which to formulate a reasonable suspicion of any of the matters contained in Section 42 (1) of The Larceny Act. Secondly that S 88 (3) (6) of the Courts of Justice Act, 1924, which transferred the powers of Justices of the Peace to Peace Commissioners is inconsistent with the Constitution and in particular with Articles 33 and 40.50 thereof.

The Applicant submitted that Article 33 was infringed because the Peace Commissioner carrying out his duties was purporting to administer justice. Similarly his power to issue Search Warrants infringed the citizens rights under Article 40.50.

Held: by the President citing the judgement of Barr J. in the case of *Michael Ryan -v- Sean O'Callaghan P.C.* 22 July 1987 (unreported) that it is in the public interest that the Gardaí have access to a simple procedure for the issue of Warrants and that there are suffient safeguards built into the procedure for the issue of Warrants pursuant to S 42 to protect the rights of the citizen and that therefore such Warrants are not tainted by constitutional illegality.

Held: further that the issuance of the Warrants was a preliminary step which may or may not lead to the institution of proceedings and that it was therefore part of the process of investigation of the crime and an executive rather than a judicial function.

Held: further that the information upon which the P.C. relied for the issuance of the warrant was sufficient to make it apparent to him that there was reasonable cause to suspect that stolen property was to be found at the premises.

The Application for *certiorari* was refused. The President also indicated that even if he had found in favour of any of the grounds advanced by the Applicant, *certiorari* being a discretionary remedy he would still have refused to make the Conditional Order absolute as the "matters in issue" fell more appropriately to be decided at the trial of the matter – see *the State (Glover and Mulligan) -v- District Justice McCarthy [1981] ILRM 47. Berkley -v- Edwards, Ireland and The Attorney General – High Court (per Hamilton J.) – 9 October 1987.*

Yvonne Bambury

NATURAL JUSTICE

Natural Justice – Judicial Review – National and International Athletics Bodies – Dope Testing Procedure – Failure of Athlete to undergo test – suspension of Athlete – Principles of Natural Justice – Right of Athlete to be called on to make his defence before penalty imposed – *audi alterem partem*.

The Applicant was a well known and experienced athlete specialising in the shot putt and discus throwing. He was aware of the rules of the International Amateur Athletics Federation (I.A.A.F.) relating to the dope testing of athletes and the procedures to be followed. Bord Luthchleas Na hEireann (B.L.E.) is a National Body responsible for the development, promotion and control of athletics in the State, and affiliated to I.A.A.F. The Applicant entered an Athletics Meeting under the auspices of the Respondent at Tullamore on 25/26 July, 1987. The Respondent decided to introduce for the first time a dope testing procedure in accordance with the rules of I.A.A.F. One of these rules requires that the athletes be handed a

written notice indicating that the I.A.A.F. Regulations apply and in addition that failure to report for testing when requested "may result in disqualification". It was common case that this notice was not handed to the Applicant. The Applicant was however, requested to give a urine sample. Initially he was unable to comply but instead of waiting for a period sufficient to enable him to comply, the Applicant requested permission, which was granted, to go back to the track to collect some of his things and instead of returning to the control centre, drove to the town of Tullamore and did not contact the B.L.E. Officials for a number of days thereafter. The Applicant's explanation for this was to the effect that he was looking for his father whom he understood to be ill. This explanation was proffered in writing by the Applicant to the Respondent upon request and the Respondent found the explanation unacceptable. On 29 September, 1987, the Respondent wrote to the Applicant informing him that having failed to deliver a sample for testing he was to be suspended from all B.L.E. Competitions for eighteen months thus excluding him from possible selection to represent Ireland at the Olympic Games in 1988. The Applicant sought Judicial Review of the decision of the Respondent.

Held:-;

1. As the suspension imposed by the Respondent amounted to a substantial penalty for alleged failure to comply with the Rules, the Applicant should have been heard in his own defence before being condemned and punished.
2. The principle "*audi alterem partem* must be observed by all persons and bodies having the duty to act judicially, which duty rests upon, *inter alia,* committees of clubs and other voluntary organisations exercising functions of a disciplinary nature involving the imposition of a substantial sanction.

Quirke -v- Bord Luthchleas Na hEireann. High Court (per Barr J.) [1989] ILRM 129.

Eugene F. O'Sullivan

BYE-LAWS

Whether particular "Regulations" were bye-laws and therefore a function reserved to and correctly exercised by the County Council – Definition of "bye-laws'.

On 8 June 1984 at the Bantry District Court the prosecutor was convicted of having on 28 January 1984 under his charge a flock of sheep which had not been dipped and that he failed to produce a certificate of dipping contrary to the Disease of Animals Acts 1894-1966, the Sheep Dipping Orders 1965 and 1977 and the Sheep Dipping Regulations of 1983.

The Respondent, who was the District Justice presiding in the Court, ordered the defendant to pay a fine of £20 payable within twenty eight days in default of which he would serve seven days imprisonment.

On 16 July 1984 the presecutor was granted a conditional order of *certiorari* in the High Court on the ground that the Regulations in respect of which he was prosecuted and convicted were invalid.

On 5 November 1984 the conditional order was set aside upon the cause shown by the County Council, the Court being satisfied that the Regulations in question were validly made. Against this decision, the instant appeal was taken.

The appeal turned on the construction of the County Management Act, 1940, sections 17 and 19 which provide that every power, function, or duty of the County Council which is not a reserved function shall, for the purposes of the Act, be an executive function to be performed by the County manager. The Second Schedule to the Act sets out a number of matters which constitute reserved functions amongst which is "the making amending, or revoking of a bye-law".

The point to be decided in this case was whether the Sheep Dipping Regulations in question constituted bye-laws or not. If they are not then it is not within the competence of the County Council to make them and such function would be reserved for the County Manager. The Regulations in the present case were made by the County Council and not by the County Manager.

The resolution passed was "that the following Sheep Dipping Regulations 1983 be accepted and that the official seal of the Council be affixed thereto". It was quite clear that the County Council treated the making of the Regulations as a reserved function and it was considered that the mere fact that within the Regulations themselves a certain discretion was given to the County Manager was not sufficient to determine whether or not the function exercised by the Council in making the Regulations was an executive or a reserved function. Furthermore no question has been raised as to whether the Regulations as to their content were *ultra vires* the Act or not and the net question therefore was whether the Regulations in question were bye-laws.

The definition of a bye-law given by Lord Russell C.J. in *Kruse -v- Johnson* [1989] 2 Q.B. 91 was cited with approval where he defined it as "an ordinance affecting the public or some portion of the public imposed by some authority clothed with statutory powers ordering something to be done, or not to be done, and accompanied by some sanction or penalty for its non-observance".

Frequently where there is a sanction for the breach of regulations the sanction is not to be found in the regulation itself but in a section of a statute.

Held: The Regulations in the present case did create a criminal offence and imposed a sanction for non-observance and that was sufficient to make it a bye-law. The fact that bye-laws may be headed with the word "Regulations" does not alter the character of it.

The appeal was dismissed.

The State (at the prosecution of Denis Harrington) -v- District Justice Brendan Wallace. (Supreme Court per Walsh J.) (Nem. diss.) [1988] I.R. 290.

Desmond Rooney

PRACTICE AND PROCEDURE

Third Party Proceedings – concurrent wrongdoers – third parties rights – Civil Liability Act 1961.

The Plaintiff in these proceedings was an employee of the first named Defendants, Toyota (Ireland) Limited, and was driving a motor car given to him by his employers. The Plaintiff was injured in a fire and explosion at a filling station on the Naas Road occupied and controlled by the second named defendants, Fieldhill Investments Limited. Whilst visiting the filling station he backed the car into a Petroleum Liquid Gas dispenser situated on the forecourt, knocking it down and causing an escape of gas which exploded and went on fire.

In his action against the two defendants, the jury found his employers to have been 18% responsible for the accident (in requiring the Plaintiff to drive the vehicle they supplied when the view through the rear window was obscured) the Fieldhill had been 49% responsible for the accident (in failing to provide a suitable barrier around the gas-dispenser) and that the Plaintiff himself had been guilty of contributory negligence and responsible as to 33% for the accident.

After an appeal to the Supreme Court, there was a reduction in the damages which the Plaintiff had been awarded and judgment was finally given against Fieldhill for £62,573 and costs. Fieldhill then sought a contribution or indemnity against Flogas Limited, a Third Party in the proceedings, who had supplied the Liquid Petroleum Gas to Fieldhill's filling station, and who had arranged for the installation of the gas equipment, including the dispenser with which the Plaintiff had collided. Flogas had not directed a protective barrier around the dispenser. This dispenser, and the other equipment, was at all times the property of Flogas.

The Order joining Flogas as a Third Party had given liberty to Flogas "to appear at the trial of the Action and to take such part therein as the trial Judge shall direct and be bound by the result of the trial" and that the question of the Third Party's liability be tried at or after the Plaintiff's Action. The Third Party was in fact represented at the trial by its Solicitor, but did not apply to take part in the Trial. Subsequently Fieldhill set down its claim for contribution or indemnity against Flogas for hearing.

At the Trial of this issue, a number of issues arose on the construction of the Civil Liability Act 1961. The first related to the definition of "concurrent wrongdoer" in the Act. The statutory claim by a Defendant against a Third Party for a contribution or indemnity can only succeed if it can be shown that the Third Party committed a wrong in respect of which the Plaintiff could have sued the Third Party – see *Conole -v- Redbank Oyster Company* [1976] I.R. 191

However, in this particular case, Flogas were entitled to resist the claim for indemnity on the grounds that they owed no duty of care to the injured Plaintiff or on the ground that any negligence of theirs was not the *causa causans* of the Plaintiff's damage. Accordingly Flogas were not "concurrent wrongdoers", if they could show that the Plaintiff could not have succeeded directly against the Third Party.

A second point concerned the wish of Flogas to adduce evidence for the purpose of establishing that the absence of a barrier did not amount to a breach of duty to take care of the safety of forecourt users, which the trial Judge would not permit them to do. That issue was determined at the trial of the Plaintiff's claim and Flogas are bound by the Jury's findings, because this was the basis

for the finding that the Defendants were liable to the Plaintiff.

A third point which arose under the Act was whether the Defendant could adduce evidence to show that there were other defects in the installation of the gas equipment, quite apart from the absence of a safety barrier. The trial Judge declined to allow such evidence to be adduced. There may well have been many other defects but these were irrelevant to the issue to be tried, namely, whether Flogas had, concurrently with Fieldhill, committed the particular wrong which Fieldhill had, in the Jury's opinion, committed – which related to the absence of a safety barrier.

The Judge ruled that Fieldhill had shown that Flogas were "concurrent wrongdoers". Flogas owed a duty of care to persons using the forecourt, they were responsible for the installation of highly dangerous equipment, there was a failure to provide a safety barrier, and quite clearly the Plaintiff could have sued Flogas for the injury he sustained and so they were concurrent wrongdoers.

The Judge also held that Flogas could not rely on an indemnity clause in an agreement with Fieldhill, accordingly, Fieldhill were entitled to contribution or indemnity.

By Section 21 of the Act, the Court can direct that contribution should amount to a complete indemnity. The Court rules in this case, that it would be just and equitable that there should be a complete indemnity in Fieldhill's favour, as the blame for the failure to provide a protective barrier was entirely Flogas'.

Fieldhill recovered judgment against Flogas for the £62,573 damages which they had paid to the Plaintiff, plus interest theron, the costs which Fieldhill had paid to the Plaintiff, plus interest thereon, the costs incurred by Fieldhill in defending the Plaintiff's claim in the High Court and on Appeal to the Supreme Court, and the costs of the Third Party proceedings.

George Staunton -v- Toyota (Ireland) Limited Fieldhill Investments Limited (Defendants) and Flogas Limited Third Party. (High Court per Costello J.) 15 April 1988 – Unreported.

Karl Hayes

ADMINISTRATIVE LAW

Army Pension – Relevance of damages awarded in civil proceedings.

The Applicant served in the Irish Army as a private soldier from 1970 to 1978. In August 1976, while driving an Army vehicle, he was involved in an accident, and was so disabled by the injuries he received that he was discharged from the Army in February 1978. He was awarded a Disablement Pension under the provisions of the Army Pensions Act 1923 to 1973.

He commenced proceedings for damages in respect of the accident against Ireland, the Attorney General and the Minister for Defence, and in January 1985 was awarded £60,000 and costs in respect of the injuries sustained by him in the accident. In April 1986, following an exchange of correspondence between the Minister and the Solicitors acting for the Applicant, the Minister advised that the pension would no longer be paid as the actuarial value of the sum awarded for damages exceeded the annual value of the pension. The Applicant challenged this decision by way of judicial review.

It was argued on behalf of the Applicant that it was not correct to take into consideration an award of damages for the purposes of a pension granted under the Army Pensions Act 1927; secondly, that if the damages were to be considered, that only that portion of the damages which represented compensation for future loss of earnings should be considered; and thirdly it was contended that the action of the Minister in taking the damages into consideration amounted to a disregard of the guidance given by the decision of the Supreme Court in the case of *The State (Thornhill) -v- Minister for Defence* [1986] I.R.I. in which this issue had been considered by the Supreme Court.

Following a consideration of the relevant sections of the Army Pensions Acts, and in particular Section 13 (2) of the Act of 1923 as amended, and considering the Thornhill decision of the Supreme Court referred to above, and the decision of the High Court in *McKinley -v- Minister for Defence* (Judgment delivered 4th May 1988), the Court held that the arguments put forward on behalf of the Applicant were not the correct interpretation of the legislation and that the Minister was entitled to act as he did.

The Court held that a wide discretion was conferred on the Minister by the provisions of the Acts and that it was not intended that the High Court should be available as a Court of Appeal from his decisions.

Daniel Breen -v- The Minister for Defence High Court (per O'Hanlon J.) 10 August 1988. [1988] I.R. 242.

Karl Hayes

LANDLORD AND TENANT

Jurisdiction of rent tribunal established under the Housing (Private Rented Dwellings) Amendment Act 1983 to fix rent of licenced premises partly used as a dwelling.

This case was appealed from a hearing of the Rent Tribunal which decided that the premises was covered by the Act and that the rent should be increased. The Respondent in this appeal was the landlord of a premises which was licenced for the sale of intoxicating liquor on the premises with living accommodation overhead. The Appellant was the tenant who appealed on a point of law as to whether the premises was a dwelling covered by the Housing (Private Rented Dwellings) Act 1982 S8.

It was claimed by the appellant that the definition in Section 2 of the 1982 Act does not cover a premises partly used for business and partly for private accommodation. The Court agreed that the definition in S2 did not cover a business premises. However, on a reading of S8(1) of the 1983 Act, the Court was of the opinion that it was necessary to consider whether the premises would have been regarded as a "controlled dwelling within the meaning of the Rent Restrictions Act 1960 to 1981" and not whether covered by definition in S2 of the Act.

Held: that a premises partly used for business is within jurisdiction of Rent Tribunal, as it is a "controlled dwelling" within the meaning of the Rent Restriction Act 1960 to 1981 at the commencement of the Housing (Private Rented Dwellings) Act 1982. The Court referred to *Mullane -v- Brosnan and others* 1974 T.R.P. 222 which dealt with a licenced premises which was a controlled dwelling. The appeal was dismissed.

Theresa Foley -v- Mary Johnson – High Court (per Costello J.) 4 February, 1988 – unreported.

J. Barry Fox

CRIMINAL LAW

A Committal Warrant which expresses on its face that is not to be executed before a specific date is not invalidated by virtue of its not being executed on that exact date. Clerical error on the face of a Warrant does not invalidate its provisions.

The Applicant pleaded guilty in Cork District Court to charges of malicious damage and assault. He was sentenced to a term of three months imprisonment on each charge to run concurrently. He subsequently appealed that sentence and his appeal was listed before Cork Circuit Court on 27 May, 1987. On that date the Applicant withdrew his Appeal but due to his wife's ill health asked that a stay be put on the execution of the Warrant until 1 July, 1987. The Judge acceded to this request and secured an undertaking from the Applicant that he would surrender himself for the purposes of execution of the Warrant at 9.00am on 1 July, 1987. The Applicant honoured his undertaking but was not taken into custody on that date because the warrants had not then issued. He made no subsequent attempt to surrender. He was arrested on 30 September, 1987.

Held: by Mr. Justice Lynch that the delay between 1 July, 1987 and 30 September, 1987 was not one which was unjust or unfair and that the Applicant could have rectified the situation by seeking to surrender himself in the interim.

Held: also that the Committal Warrants correctly reflected the Circuit Court Order notwithstanding the fact that they incorrectly recited the date of the Circuit Court Order as being 10 June, 1987, which was in fact the date of the engrossment of the Order. The validity of the Warrants was also unaffected by virtue of the fact that they were dated the day after they purported to come into effect.

The Application for *habeas corpus* was refused.

James O'Driscoll -v- The Governor of Cork Prison – James O'Driscoll -v- The Circuit Court Judge and the Circuit Court Registrar for the County of Cork. – High Court (per Lynch J.) 3 March, 1988. – Unreported.

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Recent Irish Cases

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IN BONIS GLYNN, DECD; GLYNN -V- GLYNN SUPREME COURT 28 JULY 1989

Succession — Will — Whether testator of sound disposing mind at date of making will — Testator giving instruction as to drawing of will — Testator suffering cerebral stroke prior to attesting will — Testator subsequently marking will in hospital — Evidence as to testator's ability to comprehend — Succession Act 1965, s.77.

The testator, a bachelor, gave instructions to a priest to draw up a will with the intention of leaving his property to a second cousin bearing the family name, the defendant. The priest persuaded the testator to make a bequest to the testator's sister, the plaintiff. The priest drew up the will in accordance with the instructions given, but before the testator could attest the will he suffered a cerebral stroke and was hospitalised. While in hospital, the testator was visited by the priest and another person who had known the testator. They stated that they read over the will to the testator, that he nodded agreement to its terms and appended an X to the bottom of the document. The testator died shortly thereafter. The defendant sought to have the will upheld on the ground that the testator was 'of sound disposing mind' at the time of the making of the will as required by s.77 of the 1965 Act. Evidence was given by the testator's hospital doctors that he would have found difficulty in communicating his comprehension after his stroke. In the High Court, the will was admitted to probate: [1987] ILRM 589. On appeal **HELD** by the Supreme Court (Hederman and McCarthy JJ; Walsh J dissenting): as a matter of public policy there was a presumption of due execution and testamentary capacity; and while the latter presumption had been displaced because of the circumstances of the will in the instant case, there was ample evidence before the High Court that the testator had fully appreciated what was going on when he appended his mark, bearing in mind that he was confirming instructions already given; and in those circumstances the validity of the will should be upheld. *Dicta in Perera -v- Perera* [1901] AC 354 and *In re Estate of Wallace,* decd. [1952] 2 TLR 925 applied. *Per* Walsh J (dissenting): the will could not be upheld in view of the medical evidence as to the testator's condition in hospital.

IN RE THE ESTATE OF I.A.C., DECD.; C. AND F. -V- W.C. AND T.C. SUPREME COURT 24 JULY 1989

Succession — Will — Whether testatrix failed in moral duty to make proper provision for children — Onus of proof — Succession Act 1965, s.117.

The plaintiffs were the daughters of the deceased testatrix and they instituted proceedings claiming that their mother had failed in her moral duty to make proper provision for them in her will within the meaning of s.117 of the 1965 Act. In the High Court, Costello J made an order under s.117 of the Act which varied the testatrix's will be giving a one-ninth share in certain property to the first plaintiff and a share of two-ninths in the same property to the second plaintiff. The first named defendant appealed the order of the High Court. **HELD** by the Supreme Court (Finlay CJ, Griffin and Hederman JJ) allowing the appeal in part and varying the High Court order: (1) in determining an application under s.117 of the 1965 Act, there was a relatively high onus of proof on an applicant for relief which required that a positive failure of moral duty be established, and it would not be sufficient merely to establish that the provision was not as great as it might have been or that it appears ungenerous by comparison with other gifts; (2) the Court was also required to take account of a number of other factors such as the number of the testator's children, the testator's means, the age of the applicant child and whether provision was made in the testator's life for the child. *Dicta in In re G.M., decd; F.M. -v- T.A.M.* (1972) 106 ILTR 82 approved; (3) having regard to these considerations, the Court could not conclude that the provision for the first plaintiff fell short of the testatrix's moral obligation to her; but having regard to the second plaintiff's circumstances, some of which were known to the testatrix at the time of her death, the order of the High Court as it related to the second plaintiff would be affirmed.

