INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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(Registered Indexer)

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LAW SOCIETY OF IRELAND

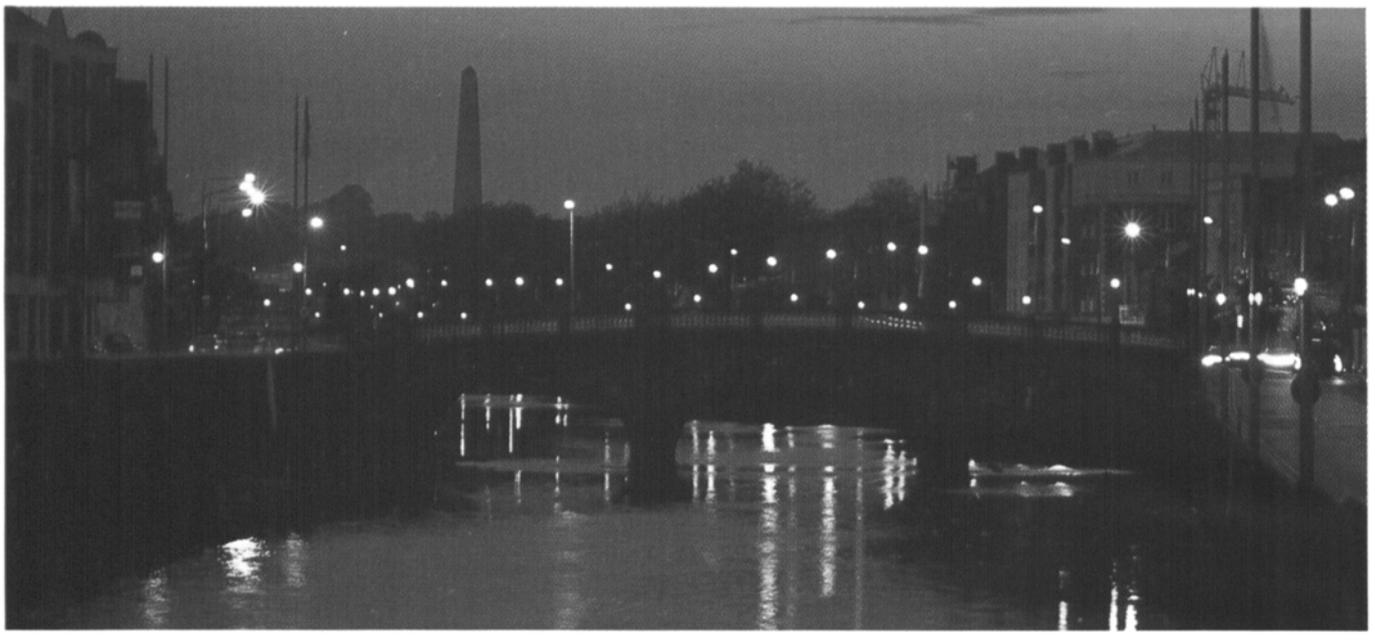
GAZETTE

LAW SOCIETY COMMITTEES 1994/95

THE COURTS AND COURT OFFICERS BILL 1994

FAMILY DISPUTE RESOLUTION

ANNUAL GENERAL MEETING



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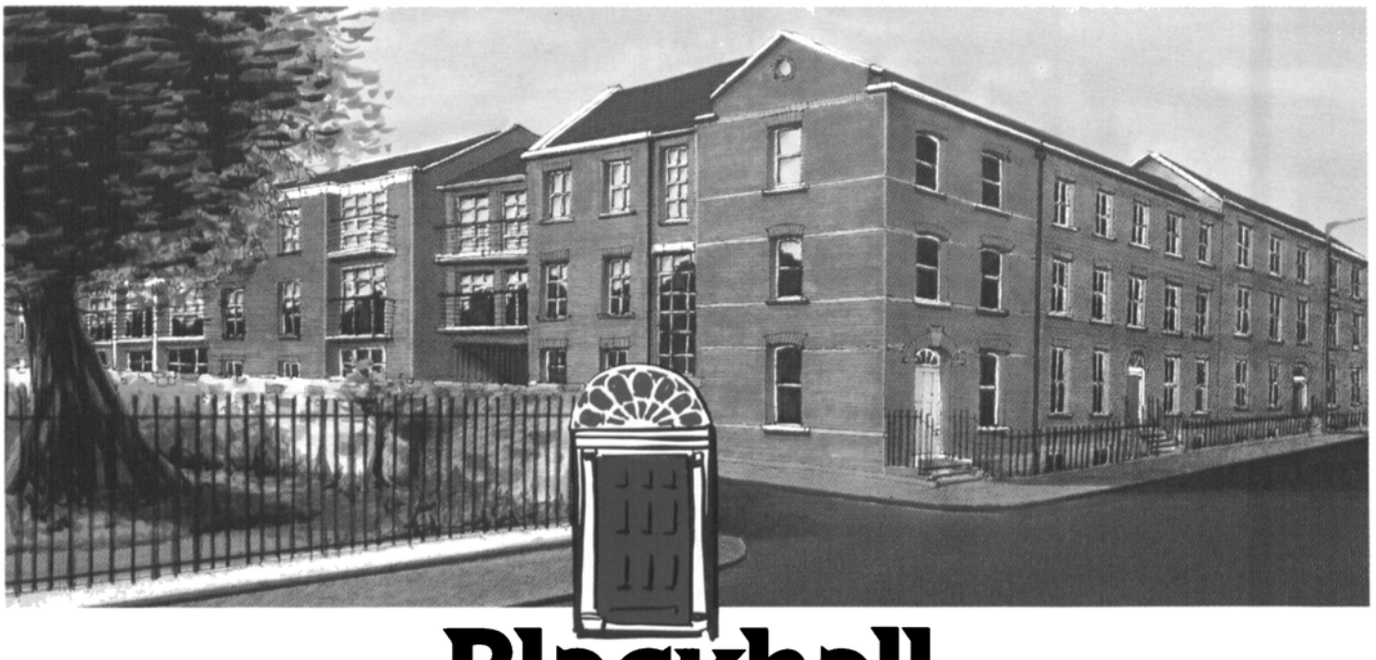

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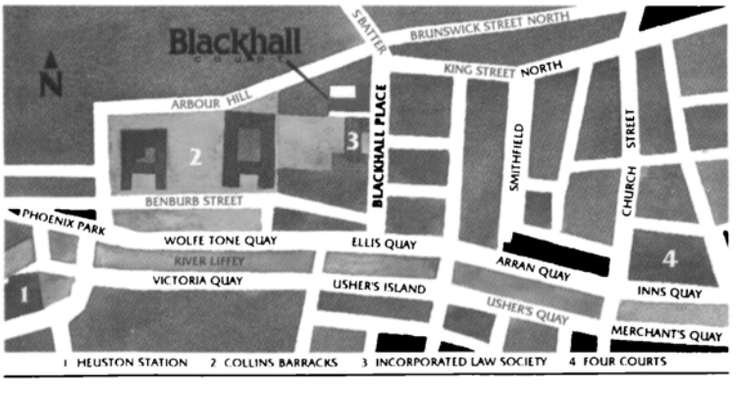

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LAW SOCIETY OF IRELAND

GAZETTE

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Fundamental Review of the Court System

The Law Society welcomes the inclusion in the new Government's Programme for Renewal of a statement of intention to carry out a fundamental review of the court system from District Court to Supreme Court level including "a modernisation of the criminal practice code to take account of new methods of information gathering, judicial skills, and use of video and audio equipment".

It is to be hoped that this review by the new Minister for Justice, *Nora Owen,* will proceed apace and that she will consult widely with all interests professionally concerned with the administration of justice. It is also to be hoped that at the expeditious conclusion of this review, the Minister will successfully secure the agreement of her Government colleagues for resources to be made available to implement the necessary reforms.

The recent announcement by Minister Owen (following a meeting with representatives of the Society) that she is "committed to establishing a commission on the management of the courts as an independent and permanent body, with financial and management autonomy" is also welcome. The day is long past where the courts service should be required to compete on a necessarily unequal basis with security-related services for her Department's share of the annual budget. The burden of the administrative management of the courts should be lifted from our court Presidents so that they and their fellow judges are made more free to perform their constitutionally independent judicial functions.

The Minister has also said that she is reviewing the provisions of the Courts and Court Officers Bill, 1994 "to ensure that the measures will adequately tackle the backlog of cases to be heard in all courts." If the removal of that "backlog" is substantively addressed by her, the Minister will deserve the thanks of not only the judiciary and both branches of the legal profession but also the ever increasing number of litigants seriously effected by the present delays in their cases being listed for hearing.

It is clear that the Minister does not intend to withdraw the Courts and Court Officers Bill but rather to amend it as appropriate at Committee stage. The Society, therefore, hopes that this will ensure that the Minister's review of the courts service will remain at the top of her legislative agenda.

We have already commented (Viewpoint, Gazette, November 1994) on aspects of the Bill, including the provision extending the eligibility of solicitors for judicial office to appointments to the Circuit Court bench, but regrettably, still leaving solicitors ineligible for appointments to the High Court and Supreme Court. Solicitors as well as barristers of appropriate experience should be eligible for appointment as judges of all courts. There is simply no logical argument to the contrary and the Society will be pressing for the appropriate amendments to be made to the Bill to bring about equality of eligibility for all judicial appointments between barristers and solicitors. In the same context, the Bill should be amended to ensure that judges of the District Court, Circuit Court and High Court of (say) three years judicial experience be eligible for appointment, respectively, to the Circuit Court, the High Court and the Supreme Court. Judicial experience, competence and temperament at each level of court should be recognised as valuable qualifications for judicial service at the next level upwards.

The Society recognises that it is desirable that the ongoing knowledge and experience of judges both of law and societal change should be kept up to date by appropriate continuing education programmes. However, the provision in the Bill that would-be candidates for judicial office should be required to attend specified training courses prior to being considered for appointment is manifestly counter-productive. Such a requirement would have the inevitable effect of excluding the best candidates from consideration as none but the mediocre would wish to be seen attending such courses in the off-chance that such public manifestation of ambition might be rewarded by a judicial appointment.

When judges are actually appointed there should be induction courses to familiarise themselves with the relevant areas of law and procedure they are going to have to apply. Instant translation from the desk to the bench is not an ideal arrangement. The ongoing continuing education and training of judges should be organised, as they are in our neighbouring jurisdictions, by a statutory Judicial Studies Board under the overall control of the judiciary.

It is not at all clear where any demand for a retirement age of 65 for all judges comes from. There has been no appreciable criticism of our Superior Court judges (with a present retirement age of 72) being too old. Many of the seminal judgments of our Supreme Court and High Court were delivered by judges who were over 65. Some of our most notable judges would probably not have been appointed at all because they were in their early 60s when they first went to the bench. It has always been perceived that the existence of judicial pensions has attracted practitioners to apply for judicial positions. If the retirement age for all judges were to come down to 65 this would likely discourage lawyers over 50 from seeking appointment because they would not be able to build up sufficient years of service to obtain a reasonable pension. Hopefully, the welcome appointment of Mr. Justice Costello to the Presidency of the High Court at the age of 68 suggests that the Government does feel that those over 65 are capable of taking on onerous responsibilities. This age 65 retirement provision should be withdrawn from the Bill.

New Council Takes Office for 1994/95

The first meeting of the new Council was held 25 November 1994. At this meeting the resolutions passed at the AGM were adopted by the Council.

The outgoing President *Michael O'Mahony* congratulated and welcomed the newly-elected members of the Council and the nominees of the Dublin Solicitors Bar Association and the Southern Law Association. He noted with regret that *Mr. Justin Condon* and *Mr. Michael Staines* had chosen not to put themselves forward for membership of the Council for 1994/95. He also noted that *Mr. Donal G. Binchy* and *Mr. Raymond T. Monahan* had decided not to seek re-election to the Council, but had indicated their intention to continue to participate in the Council as Past Presidents.

Michael O'Mahony expressed his gratitude and appreciation to the Council for entrusting him with the office of President of the Law Society for 1994/95. He thanked his Senior Vice-President, *Paddy Glynn* and his Junior Vice-President *Pat O'Connor.*

On assuming office President, *Paddy Glynn* thanked the Council for their warm welcome and noted that his election was an emotional moment for a first-generation solicitor. The President complimented *Mr. Michael O'Mahony* on his hard work and dedication on behalf of the Society and the profession and noted particularly his incredible work in relation to the Solicitors (Amendment) Act, 1994. In the coming year he anticipated that the 'capping' proposal, the Courts and Court Officers Bill, the review of the Society's structures requested at the AGM and the making of regulations pursuant to the new Solicitors Act would form the greater part of the Society's work.

Adoption of Resolutions

In view of the resolutions which had been passed at the Annual General Meeting on the previous evening, standing orders were suspended to discuss the resolutions. The resolutions called for an enquiry to be set up to examine the structure of the Council of the Law Society and the administration, finances and accounts of the Law Society, with the objective of better serving the solicitor's profession in modern Ireland and that the Bye-laws be amended accordingly. (For full text of resolutions, see report on Annual General Meeting at p.16). A review group is to be established and the group is to report back to the Half Yearly meeting to be held in Dublin. The resolutions were adopted unanimously by the Council.

Compensation Fund

The Council approved a schedule of payments from the Compensation Fund for November (see December Gazette). The Chairman of the Compensation Fund Committee reported to the Council that the Committee had decided to refer one solicitor to the Disciplinary Committee.

The Council regulations were amended to reflect certain provisions of the Solicitors (Amendment) Act, 1994.

Conveyancing

The Chairman of the Conveyancing Committee reported that following discussions between the Law Society and the Revenue Commissioners it was agreed to revise the form and content of the Particulars Delivered Form. The President congratulated the Taxation and Finance Committees on their successful negotiations on behalf of the profession.

Litigation

The Council discussed its continuing campaign in opposition to the proposed 'capping' of compensation.

Committees 1994/95

The Council approved the membership of the standing and *ad hoc* Committees of the Society for 1994/95. The Committees for 1994/1995 appear on page 8.

❐

Compensation Fund Payments – December, 1994

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Council of the Law Society at its meeting in December 1994.

	IR£
John K. Brennan, Mayfield, Enniscorthy, Co. Wexford.	4,559.15
Malocco & Killeen, Chatham House, Chatham Street, Dublin 2.	50,000.00
Christopher Forde, 52 O'Connell Street, Ennis, Co. Clare.	285.00
	54,844.15

❐

Action on Delay in Court Cases Agreed

At its meeting on 15 December 1994, the Council considered the following motion: "that this Council notes with concern the increasing delay in our courts and resolves to take all possible steps to encourage such changes as are necessary to enable persons having business before the courts to be dealt with as expeditiously as possible"

Concern was expressed at the current delays in the Circuit and High Courts. The previous joint submission with the Bar Council to the Minister for Justice on the courts service was referred to and the President and the Council agreed to reactivate the issue as a matter of priority.

The recent published Programme for Government was referred to. This gave a commitment to the establishment of a commission on the management of the courts as an independent and permanent body, with financial autonomy. It was also stated that "the Government will review the provisions of the Courts and Court Officers Bill, 1994, to ensure that measures will adequately address the need to tackle the backlog of cases to be heard in all courts." It was also noted that a Committee has been established to examine the existing organisation of the Circuits and to make recommendations for revisions. Disappointment was expressed that the Law Society had not been consulted, particularly since it represents 80% of the legal profession. It was agreed that immediate action was needed. The motion was passed.

President Appointed as Acting Director General

As and from 1 January, 1995, *Mr. Patrick Glynn* was appointed acting Director General, pursuant to Regulation 19 until such time as a permanent Director General took up office.

Compensation Fund

The Council approved a schedule of payments from the Fund (see page 6).

Draft Statutory Instruments

The Council approved three draft Statutory Instruments, providing for (a) a new form of application for a practising certificate for the year 1995/96 (b) a new form of practising certificate for 1995/96 and (c) the fees payable by solicitors for the practice year 1995/96. All three Statutory Instruments reflected changes contained in the Solicitors (Amendment) Act, 1994 and applied only to the practice year 1995/96.

Finance

On the recommendation of the Finance Committee, the Council approved an increase of £10 in the registration fee element of the practising certificate fee for 1995/96 from £525 to £535 for solicitors who were admitted for three years or more. This represented an increase of 2.3% in the registration fee operating for the practice year 1994/95. The Council also approved an increase of £7 in the registration fee for solicitors admitted less than three years from £366 to £373. The decision was taken as part of the Council's continuing response to the views expressed by the members at successive General Meetings that the Society should address its financial situation.

Litigation

The Litigation sub-committee on 'capping' reported on the various steps it was proposing to take on this issue.

Remuneration/Costs

The Council approved a draft agreement on solicitors charges, intended to meet the requirements of section 68 of the Solicitors (Amendment) Act, 1994, which would be circulated to the profession in advance of 4 February, 1995 (the operative date of Section 68).

Establishment of Review Group to Examine Structure of the Law Society

The establishment of the review group was discussed and it was decided that the President would bring forward proposals for discussion at the January Council meeting.

Departure of Director General

The meeting concluded with a tribute to *Mr. Noel C. Ryan*, Director General. The Council thanked him for his hard work and commitment over the previous four years and wished him well in his future employment. ❐

Company and Commercial Law Committee

The submissions made by the Company and Commercial Law Committee to the Company Law Review Group established by the Minister for Enterprise and Employment are available from the Society. The Booklet contains submissions dealing with e.g. Companies (Amendment) Act 1990; investigations; insider dealing; and restrictions on Directors within the Companies Act 1990 together with the position of farmer creditors and matters arising out of the recommendations of the Small Business Task Force.

The Booklet may be obtained from: *Eileen Brazil*, The Law Society, Blackhall Place, Dublin 7. ❐

Committees of the Council of the Law Society for the Year 1994/1995

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Moya Quinlan (Vice-Chairman),
W. Brendan Allen,
Terence Dixon,
Michael Hogan,
Donal Kelliher,
Elma Lynch,
William A. Osborne,
Grattan d'Esterre Roberts,
Andrew F. Smyth.

Finance Committee
Laurence K. Shields (Chairman),
Ward McEllin (Vice-Chairman),
Owen Binchy,
Geraldine Clarke,
Francis D. Daly,
Moya Quinlan,
Patrick O'Connor,
Michael V. O'Mahony,
Patrick A. Glynn (President),
Andrew F. Smyth (Senior Vice-President),
Anthony Ensor (Junior Vice-President).

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Ernest Cantillon,
Michael Carroll,
Stephanie Coggans,
John Costello,
John Dillon-Leetch,
Gerard Doherty,
Terence McCrann,
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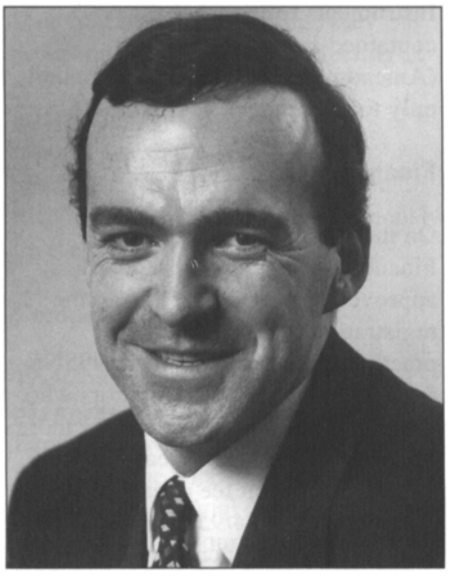
Ken Murphy,
Michael V. O'Mahony,
Moya Quinlan,
Laurence K. Shields.

Terence McCrann



Terence McCrann qualified in 1986 and was elected this year on his first attempt as a candidate. He has been appointed to serve on the Compensation Fund and Parliamentary and Law Reform committees.

Terence wants to contribute to the efficient and effective administration of the profession to ensure value for each solicitor's contribution to the Law Society. He sees the Society's main task as servicing and protecting the existing work of solicitors while constantly seeking new and developing areas of new work for solicitors.

Terence practises in the firm of McCann FitzGerald, Dublin specialising in litigation. Terence served as auditor of the Solicitor's Apprentices Debating Society in 1984/85 and as chairman of the Society of Young Solicitors in 1988/89.

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Anthony Ensor (Junior Vice-President),
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Francis D. Daly (Chairman),
Catherine Dolan (Public Relations Executive).

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Frank Bracken,
Patrick Casey,
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John Fish,
John Harte,
Michael Irvine,
Keenan Johnson,
Philip Joyce,
Tim Lucey,
James McCourt,
Lenore Mrkwicka,
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Brian Sheridan.

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Brendan Walsh.

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Paul Dobbyn,
Paul Egan,

Michael Irvine,
William Johnston,
John King,
Laura McDermott,
Patricia McGovern,
Brian O'Connor,
Alvin Price,
Mark Ryan,
Helen Sheehy.

Keenan Johnson

Keenan Johnson qualified in 1982. He went into partnership with his brother in 1983 forming the firm of Johnson & Johnson, Ballymote, Co. Sligo. His main objective as a Council member is to strenuously oppose the proposal to cap awards in personal injuries claims and to show that the interests of the profession and the public on this issue are the same, namely the protection of a citizen's rights and the preservation of justice and fair play. Keenan feels strongly that the Society should press the Government to introduce a proper system for the compensation of victims of crime. He is also concerned about the numbers entering the profession and feels that the Society should do more to increase job opportunities for newly qualified solicitors.

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Brid Brady,
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Paddy Fagan,
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Jeremiah Cronin,
Barry Donoghue,
Grainne Ní Dhubhghaill,
Eddie O'Connor,
Dudley Potter,
Liam Young.

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Petria McDonnell (Vice-Chairman),
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Angela Condon,
Michael Dickson,
John Fish,
John Larkin,
Philip Lee,
Arthur Moran,
Julie Sadlier.

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Brian Sheridan (Vice-Chairman),
Stephanie Coggans,
Eugene Davy,
Mary English,
Rosemary Horgan,
Mary Lloyd,
Pauline O'Reilly,
Joan O'Mahony,
Conor Sparks,
Muriel Walls.

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John Costello (Vice-Chairman),
John Buckley,
Elma Lynch,
Justin McKenna,
Michael V. O'Mahony,
Director General,
Catherine Dolan (Public Relations Executive)

Fionnuala Breen-Walsh

Fionnuala Breen-Walsh was elected this year on her first attempt and she thanks all her colleagues who supported her. Fionnuala obtained her B.A. as a night student at UCC while employed as a legal secretary and attended thereafter as an occasional law student. She qualified in 1984 and has been working with Guest Lane Williams since 1985. She has been a conveyancing partner since 1990. She is concerned about the negative public perception of solicitors and feels that the Society must adopt a more positive public relations policy. She is also interested in the area of education and is particularly concerned that the supply of solicitors exceeds the demand. She believes that the Society must regain control over the numbers entering the profession. She is looking forward to serving on the Education Advisory Committee for the coming year.

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Eugene O'Sullivan (Vice-Chairman),
Bruce St. J. Blake,
Orla Coyne,
Joseph Deane,
Gerard Doherty,
Ivan Durcan,
Patrick Groarke,
Joseph Kelly,
Rosemarie Loftus,
Noel McDonald,
David Pigot,
John Reidy,
Gary Rice,
Michael Tyrrell.

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Fergus Appelbe (Vice-Chairman),
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Jeremiah Cronin,
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John Glynn,
Barbara Joyce,
Keenan Johnson,
Frank Lanigan,
Jim McCourt,
Justin McKenna,
Brian Mahon,
Peter Murphy,
Brian O'Reilly,
Robert Pierse.

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William Jolley (Vice-Chairman),
Richard Bennett,
Donal G. Binchy,
Anthony Collins,
Gerald Hickey,
Carmel Killeen,
Stephen Maher,
Ernest Margetson,
Raymond Monahan,
Michael D. Murphy,
Patrick O'Connor,
Moya Quinlan,
Laurence K. Shields.

Jerry Cronin

Jerry Cronin is a sole practitioner, who was admitted to the Roll of Solicitors in 1983. He is the Southern Law Association nominee to the Council. He is currently Vice-President of the SLA, having been a member of it's Council since 1986 and its secretary for four years. He is concerned about the image of the profession and feels that it could benefit from more openness and accountability. He is also concerned about the numbers entering the profession and is disappointed that there has been no apparent move towards regulating this area. He would also like to see the Society expanding further the area of continuing legal education and providing more assistance in this and other areas to smaller practices in particular.

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Anthony Collins,
Gordon Holmes,
Mary Keane (Policy Development Executive),
Ernest Margetson,
Michael O'Mahony,
Eugene O'Sullivan,
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Carmel Killeen,
Stephen Maher,
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Garrett Gill (Vice-Chairman),
Walter Beatty,
Michael Carrigan,
Elma Lynch,
William McGuire,
Michael V. O'Mahony.

Donald Binchy

Donald Binchy practises in the family firm of O'Brien and Binchy in Clonmel and is newly elected to the Council. Following qualifying in 1987, he worked for a period in commercial law in a firm in Dublin, before returning home to the family practice in 1990.

He is particularly pleased to serve on the Compensation Fund Committee during the coming year since the increasing volume of claims against the fund is a source of concern to the profession. While he is keen to represent the interests of the profession as a whole, he is especially keen to pursue the interests of the ever growing number of younger members.

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Frank Murphy,
Susan Stapleton.

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Maurice Curran,
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David Donegan,
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Ciaran Keys,
Peter Maher,
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Eugene O'Connor,
John O'Connor,
Michael O'Connor,
Patricia Rickard-Clarke,
Paul Smyth.

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Harry Barry,
Colman Curran,
James Heney,
John O'Donnell,
Michael O'Sullivan,
Seamus Toomey.

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Patrick Casey (Vice-Chairman),
Pat Crowley,
Graham Hanlon,
Robert Hennessy,
Phillipa Howley,
Monika Leech,
Eddie O'Connor,
Orla O'Neill,
John Shaw.

Representatives of The Society on Other Bodies

Joint Consultative Committee with Bar Council
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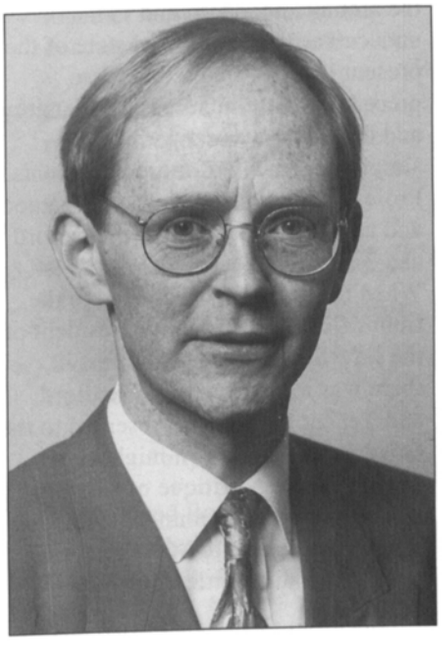
Michael V. O'Mahony (Vice-Chairman),
Geraldine Clarke,
Joseph Deane,
Gerard Doherty,
Ernest Cantillon,
Moya Quinlan,
Ken Murphy,
Anthony Ensor,
Andrew F. Smyth.

Patrick Casey



Patrick Casey qualified as a solicitor in Hilary 1986. He served his apprenticeship with and worked as a solicitor with M. J. Horgan & Sons, Cork. He set up his own practice, Patrick Casey & Company, Solicitors, at the beginning of this year and is based at Washington Street in Cork. He is a council member of the Southern Law Association and has also previously served on the Younger Members Committee of the Law Society. He is particularly concerned about the proposed capping of personal injury awards and the present entry system into the profession. He is prepared to give his time, energy and enthusiasm at council level to tackle these and other issues.

Advisory Committee on Legal Education & Training
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Patrick O'Connor,
Albert Power.

Medical Bureau of Road Safety
Elma Lynch.

Registration of Title Rules
Rory McEntee.

Irish Legal Terms Advisory
Michael J. O'Kane.

Court Rules Committee
Superior Courts:
Ernest Margetson,
Gordon Holmes.

Circuit Court:
Joseph Deane,
Gerard Doherty.

District Court:
Gerard F. Griffin,
Sean McMullin.

Dublin Road Safety
Hugh O'Donnell.

Law Clerks J.L.C.
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Justin Condon,
Elma Lynch,
Dominic Dowling,
Richard Liddy,
Stephen P. Maher,
Fachtna O'Driscoll,
Donal P. O'Hagan,
Robert Potter-Cogan.

IBA Representative
Maurice R. Curran.

Council of Law Reporting
Eamonn Hall,
Michael Staines,
Terence McCrann,
Director General *(ex officio).*

Rule Making Committee Land Act 1933 Section 3
The President *(ex-officio).*

Boardroom Centre
Laurence K. Shields.

International Chamber of Commerce
Walter Beatty,
Maurice R. Curran.

Published Accounts Awards Committee
Michael G. Irvine.

Conseil Des Barreaux De La Communaute Europeenne
John G. Fish.

Union Internationale Du Notariat Latin
Arthur Moran.

Past Presidents (entitled to sit on council pursuant to the society's bye laws:)
W. Brendan Allen,
Walter Beatty,
Donal G. Binchy,
Bruce St. J. Blake,
Adrian P. Bourke,
John Carrigan,
Anthony E. Collins,
Laurence Cullen,
Maurice R. Curran,
Joseph L. Dundon,
Gerald Hickey,
Michael Houlihan,
John Maher,
Ernest J. Margetson,
Raymond Monahan,
P. Frank O'Donnell,
W. Osborne,
David R. Pigot,
Peter Prentice,
Thomas D. Shaw. ❐

SYS SPRING CONFERENCE

The next Society of Young Solicitors Ireland Conference will take place between the 10th and 12th of March 1995
at
Adare Manor, Adare,
Co. Limerick.
Principal Speakers:
John Loosemore
on
Practice Development
– How to get new business.
Other Speakers to be announced

Society of Young Solicitors Autumn Conference 1994

The Society of Young Solicitors Autumn Conference 1994 was held at Ashford Castle, Cong, Co. Mayo on 4–6 November.

We were delighted to welcome quite a number of solicitors from England, Northern Ireland and Scotland who travelled to attend the Conference.

The Lectures presented were highly topical and extremely entertaining. Professor *J C W Wylie* delivered a paper on the Reform of Landlord and Tenant Law in which he referred to the archaic, uncertain and unnecessarily complicated state of the present law. He stated that lease precedents were unnecessarily lengthy and that there was scope for simplifying many of these precedents. Professor Wylie also gave a very good and accurate analysis of the Landlord and Tenant (Amendment) Act 1994. When the session was opened to the floor *Michael O'Mahony*, President of the Law Society, contested that if there was a draft piece of Landlord and Tenant legislation presented to the Government perhaps it might be implemented. A critique of existing legislation with recommendations for reform, according to Mr O'Mahony, tends to produce little or no legislation.

The second topic of the day was "What Irish Companies want from Solicitors in the Future". It was addressed by *David Dilger* of Greencore plc from the prospective of a large Irish plc and by *Brendan Butler* of the Small Firms Association. Both Mr Dilger and Mr Butler gave an entertaining discussion of what the public expects from solicitors.

The good weather enabled delegates to enjoy golf, horse riding, and the leadership challenge in Ashford Castle. Clay Pigeon Shooting or Archery were also enjoyed by the delegates on the Saturday afternoon. There was also a well attended cruise on Lough Corrib.

The Saturday night banquet was a great success at which we were honoured to have the President of the Mayo Bar Association, *John Dillon Leetch* and his wife Liz. After the banquet dinner, the delegates enjoyed black jack and dancing until dawn.

We would like to thank our sponsors principally the Investment Bank of Ireland Limited, whose continued support we much appreciate.

We are also extremely grateful to our other sponsors namely Behan & Associates, Rochford Brady, Norwell Computer Services, Jury's Hotel Group plc, Doyle Court Reports, Golden Pages, CFI Online Limited, Norwich Union, Dooleys, the Hibernian Hotel and Castletown Press. *(For photograph see "People & Places").*

Walter Beatty
Public Relations Officer, SYS ❐

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Family Dispute Resolution – The Solicitor's Role

The Family Law and Legal Aid Committee organised a seminar based on the theme *Family Dispute Resolution – The Solicitor's Role,* which was held in Blackhall Place on 16 November, 1994 before an invited audience. The seminar was principally aimed at members of other professions such as counsellors, child psychiatrists, probation and welfare officers and others who participate in one way or another in family law disputes. Immediately following the seminar, a reception was held which gave the participants an opportunity to discuss issues of mutual interest in an informal setting.

The seminar was addressed by His Honour *Judge Esmond Smyth*, Judge of the Circuit Court, Dr. *Gerard Byrne,* Child Psychiatrist and *Rosemary Horgan,* Solicitor. In his address, Judge Smyth noted that there is only one full-time family law judge for the Circuit Family Court for the county and city of Dublin, who must deal with the family law problems of a population of over 1 million people. The family law list in the Circuit Court consists of a motion list on Monday (containing from 50 to 90 or 100 applications), and four days thereafter to deal with substantive hearings of applications for Decrees of Judicial Separation with all the consequential reliefs and orders which it is open to the Court to make. the fact that these lists are cleared was described by Judge Smyth as something of 'a forensic miracle' which spoke volumes for the professional approach of practitioners.

Judge Smyth made a number of very helpful suggestions to facilitate the efficient conduct of a family law case, which the Committee feels are worth repeating in their entirety as follows:-

> "The following is the traditional format which should be adopted, either in briefing counsel or as an aide memoire for a solicitor who is presenting the case himself. The first page contents should set out in numbered form, matters such as the following, for example:-
>
> 1. The application itself;
>
> 2. The Certificate pursuant to Section 6 of the 1989 Act; the Appearance; the Answer; any Motions and any other Orders and any other pre-Trial Orders of the Court;
>
> 3. Any Affidavit of Discovery together with the copies of the documents discovered in it;
>
> 4. Copies of any P60's or other relevant tax documents for, at least, the year ending prior to the date of the application;
>
> 5. Copies of any payslips in respect of relevant earnings;
>
> 6. A copy of the Certificate of Readiness;
>
> 7. A copy of any folios;
>
> 8. A paginated Book of Correspondence in sequential form;
>
> 9. The parties statement of means.
>
> The Brief should then contain under the heading "The Matrimonial Background or History" in summarised form, all the relevant facts which it is felt the Court should know. Then under the heading "The Family Home" there should be a history of the family home; any details about mortgages or other incumbrances on it; its present valuation and what the parties ascertained wishes are in respect of it. Then if the client is employed there should be details of employment, including a statement as to whether it is proposed to have anyone from that employment in Court to give evidence in relation to it.
> The Brief should then proceed under the heading of the Reliefs Sought setting out the views of the client in relation to each separate relief sought. If it is suggested that the other party is in receipt of any other income, known details of that income should be set out. Alternatively, if either party is on welfare, details of that should also be set out.
>
> The Brief should then, in the usual way, list the witnesses which it is proposed to be called, with a short statement of the evidence which they are to give and finally any other matters which should be dealt with.
>
> May I also suggest that when it comes to the actual Hearing of the case, it helps if practitioners have their facts and figures properly marshalled; their legal submissions brief and to the point, and if they propose to call witnesses, practitioners should ascertain what evidence those witnesses will give, before the Hearing, and not during it – as sometimes seems to happen.
>
> It is also helpful if cross-examination is directed only to that part of the evidence of the other party that it is proposed to dispute.
>
> It is preferable if the precise wishes of the respective parties are opened to the Judge at the outset of the proceedings, so that if evidence is given, their views can be assessed in the context of the overall evidence, and not as to nota-bene at the end of the case."

At the close of his talk, Judge Smyth referred to the suggestions which are contained in the Law Reform Commission's report on Family Courts, dealing with the establishment of a Family Law Division and the setting up of regional Family Law Centres. In Judge Smyth's words "the first would require more judges but would be an eminently desirable objective for the future. The second would provide an information and referral service offering information

to people involved in family law breakdown about counselling and mediation services, social welfare entitlement and legal services and legal aid advice, as well as basic information about how family law operates and what powers the family law courts have."

Ms. Rosemary Horgan, a solicitor working in a legal aid centre in cork then addressed the Seminar. Ms. Horgan recognised that the traditional definition of "the family" has been extended considerably over the last 20 years to include single parents families, co-habiting couples with children, married families with foster children etc. The Constitution, however, limits its definition of family to the family based on marriage and Ms. Horgan pointed out that what this means for the client is that the remedies available to the married client differ from those available to the client who is not married. Ms. Horgan pointed out the very real difficulties which can arise for clients who do not form a traditional "family" where, for instance, a barring order or a maintenance order is required.

The rights of children to a family dispute were highlighted by Ms. Horgan who argued that from time to time their case deserves to be articulated independently. Although there is provision for independent representation in the Child Care Act, 1991, Ms. Horgan confirmed that these provisions are not yet in force, notwithstanding the United Nations Convention on the Rights of Child which provides for the separate representation of children in any proceedings which effect them where it is appropriate that their rights be articulated separately from that of their parents.

Ms. Horgan commented on the effect that delays in obtaining a hearing date can have on the parties concerned and the fact that delay can be used as a weapon by one participant against the other insofar as the stronger party is usually content for the status quo to continue. Ms. Horgan pointed out that "not every litigant can afford, either emotionally or financial, to wait for a postponed Court resolution."

Ms. Horgan concluded by quoting from the Law Reform Commission consultation paper on Family Courts as follows:-

> "We must begin this chapter by expressing concern about a range of serious problems and defects in the manner in which family cases are handled within our existing court system. This concern is shared by many professional working within the system. Many of the problems derive from under-resourcing, both physical and human. The picture which emerges is one of a system struggling and barely managing to cope with the very great increase in family litigation in recent years. The result is a sad parody of that which might be expected in a State whose Constitution rightly places such emphasis on the protection of family life." ❐

TURKS AND CAICOS ISLANDS
AND
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Samuel McCleery

Attorney - at - Law and Solicitor of PO Box 127 in Grand Turk,Turks and Caicos Islands, British West Indies and at P. O. Box 7, 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, Trust Administration Asset Protection.

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Donations and bequests to:-

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Phone: 01 - 6689788/9 Fax: 01 - 6683820

PARLIAMENTARY COMMITTEE

1994 LEGISLATION UPDATE – *26 November 1994-31 December 1994*

No.	Title of Act and Date Passed	Commencement Date/s
29.	Regional Technical Colleges (Amendment) Act, 1994 (2 December, 1994)	2 December, 1994
30.	European Communities (Amendment) Act, 1994 (7 December, 1994)	1 January, 1995 (S.I. No. 455 of 1994)
31.	Dublin Institute of Technology (Amendment) Act, 1994 (7 December, 1994)	7 December, 1994
32.	Select Committee on Legislation and Security of Dail Eireann (Privilege and Immunity) Act, 1994 (14 December, 1994)	15 December, 1994, by resolution of the Dail (Section 5(2))
33.	Appropriation Act, 1994 (29 December, 1994)	29 December, 1994
34.	Maternity Protection Act, 1994 (29 December, 1994)	Commencement Order/s to be made.

SELECTED STATUTORY INSTRUMENTS

33/1994 EC (Commercial Agents) Regulations, 1994

63/1994 District Court (Compensation Order) Rules, 1994 *(Compensation Orders under the Criminal Justice Act, 1993)*

86/1994 Local Government (Planning and Development) Regulations, 1994

101/1994 Rules of the Superior Courts (No. 3), 1994 *(1965 Hague Convention on the Service Abroad of Judicial and Extra judicial Documents in Civil or Commercial Matters)*

120/1994 District Court (Service Abroad of Documents in Civil or Commercial Matters) Rules, 1994 *(1965 Hague Convention on the Service Abroad of Judicial and Extra judicial Documents in Civil or Commercial Matters)*

225/1994 Circuit Court Rules (No. 1), 1994 *(Judicial Separation and Family Law Reform Act, 1989)*

266/1994 District Court (Extradition) Rules, 1994

279/1994 Circuit Court Rules (No. 2), 1994 (Unfair Dismissals Acts, 1977 – 1993 and Payment of Wages Act, 1991

391/1994 Irish Horseracing Industry Act, 1994 (Establishment Day) Order, 1994 *(1 December, 1994, appointed as the Establishment Day)*

392/1994 Irish Horseracing Industry Act, 1994 (Part IX) (Commencement) Order, 1994 *(1 December, 1994, appointed as the commencement date for Part IX of the Act)*

394/1994 An Bord Bia Act, 1994 (Establishment Day) Order, 1994 *(1 December, 1994, appointed as the Establishment Day)*

413/1994 Local Government Act, 1994 (Commencement) (No. 4) Order, 1994.

Compiled by Margaret Byrne, Librarian

AGM Agrees to Review Structures of Law Society

The Annual General Meeting of the Law Society of Ireland was held on 24 November, 1994 at Blackhall Place. The meeting commenced with an address by the outgoing President, *Michael V. O'Mahony*.

Address By Outgoing President

The President briefly reflected on the year during which he held office. He referred to the Solicitors (Amendment) Act 1994 (enacted on 4 November, 1994). He welcomed the fact that there had been removed from the Bill the provisions that would have allowed banks, insurance companies and building societies to engage in will making and probate work, as well as allowing banks and other financial institutions to engage in conveyancing work.

In relation to the proposal to 'cap' the level of claims for general damages for personal injuries, the President reviewed what steps the Society had taken in opposition. He referred to an October 1994 report of the Law Commission in England entitled "Personal Injury Compensation: How much is enough?" (which comprised a study of the compensation experience of a range of victims of personal injury) and to the statement of its Chairman (*Sir Henry Brooke*) that there was evidence that in certain classes of personal injury cases compensation levels were not high enough. The President said: "At a time when such serious concern is being expressed about the adequacy of the levels of compensation payable at present in the U.K., the Irish Government is proposing to reduce compensation levels here to bring them into line with those in the U.K. Can there possibly be any justification for this? . . . It is indefensible that, at a time when serious concern is being expressed across channel about the inadequacy of compensation levels there, we should be proposing to create the same level of injustice in our society."

Referring to the public image of the profession as a whole, the President felt that "the image of the profession will only improve when we ourselves have fully and finally put our own houses in order and when relations with our clients, particularly where problems arise, are on a more clear footing then they are at present". He recommended developing a regulatory code of practice which would deal with all aspects of solicitor's practices, including relationships with clients and third parties. He felt that such a code should have a strong 'client care' dimension, including perhaps providing for an internal office complaints procedure as in the U.K. "We must ensure that we retain public confidence in what we do as a profession," he said.

In conclusion, the President recorded the fact that the Director General, *Noel C. Ryan*, was leaving the Society at the end of December and in thanking him for his four years of service he paid tribute to the work and commitment given by him to the profession.

Special Business

An item of special business was notified pursuant to Bye-law 4(3)(a) of the Bye-laws of the Society, as follows: "To discuss whether the present structure and operation of the Law Society is fitted to meet the serious challenges which the profession will encounter in the future and to take a vote on any resolution that might be put to the meeting in relation to same."

The following resolutions (proposed by *Leo Mangan* and seconded by *Peter O'Boyle*) were considered:

1. That the Law Society do immediately set up an enquiry with an independent lay Chairperson to:

Michael V. O'Mahony addressing the Annual General Meeting of the Law Society.

   (a) Examine the structure of the Council of the Law Society with the objective of better serving the solicitors' profession in modern Ireland.

   (b) Examine the administration, finances and accounts of the Law Society with the objective of better serving the solicitors' profession in modern Ireland.

2. That, as a matter of urgency, the Bye-laws of the Society be amended after examination, to suit the structure and administration of the Society in modern Ireland.

3. That no permanent appointment/ replacement for the position of Director General be made until 2 above has been completed and new Bye-laws are approved at an Extraordinary General Meeting to be held at Blackhall Place, Dublin 7.

At the outset, *Leo Mangan, Gerry Brady, Oran Ryan* and *Peter O'Boyle* addressed the meeting in support of the resolutions. *Leo Mangan* expressed concern over the finances of the Society and described them as being "out of control". It was his opinion

that the Society was not in touch with the members of the profession. He felt that efforts would be more effective if the structure of the Society was changed. *Gerry Brady* also expressed concern about the finances of the Society. He said that the Society was not member friendly and he also expressed concern about the numbers entering the profession. *Oran Ryan*, asked the question: "Has the Law Society become too cumbersome and is its management structure suitable to serve its members?" He criticised the number of committees and the number of staff employed. He felt that the Society should be reorganised in light of the new Solicitors (Amendment) Act, 1994. *Peter O'Boyle* referred to the Bye-laws of the Society and felt that amendments to the Bye-laws were needed consequent on the passing of the new Act.

The discussion was then opened to the floor. *Gerry Hickey* stated that the motions were very general and unspecific and that specific proposals for change should be produced first to enable a constructive debate to take place. *Laurence Shields*, Chairman of the Finance Committee, denied that the finances of the Society were "out of control" and referred to the detailed debate on the Annual Accounts for 1993 which had taken place at the Half Year Meeting in Galway in May 1994. *Barry Galvin* said that none of the proposers had addressed the issue of what needed to be done and how to do it. He did not disagree with the desirability of a review and the need for change but he did disagree with the proposition that it was necessary to have an independent lay person outside our own profession to chair the review group. He proposed that the motions be amended to delete the reference to an "independent lay Chairperson" but that to create a time limit for the review and recommendations for change should be put before the Half Yearly Meeting in April/May 1995. Mr. Galvin's amendment proposal was seconded.

Michael Nugent said that while the consensus of the meeting was clearly in favour of a review of the structures of the Society, what was now at issue was whether or not the review group should be chaired by someone outside the profession. *Anne Colley* spoke in favour of an independent lay Chairperson being appointed. *Ken Murphy* said that outside consultants were not the answer and that an examination of the structures could not ignore the views of the ordinary members of the Council who were democratically elected by the profession each year. He suggested that a review group be set up which would be representative of the profession as a whole as well as the Council and which could present a written report with recommendations for change to the next general meeting of the Society.

The President, from the Chair, said it was impractical to propose that a new Director General to replace *Noel Ryan* not be appointed until the review group had completed its work. He said that the Council had to appoint a new chief executive as soon as possible to manage the Society's administrative structure. He sought a consensus that the terms of appointment of the Director General should not preempt the scope of the review or of any decisions to change the structures of the Society which might be made by a subsequent general meeting or by the Council. He was concerned that as clearly there was a consensus for a structures review that the wording of the motions, in particular the provision relating to the chairperson should not be divisive at this stage. He said the reality was that any recommendations for change made by the review group would have to be debated at a subsequent general meeting, when members would have the opportunity to express their approval or disapproval of the recommendations.

After a two hour discussion the following resolutions were passed by a large majority on a show of hands:

1. "That the Law Society do immediately set up an enquiry to:

   (a) Examine the structure of the Council of the Law Society with the objective of better serving the solicitors' profession in modern Ireland;

   (b) Examine the administration, finances and accounts of the Law Society with the objective of better serving the solicitors' profession in modern Ireland;

   and that the enquiry report back to the half-yearly general meeting to be held in Dublin."

2. "That, as a matter of urgency, the Bye-laws of the Society be amended, after examination, to suit the structure and administration of the Society in modern Ireland."

The Annual Accounts were approved and the date of the next Annual General Meeting was fixed for 23 November, 1995. The prize bond winners were announced. *(See next page).* The following results of the Council elections 1994/95 were declared at the AGM.

Mr. Patrick A. Glynn was deemed to have been elected.

No. Elected	No. of Votes
1. Barry St. John Galvin	1,294
2. Michael V. O'Mahony	1,271
3. John Shaw	1,255
4. Anthony H. Ensor	1,224
5. Moya Quinlan	1,201
6. Donald P. Binchy	1,157
7. Eva Mary Tobin	1,133
8. Patrick O'Connor	1,125
9. Michael G. Irvine	1,099
10. Geraldine M. Clarke	1,088
11. Ward McEllin	1,084
12. Ken Murphy	1,051
13. Niall Gerard Casey	1,025
14. Andrew F. Smyth	1,015
15. James MacGuill	1,012
16. Owen M. Binchy	1,001
17. Elma Lynch	1,000
18. Laurence K. Shields	999
19. John Costello	993
20. Michael Carroll	992
21. Patrick Casey	982
22. Francis D. Daly	978
23. Fionnuala Breen-Walsh	974
24. Terence McCrann	936
25. Philip Joyce	926
26. Gerard F. Griffin	923
27. Stephanie M. Coggans	910
28. John G. Fish	908
29. Keenan Johnson	906
30. Brian J. Sheridan	852

The following are the names of the candidates who have not been provisionally elected and the number of votes received by them appear after their names.

31. James McCourt	819
32. Geard J. Doherty	813
33. Richard Bennett	788
34. William B. Devine	768
35. Joseph P. Kelly	727
36. Peter McDonnell	617
37. Fergus E. Appelbe	584
38. Damien M. P. Tansey	580
39. Eddie O'Connor	459
40. John Collins	278
41. Ronald J. Egan	192

The following are the results of the 1994/95 Provincial elections:

Elected in the Province of Munster	**No. of Votes**
Angela Condon	306

Candidate who was not elected in this Province	**No. of Votes**
John O. Lee	186

Elected in the Province of Connaught	**No. of Votes**
John Dillon-Leetch	114

Candidate who was not elected in this Province	**No. of Votes**
Ciaran Keys	93

As there was only one candidate nominated for each of the Provinces of Leinster and Ulster there was no election and the two candidates for these seats were returned unopposed as follows:

Leinster:	John B. Harte
Ulster:	Peter F. R. Murphy

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Prize Bond Winners

Mr. Kieran Murphy,
Kieran Murphy & Company,
Solicitors,
9, The Crescent,
Galway.

Mr. Laurence K. Shields,
L.K. Shields & Partners,
Solicitors,
31, Merrion Square,
Dublin 2.

Mr. George V. Maloney,
George V. Maloney & Company,
Solicitors,
6, Farnham Street,
Cavan.

Mr. Daniel Gormley,
Daniel Gormley & Company,
Solicitors,
10, Hillside,
Monaghan.

Mr. Patrick J. O'Doherty,
Patrick J. O'Doherty & Co.,
Solicitors,
Bridge Street,
Carndonagh,
Co. Donegal.

Mr. Eugene Gillan,
Patrick Tallan & Company,
Solicitors,
106, West Street,
Drogheda,
Co. Louth.

Ms. Patricia Heffernan,
Rory O'Donnell & Company,
Solicitors,
15–16, Fitzwilliam Place,
Dublin 2.

Mr. Aidan O'Donnell,
c/o Mr. Kevin O'Donnell,
Solicitors,
Main Street,
Portarlington,
Co. Laois.

Mr. Thomas McMorrow,
David Wilson & Company,
Solicitors,
Raphoe,
Lifford,
Co. Donegal.

Mr. Michael Foy,
Smith Foy & Partners,
Solicitors,
59, Fitzwilliam Square,
Dublin 2.

Mr. Michael Moran,
Michael Moran & Company,
Solicitors,
Castlebar,
Co. Mayo.

Mr. David Clarke,
McCann Fitzgerald,
Solicitors,
2, Harbourmaster Place,
Custom House Dock,
Dublin 1.

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The Law Directory 1995

The 1995 edition of the Law Directory has now been published and sent to members of the profession.

Additional copies are available from the Society at a cost of £40.00 per copy including postage and packing.

Contact: *Linda Dolan* at the Law Society.

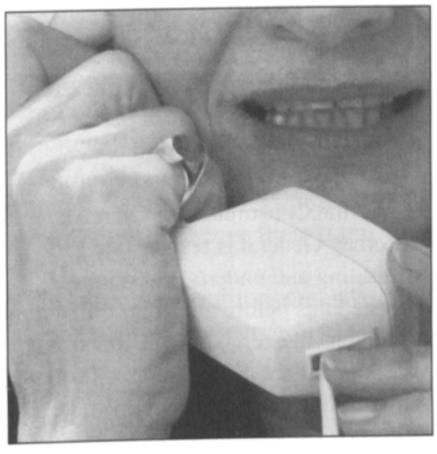
Dr. Eamonn G. Hall, Solicitor

Grievous Bodily Harm by Telephone

Not too long ago, some lawyers arranged to have themselves called to the telephone while lunching with clients. It was a desire for recognition, a desire to demonstrate how much the lawyer's services were in demand. Today the desire for power and status has not changed. Some lawyers (relatively few Irish lawyers I surmise) make frenzied calls over the Atlantic from the Concorde. Some (non-lawyers, of course!) "yap" constantly into tiny 'phones they keep in their pockets; judges have threatened lawyers, litigants and witnesses with contempt of court when mobile 'phones buzz in their court. Some have become obsessed with the telephone and there are people who, when they are not on the 'phone, have nothing to say to the people in direct physical contact with them.

This introduction has touched on one sad fact of life today: obsession with the telephone by persons intent on causing injury – psychological or physical to others. This phenomenon is on the increase.

The specific law in Ireland regulating "nuisance" telephone calls is specified in section 13 (1) of the *Post Office (Amendment) Act 1951* as amended by section 8 of the *Postal and Telecommunications Services Act, 1983*. A person who sends any message or other matter (eg text by facsimile) which is grossly offensive or of an indecent, obscene, or menacing character, or uses the telecommunications system of Telecom Eireann for the purpose of causing annoyance, inconvenience or needless anxiety to another, or sends a message which a person knows to be



false, or persistently makes use of the telecommunication system of Telecom Eireann for the purpose of causing annoyance or inconvenience is liable on summary conviction to a fine of £800 and imprisonment for one year. On indictment, such a person is liable to a fine of £50,000 or 5 years imprisonment.

"Not too long ago, some lawyers arranged to have themselves called to the telephone while lunching with clients. It was a desire for recognition"

Recently in England, hoax callers and persons making "nuisance" 'phone calls have been charged with causing grievous bodily harm in a rare use of the law on assault to cover psychological rather than physical injury. Assault occasioning actual bodily harm is a misdemeanour in Ireland punishable on indictment pursuant to section 47 of the *Offences Against the Person Act, 1861* or summarily (sections 42 – 46, *Offences Against the Person Act 1861* and the *Criminal Justice Act 1951*). There have been no prosecutions in Ireland in the context of nuisance calls under the *Offences Against the Person Act, 1861*. Many persons have been prosecuted successfully under the 1951 Act.

Some examples of telephonic harassment include the sending of a hearse with a coffin to collect the body of a person who was very much alive. Most cases fall into the sexual category. Boyfriends, girlfriends, and professional persons of all backgrounds "blight" themselves over the telephone with obsessional revenge.

In December 1994 (*The Times* December 16, 1994) in the case of *DPP v Gelder* a bank clerk, who had made legal history when he was jailed for causing grievous bodily harm by making obscene telephone calls, had his conviction quashed by the Court of Criminal Appeal. The conviction was quashed because of an error by the trial judge. He had spent five months in jail for subjecting his victim to a psychological battering. The anonymous calls to a customer of his bank involved sexual suggestions and remarks about her job, car, age, clothing and new hairstyle. The Lord Chief Justice, Lord Taylor, said that because the appeal was allowed on the grounds of the judge's misdirection, there was no need to consider a separate ground of appeal in which the appellant claimed it was impossible to inflict grievous bodily harm over the telephone constituting an offence under the *Offences Against the Person Act, 1861*.

In Ireland, persons who receive "nuisance" calls – a term used to cover telephone calls of an obscene, menacing or similar character – must first make a complaint to the Gardaí. The Gardaí, pursuant to section 98 of the *Postal and Telecommunications Services Act 1983* request Telecom Eireann engineers to initiate a surveillance and interception process. Prosecutions then follow.

There are civil remedies available and these will be covered in a subsequent note.

Vacancy for Attorney General Solicitors Eligible

In three months in 1978, there had been three Popes. In just over three weeks in 1994, three Attorneys General served the Government and people of Ireland. Before the appointment of the third Attorney General in 1994, the President of the Dublin Solicitors' Bar Association Mr *Michael D Murphy,* called for the appointment of a solicitor as Attorney General. Bolstering his argument Mr Murphy stated that many solicitors have office management experience, were involved on a daily basis in drafting complex contracts and agreements together with advisory work of a complex nature. Representing 2,300 solicitors, Mr Murphy also described the fact that solicitors were debarred from applying for posts in the drafting and advisory section of the Attorney General's Office.

AG of Gibraltar in ceremonial garb.

There is no vacancy at present for an Attorney General in Government Buildings, Dublin, but readers may wish to note that recently the position of Attorney General of Gibraltar was advertised. Irish Solicitors were eligible to apply. Candidates were expected to be experienced lawyers and have substantial professional experience. Candidates should normally be below the age of 60 but this was not an absolute requirement and applications would be considered from persons between the ages of 60 and 65.

Under the Constitution of Gibraltar, the Attorney General is responsible for instituting and undertaking criminal proceedings before any court of law in Gibraltar. In exercising this function, he is not under the direction or control of any person or authority. In practice, the Attorney General's chambers conduct all cases in the Supreme Court. The Attorney General is also responsible for advising the Governor, the Gibraltar Government and every Government Department on all questions of civil law. The Attorney advises on EC/EU legislation to which the Government is a party whether as plaintiff or defendant. Further, the Attorney General is responsible for drafting all legislation, both primary and secondary, is an *ex officio* member of the Gibraltar Council and of the Gibraltar House of Assembly.

The appointment was to be on a contract basis for three years in the first instance and may be renewed for further periods by mutual agreement. The successful candidate was also entitled to fare-paid journeys between Gibraltar and the candidate's point of origin and subsidised accommodation including hotel accommodation for the officer and his family between their arrival and the time his quarters were ready for occupancy. In addition to the Attorney General, the office is composed of a law draftsman, senior crown counsel and several crown counsel..

Irish solicitors may wish to bear such appointments in mind for the future. ❐

Chief Justice Issues Memorandum on New Form of Jurat

On 22 December 1994, the Chief Justice, issued a memorandum to all practising solicitors regarding the exercise by them of the powers of a Commissioner for Oaths conferred by Section 72 of the Solicitors (Amendment) Act 1994. On the enactment of the Solicitors (Amendment) Act 1994 on 4 November 1994, the provisions of Section 72 thereof came into effect. Section 72 gives to "every solicitor who holds a practising certificate which is in force . . . . . all the powers conferred by any enactment or statutory instrument . . . on a commissioner for oaths."

A "solicitor who holds a practising certificate that is in force" (hereinafter referred to as 'a practising solicitor') who is also a commissioner for oaths **MAY**, continue to refer to himself/herself in the jurat as a "commissioner for oaths".

A practising solicitor who is not also a commissioner for oaths **SHALL** refer to himself/herself in the jurat as "a practising solicitor."

Therefore, the following is the revised adaptable standard form of jurat:-

"Sworn/Declared by [name of deponent] this ____ day of _____ 19__ at _____ in the City/County of _____ before me a commissioner for oaths/practising solicitor, and I know the deponent/declarant.

Commissioner for Oaths/Practising Solicitor"

The full text of the memorandum is contained in the 1995 Law Directory. ❐

'Solicitors – Perhaps the Best Regulated of all Professions'

Election of New Officers

The election of President *Patrick Glynn*, Senior Vice *Andrew Smyth* and Junior Vice *Tony Ensor* was covered in the *Irish Times, Irish Press* and *Cork Examiner, Sunday Business Post* and *Sunday Tribune*. The *Limerick Leader* published an interview with Paddy Glynn on 3 December 1994. In the article he dealt with the three roles of the Society: discipline, education and representation on behalf of the country's solicitors. As regards complaints, he said that the number of complaints had to be seen in light of the millions of cases that solicitors undertake. He also said "we are a trade union type organisation representing our members, looking for better conditions on their behalf, and as such we make representations, as in the case of the recently passed Solicitors Bill". The appointment of Paddy Glynn was also featured in the *Clare Champion* and he did an interview with Clare FM. The appointment of Tony Ensor, Junior Vice was covered in the *Wexford People*, the *Gorey Guardian* and the *Enniscorthy Echo.*

Conference on Professional Negligence

A conference on professional negligence organised by Matheson Ormsby Prentice attracted a lot of media coverage. The *Irish Times* published an article headed "Professional Negligence Claims Revive Limited Liability Debate" on 3 December 1994. The article stated "solicitors, accountants and other professionals will have to consider seriously operating with some form of limited liability because of rising professional negligence claims against them, an international expert in professional negligence law told a conference in Dublin yesterday." The conference was addressed by *Mr. Ian Jenkins*, Senior Partner with London Solicitors, Baslow Lyde & Gilbert. It was reported that since 1988, the Law Society of England and Wales has experienced an average rise of 14 per cent in the number of claims against solicitors firms. Mr. Jenkins stated that "in the US, it is becoming commonplace for professional partnerships to change their status to that of a professional corporation either a limited liability company or a limited liability partnership, to protect the partners assets". The conference was also covered in the *Irish Press* under the heading "Warning on accountancy insurability." The *Irish Independent* coverage on 3 December was contained in an article headed "Soaring Claims of Negligence put accountants under the cosh". The article stated "The extraordinary rise in professional negligence claims will force leading accountancy partnerships to form limited liability companies to protect themselves, a Dublin seminar was told yesterday."

Solicitors: "perhaps the best regulated of all professions"

The above statement was made in the *Sunday Tribune*, 4 December 1994 by *Christopher McKevitt*. The article examines the safeguards provided by the different professions: auctioneers, solicitors, accountants, insurance intermediaries, and stockbrokers.

The article states: "Solicitors: These are perhaps the best regulated of all." The article referred to the fact that the Law Society operates a compensation scheme in the event of fraud and that although not compulsory, a large number of solicitors have professional indemnity insurance. "The article also states that the Solicitor's Roll can be examined by any member of the public and that solicitors must apply each year to renew their Practising Certificate and that they must supply the Law Society with an accountants certificate to verify that their accounts have been fully audited."

A similar article was written by *Gail Seekamp* in the *Sunday Business Post* on 4 December 1994. She referred to the fact that the IPAV's compensation fund is limited in scope. It reimburses people who lose cash as part of a contract but only if it was paid as part of a contract for a particular property purchase. A table outlined different forms of protection offered by the different professions. It stated that the compensation fund for solicitors parameters are quite broad, and include dishonesty. It stated that separate client accounts are mandatory and that S.26 of the Solicitors (Amendment) act 1994 empowers the Law Society to make professional indemnity insurance mandatory.

Report on the Insurance Industry

The *Sunday Business Post* printed a report on the insurance industry on 4 December 1994. The article in a section headed "Damages and Claims" stated: "in the non-life or general insurance business there is only one big problem as far as customers and insurers are concerned. It is the cost of insurance (as the customer sees it) or the cost of claims (as it appears to the underwriter.)

The article continues "The problem appears insurmountable, utterly insoluble. The jury system is gone; the size of legal teams has been reduced; the two senior counsels requirement has disappeared. These, it was said at the time the measures were introduced, would prove to be key reforms and lead to a reduction in premium. They have not."

Northern Ireland Students Claim Discrimination

In an article headed "Queen's students claims bias" on 6 December, the *Irish Times* stated "law students at Queen's University, Belfast claimed in the High Court yesterday that they were

being discriminated against by the Incorporated Law Society." They claimed that they could only become solicitors in the Republic when they sat an examination which law students with the same degree qualifications from the Republic were not required to sit." The *Irish Independent* and *Evening Press* also reported the case.

Solicitor for A.G.

The *Irish Independent* on the 13 December 1994 printed an article headed "Solicitor for Attorney General post call". It reported that *Michael D. Murphy* of the Dublin Solicitors Bar Association has called for the appointment of a solicitor as the next Attorney General. Mr. Murphy pointed out that many solicitors have office experience and office management experience and are in the daily practice of drafting complex contracts and agreements which may be scrutinised by the courts and also advising clients on matters of law. Mr. Murphy also said that "solicitors were also debarred from applying for posts in the drafting and advisory sections of the AG's office ." He called on the new Government to ensure that solicitors can be recruited in both of these areas. Michael D. Murphy was also interviewed on this issue on *Today at Five*, RTE 1.

Complaints and the Solicitors (Amendment) Act 1994

An article by *Claire Grady* was printed in the *Irish Independent* on 29 December 1994. The article referred to the fact that the Solicitors (Amendment) Act 1994 provides new grounds for complaint and that because there are more grounds it is likely there will be an increase in the number of complaints. The article carried a sensationalist headline: "Solicitors face surge in complaints."

Proposed Closures of Circuit Courts

In the *Irish Press*, the *Cork Examiner* and the *Evening Echo* (29 December 1994) articles criticising the proposed closure of a number of circuit courts were published. The *Irish Press* under a heading: "Row Brews over Courts closedown" stated: "The Department of Justice has been taken to task by the Bar Council of Ireland over proposals to close eighteen court venues countrywide as part of a major revamp of the circuit court system".

Representatives of the Law Society met with the Minister for Justice on 5 January 1995. In the *Irish Times* on 6 January in an article headed "Owen gives pledge on a courts commission", it said that the Minister "would be reviewing the provisions of the Courts and Court Officers Bill 1994 to ensure that the measures will adequately tackle the backlog of cases to be heard in all courts." She said there would be a fundamental reform of the courts system from District to Supreme Court level.

The article concluded: "The Minister made her remarks yesterday after meeting representatives of the Law Society who were concerned about certain provisions of the Courts and Court Officers Bill." Articles in the *Irish Press* and the *Irish Independent* also referred to the meeting.

Catherine Dolan ❐

Rugby News

Irish Solicitor's Apprentice R.F.C. v Linklaters & Paines R.F.C.

On 2 December last the Solicitor's Apprentices Rugby Club hosted a touring side from Linklaters and Paines, Solicitors in London. A match was played at Belfield in which the home side came out on top with a 40 – 8 win. A lavish reception consisting of a three course meal and hosted bar was then attended in the Merrion Inn. The reception was provided by *McCann FitzGerald*, Solicitors and the club is extremely grateful for their generous contribution and assistance.

This was the first game in which the Irish team sported new team kit, now with a Law Society crest. The new jerseys were sponsored by the Law School and the club is most grateful for this.

John Matson,
Team Captain ❐

The Irish Solicitors Apprentices Rugby Team who were the winners at the recent match against Linklaters & Paines, London. Back row l–r: Dan Binchy, Stephen Fitzpatrick, Pat Burke, Donogh McGowan, David McFadden, James Candon, Brian O'Neill, Kieron McCarthy, Rory O'Callaghan, Rob Boland, Philip O'Donnell. Front row l–r: Denis Keane, Paul Neary, Peter Woodcock, John Matson, (Captain), Gareth Quigley.

Council of the Law Society 1994/95

Council of the Law Society 1994/95. *Back row, l-r: John Harte, Michael Carroll, Fionnuala Breen-Walsh, Cormac O'Hanlon, Donald Binchy, Peter Murphy, Terence McCrann, John Shaw, Ward McEllin, Gerard Doherty. Second row from back l-r: Michael Irvine, Laurence Shields, Walter Beatty, Past President, John Dillon-Leetch, Elma Lynch, John Fish, Stephanie Coggans, Ernest Cantillon, Eva Tobin, Patrick Casey, Bruce St. John Blake, Past President. Third row from back l-r: James MacGuill, Gerald Hickey, Past President, Niall Casey, Philip Joyce, Owen Binchy, Ken Murphy, Geraldine Clarke, Richard Bennett, James McCourt, Jerry Cronin, Keenan Johnson, Patrick O'Connor. Front row l-r: Brian Sheridan, Raymond Monahan, Past President, Michael V. O'Mahony, Moya Quinlan, Anthony Ensor, Junior Vice-President; Patrick A. Glynn, President; Andrew Smyth, Senior Vice-President; Noel Ryan, then Director General; Frank Daly, Barry St. John Galvin, John Costello.*

Absent from the photograph are: Council members Gerard Griffin, Tim Lucey, Fergus Appelbe, Angela Condon, and Past Presidents Brendan Allen, Adrian Bourke, John Carrigan, Anthony Collins, Laurence Cullen, Maurice Curran, Donal Binchy, Joseph Dundon, Michael Houlihan, John Maher, Ernest Margetson, P. Frank O'Donnell, William Osborne, David Pigot, Peter Prentice and Thomas Shaw.

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PEOPLE AND PLACES

At the Society of Young Solicitors Conference which was held in Ashford Castle from 4 – 6 November 1994 were, standing l – r: Paul Marren, John Dillon-Leetch, President of the Mayo Bar Association; Walter Beatty, John Dwyer, Jeremy Mills, President of the NIYSA; Michael V. O'Mahony, President, Law Society; Gavin Buckley, Chairman, SYSI; Jacqueline O'Mahony, Declan O'Sullivan, David Dilger, Garrett Fennell, Andrew Unger, Prof. J.C.W. Wylie, Brendan Butler, Seated l – r: Leslie Browning, Maureen Walsh, Stewart Murray, Kate Dilger, Mary Butler and Liz Dillon-Leetch.

At the unveiling of a plaque listing the names of Auditors of the Solicitors Apprentices Debating Society of Ireland for the 110 year period from 1884 to 1994, erected by SADSI in memory of the late William O'Reilly, Warden of Solicitors Buildings, Four Court (1947-78) and as a mark of appreciation by SADSI to his wife, Dymphna were l-r: Brian O'Reilly, Solicitor (son of the late William O'Reilly); Dymphna O'Reilly (widow of the late William O'Reilly), Phillipa Howley, Auditor, SADSI and Michael V. O'Mahony, then President, Law Society.

At the presentation of the Solicitors Financial Services Annual Achievement Award at Blackhall Place were l–r: Brian Kiely, Poe Kiely Hogan; Solicitors, Kilkenny; Michael V. O'Mahony, then President, Law Society; Mercy Gaffney, Poe Kiely Hogan and Peter Prost, Deputy Managing Director, Irish Pensions Trust.

IRISH LAW OF SPECIFIC PERFORMANCE

By John Farrell, MA, SC

Consultant Editor: JCW Wylie, LLM (Harvard), LLD (Belfast), Professor of Law, Cardiff Law School

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At last - an exhaustive treatment of the law in Ireland.

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"100 metres from the Four Courts"

At a dinner in honour of out-going President, Michael V. O'Mahony were standing l – r: Raymond Monahan, Bruce St. John Blake, Thomas Shaw, Adrian Bourke, Donal Binchy, Anthony Collins, Joseph Dundon, Gerald Hickey, William Osborne and Walter Beatty. Seated l – r: Maurice Curran, Moya Quinlan, Ernest Margetson, Patrick Glynn, Michael V. O'Mahony, Peter Prentice and Frank O'Donnell.

At the recent joint seminar held with the Society of Chartered Surveyors were l–r: Brendan Sheridan, O'Sullivan O'Leary Partnership (Chartered Quantity Surveyors); John O'Reilly, John O'Reilly & Partners (Architects); Tim Bouchier-Hayes, McCann FitzGerald and ken Staveley, K.G. Staveley & Partners (Consulting Engineers and Quantity Surveyors).

Irish Solicitors Bar Association London Ball

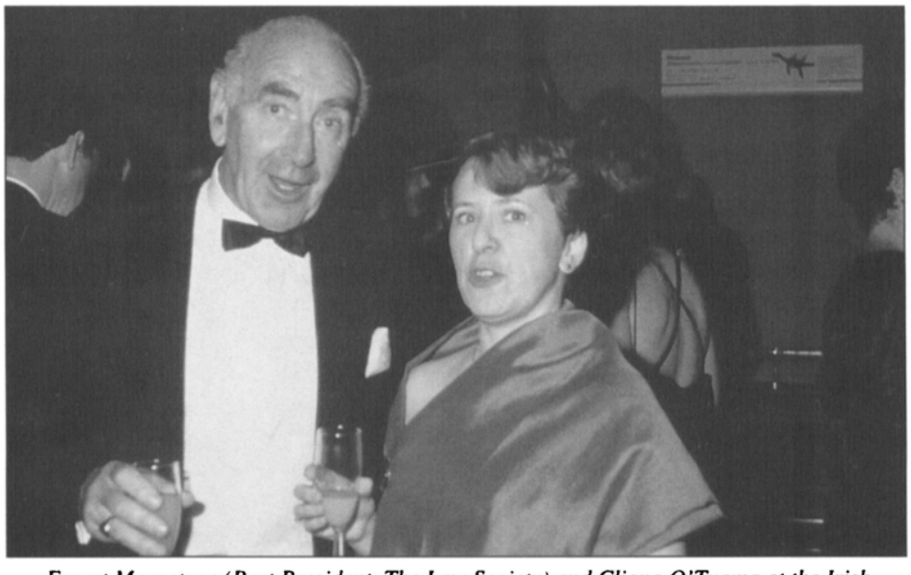
by Cliona O'Tuama, President of the Irish Solicitors Bar Association

The Irish Solicitors Bar Association's fifth annual Charity Ball was held on Saturday 22 October at the Natural History Museum in South Kensington, London. In previous years, we had always held the Ball in May or early June but decided this year to change the timing of the Ball to October.

The proceeds from the Ball were donated to the Westminster Branch of the NSPCC to assist in the running of the refuge for runaway children which they established in central London almost a year ago in conjunction with Centrepoint. The refuge, provides a safe place for runaways under sixteen years old and informs their parents or carers of their safety, but not of their whereabouts. It is an extremely worthwhile cause. The profits of the ball went a small way to making life better for innocent children who have been the victims of neglect or abuse.

A champagne reception before the dinner was kindly sponsored by AIB. A superb dinner was followed by one of the highlights of the evening, a charity auction. I had been tipped off that *Paul Kelly,* Solicitor, who had come all the way from Leixlip to support the Ball, would be a superb auctioneer and I had been lucky enough to persuade him to be our celebrity auctioneer. Paul performed superbly in his new-found role and persuaded everyone to dig deeply into their pockets and his efforts raised a total of £1,250 in the auction.

The star item in the auction was a dinner for six to be cooked for the successful bidder and delivered to his/ her home by a leading catering company. The dinner was much sought after and the bidding was keen and swift and it was eventually bought by Belfast-born barrister *Conor Quigley*, who has a thriving European law practice in London and who also lectures in EU law at Oxford. Conor was so keen to increase the profits for the NSPCC that, when all other bidders had fallen silent, he asked fellow-barrister *Mark Brealey* to bid against him and Conor eventually paid £550 for the dinner.



Ernest Margetson (Past President, The Law Society) and Cliona O'Tuama at the Irish Solicitors Bar Association London Ball.

Once again I was overwhelmed by the generosity of several major Irish law firms and commercial institutions, who supported the Ball by hosting corporate tables, taking advertisements in our souvenir programme, making financial donations or donating items for the raffle.

As before, leading Irish firm McCann FitzGerald, who was the first Irish firm to have opened an office in London, was one of our major sponsors. McCann FitzGerald partner *Roddy Bourke* (ably assisted by his wife *Ann Daly*) hosted a corporate table on behalf of the firm and his colleague *Niall Powderley* had also invited several London lawyers as guests of the firm. I was pleased when Niall won first price in the raffle, two return tickets to New York, which had been kindly donated by Aer Lingus. It was fitting that McCann FitzGerald's generosity was rewarded.

I was delighted that *Ernest Margetson,* a former President of the Irish Law Society and senior partner of another major Irish firm, Matheson Ormsby Prentice, supported the Ball once again. Ernest hosted a corporate table on behalf of MOP with *Stanley Watson* the firm's resident London partner.

Unfortunately, *William Fry*, another leading Irish firm with an office in London, were unable to take a table at this year's Ball, as their resident London partner *Aislinn O'Farrell* was out of the country. *William Fry* have always been generous supporters of the Association and gave a very generous donation in support of the Ball and the NSPCC to compensate for the fact that they were not able to take a table this year. Although we were sorry that they could not be with us this year, *William Fry* were certainly with us in spirit, thanks to their generous donation!