KELLY -V- BOARD OF GOVERNORS OF ST. LAURENCE'S HOSPITAL (STAUNTON, THIRD PARTY) SUPREME COURT 24 JULY 1989

Practice — Third Party Notice — Concurrent wrongdoer — Whether served as soon as reasonably possible — Third Party Notice served after conclusion of trial of action — Civil Liability Act 1961, s.27(1) (b) — Rules of the Superior Courts 1986, O.16, r.1.

The plaintiff had successfully brought an action against the defendant hospital for personal injuries sustained while a patient in the hospital. The proceedings had been instituted in 1983, and the hospital had filed a defence in 1984. The trial of the action took place in 1987, and the hospital appealed to the Supreme Court, which dismissed the appeal in 1988: [1989] ILRM 437; [1988] IR 402. The hospital had, after the conclusion of the trial of the action, been given leave to issue and serve a third party notice against the named third party, a consultant in the hospital. The consultant had been called as a witness in the plaintiff's action against the hospital but no indication had been given to him that the hospital would claim against him. The third party appealed to the Supreme Court against the High Court order granting leave to serve the third party notice. **HELD** by the Supreme Court (Finlay CJ, Hederman and McCarthy JJ) allowing the appeal: (1) s.27(1) (b) of the 1961 Act envisaged the issuing of a third party notice in two circumstances, one of which required that the notice be served as soon as was reasonably possible, and since the application in the High Court under O.16, r.1 of the 1986 Rules was clearly made under this provision the trial judge had erred in allowing liberty to serve the notice, it not being as soon as reasonably possible when notice was served after the conclusion of the trial of the action concerned; (2) it was clear from the terms of s.27(1) (b) of the 1961 Act, however, that a second method of claiming contribution was left open, namely a substantive claim for contribution which could be prosecuted by an action brought by civil bill or plenary summons, which would be subject to the question as to whether the delay in bringing such a claim resulted in prejudice or unfairness or was in breach of the general principle in the 1961 Act that all claims of a similar nature be determined at the same time; but as this matter had not been fully argued before the Court in the appeal, the Court would express no view as to what the decision of the High Court would be were the hospital now to institute such an action for contribution.

O'CONNOR -V- O'SHEA SUPREME COURT 24 JULY 1989

Practice — Appeal — Supreme Court — Application to introduce new evidence — Whether discretion should be exercised — Finality of litigation — Rules of the Superior Courts 1986, O.58, r.8

The plaintiff had been involved in a road traffic accident arising from which he instituted High Court proceedings for damages against the defendant. In the course of the trial, a major portion of the evidence was devoted to addressing the nature and extent of the spinal injuries which the plaintiff was alleged to suffer from. A number of consultants were called on the plaintiff's behalf indicating the circumstances in which the plaintiff might recover full use of his spine, but emphasising the difficulty of so doing. The jury awarded no damages for future pain and suffering. The plaintiff appealed the refusal to award damages for future pain and suffering. The plaintiff appealed the refusal to award damages for future pain and suffering and, pursuant to O.58, r.8 of the 1986 Rules, brought a motion to have additional medical evidence considered by the Supreme Court in the appeal. **HELD** by the Supreme Court (Finlay CJ, Griffin and Hederman JJ): while in certain circumstances the need for finality of litigation would be outweighted by the need to do justice, the Court would refuse to admit the evidence in the instant case as it could not be said to result in a dramatic alteration in the circumstances which were considered in the trial court, and could only be described as a different medical view reached by a different medical practitioner; and to admit the evidence would give rise to the disadvantage and mischief which would undermine finality in litigation. *Dalton -v- Minister for Finance* [1989] ILRM 519 and *Mulholland -v- Mitchell* [1971] 1 All ER 307 applied.

BARDUN ESTATES SOCIETY LTD -V- DUBLIN COUNTY COUNCIL HIGH COURT 27 JUNE 1989

Local Government — Planning — Compensation — Refusal of permission by reference to road plans — Subsequent abandonment of road plans — Bord Pleanala inviting renewed application for permission — Whether arbitrator entitled to take account of such invitation — Arbitrator required to 'have regard to' certain matters not including the instant situation — Local Government (Planning and Development) Act 1963, s.55.

The company had been refused planning permission to erect houses on a particular site both by the respondent as planning authority and on appeal by An Bord Pleanala. Refusal was by reference to major road proposals. The company then claimed £1.938 million compensation for the alleged reduction in the value of the company's interest in the lands pursuant to s.55 of the 1963 Act. The company later served a purchase notice for the lands on the Council, which it was unwilling to comply with it. Since the original refusal of the planning permission, the Council had, by administrative decision, abandoned the road proposals for the land owned by the company, but the proposals remained part of its development plan. An Bord Pleanala subsequently made an order in which it directed that permission should be granted for the company's planning application in the event of an application being made to it. The applicant proceeded to arbitration in its application for compensation under the 1963 Act. The arbitrator stated a case for the High Court as to whether the direction of An Bord Pleanala could be taken into account in assessing compensation under s.55 of the 1963 Act. During the hearing in the High Court, the Council stated that it could not itself grant permission in view of the continuation of the road proposals in its development plan. **HELD** by Barrington J: the arbitrator was entitled to 'have regard to' the direction of An Bord Pleanala pursuant to s.55 of the 1963 Act, since although s.55 referred to three particular matters which did not arise in the instant case, this did not preclude the arbitrator from having regard to other matters; and it was clear that it was not the intention of s.55 of the Act to put the arbitrator in blinkers in assessing compensation; nor was it for the company to complain that it would be put to expense to bring a further application for permission since it was for the company to prove its entitlement to compensation under s.55 of the 1963 Act. *Owenabue Ltd -v- Dublin County Council* [1982] ILRM 150 discussed.

APPLICATION OF THANK GOD IT'S FRIDAY LTD HIGH COURT 7 JULY 1989

Licensing — Intoxicating liquor licence — Transfer of existing licence to new premises — Whether likely to have a material adverse effect on business in licensed premises in the neighbourhood — Size of proposed licensed premises — Intoxication Liquor Act 1960, s.14(1) (c) (ii).

The applicant company sought a declaration that certain premises were fit and convenient to receive a 7 day licence under s.14 of the 1960 Act. The premises from which the licence was to be transferred was one where the maximum capacity was 200 clients, and in which very little food was served. The applicant company sought transfer of that premises' licence to a premises in the immediate vicinity in which the applicant intended to serve hot meals at lunch time and which would be part of a larger leisure complex incorporating bowling and gym facilities. A number of licensees in the neighbourhood objected to the application on the ground that the new premises would have a material adverse effect on their business, in particular having regard to the increased emphasis on meals and the size of the premises. **HELD** by Barr J: having regard to the nature and size of the premises, it was clear that the application would have a material adverse effect on the businesses in the neighbourhood within the meaning or s.14(1) (c) (ii) of the 1960 Act and the application should therefore be refused. *Dicta* in *Application of Irish Cinemas Ltd.* (1972) 106 ILTR 17 applied. *Dicta* in *Power Supermarkets Ltd -v- O'Shea* [1988] IR 206 discussed.

HILL -V- CRIMINAL INJURIES COMPENSATION TRIBUNAL HIGH COURT 21 JULY 1989.

Administrative Law — Judicial Review— Tribunal — Reasonableness — Whether decision at variance with reason or common sense — Criminal injuries — Actuarial evidence — Mistaken conclusion from evidence — Whether within jurisdiction — Scheme of Compensation for Injuries Criminally Inflicted (1974) cls.2, 25.

The applicant was the widow of a man who had been murdered. She applied for compensation to the respondent Tribunal under the terms of the 1974 Scheme. At the hearing before the Tribunal, the applicant presented actuarial evidence as to the financial loss to the family arising from the death of the applicant's husband. It became clear during the hearing that the estimated figures used by the actuary as to the deceased's weekly contribution to family expenses exceeded the estimated average by a correspondence of 3:2. Accordingly, in calculating the gross figure for financial loss to the dependants as being £108,269, the actuary made the necessary adjustment down, though without taking account of the factors referred to in the Supreme Court decision *Reddy -v- Bates* [[1984] ILRM 197;[1983] IR 131. The Tribunal awarded a sum of £65,000, i.e. roughly 40% lower than the actuary's calculation of loss. The applicant sought certiorari to quash the award and mandamus to direct the Tribunal to rehear the application. **HELD** by Lynch J granting judicial review: (1) it seemed apparent that the Tribunal has mistakenly considered, in making its award, that the sum of £108,269 had

been calculated by the actuary on the basis of the original, and excessive, estimated contribution of the applicant's husband to the family expenses when in fact the actuary had already adjusted the figure to allow for this, and that a further 10% had been deducted to allow for the decision in *Reddy -v- Bates;* (2) the Court would not set aside an award of a Tribunal merely on the basis of a mistake made within jurisdiction, it being clear from the terms of cls.2 and 25 of the 1974 Scheme that the Court was not an appeal court; but the decision of the Tribunal in the instant case was capable of being quashed on judicial review as being unreasonable as it was at variance with reason and common sense. *The State (Keegan) -v- Stardust Victims Compensation Tribunal* [1987] ILRM 202; [1986] IR 642 and *The State (Creedon) -v- Criminal Injuries Compensation Tribunal* [1989] ILRM 104; [1988] IR 51 applied.

IN RE ASHMARK LTD HIGH COURT 9 JUNE 1989

Company — Winding up — Presentation of petition — Subsequent payment of legal fees to solicitor acting for company prior to appointment of official liquidator — Whether payment should be set aside — Whether special circumstances existing — Companies Act 1963, s.218.

A petition for a creditor's winding up of the company was presented on 8 July 1988. At the time, negotiations were in progress between the company and the petitioning creditor which resulted in the deferment of the hearing of the petition to allow the company to collect its debts. After 8 July 1988, two payments were made by the company to the solicitor which had acted for the company up to the appointment of the Official Liquidator. The first payment was on foot of a cheque which had been issued in May 1988 but which was not credited to the solicitor's account until 11 July 1988. The second payment was sought on 15 July 1988 and paid on 22 July 1988. The third payment was made on foot of the terms of a settlement of an action against the company by which payment was to be made to the defendant's solicitor, which by that time had changed to the firm which now acted for the Official Liquidator. **HELD** by O'Hanlon J holding the payments void and ordering the sums returned to the Official Liquidator: (1) s.218 indicated that from the commencement of the winding up all unsecured creditors of the company should be placed on an equal footing and that any disposition of company property after presentation of the petition would not be validated unless special circumstances existed for doing so, such as where the recipient of the payment was unaware that a petition had been presented or where the disposition was of benefit to the general body of unsecured creditors; and the first two payments in the instant case did not fall within these special circumstances. *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 applied; (2) since the third payment made was on foot of a Court order requiring payment to the defendant's solicitor, the payment should have been made to the then solicitor on record, namely the solicitor for the Official Liquidator.

IRISH LIFE ASSURANCE CO LTD -V- DUBLIN LAND SECURITIES LTD SUPREME COURT 26 JULY 1989

Contract — Rectification — Whether common intention established — Whether mutual mistake between parties — Whether instrument should be rectified — Whether specific performance of instrument as signed should be ordered.

The plaintiff company wished to dispose of its portfolio of lands from which it received income from ground rents. It entered into negotiations with the defendant company, through an auctioneer, W., who represented the defendant company's interests. The portfolio of property involved over 10,000 individual properties and sites. At the outset, the property manager of the plaintiff company indicated to W. that some, unspecified, sites were to be excluded from the sale of the company's portfolio, but that certain other properties would be included which would have investment potential for the defendant. In the course of substantial and detailed negotiations, there was little reference by the parties to the sites which were to be excluded from the contract. In drawing up the written contract between the parties, the plaintiff's legal department included a plot of land which was subject to a compulsory purchase order and for which compensation in the region of £500,000 would become payable. It had not been intended by the plaintiff company's property manager to include this plot in the contract. On the date when the contract was to be signed, W. hesitated on the ground that certain properties did not appear to be included in the Schedule to the agreement. The plaintiff's solicitor stated that the agreement had to be signed on that date or the deal was off, and after consultation by W. with the defendant company the contract was signed. After the signing, the plaintiff's property manager discovered that the c.p.o. plot of land had been included in the contract with the defendant. The plaintiff's solicitor wrote to W. stating this and asking that the site should not therefore be deemed to form part of the transaction. The defendant company declined to accept this view of the transaction. The plaintiff company instituted proceedings seeking rectification of the agreement to exclude the c.p.o. plot of land and specific performance of the agreement as so rectified. The claim was rejected in the High Court: [1986] IR 332. On appeal **HELD** by the Supreme Court (Finlay CJ, Griffin and McCarthy JJ): (1) rectification is concerned with defects in recording, not in the making, of agreements, there being a heavy onus on the person seeking rectification; but although originally rectification was only granted in cases of mutual mistake, it could also be granted in cases where one party was engaged in a degree of sharp practice, although this latter situation clearly did not arise in the instant case; (2) rectification could also be granted even in the absence of a prior concluded oral contract, but only where there was prior accord on a term of the proposed agreement, outwardly expressed and communicated between the parties. *Joscelyne -v- Nissen* [1970] 2 QB 86 and *Rooney & McParland Ltd -v- Carlin* [1981] NI 138 applied. *Dicta* in *Lucey -v- Laurel Construction Ltd.* (High Court, 18 December 1970) considered; (3) the central issue in the instant case was whether, bearing in mind the heavy onus on the plaintiff, there was convincing proof, reflected in some outward expression of accord, that the contract in writing did not express the continuing common intention of the parties and what that common intention was; (4) in the circumstances in which protracted negotiations took place, the defendant was entitled to assume that all problems would be ironed out by the time the contract came to be signed; and the reference by the plaintiff's property manager to W. as to the sites to be excluded from the transaction fell far short of establishing a common intention and completely lacked the precision necessary to enable a court to conclude what the common intention of the parties was; and in the circumstances the plaintiff had failed to establish a common or mutual mistake which would entitle it to rectification; and the circumstances of the completion of the contract by which the defendant was required by the plaintiff to take the contract as it was were such that it would be unjust for the plaintiff to now claim that it was not bound by the terms of that written agreement.

THE PEOPLE (D.P.P.) -V- BUCKLEY COURT OF CRIMINAL APPEAL 31 JULY 1989

Criminal law — Procedure — Admission — Admissibility — Previous admissions during custody ruled inadmissible for breaches of the Judges' Rules — Subsequent admission ruled admissible after

caution administered — Whether previous inadmissible statements tainted subsequent admission — Whether trial court erred in admitting later admission.

The applicant had been convicted of robbery in the Special Criminal Court. He had been arrested pursuant to s.30 of the Offences against the State Act 1939, and while detained in Garda custody he had been asked to 'tell the truth' in relation to a robbery with firearms. He made a verbal admission which was ruled inadmissible at his trial for breach of Rule 8 of the Judges' Rules. A second admission was made by the applicant shortly afterwards and this was also ruled inadmissible by the trial court on the ground that a fresh caution should have been administered pursuant to the Judges' Rules. A further admission was later made by the applicant, after a caution had been administered to him, and the trial court ruled this statement to be admissible. The applicant applied for leave to appeal against conviction on the ground that the statement should not have been admitted in evidence as it was tainted by the previous inadmissible statements. **HELD** by the Court of Criminal Appeal (Finlay CJ, Carroll and Johnson JJ) dismissing the application: while a court should have regard to the circumstances surrounding the giving of previously inadmissible admissions where such previous admissions had been made by virtue of threats or inducements, very different considerations apply where the previous admissions were ruled inadmissible for breach of the Judges' Rules; and having regard to the fact that a caution was properly administered before the making of the final admission, the trial court was correct in ruling the admission was admissible in evidence and the application would be refused.

CLOVER MEATS LTD AND ANOR -V- MINISTER FOR AGRICULTURE HIGH COURT 28 JUNE 1989

European Communities — Common Agricultural Policy — Intervention payments — Minister acting as intervention agent for community — Sums due by Minister to companies under Guidance and Guarantee Fund — Sums due by companies to Minister as national authority for bovine disease levies and animal inspection fees — Whether Minister entitled to set off of fees due against sums payable to companies — Council Regulation 729/70/EEC — European Communities (Common Agricultural Policy) (Market Intervention) Regulations 1973.

The plaintiff companies were both in receivership and insolvent, but there was due and owing to them from the defendant Minister various sums by way of intervention payments pursuant to the Guidance and Guarantee Fund established by Council Regulation 729/70/EEC. The Minister was designated the Intervention Agent for the Fund by the 1973 Regulations. The Minister was also responsible in this State for the collection of levies and fees under the Bovine Disease Eradication schemes as well as under specific pieces of legislation. In that capacity the Minister was owed various sums by the plaintiff companies. The companies instituted proceedings seeking payment of the sums due to them under the Guidance and Guarantee Fund, but the Minister sought a set-off of the sums due to him by the companies in respect of the schemes and legislation referred to. **HELD** by Barrington J: the Minister was entitled to the set-off claimed since there was a certain overlap between his two capacities as Intervention Agent and National Minister; the Minister and all companies involved in the intervention trade had also entered into an agreement regarding the guaranteeing of payments under the Fund by which the Minister had reserved his right of set-off in respect of any future payments due to the companies from the Fund; nor was there any threat in the circumstances to the integrity of the Fund. *Continental Irish Meat Ltd -v- Minister for Agriculture* [1983] ILRM 503; [1985] ECR 3441 discussed.

THE STATE (D.) -V- G. AND ORS SUPREME COURT 27 JULY 1989 AND 2 NOVEMBER 1989

Family Law — Child — Care order — Whether validly made — Evidence available to court — Whether parents entitled to access to material — Health board — Whether 'fit person' to apply for care order — Children Act 1908, ss.23, 24, 38, 58 — Health Act 1970, s.66(2).

The prosecutors were the parents of a child who had been ordered into the care of a health board, the board being deemed to be a 'fit person' for such care order under s.24 of the 1908 Act. The hearing in the District Court included evidence from a doctor, who had examined the child, that in her opinion the child had been sexually abused. The evidence on which this opinion had been based was not before the Court and the prosecutors had not been given access to it prior to the Court hearing. The prosecutors sought an inquiry into the legality of the child's detention pursuant to Article 40.4 of the Constitution. In the High Court, Carroll J found against the prosecutors: [1988] IR 187. On appeal by the prosecutors **HELD** by the Supreme Court (Finlay CJ, Walsh, Griffin, Hederman and McCarthy JJ) allowing the appeal: (1) (27 July 1989) while the procedures before the District Court were not fully adversarial in nature, the inadequacies in the pre-trial procedure and in the actual conduct of the hearing were not in accordance with the requirements of natural justice and accordingly the care order should be set aside, since the Court should have had before it the necessary information to determine whether the opinion of the doctor was supportable; (2) (2 November 1989) while s.24 of the 1908 Act provided that an application such as the present should be 'in like manner' as that for an application where the person who had custody of a child has been committed for trial for ill-treatment of the child, the phrase 'in like manner' did not import that, in an application such as the present (where no criminal proceedings were in being), the District Court was confined to making a temporary care order; and accordingly the Court was empowered to make the type of order which it had made. Per curiam: this, however, created an anomaly as between the two situations; (3) the requirement to specify the religious persuasion of the child in the District Court order pursuant to s.23 of the 1908 Act was a mandatory, not directory, provision and its absence rendered the Court order incomplete but this would not in itself be sufficient to render the order invalid, but rather it would be appropriate to return the matter to the relevant District Court; (4) recitals in the District Court order which referred to the powers of the Court under s.58 of the 1908 Act but which did not arise in the instant case did not invalidate the order once validly made under s.24 of the Act; (5) the District Court was not under an obligation to consider by virtue of s.24 of the 1908 Act whether the child should be committed to the care of a relative before considering committal to another fit person; (6) the health board could not be regarded as a 'fit person' within the meaning of s.38(1) of the 1908 Act, and the provisions of s.66(2) of the 1970 Act could not be regarded as confering such a function on the board, and indeed there were indications in the 1970 Act which negatived the inference that a health board should be so construed. Per curiam: (a) where, as in the instant case, there was an allegation of abuse by one parent only, a Court should carefully consider whether the welfare of the child requires removal from the custody of the innocent parent; (b) while a health board is not a fit person within the 1908 Act, its servants or agents could appropriately make applications under the Act; (c) a named individual should be nominated in any order made under the Act as the person into whose custody the child is committed; (d) in exceptional circumstances, the identity and address of the named person could be withheld from one or other of the parents of the child. [Note: subsequent to this decision the Oireachtas enacted the Children Act 1989, by which a health board is defined as a 'fit person' under the Children Act 1908.]