Another major Irish firm who took a corporate table was *Eugene F Collins,* whose table was hosted by *Eugene Murphy* and *Simon McCormick.* (I hope that Simon wasn't too inundated by suitors after I referred to him as Dublin's most eligible bachelor! I am still receiving requests for introductions from unattached women lawyers and bankers!)

Other major corporate contributors included Aer Lingus, Anglo Irish Bankcorp, Bank of Ireland, Bord Failte, Irish Permanent and Virgin Atlantic CityJet. Thanks are due to all of them and to the many major London law firms and members of the English Bar who supported the Ball again.

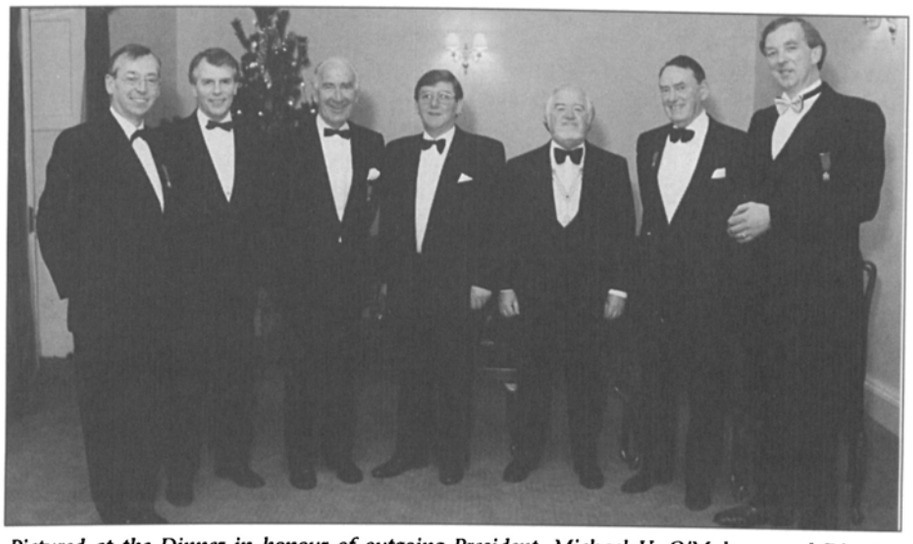
(Continued on page 28

Noel Ryan, Director General of the Law Society of Ireland (1990-1994) – a Tribute

It is with a mixture of regret and appreciation that I present this tribute to Noel's years as Director General – regret that he is no longer with the Society and appreciation for what he has done during his four years of service. The Society's loss is undoubtedly the Irish Horseracing Authority's gain as Noel takes up his position as Chief Executive of that newly-established statutory body. Only time will tell whether administering the organisation responsible for the future development of the horseracing industry will be as onerous as administering the organisation responsible for the solicitors' profession. What can be said now is that the recognition of Noel's qualifications for the job by two very different, but very important organisations is the ultimate compliment to this man of many talents.

In paying tribute to Noel's years of service with the Society it is difficult to know where to begin. In metaphorical terms, so many mountains have been climbed during his years as Tensing (or was it Hillary?) that a listing of them would be very long indeed. Suffice it to highlight the man and then to refer the reader to the Society's Annual Reports for each of his four years in office.

Noel became Director General in October 1990, after more than thirty years in the public service. That his public service career was a successful one is an understatement. For the five years preceding his coming to the Society, Noel served as an Assistant Secretary of the Department of Justice and with the Secretariat at Maryfield, Belfast, established under the Anglo-Irish Agreement of November 1985. It will ultimately be for historians to evaluate the long-term significance of those initial years of the Anglo-Irish Secretariat. However, what is clear at this remove is that what *Michael Lillis* and *Noel Ryan* and their successors have achieved in that initially isolated and, at times, dangerous posting forms a vital support pillar for the present healthy state of Anglo-Irish relations today. The making of contacts on a day-to-day basis with all the strands making up the government of Northern Ireland, as well as both sides of the so-called "divide", is what has built the trust which is facilitating the resolution of disputes which might otherwise prove intractable.



Pictured at the Dinner in honour of outgoing President, Michael V. O'Mahony and Director General, Noel C. Ryan were Michael V. O'Mahony (1993/94); Raymond Monahan (1992/93); Ernest Margetson (1989/90); Noel C. Ryan, (Director General 1990/94); Patrick A. Glynn, President of the Law Society; Donal G. Binchy (1990/91) and Adrian P. Bourke (1991/92).

It was with this auspicious background that Noel came to the Society. He was chosen as *Jim Ivers'* successor during the presidency of *Ernest Margetson* and he worked for the full Presidential terms of *Donal Binchy, Adrian Bourke, Raymond Monahan* and *I*. Don, Adrian and Ray have each acknowledged the extraordinary energy, support and encouragement received from Noel during our respective terms of office.

The following remarks of Adrian in his Presidential Report of November 1992 aptly reflect the experience of all four of us:

> "Since he came to the Society, he has been a remarkable energy force, giving unstintingly of his ideas, his contacts and his time on behalf of the Society. As was intended, he is a leader from the front. He argues his point. He always accepts the outcome of a discussion, in whatever forum, and no matter how tough the going! My belief is that the Society is lucky to have Noel as Director General and this is clearly borne out by his record to date."

In my personal view, if one word can encapsulate Noel's leadership qualities it is "conciseness", that is conciseness of thought, which is not necessarily the same as brevity. Whether addressing an issue, orally, at Council; committee or bar association or, in writing, in a report, letter or minute, the issue was always presented concisely, with all the 'pros' and with all the 'cons'. Though Noel might have had a strongly expressed personal viewpoint on an issue, once the issue was debated fully and a decision made, even if not in accord with his own initial view, he could present the grounds for the decision with the same lucidity and conviction as if he had concurred with it from the outset.

That extraordinary facility was clearly the product of his years as a public servant, years that saw him move, ever upwards, from the Department of Defence to Finance to Public Service, to Justice and finally to Maryfield. In the midst of that public service career he found time to obtain a first class honours BCL degree (UCD, 1978) and to become a barrister-at-law (1979).

Personally, my abiding memories of Noel will revolve around the Solicitors Bill. Together with *Mary Keane* the three of us had many an interesting and good-humoured session debating and drafting a proposed change to the Bill. Noel's Department of Justice experience in this respect was invaluable, as was his ability to present the arguments for the proposed change to the same Department.

In a more social context, a great many of us will fondly remember Noel's wide-ranging ability (and stamina) as a singer. A more elite number of us will remember his exhaustive knowledge of horseracing – if ever there was a round peg for the round hole it is Noel as CEO of the Irish Horseracing Authority. My only concern is that his love of the racing game will not now be diminished by reason of his professional involvement in it.

My reflection on Noel as a singer is tinged with a sense of lost opportunity. His departure from the Society has accidently coincided with the coming into office of both President *Paddy Glynn* and Senior Vice-President *Andy Smyth*, the only similarly gifted singers on the Council. What a trio they would have made at bar association functions around the country!

In concluding, I also wish to pay tribute to Noel's wife *Una* – ever good-humoured and ever-tolerant of the many late nights that were part and parcel of Noel's life as Director General and also his children, in particular the youngest, *Katie*, whose presence at annual conferences was a joy for young and old alike.

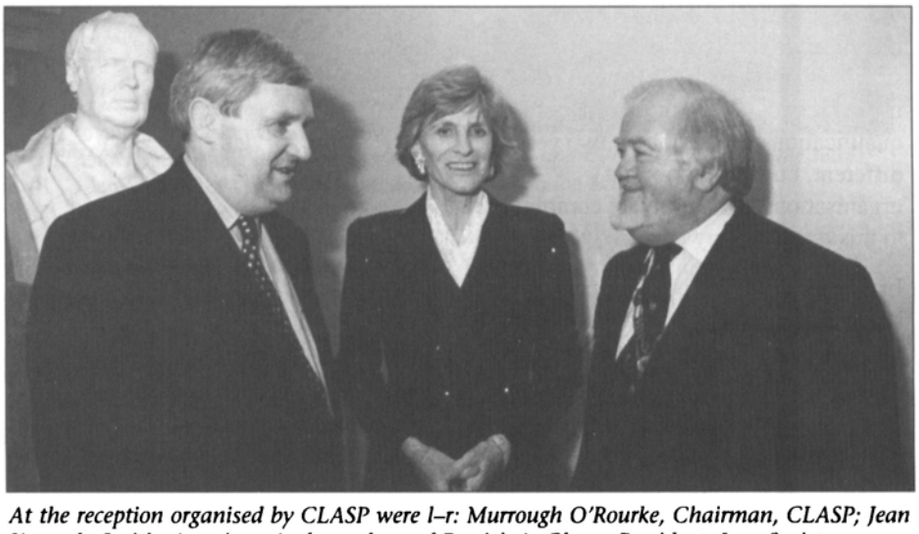
Michael V. O'Mahony ❐

Concerned Lawyers Raise Funds

Barristers and solicitors joined together in the Christmas spirit by holding a mulled wine reception in the Kings Inns on Friday 16 December. The function was a fundraising event for CLASP (Concerned Lawyers Association for the Alleviation of Social Problems). The guest of honour at the function was American Ambassador, *Jean Kennedy-Smith*. The function was attended by *Paddy Glynn*, President of the Law Society. The main support up to now comes from the Law Library. *Paddy Glynn* would like to see more solicitors getting involved. The current Chairman of CLASP is *Murrough O'Rourke*, Solicitor and there are some solicitors on the Committee.

John de Vere White conducted an auction of a variety of items including a *Mick Mulcahy* painting. He was assisted by Senior Counsel *James O'Driscoll*.

CLASP was founded six years ago to help in the alleviation of social problems. To date Focus Point, St. Vincent's Trust, Exchange House and the Merchant's Quay Project are among the charities who have received funding from CLASP. The Salvation Army's Granby Centre (off Dorset Street) received over £13,000 which helped house 100 people from one fund raiser earlier this year.



At the reception organised by CLASP were l–r: Murrough O'Rourke, Chairman, CLASP; Jean Kennedy-Smith, American Ambassador and Patrick A. Glynn, President, Law Society.

Patrons of CLASP include Mr. Justice *Hugh O'Flaherty*, Judge *Patrick Smith* and Judge *Liam Devally*. If you would like to get involved with CLASP or make a contribution contact: *Patricia Madigan*, Tel: 702 4524. ❐

Irish Solicitors Bar Association London Ball

(Continued from page 26)

A very special word of thanks is due to Greenaways, (who are also the printers to the Queen!) who agreed to produce the programme for our Ball free of charge. They also produced a stunning souvenir programme, which I am sure was much appreciated by those who had taken advertisements in it and it will have provided a nice souvenir of the evening for others.

Finally, I would like to take the opportunity to persuade other Irish solicitors to come to our Ball next year. For those who have clients in London or who receive referral work from London firms, it provides an ideal opportunity for practice development. I have been assured by Irish firms who have taken tables at the Ball that it is very useful for practice development to be able to cement existing professional links in a convivial and legally-orientated setting. For those of you who do not have clients or practice links in London, it is still a very enjoyable evening for a good cause and could be combined with a shopping trip or a visit to friends in London. Our 1995 Ball will be advertised in the Gazette well in advance!

The best news of all is that the Ball succeeded in raising about £3,000 for the NSPCC's Refuge. ❐

The Law at Life's End

by Peter Charleton, Barrister & Marguerite Bolger, Barrister

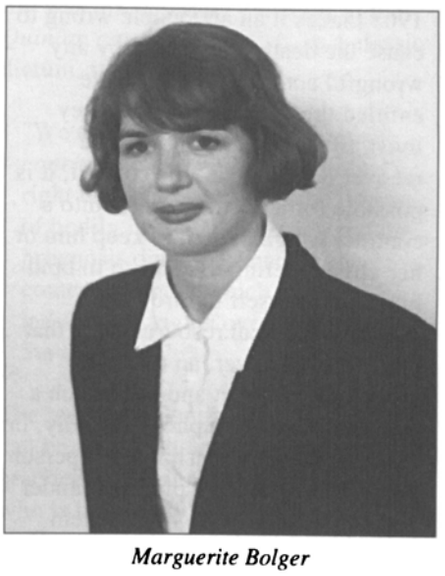
Part I*

"The most difficult but the most essential thing is to love life, to love it even when one suffers – because life is all." Tolstoy[1]

Life clings to itself, dying is not easy and were it to be so there may well have emerged situations in human history when the species could have been threatened had it not had built into it an extreme resilience to deprivation and accident. But, nature has also provided a point beyond which the human organism ceases to function. It is with the development of modern medical technology that the chance of extending life beyond its natural compass has emerged. The possibility of skill being exercised to save life has allowed lawyers a ready opportunity, particularly in the United States, to create a climate of fear whereby what is, and what should be, the natural course of life ending in death is extended or deflected in order to buy off the possibility of litigation.

It is the lawyer's art to use blunt legal rules to achieve a result. Often these rules are set at odds with one another with a view to achieving a situation where what common sense would have dictated in the first instance can be allowed to prevail. Law is simply an instrument whereby people can express a view as to what they think is a good idea in a particular situation at a particular time. Human experience cannot encompass all situations and legal rules are, for that reason alone, defective. But, these defective rules are already with us and thus must be examined in the context of potential legal liability for medical action, or inaction, at life-end.

Peter Charleton



Marguerite Bolger

1. CRIMINAL AND CIVIL LAW

1.1 Murder

It is the criminal offence of murder to kill another person by creating, whether by act or omission, any state of affairs which makes a substantial contribution to their death, intending while doing this to cause death or serious injury.[2] Where a person is under a legally imposed duty of care, an omission to act can be murder or manslaughter.[3] The duty to act arises out of those complex relations of human society which create correlative rights and duties the performance of which is so necessary to the good order and well-being of society that the State makes their observance obligatory.[4] There is no doubt that one of those relationships which the law enforces is that of doctor and patient. Consequently, a doctor who takes a patient under his/her care, is obliged to take all possible steps to guard the patient's well-being. What is possible is, however, to be judged by reference to existing good medical practice and is not, therefore, absolute. The well being of a patient is a variable factor to be decided by the patient in the exercise of personal autonomy. In cases of the patient being insensate the paramountcy of his or her interests continue but now fall to be decided by carers, or in some cases, by application to the court.

1.2 Manslaughter

Any act or omission which makes a substantial contribution to the death of a person is manslaughter if the action in question, or the failure to do that act, falls short of that ordinary and necessary care expected in the particular circumstances, to the degree that there exists negligence in a very high degree which can be shown to have brought about a very high degree of risk of substantial personal injury to the patient.[5]

A doctor is obliged to exercise that degree of care and skill that will ensure that his actions do not cause harm to a patient, but is also governed by an exceptional rule which indicates that no medical practitioner will be found guilty of negligence unless there has been no other practitioner of equal specialist or general status and skill who would have taken the action or made the judgment he or she did, acting with the ordinary care required of a person with his qualifications.[6] This means that to establish liability for manslaughter there must exist criminal negligence. Only in the most exceptional circumstances will following an accepted medical

procedure, treatment or judgment amount to negligence.

1.3 Civil Negligence

Section 48 of the Civil Liability Act of 1961 makes it an actionable wrong to cause the death of a person by any wrongful act which would have entitled the dead person, had they lived, to maintain an action and recover damages. In this context, it is possible for a doctor to enter into a contract with a patient to keep him or her alive indefinitely, and so to bind himself or herself to throw all available medical resources into that task. It is, however, an utterly unrealistic contract and one which a court would never uphold. Equally, in this context, it is possible for a person to contract with a hospital not, under any circumstances, to revive them from an unconscious state. Both examples are so extreme as to be ludicrous. The *life at all costs* example presupposes the possibility of paying for a treatment almost endless in terms of expense and time. The *life under no circumstances* example postulates the existence of a death wish which, if it were that strong, a person would have already ended his life. To enforce this latter contract would be contrary to public policy and would be therefore void. The wrongful act referred to in section 48 is, therefore, in this context clearly an act of negligence, or to put it more plainly, a want of ordinary, accepted, appropriate medical care.

1.4 Murder, Manslaughter and Negligence in Palliative Care

When these three rules are analysed as to their application in cases of terminal illness, it will be found readily that the exceptions grafted onto them allows a wide discretion to the treating doctor.

To be guilty of murder, a person must intend, by what they do and by what they fail to do, to cause death and also to be guilty of an unlawful act.[7] A person intends to cause death when they realise that their conduct, or the consequences of their conduct, will have that result. However the medical profession uses the principle of double intention or double effect when they know that their action, or inaction, will result in death. This does not incur criminal liability, as was recognised judicially by Devlin J in *R v Adams* in a dictum that emphasises intent:

> "If the first purpose of medicine – the restoration of health – could no longer be achieved, there was still much for the doctor to do, and he was entitled to do all that is proper and necessary to relieve pain and suffering, even if the measures he takes may incidentally shorten life by hours or perhaps even longer."[8]

The practice in Irish hospitals is to treat the terminally ill patient for pain, or if that pain has gone beyond management, to induce and maintain a coma where death can occur naturally. As a condition worsens, pain controlling medicines are increased in dosage and frequency. Such a degree of training and experience are needed that palliative care is a recognised speciality. The current practice cannot be unlawful, and cannot therefore be a criminal or civil wrong, as each step is carefully taken and considered in the light of the patient's needs. Where there are prospects for recovery, the form of medical care adopted must have regard to the duty of the doctor not to damage the human organism and so cause disability on possible recovery. Actions can be taken which damage health but only if these are a necessary by-product of the appropriate care. If a non-damaging treatment can be chosen, with equal result, it is what the law requires where the patient has a prospect of returning to some degree of long-term health. The fundamental principle is that the law allows persons with experience in the science of caring for the sick to evolve procedures of care designed to assist the patient as he or she dies.

A case where the doctor acted contrary to this principle, and so incurred criminal liability, was the recent case of Dr. Cox who was found guilty of attempted murder.[9] Dr. Cox's patient requested him to take her life because she was in so much pain. He did so by administering a drug chosen in order to, and having no other effect than, to stop her heart. He was not a terminal care specialist and, it would appear, had made no effort to consult such a specialist. There was no application here of the principle of double effect. However Dr. Cox could have escaped liability by taking some accepted medical action to relieve pain and thereby, if necessary, causing death as a by product, *albeit* welcome, of the treatment.[10]

The examples of Dr. Adams and Dr. Cox relate to positive actions taken by them resulting in the shortening of a patient's life. A different issue arises where doctors are considering initiating measures to preserve life or, where those have begun, considering terminating them. Then, where the patient is conscious, the choice is his or hers. Where the patient is unconscious the discussion focuses on the end to be achieved, what has been achieved by an existing treatment, the degree of interference with the course of nature imposed by the treatment, the result of discontinuance and the right of the patient for carers to have regard to his or her best interests.

2. CONSTITUTIONAL LAW

2.1 The Right to Privacy

Does the right to privacy, as recognised in the Irish Constitution, encompass the right to be left alone to die in peace?

Under Article 8 of the European Convention on Human Rights everyone has the right to respect for his private and family life. It has been recognised by the Commission that a compulsory psychiatric examination constitutes a breach of this provision[11] which gives rise to the possibility of the Convention protecting the right to be left alone to die in privacy. However in that same case the examination was justified for, *inter alia*, "the protection of health". In addition the Commission later refused to declare a conviction of aiding and abetting suicide a breach of Article 8 "by virtue of their trespass on the public interest of protecting life."[12]

This leaves the sole possibility of using Bunreacht na hÉireann to source a right to privacy, encompassing the

right to die without futile or unwanted medical intervention. The right to privacy was first located in the Constitution by the Supreme Court in *Norris v AG*[13]. O'Higgins CJ and McCarthy J postulated it as "a right to be let alone" echoing the US Supreme Court in a line of cases on the issue. Whilst all five judges recognised the right to privacy in the Constitution, the majority held that it did not cover the plaintiff as he wished to participate in conduct which was morally wrong, thus going beyond the parameters of a right to privacy which they proclaimed was not absolute. In a dissenting judgment, Henchy J pointed out that the right may be claimed

> "for purposes not always necessarily moral or commendable, but meriting recognition in circumstances which do not endanger considerations such as State security, public order or morality, or other essential components of the common good."

Whether a patient's or their family's wish to cease medical treatment could be considered contrary to the common good remains to be seen. It would appear from US and UK caselaw that, depending on the circumstances, permitting withdrawal of treatment might not cause legal conflict.

The right to privacy was actually invoked for the first time in *Kennedy v Ireland*[14] where Hamilton P reiterated the Supreme Court's earlier analysis of the qualified right to be left alone. Support for the right to be left alone to die in peace can be found in his judgment:

> "The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society."

The Irish courts' reasoning is echoed in US caselaw.[15] In *Quinlan's* case[16] the Supreme Court of New Jersey decided that the constitutional right to privacy encompassed a patient's decision to decline medical treatment in certain circumstances which outweighed the state's interest in preserving life. The court expressly held that exercise of this constitutional right did not involve any breach of the criminal law as termination of treatment pursuant to a right of privacy was by that fact alone lawful; a death resulting from such an act could not be regarded as an unlawful one. The same right to privacy also placed Mrs Cadura's right to refuse treatment on a constitutional level.[17]

Writing extra judicially (in 1986 prior to the *Kennedy* decision which successfully invoked the right to privacy in the Irish High Court), having considered the relevant US caselaw, Mr Justice Costello said:

> "[T]here are very powerful arguments to suggest that the dignity and autonomy of the human person (as constitutionally predicated) require the State to recognise that decisions relating to life and death are generally speaking ones which a competent adult should be free to make without outside restraint and that this freedom should be regarded as an aspect of the right to privacy which should be protected as a 'personal' right by Article 40(3)(1)... [I]t is highly probable that the courts would conclude that the duty to respect the dignity of each individual which the Constitution imposes is one which exists as long as the human person is alive. The comatose patient would, like the terminally ill competent patient, have a correlative constitutional right to respect. It would seem reasonable to conclude that inherent in this right to which both would have an entitlement would be a right to die with dignity."[18]

2.2 The State's Constitutional Duty to Preserve Life

No constitutional right is unlimited. The Constitution guarantees the right to life. The guarantee is in absolute terms and that means that the State, through its laws or agents, is not entitled to interfere with that right. The State, under the Constitution, correspondingly takes on a duty to uphold the right to life which may involve protecting it from private attack. An example might be a duty to legislate to outlaw a suicide manual. That duty is far more limited and is expressed in the Constitution as to "protect as best it may"[19].

The interest of the State in preserving life was discussed by the court in the *Quinlan case*. Hughes C.J., in a classic dictum, said:

> "We think that the State's interest *contra* weakens and an individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately, there comes a point at which the individual's rights overcome the State interest".[20]

The principle identified by the court can be seen in the current medical practice in this jurisdiction. A person who is terminally ill is entitled to make a decision that they should not be given further life support. Where the patient is unconscious the next-of-kin, in consultation with their physician, are entitled to reach the same decision. The more extreme the condition in which a patient is to be found, the easier it is to resolve a dilemma in favour of non-treatment. As life slips away, the interest of the State in preserving it weakens in favour of the individual's right to be left alone. Just as a competent and conscious patient has the right to refuse medical treatment, so too has a terminally ill patient the right to be protected from an unnatural intrusion into the course that nature has chosen for him. The principle involved requires that the State's interest in preserving life weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis for recovery dims.

3. FUTILE FEEDING OR TREATMENT OF A COMATOSE PATIENT

3.1 Futile Medical Care

It was never intended that the medical profession should administer non-beneficial care.[21] From this premise emerges the principle that comatose patients should not be given futile medical treatment. A proposed

definition is that a treatment is futile where the last one hundred cases in which it was used proved useless, but has a minimum threshold of benefit that is greater than zero.[22]

Permitting the *withdrawal* of futile treatment, such as tube feeding or treating infection, from a patient who has gone beyond recovery would seem to be more complex than choosing *not* to administer life saving treatment such as cardio-pulmonary rescusitation. One line of reasoning categorises the former as an omission and the latter as a positive act, but that has been rightly criticised.[23] On the other hand an American case which clearly endorsed the categorisation of switching off a life support machine as an omission and thereby incapable of attracting legal culpability, held that the withdrawing of medical nutrition and hydration ought to be evaluated in the same manner as other mechanical devices such as respirators and that legally no distinction should be drawn between them.[24] It remains to be seen whether the Irish courts would apply the same criterion to both advance directives such as *do not rescusitate* orders and the ceasing of futile treatment. The equal status attached to positive acts and omissions in the context of a duty to act, show that criminal law principles are against drawing such a distinction. Advance directives are discussed later in Part II of this article.

Another method of resolving the conflict is to classify the treatment as 'ordinary' or 'extraordinary', a moral test generally attributed to Pope Pious XII:

> "Man has a right and duty in the case of severe illness to take the necessary steps to preserve life and health... But he is obliged at all times to employ only ordinary means... that is to say those means which do not impose an extraordinary burden on himself or others."[25]

It is now perhaps more appropriate to refer to a productive or non productive treatment test, thereby firmly focussing on the individual case, as the primary determining factor must be the best interests of the patient.[26] Circumstances may exist where, on the postulated test, the interest of the patient has to be seen in the context of the resources demanded. The Aristian thrust of the Constitution may tend towards an interpretation of the duty to support life which as well as considering privacy may also evaluate the proposed or continuing treatment on the basis of how it is classified.

Whilst there is a fear that providing for a definition of treatments that may be deemed futile, and thereby permitted to be withdrawn, may provide a floodgate for medical paternalism, it has been submitted that those fears are more likely to be realised in the present state of ambiguity.[27] Thus, whilst it is unlikely that futility could be provided for by statute as it depends on a complex variety of circumstances, it is important that specific standards are offered by the medical profession. Otherwise, as with advance directives, the courts will be forced to take over and that creates the risk of ad hoc emotionally propelled decisions, rather than the development of a definition of futility.[28]

3.2 Futility, Rationing and Cost Containment

The greatest risk posed by the principle of medical futility is that it will be confused with rationing and cost containment. In an age of rising health care costs, increasing technological health care procedures and a growing elderly population who are the most significant users of the health care system such comparisons are inevitable. Indeed the Archbishop of Canterbury had the courage to point out that the costs of preservation of life were becoming insupportable in his Edwin Stevens Lecture in 1977, and received a bad press for so doing.[29] However futility is a different phenomenon to either rationing or cost containment.[30] A futile medical treatment is one which is decided to have no benefit to an individual patient and the economic state of the health system is irrelevant. Rationing also involves withholding treatment from a particular group of patients, but for the purpose of using limited resources to treat others. Cost containment involves an overall communal reduction of limited resources. Whilst futility and rationing or cost containment can occur in one situation, the fundamental distinctions are clear[31] and it is vital that these distinctions are appreciated. In any event there is evidence that advance directives result in insignificant savings to the medical scheme. It is estimated that if all Americans had advance directives, the entire saving would be only 3.3% due to the expensive nature of labour intensive humane care at life's end.[32]

3.3 Practical Implications for Irish Medical Practice

So what of the legal situation where a comatose patient in an Irish hospital is being tube fed and infections, which may occur from time to time, are being treated? Does there come a point when the law allows such feeding and treatment to be discontinued? It is unlikely that either can be regarded as "extraordinary" measures, certainly while some real prospect for recovery exists. It is submitted that if a comatose patient who has gone beyond any realistic hope of recovery develops a terminal infection (which would seem to be inevitable at some stage), nature should be permitted to take its course, and the body should be allowed to die by not using unnatural treatment. There may also be some circumstances where tube feeding is so invasive and extraordinary a measure and so productive of any result to the patient but indignity that it may be regarded as a treatment and so withdrawn. The possible precedents here are confused. It appears that the practice of not feeding an infant who is substandard only by reason of its mental state is currently illegal in the UK, Canada and Australia.[33] However, some American courts appear to be willing to allow such treatment (including feeding) to be withdrawn by competent patients, or where incompetent, by their guardian. In the UK the withdrawal of feeding has been permitted from two patients who continued in a persistent vegetative state beyond the time for the possibility of any recovery.[34] The principle applied was that to treat a

comatose patient, unable to consent to it, was an invasion only justified by the defence of necessity. Such only arose if treatment was to the benefit of a patient. In this context treatment includes antibiotic care and artificial feeding. As each such treatment constitutes an invasion it was wrong to speak of withdrawal but more correct to classify such action as a discontinuance.

This paper was originally prepared by both authors for delivery by the first author at an international conference presented by the Department of Age Related Health Care and Cardiology at the Meath-Adelaide Hospitals on Saturday 11 June 1994. The conference was organised by Dr. Desmond O'Neill M.D. The paper was then extensively revised by the second author. Part II of the article will be published in the next issue of the Gazette.

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2. S.4 Criminal Justice Act, 1964 which states: "(1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not. (2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted." See generally Charleton P. 'Offences Against the Person' (Dublin, 1992) at chapter 2.
3. Archbold (1922) at 869-71. See further Dennis, 'Manslaughter by Omission' (1980) 33 Cur. L. Prob. 255; Gamble 'Manslaughter by Neglect' (1977) 1 Crim. L.J. 247; Hughes 'Criminal Omissions' (1957) 67 Yale L.J. 590; Glazebrook 'Criminal Omissions: The Duty Requirement in Offences Against the Person' (1960) 76 L.Q.R. 386; Hogan 'Omission and the Duty Myth' Criminal Law Essays 85; Williams 'What Should the Code do about Omissions?' (1987) 7 L.S. 92; and see comments on *Miller* [1983] 2 AC 161; [1983] 1 All ER 978; [1982] 2 WLR 539, 77 Cr. App. R. 17; [1983] Crim. L.R. 466 H.L. in (1984) 22 Atlal. Rev. 281; see also (1980) 43 M.L.R. 685 and [1980] Crim. L.R. 552.
4. *R v Taktak* [1988] 34 A.Crim. R. 334 CCA NSW.
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6. *Dunne v National Maternity Hospital* [1989] IR 91; [1989] ILRM 735. On homicide by omission, see generally Charleton P. loc. cit. at 95-104.
7. S. 4 Criminal Justice Act 1964. See, in this context, the analysis by Lord Browne-Wilkinson in *Avidale NHS Trust v Brand* [1993] 1 All ER 821 at 880-883.
8. Palmer H. 'Dr. Adam's Trial for Murder' [1957] Crim. L.R. 365 at 375.
9. The Independent, 10 September 1992. Dr Cox was not found guilty of murder because the patient's state of health was so terminal that it was impossible to say whether the drug or her medical condition had killed her. See the discussion by Lord Goff in *Bland*, above at [1993] 1 All ER at 867.
10. It should be noted that voters in the US state of Oregan are soon to decide by public ballot whether patients with less than six months to live should be able to acquire prescriptions for deadly drugs ('Oregan Death With Dignity Act'). Similar legislation failed in Washington state in 1991 and in California in 1992. The Independent, 20 October 1994.
11. Appl. 835/'78 *X v Federal Republic of Germany*.
12. Appl. 19983/'82 *R v United Kingdom, D & R* 33 (1983) p.270 (271-272).
13. [1984] IR 36.
14. [1987] IR 587.
15. See generally Costello D. 'The Terminally Ill – The Law's Concerns' (1986) Ir. Jur. 35.
16. *In the matter of Karen Quinlan* (NJ) 355 A2d 647; 97 ALR 3d 205.
17. *Lane v Cadura* Mass App 376 NE2d 1232; 93 ALR 3d 59. The facts of that case are given below.
18. Costello D. *loc. cit.* at 42
19. Article 40.3.2° "sa mhéid gur féidir é".
20. at 663.
21. Jecker & Scheiderman 'Medical Futility: The Duty not to Treat' (1993) Cambridge Quarterly of Healthcare Ethics 151. In *Bland* the House of Lords pointed out that the principle applying to the conscious was consent to treatment. Where a patient was unconscious then only the principle of necessity justified medical invasion. If a treatment was not in the best interest it could not be lawful and if or when it ceased to be in the interest of a patient it could be discontinued even if death was the inevitable result: see [1993] 1 All E.R., Lord Keith at 860-861; Lord Goff at 868-871; Lord Lowry at 876-879 and Lord Browne-Wilkinson at 881-883.
22. Scheiderman et al 'Beyond Futility to an Ethic of Care' 96(1994) *Am J of Med* 110; Scheiderman & Jecker 'An Ethical Analysis of the Use of Futility' 153(1993) *Arch. Intern. Med.* 2195; Scheiderman & Jecker 'Futility in Practice' 153(1993) *Arch. Intern. Med.* 437; Scheiderman & Jecker 'Ceasing Futile Resuscitation in the Field: Ethical Considerations' 152(1992) *Arch. Intern. Med.* 2392. In deciding whether the definition is satisfied it is necessary to distinguish between the effect the treatment has on a specific body part, as versus the patient's ability to enjoy the overall benefit if the treatment; Scheiderman & Jecker 'Medical Futility: Its Meaning and Ethical Implications' (112 91990) *Anals of Internal Med.* 949.
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Annual Conference 1995

The Annual Conference 1995 will be held from **11 – 14 May, 1995** in the **Hotel Europe**, Killarney, Co. Kerry. The Hotel Europe, now under **new management** will provide an ideal location for this years conference. Surrounded by spectacular countryside, the 5-star Hotel Europe is located directly by the lakeshore. The conference seminar which will be held on Friday 12 May is entitled **"Developing Your Business: Finding and Minding New Clients"**. A varied programme of social and sporting events has been planned and the weekend will culminate with the gala conference banquet on Saturday night. A brochure with booking form will issue in early February. Book early to avoid disappointment.

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Practice Management Committee

The function of the Committee is to provide information and assistance in relation to all aspects of Practice Management. The Committee aims to assist the individual Solicitor in providing a better and more efficient service to the client. It is hoped that the client in turn will appreciate the increased level of service thereby increasing customer satisfaction.

The Committee has set itself a number of goals and objectives for 1995 and the Committee would very much welcome comments or suggestions from the Profession on any aspect relating to its work.

In 1994, the Committee established Practice Management Notes which are issued to the profession on a regular basis. These are designed to cover different aspects of legal practice in an easy and readable form. The Committee would like to hear from practitioners as to what their impressions are and any suggestions that they might have for the future.

It is the view of the Committee that Practice Management should occupy a central role in the education syllabus for Solicitors. Discussions are taking place with the Education Committee and the Education Advisory Committee to see best how this can be achieved.

The Committee has been instrumental in running "Setting up in Practice Seminars". These are a valuable help to new solicitors starting out in practice on their own.

Substantial progress has been made with the Irish Management Institute in preparing and formulating a course which would be of assistance to the larger practice. This is a new innovation for the Law Society and it will be an interesting and exciting opportunity to assess how the management skills of Solicitors can be applied to the commercial area.

A number of solicitor's firms have already attained the Q Mark and a seminar held on the topic in 1994 was much appreciated by the participants. A further seminar on the topic will be provided in 1995.

There are a number of management tapes and videos which are available in the non legal sector. They are useful in so far as they assist learning in an "easy" way. The Committee is investigating the provision of these tapes and cassettes and a selection will be made available to the profession during 1995.

Every office should have its own office manual which will assist the office in regulating its own procedures rather than dealing with issues in a haphazard way. The Committee are presently reviewing a precedent manual and will have more information on this later in the year.

The passing of the Solicitor's Act brings obligations and some opportunities to the profession. Over the coming months the profession will be circularised with a substantial amount of material on different aspects of the Solicitor's Act. It is hoped that the result will be the provision of a clear and unambiguous business relationship between solicitor and client. The client will be aware from the very start of the nature and extent of the business relationship with the Solicitor.

The committee intends to make use of the Gazette each month to give the profession an up date on its activities. The contribution will be written by different members of the Committee who will be able to give their own perspective on the Committee's work.

Philip Joyce
Chairman Practice Management Committee

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The Future of Irish Legal Services in a Global Economy

by Bernard O'Connor*

Part II

The economic integration that has happened in Europe in the last 40 years is taking place at a much faster pace globally. Communications have made working the global market as easy, if not easier, than practising on circuit in Ireland.

Services have been a leader in this economic integration with the financial sector leading the way. Accountancy is not far behind. Legal services come in a poor third.

On a global integrated services level, the big six accountancy firms truly are integrated and pose a great competitive threat to the worldwide legal profession. They provide a "seamless" service, meaning that if you walk in the door in downtown Chicago that your global problems will be addressed from your local office. Only Baker and Mackenzie attempt to do this on the legal side.

The UK based Solicitors' firms and the large New York based law firms are some way behind the accountants but they are making efforts to catch up.

The failure of the legal profession to keep pace with the changing world is due to many causes not least of which is the need for detailed knowledge of local procedures and the need for lawyer organisations to maintain standards of professional conduct and service.

Lawyers protect their privileged access to court work. However, very few transnational companies go to Court. Why waste time and money on an uncertain and public result in a jurisdiction that you don't understand, when you can go to arbitration. Non-lawyers are strong, and getting stronger, in arbitration.

In competition law there is no requirement to be a practising lawyer to represent clients before the EU Commission and, as far as I am aware, the majority of the national competition authorities.

In trade law, again, there is no requirement to be a practising lawyer to argue an anti-dumping or subsidy case in Brussels or to represent a sovereign state in the dispute settlement procedures of the GATT. Nor is there the need to be a lawyer to persuade the Irish administration that a local Irish practice needs to be changed, by legislation if necessary, so as to remove a barrier to market access or an inconsistency with EU or international law.

Accountants and consultants are increasingly becoming involved in this type of trade and competition work. Lawyers tend to be lagging behind.

Solicitors working in the field of commercial and tax law will already be aware of the increased competition from accountancy firms in the provision of legal services, tax advice, company formation and management. All of them employ lawyers. Some, such as Arthur Andersen, are establishing their own law firms.

I am informed that work referred from other UK and US law firms forms a large percentage of the work carried out by the larger Irish commercial practices. If globally lawyers are not getting commercial law work, then the flow to the large Irish firms will slow down.

Lawyers are right to protect standards but they should not let standards be an excuse for protectionism of whatever sort. Those who hide behind protectionist barriers will lose out. This is because, quite simply, the flow of commerce and practice will move on around them and leave them safe and secure and dry on their diminishing but secure island of practice. Lawyers should be looking for opportunities to partake in the global market for legal services not protecting themselves from more aggressive professionals.

The Irish legal profession along with Irish Government agencies needs to respond to these developments. Ireland should be promoted as an international legal centre to cater for the growing amount of international legal work which is not necessarily tied to one particular legal jurisduction.

With regard to differences of procedures and local rules, which have been a core argument for the maintenance of the court monopolies, I would argue that with the further integration of the European economy there will be a lessening of differences in both the Member States and the advanced industrial economies. This trend will continue in all market economies where the regulation of property and the exercise of property rights will gradually become similar.

The trend to similarity is sharpest in Europe where the EU laws in financial services, telecommunication, transport, environment, consumer protection, intellectual property, trade competition, social rights, to name but a few, both dominate and predicate national law.

The provision of legal services is therefore becoming, and needs to become more, globally orientated. Irish lawyers have a number of great advantages to take part in this globalisation of legal services, either as individuals or firms: the English language; an Anglo-Saxon legal

background added to a good working knowledge of constitutional law; membership of the European Union; and a well looked upon cultural heritage.

I would urge the Irish legal professions, therefore, to take steps to promote the participation of Irish lawyers in this new legal age. At home, I would suggest there should be a merging of the professions and the opening of the courts to non-lawyers. This liberalisation of the last bastion of the legal closed shop would encourage the profession to innovate. It would send a signal to the other professions and other legal professionals in the EU and worldwide that the profession in Ireland is dynamic and innovative.

In my view, clients will continue to seek advice from Solicitors and Barristers in conducting Court cases and very few clients will chose non-lawyers to represent them. Thus the change would have a strong impact without causing much practical impact to the livelihood of individual practitioners.

Barristers have not lost out to Solicitors since the latter were granted the right of audience before all Irish courts and it is unlikely that the need for court specialisation would diminish in a unified profession.

Abroad I would suggest that the Government, through the various agencies that support Ireland as a financial and industrial location, promote the use of Irish legal services in Europe and globally. This would be better facilitated through a merged profession. Ireland could become a centre for legal research and provide backup to the larger firms in expensive cities such as London and New York. As demand for services in Ireland begins to flow, high value added skills would begin to accumulate here. Peripherality is not a problem if you are recognised as having the necessary skill.

The pool of legal skills in Ireland is vast. It is under utilised. The chance to exercise the rights that membership of the Union gives Irish lawyers should be grabbed, not dreamed about.

These comments arise from a review of the law on the freedom for Irish lawyers to provide services in the EU. They were made at a recent conference on "New Opportunities for Lawyers", sponsored by I.C.E.L. and held in Dublin on 28 May, 1994.

**Bernard O'Connor is a Solicitor with Stanbrook and Hooper, European Community Lawyers, Brussels.*

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The Indigent's Search for a Champion: Lawyers and *Pro Bono Publico* Practice

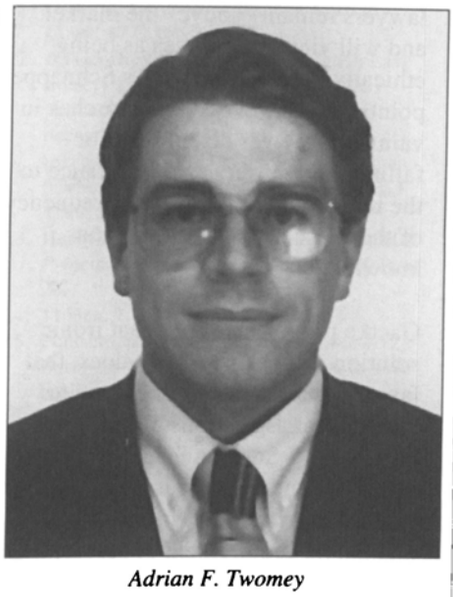
by Adrian F. Twomey, B.C.L. (N.U.I.), M. Litt. (Dub.), Barrister-at-law; Associate Lecturer in Law, National College of Industrial Relations.

"Lawyers cannot escape being officers of the court and cannot escape. . . pro bono publico *work, which inevitably go[es] with the special and exclusive privilege of being allowed to represent others in the court. . . I believe that thoughtful lawyers would not want it otherwise."*

– *Judge Seiler,* Missouri Supreme Court.[1]

Introduction

The last two years have seen previously unparalleled improvements in the State's civil legal aid system. As the Chairman of the Legal Aid Board, Mr. Vincent Landy, S.C., notes in the Board's most recently published Annual Report[2] there has been a sizeable increase in the State grant-in-aid to the Board,[3] a substantial number of new solicitors and support staff have been recruited[4] and "a pilot project which provides for the participation of private practitioners (to a limited extent) in District Court work. . . has been put into operation."[5] In addition, the Minister for Equality and Law Reform has quite recently announced that fourteen new law centres will be opened.[6] It is, therefore, with some surprise that one notes that the Chairman of the Bar Council, Mr. Frank Clarke S.C., has, in that same period, been particularly critical of the State's civil legal aid system,[7] stating, *inter alia,* that the Minister for Equality and Law Reform "seems to be downgrading the level of service being given to individuals who qualify for legal aid."[8] In such a context it is worth recalling that Judge Vilhjalmsson of the European Court of Human Rights held,[9] in the now almost legendary *Airey* case,[10] that Mrs. Airey's difficulties were with the legal



Adrian F. Twomey

profession rather than the State. Also deserving of mention is Mr. Justice Gannon's observation, in *Cosgrove v The Legal Aid Board,*[11] that:

> The duty of administering justice and adjudicating by due process does not create any obligation on the state to intervene in any private civil litigation so as to ensure that one party is as well equipped for their dispute as is the other.

If one agrees with the reasoning of both Judge Vilhjalmsson and Mr. Justice Gannon, one might be so bold as to suggest that the Bar Council ought to be examining the efforts made by its colleagues, rather than those made by the Minister, to vindicate the right of access to justice of indigents.[12] In such a context, that which follows attempts to outline the scope of the moral and ethical duty which lawyers have to work *pro bono publico,* at all times bearing in mind the fact that, as Brown and Marriott point out:

> Even for those who can afford it, civil litigation is an extremely expensive and hazardous undertaking. Only if very considerable sums of money or fundamental rights principles are at stake, is it worth contemplating. In certain kinds of disputes the costs of delay in resolution may be wholly disproportionate to the amount in issue.[13]

The Origins of the *Pro Bono* Tradition

The idea of lawyers volunteering their services *pro bono publico* seems to have first been mentioned in an English statute of 1495 which provided that if a plaintiff could establish that he was worth less than £5 he could sue *in forma pauperis* and have a sergeant-at-law appointed to be his advocate.[14] If, however, such a 'pauper' lost his case, and could not afford to pay the defendant's costs, he was condemned by the law to be "whipp'd".[15] It does not stretch the imagination very far then, to suggest that this threat deterred at least some thin-skinned souls.[16]

Almost two centuries later, in *Scroggs* case,[17] the English Chief Justice, Sir Matthew Hale, warned uncharitable lawyers that "[i]f the court should assign [a serjeant] to be counsel, he ought to attend; and if he refuse we would not hear him, nay, we would make bold to commit him."

The provision by lawyers of services free of charge to indigent litigants has also been something of a tradition in the United States, where it most commonly occurred in the late nineteenth and early twentieth centuries. In 1868, for example, Cooley thought it far from unusual to state that a lawyer appointed to represent an indigent defendant "shall be paid by the Government"[18] but if no payment is authorised, the lawyer owes a duty to his profession, to the courts and to justice to serve without compensation. Unfortunately, the tradition has since largely died out, although as late as 1965, in *United States v Dillon,*[19] the federal courts

rejected a lawyer's constitutional challenge to an appointment to serve without fee as counsel for an indigent prisoner,[20] and an empirical study published in 1975 concluded that an average of 6.2% of American lawyers' billable time was devoted to working for little or nothing in "public interest practice."[21] Some 30.2% of the lawyers surveyed, however, contributed no such hours.

Mandatory *Pro Bono* Activities

In Ireland, *pro bono* work would not appear to be particularly prevalent. As *Brian Harvey,* Information Officer of the Simon Communities, pointed out in 1988:

> [L]awyers are literate, they are versed in argument, they have access to knowledge, to information, to books, to texts, to libraries, they are tested in the courts, they are *skilled people.* Yet very few put these skills at the disposal of voluntary organisations. . . *[P]ro bono* work. . is conspicuous by its absence here.[22]

In such a context, it is worth noting that, in recent years, American writers such as Gaetke[23] and Rosenfeld[24] have proposed that a mandatory obligation to perform *pro bono* work should be imposed on the Bar. Gaetke attempts to justify his argument by examining the role of the lawyer as an officer of the court; a label which places the lawyer apart from other professionals by stripping him of the right automatically to charge for his services. This view of the lawyer is not a new one.[25] As far back as 1710 it was being argued in the U.S. that lawyers should not approach their work as experts for hire but rather as men devoted to fairness and justice.[26] The idea has also received support from members of the judiciary, such as Chief Justice Cardozo, who has observed that a lawyer admitted to practice "was received into that ancient fellowship for something more than private gain. He became an officer of the court, and is, like the court itself, an instrument or agency to advance the ends of justice."[27]

Chief Justice Cardozo's perception of the role of the lawyer is not very different to that of Chief Justice Hale. Unfortunately for American indigents, however, the court of Chief Justice Cardozo was far less likely to sanction uncharitable attorneys, preferring instead to rely on the fallacy that lawyers remain "above" the market[28] and will view themselves as being ethically bound to serve. As Schnapper points out, however, "one searches in vain for a lawyer disciplined for failing to give free legal assistance to the indigent. . . although the frequency of these occurrences is common knowledge."[29]

Gaetke provides a somewhat ironic solution, suggesting, as he does, that lawyers be compelled to live up to "the ethical aspirations of the profession." Such an idea is not a new one. The Kutak Commission,[30] for example, first proposed, in 1979, a mandatory requirement of service *pro bono publico* of forty hours per year or the (financial) equivalent thereof. The proposal, however, failed to win support from the American Bar Association's House of Delegates in its adoption of the *Model Rules* in January 1980. Instead it was watered down to a mere recommendation that lawyers become involved in such activities.[31]

In 1986 the A.B.A.'s Commission of Professionalism,[32] formed at the urging of Chief Justice Burger, once again stopped short of mandating *pro bono* activities. The Commission proclaimed that "it would be antithetical to the tenets of public service to have to conscript lawyers to assist the poor."[33] The courts have similarly become reluctant to "conscript" lawyers for such a purpose.[34] Rosenfeld contends that this "judicial backlash" reflects, more than anything else, the concern that it is unfair to single out the legal profession to bear a burden that should be more widely shared.[35]

Gaetke, however, remains unconvinced. While admitting that "it would be preferable if all lawyers freely fulfilled their ethical duties," he contends that ethical dictates are necessary to bring the less conscientious in the profession up to minimum levels of expected behaviour.

It would appear in practice, however, that the lack of a *pro bono* obligation in both the U.S. and Ireland, has been brought about by the professions' self-interest in avoiding the imposition of one.[36] While the majority of lawyers will readily admit the indigent's need of a champion, they will themselves serve only those who offer a purse as reward. For that reason, it is submitted that some consideration might be given to the introduction of a scaled system of mandatory *pro bono* work, perhaps with the number of hours work demanded by the professional bodies reflecting the lawyer's income.[37] Lawyers may find such a scheme unappealing, but as Chief Justice Burger has said: "the dynamics of the profession have a way of rising to the burdens placed on it."[38]

The potential benefits of such a mandatory *pro bono* scheme cannot be doubted.[39] The State civil legal aid scheme still precludes the Legal Aid Board from issuing legal aid certificates in particular categories of cases.[40] A mandatory system of *pro bono* work could plug some of those gaps. Perhaps more importantly for the legal profession, such a *pro bono* system would serve to put a gloss on its reputation. If the profession is to be credible when it criticises the *Scheme of Civil Legal Aid and Advice,* then it must be willing, on occasion, to throw off the cloak of the mercenary and bear the device of the indigent's champion upon its shield. As Mr. Justice Brennan pointed out only five years ago, "[i]n a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest."[41]

Conclusion

One of the fundamental tenets upon which our system of justice is built is that the law applies equally to all. Unfortunately, it remains the case that the law is not as accessible for many as it might ideally be. Indeed one can justifiably argue that many indigents

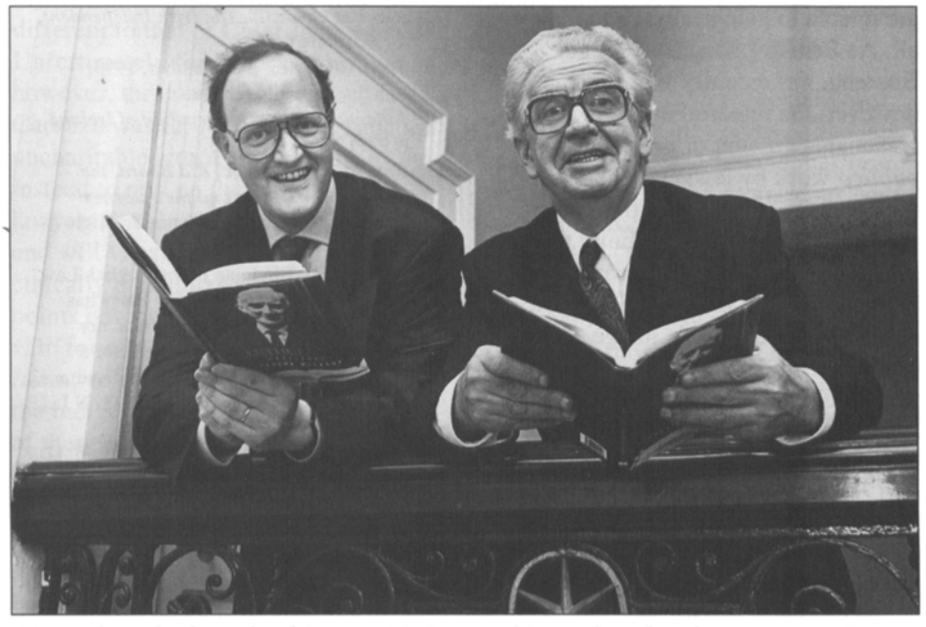
are unable to gain access to the law at all. As British Labour M.P., Paul Boateng, has recently suggested, however, the undertaking of a reasonable amount of *pro bono publico* work by lawyers would undoubtedly help to ease the problem.[42] Such an opportunity must surely be welcomed by a profession with what might most charitably be described as "a distinct image problem". The gauntlet has been thrown down by Boateng, Gaetke, Judge Vilhjalmsson *et al.* It remains to be seen whether or not the professions will rise to the challenge.[43]

References

1. *State v Green* 470 S.W.2d 571, 574 (Mo. 1971) (Seiler J. conçurring).
2. *Annual Report and Accounts of the Legal Aid Board, 1992,* (Dublin, 1994).
3. From £2,685,000 in 1992 to £3,206,000 in 1993. The Minister for Equality and Law Reform, Mervyn Taylor, T.D., announced earlier this year that the State's grant-in-aid to the Board will be increased yet again in 1994 (to £5,000,000). See column 1154, Dáil Debates, 23 March, 1994.
4. Twelve new solicitors and twenty-nine new support staff were recruited in 1993. See *Annual Report and Accounts of the Legal Aid Board, 1992, op. cit.,* at 2. The Minister has indicated that a further twenty-four solicitors and thirty-four support staff will be employed this year. See column 1155, Dáil Debates, 23 March, 1994.
5. *Annual Report and Accounts of the Legal Aid Board, 1992, op. cit.,* at 2. At page 10 the Report states that "the Minister amended the Scheme in September, 1993, to empower the Board to engage private practitioners to provide legal aid services. . . A pilot project for the involvement of private practitioners in the Scheme [in District Court barring, maintenance and custody proceedings] has been approved by the Minister and the Board's Grant-in-Aid for 1993 has been increased by £100,000 to fund this project."
6. Ten full-time and four part-time centres. Column 1154, Dáil Debates, 23 March, 1994.
7. See, *inter alia,* "Incoming Bar Council chairman slams state of the country's legal aid system", *The Sunday Press,* 8 August, 1993; "Barristers angry at legal aid plan", *The Irish Independent,* 19 August, 1993; "Big money for top 20 only, says Bar's new Chairman", *The Irish Times,* 2 September, 1993, and "Slow Justice", *The Irish Independent,* 2 September, 1993. See also "Bar Council urges review of civil legal aid scheme", *The Cork Examiner,* 9 November, 1993; "Review of legal aid system sought", *The Irish Times,* 9 November, 1993; "Bar Council fury at new Government cutback on legal aid", *The Irish Independent,* 9 November, 1993; "Barristers threaten to quit legal aid scheme", *Irish Press,* 9 November, 1993; "No legal aid cuts, Taylor tells Bar Council", *The Irish Independent,* 10 November, 1993.
8. *The Irish Times,* 2 September, 1993.
9. In a dissenting judgment.
10. *Johanna Airey v The Republic of Ireland* (1979) 2 E.H.R.R. 305.
11. *Cosgrove v The Legal Aid Board, the Minister for Justice and the Attorney General,* Unreported, Gannon J., High Court, 17 October, 1990.
12. As Geoffrey Bindman of the English Law Society's *Pro Bono* Working Party has pointed out, it is "neither realistic nor decent to rest content with pleas for a reversal of Government policy." Bindman, "Debtors to our profession", (1993) N.L.J. 1789, at 1789.
13. Henry J. Brown & Arthur L. Marriott, *ADR Principles and Practice,* (London, 1993), at 23.
14. 11 Hen. 7, c.12 (1495).
15. Punishments carried out under Cromwell's Barbones Parliament would appear to have been even more violent. See further, R. Egerton "Historical Aspects of Legal Aid" (1945) 61 L.Q.R. 89.
16. Chief Justice Holt did, however, observe that he had no officer to perform the task and that he had never seen it done (see M. Bacon *A New Abridgement of the Law* *812).
17. 1 Freeman 389, 89 Eng. Rep. 289 (King's Bench 1674).
18. T. Cooley *Constitutional Limitations,* (1868).
19. 346 F. 2d 633 (9th Cir. 1965), 382 U.S. 978 (1966).
20. Without distinguishing between civil and criminal cases, the court concluded from examining historical precedents that the obligation "to represent indigents upon court order, without compensation was well established in the traditions of the profession."
21. Handler, Hollingsworth, Erlanger & Ladinsky, "The Public Interest Activities of Private Practice Lawyers" 61 *A.B.A.J.* 1388 (1975).
22. Brian Harvey, "The Lawyer, the Vagabond, the Justice and the Beggar"; a seminar on Poverty and the Law organised by Coolock Community Law Centre, the Free legal Advice Centres and the Centre for the study of Family and Social Welfare Law, held in Trinity College Dublin on 19 November, 1988.
23. Eugene R. Gaetke "Lawyers as Officers of the Court" (1989) 42 *Vanderbilt Law Rev.* 39.
24. Steven B. Rosenfeld "Mandatory Pro Bono" (1981) 2 *Cardozo Law Rev.* 255.
25. For an excellent analysis of the historical origins of this view of the role of the lawyer see Rosenfeld *loc. cit.*
26. Cotton Mather, "Officials and Lawyers" in *Bonifacius, An Essay upon the Good,* (1710), (Cambridge, Mass., 1966), 120–131.
27. *Karlin v Culkin* 248 N.Y. at 470-71. See also *State v Rush* 46 N.J. 399, 410, 217 A.2d 441, 447 (1966) where Chief Justice Weintraub of the New Jersey Supreme Court stated that: "A lawyer does not owe free representation to any and every indigent who chooses to demand it of him. Rather the duty is owed to the Court, and it is the Court's call that he is obliged to answer. The duty is to assist the Court in the business before it. The duty thus is an incident of the licence to practice law. . ."
28. For a discussion of the role of the lawyer in the market see, generally, Gerard Quinn "The Right of Lawyers to Advertise in the Market for Legal Services: A Comparative Irish, American and European Perspective" (1992) 20 *Anglo-American Law Review 1.*
29. Schnapper "The Myth of Legal Ethics" (1978) 64 *A.B.A.J.* 202.
30. The American Bar Association's *Commission on the Evaluation of Professional Standards.*
31. At present, the A.B.A. recommends that lawyers provide fifty hours of voluntary services per year. *The Times,* 12 July, 1994.
32. A.B.A. Commission on Professionalism – *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism,* (1986).
33. *Ibid.* The recently published report of the English Law Society's *Pro Bono* Working Party also stops short of recommending the imposition on solicitors of mandatory *pro bono* work. See not only the Report of the Working Party, but also, for comment, (1994) *N.L.J.* 698, and *The Times,* 12 July, 1994.
34. Shapiro *op. cit.* See cases such as *Bradshaw v Ball* 487 S.W. 2d 294, 299-300 (Ky. 1972); *State v Green* 470 S.W. 2d 571, 573 (Mo. 1971); *Menin v Menin* 79 Misc. 2d 285, 293, 359, N.Y.S. 2d 721, 730 (Sup. Ct. 1974), aff'd, 48 A.D. 2d 985 (1975).
35. Rosenfeld *op. cit.* See also Tucker "The Private Lawyer and Public Responsibility" (1972) 51 *Nebraska L. Rev.* 367; Brennan "The Responsibilities of the Legal Profession" in *The Path of the Law from 1967,* (A. Sutherland, ed., 1968).
36. As argued by Gaetke *loc. cit.*
37. Other alternatives are suggested by Bindman, loc. cit., at 1790.
38. *Agersinger v Hamlin* (1972) 407 U.S. 25, 44.
39. Chief Justice Bhagwati, of the Indian Supreme Court, claimed that public interest litigation is "a highly effective weapon in the armoury of the law for dispensing social justice to the common man." *State of Himachal Pradesh v A Parent of a Student of Medical College, Simla* (1985) 3 S.C.C. 169, 176.
40. See Schedule A of the *Scheme of Civil Legal Aid and Advice.*
41. Per Brennan J. *Mallard v U.S. District Court for the Southern District of Iowa* (1989) 109 S. Ct. 1814. Emphasis added.
42. See *The Times,* 12 July, 1994.
43. This article originally formed part of a more extensive work dealing with matters relating to civil legal aid (a further extract from which can be found in the 1994 volume of the Irish Student Law Review; see Adrian F. Twomey, *Competition, Compassion, and Champerty: The Contingent Fee in Profile,* (1994) 4 *I.S.L.R.* 1). This part of that work benefited from the perceptive observations of Prof. Gerard Quinn, Anne Twomey and Sinéad McSweeney. The opinions expressed, however, are the author's own.

News from the Criminal Law Committee – Criminal Law Experience for Apprentices

Many apprentices work in offices where they cannot gain any experience of Criminal Law and its practice although they are very interested in this type of work. The Criminal Law Committee would therefore like to set up a panel of practitioners in all areas of the country who are prepared to allow suitable apprentices to work in their offices for a period of six to eight weeks to gain experience of Criminal Law.



Pictured at the launch of Eugene McCague's biography of Arthur Cox, are Eugene McCague and the Hon. Mr. Justice Liam Hamilton, Chief Justice. A review of the biography will be printed in the Gazette at a later date.

As the whole object is to enable the apprentice to work exclusively on Criminal Law for a period, only practitioners who have a substantial criminal practice should agree to go on the panel.

If you are willing to participate in this scheme, please write to *Patricia Casey*, Solicitor, Secretary to the Criminal Law Committee, The Law Society, Blackhall Place, Dublin 7. ❐

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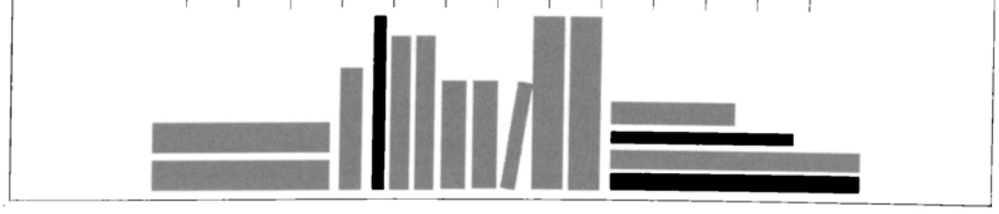

The Administration of Justice

By the Rt Hon The Lord Mackay of Clashfern. The Hamlyn Lectures, Stevens & Sons/Sweet & Maxwell, xii + 91 pp, 1994. Hardback, £16.95 sterling, paperback, £6.95 sterling.

As I write this notice, I have newspaper extracts from *The Times* for 1989 before me. I sensed at the time that the reportage was worth retaining. Lord Lane, then Lord Chief Justice of England and Wales, in *The Times* of February 16, 1989 was reporting as stating that Lord Chancellor Mackay's plan for overhauling the legal profession as set out in his Green Paper was "one of the most sinister documents ever to emanate from Government"; that the independence of both lawyers and judiciary was threatened and that independence was "the last bastion, between the citizen on the one hand and tyranny on the other".

One of Lord Mackay's "sinister" reforms was to end the barristers' monopoly of advocacy rights in the higher courts. Readers will remember that the barristers' monopoly in advocacy was removed in Ireland in 1971. The UK Bar retained Saatchi and Saatchi to assist their public relations team in their opposition to the proposal and sought to raise £1m from its members to cover the campaign. In effect, the Bar lost.

Lord Mackay, the only son of a railway signalman, a man of moral, legal and religious seriousness, the first member of the Scottish Bar to sit on the Woolsack, a judicial "outsider", a Christian who was excommunicated from the Scottish Free Presbyterian Church for having attended Requiem Mass for two former judicial colleagues, held firm on most of his reforms. Accordingly, it was with a sense of anticipation that I looked forward to reading *The Administration of Justice* based on the forty-fifth series of the Hamlyn Lectures. In four chapters, Lord Mackay examines four aspects associated with the administration of justice in the United Kingdom: the judges, the courts, legal services and alternative dispute resolution.

Lord Mackay is a pragmatist par excellence. This sense of pragmatism permeates his lecture series.As readers know, the Lord Chancellor is responsible for the administration of justice in the United Kingdom, and he is its most senior judge. The Lord Chancellor is President of the Supreme Court of England and Wales, has responsibility for the County Court, is entitled to preside if he sits on appeals in the House of Lords, is Speaker of the House of Lords and a senior member of the UK Cabinet. Remember Ireland was the "first adventure of the common law"; we share the common law inheritance, we cannot reverse history; accordingly, we should listen when a distinguished lawyer from our nearest neighbour speaks on matters of common concern to us.

What does the Lord Chancellor say? This is a subjective and selective consideration: good advocates can make bad judges and conversely; gifts bestowed on human beings are in different combinations and with different emphases; there is merit in an open system for the appointment of judges; the independence of the judiciary is rightly regarded as a key principle of the constitution; the solicitors' branch of the profession operates "under a fairly elaborate framework of statutory provisions" while the Bar operates with "very little in the way of statutory framework"; in due course, solicitors will become eligible to take silk as Queen's Counsel; and the development of alternative dispute resolution should be explored in the context of reducing the delay, cost and complexity of going to law.

In his lectures, Lord Mackay demonstrates no pretensions; no grandiose theoretical ideas about the administration of justice are expressed by him. His intention – in the spirit of the lecture series – was to add a little of the knowledge of "the so-called common people" about aspects of the administration of justice. He has succeeded admirably.

Dr Eamonn G Hall

Contempt of Court – A Law Reform Commission Report

September 1994, 81pp, softback, £10.

The Court rulings and the prosecution of the investigative Journalist *Susan O'Keeffe* arising out of the Beef Tribunal has made "Contempt of Court" a familiar term in every household in the land.

Deemed Contempt

In relation to Tribunal enquiries such as the Beef Tribunal the Commissioners recommend:-

> There should be no offence of contempt in the face of a Tribunal Enquiry, akin to contempt *in facie curiae*.
>
> Certification proceedings such as Section 10 (5) of the Companies Act 1990 should not be entertained in the future in bodies exercising *quasi* judicial functions.

If "deemed contempt" is not repealed, amending legislation should make it

clear that liability will accrue only when the act or omission (deemed to be contempt) was *intentional* or *reckless*. In relation to disclosure:-

"Legislation should provide that a person may only be required to disclose the source of information contained in a publication for which he or she is responsible, if it is established to the satisfaction of a Tribunal of Enquiry that disclosure is absolutely necessary for the purpose of the enquiry or to protect the constitutional rights of the other person".

The Policy Rationale of the Recommendations

In considering whether to replace the existing Common Law structure of contempt with a new statutory scheme, the Commissioners approach is to acknowledge first; under the Constitution judges are independent in the discharge of their functions. Second; justice is administered in public save in those special and exceptional cases permitted by law. Third; the constitutional right of freedom of expression and of communication of information.

Criminal Contempt

This comprises contempt in the face of the Court (*in facie curiae*); scandalising the Court; breaches of the *sub judice* Rule, and other interference with the administration of justice such as threatening a witness. Sentencing may under this heading be punitive as distinct from coercive, in civil contempt.

The Report recommends that the law in respect of contempt in the face of the Court (which is generally an act which cannot be undone) with the penalty of attachment should be retained without amendment.

T.V. in the Courtroom This subject impinges on privilege. The Report sees a need for change in media coverage of proceedings and advocates the establishment of an Advisory Committee to review the arrangements for and legal provisions relating to the recording and broadcasting of Court.

Scandalising the Court This offence should be defined by statute and consist of:-

(i) Imputing corrupt conduct to a Judge or Court.

(ii) Publishing to the public a false account of legal proceedings.

A person should be guilty of the offence only where he or she knew there was a substantial risk that the publication would bring the administration of justice into serious disrepute or was recklessly indifferent as to whether it would or not, and in the case of a publication of a false account, only where he or she intended to publish a false account or was recklessly indifferent as to whether it was false.

The truth of a communication should render it lawful.

Sub Judice

There should be a new statutory definition for prosecution purposes of what constitutes publication for breach of the Sub Judice rule. The offence would be confined to a *substantial risk* of prejudice to the procedure of justice. The over-riding considerations in this area are "serious prejudice" and "negligence" in relation to the publication.

There should be an express statutory defence to *sub judice* contempt for fair and accurate reports of proceedings in the Oireachtas published contemporaneously with, or within a reasonable time after, the proceedings. There should be no Oireachtas power to inhibit publication of any portion of the proceedings on the basis that it may offend against the sub judice rule.

Other Interferences

The Report recommends:

a prosecution should only lie where the impugned conduct creates a substantial risk of serious interference with the administration of justice; *mens rea* would require the elements of intention or recklessness. A new statutory offence should discourage threats or reprisals against a party to civil proceedings.

Civil Contempt

This arises from defiance of a Court Order. Imprisonment should be retained as a sanction in civil contempt and Fines should continue to have a role to play.

The offence should have the *mens rea* element of knowledge of risk of breaching or of intention to breach a Court Order.

Family

Contempt proceedings should continue to apply to family litigation.

District Court and Circuit Court

These Courts should have full jurisdiction in relation to criminal contempt. Fines should be subject to maximum sums.

Mode of Trial

The uncertainties in the law with respect to mode of trial for criminal contempt should be resolved by a future decision of the Supreme Court. There should be no change in the summary mode of trial for civil contempt.

Conclusion

I hope the above may give a flavour of the range and thrust of the report. In the long term many of the issues raised may be seen in the light of a Freedom of Information Act and a Citizens Charter of Rights – with possible constitutional changes required in the context of North/South relations. This is the 47th Report of the Law Reform Commission. It together with the erudite consultation paper which preceded it, are invaluable publications.

Franklin J. O'Sullivan

Credit Unions in Ireland

by Anthony P. Quinn M.A., B. Comm., B.L. Published by Oak Tree Press, Dublin, 163 pp. IR£9.95.

Credit Unions are now the fastest growing sector of the co-operative movement, having over 88 million members in 85 countries with savings of $433 billion. Introduced into Ireland on the basis of the model operating in the U.S.A., in 1958, by the following year there were three Credit Unions with 200 members and savings of £415. By the celebration of International Credit Union Day on 20th October, 1994, the publication date of this book, there were in Ireland 526 Credit Unions with 1,564,207 members and savings of £1.4 billion. In the person of *Gus Murray* (recently deceased), Ireland had achieved the Presidency of the World Council of Credit Unions, was engaged in the spread of the movement in Poland, the Gambia, Russia, Nepal and Britain. Under the auspices of University College Cork, a course in distance learning on the management of Credit Unions had been established, programmed to extend its operations to U.K. centres in 1995. A truly remarkable achievement for a small country.

The Credit Union movement is fortunate in having *Anthony Quinn* as the author of this Practical Guide Book in that he has a background in the co-operative movement, he worked in the Registry of Friendly Societies, the State office which registers and supervises Credit Unions, and practises at the Bar.

In the opening chapter Credit Unions are placed in context as part of the under co-operative movement in Europe, Canada and the U.S.A. Thereafter Credit Unions in Ireland and the many issues arising are placed in the context of the relevant legislation ranging from the Industrial and Provident Societies Acts, 1893 – 1978, the Credit Union Act, 1966, the Companies Acts 1963 – 1990 and the Consumer Credit Bill, 1994. The case is argued for the early introduction of a stand alone Credit Union Act, proposals for which have been under consideration in the former Department of Industry and Commerce and now in the Department of Enterprise and Employment, since the early 1970's. While accepting that the volume of necessary new company legislation is significant, it is hoped that the publication of the new Credit Union Bill will not be long delayed.

The book describes the key issues concerning Credit Unions with particular reference to the statutory requirements. Specifically the author comments on the legal basis, formation, finances, procedures, meetings, the unique method of supervision and control of Credit Unions. He also outlines in detail Credit Union members' rights and responsibilities under the rules and background legislation. Given that in Ireland Credit Unions are moving into the mature stage of their development, this is an area which will in the future, assume greater importance, particularly for those of the legal profession called upon to advise Credit Unions or their members.

The book concludes with a commentary on selected Credit Unions. That on the Lough Credit Union Ltd., Cork is particularly interesting on its efforts to counter the problem of money lending in its area of operation. These efforts received official support from the Minister for Social Welfare.

The rapid growth of the Credit Union movement in Ireland was due to the considerable voluntary effort over the year of its members drawn from all walks of society. Now there is a need for more active participation by young people, both men and women, to ensure the continuation of Credit Unions into the next century.

Concluding his comments on the future, the author stresses the likelihood of increasing competition from other financial institutions which will require a greater level of professionalism and expertise on the part of Credit Unions. The maintenance of a balance between the professional management and the energy of voluntary enthusiasts while fraught with tensions, will be essential.

Credit Unions in Ireland is an essential reference book for solicitors having a Credit Union as a client.

Jim Ivers ❐

THE IRISH SOCIETY FOR EUROPEAN LAW

Tuesday, 21 February 1995

at 6.30 pm in Room 5, Newman House, St. Stephen's Green, Dublin 2

"TOWARDS MULRANY 1996 – THE PRIMACY OF EU LAW"

Mr. Justice Ronan Keane

Fax Transmissions

Since the advent of facsimiles, there have been a number of articles published in the Gazette, one in particular dealing with the question of confidentiality. However, it would appear that the time is right for a further reminder to the profession that it seems caution should be taken with regard to dealing with a clients business by way of facsimile message.

What may not be a confidential matter for any of us may indeed be very confidential from the point of view of a client. People practising in each different area of law should stop and look at what might be confidential from their client's point of view and in those circumstances, should contact the client and get specific instructions that a facsimile message can be put through or otherwise as the case may be.

In an ideal world, I would strongly recommend that when taking initial instructions from a client, one would seek the written consent of the client that the matter be dealt with where necessary by way of facsimile message. Despite our best endeavours, we cannot overrule human error and if a member of our staff happens to send a facsimile message dealing with a client's business to a wrong number, albeit that it contains a disclaimer, it is my view that we are immediately exposed to a claim for breach of confidentiality.

If the client gives an instruction that the matter can be dealt with by way of facsimile message, he may very well have a specific fax number to which, he wishes the message to be sent. He may wish to utilise a "mailbox" facility on his fax machine. This enables the transmission to be stored in the receiving machine until a security code is keyed in. The relevant details could be written on the outside of the file or if the file has a sheet attached giving the name, address and phone number of the client, it could be inserted here.

Niall Casey, Chairman
Professional Purposes Committee

Employing Foreign Lawyers

Solicitors employing foreign lawyers as agents are personally liable for their fees.

The Professional Purposes Committee of the Law Society is very frequently asked to consider complaints from foreign lawyers, who have been employed by Irish solicitors as agents, but who have not been paid their fees. The Committee has no alternative but to direct immediate payment by the Irish solicitor, if necessary from his personal funds. The strict professional duty to pay such fees is clearly set out in the "Guide to Professional Conduct of Solicitors in Ireland":

. . . . "A solicitor who instructs a lawyer outside the jurisdiction is liable, personally, to pay all fees reasonably and properly incurred by that lawyer unless there has been an express agreement that such solicitor is not to be made personally liable".

This reflects the position as set out in the IBA International Code of Ethics and the CCBE Code of Conduct for Lawyers in the European Community.

Many Irish solicitors appear to engage foreign agents without first discussing fees. They presume that their foreign colleagues will not seek payment unless and until the Irish solicitor is in funds and, if necessary, will seek payment directly from the client.

A bill of costs can of course be challenged on the basis of the work not having been carried out, or the fees being excessive. However, Irish solicitors, frequently allow opportunities to question the bill to pass until it is too late.

If an Irish solicitor wishes to avoid personal liability for fees an express agreement in relation to the matter must be made when the agent is appointed.

Besides the matter of fees, solicitors should also ensure when an agent is appointed, that the foreign lawyer and the client understand that the Irish solicitor has no expertise in the foreign legal system and relies on the foreign lawyer to advise fully in relation to all matters, including the feasibility of the action being taken.