Recent Irish Cases

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The following case summaries have been reprinted from the *Irish Law Times and Solicitors Journal,* with the kind permission of the publishers.

SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN (IRL) LTD -V- COOGAN AND ORS SUPREME COURT 28 JULY 1989 AND 20 MARCH 1990.

Constitution — Locus standi — Injunction — Right to life of unborn — Whether Attorney General having exclusive right to seek injunction to uphold right to life of unborn — Whether private corporate entity has sufficient locus standi — Practice — Costs of appeal to Supreme Court — Follow the event — Constitution, Article 40.3.3

The plaintiff society sought an interlocutory injunction preventing the publication or distribution of a publication entitled 'Welfare Guide UCD 88/89'. The defendants were eight elected officers of University College Dublin Students' Union, a printer and UCD itself. The plaintiff argued that the contents of the Guide would constitute an undermining of the right to life of the unborn guaranteed protection in Article 40.3.3. In the High Court Carroll J held that the plaintiff had no locus standi to seek the injunction: [1989] ILRM 526. The plaintiff appealed to the Supreme Court, and in the course of the hearing the Court sought and obtained the views of the Attorney General as to his role and function. The Attorney disclaimed any exclusive right to assert constitutional claims. **HELD** by the Supreme Court (Finlay CJ, Walsh, Griffin and Hederman JJ: McCarthy J dissenting) allowing the plaintiff's appeal and remitting the injunction proceedings to the High Court: (1)(28 July 1989) the plaintiff had sufficient locus standi to maintain the proceedings having regard to its previous involvement in similar proceedings regarding Article 40.3.3. and having regard to its proximity to or interest in the protection of the particular constitutional right which it was sought to protect, namely, the right to life of the unborn. *Attorney General (SPUC Ltd) -v- Open Door Counselling Ltd* [1989] ILRM 19; [1988] IR 593 discussed. *Per* Walsh J: circumstances could very well arise in which it would be entirely inappropriate for the Attorney General to be regarded as the sole person with power to assert constitutional claims and it was important for ordinary citizens to exercise the right of access to the court. *The State (Ennis) -v- Farrell* [1966] IR 107 discussed. *Per* McCarthy J (dissenting): the plaintiff could not be held to have locus standi in the present circumstances where it had refused to consider the Attorney's offer that he would consider converting the proceedings into a relator action; (2) (20 March 1990) the plaintiff was entitled to its costs of the Supreme Court appeal, there being no grounds for departing from the usual principle that costs follow the event, and it would require very substantial reasons of an unusual kind before the Court would depart from that principle. *Per* McCarthy J (dissenting): the application for costs was premature and should await the final outcome of the case.

THE PEOPLE (D.P.P.) -— O'SHEA (G.) COURT OF CRIMINAL APPEAL 28 JULY 1989

Criminal Law — Arrest — Offences against the state — Extension order — Suspicion of chief superintendent that arrested person committed scheduled offence — Whether established — Offences against the State Act 1939, s.30.

The applicant had been arrested under s.30 of the 1939 Act on suspicion of having committed a scheduled offence, namely an offence under the Firearms Act 1925. An order extending the time for his detention under s. 30 for a further period of 24 hours was made by a Chief Superintendent of the Garda Siochana. The applicant was subsequently charged with robbery. At the applicant's trial, the Chief Superintendent gave evidence that he had had discussions with the officers involved in the interrogation of the applicant and had formed the opinion that it would be necessary to detain him for the second 24 hour period. He stated that he had been satisfied that this was necessary in the interests of the progress of the investigation. The Special Criminal Court ruled that the extension order made by the Chief Superintendent was valid and the court subsequently convicted the applicant. On application for leave to appeal **HELD** by the Court of Criminal Appeal (Finlay CJ, Barron and Blayney JJ) dismissing the application: the Chief Superintendent was entitled to rely on the information and opinions of his subordinate officers with regard to matters which had given them a suspicion as to the commission of an offence by the detained person and as to the progress of the investigation of the crime; and it was clear from the Chief Superintendent's evidence at the applicant's trial that he retained, at the time he made the extension order, a real suspicion of the guilt of the applicant of the crime of the use of firearms. *Per curiam*: notwithstanding the unqualified onus of proof on the prosecution and that there can never be an onus on the defendant to establish any particular matter, it was for counsel to raise or establish an alternative meaning to answers, such as those in the instant case, which had a plain, reasonable meaning attaching to them.

SINGH -V- RUANE AND MINISTER FOR LABOUR HIGH COURT 27 JUNE 1989

Criminal law — Conviction — Judicial review — District Justice refusing to allow certain evidence to be led — Whether subsequent conviction void — Whether prohibition of further trial should issue — Whether matter should be remitted to trial court

The applicant was charged with an offence under s.10(3) of the Industrial Relations Act 1969. In the District Court hearing before the first respondent the applicant's defence was that the offence had been committed by a limited liability company of which he was managing director. The first respondent refused to alllow production of the certificate of incorporation of the company. The applicant was subsequently convicted of the offence. In his application for judicial review of the conviction, the applicant argued that the conviction should be quashed on certiorari and that this should have the effect of an acquittal so that the matter should not be remitted to the District Court. **HELD** by Barron J granting certiorari but remitting the matter to the District Court: in the instant case there was no valid adjudication and thus the convicton was void ab initio; and this was different from situations where autrefois convict can be pleaded since in those cases the accused might have been subjected to a lawful punishment within jurisdiction. *The State (Tynan) -v- Keane* [1968] IR 348 and *The State (Keeney) -v- O'Malley* [1986] ILRM 31 discussed.

THE PEOPLE (D.P.P.) -V- O'BRIEN COURT OF CRIMINAL APPEAL 21 JULY 1989

Criminal law — Appeal — Whether jury decision perverse — Judge indicating weakness of prosecution case — Whether court of criminal appeal should set aside verdict — Courts (Supplemental Provisions) Act 1961, s.12.

The applicant was convicted of having unlawful sexual intercourse with three girls under the age of 15 years. The complaints against the applicant were made one month after the incident in question and the trial took place over 2 years later. At the applicant's trail, medical evidence was given which indicated that the three complainants were found to be virgins. The trial judge, in his direction to the jury, drew attention to the weakness of

the prosecution case and of the danger of convicting on uncorroborated evidence. On application for leave to appeal against conviction **HELD** by the Court of Criminal Appeal (McCarthy, Barrington and Lardner JJ) dismissing the application: while there might be cases in which the Court would use the wide powers granted it by s.12 of the 1961 Act to interfere with the verdict of a jury in a case where there was evidence to support a verdict, this was not such a case; and having regard to the exemplary manner in which the trial was conducted and the express warnings given to the jury, it was for the jury to assess the evidence tendered and to arrive at the verdict which they did. *The People -v- Madden* [1977] IR 336 referred to.

THE PEOPLE (D.P.P.) -V- MURTAGH COURT OF CRIMINAL APPEAL 27 JULY 1989

Criminal Law — Evidence — Accomplice — Subornation of witness — Perversion of course of justice — Accused alleged to have persuaded person to make false statement to Gardaí — Whether person making false statement accomplice to accused — Whether trial judge should have given warning of convicting on uncorroborated evidence of accomplice.

The appellant had been convicted of subornation of perjury and of an attempt to pervert the course of justice. At his trial in the Circuit Criminal Court, a central piece of evidence was given by a woman who stated that she had been asked by the appellant to make a false statement that the appellant had been assaulted while in Garda custody, and that she had made this statement. The appellant was sentenced to two years imprisonment on both counts. He applied for leave to appeal, the application was granted and he was admitted to bail pending his appeal. **HELD** by the Court of Criminal Appeal (Finlay CJ, Costello and Johnson JJ) allowing the appeal: in relation to both counts, the person who had made the false statements in question was an accomplice of the appellant in the two offences alleged against him and the trial judge should have given a warning to the jury on the dangers of convicting on the evidence of an accomplice, and in the absence of such warning the convictions should be set aside.

THE PEOPLE (D.P.P.) -V- KENNY (M.) COURT OF CRIMINAL APPEAL 15 JUNE 1989 AND 30 NOVEMBER 1989; SUPREME COURT 20 MARCH 1990

Criminal law — Evidence — Admissibility — Constitution — Inviolability of the dwelling — Search warrant obtained — Failure by peace commissioner to satisfy himself as to basis for granting warrant — Whether subsequent search a conscious and deliberate violation of constitutional right — Whether evidence thereby obtained admissible — Nature of act involved in conscious and deliberate violatiaon — Purpose of exclusionary rule — Constitution, Articles 40.3, 40.5 — Courts of Justice Act 1928, s.5(1)(a) — Misuse of Drugs Act 1977, s.26.

The appellant had been charged in the Circuit Criminal Court with offences under the 1977 Act, as amended. The principal evidence against him consisted of quantitites of controlled drugs which had been found in his flat pursuant to a search warrant obtained by the Garda Siochana under s.26 of the 1977 Act, as amended. The Garda applying for the search warrant had sworn an information stating that he suspected that controlled drugs were in the flat in contravention of the 1977 Act, as amended. The Peace Commissioner who granted the warrant acted on the sworn information without further evidence. At the appellant's trial, the trial judge ruled admissible the evidence obtained on foot of the search warrant, and the appellant was subsequently found guilty of the offences charged. On application for leave to appeal **HELD** by the Court of Criminal Appeal (McCarthy, O'Hanlon and Lardner JJ): (1) (15 June 1989): the search warrant was invalid since the Peace Commissioner had acted purely on the say-so of the Garda who applied for the warrant and had failed to exercise any independent judicial discretion as required by s.26 of the 1977 Act, as amended. *Byrne -v- Grey* [1988] IR 31 and *R. -v- Inland Revenue Commissioners, ex p. Rossminster Ltd* [1980] AC 952 applied; (2) (30 November 1989) although the entry into the appellant's dwelling was unlawful, the question then arose as to whether this rendered inadmissible the evidence obtained on foot of the warrant, and whether there was a deliberate and conscious violation of the appellant's constitutional right under Article 40.5; (3) where no justification could be put forward by the prosecution witnesses for failure to observe a clearly established rule of law, the considerations which applied were clear; but different considerations applied where the law had been generally interpreted and applied in a particular way without challenge over a substantial period of time and then there is a change in the judicial interpretation of what is accepted as lawful, such as in the instant case; in such circumstances there is no deliberate and conscious violation of constitutioanl rights and the courts should not apply the exclusionary rule in relation to evidence thereby obtained. Dicta of Kingsmill Moore J in *The People -v- O'Brien* [1965] IR 142 and of White J in *United States -v- Leon* 468 US 897 (1984) applied; (4) in the instant case the admisssibility of the evidence was a matter for the trial judge and since no miscarriage of justice had occurred the Court would dismiss the appeal in accordance with s.5(1)(a) of the 1928 Act. The Court of Criminal Appeal granted a certificate of leave to appeal to the Supreme Court pursuant to s.29 of the Courts of Justice Act 1924. The Supreme Court admitted the appellant to bail pending the appeal. **HELD** by the Supreme Court (Finlay CJ, Walsh and Hederman JJ: Griffin and Lynch JJ dissenting) allowing the appeal: (1) in view of the obligation on the courts to protect the personal rights of the citizen pursuant to Article 40.3 of the Constitution, they must, as between two alternative rules or principles governing the admissibility of evidence obtained as a result of violation of such rights, choose the principle which is likely to provide a stronger and more effective defence and vindication of the right concerned; (2) to exclude evidence only where a person knows or ought reasonably to know that he is invading a constitutional right is to impose a negative deterrent, which clearly dissuades a policeman from acting in a manner which he knows to be unconstitutional or in a reckless manner; but to exclude evidence on the basis of what may be described as the absolute protection rule of exclusion (that is in circumstances where there is a conscious and deliberate violation of rights without regard to the state of knowledge of the policeman) incorporates an additional positive encouragement to those involved in crime prevention and detection to consider in detail the effects of their powers on the personal rights of the citizen; and therefore the latter principle was more likely to protect constitutional rights (3) although the absolute protection rule of exclusion might lead to anomalies in its application, and might hinder the capacity of the courts to arrive at the truth and thus to administer justice effectively, this could not outweigh the obligation to protect personal rights pursuant to Article 40.3, and accordingly the courts must rule inadmissible evidence obtained in violation of constitutional rights unless the act constituting the breach was committed unintentionally or accidentally, or there are extraordinary excusing circumstances justifying its admissibility. *The People -v- Shaw* [1982] IR 1 not followed. *United States -v- Leon* 468 US 897 (1984) disapproved. *The People -v- O'Brien* [1965] IR 142 discussed. *The People -v- Healy* (Supreme Court, 5 December 1989) followed; (4) since the acts of the Gardaí in the instant case were neither unintentional nor accidental and there were no extraordinary excusing circumstances present, the evidence obtained was inadmissible even though the Gardaí had not knowledge that they were invading the constitutional rights of the appellant; and accordingly the conviction would be quashed. *Per* Griffin and Lynch JJ (dissenting): the acts of the Gardaí could not be regarded as amounting to conscious and deliberate violations of the appellant's constitutional rights.

KEATING -V- NEW IRELAND ASSURANCE CO PLC HIGH COURT 15 MARCH 1989; SUPREME COURT 6 DECEMBER 1989

Contract — Insurnace — Non-disclosure — Material fact unknown to policy holder at time of signing proposal — Contract conditional on disclosure of all material facts of which company 'ought to have been informed' — Whether non-disclosure vitiated contract — Whether full disclosure intended as an absolute warranty.

The plaintiff and her late husband entered into a contract of life insurance with the defendant company under which the sum of £35,000 would be payable on the death of either of them to the survivor. In the course of the medical examination conducted for the company prior to the completion of the proposal form, the plaintiff's husband disclosed that he had recently attended a cardiologist in a Dublin hospital but he stated that nothing abnormal had been discovered. In fact the plaintiff's husband had been referred to the cardiologist by his own doctors on suspicion of angina and this had been confirmed in the test carried out in the hospital. His discharge note from the hospital, however, read 'Initial report good. Full report to follow'. The defendant company's proposal form stated that the policy was conditional on 'full and true disclosure . . . of all material facts of which the Company ought to have been informed . . . ' On her husband's death the plaintiff sought payment of the sum due under the policy but the company sought to repudiate liability for non-disclosure of the angina. The plaintiff instituted proceedings seeking to enforce the contract. **HELD** by Egan J upholding the plaintiff's claim: the information which was not disclosed was clearly material from an objective point of view but on the evidence it could not be held that the plaintiff's husband was aware of his condition at the time of his medical examination, and non-disclosure can only be relevant to some fact of which the person has knowledge at the relevant time; and it was not sufficient for the company to establish that the answers given were actually untrue since the policy required disclosure only of information of which the company 'ought' to have been informed. On appeal by the company **HELD** by the Supreme Court (Finlay CJ, Hamilton P, Walsh, Hederman and McCarthy JJ) dismissing the appeal: (1) the Supreme Court could not disturb the finding of fact by the High Court that the plaintiff's husband was unaware of the angina condition. *Dunne -v- National Maternity Hospital* [1989] ILRM 735 applied; (2) the contract between the parties could not reasonably be construed as requiring disclosure of information of which the insured was unaware. Dicta in *Anderson -v- Fitzgerald* (1853) 4 HL Cas 484 and *Joel -v- Law Union and Crown* [1908] 2 KB 863 applied; (3) the company had not established by clear and unambiguous language in its contract that it was intended that the plaintiff and her husband warranted the truth of the information supplied in the course of the medical examination.

IN RE S.W., AN INFANT; K. -V- W. AND ORS SUPREME COURT 1 DECEMBER 1989: HIGH COURT 9 FEBRUARY 1990

Family law — Guardianship — Natural father — Application to be made guardian — Natural mother placing child for adoption — Welfare of child paramount consideration — Nature of father's right to apply — Guardianship of Infants Act 1964, ss.3 6A(1) — Status of Children Act 1987, s.12.

The infant child was born to a couple who were not married but who had been living together for a time prior to the mother becoming pregnant. The mother determined that the infant should be placed for adoption and after the birth she put adoption proceedings in train. The father thereupon instituted proceedings seeking to be appointed guardian of the child pursuant to s.6A(1) of the 1964 Act, as inserted by s.12 of the 1987 Act. It was agreed that the effect of being appointed guardian would be that adoption of the child could only take place with the father's consent. In the Circuit Court, the father was appointed guardian. On appeal to the High Court by the mother and the adoptive parents, Barron J stated a case for the Supreme Court as to the correct interpreation of s.6A(1) of the 1964 Act. **HELD** by the Supreme Court (Finlay CJ, Walsh, Griffin and Hederman JJ: McCarthy J aliter): (1) in an application by a natural father under s.6A(1) of the 1964 Act, the welfare of the child remained the first and paramount consideration, and the 1987 Act did not give the natural father a right to be appointed guardian but only a right to apply to be so appointed; (2) the High Court judge had erred in stating that the test under s.6A(1) of the 1964 Act was: (a) whether the natural father was a fit person to be appointed guardian and (b) whether there were circumstances involving the child's welfare requiring that he not be appointed, notwithstanding he was a fit person, since such a test presupposed a right to guardianship and it conflicted with placing the welfare of the child as the first and paramount consideraton: (3) the natural father has no constitutional right to guardianship, although there were considerations connected with the circumstances of the relationship of the natural father and the child which would be relevant in the exercise of the court's discretion as to guardianship having regard to the welfare of the child as the first and paramount consideration; (4) in circumstances such as the present, where guardianship was linked with an application for present custody, the court should not have regard to the objective of satisfying the wishes and desires of the natural father to be guardian and to enjoy the society of the child unless the court has first concluded that the quality of welfare in the custody of the adoptive parents is not to an important extent better as compared with that which might be achieved in the father's custody. *Per* McCarthy J: the test propounded by Barron J did not appear to be in conflict with the paramountcy of the welfare of the child. On remittal to the High Court **HELD** by Barron J in refusing the application by the natural father: having regard to the security, arising from attachment, which the child will have from being a member of a family recognised by the Constitution if left with the adoptive parents, it could not be said that the quality of welfare likely to be achieved by her would not be to an important extent better than that likely to be achieved in the father's custody; and in the light of the test laid down by the Supreme Court, the father's wish to be involved in guardianship could not be taken into account and his application under s.6A(1) of the 1964 Act would be refused.

THE PEOPLE (D.P.P.) -V- HEALY (P.) SUPREME COURT 5 DECEMBER 1989

Criminal Law — Arrest — Garda custody — Access to solicitor — Nature of right — Whether constitutional in origin — Solicitor refused access to detained person — Detained person in course of making inculpatory statement — Whether statement admissible — Whether obtained through deliberate and conscious violation of constitutional rights — Constitution, Article 40.3.

The accused had been arrested under s.30 of the Offences against the State Act 1939 in connection with an armed robbery. In the course of his detention, he began making an inculpatory statement at approximately 3.40p.m., which he concluded at 4.30p.m. approximately. At 4p.m. a solicitor retained by a member of the accused's family had arrived at the Garda station where the accused was detained and had asked a Garda superintendent to see the accused. This was refused by the Garda on the basis that the accused was in the course of being interviewed. At the trial of the accused in the Central Criminal Court, Egan J ruled that the inculpatory statement was inadmissible in evidence and he directed the jury to return a verdict of not guilty. On appeal by the Director of Public Prosecutions against the acquittal (see *the People*

-v- O'Shea [1983] ILRM 549; [1982] IR 384) **HELD** by the Supreme Court (Finlay CJ, Walsh, Griffin, Hederman and McCarthy JJ) dismissing the appeal: (1) the right in issue was that of the detained person to have access during his detention to a solicitor whose attendance he had requested or whose attendance has been requested on his behalf by other persons bona fide acting on his behalf; and such right could be defeated either by failure to convey the request in the first instance or by failing to inform the detained person or to allow access in the second instance. *Per curiam:* the questions whether a detained person had a right to be informed of his right of access by a member of the Garda Siochana or of any possible right to the presence of a solicitor during interrrogation did not arise in the instant case; (2) the right of reasonable access to a solicitor of a detained person was constitutional in origin and to classify it as merely legal would be to undermine its importance, since it was directed towards the vital function of ensuring that the detained person is aware of his rights and has independent advice to permit him to reach a truly free decision as to his attitude to interrogation or to making any statement, whether inculpatory or exculpatory, and must be seen as a contribution towards a measure of equality in the position of him and his interrogators. Dicta in *The People -v Shaw* [1982] IR 1 and *The People -v- Conroy* [1988] ILRM 4; [1986] IR 460 discussed; (3) the issue which arose in this light was whether, if a breach of the right occurred as a result of a conscious and deliberate act by a member of the Garda Siochana, there was a causative link between that breach and the obtaining of the evidence; (4) the right of reasonable access means in the event of the arrival of a solicitor at the Garda station an immediate right of the detained person to be told of the arrival and, if the detained person requests it, an immediate access, subject only to an objectively jusitfiable reason from the point of view of the detained person's welfare for refusing access. *The State (Harrington) -v- Garda Commissioner* (High Court, 14 December 1976) referred to; (5) the test of whether the refusal in the instant case was a deliberate and conscious act was not to be based on the Garda superintendent's subjective belief, nor was there any justification for refusing access for the purpose of completion of a statement; and in the circumstances there had been a deliberate and conscious violation of the accesed's constitutional right; and the conclusion of fact by the trial judge that he could not be satisfied that the incriminating statement was made prior to the arrival of the solicitor could not be distrubed on appeal.

SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN (IRL) LTD -V- GROGAN AND ORS SUPREME COURT 19 DECEMBER 1989

Constitution — Right to life of unborn — Interlocutory injunction — Whether should be granted to prohibit distribution of information as to availability of abortion in United Kingdom — Reference by High Court of issues to Court of Justice of EC — Whether Supreme Court may grant interlocutory injunction notwithstanding reference by High Court — Constitution, Articles 29.4.3, 34.4.3, 40.3.3 — Treaty of Rome (1957), Article 177.

The plaintiff society applied for interlocutory injunctions against the defendants preventing the publication or distribution by them of information calculated to inform persons of the identity and location of and the method of communication with clinics where abortions are performed contrary to Article 40.3.3. of the Constitution. The defendants were members of the Union of Students of Ireland, the Student's Union of University College Dublin and the Students' Union of Trinity College Dublin. In the High Court the defendants asserted a right to distribute such information by virtue of the Treaty of Rome. Carroll J made an order referring certain questions to the Court of Justice of the EC pursuant to Article 177 of the Treaty of Rome, and she declined to make an order in relation to the application by the plaintiff for an interlocutory injunction. On appeal by the plaintiff **HELD** by the Suprme Court (Finlay CJ, Walsh, Griffin, Hederman and McCarthy JJ) allowing the appeal and granting an interlocutory injunction: (1) while the order of the High Court did not expressly refuse an interlocutory injunction, this was in reality a separate issue from the reference of questions to the Court of Justice of the EC and the Supreme Court thus had jurisdiction to entertain an appeal from the High Court without affecting the reference. *Campus Oil Ltd -v- Minister for Industry and Energy* [1983] IR 82 discussed; (2) the deferral or postponement of the decision on the interlocutory injunction was, in effect, to decline or refuse to make an interlocutory injunction, and having regard to the appellate jurisdiction of the Supreme Court pursuant to Article 34.4.3 the plaintiff had a right of appeal to the Supreme Court on the issue of whether an injunction should be granted; (3) it was clear that the activities of the defendants were unlawful having regard to the provisions of Article 40.3.3. of the Constitution, and it was the fact that information relating to abortion (and not the method of communication) was being distributed that created an unconstitutional illegality against which the courts must fully and effectively grant protection; and having regard to the question of the status quo and the balance of convenience the interlocutory injunction should be granted; (4) if and when the Court of Justice of the EC rules that some aspect of EC law affects the activities of the defendants, the consequence of such decision would fall to be considered having regard to Article 29.4.3 of the Constitution, but the issue as to what stage a reference should be made to the Court of Justice was a matter exclusively for the national courts to determine.

FEENEY AND ORS -V- CLIFFORD SUPREME COURT 19 DECEMBER 1989

Criminal law — Trial — District Court — Whether case to be dealt with in summary trial — Defendant pleading guilty and agreeing to summary trial — District Justice hearing evidence that defendant currently serving term of imprisonment — Justice sending defendant forward for trial — Whether justice acted without jurisdiction — Law reform — Whether need to alter procedure — Criminal Justice Act 1951, s.2.

The applicants had appeared before the respondent Justice in February 1988 charged with unlawful possession of two motor vehicles as well as malicious damage to one of them. Having heard evidence of the circumstances of the offences, the respondent decided pursuant to s.2 of the 1951 Act that the charges were minor and fit to be tried summarily. The applicants agreed to this course and pleaded guilty. When the respondent was then informed that the applicants were then serving sentences, including one of 2 years imprisonment imposed in July 1987, he indicated that as he had intended to impose 2 years imprisonment on the applicants but that this was not possible in the circumstances arising he would send the applicants forward for trial in the Circuit Court. On application for judicial review, Barr J refused the relief sought in the High Court: [1988] IR 499. On appeal by the applicants **HELD** by the Supreme Court (Finlay CJ, Hederman and McCarthy JJ) allowing the appeal and quashing the order sending the applicants forward for trial: if a District Justice has concluded that an offence is fit to be tried summarily pursuant to s.5 of the 1951 Act, and the accused person then pleads guilty, once the Justice embarks upon an enquiry as to the penalty appropriate to the offence he is precluded from changing his mind, there being no such thing in law as a provisional conviction, and in the result the respondent had acted in error. Dicta in *The State (McEvitt) -v- Delap* [1981] IR 125 distinguished. *Per curiam:* the effect of the decision was to create a procedural lacuna by which the accused could prevent the holding of a trial on indictment and consideration should be given to amending the 1951 Act to allow the Director of Public Prosecutions to object to such a course.

Recent Irish Cases

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O'FLYNN AND HANNIGAN -V- CLIFFORD SUPREME COURT 20 DECEMBER 1989

Criminal law — Trial — Delay — Delay between alleged commission of offence and date when accused charged with offence — Whether accused prejudiced by virtue of delay — Whether accused had right to be charged expeditiously.

The applicants had been charged in February 1988 in relation to offences alleged to have taken place in August 1986. Around the time of the alleged offences, they had been arrested under s.30 of the Offences against the State Act 1939 but were released without charge. The respondent District Justice who had conducted the preliminary examination of the case under the Criminal Procedure Act 1967 considered that the delay involved had been inexcusable, but he entered into the preliminary examination and he returned the applicants for trial in accordance with s.8 of the 1967 Act. The applicants sought judicial review of the return for trial, grounded on reasons connected with the delays. In the High Court, Gannon J refused the relief sought: [1988] IR 740. On appeal by the applicants **HELD** by the Supreme Court (Finlay CJ, Walsh and Griffin JJ) dismissing the appeals: (1) it cannot be claimed that any person has the right to be charged with an offence of which he is suspected, since to charge a person without sufficient evidence would be highly prejudicial to that person; and it was a matter for the prosecuting authorities to decide whether to prosecute a person having regard to the sufficiency of evidence and the complexity of the case; (2) once it was decided that there was sufficient evidence to charge a person that decision should be given effect to without unreasonable delay and should be prosecuted in a manner which did not lead to undue prejudice to the accused person; but since there was no evidence in the instant case that the applicant's right to a fair trial had been prejudiced, the applications would be dismissed. *The State (O'Connell) -v- Fawsitt* [1986] ILRM 639; [1986] IR 362 discussed.

THE PEOPLE (D.P.P.) -V- HEALY (N.) COURT OF CRIMINAL APPEAL 12 JULY 1989

Criminal law — Sentence — Co-accused — Disparity in sentences — Disparity due to sentencing Judge taking account of sentences already imposed on co-accused — Co-accused on bail at time of commission of offence — Criminal Justice Act 1984, s.11.

The applicant had pleaded guilty to conspiracy to commit false imprisonment and conspiracy to rob, and was sentenced to two concurrent terms of 8 years imprisonment. Three co-accused had been sentenced in respect of the same event, and had received sentences of 2 years, 2 years and 4 years, respectively. The sentencing judges who imposed these sentences took account of the fact that the applicant's co-accused were, by the time of the imposition of the sentences for the conspriacy to rob, serving lengthy terms of imprisonment for other offences, in respect of some of which they were free on bail at the time of the conspiracy. The applicant sought leave to appeal against the severity of sentence imposed on him. **HELD** by the Court of Criminal Appeal (McCarthy, Carroll and Barron JJ) dismissing the application: disparity in sentence is not a ground on which the Court would, necessarily, intervene and in the instant case the sentence of 8 years imprisonment was in no way excessive or founded on any error of principle, having regard to the characters and antecedents of the convicted persons. *The People -v- Poyning* [1972] IR 402 applied. *Per curiam:* although s.11 of the 1984 Act was not relevant to the instant cases, since the offences occurred before it came into effect, it appeared that the sentencing judges had taken account of its provisions; and the Court would therefore take the opportunity to indicate that the sentencing judge should determine the sentence appropriate to the offence without regard to the fact that it must be a consecutive sentence where s.11 of the 1984 Act applies, although in a grave offence this would not preclude the sentencing court from adjusting the sentence downwards where not to do so would impose a manifestly unjust punishment on the accused.

THE PEOPLE (D.P.P.) -V- EGAN COURT OF CRIMINAL APPEAL 27 JULY 1989

Criminal law — Party — Robbery — Whether evidence indicating that accused was accessory before the fact — Nature of evidence required — Accused making statement indicating he knew 'small stroke' was to take place — Evidence — Admission — Whether voluntary — Larceny Act 1916, s.35.

The applicant was convicted by a jury in the Circuit Criminal Court of robbery and found not guilty of receiving stolen goods (having been directed that the charges were alternative ones). He was then sentenced to 7 years imprisonment. The only eivdence against him was a statement made by him in the course of being in Garda custody pursuant to s.30 of the Offences against the State Act 1939. In the course of his statement, the applicant indicated that he had been asked to make available his garage to leave a van in it for what the applicant said he thought was a 'small stroke'. When the van arrived, the applicant said that he realised only then that the men in the van had been involved in an armed robbery on a jewellery shop. The statement also described how, after the armed men left, the applicant had found a bag of jewellery in the garage and how he had disposed of its contents. The statement had been made after the applicant had been in custody for 30 hours and after he had seen, at various times, his wife and son. During a 'trial within a trial' the applicant stated that he had been abused and threatened by the Gardaí and it was also argued at his trial that the effects of the meetings with his wife and son had been to break down his will. The trial judge rejected the claim that the admission was not voluntary. The applicant sought leave to appeal against conviction on the grounds that the admission should not have been admitted in evidence and, alternatively, that the admission did not disclose sufficient evidence on which the applicant could have been convicted of robbery. **HELD** by the Court of Criminal Appeal (Finlay CJ, Costello and Johnson JJ) dismissing the application: (1) the trial judge was entitled to find that the admission had been made voluntarily, and that the visits made by his wife and son, which the applicant had requested, had not affected the decision of the applicant to make the admission; (2) from the admission given, the prosecution was able to establish that the applicant knew before the incident in question had taken place that a crime was to be committed, that it involved the theft of goods and that he assisted in this crime by making his garage available to the

principal offender; (3) where goods are stolen, it was not necessary for the prosecution to establish that a person who had aided the principal offender before the crime was committed knew either the means to be employed or the place from which the goods were to be stolen or the time at which the theft was to take place or the nature of the goods to be stolen; and it was sufficient for the prosectuion to show that the accused who gave assistance to the principal before the crime was committed knew the nature of the crime intended, namely the theft of goods; and accordingly on the evidence it was open to the jury to conclude that the applicant was an accessory before the fact of the crime and that his conviction should not be set aside. *The People -v- Madden* [1977] IR 336 and *R -v- Maxwell* [1978] 3 All ER 1140 applied.

ELLIS -V- O'DEA AND SHIELDS HIGH COURT 27 JULY 1989; SUPREME COURT 5 DECEMBER 1989

Criminal law — Extradition — Warrant — Whether information on which warrant requesting extradition was based should be available to accused — Constitution — Fair procedures — Whether warrant to be treated as prima facie valid — Practice — Description of State in warrants — Whether in accord with Constitution — Constitution, Articles 4, 40.3 — Extradition Act., 1965, s.55.

The applicant sought an order of prohibition preventing the further hearing of an extradition hearing in the District Court until he was furnished with copies of the sworn informations alleging that he committed offences upon which the warrants seeking his extradition under the 1965 Act were based. The applicant had stated in the District Court that English solicitors had been instructed to seek, and had sought, copies of the informations from the Crown Prosecution Service but that no reply had been received. **HELD** by Costello J refusing to grant an order of prohibition: there was nothing to suggest that the District Court was not going to follow the procedures laid down in s.55 of the 1965 Act and, in the absence of a challenge to the constitutionality of s.55 (which presumed the validity of the warrants seeking extradition unless the court sees good reason to the contrary), the applicant had not shown that his constitutional rights of access to the court or to fair procedures were being infringed. On appeal by the applicant **HELD** by the Supreme Court (Finlay CJ, Walsh and McCarthy JJ) dismissing the appeal: as the 1965 Act was a post-constitutional statute, it must be construed as not permitting procedures which would amount to an infringement of the constitutional right to fair procedures; but there was nothing in the instant case to suggest that the District Justice could not enforce production of the information if he considered that its production was required to ensure complicance with fair procedures, and therefore the application for prohibition should be dismissed. *Per* Walsh and McCarthy JJ (Finaly CJ reserving his view): it was impermissible for requesting courts to refer to the State as anything other than 'Ireland', when referring to it in the English language, as provided for in Article 4 of the Constitution; and any warrants requesting extradition in the future which did not refer to the State as 'Ireland' should not be backed under the 1965 Act. *Per* Walsh J (Finlay CJ and McCarthy J expressing no view): the combination of a conspiracy charge with the substantive offence might be regarded as leading to the possiblity of unfair procedures in the requesting State which would require a court to refuse an extradtion request.

BURKE AND ORS -V- DUBLIN CORPORATION HIGH COURT 13 JULY 1989

Contract — Implied term — Housing authority — Whether houses fit for human habitation — Negligence — Whether housing authority negligent — Heating units resulting in ill-health — Housing Act 1966, ss.66, 90.

The defendant, as housing authority within the 1966 Act, installed conserva warm air heaters into houses which had originally been fitted with oil fired heating units. The plaintiffs instituted proceedings claiming damages in respect of ill-health which they alleged they suffered as a result of using the conserva heaters. The first plaintiff was the infant son of one of the defendant's tenants and claimed that the defendant had been negligent in choosing the conserva thus aggravating his respiratory condition. The second plaintiff had formerly been a tenant but had entered into an agreement pursuant to s.90 of the 1966 Act by which she purchased the fee simple in the house from the defendant; she claimed to have developed bronchitis and bronchiolitis from using the conserva heater. The third plaintiff was at all material times a tenant of the defendant; she claimed to have developed bronchitis and bronchiolitis from using the conserva heater. The defendants denied that they were in breach of any implied term under s.66 of the 1966 Act that the houses under their control be fit for human habitation or that, in relation to the first plaintiff, they were negligent. **HELD** by Blayney J: (1) the evidence indicated that frequent 'blow backs' from the conserva heater caused fumes and dust to circulate in the houses which contributed to the ill-health complained of by the plaintiffs; (2) the letting to the third plaintiff included an implied term that the house be fit for human habitation pursuant to s.66, which involved matters not confined to those referred to in the Second Schedule to the 1966 Act; and in the circumstances of the present case, where the heater was intended to be used and had caused the third plaintiff to contract asthma, the house was not fit for human habitation and she was therefore entitled to damages. *Siney-v- Dublin Corporation* [1980] IR 400 applied; (3) although the second plaintiff was no longer a tenant of the defendant, having purchased the fee simple under s.90 of the 1966 Act, she was entitled to rely on an implied term that the house would be fit for human habitation since otherwise the defendant would be able to disregard its responsibilities under the 1966 Act, and she was therefore entitled to damages; (4) in connection with the first plaintiff, he was not privy to the tenancy contract between his parents and the defendant and could not therefore rely on the implied term of fitness for human habitation; nor could it be said that the defendant was negligent in choosing the conserva heater; since it was not, on the evidence, foreseeable that at the time the defendant purchased the heaters they would contribute to ill-health in the first plaintiff, and therefore the first plaintiff's claim would be dismissed. *O'Mahony -v- Henry Ford & Son Ltd* [1962] IR 146 applied; (5) the third plaintiff was entitled to an injunction requiring the defendant to render her house fit for human habitation, but the second defendant was not entitled to an injunction since as the owner she was the most appropriate person to effect the necessary changes and her award of damages would reflect this.

Recent Irish Cases

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ADMINISTRATIA ASIGURARILOR DE STAT AND ORS -v- INSURANCE CORPORATION OF IRELAND plc HIGH COURT 21 JULY 1989

Arbitration – Stay on proceedings – Arbitration condition precedent to right of action – Allegations of fraud – Whether court may stay proceedings – Whether prima facie evidence of fraud required – Arbitration Act 1954, ss.12, 39 – Arbitration Act 1980, s.5.

The plaintiffs were 14 insurance or reinsurance companies who had entered into reinsurance treaties with the defendant insurance company. The plaintiff companies sought to repudiate liability under the insurance treaties. In correspondence with the defendant the plaintiffs variously alleged fraud as a ground for repudiating liability. In their subsequent pleadings, the plaintiffs alleged misrepresentation and/or fraud. The statement of claim ran to over 80 pages. The defendant denied any fraud or that the plaintiffs were entitled to repudiate liability under the treaties of insurance. The defendant sought to have the disputes referred to arbitration in accordance with the terms of the treaties, and nominated a Queens Counsel to act as arbitrator. The treaties provided that submission of any disputes to arbitration was a condition precedent to any cause of action. The defendant applied to have the plaintiffs' proceedings stayed pursuant to s.12 of the 1954 Act, as amended by s.5 of the 1980 Act.

HELD: by O'Hanlon J. refusing the stay: (1) while the courts were reluctant to interfere with an arbitration process which had been agreed between parties, the Court retained a discretion under s.39 of the 1954 Act (which was not affected by s.5 of the 1980 Act) to order that any arbitration agreement shall cease to have effect where an allegation of fraud is made; and it was not necessary for the plaintiffs to establish a prima facie case of fraud, but it was sufficient that the allegations are made bona fide, having regard to the well-recognised principle that counsel should not sign pleadings containing an allegation of fraud unless satisfied there are substantial grounds for making such. *Workman -v- Belfast Harbour Commissioners* [1899] 2 IR 234 and *Cunningham-Reid -v- Buchanan-Jardine* [1988] 2 All ER 438 approved. *Camilla Cotton Oil Co. -v- Grenadex SA* [1976] 2 Lloyd's Rep 10 discussed; (2) having regard to the complexity and seriousness of the case and to the fact that the parties would not have envisaged an allegation of fraud at the time of agreeing to arbitration, it was appropriate that the matter be dealt with by the High Court, with an appeal to the Supreme Court, rather than by way of arbitration where discovery and points of law might, in any event, be referred to the courts; and it was more likely that the matter would be dealt with expeditiously by continuing the proceedings in the courts.

O'MAHONY AND ANOR -v- MELIA AND ORS HIGH COURT 6 JULY 1989

Constitution – Administration of justice – Criminal procedure – Bail – Peace commissioner – Whether granting of bail amounts to administration of justice – Whether statute empowering peace commissioner to grant bail invalid – Locus standi – Whether established – Criminal Justice Act 1951, s.15 – Criminal Justice Act 1984, s.26 – Constitution, Article 34.1

The applicants, husband and wife, had been charged in a Garda station before the respondent Peace Commissioner with certain offences under the Misuse of Drugs Acts 1977 and 1984. When the arresting Garda objected to bail, the respondent remanded the applicants in custody overnight pursuant to s.15 of the 1951 Act (as substituted by s.26 of the 1984 Act). At the sitting of the District Court the next day, the applicants were again remanded in custody. The applicants sought judicial review of the respondent's order remanding them in custody overnight and a declaration that s.15 of the 1951 Act (as substituted by s.26 of the 1984 Act) was invalid for breach of Article 34.1 of the Constitution.

HELD: by Keane J granting the relief sought: (1) the applicants had locus standi to challenge s.15 of the 1951 Act since, although the effects of any declaration of invalidity would be a matter for their trial judge their constitutional rights could be said to be threatened if the legislation were invalid. Dicta in *Cahill -v- Sutton* [1980] IR 269 applied: (2) the determination by the respondent under s.15 of the 1951 Act (as substituted by s.26 of the 1984 Act) was clearly in the nature of a judicial, not an administrative, act and accordingly it was, to that extent, invalid having regard to the provisions of Article 34.1. Dicta in *The State (Lynch) -v- Ballagh* [1987] ILRM 65: [1986] IR203 applied.

RADIO TELEFIS EIREANN AND ORS -v- MAGILL TV GUIDE LTD AND ORS (No. 2) HIGH COURT 26 JULY 1989.