The circumstances of the case will not always require that a foreign agent is appointed. It may be perfectly satisfactory for clients to be directed to an embassy or other agency who will refer them to a lawyer in the particular jurisdiction and whom they will instruct directly. The relationship of an agent does not arise and personal liability for fees does not follow in that situation.

The difficulties arising for Irish solicitors were clearly demonstrated in a recent case where a foreign lawyer failed to advise that the Irish client would probably qualify for civil legal aid. He sent his bill of costs to the Irish solicitor. The bill was taxed, the Irish solicitor not having arranged to be represented at taxation. The foreign lawyer demanded payment from the solicitor personally. The solicitor was required to pay.

Niall Casey, Chairman
Professional Purposes Committee

English Agents: Agency work undertaken for Irish solicitors in both litigation and non-contentious matters – including legal aid. Fearon & Co., Solicitors, Westminster House, 12 The Broadway, Woking, Surrey GU21 5AU.
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An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a 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.

Published: 3 February 1995.

George Rogers, Folio: 1814F; Land: Haggardstown; Area: 7 perches. **Co. Louth.**

Thomas William Rehill, Folio: 7048; Land: Shanmullagh; Area: 42(a) 3(r) 5(p). **Co. Longford.**

John Fraher (Junior), Folio: 4367, 4389 and 4373; Land: Knockaunnacurraha and Ballynamuddagh. **Co. Limerick.**

Peter Conlon, Folio: 17006; Land: Moylough; Area: 3(r) 20(p). **Co. Monaghan.**

Daniel Lynch, Folio: 10751F; Land: Ballylynch; Area: 0.427 hectares. **Co. Tipperary.**

Kieran Brandon, Folio: 5420; Land: Behernagh; Area: 120 acres. **Co. Kings.**

William Joseph Fitzmaurice, Folio: 2775; Land: Tillaghna; Area: 36(a) 0(r) 10(p). **Co. Kerry.**

Peter Paul O'Reilly and Mary Josephine O'Reilly, Folio: 61L; Land: Demesne. **Co. Louth.**

Alan Harris, 15 St. Stephen's Green, Dublin 2. Folio: 51231; Area: (1) 1(a) 2(r) 21(p) (2) 3(a) 1(r) 0(p); Land: (1) Lackderg (2) Lackderg. **Co. Mayo.**

Richard Hourigan, Folio: 19342; Land: Waterpark; Area: 29(a) 1(r) 38(p). **Co. Limerick.**

Thomas Cavish, Rooghan, Kincon, Ballina, Co. Mayo. Folio: 10069; Townland: Rooghan; Area: 45.650 acres. **Co. Mayo.**

Thomas Kenny, Folio: 4500F and 7135F; Land: Straduff, Rathnageeragh and Knockendrane; Area: 14.08 acres with appurtenant mountain rights. **Co. Carlow.**

Vincent O'Shea, Carricknagat, Collooney, Co. Sligo. Folio: 14982; Townland: Carricknagat; Area: 3(a) 0(r) 20(p). **Co Sligo.**

Michael Westropp Studdert and Mary Lila Studdert, Dromellihy, Cooraclare, Co. Clare. Folio: 1825; Townland: Drumellihy (Cunningham); Area: 28(a) 3(r) 12(p). **Co. Clare.**

John O'Brien, Elm Park, Ennis Road, Limerick. Folio: 2290F; Townland: Moneennahliggin South; Area: 2(a) 1(r) 0(p). **Co. Clare.**

Johanna Dwyer, Folio: 2770; Land: Camus; Area: 46 acres. **Co. Tipperary.**

Eugene Coyle and Maureen Coyle, Folio: 8695F; Land: Mountain Lodge, Demesne; Area: 1.239 acres. **Co. Monaghan.**

Patrick Galavan, Folio: 2917. **Co. Wexford.**

Desmond Hillery, Spanish Point, Milltown Malbay, Co. Clare. Folio: 24137; Townland: Breaffy South; Area: 21(a) 1(r) 2(p). **Co. Clare.**

Florence Barry (deceased), 77 Domard Road, Drimnagh, Dublin 12. Folio: 15091F; Land: Property known as 77 Donard Road situate to the South of Mourne Road in the parish and district of Crumlin, **Co. Dublin.**

Desmond O'Shea and Catherine O'Shea, Folio: 4623F; Land: Balrask Old and Philpotstown. **Co. Meath.**

Ian Stanislas, Knocknacarrow, Cootehall, Co. Roscommon. Folio: 34752; Townland: Knocknacarrow. **Co. Roscommon.**

Bridget Kiernan, Folio: 747. **Co. Longford.**

Michael Fleming, Folio: 4634; Land: Townland of Ballycooleen (Part), Barony of Arklow and County of Wicklow. **Co. Wicklow.**

Wills

Gray, Mary, late of Ballydonfin, Glenbrien, Enniscorthy in the County of Wexford, widow, deceased. Would any person knowing the whereabouts of any will made by the above named deceased please contact Ensor O'Connor, Solicitors, 4 Court Street, Enniscorthy, Co. Wexford – Tel: 054 35611. Fax: 054 35234.

Galvin, John, late of 5 Chapel Avenue, Irishtown, Dublin 4. Would any person having knowledge of a will executed by the above named deceased, who died on 2 December 1994, please contact Thomas O'Reilly, Solicitors, Castleview House, Sandymount Green, Dublin 4. Tel: 668 7855, Fax: 668 7081.

Cumiskey, Cecilia, deceased late of 1 St. Laurence's Place, off Fontenoy Street, Dublin 7. Would any person having knowledge of a will executed by the above named deceased who died on 28 September 1994 please contact

Thomas Ryan & Co., Solicitors, 15 Baggot Road, Navan Road, Dublin 7. Tel: 868 1060, Fax: 868 1064.

Miscellaneous

Northern Ireland Agents for all contentious and non-contentious matters. Consultation in Dublin if required, reasonable rates. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry, Tel: 080 693 61616 Fax: 080 693 67712.

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VOL. 89 NO. 2

MARCH, 1995

LAW SOCIETY OF IRELAND

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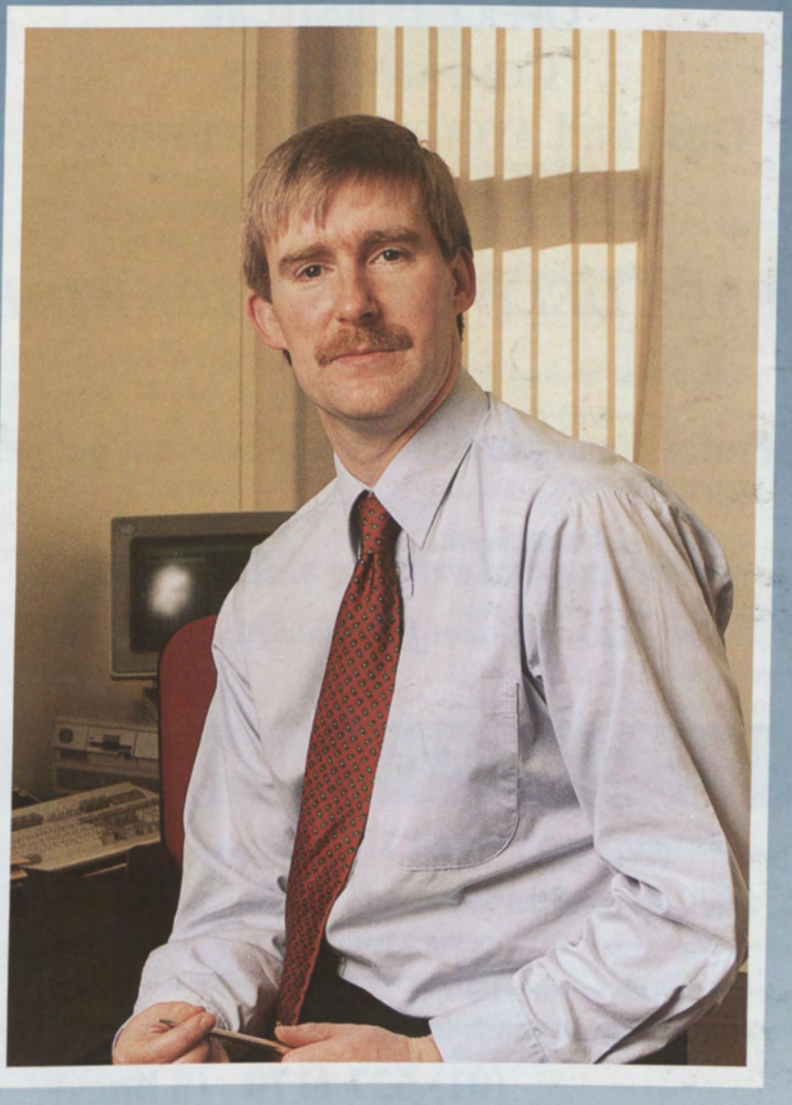

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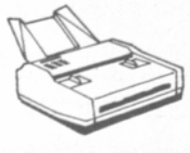

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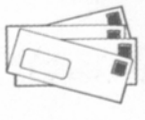

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Front cover: The new Director General of the Law Society, Mr. Ken Murphy. See profile, page 55.

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at 6.30 p.m. in Newman House, St. Stephen's Green, Dublin 2.

David O'Keeffe, a UCD Graduate, holds the Chair of European Law at University College London and teaches at a number of Universities on the Continent and in the United States. He is also a consultant with the international firm, Coudert Brothers. Professor O'Keeffe's talk will cover some of the major current issues in EU Law.

Membership of the Society is open to Lawyers and all others interested in European Law. Details may be obtained from the **Hon. Treasurer Ms. Anne Nagle, Solicitor, Solicitor's Office, Telecom Eireann, 52, Harcourt Street, Dublin 2. (Telephone: 671 4444, Telefax: 679 3980).**

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VIEWPOINT

Efficiency of our Court Procedures?

The efficiency of our own court procedures in the conduct of civil cases has been called into question by a practice direction formally handed down by the English High Court on 24 January 1995 ([1995] 1 All ER 385/87), which is summarised on page 81. The first two paragraphs of this practice direction reflect its objective, as follows:

> *"1. The paramount importance of reducing the cost and delay of civil litigation makes it necessary for judges sitting at first instance to assert greater control over the preparation for and conduct of hearings that has hitherto been customary. Failure by practitioners to conduct cases economically will be visited by appropriate orders for costs, including wasted costs orders.*
>
> *2. The court will accordingly exercise its discretion to limit: (a) discovery; (b) the length of oral submissions; (c) the time allowed for the examination and cross-examination of witnesses; (d) the issues on which it wishes to be addressed; and (e) reading aloud from documents and authorities."*

It is likely that our own High Court judges would concur with the above objectives. It, therefore, should become the urgent priority of our Superior Courts Rules Committee to examine critically this practice note and to incorporate it as appropriate into our own procedures.

The public are right in demanding that the delays now endemic in our courts system be eradicated. Lawyers rightly respond to that demand by calling for the appointment of more judges. However, part of the cause of delays, particularly in commercial cases in the High Court, is the uncritical facility provided at present by our Rules of Court to 'swamp' a case with documents (by means of discovery) without regard to what is really relevant to do justice between the parties.

Mr. Justice *Hugh Flaherty* of the Supreme Court, in recently addressing the efficiency of our courts system, observed:

> *"If the main objective of the courts is to dispense justice according to the law, it is a serious failing where this function becomes obstructed and hindered by delay and time consuming procedures. Litigants deserve, and are entitled to expect, an efficient expeditious justice system. . . The courts must be astute not to contribute to delays. In this respect it is ironic that pre-trial procedures which are meant to expedite proceedings very often contribute to the length and cost of litigation. For example, pre-trial discovery . . . seems almost to have become an end in itself . . . Judges must be on their guard to avoid becoming too concerned with procedural niceties at the expense of the merits of a particular case. Form should not reign supreme over substance. . . Of course, it is always necessary to have regard for the rules of natural justice such as 'audi alterem partem' and the need for justice not only being done but being seen to be done, but once these are given due recognition they must not be elevated to being the be-all-and-end-all of litigation. They are simply procedural rules which must be observed so that a correct decision is reached on the merits."*

Our rules of procedure should provide for formal judicial intervention at an early stage of civil proceedings in order to identify clearly the real issues and dispose of the issues that can be resolved by agreement. 'Case management' has become a new science, particularly in the USA and Canada, where the 'docket' system operates i.e. the allocation of a case at an early stage in the process to a particular judge who would deal with all interlocutory issues and who would be both entitled and required to seek to reduce the number of issues to be tried and the number of documents and witnesses required for the actual trial.

It may be that a part-solution lies in the appointment of more Masters of the High Court and similar quasi-judicial officials in the Circuit Court, who would be responsible, within specified time limits, for reviewing with the lawyers for the parties every case set down for hearing before being listed for actual hearing, with authority to make recommendations as to the agreement of issues e.g. medical evidence. Such a procedure could be coupled with a sanction that if such recommendations are not accepted that the trial judge could ultimately make a 'wasted costs' order against a party seen to have been unreasonable in that regard – analogous to the powers of the court under the existing lodgement process where an award of damages does not exceed the lodgement in court.

Our three court rule-making committees (for High/Supreme, Circuit and District Courts) responsible for initiating procedural improvements in our rules of court are each made up of judges, barristers and solicitors of considerable experience. It behoves them to constantly review the court procedures applied in other common law jurisdictions, particularly our neighbouring jurisdictions. If these committees were statutorily required to publish an annual report accounting for their year's work, the legal profession and the public at large would fairly be able to pass judgment on their efforts. In the absence of such accountability, those concerned with our court procedures can only be envious of others and critical of ours.

See page 59 of this Gazette for the Law Society response to the Review Working Group on the Circuit Courts.

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The New Director General

Ken Murphy's career to date has in many respects constituted an ideal preparation for the challenging role of Director General of the Law Society.

Over a decade on the Law Society Council has given him a sound understanding both of the Law Society and of the issues facing the profession. He has received the support of over 1,000 voters in each of the last three Council elections which suggests that he is in touch with the views of the Society's members, something crucial for a Director General.

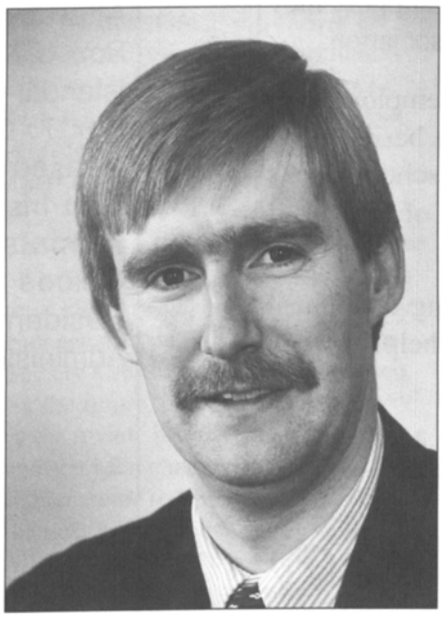
His background in a variety of practice areas, his feel for the media gained through years of writing in The Irish Times and elsewhere, his years in Brussels and his management and administration experience as a partner in a solicitors firm with a staff more than three times larger than the Law Society, will all be of use to him as Director General.

It seems appropriate that, after a break of some decades, a solicitor should, once again, be the Law Society's chief executive. It is fitting also, given the current age profile of the profession, that the Law Society should turn to a Director General in his thirties. It seems a reasonable assumption that, at 38, he has been appointed Director General at a considerably younger age than any of his predecessors.

Having been educated at Terenure College and University College Dublin, where he obtained an Honours BA in English and Philosophy in 1978, he qualified as a solicitor in 1981. He is married to *Yvonne Chapman* and they have three children, *Gavin* (4), *Charlotte* (3) and *Rebecca* (6 months).

Law Society Career

In November, 1994, *Ken Murphy* was elected to the Law Society Council for the eleventh time and was re-appointed



Ken Murphy, Director General

Chairman of the Education Committee. He was first elected to the Council in 1983 as one of the youngest ever Council members. Over the years, his Law Society committee membership has included Education, Education Advisory, EU and International Affairs, Younger Members and Justice Media Awards (all as Chairman) Registrars and Parliamentary (both as Vice-Chairman), together with Compensation Fund, Public Relations, Professional Purposes, Practice Management and Bar Liaison.

In 1993, he was the only Council member to serve on both the Compensation Fund Policy Review Committee and the Education Policy Review Committee.

As a Council member he was responsible for a number of initiatives including the Law Society stand at successive Brighter Homes Exhibitions and the Eurlegal supplement to the Gazette. He also initiated and has organised the Justice Media Awards for the last three years.

As a Committee member of the Society of Young Solicitors for a number of years he organised conferences in Windermere, Glasgow, Cork and Mullingar. In 1986-87, as Chairman of the SYS, he initiated and organised a joint conference of solicitors and barristers which was apparently the first ever to take place in the British Isles.

Professional Career

From 1978 to 1981 he served his solicitor's apprenticeship with Hickey Beauchamp Kirwan & O'Reilly. Following qualification he worked for a further 18 months with his former master, *John F. Buckley*, in the areas of conveyancing and landlord and tenant law.

In 1983 he joined the Litigation Department of A & L Goodbody and for the next five years dealt with a very wide variety of contentious matters involving all sizes of cases in all courts.

In 1988 he was chosen by his firm to go to Brussels to set up and run A & L Goodbody's office there. There are over 100 non-Belgian law firms with offices in Brussels and accordingly he was able to meet and get to know lawyers from many different countries, thereby gaining insights into the problems and changes underway in the legal profession internationally.

In the course of his four years in Brussels he advised Irish clients on a wide range of EU law matters, particularly on competition law. He also gained experience of lobbying which he can now put to use on behalf of the Law Society. During his years as a practitioner in Brussels and subsequently he wrote and lectured regularly in Ireland, Europe and the US on various legal subjects.

He was made a partner in A & L Goodbody in 1990 and returned to the

Continued on page 57

The Irish Kidney Association is the only national organisation working solely in the interest of patients with chronic kidney disease.

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Review of Law Society and Council – Opportunity for Change

The following resolution was passed at the Society's AGM in November 1994 and was subsequently adopted unanimously by the Council:-

(1) "That the Law Society do immediately set up an enquiry to:

(a) Examine the structure of the Council of the Law Society with the objective of better serving the solicitors' profession in modern Ireland:

(b) Examine the administration, finances and accounts of the the Law Society with the objective of better serving the solicitors' profession in modern Ireland;

and that the enquiry report to the half-yearly General Meeting to be held in Dublin."

(2) "That, as a matter of urgency, the Bye-Laws of the Society be amended, after examination, to suit the structure and administration of the Society in modern Ireland."

The Working Group established to conduct the review are *Donal Binchy* (Chairman), *Patrick O'Connor, Leo Mangan, Daire Murphy, Ken Murphy* (Director General), *John Shaw* and *Liam Young*.

The review provides an opportunity for all members of the profession to make their views known and to indicate any changes they would like to see in the Society's structure, role and direction for the future. In a sense, the objective of the review is to look at the Society and see what changes, if any, should be implemented to bring it through into the next millennium.

In particular, the Group would welcome any views on how the Council or Society could provide a better service to the members, more assistance in your daily practice as a solicitor, any comments or criticisms on the present structures and services and any expectations you have in relation to the President, Director General or officers. The Group would welcome forthright and hard-hitting but, hopefully, constructive views or suggestions on any of these matters.

The following are some specific areas upon which members might give their views:-

(a) the services provided by the Society
(b) the Society's representative role
(c) the Society's regulatory obligations
(d) public relations
(e) education and admission
(f) Continuing Legal Education
(g) the electoral procedures for the Council and its officers
(h) the number and size of Council Committees (see pages 9 – 11 of 1995 Law Directory)

Any views on the foregoing or any other matters affecting the profession will be most welcome and will be treated in the strictest confidence. The same should be sent to Mr. *Donal Binchy* (Ref: RWG), c/o The Law Society, Blackhall Place, Dublin 7, to arrive, if possible, not later than Monday, 10 April, 1995.

❐

The New DG

Continued from page 55

firm's Dublin office in 1992. Since then, he has practised in the commercial law department with a particular emphasis on EU and Irish competition law.

He will be well known to readers of *The Irish Times* for whom he has published dozens of articles over the years on a variety of legal topics. Business law articles by him have also appeared in Business & Finance, Irish Business and The Sunday Tribune as well as many specialist Irish and International legal journals. In addition he has experience of the broadcast media, on RTE's 'Marketplace' TV programme and last month representing the views of the profession on the 'Late Late Show.'

❐

At the opening of a new suite of offices for Ronan Daly Jermyn, Solicitors, Cork City were l-r: Frank Daly; Richard Bourke, President, Cork Chamber of Commerce; John Jermyn and Nicholas Comyn.

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Law Society Issues Response to Circuit Court Review Working Group

The following is the text of the Law Society response to the review of the Circuits:

1. The proposal adopted by the Circuit Courts Review Working Group emanates from a Group which did not include a representative from either branch of the legal profession. As the representative organisation of 80% of that profession, the Law Society regards it as regrettable that its views were not canvassed in advance of the production of the proposal which it was only recently asked to consider. Input from barristers and, in particular, solicitors at an earlier stage in the process would, in the Society's view, have had the dual benefit of:-

   (a) eliciting the views of those who have regular involvement with the Circuit Courts at local level and, consequently, experience of deficiencies in the existing system; and

   (b) producing proposals which would seek to achieve some consensus on possible solutions to the difficulties being encountered at Circuit Court level.

2. It has recently been intimated to the Society that, in addition to an intention to reduce costs, increase efficiency and minimise the number of venues, the primary consideration of the Working Group was to achieve "the reduction to manageable proportions of the ever-lengthening delays in all Circuit Court lists".

3. It is common cause that the current delays in the Circuit Court are unacceptable. However, the Society believes that the proposal under consideration does not present an effective solution to the problem. At the present time, there are eight Circuits, serving approximately 56 venues. The Working Group proposes to increase the number of Circuits from 8 to 10, but to reduce the number of venues drastically, from the existing 56 to 31. (In so doing, the Group appears to have omitted some venues from their review, e.g. Tipperary, Thurles, Bantry, Manorhamilton, Castleblayney.)

4. The proposal is stated to be based on "the statistical figures for the year 1993, the geographical locations of the various counties" and on a formula which seeks to identify the average time required for criminal trials, pleas and sentences. The time calculated as required for criminal matters is then deducted from an average 156 days per annum of Circuit Court time in each revised Circuit Court area, with the balance being allocated to civil matters and family law.

5. It is unclear how this exercise proves the case that the Circuits and venues should be altered in the manner proposed. There is no indication of how the existing delays will be eliminated by reducing the number of venues and, indeed, it would appear to involve a mere consolidation of the problem in fewer locations. No assessment appears to have been made of whether, for example, the hypothetical 116 days of Circuit Court time in Circuit No. 2 is sufficient to deal with 2,457 Civil Bills and 125 family law matters. Similarly, we are unaware of any analysis which would indicate that 120 days provides sufficient time to deal with 2,372 Civil Bills and 123 family law matters in Circuit No. 3.

6. The Society would submit that a geographical analysis, resulting in a reshuffle of Circuit Court areas and a reduction in venues, fails to address the fundamental problem underlying the delays in the Circuit Courts. In the Society's view, the problems at Circuit Court level related almost exclusively to the huge increase in the volume of work which the Circuit Court has had to deal with. This increase arises principally as a result of work assigned to the Circuit Court which was previously dealt with by other Courts, in addition to work arising as a result of the introduction of legislation and changes in the times in which we live. Amongst the areas of increased work now dealt with by the Circuit Court are the following:-

   (a) Family Law
   (b) Civil claims up to £30,000 (i.e. the vast majority of all personal injury litigation)
   (c) Disputes involving land where the PLV is less than £200 (i.e. the vast majority of land-related disputes)
   (d) Planning matters
   (e) Competition Law matters

7. Both Planning and Competition Law provide examples of areas of work now within the province of the Circuit Court which have developed only in recent years. The increased level of crime and criminal prosecutions has also increased the workload of the Circuit Court.

8. Notwithstanding the fact that a number of Circuit judges sit for very long hours in an attempt to stem the tide, backlogs are increasing. Due to the absence of immediate accessibility to justice, the Courts are perceived as ineffectual and the public's respect for the administration of justice is lessened. The proposal under consideration, by

concentrating the existing problems in fewer centres, will serve only to increase the perception of inaccessibility and remove the administration of justice further from the people whom it is designed to serve.

9. Any economic consideration on which the proposal is based is surely misconceived. The public pay for the cost of litigation and, clearly, the public must find it cheaper to litigate in their own locality rather than having to go further afield. The expense of transporting litigants, their witnesses (including Gardaí, doctors, engineers and lay witnesses) from local areas to a centralised venue can only serve to increase the cost of litigation. In bringing justice to the people in Circuit Court venues, the additional costs (payable by the State but, ultimately, by the public) are limited to travel expenses payable to the Circuit Court judges and upkeep of the Circuit Court buildings. Compared to the costs and gross inconvenience of transporting all parties to a litigation action to a centralised venue, any saving in travel expenses payable to Circuit Court judges must be minimal. The costs of maintaining courthouses exist whether or not the Circuit Court venues remain as at present as, in the vast majority of cases, these courthouses serve a dual purpose as a District Court or, in some cases, a community centre. While the Society would concede that there may be an element of cost in maintaining the existing Circuit Court arrangements, it would argue that justice should not suffer to achieve a minimum of expediency.

10. The Society acknowledges that there may well be certain limited venues which might be identified, in consultation with the local Bar Associations and local community interest groups, where the necessity for Circuit Court sittings might be discontinued. Those limited venues could only be identified following the fullest of consultation at local level. The Society has received submissions from local Bar Associations which detail the impact that the Working Group's proposals would have on those areas and these submissions have been furnished to the Working Group. On a social level, the Society also acknowledges the detrimental effects that the Working Group's proposal would have on the fabric of rural Ireland.

11. There is a constitutional perspective which, in the Society's view, casts doubt on the constitutional validity of the proposal under consideration. Article 34 of the Constitution provides, *inter alia*, as follows:-

    "The Courts of First Instance shall also include Courts of local and limited jurisdiction."

Article 34 has been interpreted as referring not only to the District Courts, but also to the Circuit Courts. That being so, it is doubtful that, should the Working Group's proposal be adopted, the Courts thus established could be deemed to be "local" within the meaning of Article 34.

12. The Society is very much in favour of finding a solution to the problems that exist in the Circuit Court. These problems exist due to the high volume of work and have little or no relationship to the geographical situation identified by the Working Group. The Society would assert that, in addressing the acknowledged difficulties at Circuit Court level, the Minister for Justice should:-

    (a) appoint a sufficient number of judges to deal with the volume of work; and

    (b) provide suitable facilities in the existing venues to enable the judiciary, the legal profession and Court staff carry out the work efficiently for the benefit of the public and the administration of justice generally.

❐

Compensation Fund Payments - January 1995

The following claim amount was admitted by the Compensation Fund Committee and approved for payment by the Council of the Law Society at its meeting in January 1995.

	IR£
Diarmuid Corrigan, 6 St. Agnes Road, Crumlin, Dublin 12.	2,889.00

Compensation Fund Payments - February 1995

The following claim amount was admitted by the Compensation Fund Committee and approved for payment by the Council at its meeting in February 1995.

	IR£
David Fitzpatrick 19 Main Street, Blackrock, Co. Dublin.	5,400.00

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Revision of Circuit Court Venues

The proposed closure of 18 Circuit Court venues featured strongly in the media during January (particularly in the provincial newspapers). The report which recommended these closures was drawn up by a Committee of five circuit court judges and five public officials under the chairmanship of the President of the Circuit Court, Mr. Justice Spain.

An article by Carol Coulter on the proposed closures was featured in the *Irish Times* on 14 January 1994. The article commenced on the front page with the headline 'Report Proposes the Closure of 18 Circuit Court Venues' and continued inside the newspaper. She stated: "This proposal is unlikely to find favour with either of the two organisations representing the legal profession. Although neither has yet prepared its responses to the document, spokesmen for both have expressed their misgivings." Paddy Glynn was quoted extensively in the article. He stated that: "the public is more likely to be inconvenienced than anyone else." He pointed out that joining certain counties together did not make sense. "Just because Clare is near Galway and Meath next to Westmeath does not mean that this is an ideal marriage" said Paddy Glynn. The article also referred to the fact that the condition of some circuit court venues had been the subject of concern and led to several civil legal actions over the years brought by local bar associations against the Minister for Justice.

The article continued, "The Law Society whose members are more directly affected has not yet drawn up its policy on the issue, because according to Mr. Glynn, it was not consulted at the outset, and is now asking its members about the proposals. They are likely to oppose at least some of the closures and criticise the proposed reorganisation of the circuits."

Many provincial papers carried articles criticising the proposed closure of the particular courthouse in their area.

It was reported in various provincial papers at the end of January that the Minister for Justice, Nora Owen has stated that the review of the Circuit Courts was not finalised. The Minister pointed out that the committee was still in the process of formulating its proposals. The Minister said "I have not seen the draft proposals being formulated by the committee. I am, however, looking forward to receiving the report. My Government is committed to ensuring that the courts system is organised in such a way as to give the best possible service to the public." The *Irish Independent* printed an article on 1 February headed 'Circuit Courts closure stirs up protest'.

The Law Society's response to the Working Review Group was issued on 15 February and a press release was issued 16 February 1995 to the *Cork Examiner*, provincial papers and local radio stations.

The *Cork Examiner* covered the Law Society's response under the heading: 'Law Society Criticises Review Plan'. The article stated: "The Law Society are calling for the appointment of a sufficient number of judges to deal with the volume of work and suitable facilities in the existing venues to enable the judiciary and the legal profession to carry out the work efficiently." The Law Society's response was also covered in a number of provincial papers.

Lawyers have their day!

Front page headline on *Sunday Independent* on 15 January stated 'It's no handicap being a proven lawyer'. The article reported the result of a survey carried out by the *Independent*. The results revealed that lawyers are held in higher regard than journalists. The survey from a sample of 200 respondents evenly distributed between city and country asked people to say who they considered most trustworthy: lawyer, politician or journalist. A whopping 60.5 per cent said they would place lawyers at the top of the list. Only 33.5 per cent chose journalists and a mere 6% chose politicians!

Parchment Ceremony

The parchment ceremony on 20 January at which 52 newly-qualified solicitors received their parchments was covered in the *Irish Independent* on Saturday 21 January. The headline stated 'Law Chief raps 5,500 – solicitor roll'. Paddy Glynn was reported as saying "there are too many solicitors in this country . . . too many for all to make a living." The article also stated "strongly defending the profession Mr. Glynn said the 1,200 complaints against solicitors dealt with last year 'has to be related to 5m legal transactions' The article also reported that "Mr. Glynn told the *Irish Independent* it was wrong that solicitors who represent 80 per cent of the country's lawyers, were still only allowed sit as judges in the district court."

The parchment ceremony was also covered in the *Irish Press* on 21 January. The report covered the content of the address made by Paddy Glynn at the ceremony. It stated "Mr. Glynn urged the newly qualified solicitors to communicate with their clients, to keep them informed of the progress of a case and in particular to explain any delay". "He also advised them to keep abreast of legal developments and to endeavour to establish and maintain up-to-date practice management systems."

'Family Law: a mystery to most'

A full page of the *Irish Times* was devoted to the problems encountered in the area of family law on 24 January. The main article by Carol

Coulter stated that "As the Government prepares for a divorce referendum later this year a body of legal practice on marriage breakdown has already grown up. But because of the 'in camera' rule concerning family law cases, few members of the public know what it is". Another piece was written by Kieran Conway and it reported on the worsening delays faced by lawyers and their clients in the family law area. An interview was also featured with a female litigant under the heading "I sat before every judge of the High Court." Carol Coulter stated "the breakdown of a marriage can lead to years of litigation concerning everything from the fate of the family home to education of children."

Appointment of new Director General

A press release was issued on the appointment of Ken Murphy as the new Director General on Thursday 26 January. The appointment was covered in the *Irish Times*, the *Irish Independent* and the *Irish Press* on 27 January.

A profile of Ken Murphy and comments from him were published in the *Sunday Business Post* on 29 January.

An interview with Fergus Black was published in the *Irish Independent* on 20 February. The headline read: 'Move on Courts Posts'. It was reported: "solicitors are to press for an end to the 'barristers only' practice which prevents them from being appointed as judges of higher courts". "It is a form of discrimination in that 80% of the legal profession have been prohibited from holding these judicial posts, posts which we feel eminently qualified to hold", the Society's new Director General, Ken Murphy, told the *Irish Independent.*

Court Delays

An interview given by Paddy Glynn on 30 January 1995 was reported in an article in the *Irish Independent* on 31 January 1995. The headline read 'More judges call as case delays run to 7 years'. The article commented "The head of the Law Society yesterday called for the number of Circuit Court and High Court judges to be doubled, saying the courts backlog was now so bad that it could take up to seven years to have some cases determined." Paddy Glynn referred to the fact that it takes up to three years for a case to be heard in the High Court in Dublin, Cork and Limerick and if there is an appeal to the Supreme Court the delay could be as long as seven years. The article stated "The Law Society has discussed the huge backlog with Justice Minister Nora Owen in a recent meeting, "I have no doubt that the commitment is there but will the courts get the priority as regards funding?" asked Mr. Glynn. "

The *Cork Evening Echo* printed an article on 31 January with the headline 'Court scandal as thousands wait'. The article contained the comments made by Paddy Glynn in the *Irish Independent* article of the same day. The article reported that "over 7,000 people are now on a waiting list to have their cases heard in the Cork Circuit Court."

'Capping'

An article by Frank O'Mahony, solicitor was published in the *Cork Examiner* on 27 January on the issue of 'capping' damages. The heading read 'Capping Damage Adds Insult to Injury'. This is a good article outlining the various arguments against 'capping'. The sub-heading reads "no longer is the test to be what is fair and reasonable but what the insurance industry can afford."

Employment Appeals Tribunal

In the *Evening Herald* on 30 January, it was reported that Labour Affairs Minister, Eithne Fitzgerald plans to make the EAT less legalistic. She made her announcement as she named the Chairman and members of the Tribunal in Dublin. The same report was carried in the *Cork Examiner* under the heading 'Minister frowns on formal gowns'. In the *Irish Times* of 2 February, Michael D. Murphy, President, DSBA responded to the criticism. It was reported "the solicitors are angry at a statement by the Minister of State for Labour Affairs, Ms. Eithne Fitzgerald that she hoped there would be less wigs and gowns in the new EAT". The DSBA called for legal aid to be available to people taking cases to the EAT.

A.G.'s Office set for major overhaul

An article bearing the headline above was printed in the *Cork Examiner* on 3 February. It was reported that "a major shake-up" of the AG's Office is to be ordered by the Cabinet following the findings of a confidential high-level report which has been presented to the Taoiseach, Mr. John Bruton.

Existence of Whiplash disputed by doctor

Dr. Paul Carson wrote an article for the *Irish Medical News* on 30 January 1995 on Whiplash. The article was headed 'Whiplash backlash'. With a sub-heading: "Whiplash injuries are resistant to all treatments except money." He stated that the condition was text-book in progress (not medical, but legal textbook). He stated that "the condition is not a medical problem but a legal one". This doctor was also interviewed on Gay Byrne *Radio 1* on 1 February. His arguments were very well rebutted by solicitor, Brian Spellman. A G.P. on the *Gay Byrne Radio Show* a few days later strongly argued that whiplash certainly does exist.

On 24 February, the *Late Late Show* featured a topic on solicitors and advertising and the "compensation culture". Gay Byrne interviewed John Schutte, Solicitor. The Law Society were asked to provide another solicitor to partake in the panel discussion. The panel was made up of Dr. Paul Carson, Frank Feely, Dublin City Manager and Geraldine Clarke, Council Member, The Law Society. There were also a number of solicitors in the audience. The discussion centred on the level of claims. The solicitors handled the arguments put forward very well and the discussion was quite balanced.

'Crackdown on rogue solicitors a success'

An article bearing the above headline was printed in the *Sunday Press* of 5 February by Howard Rose. The article stated "a crackdown on solicitors suspected of misusing clients' money has been a success". "The crackdown targeted solicitors thought to be acting illegally. The Society has used new powers under the 1994 Solicitors Amendment Act but its most effective sanction has been to demand audited accounts for each practice before renewing a licence to practise," it was reported.

Family Law reporting ban review

It was reported in the *Irish Independent* of 6 February that new moves to ease the blanket ban on reporting family law cases may be considered by the Equality and Law Reform Minister, Mervyn Taylor. It was reported that: "on foot of the High Court ruling in relation to incest cases, Mr. Taylor is said to be keen on hearing the views of lawyers and other groups on the ban on reporting family law cases. "

Civil Legal Aid

In the *Evening Herald* on 30 January in an article headed 'Taylor in £2m legal aid move' it was stated that Equality and Law Reform Minister, Mervyn Taylor is to spend £2m on a range of measures to improve family, legal and counselling services. The article also stated that within a matter of weeks, the Minister will place a Civil Legal Aid Bill before the Cabinet as part of a package of reform and legislation which the Government wants to have in place before holding a divorce referendum possibly mid-June.

In the *Irish Times* on 7 February it was reported that the Minister for Equality and Law Reform, Mr. Taylor has announced legislation which will make the civil legal aid service a full legal entity nearly 22 years after the European Court of Human Rights case which led to its establishment. Mr. Taylor also announced a 24% rise in the legal aid boards' funding this year, and the doubling of its staff over the past two years.

On 7 February the *Irish Press* printed an article headed "Divorce to boost need for legal aid". The report stated: "Minister for Equality and Law Reform, Mervyn Taylor yesterday predicted an upsurge in the demand for civil legal aid if a Divorce Referendum is successful. The *Cork Examiner* reported on 7 February that "if divorce is introduced here in this summer's proposed Referendum, the Legal Aid Board which operated a series of law centres around the country will have sufficient resources at its disposal to require free legal aid, Law Reform Minister Mervyn Taylor pledged yesterday." An article by Gerry Whyte of TCD analysed the proposed changes in the legal aid service in the *Irish Times* on 8 February.