Copyright – Literary work – Schedule of weekly broadcasts – Whether literary work – Involvement of labour, time and skill – License to publish daily schedules – European Communities – Competition – Abuse of dominant position – Whether refusal to license publication of weekly schedules amounted to abuse of dominant position – Whether concerted practices between parties established. Treaty of Rome 1957, Articles 85, 86 – Copyright Act 1963, ss.2, 8.

The first plaintiff was the statutory broadcasting authority in the State established by the Broadcasting Authority Act 1960. It published a weekly magazine which contained, *inter alia*, a complete schedule of its programmes for the week in question. The vast majority of the sales of the magazine were within the State. The plaintiff also entered into agreements with newspapers and magazines by which they were permitted to publish details of its programme schedules for the day of issue of the publication, as well as permitting publication of listings for Saturday and Sunday. The plaintiff was, however, the only organisation which published a full weekly list of schedules. The other plaintiffs were publishers of similar weekly magazines containing lists of schedules for programmes broadcast by the BBC and ITV. They also had agreements with newspapers and magazines which were similar in many respects to those entered into by the first plaintiff. The first defendant was the publisher of a listing guide to braodcast programmes, and it had entered into an agreement to publish limited extracts from schedules of the plaintiffs. For the week 31 May to 6 June 1986, however, the defendant published the full week's listing. The plaintiffs then instituted proceedings for injunctions preventing the defendant from publishing any listing except in accordance with the terms of the licences entered into. The defendant denied the plaintiffs' claim to copyright and counterclaimed that the plaintiffs were acting in breach of Articles 85 and 86 of the Treaty of Rome in not permitting the defendant to publish a full listing guide. The plaintiffs obtained interlocutory relief from the High Court in 1986: [1988] IR 97. On the trial of the action **HELD** by Lardner J. granting the plaintiffs the relief sought: (1) in interpreting the phrase 'literary work' in ss.2 and 8 of the 1963 Act, the Court

must take a broad view and the phrase should be taken to mean any written or printed composition which was an original composition that involved labour, time and skill in its compilation; and since the times and titles of programmes were not matters within the public domain but had originated from the plaintiffs, and their compilation had involved considerable labour, time and skill, they were entitled to claim copyright in them. *Educational Co. of Ireland Ltd -v- Fallon* [1919] 1 IR 62 distinguished; (2) although there was a degree of similarity in the licensing terms which each plaintiff entered into with newspapers and magazines, this did not involve the type of co-ordination which would amount to a concerted practice between them within the meaning of Article 85 of the Treaty of Rome. *Imperial Chemical Industries Ltd. -v- Commission* (Case 48/69) [1972] ECR 619 applied; (3) the defendants had failed to establish that, insofar as any agreements made by the plaintiffs had any affect on trade outside the State, there was any significant distortion of the market within the Community within the meaning of Article 85 of the Treaty of Rome; (4) having regard to the fact that issues relating to Article 86 of the Treaty were pending before the Court of Justice of the EC on appeal from the Commission, the Court would limit its findings to ones of fact without expressing a view on them; but the defendant had not established in evidence that the matters complained of would have a significant effect on trade between member states within the meaning of Article 86 of the Treaty. *BRT -v- SAMAM (No. 2)* (Case 127/73) [1974] ECR 313 discussed.

SEY -V- JOHNSON HIGH COURT 20 SEPTEMBER 1989

Criminal Law — Extradition — Corresponding offences — Whether stated with sufficient particularity — Whether extradition order invalid for partial misdescription of correspondence — Whether order invalid if one offence does not correspond - Extradition Act 1965, s.47.

The respondent Justice ordered the extradition of the applicant to Scotland on foot of warrants issued by a Scottish sheriff. The warrants specified two counts against the applicant: (i) making false representations to the police and to an insurance company that his house had been broken into and property stolen therefrom, as a result of which compensation was paid to him; and (ii) receiving a cigarette lighter for safekeeping and appropriating it to his own use and stealing it. The respondent Justice's order under s.47 of the 1965 Act stated that the first count in the warrant corresponded to offences under s.10 of the Criminal Justice Act 1951 and s.6 of the Forgery Act 1913, though the order did not specify the precise offences. As to the second count, the respondent's order stated that this corresponded to fraudulent conversion under s.20 of the Larceny Act 1916. The applicant sought judicial review claiming that the counts alleged did not correspond to offences under Irish law and that, in relation to the second count, the delay of six years in bringing the charge precluded the courts from granting the request. On judicial review **HELD** by O'Hanlon J refusing to quash the respondent's order: (1) the first count corresponded to an offence under s.10 of the Criminal Justice Act 1951, and although the respondent may have been in error in considering that there was also a correspondence with s.6 of the Forgery Act 1913, this did not invalidate the order once correspondence had been established. Dicta in *The State (Furlong) -v- Kelly* [1971] IR 132 applied; (2) while it was preferable that the respondent should specify the nature of the offences which he considered to be corresponding, such failure was not fatal once correspondence was in fact established in the High Court. Dicta in *Wyatt -v- McLoughlin* [1974] IR 378 applied; (3) delay in the bringing of the second charge against the applicant was not a ground for refusing an extradition request. Dicta in *Hanlon -v- Fleming* [1981] IR 489 applied; (4) while the second count might or might not have a corresponding offence under Irish law, there was no need to come to a final determination on this point since it was sufficient, to validate the warrant requesting exdtradition, that one of the offences specified corresponded. Dicta in *Molloy -v- Sheehan* [1978] IR 438 applied.

F -V- SUPERINTENDENT OF B. GARDA STATION (R., EASTERN HEALTH BOARD AND McDONNELL, NOTICE PARTIES) HIGH COURT 6 NOVEMBER 1989; SUPREME COURT 3 MAY 1990

Family — Children — Removal of child from family by Garda — Detention in place of safety — Nature of detention — Whether deprivation of liberty — Place of safety order — Whether should be made within reasonable time — Whether proceedings in nature of criminal proceedings — Functions of District Justice — Constitution — Family — Extent of Interference — Children Act 1908, ss.20, 21, 24 — Summary Jurisdiction Rules 1909, rr.6, 12 — Constitution, Article 41.

The applicant was the mother of five children. She separated from her husband in 1987 and since that time had required the assistance of the social services of the Eastern Helath Board. On 13 October 1989, a social worker attached to the Board expressed concern to the Board's solicitor over the children's welfare. The solicitor prepared proceedings under s.24 of the 1908 Act for hearing the following Monday (16 October), but in the meantime the social worker arranged for the Garda Siochana to call to the family home and to have the children brought to a place of safety pursuant to s.20 of the 1908 Act. The s.24 proceedings were brought before the District Court on 16 October and a place of safety order was made. On foot of this order, 'fit person' summonses were issued in respect of each of the children, returnable to the sitting of the District Court on 22 November 1989. The applicant mother sought information from the health board as to the location of her children but was unsuccessful. On 31 October, the applicant sought an inquiry under Article 40.4 of the Constitution into the legality of the children's detention. **HELD** by Barron J finding the detentions unlawful and directing their release: (1) the children were properly taken to a place of safety by the Gardaí under the powers conferred on them by s.20 of the 1908 Act; (2) however, the District Justice had no jurisdiction to make a place of safety order under s.24 of the 1908 Act since that section presupposed that the children had still to be taken to a place of safety, and the power of the Gardaí to make a search pursuant to s.24(3) was fundamental to the s.24 jurisdiction; and therefore either s.20 or s.24 of the Act could be invoked but not both; (3) even if ss.20 and 24 did not involve separate types of situations, the deprivation of liberty authorised by either section required the same level of stringent safeguards as in the case of persons accused of crime; and since a remand of eight days was the maximum permissible in a criminal matter, proceedings under the 1908 Act should be before the Court within that time and then at intervals of not more than eight days until the fit person summons is finally disposed of by the Court. *The State (D.) -v- G.* [1990] ILRM 10 applied. On appeal, the Board challenged the grounds of the trial judge's decision but did not seek an order returning the children to its care. **HELD** by the Supreme Court (Finlay CJ, Griffin, Hederman, McCarthy and O'Flaherty JJ): (1) while the Court does not ordinarily give a ruling on a moot, cases concerning the care and custody of children were possibly of a unique character; and the Court would therefore rule on the issues in order to provide guidance to those involved, and in particular having regard to the absence of provision for legal assistance for the children involved in such proceedings; (2) the evidence indicated that there had been an unfortunate breakdown in communication between the Board and the applicant; (3) while the presumption of constitutionality did not attach to the 1908 Act, it remains part of the legislative framework until

it is found inconsistent with the Constitution and it does so subject to the Constitution; (4) while the Act was now showing its age, the Court must construe its mechanisms in order to safeguard the constitutional rights of children, and in particular to have regard to the paramountcy of the children's welfare. Dicta in *In re the Adoption (No 2) Bill 1987* [1989] ILRM 266 applied; (5) the Gardaí were entitled under s.20 of the 1908 Act to take the children to a place of safety without a court order, where they had reason to believe offences under the Act had been committed, pending the drawing up of criminal charges; (6) where no charges are contemplated, it was permissible for the social worker concerned to apply to the District Court under s.24 of the Act seeking a place of safety order, even in a case, such as the present, where the children had already been removed to a place of safety under s.20; and the power to search under s.24(3) of the Act was not fundamental to the jurisdiction of the District Justice to make an order under s.24, since s.24(3) was directory in nature, and not mandatory; (7) once the ex parte order has been made under s.24, a summons directed to the parent should be served as soon as is practicable, seeking the making of a fit person order, and the return date for such summons should be as short as is reasonable having regard to the necessity to give both sides the opportunity to prepare for a proper hearing; (8) unless there are very exceptional circumstances, the parent of the children should be informed, pending the making of the fit person order, of the location of the place of safety and of the proposed 'fit person'. Dicta in *The State (D.) -v- G. (No. 2)* [1990] ILRM 130 applied.

COAL DISTRIBUTORS LTD -V- COMMISSIONER OF VALUATION HIGH COURT 31 JULY 1989

Local government — Valuation — Newly reclaimed land — Whether property may be subject to rate — Two plots held under differnet titles — Whether separate valuation required — Whether Circuit Court having jurisdiction to determine appropriate rate — Valuation (Ireland) Act 1852. ss.11., 23 — Valuation (Ireland) Act 1854, s.4 — Annual Revision of Rateable Property (Ireland) Amendment Act 1860, s.6.

The appellant company was the owner of two plots of land in Dublin, both of which had been reclaimed from the sea and brought within the County Borough of Dublin for the first time in 1985. One of the plots was held by the company under separate titles. Pursuant to s.4 of the 1854 Act, Dublin Corporation raised valuations on the plots and the company appealed against these to the Commissioner who confirmed them. On further appeal to the Circuit Court, the judge stated a case for the High Court as to whether: (a) a valuation could be raised on the plots as part of the annual revision having regard to their being newly reclaimed land; and (b) the plot which was held under separate titles should have been valued separately, and if so whether the valuation was null and void. **HELD** by Blayney J: (1) newly reclaimed land was capable of being valued under the annual revision, since s.4 of the 1854 Act required a revision of the existing valuation of the entire County, Barony or Poor Law Union as a whole and in that annual revision it was necessary to include any tenements introduced for the first time into the valuation. *Alma -v- Dublin Corporation* (1876) IR 10 CL 476 approved: (2) the plot which was held under separate titles should have been valued separately by the Commissioner pursuant to s.11 of the 1852 Act, but the Circuit Court judge had power under s.23 of the 1852 Act and s.6 of the 1860 Act to make such order as he thought fit on appeal from the Commissioner: and therefore the matter would be remitted to the Circuit Court for a separate valuation to be placed on that plot. *Switzer & Co. Ltd. -v- Commissioner of Valuatiaon* [1902] 2 IR 275 approved.

TROMSO SPAREBANK -v- BEIRNE AND ORS (No. 3) SUPREME COURT 15 DECEMBER 1989.

Practice — Joinder of party — Service out of jurisdiction — Whether appropriate to join defendant — Centralising claim — Rules of the Supreme Courts 1986, O.11, r1(h).

The plaintiff bank had issued proceedings for payment on foot of promissory notes which had been discounted by the plaintiff. The defence filed by a number of defendants, who included the parent bank of the branch which had issued the notes, alleged fraud in the making of the notes. The parent bank, which was registered in England, was joined as defendant under O.11, r.1(h) of the 1986 Rules. The parent bank appealed against the making of the order joining it as defendant.

HELD by the Supreme Court (Finlay CJ, Walsh and McCarthy JJ) dismissing the appeal: it was clear that the plaintiff alleged in its claim that it would not have discounted the notes without a certification of validity from the parent bank and it was therefore clear that there was a direct connection with the proceedings; and in view of the desirability of having all issues centralised in one action, there was ample jurisdiction to justify the making of the order under O.11, r.1(h) of the 1986 Rules to join the parent bank and it was difficult to see how the High Court judge could have exercised his discretion in any other way.

BREATHNACH -V- IRELAND AND ORS HIGH COURT 18 JULY 1989 AND 14 MARCH 1990

Practice — Res judicata — Issue estoppel — Abuse of the process of the court — Determinations made in criminal trial against accused — Subsequent appeal — Conviction quashed — Appeal Court not interfering with certain conclusions of trial court — Whether issues may be relitigated by accused in civil proceedings against State — Whether State estopped from raising issues determined in favour of accused plaintiff.

The plaintiff instituted proceedings against the State and named Gardaí claiming damages for assault and battery, false imprisonment, intimidation, malicious prosecution and failure to vindicate his constitutional rights. The claim arose out of events alleged to have taken place while the plaintiff was in Garda custody in 1976 pursuant to s.30 of the Offences against the State Act 1939. The plaintiff was subsequently charged with armed robbery and convicted in the Special Criminal Court. During his trial, the Court held: (i) no assault or battery took place on him while he was in Garda custory; (ii) the plaintiff's confession had not been signed in fear of assault nor was it extracted by oppression; (iii) the plaintiff had been falsely imprisoned and wrongfully detained for a period of 48 hours; and (iv) that, on the view most favourable to the plaintiff's evidence at his trial, he had been denied a right of access to a solicitor having requested such. On appeal to the Court of Criminal Appeal, the plaintiff's conviction was overturned only on the basis that the confession obtained from him was not voluntary; the Court of Criminal Appeal expressly refused to interfere with the findings of fact by the trial court. In the plaintiff's civil action, preliminary issues were set down for decision as to whether the four issues dealt with by the Special Criminal Court were now res judicata or alternatively whether it would be an abuse of the process of the court to relitigate those issues. **HELD** by Lardner J (18 July 1989): (1) where a clearly identifiable issue had been raised in a criminal trial and determined against a party to those proceedings, such determination raised an issue estoppel against the party in any subsequent civil proceedings in which that party was also involved. *Kelly -v- Ireland* [1986] ILRM 318 followed; (2) in the instant case the Special Criminal Court had made a clear determination, after a full hearing, that the statements alleged to have been made by the plaintiff were not made as a result of any assaults or ill-treatment by the Gardaí and this finding had not been disturbed by the Court of Criminal Appeal; and neither justice or fairness required that the matters be reopened, and accordingly the plaintiff was es-

topped from raising these issues now. Dicta in *Reichel -v- McGrath* (1889) 14 App Cas 665 applied. **HELD** further by Blayney J (14 March 1990): (3) the plaintiff was estopped from asserting that the confessions made had been obtained in fear of assault or from oppression; (4) while the Gardaí in the instant civil proceedings could not be regarded as having been a party to the criminal trial, it would be an abuse of the process of the court for them to re-open matters which had been determined in the criminal trial. *Hunter -v- Chief Constable of West Midlands* [1982] AC 529. *Shaw -v- Sloan* [1982] NI 393 and *Kelly -v- Ireland* [1986] ILRM 318 followed; (5) The Gardaí were thus precluded from denying that the plaintiff had been falsely imprisoned or detained wrongfully for a period of 48 hours, in view of the Special Criminal Court's findings; (6) the question whether the plaintiff had been denied access to a solicitor was not res judicata since the Special Criminal Court had not made a final determination on this allegation in the trial; and therefore this was a matter which could be reopened in the present litigation.

COMHLUCHT PAIPEAR RIOMHAIREACHTA TEO -V- UDARAS NA GAELTACHTA AND ORS SUPREME COURT 23 NOVEMBER 1989

Practice — Security for costs — Company — Action commenced after winding up — Whether costs of successful litigant against company rank in priority to all other claims — Whether application for security should be therefore refused — Discretion of Court — Companies Act 1963, ss.281, 285, 286, 390.

After his appointment, the liquidator of the plaintiff company (which was insolvent though with some funds available for unsecured creditors) instituted proceedings against the defendants under s.286 of the 1963 Act claiming that a loan repaid by the company while it was insolvent amounted to a fraudulent preference. The defendants applied pursuant to s.390 for an order for security for costs. In the High Court, Costello J refused to make the orders sought on the ground that, in the exercise of his discretion, there were special circumstances which justified such refusal; [1987] IR 684. On appeal by the defendants **HELD** by the Supreme Court (Finlay CJ, Hederman and McCarthy JJ) upholding the High Court order for different reasons: the application for security for costs failed in limine since, where an action is brought by a company after liquidation, the costs of a successful litigant against an insolvent company rank in priority to all other claims under ss.281 and 285 of the 1963 Act where, as in the instant case, there are sufficient funds available to pay the costs of the successful litigant. Passage in *Halsbury's Laws of England*, 4th ed. Vol. 7(2), para. 1803, approved. Per curiam: it may be that the liquidator, faced with so large a prospective claim in priority to all other creditors, would be reluctant to proceed with the action against any or all of the defendants. *Per curiam:* the High Court judge had erred in concluding that there were special circumstances which justified his refusal to make an order against the company; nor was the strength of the plaintiff's case such as to indicate that such order should not be made.

CARROLL GROUP DISTRIBUTORS LTD -V- G & JF BOURKE LTD AND ANOR HIGH COURT 4 OCTOBER 1989

Sale of goods — Reservation of Title — Goods supplied with intention that they be sold — Requirement that proceeds of sale be placed in separate account — Proceeds placed in general account — Whether fiduciary duty established — Whether supplier entitled to trace into general account — Whether charge or mortgage created — Companies Act 1963, s.99.

The plaintiff supplied goods to the defendant company with four weeks credit terms, but subject to a reservation of title clause. The clause provided, inter alia, that: ownership in the goods would not pass until the sums due to the plaintiff had been discharged in full; that risk transferred on delivery to the defendant; that the defendant acted on its own account, and not as agent for the plaintiff, where the goods were sold by the defendant; and that the proceeds of sale from the goods should be placed by the defendant in a separate account. No such separate acount was opened by the defendant and the defendant placed the proceeds of sale in one of its general bank accounts. The defendant went into voluntary liquidation. At the time some goods remained unsold in its premises, and credit of approximately £7,000 remained in its bank account, after the bank had exercised its right of set-off in respect of another account. A sum in excess of £54,500 was owed by the defendant to the plaintiff in respect of goods supplied. **HELD** by Murphy J: (1) the liquidator of the defendant had acted correctly in returning the goods supplied by the plaintiff and in the possession of the defendant at the time of its liquidation; (2) the reservation of title clause in substance, though not in terms, created a charge over the proceeds of sale of the goods supplied by the plaintiff, regard being had to the overall context within which the bargain between the parties had been made. *Kent -v- Sussex Sawmills Ltd* [1947] Ch 177 and dicta in *Frigoscandia Ltd. -v- Continental Irish Meat Ltd* [1982] ILRM 396 applied. *Per* Murphy J: even had the plaintiff established a right to trace into the defendant's general account, such right was necessarily defeated when the moneys in the account were dissipated and not replaced by any other asset, after the bank had asserted its right of set-off on the liquidation. *Roscoe -v- Winder* [1915] 1 Ch 62 referred to.

BOWES -V- MOTOR INSURERS' BUREAU OF IRELAND SUPREME COURT 28 JULY 1989

Motor Insurers' Bureau of Ireland — Agreement to compensate victims of uninsured drivers of motor vehicles — Notes to agreement indicating ex gratia payment considered where victim unable to trace driver — Whether courts may grant declaration of entitlement to payment in absence of assertion of unreasonableness by Bureau

The plaintiff instututed proceedings claiming a declaration that she was entitled to consideration by the defendant Bureau of her claim for damages pursuant to the 1964 Agreement made between the Bureau and the Minister for Local Government. The 1964 Agreement deals primarily with payments by the Bureau to victims of the uninsured drivers or owners of motor vehicles. Explanatory Notes to the 1964 Agreement also provided, however, that the Bureau would 'at their discretion, give sympathetic consideration to making some ex gratia payment' in the case of a victim of a driver who cannot be traced, where it was established that a person had sustained 'serious and permanent disablement'. The plaintiff claimed that, while the Bureau had the discretion under the Explanatory Notes to determine whether payment should be made ex gratia, she was entitled to a declaration that the injuries sustained by her involved serious and permanent disablement. Her claim was refused in the High Court. On appeal **HELD** by the Supreme Court (Finlay CJ, Griffin and McCarthy JJ) dismissing the appeal: the Notes to the 1964 Agreement indicated that it was for the Bureau to determine whether a person had suffered serious and permanent disablement; and in the absence of establishing that the Bureau had reached a decision which no reasonable body or person could reach on the evidence before it, the plaintiff had disclosed no sustainable claim.

Recent Irish Cases

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The following case summaries have been reprinted from the *Irish Law Times and Solicitors Journal,* with the kind permission of the publishers.

VAN NIEROP -v- COMMISSIONERS FOR PUBLIC WORKS IN IRELAND AND ORS HIGH COURT 28 JULY 1989

Fishery Harbour — Acquisition of land — Notice of compulsory acquisition — Delay in execution of powers to acquire land — Whether power to acquire abandoned — Whether notice invalid for delay — Fishery Harbour Centres Act 1968.

The defendant Commissioners determined in 1969 that they would acquire certain lands for the purpose of erecting a boatyard in Killybegs. They inquired of the company which was then believed to be the owner whether the lands in question were available for purchase. A positive reply was received from solicitors acting for the plaintiff in August 1970. In February 1971, the Commissioners wrote stating that arrangements were in train for the compulsory acquisition of the land pursuant to the 1968 Act. The parties subsequently agreed to put the price of the land to arbitration and a hearing was arranged for April 1974, but this was postponed *sine die* at the request of the Chief State Solicitor. In October 1974 a new set of documents were served under the 1968 Act amending the reference to the size of the land to be acquired. Reminders from the plaintiff's solicitors were sent to the Commissioners between November 1974 and November 1981 but without further progress. The plaintiff subsequently received an offer for the lands in question and proceedings were instituted seeking to have the notices served declared invalid on the ground that the proposed acquisition of the land had been abandoned by the Commissioners. **HELD** by O'Hanlon J granting the relief sought: (1) it was for the Commissioners to seek to exercise their powers of compulsory acquisition under the 1968 Act within a reasonable time from the date of giving notice, and where they did not proceed within a reasonable time (this being a question of fact) they might well lose their rights to enforce their notice. *Richmond -v- North London Railway Co.* (1868) 5 Eq 352; (1868) 3 Ch App 679 and *Simpsons Motor Sales Ltd -v- Hendon Corporation* [1962] 3 All ER 75 approved; (2) on a considerationn of all the evidence, it was reasonable for the plaintiff's solicitor to assume that the Commissioners would take the initiative in seeking the appointment of an arbitrator in respect of the 1974 acquisition and notice as had been done for the 1971 proposed acquisition; and in the circumstances it would be unreasonable for the defendants to seek to rely on the steps taken in 1971 or 1974, having regard to the period of time which had elapsed without any effective steps being taken to pursue the claim and the acquisitin must be regarded as being abandoned; (3) accordingly there would be an order that the notices of 1971 and 1974 were no longer valid or of legal effect and that the powers conferred by the 1968 Act were of no effect for the purpose of compulsory acquisition of the plaintiff's lands.

DAWSON -v- HAMILL HIGH COURT 9 AUGUST 1989 [1989] I.R. 275

Criminal Law — Trial — Procedure — District Court — Adjournment to deliver reserved judgment — Counsel for accused excused from appearing — Prosecution seeking to adduce additional evidence at adjourned hearing — Whether Court should hear evidence — Absence of preferred counsel of accused — Judicial review — Remittal to District Court — Discretion of Court — Rules of the Superior Courts 1986. 0.84, r.26(4).

The applicant had been involved in two incidents on 4 December 1986 while driving his motor lorry. The first incident involved an allegation that he overtook a line of traffic on a continuous white line at a hill. The second incident was alleged to have occurred about a mile and a half further along the road in which there was a fatal injury involving a collision between the applicant and others. Arising from the first incident, the applicant was served with a summons alleging dangerous driving which was grounded on a complaint made one day before the six month time limit for making the complaint had expired. No previous indication was given to the applicant that a charge would be brought arising from the first incident. The hearing of this summons was adjourned pending the disposal of the charges arising from the fatal accident. The applicant was subsequently acquitted in the Circuit Criminal Court on all charges arising from the fatal accident. The summons for the first incident came before the District Court in June 1988. The main evidence was from a witness who gave evidence that the applicant had passed a long line of traffic on a continuous white line. At the end of the evidence, lengthy submissions were made as to whether the applicant could be convicted having regard to the requirements of the Road Traffic Acts 1961 and 1984 relating to the notice of intention to prosecute. The respondent Justice indicated that he would reserve his decision to the following day. Counsel for the applicant indicated that he would be unable to appear the next day and the respondent excused him on the basis that he would be delivering reserved judgment only. After the hearing had concluded, the witness in the case approached the prosecution and indicated that he had later come across the second incident and remonstrated wtih the applicant for having earlier overtaken him. On the following day, the prosecution sought to have this evidence introduced. The respondent allowed the new evidence after hearing objection from the pupil of the applicant's counsel. The applicant was convicted. On judicial review of the conviction **HELD** by Lynch J quashing the conviction and remitting the case to the District Court: (1) the respondent had jurisdiction to allow the prosecution to reopen its case having regard to the obligation to be impartial as between both sides; (2) the respondent had, however, acted in excess of jurisdiction in hearing the additional evidence in the absence of the applicant's counsel of choice, having regard to the specific fact that counsel had been excused by the respondent from appearing at the adjourned hearing. *The State (Healy) -v- Donoghue* [1976] IR 325 applied; (3) it was appropriate to remit the matter to the District Court pursuant to 0.84, r.26(4) of the 1986 Rules, and on this aspect of the case it was relevant to consider the merits of the case; and in this respect the courts were required to have regard to the rights of the people of Ireland and the applicant would not be in any worse position so far as meeting the charge against him. *Per* Lynch J: the matter could be heard by the respondent or by any other Justice assigned to the District in question, and there was no substance in the suggestion that justice would not be seen to be done if the case was to be heard by the respondent.

MURTAGH -V- BOARD OF MANAGMENT OF ST EMER'S NATIONAL SCHOOL HIGH COURT 27 NOVEMBER 1989

Administrative Law — Judicial Review — National School — Suspension of pupil — Whether certiorari lies to quash suspension — School subject to Department of Education rules — Whether Board of Management biased in dealing with complaint against pupil — Discretion of Court — Rules of the Superior Courts 1986, O.84, rr.22(1), 26(5).

The applicants were the parents of a pupil in sixth class at St. Emer's National School, Longford. In the course of a class he wrote the words 'Noleen Bitch Rooney' on a sheet of paper; Mrs Rooney was a teacher in another class. He was asked to apologise to Mrs Rooney but refused to do so. The next day he left a note on Mrs Rooney's desk which indicated that she was interfering with the running of fifth and sixth classes and that if she wanted to be headmistress she should apply elsewhere. The headmaster continued to require an apology and he subsequently wrote to the applicants seeking a meeting and this took place though they objected to the principal dealing with the matter. The matter was put before a meeting of the Board of Management who agreed to suspend the pupil for three days. The applicants objected to the procedure and it was agreed that they should attend a meeting of the Board, pending which the suspension was lifted. At the subsequent meeting of the Board with the applicants present, the suspension was reimposed. On application for certiorari to quash the decision **HELD** by Barron J refusing the relief: (1) judicial review did lie to quash the Board's decisions since it operated under Rules formulated by the Department of Education which were not consensual in nature; and while a cause of action might arise from a failure to observe the Rules this did not affect the supervisory jurisdictionn of the High Court. *Per* Barron J: it was unfortunate that a submission of this kind was possible in spite of 0.84 of the 1986 Rules, which did not apply to the instant case; (2) the obligation on the Board was to act fairly and in the circumstances the Board and the principal had behaved perfectly properly by giving the applicants opportunities to say why they opposed the suspension; nor was there any question of the Board acting with closed minds because this was not a case in whcih disputed evidence had been ruled on improperly. *Per* Barron J: relief would also have been refused in the exercise of the court's discretion having regard to the possible authorship of the note which had been left on Mrs Rooney's desk on the day after the original incident.

P.C. -v- V.C. HIGH COURT 7 JULY 1989

Family Law — Nullity — Whether parties capable of sustaining normal marital relationship — Incompatible temperaments — Dysfunctional relationship — Whether of such degree as to justify decree of nullity

The applicant was 31 years of age when he married the respondent, who was 26 at the time. Prior to the marriage ceremony, the parties had had a number of serious disputes as to the alleged interference of their respective parents (and in particular the alleged excessive influence of the respondent's parents over her), the choosing of the engagement ring; the choosing and financing of the matrimonial home; whether they should go on a pre-marriage course and what type of course; and the guest list for the wedding reception. The disputes led on one occasion to the calling off of the engagement. The marriage was consummated on the couple's honeymoon and the respondent became pregnant. Owing to severe illness associated with the pregnancy the respondent moved back with her parents. There were a number of disputes between the couple at this time which resulted in limited contact between them. After the birth of the baby, the couple sought some counselling, cohabitation was resumed but after some time the respondent moved out of the marital bedroom and ultimately they separated. Again, there were a number of disputes between the couple and between the applicant and the respondent's parents. The respondent instituted proceedings for a divorce *a mensa et thoro*. The applicant sought a decree of nullity, which was fully contested by the respondent. A psychiatrist giving evidence in the petition stated that the relationship between the parties was dysfunctional; that the applicant had a very strong personality which might be suited to a woman who was prepared to be dominated; and that the respondent had led a sheltered life and may not have been prepared to leave the protection of her parents. **HELD** by O'Hanlon J granting a nullity decree: (1) the evidence indicated that the marriage was doomed from the outset by reasons of elements of immaturity in the character and temperament of both parties and an inability to form and sustain a normal marriage.relationship, with a lack of capacity for compromise on either side and incompatible views of their respective roles in a marriage; (2) although the inability to sustain a normal marital relationship was more marked on the part of the petitioner in the instant case, there was want of capacity to some extent on both sides and on this basis he was entitled to a decree of nullity even though there had been no repudiation of the marriage by the respondent. *B.D. -v- M.C.* (High Court, March 1987) followed. *Per* O'Hanlon J: the rule that a petitioner could not rely on his own incapacity where there was no repudiation by the other party was open to well-founded criticism. Shatter, *Family Law in the Republic of Ireland,* 2nd ed, pp.73-75 referred to; (3) while temperamental incompatibility did not render a marriage void, and some of the recent cases had blurred the distinction between the grounds for divorce *a mensa et thoro* and those for nullity, the instant case went beyond temperamental incompatibility simpliciter and the factors present were such as to render the purported marriage null and void.

SHELLY -V- MAHON AND ANOR HIGH COURT 31 OCTOBER 1989; SUPREME COURT 8 MARCH 1990

Constitution — Administration of Justice — Appointment of judges — Criminal trial — District Justice reaching 65 years of age — Failure to issue warrant continuing justice in office due to mistake as to age — Subsequent legislation purporting to validate justice's continuation in office — Whether retrospective validation of orders in conflict with Constitution — Courts (No. 2) Act 1988, s.1 — Constitution, Articles 34.1, 38.1.

The first respondent had been appointed a temporary, and later permanent, District Justice. He had initially given his date of birth as January 1919 whereas in fact is was January 1920. The error was not noted in the Department of Justice although the respondent had subsequently forwarded his birth certificate with the correct date of birth. In January 1984, when the respondent reached 65 years of age, a warrant continuing him in office pursuant to the Courts of Justice (District Court) Act 1949 was not issued owing to the error within the Department as to his true age. Subsequent warrants under the 1949 Act were issued in 1985, 1986 and 1987 but is was agreed that these were of no effect. In 1988, the error as to the respondent's age was discovered. The 1988 Act was passed by the Oireachtas and it purported to provide that

warrants could be issued by the Committee which operated under the 1949 Act which would validate any orders made by a Justice in the position of the respondent. The applicant had been convicted by the first respondent in 1987 of an offence under the Road Traffic Acts, and he sought to quash the conviction on the ground that the first respondent was not, at the time, a validly appointed Justice. **HELD** by Blayney J granting the relief sought: the applicant's purported conviction was null and void since there had been no trial in due course of law by a validly appointed judge as required by Articles 34.1 and 38.1 of the Constitution; and since s.1(3) of the 1988 Act had made any validation subject to any constitutional rights, it was clear that the 1988 Act could not have the effect of validating a matter which would be in conflict with the applicant's constitutional rights, and accordingly his conviction would be quashed. On appeal by the respondents **HELD** by the Supreme Court (Walsh, Griffin, Hederman and McCarthy JJ; Costello J dissenting) dismissing the appeal: the 1988 Act could not have the effect contended for by the State since it would involve the Oireachtas in an unconstitutional infringement of the judicial function by retrospective validation of a conviction of the applicant at a time when he had been tried by a person who was not a judge appointed in accordance with Article 34 of the Constitution and whose conviction was a nullity. *Per curiam:* the effect of s.1(3) was clear in that it made any validation of orders subject to any conflict with constitutional rights at the time that such orders were made and not subsequent to the enactment of the 1988 Act itself. *Per* Costello J (dissenting): the 1988 Act did not have the effect that the Oireachtas imposed a punishment on the applicant.

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Recent Irish Cases

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BAKHT -v- MEDICAL COUNCIL SUPREME COURT 6 APRIL 1990

MEDICAL PRACTITIONERS — REGISTRATION — MEDICAL COUNCIL — REQUIREMENT THAT APPLICANT FOR REGISTRATION SATISFY CERTAIN CRITERIA — MEDICAL COUNCIL REQUIRED BY STATUTE TO ADOPT RULES AS TO CRITERIA REQUIRED FOR REGISTRATION — WHETHER STATUTORY OBLIGATION MANDATORY OR DIRECTORY — PRACTICE — SUPREME COURT — ASSESSMENT OF DAMAGES — NO ASSESSMENT IN HIGH COURT — EXPENSE OF REMITTAL TO HIGH COURT FOR ASSESSMENT OUT OF PROPORTION TO LEVEL OF DAMAGES — Medical Practitioners Act 1978. s.27.

The applicant had been given five certificates of temporary registration to practise medicine in the State by the respondent Council pursuant to the terms of s.27 of the 1978 Act. Each certificate of registration was for a duration of one year. S.27 of the 1978 Act provides that no more than five such certificates may be granted. The applicant then applied for registration on a permanent basis pursuant to s.27 in accordance with a provision by which the Council may register a person who satisfies it that he had undergone such courses of training and passed such examinations as are specified for the purposes of the section in rules made by the Council. At the time that the applicant applied for registration, the Council had not made any rules under this provision. As a result, the applicant had not been able to practise medicine from January 1988. In June 1988, the applicant sought, inter alia, an order of mandamus directing the Council to register him, issue rules under s.27 of the 1978 Act and damages for loss of earnings. After the institution of these judicial review proceedings, the Council adopted rules under s.27 specifying examination requirements, and these rules came into effect in October 1989. In the High Court, Gannon J granted an order of mandamus directing the Council to consider the applicant's case and declaring that the Council had been in default in failing to adopt rules under s.27 of the Act. On appeal by the Council **HELD** by the Supreme Court (Finlay CJ, Griffin and Hederman JJ) allowing the appeal in part only: (1) the High Court had erred in ordering the Council to consider the applicant's case without regard to the rules which the Council, at the time the High Court order was made, proposed to bring in; (2) the Council had been in default of the requirement to make rules under s.27 of the 1978 Act, which was a mandatory requirement having regard to the overall purposes of the 1978 Act and the national and European Community obligations of the Council as regards setting standards for registration of medical practitioners; (3) the Court would itself assess damages since the cost of referring the matter back to the High Court would be out of all proportion to the amount of damages likely to be awarded in the High Court; (4) having regard to the fact that the Council could, having been notified of the applicant's case, had rules in place by late 1988 but had not in fact had them in place until the end of 1989, the Council was liable for one year's loss of earnings by the applicant, which on the applicant's uncontradicted evidence indicated a total sum of £12,500.

RHATIGAN -V- TEXTILES Y CONFECCIONES EUROPEAS SA SUPREME COURT 31 MAY 1990

PRACTICE — ENFORCEMENT OF JUDGMENTS — EUROPEAN COMMUNITIES — WHETHER EVIDENCE BEFORE MASTER THAT JUDGMENTS TO BE ENFORCED CAME WITHIN SCOPE OF ENFORCEMENT LEGISLATION — BALANCE OF JUSTICE — WHETHER NECESSARY TO SPECIFY ADDRESS FOR SERVICE OF PROCESS IN ORDER AUTHORISING ENFORCEMENT — WHETHER ISSUE OF COMMUNITY LAW AROSE — Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988 — Treaty of Rome 1957, Article 177.

The plaintiff sought to set aside orders made by the Master in which the Master had, pursuant to the 1988 Act, authorised the enforcement against the plaintiff of four judgments obtained by the defendant against the plaintiff in the courts of England. The plaintiff contended that, in making the application to the Master, the defendant had not established that the judgments in question were ones which came within the terms of the 1988 Act nor had it been stated in the Master's order the address for service of the process under the 1988 Act. In the HIgh Court, Blayney J held that the Master had had jurisdiction under the 1988 Act to order enforcement of the judgments: [1989] IR 18. On appeal by the plaintiff **HELD** by the Supreme Court (Finlay CJ, Griffin and McCarthy JJ) dismissing the appeal: (1) it was not required that the address for service of process be specified in the enforcement order made by the Master under the 1988 Act but it was only required that the address be given in the course of the application. *Carron -v- Germany* [1987] 1 CMLR 838 applied; (2) assuming, without necessarily so deciding, that the Master's order should have stated on its face that the judgments were of a Contracting State, the balance of justice lay with enforcement of the judgments obtained by the defendant in the English courts. *Per curiam:* no issue of Community law arose in the instant case which required a reference to the Court of Justice under Article 177 of the Treaty of Rome.

THE PEOPLE (D.P.P.) -V- O'REILLY COURT OF CRIMINAL APPEAL 26 APRIL 1990

CRIMINAL LAW — EVIDENCE — IDENTIFICATION EVIDENCE — INFORMAL IDENTIFICATION BY WITNESS — WHETHER FORMAL IDENTIFICATION PARADE REQUIRED IN CIRCUMSTANCES — TRIAL JUDGE'S WARNING AS TO RISK OF ERRONEOUS CONVICTION BASED SOLELY ON IDENTIFICATION EVIDENCE.

The applicant had been convicted of larceny in the Circuit Criminal Court and sentenced to four years penal servitude. The principal prosecution witness was an 85 year old woman from whom a sum of money had been stolen by a gang of people. She was brought by the Gardaí from her home in Athlone to Edgeworthstown, Co. Longford in a Garda car from which she was asked whether she recognised any of the people on the street. Having made a partial identification of one person among a group of three, she made a positive identification of the applicant. At the trial of the applicant, she again identified him as the person involved in the robbery of her money. The trial judge gave a warning to the jury on the

danger of convicting on the identification evidence of the presectution witness. **HELD** by the Court of Criminal Appeal (O'Flaherty, Barr and Lavan JJ) in allowing the application and appeal and quashing the conviction: (1) in the circumstances which arose, a formal identification parade should have been held; and while the Gardaí had acted out of a mistaken belief that the method of identification used might be for the benefit of the application, a formal parade had not outgrown its usefulness and was a procedure in which the accused person (or his legal adviser) has an input to ensure its fairness; (2) while the trial judge had given a warning as to the dangers of convicting on the identification evidence of the presecution witness, there was a need in the instant case for more than a general warning, particularly having regard to the absence of a formal identification parade. *The People -v- Casey* (no. 2) [1963] IR 33 applied. *The People -v- Fagan* (1974) 1 Frewen 375 discussed; (3) since the defects in the original trial could not be put right, the Court would not order a re-trial.

THE PEOPLE (D.P.P.) -V- EGAN SUPREME COURT 30 MAY 1990

CRIMINAL LAW – APPEAL – FUNCTION OF COURT OF CRIMINAL APPEAL – WHETHER VERDICT OF JURY MAY BE OVERTURNED ON BASIS OF LURKING DOUBT OR UNSAFENESS OF VERDICT – Courts of Justice Act 1924, s.34 – Courts (Supplemental Provisions) Act, s.12.