'Judiciary not above criticism: top judge'

An article by Alan O'Keeffe in the *Sunday Independent* on 12 February stated that judges, like every other public official, should not be immune to criticism said Supreme Court Judge Hugh O'Flaherty last night. This was part of his address to the NUJ Conference in Dingle. He also spoke of the importance of freedom of expression and of the need for an efficient courts system: "it seems to be that trials are taking too long," he said. Judge O'Flaherty referring to the media and the libel laws, said there was a strong argument that money damages should be confined to intentional defamation and all defamation awards should have reasonable limits. The *Irish Times* reported the speech under the heading "Judge favours lower defamation awards".

Catherine Dolan

SADSI Elects New Auditor

The results of the election of Auditor of the 111th session of the Solicitors Apprentices Debating Society of Ireland were announced on 17 January.

The new Auditor is Mr. *Feargal Brennan* who, in a keenly contested race, narrowly defeated the other candidate, Mr. *Stewart Gilhooley*.

Mr. Brennan, an apprentice with *Gerrard Scallan & O'Brien, Solicitors* in Dublin, hails from Waterford. He has placed effective representation for all apprentices at the top of his agenda for the coming year. He hopes that he can contribute to an improvement in conditions generally for apprentices while at the same time enhancing the debating and social tradition of the society.

Indeed his year of office has kicked off to a good start. On Thursday, 16 February apprentices packed Blackhall Place for the first event of the year, the "Post Valentine Ball". Slightly less formal than the name might suggest, the event nonetheless was enjoyed by all in attendance and certainly augurs well for the coming year.

On the debating side of things SADSI has already this year had orators expounding on multivarious themes, in the Irish Times, Observer Mace and Trocaire/Global Development Forum debating competitions, and SADSI, in keeping with the long tradition of the society will also be represented in the forthcoming Irish Moot Court competition.

The Auditor certainly has a busy year ahead of him.

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LAWBRIEF

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The Government and the Legal System

The Government, composed of Fine Gael, Labour Party and Democratic Left, in its policy agreement *A Government of Renewal* December (1994) have pledged reform of many aspects of the legal system.

- A Commission on the management of the courts is to be established as an independent and permanent body, with financial and management autonomy.
- Measures to tackle the backlog of cases to be heard in all courts will be prepared in the context of the *Courts and Courts Officers Bill, 1994.*
- A National Bureau of Fraud Investigation is to be established with a professional staff to investigate allegations of serious corporate or organisational fraud, prosecute where necessary, report fully to the public, in an appropriate way, its findings and actions, with its Director appearing from time to time before relevant Dáil Committees.
- A fundamental reform of the Courts system from District to Supreme Court is to be undertaken.
- The Criminal Justice Code is to be modernised to take account of new methods of information gathering, judicial skills, use of video and audio equipment etc.
- A charter for the victims of crime which will include an immediate review of the Criminal Injuries Compensation system is to be prepared together with the establishment of a "Restitution Fund" to which offenders would contribute.
- An all-party Committee of the Oireachtas is to begin work in January 1996 to review the Constitution.
- A consumer Bill of Rights will be prepared to guarantee standards of service from semi-State companies.
- Consideration will be given to strengthening the Competition Authority by giving it enforcement powers and by enabling the courts to impose stiff fines on those engaged in unfair competition.
- The office of Attorney General is to be a full-time position.
- The feasibility of splitting the two roles of the Attorney-General – that of legal adviser to the Government and Ministers, and of upholding the public interest in the courts of justice – is to be examined.
- Freedom of Information legislation is to be enacted in 1995 to cover both central Government and the broad public sector.
- *An Administrative Procedures Act* is to be enacted which will vest in the Office of the Ombudsman monitoring and regulating functions including requirements on the form in which decisions are communicated dealing with the basis of the decision, the right of appeal, the right of access to the relevant information on the case and the right of a citizen to confer with officers making the decision concerning that citizen.

- The report of the "high-level" group carrying out the examination of the Attorney General's Office is to be published without delay. This report has been published.
- Measures will be introduced to improve the efficiency of the legislative process, including additional drafting resources in Government Departments and the Attorney General's Office and legal work is to be contracted out where appropriate and feasible.

This is an ambitious programme: some lawyers will be busy!

Bank Can Assume Solicitor Acted Properly

Sometimes solicitors consider that their duties and responsibilities cast an almost impossible burden on them. The duty of a solicitor, was considered by the Court of Appeal in the recent case of *Bank of Baroda v Rayarel and Others (The Times,* January 19, 1995); the decision of the court is pragmatic and has a practical significance for solicitors.

The Court of Appeal held that a bank dealing through a solicitor with a wife acting as surety for a loan to her husband could normally assume that the solicitor had properly advised the wife. The bank was not required to take any further steps to avoid being fixed with constructive notice of misrepresentation or undue influence by the husband to enable the wife to escape liability for the debt.

The case illustrates the cardinal importance, where there is the slightest possibility of a conflict of interest, of having a client confirm in writing that the effect of a document has been explained to him or her, and that he or she had the right to have independent legal advice on its effect, and (if appropriate) had waived that right.

A crucial factor in the case was that the charge document contained a statement or certificate that the mortgagor acknowledged receipt of the charge deed, to have been advised of its effect, and of the right to have independent legal advice. The certificate was signed separately by each of the defendants and was witnessed by the same solicitor. The court concluded that the bank was entitled to rely on the solicitor giving his client correct advice and that the matter was put beyond doubt by the statement endorsed on the mortgage and signed by the wife.

In a separate judgment, *Hoffmann LJ* said the bank's legal department was not required to commit the professional discourtesy of doubting whether the solicitor had actually given the required advice nor was it required to inform the solicitor of his professional duties.

The case illustrates the cardinal importance, where there is the slightest possibility of a conflict of interest, of having a client confirm in writing that the effect of a document has been explained to him or her, and that he or she had the right to have independent legal advice on its effect, and (if appropriate) had waived that right.

Nuisance: State Liable

There are occasions when lawyers are disappointed with the decision of a judge. Leaving aside any bias in favour of one's own client, there is, sometimes a genuine intellectual disillusionment with the decision of the judge: justice was not done. In those circumstances, we (lawyers) should comfort ourselves with the sentiment expressed by *Logan E Bleckley,* an American jurist, who observed that in court, "it is always probable that something improbable will happen" (*Warren v Purtell* 63 GA. 428, 430). We can expect too much from the judges. The celebrated Justice Oliver Wendell Holmes observed in *Truax v Corrigan* (257 US 312, 342, 1921); "Delusive exactness is a source of fallacy throughout the law."

Mrs Cregoria Lopez Ostra failed in all the domestic courts of Spain in relation to fumes causing health problems at a local plant for the treatment of liquid and solid waste. Justice was finally achieved in the European Court of Human Rights.

In a judgment delivered at Strasbourg on 9 December 1994 in the case of *Lopez Ostra v Spain,* the European Court of Human Rights held unanimously that there had been a violation of Article 8 of the European Convention on Human Rights (right to respect for private and family life and for the home) on account of nuisance caused to Mrs Lopez Ostra and her family by a plant for the treatment of liquid and solid waste sited a few metres from their home. Under Article 50 of the Convention, the Court awarded the applicant compensation for damage and a sum for costs and expenses.

In 1988 Mrs Gregoria Lopez Ostra, a Spanish national, lived with her family, a few hundred metres from the centre of Lorca. In July 1988, a plant for the treatment of liquid and solid waste from tanneries at Lorca, financed by a consortium of firms in the leather industry, began to operate a few metres from her home.

As soon as the plant started up, the fumes from it caused health problems and nuisance to many local people, including the applicant. This prompted the municipal authorities to evacuate people living near the plant and eventually, on 9 September 1988, in the light of expert opinions produced by the relevant authorities, to order partial cessation of its operations.

After returning to her home, the applicant continued to suffer health problems and noted a deterioration in the environment and the quality of life. She made an application to the local court seeking protection of her fundamental rights and alleging unlawful interference with her home and attacks on her physical and psychological integrity. In a report of 19 January 1989 the Environment and Nature Agency of the region recorded that nuisance was being caused. On 31 January 1989, the local court found against Mrs Lopez Ostra despite an opinion by Crown Counsel endorsing her application.

The applicant then lodged an appeal with the Supreme Court, which was dismissed. On 26 January 1990 the Constitutional Court held that an appeal she had lodged was manifestly ill-founded.

The European Court of Human Rights nevertheless considered that severe environmental pollution might affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their

health. At all events, regard must be had to the fair balance that had to be struck between the competing interests of the individual and of the community as a whole.

In the instant case, the waste-treatment plant in issue had been built to solve a serious pollution problem in Lorca but as soon as it had started up, it had caused nuisance and health problems to many local people.

The town council had reacted promptly by rehousing the residents affected, free of charge, in the town centre for the summer months, but its members could not have been unaware that the problems had continued after the partial cessation of the plant's operations on 9 September 1988. The Court noted that the municipal authorities had failed to take steps to protect the applicant's right to respect for her home and for her private and family life.

The Court accordingly held that, despite the margin of appreciation left to it, the respondent State had not succeeded in striking a fair balance between the interest of the town of Lorca's economic well-being (that of having a waste -treatment plant) and the applicant's effective enjoyment of her right to respect for her home and her private and family life. In the Court's unanimous opinion, there had accordingly been a violation of Article 8. (right to respect for private and family life and the home). The court awarded the applicant compensation for damage and a sum for costs and expenses.

CCBE UK Delegation Meet at the Law Society

The CCBE group photographed at the Law Society in January. From left to right (front row): Mr. Richard McCombe, Q.C.; Mr. Michael Irvine, Chairman of the Law Society's EU & International Affairs Committee; Mr. John Dowling, Director, Bar Council; Mr. Michael Deakin; Mr. Ian D. Dunbar; Ms. Suzanne Bryson; Mr. Matthew Clarke, Q.C.; Head of the U.K. Delegation; Mr. Patrick A. Glynn, President, Law Society; Mr. John Fish, Head of the Irish Delegation; Ms. Margaret Byrne, Irish Information Delegate. Back Row: Mr. Ken Murphy, Director General, Law Society; Mr. Eoghan Fitzsimons, S.C., Mr. Aidan Canavan, President, Law Society, Northern Ireland, Ms. Lindsay Paterson, Mr. Hamish Adamson, Ms. Fiona Woolf.

At the invitation of the Irish Delegation, the UK Delegation to the Council of the Bars and Law Societies of the European Community (CCBE) held its delegation meeting in Dublin on 30 January, 1995. Members of the Delegation attending represented the Bars and Law Societies of England and Wales, Scotland and the Law Society of Northern Ireland. The Members of the Irish Delegation attended as observers.

The main item on the agenda was the European Commission's recently published **draft directive on establishment of lawyers** in a Member State other than that in which they qualified. This proposal is the Commission's response to the CCBE's own model draft presented to the Commission two years ago.

Both Delegations are very concerned that it departs from the CCBE draft in two significant respects. Firstly, instead of allowing an unlimited right of establishment, it allows lawyers only a temporary right, for a period of five years, to practise under home title in the host Member State, after which time they will have to decide whether or not they wish to be admitted in the host Member State or cease practising there. Secondly, the provisions regarding automatic admission to the Bar of the host Member State after a three year period raise issues of competence, quality control and consumer protection.

Since this meeting CCBE Working Group meetings have been held to try and reach a compromise position on these issues.

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The Succession Act: S.117 and Life After Death

By John Mee, B.C.L., LL.M. (N.U.I.), LL.M. (Osgoode Hall), B.L.*

Introduction

When we die, the world will somehow pull itself together and struggle on. This unfortunate reality gives rise to an interesting legal issue concerning s.117 of the Succession Act. It will be recalled that this section provides a mechanism whereby the children of a testator may apply to court for increased provision from the estate. What is the relevance of events which take place after the death of the testator but prior to the hearing of such an application? To take an extreme example, could a court take into account the fact that one of the children of the testator, in perfect health at the date of the testator's death, has since become permanently disabled as a result of a car crash?[1]

This article will consider a number of recent High Court cases where this general issue was discussed. Before moving on to those cases, it will be helpful to quote the relevant part of s.117:

(1) Where, on application by or on behalf of a child of a testator, the court is of the opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, the court may order that such provision shall be made for the child out of the estate as the court thinks just.

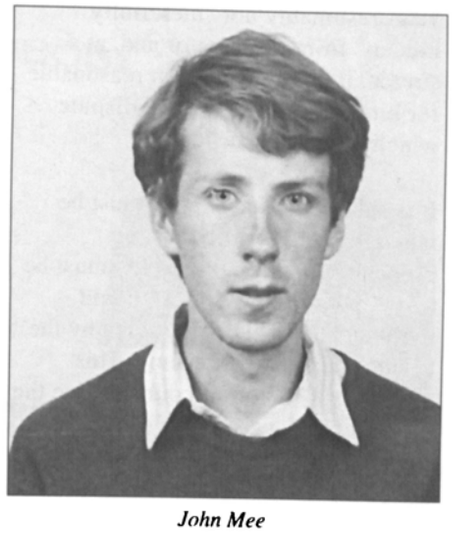
(2) The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.

As a further preliminary, it may be pointed out that in *Re G.M.*,[2] the first reported case on s.117, Kenny J. established two elementary propositions. First, the applicable test is an objective one and it is irrelevant whether or not the testator regarded himself as having made adequate provision. A corollary of this is that an application may succeed even if the behaviour of the testator was not blameworthy. He may have done his best to discharge his duty but may still, as a practical matter, have failed to make proper provision for his children. Secondly, Kenny J. pointed out that the date of death is the relevant time for assessing the question of failure in moral duty by a testator. It would be no answer to an application to demonstrate that, at the time it was made, a particular will made proper provision for the applicant.[3] Circumstances might well have changed after the making of a will and the duty created by s.117 extends to modifying testamentary provisions to ensure that they remain satisfactory.

At first glance, the approach in *Re G.M.* appears to preclude any attempt to consider events after the date of death. However, the Irish courts have displayed a certain degree of ingenuity in finding ways around this problem. The case law reveals three separate strategies which have been developed to justify taking into account events which have taken place between the death of the testator and the court hearing. These will now be considered in turn.

A. Foretelling the Future

In *Re N.S.M*[4], another early case, Kenny J. attributed to the testator a remarkable capacity to anticipate the future. The testator had given the residue of his large estate to his youngest son. However, as a result of



John Mee

estate duty and expensive litigation which followed the death of the testator, the value of the residuary gift had shrunk to nothing. Kenny J. held that:

> "The court must attribute to the testator on the day before his death knowledge of the amount of estate duty which will be payable on his estate and a remarkable capacity to anticipate the costs of the litigation which will follow his death. I realise that this is unreal, that the amount of estate duty payable is usually mercifully hidden from most testators and that it is impossible to anticipate what litigation will follow on death. I am convinced, however, that s.117 must be interpreted in this way."

Kenny J. offered no justification for his approach. On the face of it, it would seem unacceptable to depart from reality in the manner which he appeared to envisage.[5] However, it is possible to rationalise the decision on the basis that the "just and prudent parent" mentioned in s.117(2) would take account of reasonably foreseeable events. Thus, it seems clear that a reasonable parent would ascertain the tax consequences of his or her testamentary dispositions. In addition, certain kinds of litigation might be

foreseeable during the lifetime of the testator. Thus, in *N.S.M.*, the litigation had been triggered by the fact that there were two women claiming to be the testator's surviving spouse under Irish law. The fact that he had divorced and remarried in England was presumably not "mercifully hidden" from the testator and, at a stretch, it might have been reasonable for him to foresee the legal dispute which arose after his death.

It is submitted that *N.S.M.* must be taken to stand for the sensible proposition that future events must be taken into account if they should reasonably have been foreseen by the testator during his life-time. This reasoning will not, of course, solve the problem in all cases. The next two approaches to be considered offer a method of taking events after death into account despite the fact that they could not reasonably have been foreseen.

B. Reliance on S.117(2)

Reliance was placed on s.117(2) in *In the Goods of J.H.,deceased.*[4] *Barron J.* noted that the issue to be considered was whether the testator had failed in his moral duty. He conceded that at first sight it might appear that this duty had to be considered at the date of death. However, the learned judge argued that "the principles of fairness require every relevant consideration to be taken into account when the decision is being made."[7] He reasoned as follows:

> "[It] is the decision of the court on the hearing of the application which has to be fair. Such a decision would not, in my view, be fair if it disregarded a relevant factor merely because it occurred after the date of death of a testator.[8]"

Barron J. regarded any such factor as falling within the provisions of s.117(2) which require account to be taken of "any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children."

There had been an interval of over two years between the death of the testator and the date of the court hearing in *J.H., deceased.* Naturally over that time, the circumstances of the children had changed somewhat. One of them, a chef, had become unemployed; another had enjoyed increased success in his haulage business; and a third had been the victim of an assault which left her with "moderately severe facial injuries." Although his judgment does not indicate what precise weight Barron J. attributed to these issues, one presumes from his legal analysis that he took them into account in reaching the conclusion that there had been a breach in the moral duty owed to the applicant children.

In the subsequent case of *In the Estate of J.H. de B., deceased,*[9] Blayney J. quoted the relevant passage from the judgment of Barron J. in *J.H.*. Blayney J. agreed with and adopted "this very clear analysis of how subsection (2) of Section 117 should be construed."[10] On this basis, Blayney J. took into account the fact that two sisters of the plaintiff had made a claim under s.117 which had been compromised by the executor (another brother), thereby reducing the assets from which an order could have been made to provide for the plaintiff.

The difficulty with the approach in these two cases is that it appears to do violence to the words of s.117. The reference in subsection 2 to "other factors which the court may consider of assistance in arriving at a decision" is clearly conditioned by the fact that the decision in question relates to a failure in the moral duty mentioned in subsection 1. Unless the concept of moral duty is to be drained of all meaning, its fulfilment must be judged during the lifetime of the testator. Therefore it must be concluded, with all due respect to Barron and Blayney JJ., that the argument based on s.117(2) is unduly simplistic and ignores that subsection's context within s.117.

C. A Two-Stage Approach

Finally, it is proposed to examine the more subtle approach adopted by Carroll J. in *M.P.D. v M.D*[11] Carroll J. felt that the inquiry under s.117 should be approached in two stages. First, it was necessary to consider the question of failure in moral duty. This issue had to be determined with reference to the circumstances prevailing at the date of death. However, if such a failure in moral duty were established, one had to move on to the second stage of devising an order which made "just" provision for the applicant. At this second stage, the court was obliged to take into account the situation at the date of the hearing. On this basis, in *M.P.D.* Carroll J. would have been willing to take into account, in making provision for an applicant, the fact that the assets of the testator had doubled in value since the date of death.[12]

Under the general approach suggested by Carroll J., it would sometimes be possible to take into account unforeseeable events after the testator's death. Once the initial hurdle is surmounted of demonstrating that the testator has failed to some extent in his moral duty to provide for the applicant, it becomes possible in shaping the appropriate order to take account of all the circumstances at the date of the hearing, e.g. the consequences of a serious accident (or conversely the winning of a lottery) after the death of the testator. Presumably, if the developments after death were sufficiently serious, there would be a temptation for a court to find an initial breach of moral duty on relatively flimsy grounds in order to ensure a just result.

It is submitted that Carroll J.'s approach is consistent with the words of s.117 and provides an attractive, albeit limited, solution to the problem under discussion. Given the express mention of "moral duty" in s.117, it is surely impossible to conduct the entire inquiry on the basis of the facts in existence at the date of the hearing. On the other hand, it would be stultifying to insist that a court, in ordering provision for an admittedly deserving applicant, should ignore the circumstances prevailing at the time the order has to be devised. It is interesting to note that Carroll J.'s approach has a respectable pedigree, finding support in the decision of the High Court of Australia in *Coates v National Trustees Executors.*[13]

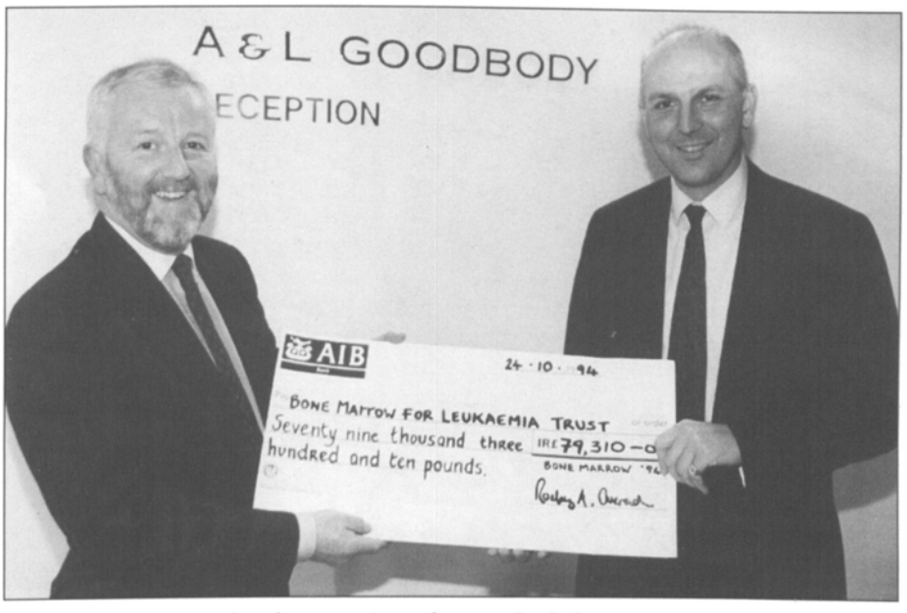
Continued on page 72

Obituaries

Rodney Overend – An Appreciation

Rodney's death came as a shock to all who knew him. Everyone was aware of the danger he was in but his courage, conviction and seemingly inexhaustible optimism was contagious. Talking to him about his leukemia was no hardship but rather a lesson in positive thinking. In many ways that latter description epitomised the type of person he was – thoroughly positive but with such charm and modesty that his determination often went unnoticed.

After finishing school at Glenalmond, Rodney read law at Trinity. He subscribed to the view that University life offered more than pure academia and he participated in many extra-curricular activities, most notably in sport where, as always, he excelled. He was apprenticed to Arthur Cox & Co. and within days of qualifying was diagnosed with leukemia. After many months, during which time his family and friends feared the worst, he made what appeared to be a complete recovery. Shortly afterwards he "returned home" to Goodbody's, the firm built up by his grandfather, his late Uncle George and his father, Brian. His cheerful manner, warmth, good humour and enthusiasm made him outstandingly popular with everyone within the firm.



The late Rodney Overend (right) presenting a cheque to Prof. Shaun McCann, funds which he raised for the Bone Marrow Leukaemia Trust.

Clients swore by him and his career encompassed some of the most demanding of commercial transactions. He also continued to display his sporting prowess, notably within Three Rock Rovers, Carrickmines Golf Club and on the cricket pitch. He married Maggie an exceptional wife and the arrival of Scott was just reward for the belief and positivity which had assisted him overcome his leukemia.

Unfortunately his recovery was not complete and he suffered a relapse in June 1993. This shocked all who knew him. However, as was typical, Rodney found time, whilst undergoing the most demanding of treatment, to raise very considerable sums for the Bone Marrow Leukemia Trust. Throughout his treatment at St. James' Hospital he demonstrated what an incredible person he was. He always had a welcome for those who visited him and remained convinced that his problems were only a set-back. Our sympathy and most wholehearted feelings go to Maggie, Scott, Brian, Mary, Jennifer and Rosie. Should any of us get to heaven, Rodney will surely be there.

JRO

Desmond Finbar Rooney – An Appreciation

Mr. *Desmond F. Rooney* who died recently in Galway was educated in Belvedere College and in University College Dublin where he obtained his B.A. and LL.B (Honours) Degree.

Having served his apprenticeship in Dublin he spent some years working in rural practice attaining general experience in practice and he subsequently set up practice on his own in Galway City where he had made his home having married Ms. *Sheila Henry,* M.C.S.P. of Sligo. There were six children of the marriage, two daughters *Aideen and Aoife,* and four sons, *Desmond Junior, Fergal, Niall* and *Robert.* Robert died while still a child.

All of the family except the youngest Aoifa (who graduated from University College Galway) followed their father into the practice of the Law. Aideen the eldest is now married and living in

Continued on page 72

Desmond F. Rooney

PEOPLE AND PLACES

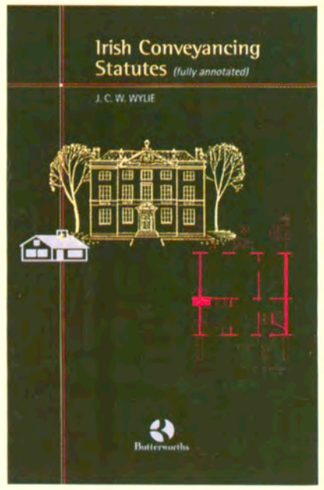
The Canadian Ambassador, Mr. Barry Mawhinney, who recently paid a visit to the Law Society, Blackhall Place, pictured with the President of the Law Society, Patrick Glynn (left) and Senior Vice-President, Andrew Smyth.

Patrick Glynn, President of the Law Society, presenting the trophy to Lawrence Kelly, owner of "Another Grouse", winner of the Holmes O'Malley Sexton Handicap Chase. Also pictured are Gordon Holmes, Managing Director, Holmes O'Malley Sexton (left); Mrs. Peg Kelly and John F. Hayes, Partner, Holmes O'Malley Sexton (right).

At the Dublin Solicitors Bar Association Annual Dinner were l-r: Patrick Glynn, President of the Law Society; The Hon. Mr. Liam Hamilton, Chief Justice; Nora Owen, Minister for Justice and Michael D. Murphy, President of the DSBA.

Pat O'Connor, then Junior Vice-President, Law Society who was admitted to the Roll of Solicitors in Northern Ireland pictured with Adrian Canavan, President of the Law Society of Northern Ireland (left) and Sir Brian Hutton, QC, the Lord Chief Justice.

342 YEARS 28 STATUTES



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At the Parchment Ceremony on 20 January, 1995 were Noelle Anne Curran and Maurice Curran, Past President, Law Society with their daughter, Sara, who was admitted to the Roll of Solicitors.

Desmond Finbar Rooney – An Appreciation

Continued from page 69

France. Desmond Junior is a solicitor in the office of Arthur O'Hagan & Co., in Dublin. Fergal is Chief Solicitor in the Legal Aid Office in Limerick and Niall is the County Registrar in Waterford. Desmond Rooney carried on an extensive practice for many years in Galway City where he was widely respected by his professional colleagues and was held in the highest of esteem by his many friends and clients whose interests were always his primary concern. He suffered greatly from ill health for many years and this resulted in his premature retirement from practice.

A love of the sea was one of the many reasons why Desmond Rooney made his home in Galway and in earlier years a favourite hobby was sailing and he spent many peaceful hours on Galway Bay. His love of sailing was inherited by his daughter Aideen. During the long years of his illness, Desmond was faithfully and lovingly cared for by his devoted wife Sheila who gave unsparingly of her time and herself and who was a great comfort to him during difficult times. He was very proud of her.

To Mrs. Rooney and her children goes our deepest sympathy.

Ar dheis dé go raibh a ainm dhílis.

J.H.

A new Law Centre was opened to the public by the Minister for Equality and Law Reform, Mr. Mervyn Taylor, T.D., at Upper Mount Street, Dublin on 2 February.

Photo shows the Minister, Mervyn Taylor, (right), viewing facilities at the new centre, with Frank Brady, Assistant Chief Executive, Ray Finucane, Solicitor in Charge, and Pierse Rayel, Chief Executive, Legal Aid Board. Law Clerk Rachel Ward was providing the information.

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The Succession Act: S.117 and Life After Death

Continued from page 68

Conclusion

The following conclusions may be drawn from the foregoing analysis:

1. It is appropriate to take into account events after death which were reasonably foreseeable within the testator's lifetime: *Re N.S.M.*[14].
2. Despite the views expressed in *Re J.H., deceased*[15] and *Re J.H. de B., deceased,*[16] it is not legitimate in assessing the question of failure of moral duty to consider unforeseeable events which take place after the death of the testator.
3. However, once a failure in moral duty has been established, it is permissible to consider the facts at the date of the hearing in determining what amounts to just provision for the applicant: *M.P.D. v M.D.*[17]

References:

1. Striking practical examples of circumstances changing after the testator's death are provided by the Australian cases of *In re Wheare* [1950] S.A.S.R. 61 (accident causing serious injury to applicant) and *Re Forsaith Dec'd* (1926) 26 S.R. (N.S.W.) 613; 43 W.N. 171 (married daughter deserted by her husband).
2. (1972) 106 I.L.T.R. 82.
3. See e.g. *C.C. and Ch. F. v. W.C. and T.C.* [1990] 2 I.R. 143, 149.
4. (1973) 107 I.L.T.R. 1.
5. Note the comments of Townley J. in the Australian case of *Re Browne Dec'd* [1952] Q.S.R. 47, 49-50: "To take into consideration changes in circumstances which could not have been foreseen by the testator would be to attribute to him not only wisdom and a sense of justice but also the gift of prophecy."
6. [1984] I.R. 599.
7. *Ibid.*, 607.
8. *Ibid.*
9. [1991] 2 I.R. 105.
10. *Ibid.*, 112.
11. [1981] I.L.R.M. 179, 188.
12. On the facts of the case, Carroll J. held that she was precluded from making an order by the fact that the relevant application was made outside the time-limit laid down in s.117(6), i.e. one year from the taking out of representation.
13. (1956) 95 C.L.R. 494. For recent confirmation of this approach in Australia, see *e.g.* the decision of the Full Court of the Supreme Court of South Australia in *Eckert v Starick* unreported, June 15 1994.
14. *Supra.*
15. *Supra.*
16. *Supra.*
17. *Supra.*

**John Mee is a Lecturer in Property and Equity Law, University College, Cork.*

The Law at Life's End *

Peter Charleton, Barrister and
Marguerite Bolger, Barrister

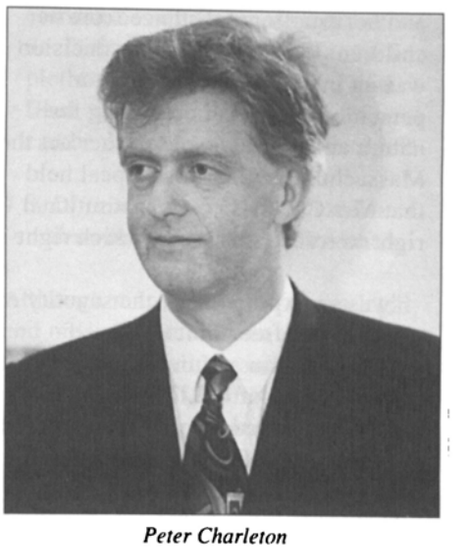
Part II

4. ADVANCE DIRECTIVES / LIVING WILLS

4.1 What is an Advance Directive?

An advance directive enables a person to dictate the medical procedures to be carried out on them, or not, in the event of their being incapable of directing such procedures themselves. It can be in the form of a document specifying exactly the person's wishes, usually known as a living will, or a power of attorney which empowers another person to act on the person's behalf. The most common specified request in such a directive is a DNR (Do Not Resuscitate) order declining CPR (Cardiopulmonary Resuscitation) in the event of heart failure. Sometimes a person might also decline life sustaining, as versus life saving, treatment such as force feeding or the treatment of infection. Whilst the former is largely accepted by the medical profession,[35] the latter poses some difficulties and a greater likelihood of litigation as can be clearly seen from the relevant American caselaw discussed earlier. It is estimated that some 15% of the North American population have drawn up living wills, although only half of those people have discussed them with their families.[36] The Federal US Patients Self-Determination Act of 1990 also obliges the physicians of patients under the Medicare scheme to inform them, in writing at the time of admission, of their right to draw up a living will, and many hospitals in America (and Canada) fulfil their obligations by giving their patients a booklet which gives a significant amount of detail on advance directives, and even sample documents.[37]

Marguerite Bolger



Peter Charleton

4.2 Advance Directives in Irish Hospitals

In the Irish context there has been little discussion of the legal validity of such documents and no judicial intervention in the area. Whilst this is probably as it should be, as the courts may not be the appropriate place to resolve the agonising personal problems underlying such cases,[38] unless clear guidelines on the legal status of such documents are forthcoming the courts may be forced to assume medical roles for which they are poorly suited.[39] Presently, the prevalent attitude amongst Irish patients and their relatives tends to be "doctor knows best", and advance directives are virtually unheard of, with any DNR orders that do exist being purely medical decisions with no patient input. However, this was also the attitude in America until the 1960s and '70s but more recent times have seen a distancing between patient and physician and a greater difficulty in defining 'family'. This, according to one American writer, is what has necessitated advance directives.[40] There is no reason to think that Ireland can remain immune to similar developments. Thus it is important to examine the possible difficulties with the legality and enforceability of living wills and their treatment in the UK and North American courts where doctors have been prosecuted for terminating life support measures[41] or for administering a drug the only effect of which could be to stop the patient's heart[42] and where families have been forced to go to court in order to cease life support for a vegetative patient[43] or to attempt to discontinue tube force feeding.[44]

4.3 Issues emerging in Litigation

It is clear from the caselaw that many of the problems leading to litigation arise from the fear of the medical profession of withdrawing or declining treatment, thereby handing over the life or death decision to the judiciary.

> "In an absurdity of absurdities, patients and relatives have to fight both for an entrance to and exit from the health care system... The medical system has been bypassed, and courts and legislatures have stepped in to try to put patients and relatives in charge of what is now often mere chaos."[45]

Whilst much of the caselaw concerns efforts by relatives to discontinue treatment on a patient for whom there is no clear written evidence of his

wishes, even competent patients have had to go to court in order to decline life saving treatment. In *Lane v Cadura*[46] Mrs Cadura refused consent for an amputation operation necessary to save her life because she welcomed death due to her age, her widowhood and her emotional distance from her children. In holding that her decision was an informed one made by a person capable of appreciating the nature and consequences of her act the Massachusetts Court of Appeal held that Mrs Cadura had a constitutional right to refuse treatment, which right

> "was an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by failure to allow a competent human being the right of choice."

This right to self-determination would also appear to exist in UK law. Arguably there is a general principle that, as consent makes a touching lawful, if a patient withholds consent and refuses to be touched by a doctor, any further touching will be unlawful and give rise to civil and criminal liability.[47] Professor Glanville Williams has written:

> "Some doctors seem to fail to realise that if an adult patient has positively forbidden particular treatment, they act illegally if they administer it, and could be prosecuted for assault."[48]

However, it has been argued that in conflict with the principles of self determination that allows a patient to withhold consent, is the possible paternalism of the medical profession which continues treatment on the basis that the patient's views are unreliable and the treatment is necessary. This may allow the defence of necessity to a charge of assault[49], aiding and abetting a suicide[50] or of neglect[51]. The resolution of this conflict in Irish hospitals appears to be by the use of the principle of rational consent, that a patient's wishes are followed once they are competent and have been given all the relevant information necessary to make a decision. A good example of this in practice, albeit in the UK, was the importance attached to the personal automony of the H-Block hunger strikers, even in the face of possibly serious political repercussions.[52] Hunger strikes are not unknown in Ireland. Most of them have evolved from issues in litigation over land where the loosing party is committed to prison for contempt of court. The current practice is to have the patient psychiatrically examined. If they are competent, the choice of the patient is respected.[53]

4.4 Can comments made in the past constitute an Advance Directive?

What of the situation where a patient is incapable, through incompetence, of expressing their wishes? Possible comments by them in the past may be accepted as an advance directive, but some American cases show that a very high degree of proof will be required to permit their family to refuse life sustaining treatment on their behalf. In both *O'Connor* and *Cruzan*[54] the patients were being tube fed. Whilst O'Connor was in a vegetative state, Cruzan did respond but not always consistently or appropriately. In both cases family and friends gave evidence of statements made by the patients to the effect that they would not want to go on living if they could not do so independently. These statements were not accepted by the courts as sufficiently clear or convincing evidence of the patient's refusal to be treated and in both cases the court ordered the wishes of the families to be ignored and tube feeding continued.

The result of the decisions is that the American courts will require exacting evidence that a patient would refuse treatment, while accepting unquestioningly the mere possibility that the patient would want treatment[55]. The decisions have been criticised for promoting the imposition of treatments that are neither beneficial nor wanted and for failing to consider the quality of life of incompetent patients.[56] In addition, requiring such clear instructions from a patient without any flexible intervention by their family might not, in fact, accord with their wishes. One survey amongst dialysis patients who had drawn up living wills showed that the majority wished their family to have some leeway in departing from the exact terms of their instructions.[57] That research would appear to indicate that, rather than the specific instructions of the patient relating to what treatment they would not wish to accept, the fundamentally important element of a living will is the factors the patient would wish to be taken into account in deciding whether or not to discontinue treatment.

4.5 Possible Procedures for Resolution of a Conflict over Chosen Death

In contrast to *O'Connor* and *Cruzan* the Supreme Court of New Jersey in the *Quinlan* case[58] held that both competent and incompetent terminally ill patients have a constitutional right to decline life support systems, the exercise of which did not involve any breach of criminal law by either patient or physician. The court established a procedure by which an incompetent patient, such as was involved in the case, could make that decision. The patient's father was appointed guardian and the court declared that discontinuance would be lawful if (a) he agreed, (b) the attending physicians concluded that there was no reasonable prospect of her emerging into a cognitive and sapient state and recommended discontinuance and (c) the hospital's ethics committee agreed.