The appellant was convicted of rape in the Circuit Criminal Court and sentenced to 10 years penal servitude. He applied for leave to appeal to the Court of Criminal Appeal, which dismissed the application on the ground that to allow the appeal would be to substitute the verdict of the Court of Criminal Appeal for that of the jury. The Court certified, however, that the case raised a point of law of exceptional public importance under s.29 of the 1924 Act. **HELD** by the Supreme Court (Finaly CJ, Hamilton P, Griffin, McCarthy and O'Flaherty JJ) dismissing the appeal: the Court of Criminal Appeal had no jurisdiction under s.34 of the 1924 Act (as applied by s.12 of the 1961 Act) to overturn the verdict of a jury on subjective criteria such as a 'lurking doubt' as to the correctness of the verdict reached in the trial court. *R -v- Cooper* [1969] 1 QB 267 distinguished. *The People -v- Mulligan* (1980) 2 Frewen 16 approved; (2) in the instant case it was clear that the trial judge had correctly directed the jury as to the legal issues arising and that the verdict was peculiarly one for the jury in the light of the conflicting evidence which had been presented in the trial court, and on this basis the Court of Criminal Appeal had been correct in refusing to interfere with the verdict reached.

THE PEOPLE (D.P.P.) -V- NEILAN CENTRAL CRIMINAL COURT 23 APRIL 1990

CRIMINAL LAW – INSANTIY – VERDICT OF GUILTY BUT INSANE – COURT ORDERING DETENTION OF PERSON IN CENTRAL MENTAL HOSPITAL UNTIL FURTHER ORDER OF THE COURT – APPLICATION FOR RELEASE – WHETHER EXECUTIVE TO DETERMINE RELEASE – CONSTITUTION – JUDICIAL POWER – WHETHER COURT RETAINING JURISDICTION – PRACTICE – HEARING OF APPLICATION IN CHAMBERS OR IN PUBLIC – FORM OF ORDER. Trial of Lunatics Act 1883, s.2 – Courts – Martial Appeals Act 1983, s.6 – Constitution, Articles 34.1, 50.

The accused was tried on a charge of murder in the Central Criminal Court in 1983. Evidence was given on his behalf that, at the time of the killing, he was suffering from an acute paranoid psychosis. The jury returned a verdict of 'guilty but insane' in accordance with the terms of the 1883 Act. The trial judge (Keane J) made an order directing that the accused be detained in the Central Mental Hospital until further order of the Court. From time to time after the verdict of the Court, applications were made in chambers to the trial judge for accompanied and unaccompanied parole, grounded on medical evidence that the accused was no longer a danger to society; these applications were granted. In 1989, the accused sought a transfer from the Central Mental Hospital to a psychiatric hospital nearer his family. The medical evidence was also in support of this application. Keane J ordered that notice of the application be given to the Director of Public Prosecutions as representing the public interest. In the course of the application, the question arose as to whether the form of order made in 1983 was correct, or whether the accused should instead have been ordered detained until the pleasure of the Minister for Justice be made known. **HELD** by Keane J acceding to the application for the transfer: (1) an order detaining a person who, under s.2 of the 1883 Act, has been found guilty but insane is in the nature of the administration of justice within the meaning of Article 34.1 of the Constitution; accordingly the terms of the 1883 Act which purport to confer on the executive the authority to exercise such power were inconsistent with the separation of powers in the Constitution and were not carried forward into our law by Article 50. *The State (O.) -v- O'Brien* [1973] IR 50 discussed. *The People -v- Ellis* (Central Criminal Court, 9 February 1990) not followed. *Per* Keane J: it could not be a decisive factor that s.6 of the 1983 Act appeared to be based on the assumption that the conclusion arrived at in the instant case was the correct legal position, since the Oireachtas was capable of enacting legislation on an erroneous assumption of the law; (2) the order which had been made in 1983 was correct in form, and on the medical evidence presented in the instant application the application for a transfer should be granted, subject to the medical supervision and monitoring which had also been suggested. *Per* Keane J: all applications of the instant nature should in future be made in open court, rather than in chambers as had been the practice, and submissions from the Director of Public Prosecutions should be sought before making any order on such application. *Per* Keane J: the outcome in the instant case should not be a reason for deferring the reform of the existing law on insanity.

SUNDERLAND -V- LOUTH COUNTY COUNCIL SUPREME COURT 4 APRIL 1990

NEGLIGENCE – DUTY OF CARE – LOCAL AUTHORITY – PLANNING AUTHORITY – WHETHER IN GRANTING PLANNING PERMISSION FOR ERECTION OF HOUSE LOCAL AUTHORITY OWES DUTY OF CARE TO PURCHASER – HOUSE DEFECTIVE IN CONSTRUCTION – STATUTORY FUNCTIONS OF LOCAL AUTHORITY – PURPOSE OF LEGISLATION – Local Government (Planning and Development) Act 1963, ss.26, 28.

In 1979, the plaintiffs purchased a house which had been built by a person who had had no previous building experience. Planning permission for the house had been granted by Louth Councy Council as planning authority under the 1963 Act. Prior to completion of the purchase, the plaintiffs engaged an architect to conduct a brief inspection of the premises. It transpired that the house had been built in an unsuitable part of the plot of land in respect of which planning permission had been obtained. In the High Court, *sub nom. Sunderland -v- McGreavey and Ors* [1978] IR 372, Lardner J held that the house was rendered uninhabitable by reason of its position in the

plot of land. He awarded the plaintiffs damages in respect of the loss sustained as against the builder. However, he dismissed the plaintiff's action against the arthitect and the County Council. The plaintiffs appealed the decision to dismiss the claim against the Council. **HELD** by the Supreme Court (Finlay CJ, Griffin, Hederman, McCarthy and Costello JJ) dismissing the plaintiffs' appeal: having regard to the fact that the 1963 Act was enacted for the benefit of the public at large rather than for the benefit of a limited class of persons, the Council did not owe any duty of care to individual purchasers of houses who occupied buildings in the Council's functional area. *Siney -v- Dublin Corporation* [1980] IR 400 and *Ward -v- McMaster* [1989] ILRM 400; [1988] IR 337 distinguished.

THE PEOPLE (D.P.P.) -V- ELLIS CENTRAL CRIMINAL COURT 9 FEBRUARY 1990; SUPREME COURT 15 JUNE 1990

CRIMINAL LAW — INSANITY — VERDICT OF GUILTY BUT INSANE — COURT ORDERING DETENTION OF PERSON IN CENTRAL MENTAL HOSPITAL UNTIL FURTHER ORDER OF THE COURT — WHETHER CORRECT FORM OF ORDER — WHETHER DETENTION SHOULD BE UNTIL FURTHER ORDER OF THE GOVERNMENT IS MADE — ASSUMPTION THAT DETENTION WOULD BE UNTIL FURTHER ORDER OF THE COURT — WHETHER APPROPRIATE TO RESCIND ORDER IN THE CIRCUMSTANCES — Trial of Lunatics Act 1883, s.2 — Rules of the Superior Courts 1986, O.60.

The accused was tried on a charge of murder in the Central Criminal Court in 1987. Evidence was given on behalf of the accused that, at the time of the killing, he was in an automatous state. A defence of insanity was left to the jury. The jury returned a verdict of 'guilty but insane' in accordance with the terms of the 1883 Act. The trial judge (O'Hanlon J) made an order directing that the accused be detained in the Central Mental Hospital until further order of the Court. In July 1989, the accused applied to O'Hanlon J seeking his release from the Central Mental Hospital on the ground that he was not suffering from any disease of the mind which would justify his further detention. O'Hanlon J allowed the accused to be released into the care of his family for a period of six months. On further application at the end of that period **HELD** by O'Hanlon J: (1) the order made in 1987 under the 1883 Act had been in error and should be amended to provide that the accused be detained in the Central Mental Hospital until further order of the government; (2) it was clear that the trial court was functus officio when a jury returns the special verdict of guilty but insane and the question of the further detention of the accused was an executive matter, and not one of sentence which was a matter exclusively for the executive. *The State (O.) -v- O'Brien* [1973] IR 50 discussed. *Per* O'Hanlon J: the instant case illustrated the need for the Oireachtas to consider amendment of the law on the defence of insanity in the light of modern medical advances. On appeal by the accused **HELD** by the Supreme Court. (Finlay CJ, Griffin, Hederman, McCarthy and O'Flaherty JJ) allowing the appeal and remitting the application to the High Court: the 1987 order should not have been amended without affording the accused an opportunity to be heard on the legal issues on which it was founded and having regard to the lapse of time and the events which had occurred since 1987; and the failure to serve notice on the Attorney General in accordance with O.60 of the 1986 Rules also raised doubts as to the validity of the amendment to the order made in the High Court; and accordingly the High Court should now determine the matter on the basis of the medical evidence before it. *Per curiam:* it was inappropriate to consider in the instant case whether the terms of the 1883 Act were inconsistent with the provisions of the Constitution. *The People -v- Neilan* (Central Criminal Court, 23 April 1990) (above) referred to.

Solicitors professional negligence – risk management

If you want to avoid being sued for professional negligence then there are a limited number of options open to you. Firstly, you can devote your time only to defending professional negligence claims on behalf of your own indemnifiers and hence have the same potential claimants and indemnifiers, or you could decide to answer a call to the Bar where the scope of your immunity would be far greater than that enjoyed, if that is the word, by Solicitors. Best of all, perhaps, if you could procure your elevation to the Bench, then you could flail about you with negligent abandon safe in the knowledge that public policy and the common good required you to be safe from action at the suit of your victims. Is it not curious that the further up one goes along the legal ladder, the wider the scope of the immunity? Perhaps an anthropologist might regard it as a latter day echo of the caste system in which the Solicitors are classed as the "the Touchables". Perhaps some comfort may be derived from the knowledge that one of the more compelling reasons for giving the Judiciary complete immunity is that otherwise no one would take on the job because of the risk of bankruptcy early in the judicial career. What with the current inclination to rush headlong into litigation when an injury, or imagined injury, is sustained and with the matching impulse of ascribing the reason for failure in an enterprise to someone else, especially one's professional advisers, can the time be far off when public policy must demand that not only must Judges be immune from prosecution but so also must a wide range of professional advisers. I would have to say that in my view it would be imprudent in the extreme to regard that New Jerusalem is anything but a pipe dream even though it is clear that in the United States there is considerable disquiet at the effect malpractice suits are having on the way in which American doctors practise medicine. A perceptible change of attitude is occurring. In Ireland, indeed, it is now possible to observe the neat verbal trick of some doctors and some judges referring not to medical negligence but to medical accidents. May we shortly expect

By
Eugene O'Sullivan
Solicitor *

to hear of a client suffering a legal accident in his Solicitors office. It has to be said that the doctors' plight will in all probability be treated with much greater public sympathy than the Solicitors' plight. It was said, if I recall correctly, during the French Revolution that the Revolution would only be achieved when the last Priest had been hanged with the intestines of the last lawyer.

"... . thoughtlessness or carelessness is the cause of most problems."

A neat juxtaposition of anti-clerical and anti-lawyer sentiments. The former would appear to be somewhat in abeyance: the latter by no means so.

It is time to pass from the philosophical to the practical and proceed on the basis that things are likely to get much worse before they get any better. The object set me is to suggest ways in which claims may be avoided and to that end I am proposing a new Decalogue. Having indicated what this is, I would propose to illustrate for the most part from cases I have been involved in. Some have been before the Courts, others settled. It will be seen that thoughtlessness or carelessness is the cause of most problems. I hope that, by vicariously experiencing the circumstances of the cases, your senses will be sharpened and that you may sense when you are entering a danger zone.

(1) Do not cut corners;
(2) Give undertakings only after the most rigorous consideration of all the circumstances;
(3) Commit attendances to writing not to memory;
(4) Don't delegate or pass over work without instructing the assignee comprehensively;
(5) Know the law;
(6) Carefully assess your client's capacity and advise in the light of his social, educational and intellectual background;
(7) Do not engage in rancorous correspondence for its own sake;
(8) Beware of acting on both sides of a transaction;
(9) Establish office procedures which are not departed from;
(10) Do not prefer your client's interests above your own – you are required to love your neighbour as yourself – not more than yourself.

1. Do not cut corners.

The first injunction I have commended to you is that you should not cut corners. This is self-evident but requires to be emphasised. It is

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another species of taking chances and if you have to take chances then you probably have too much work on hands or are not delegating in an efficient manner. It is absolutely essential that there be some couple of hours in the day when you are not available to anybody. It is difficult to fit that period into the working day but if competent work is to be done on a technical matter the "Do Not Disturb" sign does require to be put up. My own practice is to start an hour or two before the phones are switched through. Most Solicitors appear to prefer to do this at the end of the day. It is purely a matter of personal preference but in my view either a Solicitor finds the time to do it or else he reduces his workload, delegates or takes on an additional Assistant.

In a case which I shall call *A -v- H*, the Purchasers of property discovered to their horror some three years after purchasing that a motorway was to be constructed which was to run at approximately 17ft above the level of the eaves of their house and would be located only some 52ft from the eastern gable of the house. Since the house was located in a rural area this greatly distressed the Purchasers who sued and recovered £26,460 damages and costs. Each of the two Purchasers was given £2,500 damages for the depression and anxiety they suffered; they were awarded £6,000 for inconvenience and the disruption of being uprooted from their home and for the aggravation of having to seek out alternative premises; £8,000 was awarded for diminution in value of the house and the balance was made up of legal costs and stamp duty which they would incur in purchasing alternative premises as well as legal costs incurred in representation they had arranged for the local public enquiry in relation to the motorway. The Purchasers' Solicitor had failed to draw to the attention of his clients the fact that the first condition of the Planning Permission was in the following terms:-

> "(1) The proposed house to be sited as close as possible to the western boundaries of the site".

In column 2 the reason was given as follows:-

> "To allow for construction of possible future motorway".

The reason the matter was overlooked was because it was simply not seen by the Purchasers' Solicitor who was under the most extreme pressure to get the sale closed. He therefore sent off all of the documents he received from the Vendors' Solicitors to the Lender's Solicitors on the day that he received them. The case also illustrates the importance of injunction 10 above where I have suggested that you should balance the interests of your clients and your own and not take chances to suit the clients perceived convenience. Ultimately, delay seldom engenders anything worse than a little passing irritation. It is better to delay than to err.

I would just repeat; everything that comes before you should be read and corners should never be cut.

2. Give undertakings only after the most rigorous examination of the circumstances.

A case that illustrates corner-cutting and the casual and imprudent giving of undertakings in a conveyancing transaction by both Vendor's Solicitor and Purchaser's Solicitor commenced in June 1978. I will refer to it as *R -v- C*. A dwellinghouse on a little more than half an acre was purchased for £14,000. Requisitions on Title were raised in October 1978 and in response to Requisition 25(c), "Are the premises affected by any road widening proposals?" the answer given was "Not to the knowledge of the Vendors". Requisition 48 was directed to establishing what the position was regarding Planning Permission and in response to the request to furnish Planning Permission the answer given was that copy had been requisitioned and would be produced on closing. In response to the request for evidence of compliance with the conditions the answer given was "Declaration to that effect will be furnished". In the final requisition listing the items to be handed over on closing the following requirement was made:- "Statutory Declaration of an Architect or Engineer exhibiting the final Planning Permission granted by the County Council and the Land Registry Map and declaring therein that (a) the dwellinghouse has been completed in accordance with the Planning Consent (b) that the dwellinghouse with appurtenances are situate entirely within the confines of the site shown edged red on the map referred to in the Land Commission letter of consent to sub-division". The answer given was "Yes". Completion had been scheduled for five weeks after the contract date but in the event the sale was not concluded until 4th May 1979 when the Vendor's Solicitor orally undertook to furnish the Statutory Declaration sought. It appears that the Vendor's Solicitors had written to the Planning Department of the local County Council only on 3rd May 1979 to enquire as to position regarding Planning Permission and was informed after completion that the first three conditions had not been complied with. The Purchaser was visited after completion by a representative of the County Council who informed him of the position which was that permission for the erection of the dwellinghouse was subject to six conditions the first three of which were as follows:-

> "(1) A new road boundary wall shall be constructed in a position as indicated on the layout on 4th January 1974. Applicant shall dedicate to the Council, free of charge, for public use, the area of land between the public road and the new road boundary wall. (2) The finished ground level at the entrance gate shall be at the same level as the existing road level opposite the entrance gate. (3) The entrance gate shall be recessed 15ft and splayed wing walls shall be provided".

What had happened, in effect, was that the Purchaser had bought the property without knowing that frontage measuring approximately 40ft by 30ft by 43ft was at some stage to be taken over by the County Council. The Vendor, in other words, had no title to sell that plot of ground.

What the case illustrates is that as far as a Vendor's Solicitor is concerned, he should not have given an undertaking to furnish a Declaration of Compliance with Planning Conditions without know-

"Ultimately, delay seldom engenders anything worse than a little passing irritation. It is better to delay than to err."

ing what these were and a Purchaser's Solicitor likewise should not agree to accept such an undertaking without first establishing what the conditions are. There was a degree of indefensible casualness on the part of both Solicitors.

"[the Vendor's Solicitor] ... should not have given an undertaking ... without knowing what [subject-matter] was ....."

I would recommend that at the first meeting with the client, whether Purchaser or Vendor, that the Solicitor goes through the relevant Requisitions on Title. These will act as a kind of aide memoire and will tend to highlight where problems may be expected to arise. It would be a fortunate Solicitor who would be able to say in Court when the Defendant in a negligence action concerning a conveyancing transaction that his unalterable practice in all cases was to go through the Requisitions on Title with the clients even though he might not remember in that particular case whether or not he did so. The trouble with negligence actions is that they tend to come about years after the transaction has taken place when the Solicitor's recollection is very poor or non-existent. It is at a time like that that the knowledge that one follows an unvarying practice may make the difference between winning and losing the case.

The above case illustrates the danger of giving undertakings where what precisely is involved is not known to the undertaking Solicitor. In this particular case, the Purchaser sued his Solicitor and accepted a certain sum in settlement whereupon the Purchaser's Solicitor sued the Vendor's Solicitor and obtained a substantial contribution. The Vendors themselves were not sued because they were no longer within the jurisdiction.

3. Commit attendances to writing not to memory.

Injunction three is that attendances should be committed to writing. In general, Solicitors are very poor keepers of attendances and when a file is read a great deal has to be inferred. Negligence cases are, of their nature, longtailed, and again and again one finds that the Solicitor's memory of the circumstances of a case is very poor indeed. On the other hand, the client's recollection will usually be quite clear. He will remember, for instance, that he was not advised to obtain a survey of a property. The Solicitor will have no idea at all after a few years whether or not he gave that advice. It is not surprising that the client should have a clear recollection having regard to the importance of the transaction to him. The Solicitor on the other hand is merely transacting another day's business. Not surprisingly, the Court will oftentimes accept the clear recollection of the client over the hazy recollection of the Solicitor. It is extremely difficult in a busy practice to keep good attendances. Ideally, attendances should be dictated and typed up but a perfectly acceptable alternative, in my view, is to adopt a practice of making a short note of telephone calls, meetings, or consultations and so forth, as they occur in handwriting and putting the manuscript note on file. The handwritten note does not need to be an object of elegance but it is infinitely better to have such a record than to have none at all. One of the first questions Counsel for the Plaintiff will put to a Solicitor where there is a conflict of evidence is where is the Solicitor's record. Please note also that the note should be comprehensive. If something important is missing from the note, the only conclusion that will be drawn is that it was not raised.

An alternative to dictating an attendance or making a manuscript note of it is to write to the client immediately after the consultation, telephone call or whatever setting out what was advised.

In *H -v- C*, the Plaintiff was taking a lease of ground floor premises in a residential area. The Plaintiff intended to use the premises as a Launderette. The Lessor's Auctioneer informed him that there was full planning permission for the use intended. The Solicitor consulted Thom's Directory to find that the premises was described as residential, and brought this to the Plaintiff's attention who said the Planning Permission had been recently obtained and accordingly the Solicitor should not concern himself with it any further. In the event it transpired that there was no Planning Permission.

No note or attendance was made by the Solicitor of this telephone conversation, but when he pleaded in the Defence the fact of the conversation having taken place, it was expressly denied in the Reply.