Although the court in *Quinlan's* case specifically held that its judgment did not mean that in future cases there should be an application to the court to authorise discontinuance, a difference of opinion has emerged in the American courts on this issue.[59] A Massachusetts[60] and New York[61] court have both rejected the approach taken in the *Quinlan* case in holding that decisions on withholding treatment from incompetent patients must reside with the judicial process alone. However, as discussed earlier, whether the judiciary is properly equipped to make such decisions is questionable. Certainly, in the light of current Irish medical practice, it is highly unlikely

that such an application would be made to an Irish court as there is a lengthy *medical* procedure which is followed prior to a ventilator being switched off, including counselling of the relatives.[62] In the UK, pending the full development of legal rules by Parliament or by the judges, the appropriate procedure in the case of a patient in a persistent vegetative state, is for the hospital to seek a declaration that the discontinuance of care is lawful.[63] Under correct UK medical practice, likely to be mirrored in Ireland, there are four safeguards to be fulfiled before such an application is even considered: (1) every effort should be made at rehabilitation for at least six weeks after injury; (2) the diagnosis of irreversible PSV should not be considered confirmed until at least twelve months after the injury, with the effect that any decision to withhold life-preserving treatment will be delayed for that period; (3) the diagnosis should be agreed by at least two independent doctors; and (4) generally, the wishes of the patients immediate family will be given great weight.[64]

4.6 The Usefulness of Legal Rules

From this it can be seen that the life/death decision to be made is a medical decision subject to approval in some cases.[65] While this may change in the future, as it did in the US during the 1980s as discussed above, there is some recent indication in US jurisprudence that the sole requirement for doctors to remain within the law is that of good faith.[66] This suggests a move towards the practice of Irish doctors, which has been welcomed by the American medical profession.[67] The greater discretion enjoyed by the medical professionals in the absence of the constraints of law was discussed by Mason and McCall-Smith in the context of a criticism of US 'Allow to Die' legislation:

> "It has been well argued that such state control may be counter productive and operate against the patient's best interest.[68] Certainly, any law must be difficult to apply; the treatment of the terminally ill is so inextricably a matter of medical practice and clinical decision that it is probably better left that way. The growth of the hospice movement is likely to have a profound influence on attitudes."[69]

4.7 A Possible Statutory Framework for Advance Directives

The UK Law Commission published a consultation paper On Mental Incapacity and Medical Treatment in 1993. Presently, in that jurisdiction the courts can actively consent to a withdrawal of treatment using the 'best interests' criterion where the patient is a minor, is insensate or is a Ward of Court. Whilst the general practice of the medical profession has been to apply such a criterion in all cases, the paper points out that where there were disputes doctors were left feeling vulnerable and insecure and increasingly have sought protection and general guidance from the courts as to the legality of certain medical procedures, particularly the stopping of treatment where death would follow. The common law has been limited to declaring treatment legal in individual cases and issuing general guidelines. The question is:

> "How does one legislate for a range of contingencies without restricting them, or avoid creating the need for expensive recurrent applications to the courts or some other designated body for approval of individual treatments?"[70]

The Consultation Paper suggests the creation of a statutory framework that provides for tiers of empowered decision-makers with a judicial forum at its head for difficult cases. There is also a suggested obligation to consult the nearest relative or some other designated person in reaching a best interests decision. Most importantly, the Commission positively supports the introduction of "advance directives". The Lancet, whilst welcoming those suggestions, entered a note of caution:

> "While there is much of value in these proposals, will the proposed new comprehensive statutory framework be an improvement in practice? There is a need for recognition of advance directives and to invest persons or courts with the powers to consent and advise in individual cases, but great care must be taken not to erect an elaborate bureaucracy, with expensive managers of medical affairs, with committees of designated, dithering decision-makers, and with a plethora of forms to be filled and filed, all before a useful treatment can be offered or validly refused."[71]

4.8 Difficulties to be considered in drawing up Advance Directives

Although many members of the legal and medical professions have called for proper guidelines and guarantees on the legality of living wills, there are a number of potential difficulties which ought to be considered.

1. There is an obvious need for a patient to discuss their instructions with their doctor and possibly with their family or other person whom they wish to designate as a surrogate decision-maker. Research has shown that, whilst many patients would welcome such an opportunity, few actually obtain it.[72] This can lead to a decision being improperly documented leading to inappropriate resuscitation and the non-designation of patients who should not be resuscitated, as was found in one UK hospital.[73]

2. In discussions between the patient and their doctor, it is vital that the patient be made aware of the realities of CPR and the chances of survival[74] as it has been suggested that there is inadequate information given to patients on CPR, which results in many patients having unreal expectations of it.[75]

3. Even where the chosen surrogate decision-maker is someone very close to the patient, research has shown that their judgements may not coincide with the wishes of the patient.[76] One can only conclude that a surrogate, even where designated by the patient, can not necessarily have an absolute right to decide on withholding treatment without consultation with others.

4. Neither can it be assumed that a doctor can make a decision alone as it would seem that they are more willing than either family or patients to withdraw treatment.[77] It has been suggested that fit young doctors do not appreciate the positive aspects of apparently less independent elderly patients.[78] Most disturbing of all is an indication of a high degree of willingness on the part of the medical profession to ignore living wills altogether, in one international study 40% of doctors said they would have treated the patient in a manner inconsistent with their stated requests.[79]

In consideration of these limitations and difficulties of living wills, it may be that some form of judicial forum could serve a purpose in balancing the rights, the needs and the concerns of patient, family and doctor. However even in spite of inevitable difficulties, there is evidence to show the benefits in practice of living wills.[80] This must suggest a greater move towards the medical attitudes envisaged by Kjellstrand:

> "Physicians need to teach themselves to recognise better the shadow lines between prolonging life and prolonging dying and to understand that death should be a human act of dignity and not a prolonged mechanical failure that can be fixed with even more technology."[81]

5. CONCLUSIONS

People should not be kept alive against their wishes except where that wish conflicts with obvious prospects for recovery. Recovery should be effected where it is reasonably possible in the context of a return to something approaching health. To do otherwise tends towards the doctor allowing himself to be the instrument of fulfiling a death wish. As in nature, as prospects for recovery diminish, either by reason of age or illness, less extreme steps are required to fulfil the duty to protect life. There comes a point at which the course of nature will be so deflected and the obvious and common sense right of a person to die in peace will be so intruded upon, that further treatment constitutes in itself a wrongful act, an offence against life itself. In approaching the problems associated with those too ill to exercise autonomy the principles of asking what treatment, or lack of it, is in the patients' best interests offers at least a challenge to humility. It seems senseless, and perhaps is also legally wrong, to continue treatment on an insensate patient where no rational autonomous being would chose life-prolonging measures. In that context biological life is not all, stripped as it is of all the attributes of consciousness and of dignity.

The problem is that neither patients, their next of kin, lawyers or legislatures can be guaranteed to have perfect wisdom. Whatever way the problems are worked out one hopes that the current practical attitude of the majority of the medical profession in Ireland will not be intruded upon by those with less knowledge. It is to be hoped that Irish lawyers do not show the same enthusiasm as their American colleagues for venturing into the area of life-end, as, to quote *George Elliot:*

> "Legal training only makes a man more incompetent in questions that require knowledge of another kind".[82]

This paper was originally prepared by both authors for delivery by the first author at an international conference presented by the Department of Age Related Health Care and Cardiology at the Meath-Adelaide Hospitals on Saturday the 11 June 1994. The paper was then extensively revised by the second author. Part I was published in the Jan/Feb 1995 issue at P.29

References

35. The March 1993 bulletin of the British Medical Association and the Royal College of Nursing indicates that it is appropriate to consider a DNR decision in the following circumstances: (a) Where the patient's condition indicates that effective CPR is unlikely to be successful. (b) Where CPR is not in accord with the recorded, sustained wishes of the patient who is mentally competent. (c) Where successful CPR is likely to be followed by a length and quality of life which would not be acceptable to the patient.
36. Torian et al 'Decisions for and against Resuscitation in an Acute Geriatric Medical Unit' 152 (1992) *Arch. Intern. Med.* 561.
37. A common such booklet distributed in Canadian hospitals is Molloy and Mepham 'Let Me Decide' (1989) which, in its 46 pages, contains clear explanations of treatment options, convenient pull-out forms and a completed sample Directive.
38. *In re Jobes* 529 A.2d 434(N.J. 1987).
39. Relman A.S. 'The Saikewicz decision: judges as physicians' *N Engl J Med* 298 (1978) 508.
40. Dr. Rothman, writing in the June 1987 edition of 'Neurology'; cited in Costello J. *loc. cit.*
41. *Barber v Superior Court of Los Angeles County* 147 Cal App. 3d 1006; 47 ALR 4th I.
42. *R v Cox*, see The Independent, 10 September 1992; *R v Adams* [1967] Crim. L.R. 365.
43. *In the matter of Karen Quinlan* (NJ) 355 A2d 647; 97 ALR 3d 205.
44. *In re O'Connor* 72 N.Y. 2d 517, 531 N.E. 2d 607, 534 N.Y.S. 2d 886 (1988); *Cruzan v Harmon* 760 S.W. 2d 408 (1988).
45. Kjellstrand C.M. 'Who Should Decide About Your Death?' *JAMA* 267(1992)103.
46. Mass App 376 NE2d 1232; 93 ALR 3d 59.
47. Kennedy I 'The Legal Effect of Requests by the Terminally ill and Aged not to receive further Treatment from Doctors' [1976] *Crim. L.R.* 217. See *Airedale NHS Trust v Bland* [1993] 1 All E.R. 821 at 860 and *F v West Berkshire Health Authority* [1989] 2 All E.R. 545.
48. Williams, 'Euthanasia' 41 *Medico-legal Journal* 14, 24.
49. Kennedy I. *loc. cit.* at 221-223 where he says this undermines the patient's self-determination, which is the last right remaining for the terminally ill or the aged.
50. *Suicide Act* 1961 section 2.
51. *Istan* [1893] 1 Q.B. 450. Both possibilities are dismissed by Kennedy, *loc. cit.*, as invalid justification for ignoring the request of the patient that treatment be discontinued.
52. See generally Zellick G. 'The forcible feeding of prisoners: An examination of the legality of enforced therapy' [1976] *Public Law* 153.
53. Dr. Charles Smith; personal communication.
54. On both cases see generally Lo et al 'Family Decision Making on Trial' 322(1992) *N Engl J Med* 1228.
55. Annas G.J. 'Precatory prediction and mindless mimicry: the case of Mary O'Connor.' *Hastings Cent Rep* 18(1988)31.
56. Lo et al *loc. cit.*
57. Schgal et al 'How Strictly do Dialysis Patients want their Advance Directives followed?' *JAMA* 267(1992)59.
58. (NJ) 355 A2d 647; 97 ALR 3d 205. See generally Costello J 'The Terminally Ill – The Law's Concerns' (1986) *Irish Jurist.*
59. See Costello *loc. cit.*
60. *Superintendent v Saikewicz* 373 Mass. 728.

DOUBLE JOBBING SOLICITOR!

"Double Jobbing Solicitor" – Irish solicitor while on vacation in Florida acts as Sales Executive on behalf of her cousins, the Lynch sisters from Ballydehob, Co. Cork, who carry on a most hospitable hostelry on "Long Boat Quay" a sumptuous archipelago on the west coast of Florida, overlooking the Gulf of Mexico. Patrons and potential patrons can rest assured that solicitor, Ms. Lynch did not indulge in cooking any of the fare, nor tamper with the cuisine in any way, but merely used her solicitors experience to attract the casual passer-by!

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61. *In re Eichner* NYS 2d (App Div) 1980.
62. The decision rests on an assessment of the patient's ultimate condition. There are two possible results of discontinuance; either the patient breathes spontaneously and survives, or they die as a result of cardio-respitory failure. The decision is essentially a clinical one which the doctor makes on the basis of what the ventilation treatment can achieve for the patient. If ventilation constitutes non-productive treatment, then it can be discontinued. See generally Mason J.K. *op. cit.* at 46-7.
63. *Airedale NHS Trust v Bland* [1993] 1 All E.R. 821; *Frenchay Healthcare NHS Trust v S* [1994] 2 All E.R. 803.
64. BMA Discussion Paper on Treatment of Patients in Persistent Vegetative State, September 1992, quoted in *Bland*, fn 63 at 871.
65. *R v Malcherek, R v Steel* [1981] WLR 690.
66. *John F. Kennedy Memorial Hospital v Bludworth* 452 So 2d 921 (Fla, 1984).
67. Mason J.K. *op. cit.* cites as examples Relman A.S. 'The Saikewicz decision: Judges as physicians' (1978) 298 *New Engl J Med* 508; Dunea G. 'When to stop treatment' (1983) 287 *Brit Med J* 1056. At the time of writing, November 1993, there have been no such applications in the courts as in the *Bland* case, fn 63.
68. Lappe M. 'Dying while living: A critique of allowing to die legislation' (1978) 4 *J Med Ethics* 195.
69. 'Butterworths Medico-Legal Encyclopedia' (1987) at 553. Our emphasis.
70. Editorial *The Lancet* 341(1993) 1123.
71. *supra* at 1124. See also the article by Ezekiel Emanuel in the *'Lancet'*, Jan 16, 1988 p.106.
72. See Kjellstrand C.M. 'Who should decide about your death?' *JAMA* 267 (1992) 103 where a survey showed that 70% of patients interviewed wished to discuss the issue with their doctor, but only 6% had done so. In Kohn et al 'Life Prolongation: Views of Elderly Outpatients and Health Care Professionals' *JAGS* 36(1988)840 it was found that patients believed that the doctor should initiate discussion, but doctors were reluctant to do so for fear of unnecessarily alarming the patient.
73. Stewart et al 'Resuscitation decisions in a general hospital' *BMJ* 300(1990)785.
74. In one UK survey 11% of patients for whom resuscitation was attempted survived to discharge. Keating 'Exclusion from resuscitation' 82(1989) *JRSM* 402.
75. Torian et al 'Decisions for and against Resuscitation in an acute Geriatric Medical Unit' 152(1992) *Arch Intern Med* 561. See also Murphy et al 'The Influence of the Probability of Survival on Patients' Preferences' 330 (1994) *N Engl J Med* 545 where a study of elderly patients' attitudes to CPR after their doctors had informed them of the possible outcomes of such treatment showed that, whilst 41% had opted for CPR before learning of the probability of survival, this was reduced to 22% after such discussions.
76. Some research shows that surrogates tend to display a greater reluctance to withdraw treatment than the patients would themselves; Uhlmann et al "Physicians and Spouses' Predictions of Elderly Patients' Resuscitation Preferences' 43(1988) *J of Gerontology* 115. Other research indicated that where decisions were made by surrogates, a greater number of patients were classified as DNR; Luce P. 'Cardiopulmonary Resuscitation in the Elderly' 47 (1993) *BJCP* 285.
77. Emanuel 'The Economics of Dying' (1994) *N Engl J Med*.
78. Luce P. *loc. cit.*
79. 'Variability in Physicians decisions on caring for chronically ill elderly patients: an international study' 144(1991) *Can Med Assoc J* 1133.
80. In a survey of doctor's attitudes towards such documents, it was demonstrated that the single most important influence on a doctor's decision to withhold treatment was the patient's self reported wishes; Miller et al 'Factors Influencing Physicians in receiving in-hospital CPR' 153(1993) *Arch Intern Med* 1999. In an American nursing home where 76% of the residents completed advance directives, one year after implementation it was found that deaths in the home had increased and deaths in hospital had decreased, along with a decrease in the mean length of hospital stays.
81. Kjellstrand C.M. *loc. cit.*
82. *'Middlemarch'* (ed. Harvey W.J. 1965) at 186.

Historic Development in Legal Professional Training in Ireland

"Innovative, exciting and historic" were just some of the very approving terms which have been used to welcome the news that The Law Society and the King's Inns have agreed that for the first time their respective students will enjoy the benefit of jointly taking a common course as part of their professional training. The course chosen for joint teaching is litigation.

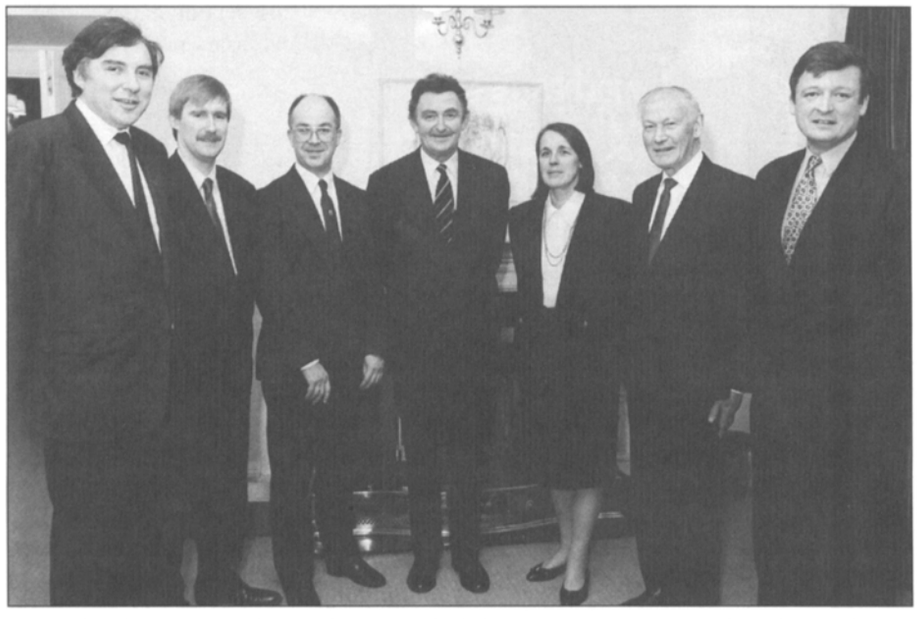
This initiative is the result of regular discussions over a lengthy period between representatives of the Education Committee of The Law Society and of the King's Inns. The Law Society representatives involved were *Ken Murphy, Michael V. O'Mahony* and *Pat O'Connor* and the King's Inns was represented by Mrs. Justice *Susan Denham* and *John Rogers* S.C.

It is intended to continue these meetings to further explore mutually beneficial co-operation between the two institutions in legal professional training.

The joint course will consist of lectures and tutorials to be taken side by side by both students for the Bar and solicitors' apprentices. The teaching will probably be done half-and-half (or as close to this as is sensible and convenient) by existing King's Inns lecturers/tutors and Law Society lecturers/tutors. The same educational materials will be used by all students.

The decision to run a common litigation course was formally made with the adoption of identical policy papers at the highest decision-making level by both institutions. The policy paper was adopted on 10 February, 1995 by the Council of the Law Society and on 14 February, 1995 by the Council of the King's Inns.

The precise form of the joint syllabus is yet to be finalised but it is a measure of the substantial nature of this joint educational commitment that a course of over 50 teaching hours duration is being considered.



Pictured at the meeting in the Law Society, on 24 February are representatives from the Law Society and the King's Inns and Chairman Mr. Justice Ronan Keane. From left to right: Mr. John Rogers, S.C., King's Inns Representative; Mr. Ken Murphy, Chairman Education Committee, Law Society; Mr. Albert Power, Law School Principal, The Law Society, Mr. Justice Ronan Keane, Chairman of ACLET; Mrs. Justice Susan Denham, King's Inns Representative; Mr. Kevin Waldron, Director of Education, King's Inns and Mr. Pat O'Connor, Law Society Education Committee.

The course of lectures and tutorials in litigation will be in substitution for, rather than in addition to, existing courses taught by the two institutions. It is hoped to commence the joint course in the Autumn of 1995. Many substantial logistical problems will have to be overcome in this regard but they are being addressed at present.

This is a pilot project. If it proves successful then the Law Society and the King's Inns will consider whether it would be of value to run joint courses in other subjects on a similar basis.

A catalyst for this initiative has been the Advisory Committee on Legal Education and Training ('ACLET') which is a very broadly based committee representative of all parties interested in legal education and training in Ireland. It is chaired by Mr. Justice *Ronan Keane*. It was at a meeting of ACLET on 24 February, 1995 that the enthusiastic welcome, referred to at the first line above, was given to this initiative.
One of the key objectives for ACLET over the last three years has been to examine the recommendation in the Fair Trade Commission Report of 1990 that a substantial measure of joint professional education of solicitors and barristers, would promote efficiency and higher standards in the public interest.

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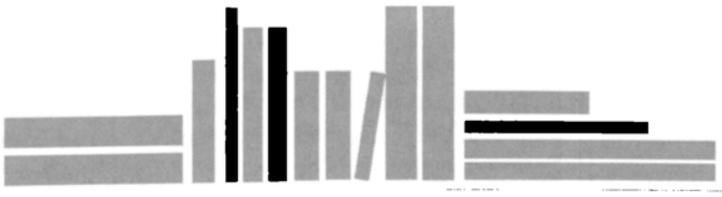
Notice – AGM of SBA

NOTICE IS HEREBY GIVEN that the One Hundred and Thirty-First Annual General Meeting of the SOLICITORS BENEVOLENT ASSOCIATION will be held at the Law Society, Blackhall Place, Dublin, on Friday 7 April 1995 at 12 noon:

1. To consider the Annual Report and Accounts for the year ended 30 November 1994.
2. To elect Directors.
3. To deal with other matters appropriate to a General Meeting.

Geraldine Pearse
Secretary

BOOK REVIEWS



Law Reform Commission, Fifteenth Annual Report (1993)

1994, Dublin v +18pp, softback, £2

The law is, in general, behind the times. This, of necessity, is probably the way it ought to be. But there is a limit to this principle. Aeschylus in *Seven Against Thebes* 467 BC in words that have gained common coinage noted: "The laws of a state change with the changing times." In Ireland, the law has not changed sufficiently in accord with the changing times.

The Law Reform Commission has achieved much since its first programme published in December 1976. For the record, the Commissions in office in 1993 were Mr *Justice Anthony J Hederman,* President, Mr *John Buckley,* Solicitor, Professor *William Duncan* and Mr *Simon O'Leary* BL. Dr *Alpha Connelly* is Research Counsellor to the Commission.

In the year under review, the Commission published Consultation Papers on sentencing and occupiers' liability. Meetings with judges of the Circuit and District Courts were held with the Commission in relation to the issue of sentencing. At the time of writing, the *Occupiers' Liability Bill,* 1994 based, to a considerable degree, on the recommendations of a majority of the Commission, was being considered by the Oireachtas.

Work continued during the year of review on non-fatal offences against the person, intoxication, private international law, land law and conveyancing, family law, contempt of court, structured settlements, plain language and the concept of licensing.

The inscription carved over the entrance to the Yale Law School: "The law is a living growth, not a changeless code", should remind us that the Law Reform Commission will never become redundant. We may not see the end of the road, but we must set out on the journey and make the necessary preparations

Dr Eamonn G Hall

European Community Law: A Practitioner's Guide, Second Edition

By William Rawlinson and Malachy Cornwell-Kelly, London, Sweet and Maxwell, 1994, hardback, lxxii +310pp, £49.00.

A few years ago, a learned Senior Counsel (and he was a learned man), involved in "constitutional" litigation confessed to his instructing solicitor he knew nothing whatsoever about European Community Law. I am unsure whether the confession amounted almost to a boast. Senior Counsel said that at his age he was not about to embark on a study of European law. He has since passed away to a Better Place where knowledge of European Union law is not required.

It would be unwise of a lawyer to boast today that he or she knows nothing about European Law. It is now 21 years since the case of *Bulmer Ltd v Bollinger SA* [1974] 4 Ch 401 at 411, when Lord Denning wrote in that case of European Community law as

> "like an incoming tide, it flows into the estuaries and up the rivers. It cannot be held back".

The authors of this book in their first edition in 1990 noted that Community law pervaded and overlapped the domestic law of the states to the point at which no lawyer can be said to have an adequate view of any legal topic without a knowledge of Community law relevant to the sector in question.

The authors provide in a concise and accessible manner a practical step-by-step approach to European Community Law. The institutional and constitutional principles of EC law are outlined followed by an analysis of EC legislation in the light of relevant cases. The text of the second edition takes into consideration important developments including the impact of the new Europe after the European Union Treaty, the birth of the European Economic Area and enlargement, and new cases such as *Francovich and Bonifaci v Italy* [1991] 1 ECR 5337 on remedies for failure to implement a Directive, and *Enderby v Frenchay Health Authority,* [1994] 1 CMLR 8 on sex discrimination.

Dr Eamonn G Hall

VAT on Property

By Fergus Gannon; Publisher: Institute of Taxation, 1994, Second Edition, 252pp, softback, £12 – members – £14 – non-members.

VAT on property is a most complex subject, bedevilled by distinctions between three categories of lengths of lease, persons or institutions not registered or registerable for VAT and persons registering on a one-off basis. In addition there is a need to keep track of what VAT has been reclaimed originally where there are a series of exempt transfers on sales of businesses as a going concern.

Fergus Gannon's book is extremely helpful in dealing with these and various other aspects of VAT on property. Its approach is an extremely practical one. The second edition will be of much assistance to those of us who have been struggling with the subject for a number of years. Its approach and layout are extremely user friendly and the examples given are not only wide ranging but are also typical of the factual situations that tend to arise. This second edition is even more welcome than the first edition.

The book is one of the series of handbooks on tax published by the Institute of Taxation and more than meets the high standards of that series.

John Buckley

European Union and Lugano Conventions on Jurisdiction and the Enforcement of Judgments

By Peter Byrne; Publisher: Baikonur, 1994, 600pp. £74.

When I have lectured on the Jurisdiction and Enforcement of Judgments Conventions, I have often commenced the lecture by pointing out what a difficult area of law this is. Not so much arising from the Irish legislation and cases but because of the difficulty that a lawyer trained in the common law system has in understanding and appreciating the continental law approach to issues. I now regret this admonition and wonder if it is this sort of approach by our profession that has led Mr. Byrne in his covering letter to the Editorial Board of this Gazette to make the comment that "It is probably fair to say that barristers are more understanding of this kind of material which is very technical and at time esoteric". It is true that the introduction of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988 was one of the few occasions that prompted the Law Library to provide lectures for their members. That being said, if Mr. Byrne's perception of the technical abilities of the respective wings of the profession is correct, this is something that must and should not be allowed to continue.

I would hazard a guess that 85/95% of business clients trade outside this country whether by way of imports or exports. No-one doubts that this trend has been developing and will continue to develop. Solicitors who have to date avoided this topic cannot continue to do so. The fact of the matter is that those articles of the Convention that have exercised Irish judicial thought are relatively few and indeed are reasonably straightforward. Certainly if one has to deal with an international aspect to a claim it is much simpler to do so under the Conventions than under the more nebulous and complex area of general private international law. While not perhaps forging new frontiers, the Irish decisions are models of straightforward common law speak and have tended to transpose the more obtuse European Court of Justice decisions in to amenable language.

For those practitioners who are familiar with the Convention, there is no doubt but that this book by Peter Byrne will be a useful addition to their library. For those who have not it is an essential purchase. Mr. Byrne's earlier text published in 1990 and entitled "The EC Convention on Jurisdiction and the Enforcement of Judgments" has been superseded by the implementation into Irish law of the Rome Contracts Convention, the Lugano Judgments Convention, the ratification of The Hague Service Conventions and, since publication of this text, the ratification of the Supplemental Rome Maintenance Judgments Convention by the Maintenance Act 1994.

The layout of the book is more complex than usual and the reader would be advised to read the special section which deals with definitions and the layout of the text. The index of cases at the beginning is, for example, laid out under four categories:-

- Preliminary Rulings
- English Decisions on the Convention
- Irish Decisions on the Convention
- Other Decisions

While it is interesting to see the development of Irish jurisprudence it is not quite clear what the purpose of separating the indices in this way is, or the criteria for the "Other Decisions". To an extent I would counsel against this approach (which continues in the body of the text) insofar as it is unreal to suggest that the Irish, or indeed the English cases, can be addressed without close reference to the important decisions of the European Court. This is in essence the reservation I have about the manner in which the English and Irish decisions relating to the Convention are separately dealt with at Appendix N in the book which merit but cursory references in the substantive chapters.

It is also unfortunate that nowhere in the book, either in the indices or in the detailed analysis of the English and Irish cases at the end, is there a precise reference to where in the particular chapter the reference to the Irish/English case is to be found. For example, at page 441 the reader is given a note of an interesting case of *Gascoine -v- Pyrah and Cronau* and is then referred to one of the most important decisions of the Court in *Kalfelis -v- Schroder* which is simply described as being set out in chapter 5. On turning to chapter 5 the reader is then sent to continue her search in chapter 6. That being said, there is no question but that the gathering together of the Irish and English decisions in one text, where they are given 116 pages, is extremely valuable.

This book was published some time in the Autumn 1994 and is right up to date in relation to virtually all judgments up to about July 1994. Readers will note the interesting developments in the case of *Shevill -v- Press Alliance* [1992] 1 All ER 409 reported in Mr. Byrne's book at page 434. This case dealt with a libel action taken in England against France Soir which had a daily circulation in France of 200,000 copies but in the UK of only 230. The Defendant publisher challenged the English Court's jurisdiction. The Court made a reference for a preliminary ruling to the ECJ. Since publication of this book the Advocate General's Opinion was delivered on the 14 July 1994 and he proposed that the Court should rule as follows "In the case of defamation by a newspaper article circulated in more than one Contracting State, Article 5(3) must be interpreted as meaning that the Plaintiff may sue either in the Courts of the place of publication, which have jurisdiction to award a compensation for the whole of the damage arising from the unlawful act, or in the Courts of the places where the newspaper is distributed, which have jurisdiction solely in respect of the damagearising, according to the law applicable to the tort or delict within their judicial district".

The chapter dealing with recognition and enforcement of judgments is a useful guide to what is often a fairly practical area that can be dealt with by strict adherence to the Convention and Superior Court Rules.

Family law practitioners will find particularly helpful chapter 14 on the Rome Convention on maintenance recovery procedures.

Finally, I would commend this book for the very considerable work done to assist the reader in working through the various Conventions and their amendments. Appendix 4 is also of particular value, being a table coordinating the references in the Jenard, Schlosser, Möller and Cruz/Real reports to the various Articles.

Claire Callanan

Note:
The 1994 Maintenance Act was amended at the committee stage, but only concerning jurisdiction and enforcement in maintenance matters. The consolidation text of the 1988, 1993 and 1994 Acts will be provided to purchasers of the book as an insert which will make for even greater ease of reference.

❐

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English Practice Note – Conciseness now the Order of the Day

The following is a summary of the *Practice Note* [1995] 1 All ER 385 referred to in the Viewpoint of this *Gazette*. In this Practice Note the Lord Chief Justice of England and Wales, Lord Taylor advised judges to take tight control of the length of trials, set timetables for the proceedings and fix limits on lawyers' speeches and the use of cross-examination. Less time will be spent on oral advocacy and cross-examination with more emphasis on written argument. Appropriate orders for costs will be made against lawyers who fail to conduct cases economically.

Accordingly, there will be more judicial control over cases at each stage leading up to and including the trial. The court will exercise its discretion to limit discovery, the length of oral submissions, the time allowed for the examination and cross-examination of witnesses, the issues on which the court wishes to be addressed and reading allowed from documents and authorities.

Witnesses in most cases are to give their main evidence as written statements. Pre-trial hearings in cases to last more than ten days are to be held with outline arguments being submitted in advance. Strict requirements will be imposed on each side to get documents to court on time. The parties to a case also must endeavour to agree the main issues in advance and will be under a duty to reduce or eliminate issues requiring oral evidence. A completed pre-trial check-list annexed to the practice direction is to be lodged in court no later than two months before the date of the trial.

❐

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PRACTICE NOTES

Passport Regulation for Irish American Children

Solicitors often handle child custody cases on behalf of their clients including Irish-American national children. The following information issued by the US Embassy should be helpful to practitioners.

Under U.S. law, when there is controversy concerning the custody of a minor child, a passport-issuing office in the United States or abroad may deny issuance of a passport to a minor only if it receives a court order (original or certified copy) from the court within the country in which passport services are sought. The court order must give custody of the child to the person who has requested that passport services be denied to the non-custodial parent, or must specifically forbid the child's departure from the country without the court's permission. It should also be noted that the court order is only valid in the country in which it was issued. In the absence of such a court order, the issuance of a passport to a qualified applicant may not be denied. Either parent may apply to obtain a passport for a child under the age of thirteen without the consent of the other parent.

In other words, should the US Embassy in Dublin receive an original or certified copy of an Irish court order awarding custody of their American citizen child to a client, stating that the parent who was not awarded custody cannot remove the child from Ireland without the permission of the client or of the Irish court, the Embassy would then be in a position to refuse to issue a passport for the child to the non-custodial parent.

Should you have a client involved in a custody dispute, where the child either is an American Citizen, or has a claim to United States citizenship, and your client does not wish for the non-custodial parent to obtain a passport for the child, then please forward the court order granting custody to your client to the American Citizen Services Unit, the American Embassy, 42 Elgin Road, Ballsbridge, Dublin 4, tel: (01) 6688-777, ext: 2412.

Family Law and Civil Legal Aid Committee

Law Society/RIAI – Agreed Statement – Planning Permission – Opinions on Compliance

1. The five forms of Opinion of Compliance published by the RIAI are agreed with the Law Society for use in appropriate circumstances. A sixth form of Opinion on Compliance for apartments is in the course of preparation.

2. The RIAI and the Law Society agree that it would be desirable to have only one set of standard Forms of Opinion or Certificate and both will co-operate with the objective of producing such a set of Forms and getting them agreed with all appropriate parties. The RIAI will agree to its forms becoming the basis for such an agreed set.

3. The Law Society will advise its members to try and clarify at the commencement of a transaction what form of Certificate of Opinion on Compliance will be forthcoming. The Law Society agrees that in dealing with RIAI members it will advise its members to accept the appropriate RIAI form. RIAI members may occasionally be asked to sign the forms of Certificate of Opinion on Compliance published by the Law Society but the Law Society agrees that solicitors should not press RIAI members to sign the Law Society forms. Occasionally the RIAI forms will not meet the particular circumstances of a case and may have to be adapted. Care should be taken by RIAI members to make sure that any altered form is acceptable to their Professional Indemnity Insurers.

4. The RIAI and the Law Society have agreed to the publication of a factual statement of qualifications for membership of the RIAI, the Irish Architects Society, the Incorporated Association of Architects and Surveyors, and the Architects and Surveyors Institute. The Law Society will contact these bodies with a view to seeing if there is a consensus in favour of agreeing such a statement. When this has been done the Law Society and the RIAI will review the position.

Conveyancing Committee

Law Society Form – Price Increase

Due to spiralling paper costs increases in 1993 and January 1994 of 40%, it has been necessary to increase the price of the Law Society's standard forms with effect from 17 January, 1995.

The new prices are as follows:-

Requisitions on Title (per 50)	£24.50
Conditions of Sale (per 50)	£16.00
Building Agreements (per 50)	£14.75

All of the above are subject to 21% VAT.

Contents of documents schedule in conditions of sale

The intention of the Law Society Conveyancing Committee in preparing the standard Conditions of Sale for general use was that the Vendor would disclose at contract stage sufficient and adequate particulars of the Vendor's title to enable a Purchaser's solicitor to consider properly the adequacy of such title before completion of contracts in accordance with long standing conveyancing-practice.

The Conveyancing Committee has become quite concerned at the developing practice of Vendors solicitors furnishing to purchasers solicitors copies of all documents relating to the vendor's title coupled with a special restrictive condition worded in the following or similar terms viz:

"The title shall consist of the documents listed in the documents Schedule and shall be accepted by the purchaser as full and adequate evidence of the vendor's title to the subject property."

It is the view of the Committee that such a practice is highly undesirable and unfair to purchasers and their solicitors as a clear attempt to restrict the raising of proper requisitions on title. Furthermore, the Committee considers that the practice is also unfair to purchasers and their solicitors as by putting them on notice of such documents at the pre contract stage it obliges the purchaser's solicitor to carry out a full and detailed investigation of title before advising his clients to complete the contract. This is particularly the case where property is being sold by auction.

Even if the condition merely says "The title shall consist of the documents listed in the Documents Schedule" a purchasers solicitor is by virtue of General Condition 6 put on notice of certain covenants etc.

The Conveyancing Committee disapproves of the foregoing practice and recommends that in accordance with established conveyancing practice the documents listed in the Documents Schedule should be limited to:-

a. The root of title being shown.
b. Any document to which title is stated to pass under the special conditions.
c. Any document which is specifically referred to in a special condition.

The Conveyancing Committee disapproves, save in very exceptional circumstances, of a practice which would unreasonably restrict solicitors for purchasers in carrying out proper and detailed investigations of title on behalf of their clients.

Conveyancing Committee

Certificates of Title

When, at the instigation of The Law Society Conveyancing Committee, the practice of lenders accepting Certificates of Title in lieu of the previous practice of having their own solicitors investigate and report on title, was introduced, it clearly was envisaged that Certificates of Title would be accepted without objection or enquiry save in instances where borrowers solicitors have qualified titles.

Before issuing Certificates of Title, there is a clear obligation on borrowers solicitors to conduct a thorough investigation of title to enable them properly to certify that borrowers have acquired good marketable title to the properties in question having due regard to the current guideline requirements of the relevant lenders.

The responsibility of lenders solicitors is limited to taking the necessary steps to perfect the lenders security to the properties in question. In practice, this generally merely involves the lenders solicitors attending to the stamping and registration of the borrowers Deeds of Assurance and Charge unless such stamping and registration have already been completed by borrowers solicitors.

Accordingly lenders solicitors should not go behind properly completed Certificates of Title presented to them unless, as already indicated, borrowers titles are being qualified in any manner. The standard Certificate of Title form consciously was drawn to include provision for the insertion of borrowers solicitors of a qualification of title which could be accepted or rejected by lenders.

In fact, not having investigated the titles in question, lenders solicitors would be seen to be intermeddling and putting themselves on notice of matters which could be to the detriment of their lender clients in the event of any action or proceedings being taken in relations to such Certificates of Title.

By accepting properly completed Certificates of Title, lenders solicitors ensure that the responsibility for and any liability arising in respect of Certificates of Title will lie, where it properly belongs, with borrowers solicitors.

Conveyancing Committee

Closing Sales by Bank Drafts

Following the longstanding recommendation of the Conveyancing Committee, the general practice of requiring payment of the balance of the proceeds of sale to be made by means of either Bank Drafts or cheques issued by Lending Institutions on the completion of the purchase of properties has become well accepted and established.