The case was ultimately compromised, not just because of the conflict of evidence that would undoubtedly have arisen, but because it was considered that the Solicitor should in any event have made a Planning Search at the outset of the transaction. In the course of advising the Solicitor, Senior Counsel observed:- "I know that a Solicitor would be bound to carry out his client's instructions (i.e. to concern himself no further with planning considerations) but I feel that very strict warnings would have to be given to the client to ensure that the client knew the dangers he was facing ... It does not appear to me to be an open and shut case which the [Solicitor] must win". The standard required of a Solicitor since the decision in *Roche -v- Peilow* is well-nigh impossible of achievement but the odds can be shortened considerably by keeping proper records.

4. Do not delegate or pass over work without instructing the assignee comprehensively.

The fourth injunction I have commended to you is that a Solicitor must not delegate or pass over work without giving comprehensive instructions. Lack of communication can have serious consequences as is illustrated in a case of *W -v- A* which came before the High Court in April 1989 on a preliminary issue. The Plaintiff had consulted the Defendant in November 1979. He contended that the Solicitor had advised him to form a limited company to carry out certain engineering works so that the profit from the works, which would be regarded under the Export Sales Relief legislation as exports sales, would be tax-relieved. The advice was said to have been given in respect of an Agreement which was to run from 1st November 1979 to the end of March 1980. The Solicitor had no recollection of giving that advice and had no record of having given that advice. He delegated the work

appeared on the Licensing Register as a Seven Day Publican's Licence. It appears that this transformation came about as a result of an application having been made in 1973 to the District Court to permit the operation of a Public Bar on the premises. The District Justice granted the application but in doing so purported to grant a Seven Day Publican's Licence. The District Justice had accordingly acted in excess of jurisdiction. The District Court could not then or now grant a Seven Day Publican's Licence. It is submitted that the description of the property as the "Southern Hotel" should put a Solicitor on notice that the Licence attaching might well be a Hotel Licence rather than an ordinary Publican's Licence. Further, a competent Solicitor should know that the District Court cannot grant a Seven Day Publican's Licence. Technically a Hotel Licence is a Publican's Licence and the Licence itself is in fact identical being described on its face as a "Publican's Licence (Ordinary)". On the back of the Licence however one reads the note which says "This form of Licence is used both for (1) Public Houses and (2) Certain Hotels licensed under Section 2(2) of the Licensing (Ireland) Act 1902". These Hotel Licences are subject to certain restrictions which do not apply to Public Houses. Firstly, to qualify as Hotels, a certain complement of rooms is required for the use of travellers and in the case of Licences obtained after the passing of the intoxicating Liquor Act 1960 which was passed on 4th July 1960 registration of the Hotel with Bord Failte is also essential to enable the District Justice to renew the Licence each year. In general, Hotel Licences obtained before 1960 do not need to be registered with Bord Failte but that is subject to this exception that if application was made under the Tourist Traffic Act 1952 for the granting of a new Hotel Licence then it is necessary also on the application being granted to be registered with Bord Failte. It should be noted further that the extinguishment of a Licence under Section 19 of the 1960 Act done in order to make it lawful to run a public bar in a Hotel has the result that the Licence so extinguished merges in the Hotel Licence and not the other way around as the District Justice in the instant case appears to have thought. Further, if and when the Hotel ceases to be operated as a Hotel, the Licence lapses.

It will be evident from the foregoing that a Solicitor acting for the prospective purchaser of licensed premises must make careful enquiries as to the nature and status of that Licence. In *Kelly -v- Crowley* [1985] IR 212 Mr. Justice Murphy stated:-

> "It seems to me that in every case in which a Solicitor acts on behalf of a client in the purchase of premises in respect of which there has been granted a Licence for the sale of intoxicating liquor, the Solicitor is bound to concern himself with the nature of the Licence attaching to the premises; the power of the vendor to procure such Licence to be vested in the purchaser and the means by which such Licence is transferred are vested in the client".

In another case Mr. Justice Finlay stated as follows:-

> "Any reasonable investigation of the title to them (the premises) in particular with regard to their licensing history, would have indicated a most unusual licensing history. Firstly, consideration of the Register of Licences kept by the District Court Clerk for the area would have indicated . . . . "

It will be seen that the particular circumstances determine the depth of investigation that is required. Merely repeating standard practice will not avail, cf. Henchy J. in *Roche -v- Peilow:* "Neglect of duty does not cease by repetition to be neglect of duty" (quoting Walsh J. in *Donovan -v- Cork County Council*).

" . . . a Solicitor acting for the prospective purchaser of licensed premises must make careful enquiries as to the nature and status of that Licence."

As to the consequences where a mistake is made as to the nature of the Licence I can bring you right up to date on the attitude the Supreme Court takes in measuring damages in cases such as these where a Licence had been sold but in fact does not exist either by reason of the necessary complement of rooms not being available or because of lack of registration or indeed because premises are operated purely as a bar and not as a Hotel. On 22nd February last in the case which I shall call *F -v- H* the Supreme Court heard an Appeal from the Judgment of Mr. Justice Johnson of 16th December 1987 in which he awarded a sum of £55,000 plus and costs to the Plaintiffs. £30,000 of that sum comprised damages for dimunution in value of the property. In other words the Court held that with a Licence the property would have been worth £30,000 more at the relevant time. The value was £30,000 less than the price. The Judge also awarded interest on borrowings which were attributable to the lack of a proper Licence in the premises but disallowed certain claims for interest in respect of borrowings where the loss was attributable to trading losses rather than attributable to the lack of a Licence. Judge Johnson also awarded a sum of £8,500 for general damages for the upset and mental distress suffered by the Plaintiff husband and wife. In the Supreme Court Judge Johnson's Orders were all affirmed apart from that relating to mental distress. The Supreme Court substituted a sum of £20,000 for mental distress for the £8,000 awarded by Judge Johnson.

The £20,000 awarded in this case should be compared with the sum of £22,000 awarded for mental distress in *Roche -v- Peilow.* In the *F -v- H* case, the Plaintiffs had been remarkably laconic in describing their upset but the Supreme Court felt that nonetheless the High Court had grossly undervalued the compensation that should have been paid under that heading. The Plaintiffs in the *Roche -v- Peilow* case had not been at all laconic in describing their misfortunes and in dealing with the matter of damages on 8th July 1986 Miss Justice Carroll began her Judgment by saying that "Mr & Mrs Roche, the Plaintiffs in this case have lived a Kafkaesque nightmare for the last eleven years". A little time has elapsed since then but, to me, it is remarkable nonetheless that similar damages should be awarded in the two cases. I once heard Mr. Hugh

to a colleague but the colleague was not aware that in order to attract the tax relief the work would need to be carried out through the medium of a limited company and accordingly the formation of the company was not given any particular priority and the delays that occurred were compounded by the Solicitor becoming ill for some time so that the work under the contract had been concluded by the time the company was available. There was no prospect that the Revenue could be persuaded that the work was carried out by the company. There then followed the passing of the Finance Act 1980 on 25th June 1980 wherein it was provided at Section 42 that export sales relief could not be claimed in respect of any accounting period after 31st December 1980 except to a company which had exported goods out of the State prior to the 1st January 1981. Work attracting export sales relief had, as I have said, been carried out by the Plaintiff but no such work was carried out by the company formed in June 1980 between then and 1st January 1981. The result was that the company did not qualify for exports sales relief in respect of contracts carried out after 1st January 1981.

The preliminary issue was to establish whether or not the precise work being done by the Plaintiff would have in any event qualified for export sales relief. The Court held that it would. Subsequently the case was settled. It highlights the importance of one Solicitor properly briefing another to whom he is assigning or delegating a case. Needless to say, the same applies to the briefing given to Counsel. To pass Counsel the original file with the request that he should deal with it is dangerous on two counts; firstly, the file may go missing and, secondly, it may not constitute an adequate briefing. Incidentally, it may also contribute to a claim becoming statute-barred since without the file the date of accrual of an action is not known.

"To pass Counsel the original file with the request that he should deal with it is dangerous . . . ."

5. Know the law.

The fifth commandment is that you should know the law. As with the injunction that you should love your neighbour as yourself, it is impossible to observe, but one must do one's best and that involves the taking of active steps to keep up with legislative changes and important case law. Paradoxically, however, one can make mistakes late in one's career which one might not have made at the beginning when such rules as the Rule in *Turquand's* case, the Rule against Perpetuities and the like are fresh in one's mind. If the Solicitor had been reading Wylie for the Land Law examination would the following problem have arisen. The Registered Owner wished to transfer his lands to himself for life and to his son in fee simple. We will call the father "John Murphy" and the son "Patrick Murphy". In the Transfer executed by John Murphy the lands were transferred "to the said John Murphy for his life and thereafter to the said Patrick Murphy in fee simple". The Land Registry rejected the Transfer on the grounds that the creation of the successive interests attempted by the Transfer should have been created by a limitation to a grantee to uses to the use of John Murphy for his life with remainder to the use of Patrick Murphy in fee simple. In the meantime John Murphy died before a new Transfer was executed. At Common Law a man could not convey land to himself and while Section 123(3) of the Registration of Title Act 1964 provides that a resulting use or trust should not be implied merely by reason that the property was not expressed to be transferred to the use or benefit of the transferee, that saver did not operate in this case because the Registered Owner could not be regarded as the transferee. The Transfer to John Murphy being ineffective, the remainder freehold interest to be transferred to Patrick Murphy was void on the grounds that it violated the first of the four common law remainder rules which provided that a remainder had to be supported by a prior freehold estate. It is noteworthy that Wylie at paragraph 3.020 suggests that since the passing of the Conveyancing Act 1881 a person is permitted to convey land to himself without resorting to a conveyance to uses. He refers to Section 50 of the Conveyancing Act 1881, but as Senior Counsel pointed out in the instant case Section 50 does not appear to support that proposition because it deals merely with a situation where a person conveys land in joint tenancy i.e. a conveyance by A to A & B as joint tenants.

Because the Transfer was ineffective, and because the Transferor died without executing a fresh Transfer, the lands passed in accordance with the provisions of his Will.

The problem was cured by Patrick Murphy staying in adverse possession for twelve years, but one can well imagine that the Solicitor might not always be that lucky. On the subject of uses, note also that Form 23 of the Land Registration Rules 1972 provides for a conveyance to uses in the case of a transfer of freehold property with a power of revocation: "A.B. hereby transfers all the property described in Folio _____ of the Register Co. _____ to E.F. to the use of C.B.".

The second issue I will deal with under the heading of "Know Your Law" is the issue of Hotel Licences. Difficulties regarding Hotel Licences turn up with depressing regularity and because of the relatively large sums of money that are at stake, mistakes in this regard can be expensive. A case I know of, but which I was not involved in, concerned a property which had the word "Hotel" in its title. For convenience, I will refer to the Hotel as the "Southern Hotel" but that is not its name. The premises were purchased in 1976 and in the Contract the Licence was described as a Seven Days Publicans Licence. The case closed without incident in March 1977 and an ad interim Transfer and confirmation was obtained in the same year. The premises were subsequently conveyed on again without incident. There had been ten bedrooms attaching to the property but these were demolished in course of renovation in 1987. The premises were sold once again in 1988 but on this occasion the Solicitor acting for the Purchaser having inspected the Licensing Register in the District Court had doubts about the validity of the Licence. The Licence

O'Flaherty Senior Counsel describe mental distress as "A forensic centipede that needs to be carefully corralled". It is evident that the beast has breached its confines.

6. Carefully assess your client's capacity and advise in the light of his social, educational and intellectual background.

The sixth matter that I listed is to the effect that the Solicitor should carefully assess his client's capacity and advise the client in the light of his social, educational and intellectual background. If the client's origins are humble and educational attainments meagre, the obligation is proportionately higher on the Solicitor to ensure that that client knows what is going on so that he can make a fully-informed decision. The knowledge of one's client is inevitably circumscribed by the number of visits the client had paid and whether the client is known socially or not. It is essential in all cases to look out for indications that things are not as they should be. A Solicitor acted on behalf of a Plaintiff who wished to sue his employers for injuries sustained in an accident that occurred in December 1979 when the Plaintiff in the course of his employment drove a van, the property of his employers, into the sea shortly after midnight and was submerged for some ten minutes before being rescued. The Plaintiff contended that the van was defective in both its steering and braking capacity. A medical report prepared some three months after the accident dealt principally with the physical injury sustained but went on to refer to the fact that he had had nightmares and had been referred to a Psychiatrist. The report ended by stating that clearly there had been severe psychological effects of this near fatal accident. The Solicitor wished to obtain a psychiatric report having been informed that the Plaintiff's sleep was affected and that he had changed psychiatrically and that his memory was very bad. The Plaintiff was however adamant that he wished to settle the case and negotiations took place between the employers' insurers and the Plaintiff's Solicitor culminating in the settlement of the case for £7,500 and costs. It has to be said that the Plaintiff appeared to have an extremely weak case as far as liability was concerned and the only engineering evidence that was available was that of the employers whose engineers found nothing wrong with either the brakes or the steering of the van. The Solicitor met with the Plaintiff in December 1981 and in a handwritten attendance noted that the Plaintiff could not get any other witnesses and could get no co-operation from his co-workers. The Plaintiff believed that there was a cover-up going on because of worries among his colleagues that if they assisted in a claim against the company that they might be victimised in a situation where redundancies were in prospect. An attendance notes that the Plaintiff wanted to settle even though the Solicitor pointed out that he had not yet got a psychiatrist's report and that he could not evaluate the case without up to date reports. Notwithstanding that, the Plaintiff indicated that he would accept £6,000. In the event the case was settled for £7,500 on the express instructions of the Plaintiff. The Plaintiff subsequently had second thoughts and instituted High Court proceedings in December 1984 against the Solicitor. In the Statement of Claim he stated, *inter alia*, that the Solicitor had "compromised the Plaintiff's proceedings for a sum of money which was inadequate without ensuring that all the information both as to the circumstances of the accident and in relation to the Plaintiff's injuries had been procured". In a Reply to a Notice for Particulars the Plaintiff stated *inter alia* that the Solicitors had "compromised the Plaintiff's proceedings when they knew or ought to have known that the Plaintiff was partically or fully incapable of properly understanding the meaning and effect of same". As far as the Solicitor was concerned, he was presented with a person who was clearly withdrawn but little else. There was little enough to indicate how serious the Plaintiff's condition was psychiatrically and on top of that he was faced with the express instructions of his client to settle the case. He was on the horns of a very uncomfortable dilemma.

The claim was ultimately compromised but it highlights the importance of being prepared to take a strong line with a client where there were indicators that the client was not giving instructions that best served his interests. The Solicitor could hardly be expected to make application to have the Plaintiff made a Ward of Court but on the other hand he was under a very strong duty to point out in detail and with considerable vigour the unwisdom of compromising a case where all the medical reports were not available. I am not to be taken to be saying that a Solicitor must refuse to carry out his client's instructions but he is an Officer of the Court who will be expected by the Court to bring to bear his full powers of persuasion even at the risk that the client might decide to retain another Solicitor. It transpired that in fact, unknown to the Solicitor, the Plaintiff's life was in a shambles. He was suffering phobic anxiety and depression, had apparently suffered a personality change, and was alleged to have suffered brain damage so that he experienced the most distressing nightmares coupled with sleeplessness at other times. A psychiatrist's report would have revealed this in detail.

On a more ordinary level, it is of course essential that a Solicitor should meet with his client and discuss the client's affairs with him before implementing the instructions. That might appear to be obvious but how many times has a Solicitor taken action on instructions given by, say, the husband which affects the rights and obligations of both a husband and wife. In a case which arose a few years ago a Solicitor acting for a Lending Institution was persuaded by a Solicitor Borrower to complete a mortgage transaction where the spouse of the Solicitor Borrower was not present at the closing. The funds were dispensed and it ultimately transpired that the spouse of the Solicitor Borrower knew nothing of the transaction. It is also important to remember when acting on behalf of an Insurance Company that one has a dual

"... a Solicitor should meet with his client and discuss the client's affairs with him before implementing the instructions."

obligation. One must of course do one's best for the Insurance Company, but one also has a duty to the insured. The interests of both parties will in almost all cases be parallel, but there will be occasions where a conflict can arise and that should be recognised and due weight should be given to the interests of both parties.

7. Do not engage in rancorous correspondence for its own sake.

The seventh commandment listed is that one should not engage in rancorous correspondence for its own sake. It is tempting to give vent to indignation, but care needs to be taken as to how, and to whom, that indignation is expressed. Some months ago I was concerned in a case involving a Doctor and a Solicitor. The Solicitor required the Doctor to give evidence on behalf of his client but the Doctor, not unnaturally, was concerned with the disruption that this would give rise to because of the short notice involved and indeed wished to be reasonably assured that he would not lose out financially as a result. The personalities of the two grated upon each other and the Doctor attempted to evade service of a Subpoena though in the event turned up for the case which was then settled. When the Doctor presented his account, the Solicitor sought a breakdown of some of the particulars which the Doctor took askance and he wrote to the Law Society about it. At this juncture, the Solicitor was rather fed up with the treatment he considered he had endured and he wrote to the Law Society regarding the Doctor in distinctly uncomplimentary terms. Had he confined himself to doing that, the protective veil of qualified privilege would almost certainly have been more than sufficient to protect him from any action for defamation. Unfortunately, however, he did not confine himself to writing to the Law Society. He decided that the matter should be taken further and a complaint should be made to the Doctor's Professional Body. Unfortunately, he communicated with the Irish Medical Organisation which is not the Body which deals with disciplinary matters for doctors and there followed litigation on a grand scale. Initially, the case was withdrawn from the High Court Jury but on Appeal was sent back for retrial in the High Court and a full ten days were spent litigating the matter before it was ultimately compromised.

The lesson of the above is that communications of a rancorous nature should never be despatched on the spur of the moment. Their despatch should be postponed at least for a day to allow calm to reassert itself.

8. Beware of acting on both sides of a transaction.

Eighth on my list is that you should beware of acting on both sides of a transaction. It can even happen that a Solicitor may not be aware that he is supposed to be acting on both sides of a transaction. In a case recently settled the Solicitor represented a Lending Institution. The borrower had no Solicitor and was informed by the Lending Institution that the Lending Institution's Solicitor would put through the matter for the borrower. The Solicitor did not regard himself as being under any obligation to provide the kind of advice that he would normally tender when acting on behalf of a purchaser. He did not advise on the advisability of a pre-contract survey. The purchaser went into possession to find that he was dissatisfied with the physical condition of certain of the walls and estimated that it would cost him well over £1,000 to repair them. He sued the Solicitor contending that the Solicitor acted on his behalf and should have advised him about the desirability of a survey. Among the counts of negligence was one that I have never before seen pleaded against a Solicitor namely that the Solicitor had completed the purchase too quickly. The answer to the claim, in my view, was that the Solicitor's Brief as far as the Purchaser was concerned was limited to carrying through the nuts and bolts of stamping and registration and did not extend beyond that.

9. Office Procedures should be established which should not be departed from.

Ninth in my list is that office procedures should be established which are not departed from. In this regard, I would suggest that all active files should be checked at least twice a year. A good time to do this is in the period immediately after Christmas before normal life resumes. The second annual inspection might with advantage be timed for the day of return from holidays. It is highly expedient to announce one's return to the office for a Tuesday but to return on the Monday to check the files.

Carefully keeping a diary is also of the highest importance. It not only records appointments but can be employed judiciously in a campaign to deal with cases about which one has a mental block. Mental blocks are, in my experience, common to every Solicitor, though some are worse afflicted than others. A useful psychological trick when one is aware that something requires to be done but is not being attended to is to note the matter for attention in the diary say a week hence. It is obvious that this cannot be done in the most urgent of cases, but in my experience it is often in probate cases and some conveyancing cases that the block develops. One can then build up psychologically to the task. Better still, of course, would be to pass the case to a colleague on the basis that he will reciprocate; even to discuss the case with a colleague is often sufficient to facilitate the taking of action on it.

" . . . all active files should be checked at least twice a year."

10. Do not prefer your clients interests above your own.

Last in my list is the precept that you should not prefer your clients interests above your own – that you are only required to love your neighbour as yourself and not more than yourself. This is more a matter of attitude than anything else. One wishes, of course, to have good relations with a client and to discharge all of your obligations to the client. You are under no obligation however to have to submit to unreasonable demands or indeed harrassment in the course of a transaction. It serves neither the client's interests nor yours to so hasten matters that you are not afforded an opportunity to ensure that the business gets reasonable attention. As a professional person exercising specialist skills in difficult circumstances, it is imperative that you do not submit to the tyranny of time. The client's interests, as well as one's own, will ultimately be best served by the Solicitor marching to the beat of his own drum. If the commoner mistakes are to be avoided, thoughtlessness and carelessness have to be avoided. To avoid these twin evils you must make time, and then you must take time. □