However it has come to the notice of the Committee that there is an increasing tendency to depart from this practice by reverting to the previous practice of Purchasers Solicitors tendering their own client account cheques for payment of balance of proceeds of sale on completion of purchases. The Committee emphatically disapproves of such a tendency as it considered it to be not in accordance with good conveyancing practice and highly undesirable as it

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Editor
Law Society Gazette
Law Society
Blackhall Place
Dublin 7

Dear Editor

As an Irish lawyer who has been practising for over twenty years in France, it was extremely heartening to read that an Irish university has established a business law course with a strong component of the national law of a European country and its national language which, in the case of the U.C.D. degree, is that of France. I would like to express some personal views on its relevance to improving the job prospects of Irish law graduates in France and elsewhere.

Considering that some entrants to the profession in Ireland may be required to pursue their careers elsewhere, our law faculties have a key role to play in preparing them to take advantage of the very real job opportunities which exist in continental Europe. Young Irish lawyers seeking employment abroad, whether through lack of prospects at home or through personal ambition to practice in a foreign jurisdiction, should not be forced to enter the rat race of the big law firms of London, New York or other mega-centres of legal practice in the English-speaking world when careers which are at least as rewarding in professional terms, and often much more so in terms of fulfilment as individuals, are available elsewhere – provided one has the language and the legal training.

While the sceptics might be inclined to view the UCG course as a slightly exotic academic experiment, in fact, it is very much in line with the way in which other universities in Europe have been redefining their approach to legal education (although the UCG scheme is probably even more necessary in the Irish context because of emigration). It is interesting to note that a comparable course (that of the Diplôme de Juriste Conseil d'Entreprise) which is now provided by all of the major universities in France has become one of the most prestigious legal qualifications available and a virtual guarantee of job selection.

In her interesting article describing the UCG course, *Sofie Cacciaguidi* refers to the general lack of proficiency in foreign languages which prevails in Ireland (and, of course, throughout the English-speaking world). It has been my experience that whatever their origin, anglo-saxons invariably offer the same explanations for this condition, namely that English is spoken everywhere, that time prevents one from learning another language and that other languages just seem so much more complicated compared with the rather minimal rules of English grammar.

While all of these explanations have some foundation, I have also observed in recent years that Continental Europeans are becoming rather less tolerant of chronic anglo-saxon monolingualism. There is a perception that having been in what is now called the European Union for over twenty years, it is surely time that efforts were made to communicate in the language (or, better still, languages) of one's neighbours.

This perception is likely to increase for the coming generations for there has been recognition on the Continent that up to now, the UK and Irish business communities have been composed of members who were not used to practising foreign languages. The younger generation of Irish lawyers, however, will be expected to be more proficient because their counterparts in Europe (with the notable exception of the U.K.) have realised the importance of foreign languages, at least in the field of commercial law.

By way of illustration, a survey published in December last and which was undertaken among one thousand French in-house corporate counsel revealed that 77% of respondents practised one or more foreign languages but the figure was much higher for the under-30s. Interestingly, nearly 14% of the latter also held a legal qualification from a foreign university. It is by no means unusual in France to-day to find tri-lingual and even quadri-lingual members of the legal profession among the younger generation. While twenty years ago, knowledge of English was considered advantageous for a French business lawyer, nowadays, it is regarded as the bare minimum for any one intending to practice commercial law. In short, lack of linguistic proficiency really reduces career prospects so much so that a French lawyer starting his career but not having any foreign language capabilities probably only has a one in ten chance of finding a job (and invariably not a very interesting or well paid one at that).

Having learned Irish, we have the advantage of being more open to the realisation that learning other languages is within our grasp whereas native English-speakers elsewhere often assume that mastering another language is an insurmountable psychological barrier for all but those who have an aptitude for languages.

Irish law graduates intending to emigrate would deprive themselves of really worthwhile job opportunities in Europe through failure to speak at least one European language. Native English speaking lawyers are much in demand both in private practice and in industry but they are also invariably

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Practice Notes

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exposes Vendors Solicitors to potential claims for negligence in the event of payment on foot of such cheques not being honoured on the instructions of Purchasers or otherwise.

In expressing the foregoing view, the Committee is conscious of the expanding practice which, as a matter of necessity, has developed in respect of three-way closings of sales, of Lenders Solicitors cheques being utilised to discharge payment of balance of proceeds of sale where Purchasers loan cheques are split to facilitate the redemption of Vendors Mortgages on such closings.

However as this latter procedure does vary from the recommended practice, the Committee considers that, as a matter of prudence, Vendors Solicitors, to avoid potential claims for negligence, only should avail of such procedures on the express written instructions of their clients.

Conveyancing Committee

Presentation by Clare Bar Association to Judge Dermot Kinlen

Mr. John Shaw, President of the Clare Bar Association presented a portrait by Michael O'Dea, of Ennis, to the Honourable Mr. Justice Dermot Kinlen, to mark his appointment to the bench on behalf of the Clare Bar Association. The picture shows Mr. John Shaw; (4th from the left) presenting the portrait to Judge Kinlen at a ceremony held at the Four Courts, Dublin on Friday 10 February. Also in the picture are (from left): Michael Houlihan, Past President of the Law Society; Michael O'Dea, Artist; Pamela Wall, Secretary of the Clare Law Association; Liz Rackard, wife of the artist and Niall Casey, member of the Law Society Council.

ANNUAL CONFERENCE

The Annual Conference will take place from 11-14 May. Booking forms must be returned by Friday, 24 March.

Date for Half-Yearly Meeting

The half yearly meeting of the Society will take place on Thursday, 4 May 1995 at 6.30 p.m. at the Law Society, Blackhall Place.

Correspondence

Continued from page 84

expected to be able to communicate with senior managers in the local language.

Even if one never practices French law, to practice any other law in France will, in any event, require the foreign practitioner to work with members of the French legal profession. Inability to speak the language will severely curtail the prospects of establishing working relationships. Members of the profession in France tend to apply an abstract approach to legal reasoning of which the foreign practitioner will be totally unaware if he does not speak their language. This is due both to the Cartesian logic which is an inherent element of Gallic culture and also the manner in which law is taught and practised in a codified system. As an illustration, contracts in French tend to be much more succinct than those in English with the result that negotiation sessions with monolingual angle-saxon lawyers can degenerate into frustrating marathons and sometimes even break off through lack of understanding on both sides.

Hopefully, these personal observations will be of some value to students of the UCG Corporate Law Degree course and perhaps to other readers as well.

Yours faithfully

Colm Mannin
Senior Counsel
Airbus Industrie
1 Rond Point Maunice Bellonte
31707 Blagnac Cedex, France

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PRACTICE MANAGEMENT

The Practice Management Committee continues to meet every month under the chairmanship of *Philip Joyce*. It is working on a wide ranging agenda. Some of the principal items which are being actively worked on as part of the agenda include:-

Practice Management Notes:

At the beginning of the year each practice was supplied free of charge by the Committee with a binder for a set of Practice Management Notes. The Committee has an issue of Practice Management Notes ready to go out with each months Gazette for the next six months. It is important to insert the notes into your binder as soon as they arrive. It will be much easier to read them there than to have to look for them at a later stage when the need arises. If you are missing any notes, contact *Cillian MacDomhnaill* of the Law Society. There are a limited number of duplicates available.

If you would like to have any particular item covered by the Practice Management Notes; please let the Committee know. They will only be too glad to oblige.

Q Mark

The Committee is in the process of setting up a seminar on how practices may apply for and obtain the Q Mark. Practitioners will have noticed from recent issues of the Gazette that a number of practices have already been given this recognition. There will be more news on this in the weeks to come.

Practice Link

This service is working well. It is designed to put practitioners who wish to acquire, sell, merge or retire from practice in touch with each other. Further information can be obtained from Cillian MacDomhnaill of the Law Society.

Mandatory Continuing Legal Education

The Committee is preparing a syllabus for Mandatory Continuing Legal Education in the area of Practice Management. Discussions are presently taking place between the Education Committee and the Continuing Legal Education Committee on this topic. Practice Management is likely to be the first area where Mandatory Continuing Legal Education will be introduced for the profession.

Video Library

The Committee is in the process of establishing a video library on Practice Management Topics. *Brian O'Reilly* who is in charge of this project is finding it difficult to get videos specifically on legal Practice Management. Setting up the library is quite an expensive process and it is hoped that there will be an official launch of the service in the very near future. If anybody has any videos which they would like to donate to the Committee for use in the library, the Committee would be pleased to accept them.

Office Management Manual

The Committee has begun the preparation of an office manual. This will be a manual particular to each office which will set out how the office ought to be run. At the moment the Committee is considering sections of the Manual dealing with Personnel and Administration, Office Procedures, and Client Care. In view of the size of this project it will probably be some time before it comes to maturity.

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An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a 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 existehce 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.

Published: 22 March 1995.

Peter Patrick Meegan, Folio: 4518; Land: Termonfeckin; Area: 25(a) 3(r) 26(p). **Co. Louth.**

Timothy Duggan, Folio: 15871; Land: Drumliffe; Area: 2(r) 39(p). **Co. Cavan.**

Bernadette Dore, Folio: 1744F; Land: Gortnaclohy and Clooncan; Area: 3(p) 50.934(a). **Co. Limerick.**

James O'Neill, Folio: 3101; Land: Barony of Duhallow. **Co. Cork.**

Brendan McManus, Folio: 8946; Land: Clonhane; Area: 34(a) 3(r) 14(p). **Co. Kings.**

John MacCann, Folio: 4334; Land: Part of Martinstown; Area: 22(a) 2(r) 11(p). **Co. Meath.**

David Thorpe, Folio: 1059F; Land: Finnan; Property no.1 36.002 acres, Property no. 2 16(a) 3(r). **Co. Kilkenny.**

John P. Stack, Folio: 9363F; Land: Greenoge; Area: .688. **Co. Meath.**

John Kelly, Folio: 3347F; Area: (1) 16.400 acres, (2) 5.106 acres, (3) 2.15 acres, (4) 1.988 acres, (5) 1.75 acres; Land: (1) Durrow Townparks, (2) Durrow Townparks, (3) Durrow Townparks, (4) Durrow Townparks, (5) Durrow Townparks. **Co. Queens.**

Patrick Reilly, Folio: 10657; Land: Property no. 1 Aghnagarron, Property no.2 Dalystown; Area: Property no. 1 17.750 acres, Property no. 2 24(a) 0(r) 8(p). **Co. Longford.**

Robert N. Tanner, Folio: 10451F; Land: Townland of Crushyriree, Barony of Barrymore. **Co. Cork.**

William Purcell, Folio: 15788F; Land: 0.550 acres; Area: Ballydavid. **Co. Tipperary.**

Wexford County Council, Folio: 3345F; Land: Quanstown. **Co Wexford.**

Edward Gibbons, Folio: 32634; Land: Cashelpreahan; Area: 127(a) 4(r) 1(p). **Co. Donegal.**

Mary (Polly) Cullen, Folio: 8076; Land: Townland of Kilmalum, Barony of Naas South. **Co. Kildare.**

Walter Breen, Folio: 6059; Land: Greenanne; Area: 13(a) of 4p. **Co. Wexford.**

Percival Robert O'Donnell, Folio: 60L; Land: Clonroad Beg. **Co. Clare.**

Noel Humphrey Sullivan and Anthea Elizabeth Sullivan, Folio: 1387F; Land: Townland of Turkhead, Barony of Carbery West (East Division). **Co. Cork.**

James Tooher, Folio: 5411 closed to 17406; Land: Clonkelly and Ballyegan. **Co. Kings.**

Patrick J. Shine, Monksland, Athlone, Co. Roscommon. Folio: 36153; Land: Keelty; Area: 0(a) 3(r) 15(p). **Co. Roscommon.**

Michael Goggin, Folio: 1875F; Land: Ballindinas; Area: 0.825 acres. **Co. Meath.**

Sean Vaughan, Carriglea, Killaloe, Co. Clare. Folio: 10113; Land: Craglea; Area: 18(a) 1(r) 15(p). **Co. Clare.**

The Balrothery Board of Assistance, (now the Eastern Health Board) c/o The County Solicitor, 31 North Frederick Street, Dublin. Folio: 8608; Land: Townland of Ballalease West. **Co. Dublin.**

John Brogan, Folio: 4321F; Land: Townland of of Rooves Beg, Barony of Muskerry East. **Co. Cork.**

Margaret Clogher, Ballygill, Castleampson, Co. Roscommon. Folio: 28579; Lands: (1) Carrowreagh, (2) Gortnabla, (3) Gortnabla; Area: (1) 15.138 acres, (2) 6.187 acres, (3) 4(a) 0(r) 10(p). **Co. Roscommon.**

Harriet Josephine Murna Peacocke, Folio: 7118; Land: Townland of Rathdown Lower, Barony of Rathdown. **Co. Wicklow.**

Thomas Foley, Folio: 11602; Land: Lumcloon; Area: 7(a) 3(r) 38(p). **Co. Kings.**

Mary J. Rogan and Patrick J. Rogan, Folio: 336F; Land: Mullynadrumman; Area: 24 perches. **Co. Leitrim.**

James McLoughlin, Folio: 314; Land: Carrowmore; Area: 14(a) 1(r) 28(p). **Co. Donegal.**

Dympna Collins, Folio: 7904F; Land: Townland of Inchamore, Barony of Muskerry West. **Co. Cork.**

Blarney Stone Public Houses Limited, (Limited Liability Company), of 12 Mountjoy Square, Dublin. Folio: 57338F; Lands: Townland of Dubber in the Barony of Coolock. **Co. Dublin.**

Thomas Smith, Folio: 3160F; Land: 10 Jubilee Terrace. **Co. Cavan.**

Terence O'Donnell, Folio: 353R; Land: Corracar; Area: 25(a) 0(r) 20(p). **Co. Leitrim.**

James J. Coyne (deceased) and Edna Joyce Coyne (deceased) of, 10 Dunne Street, North Strand, and of 13 Seaview Avenue North, Clontarf, Dublin. Folio: 18589; Lands: A plot of ground situate on the west side of Seaview Avenue North in the Parish of Clontarf, District of Clontarf and City of Dublin. **Co. Dublin.**

Patrick and Kate Joyner, Folio: 4881; Townland: Barnaderg; Area: 2.656. **Co. Galway.**

Michael McGovern, Folio: 1637, Land: Moneensauran; Area: 103(a) 19(p). **Co. Cavan.**

Edward Cecil Mitchell, Folio: 282R; Land: Knockroe; Area: 28(a) 3(r) 4(p). **Co. Limerick.**

Walter Martin Ruigrok (deceased) of, Rush House, Rush, Co. Dublin. Folio: 5578; Lands: Townland of Rush in the Barony of Balrothery East. **Co. Dublin.**

Agnes Monaghan of, Tulnagee Cottage, Bohernabreena, Dublin 24 and of Cnoc Muire, Friarstown, Tallaght, Co. Dublin. Folio: 8245; Land: Townland of Bohernabreena in the Barony of Uppercross. **Co. Dublin.**

Brian Edward Hayden and Jean Hayden of, 55 Knockaire, Knocklyon, Templeogue, Co. Dublin. Folio: 5830F; Land: Townland of Knocklyon in the Barony of Uppercross. **Co. Dublin.**

Hugh Daly, Folio: 16511F; Land: Raymoghy; Area: Part. **Co. Donegal.**

Margaret Lyons, Folio: 45939; Land: Town of Dunmanway, Barony of Carbery East (West Division). **Co. Cork.**

Samuel Pryce (deceased), Folio: 1355; Land: Barony of Ballinacor South. **Co. Wicklow.**

Christina Kenny and Rosanna Kenny, both of 18 Larkfield Grove, Kimmage, Dublin. Folio: 31F; Land: A plot of ground situate on the West side of Larkfield Grove in the parish of St. Peter, District of Rathmines and City of Dublin. **Co. Dublin.**

Patrick J. Dwyer, Folio: 2576F; Land: Clonea Upper; Area: Part. **Co. Waterford.**

Peter Long, Folio: 241R; Land: Kilkieran; Area: 161(a) 3(r) 29(p). **Co. Kilkenny.**

Peter Joseph Walsh, Executor of Stephen Joyce (deceased) Slievefin, Currandulla, Co. Galway. Folio: 1238; Townland: Part of the lands of Shanafanaghaun containing 13 acres and 16 perches, one undivided fifth part of the lands of Shanafanaghaun containing four acres or thereabouts. One undivided fourth part of other part of the lands of Shanafanaghaun containing one acre and thirty perches or thereabouts and one undivided seventeenth part of share of the mountain part of the lands of Shanafanaghaun called Benmee containing four hundred and fifty two acres or thereabouts in the Barony of Ross and County of Galway. **Co. Galway.**

Tipperary NR County Council, Folio: 37725; Land: Parkmore; Area: 13(a) 2(r) 20(p). **Co. Tipperary.**

Thomas Traynor, Folio: 16498F; Land: Gortmaloge. **Co. Tipperary.**

Nicholas Alphonsus Sheridan, Folio: 5572; Land: Oldcastle; Area: 16.888 acres. **Co. Meath.**

Patrick N. O'Donovan, Folio: 36318; Land: Townland of Dromerk, Barony of Carbery East (West Division). **Co. Cork.**

Michael O'Mahony, Folio: 9144F; Land: Townland of Dunowen barony of Ibane and Barryroe. **Co. Cork.**

Michael Morkan and Lorraine Morkan, Folio: 11630; Land: Shinrone; Area: 1(a) 0(r) 10(p). **Co. Offaly.**

Michael Fennan, Folio: 6071F; Land: Townland of Sroughan, Barony of Talbotstown Lower. **Co. Wicklow.**

Wills

Friel, Hugh (Hughie), deceased, late of Magheraroarty, Gortahork, Co. Donegal. Would any person having knowledge of a will executed by the above named deceased who died on 30 December 1994 please contact Messrs. James P. Sweeney & Company, Solicitors, Main Street, Falcarragh, Co. Donegal. Tel: 074 35121. Fax: 074 35704.

Molloy, Bernard, late of Ross West, Castlebar, Co. Mayo and 27a Castlehill Park, Castlebar, Co. Mayo. Would any person or solicitor having knowledge of a will made by the above named deceased who died on 1 January 1995 at Mayo General Hospital, Castlebar, please contact Messrs Michael Moran & Company, Solicitors, Mountain View, Castlebar. Tel: 094 21053, Fax: 094 22356.

Aherne, Michael, deceased, late of 9 Bayside Boulevard South, Sutton, Dublin 13 and Ormond Street, Nenagh, Co. Tipperary. Would any person having knowledge of a will executed by the above named deceased who died on 28 November 1994 please contact MacGrath & Company, Solicitors, 51 Kenyon Street, Nenagh, Co. Tipperary. Tel: 067 33455, Fax: 067 33462.

Coen, Martin, deceased, late of Clough, Kilcolgan, County Galway or Killeenavarra, Kinvara, County Galway. Would anybody having knowledge of a will made by the above named deceased who died on 14 December 1994 please contact Charles Foley, Solicitor, The Square, Gort, County Galway. Tel: 091 31472.

Bermingham, Patrick, deceased, late of Mile River House, Carrickmacross and also of Coolderry, Carrickmacross, Co. Monaghan. Would any person or solicitor having knowledge of a will executed by the above named deceased who died on 16 December 1994 please contact Martin P. Crilly, Solicitor, 7 Main Street, Carrickmacross, Co. Monaghan. Tel: 042 61957, Fax: 042 61775.

O'Shaughnessy, Nora, late of Church Street, Glin, Co. Limerick. Will anyone having knowledge of the whereabouts of a will of the above named deceased who died on 15 January 1995 please contact Philip J. Culhane & Company, Solicitors, 4 Mallow Street, Limerick. Tel: 061 413288.

Atkin, James, deceased, late of "Morceau", Hoar Rock, Skerries in the

County of Dublin. Would any person having a knowledge of a will executed by the above named deceased, who died on 5 August 1984, please contact Gerrard L. McGowan, Solicitors, Balbriggan, Co. Dublin. Tel: 01 8412115, Fax: 01 8412037.

Twinem, Nora, late of Riverside Grove, Clonshaugh, Dublin 17, a widow deceased. Would any person having knowledge of a will executed by the above named deceased who died on 3 November 1994 please contact Patrick Duffy, Solicitors of 99 South Circular Road, Dublin 8. Tel: 453 8431, Fax: 4538966.

McDonnell, Elizabeth, widow, late of 87 Harmonstown Road, Artane, Dublin 5, deceased. Would any person knowing the whereabouts of any will made by the above named deceased please contact H. C. Browne & Company, Solicitors, Malahide Road/Kilmore Road Corner, Artane, Dublin 5. Tel: 832 7849, Fax: 832 7852,

Murnane (formerly Curran), Joan, late of 17 Reuben Street, South Circular Road, in the City of Dublin, retired Waitress. Will anybody having knowledge of the whereabouts of a will of the above named deceased, who died on 23 April 1992 please contact Lehane & Hogan, Solicitors, 1 Upper Ormond Quay, Dublin 7. Tel: 677 5396/677 0737.

Miscellaneous

Northern Ireland Agents for all contentious and non-contentious matters. Consultation in Dublin if required, reasonable rates. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry, Tel: 080 693 61616 Fax: 080 693 67712.

Personal Injury Claims in England and Wales. Specialist P I solicitors with offices in London and Bermingham can assist in all types of injury claims. One of our staff is in Ireland for one week in every month. Legal aid available to clients that qualify. Contact David Levene & Co., Ashley House, 235-239 High Road, Wood Green, London N22 4HF, England. Telephone: 0044 81 881 7777 Fax: 0044 81 889 6395 and Bank House, Cherry Street, Bermingham, B2 5AL Tel: 0044 21 633 3200 and Fax: 0044 21 633 4344.

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Wanted – Legal accounts position full or part-time. Reply to Box No. 26.

Lost Title Deeds

JAMES GREGORY ASHE late of Lower Main Street, Dingle, County Kerry. Will any person having knowledge of the whereabouts of any title documents to property held by the above named James Gregory Ashe at DYKEGATE STREET (otherwise DYKEGATE LANE) Dingle, County Kerry, please contact TOM COLLINS & Co., Solicitors, 4, Charlemont Street, Dublin 2.

Application for First Registration

Schedule

Deed of Conveyance dated 27th July, 1835 Margaret Cullen and others to Gerrard Tyrell.

Deed of Conveyance dated 26th June, 1879 Gerrard Tyrell to William Austin Colclough.

Deed of Conveyance dated 19th October, 1895 John Colclough to William James Phillips.

Deed of Conveyance dated 27th November, 1899 William James Phillips to George F. Molloy.

Deed of Conveyance dated 20th April, 1918 Ellen Teresa Molloy to Hibernian Bank Limited.

Deed of Conveyance dated 7th May, 1919 Ellen Teresa Molloy to Hibernian Bank Limited.

Deed of Conveyance dated 29th September, 1919 Hibernian Bank Limited to William Maurice, Middleton Curtis.

Deed of Conveyance dated 16th June, 1925 William M. M. Curtis to Edward Monsell Wilson.

Deed of Conveyance dated 3rd January, 1973 Desmond Joseph Wilson to Sheila Gladys Wilson.

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Contact: Bridget Molloy

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VOL. 89 NO. 3

APRIL, 1995

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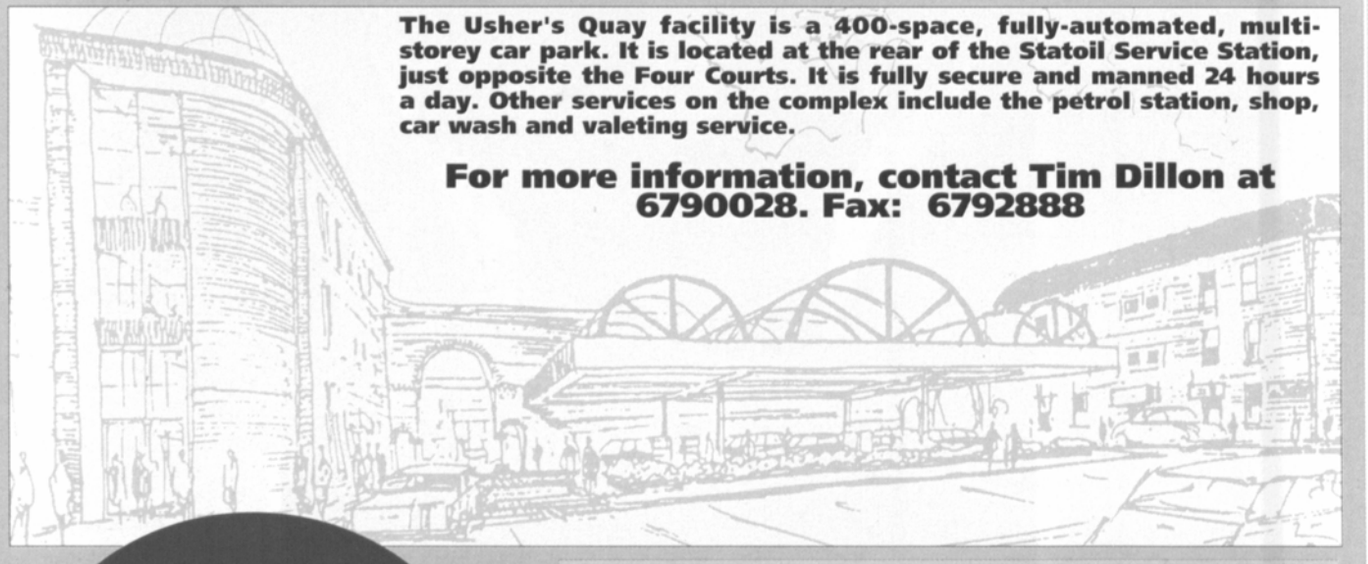

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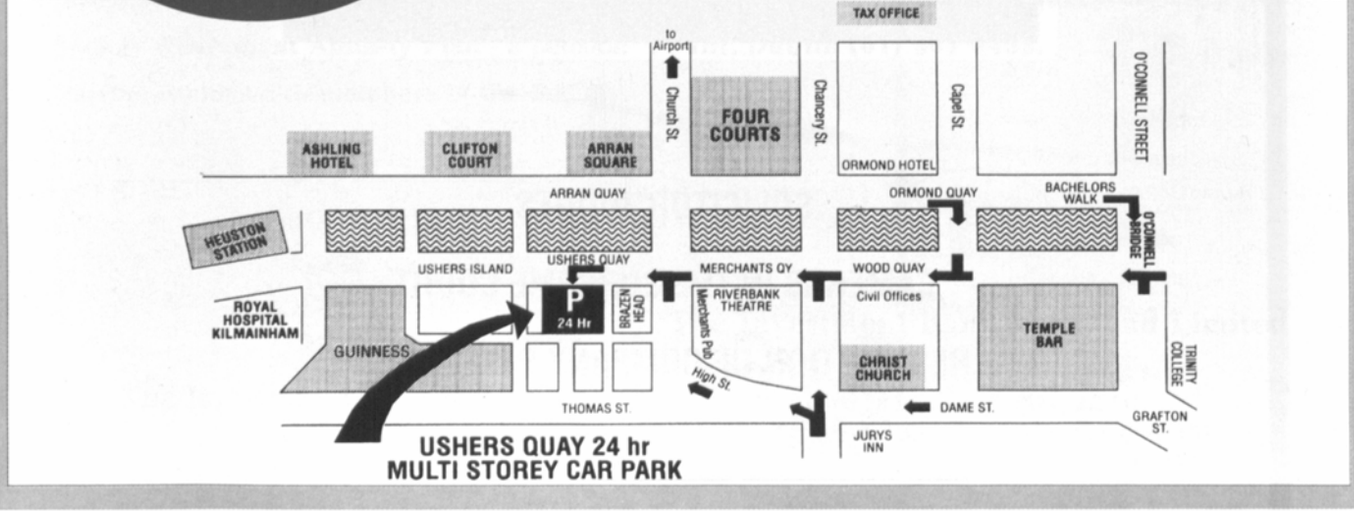

USHERS QUAY 24 hr MULTI STOREY CAR PARK

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LAW SOCIETY OF IRELAND

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Front cover: Pictured at the Law Society Annual Dinner are (left to right): His Hon. Judge Michael Sachs, Nora Owen TD, Minister for Justice and Patrick Glynn, President of the Law Society.

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A LAW SOCIETY SERVICE

VIEWPOINT

Radical Approach required in Law Society 'Root and Branch Review'

Springtime. The spirits rise. The poets write. New life grows from the dead earth. Blossoms and buds appear before changing, almost overnight, into leaves. Nature is conducting a 'root and branch review'. So is the Law Society.

The difference, of course, is that nature's process of renewal is undertaken annually. For the Law Society such a process is rare indeed. The Society's archives contain the results of two or three different stabs at such reviews undertaken over the last twenty five years. They appear, however, to have been less than full-blooded affairs. Indeed, measured in terms of resulting change, they seem to have been positively anaemic. It is to be hoped and expected that this review will be different. The immediate source of the review was a stormy Annual General Meeting of the Law Society last November. That meeting heard a dam burst of complaint, apparently growing for many years, that the Society is deeply out of touch with its membership and that its ever-increasing costs are of serious concern.

It was clear from the outset that the call for a committee to review the Society and its activities commanded overwhelming majority support in the meeting, including widespread support among the Society's Council members who also felt frustration with the status quo and recognised the need for change. Those proposing a review were well-informed and constructive in their approach and repeatedly made clear that dissatisfaction with Council members' performance was not an issue. The great majority of Council members are re-elected year after year and tribute was paid to them for the conscientious and capable way in which they bear the Council's enormous workload. In addition, reference was made to the report delivered a few years ago by the independent consultants, Price Waterhouse, which found that the Law Society is, if anything, understaffed rather than overstaffed. The Council members who deal with the Society's staff know them to be particularly hardworking and professional.

So, if neither the Society's Council members nor its staff are the problem, what is? The Review Committee was instructed to focus primarily on the Society's structures. If the Committee confines itself to the signals emitted at the AGM then it will probably return later this year with a report recommending fewer and smaller committees, Council membership terms of perhaps three years instead of one, limits on the number of terms which may be served and an alternative to the traditional 'Buggin's turn' method of selecting the Society's President. A few recommendations on how to cut spending will probably be thrown in for good measure.

While such a review would be important, it would represent a missed opportunity. Although such changes would be significant, analysed more deeply they would be cosmetic and superficial. The core of the problem would remain untouched. This is because to truly address the problem the review must extend beyond the Law Society to include an economic and strategic examination of the profession itself. What are the strengths, weaknesses, opportunities and threats to the solicitors' profession as it approaches the twenty first century? It would make no sense to consider whether or not the Law Society is meeting the needs of the profession without identifying precisely what the profession's needs are.

The solicitors' profession is reeling under unprecedented levels of internal and external competition, growth in numbers, consumer demand, government regulation, loss of social esteem and declining profitability where profit exists at all. It is essential that the profession correctly identifies the nature and scale of the forces which are changing the environment in which it must operate so that it may predict these changes and shape the process.

Having done that, the next essential step is to develop a realistic and coherent plan of action, identifying short, medium and long-term objectives together with the practical means of achieving them, and to build a consensus of support throughout the profession for that plan. Although much of the Law Society's activities are regulatory and prescribed by statute, all of the 'trade union' role is discretionary. There is nothing to prevent its transformation.

The biggest problem with the Law Society is not the number of committees or the method of selection of the President. The biggest problem, remarkable for an organisation of its size and importance, is that it has no strategic plan which analyses where it wants the profession to be in ten, five or even two years from now and identifies the steps which must be taken to achieve these objectives. Every member of the profession has an interest in the outcome of this review and should be prepared to contribute to it as invited in the March *Gazette*. **You should write to the review committee with your views.**

When, in springtime, nature undertakes its 'root and branch review' it does so in accordance with a blueprint. It knows where it is going and what it wants to achieve. The Law Society review process must produce such a blueprint and be conducted in a radical spirit. Such a spirit is expressed – springtime is for poets – in the concluding lines of Philip Larkin's *The Trees*:-

Yet still the unresting castles thresh
In full grown thickness every May.
Last year is dead, they seem to say,
Begin afresh, afresh, afresh.

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Solicitor Judges

The Law Society Dinner was held on 6 April. Among the guests who attended the dinner were prominent members of the Oireachtas; judiciary; diplomatic corps; public service, and business and professional organisations. This annual dinner serves as an opportunity to return hospitality to those who have provided us with same during the year. More importantly it serves as an opportunity to engender good relations with those people and organisations who are important to the solicitors' profession.

We were honoured this year to have as our special guest speaker, *His Honour Justice Michael Sachs* from the High Court of England and Wales who made history by being the first solicitor in our neighbouring jurisdiction to be appointed a High Court judge. The motivation behind inviting Judge Sachs was to highlight the fact that in the UK solicitors are eligible for appointments to the High Court. He was made a High Court Judge in 1993 due to legislation passed two years previously to end the Bar's monopoly of senior judicial appointments.

The present position in law in this country is that, except in the District Court, solicitors are not eligible for appointment to judicial office. In 1994, the Government announced proposed changes in our judicial system in the form of the Courts and Court Officers Bill. This Bill provides for solicitors to be eligible for appointment to the Circuit Court bench – though sadly not to the higher courts.

Why are solicitors not considered suitable for appointment to the Superior Courts? The fact that this is the case today, is a relic of history and seems to be based essentially on the view that experience as an advocate in the higher courts is a prerequisite for appointment to the bench. The argument that only those who had engaged in advocacy in the Superior Courts should be appointed as judges in those courts has, been discredited by the appointment of solicitors in other jurisdictions who have proved to be excellent judges.

I read with interest recently a profile in *Proctor*, the legal journal of the Queensland Law Society of *Judge Robertson* who is the only solicitor to have been appointed to the District Court Bench in that jurisdiction since its inception in 1959. Judge Robertson stated in the article: "It is a myth that you have to go to the Bar to achieve the transition from the profession to the Bench. But it is important that people who are appointed have a very good grounding in the rules of evidence and the rules of practice."

Experience has shown that the best advocates do not necessarily make the best judges and, correspondingly, that some of the most able judges in the past did not have distinguished careers as advocates. Surely, the person's knowledge of the law and his or her standing as a lawyer, independence of mind, administrative ability, judgment and decisiveness are amongst the qualities that are more desirable than experience as an advocate. Vital personal qualities are patience, courtesy and compassion.

There is no logical reason why a solicitor should not be considered for judicial appointments to all courts including the High Court and the Supreme Court.

Patrick A. Glynn

❐

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'Capping' - New Developments

'Capping' – New Developments

The new Government made their first public statement on the previously proposed 'capping' of damages in the *Irish Times* on 15 March 1995. The article stated that "consultants will be appointed to study the economic implications of insurance costs in the State and to establish the key factors behind those costs, the Minister of State for Commerce and Technology *Mr. Pat Rabitte* will announce in the Dail today." It was reported that the move to appoint consultants follows strong pressure on Mr. Rabitte to cap court awards for pain and suffering for claimants in injury cases. The article stated that Mr. Rabitte feels that the problem of insurance costs is "much wider" than the level of awards for pain and suffering. "There is no definitive study to show how tackling pain and suffering awards would reduce the cost of insurance," he said. Another article on the insurance sector which was published in the Business Supplement of the *Irish Times* on 17 March 1995 dealt with the issue of 'capping'. It was reported in the article that the Irish Insurance Federation says it is neutral on the issue of capping awards. "That is a question for politicians and the public," says *Mr. Mike Kemp*, Manager of the non-life insurance section.

"There is no definitive study to show how tackling pain and suffering awards would reduce the cost of insurance" – Pat Rabitte, T.D.

There was an article published in the March issue of *Management* Magazine headed 'The price of suffering'. The article stated "some of the most vociferous opposition to the proposals have come from the Law Society. It views the idea of capping awards as a cop out from the more difficult but fundamental task of reducing accidents of all kinds". The article continued "the solicitors would argue that each compensation case has to be looked at individually – in extreme circumstances, capping could mean clearly inadequate awards for the damage done". *Ernest Cantillon*, Chairman of the Litigation Committee was also quoted in the article.

Solicitors battle AG office 'Block'

An article was published in the *Irish Independent* on 21 February 1995 under the above heading. It was reported in this article that "a solicitors' group last night pledged to fight efforts to block a proposal to allow their recruitment to the Attorney General's office." It was reported that the President of the Dublin Solicitors Bar Association, *Michael Murphy* said last night: "our experience and training makes us just as qualified as barristers". It was reported: "traditionally, staff at the AG's office have been barristers but a Government report proposes solicitors should be recruited." It was reported in the article: "Mr. Murphy also pointed out that there was nothing in Statute or the Constitution which prevented solicitors from being appointed Attorney General."

In the *Cork Examiner* on 22 February 1995 an article written by *Mark Hennessy* stated that "the office system of the Attorney General's office has been dubbed as "cumbersome and under-developed" by a high level report recommending major changes, approved by the cabinet yesterday." It was reported that the three-strong review body was set up by the then Taoiseach Albert Reynolds on 15 November, in the wake of the furore about the 7 months' delay in dealing with Father Brendan Smith's extradition application. The headline of the article read 'Report backs changes in the office of the AG'.

Compensation claims

An article was published in the *Evening Press* on 9 March 1995 written by *Mark Tierney*. This article was on the topic of claiming compensation. The article stated that "Irish people are the biggest injury complainants in Europe, cadging millions from courts and insurance companies each year". The article contained comments from *Noel Carroll* of Dublin Corporation. Noel Carroll stated in the article that he estimates that 10% of claims lodged with the Corporation are entirely fraudulent and he added: "I would say that the vast majority of claims are exaggerated." It was also stated in the article that the Law Society views the "no foal no fee" method of legal practice as a form of social justice in the absence of civil legal aid according to spokeswoman *Catherine Dolan*. "The judicial process is there to expose fraudulent claims. If a claim appears to be fraudulent we would advise solicitors to withdraw from it," Ms. Dolan pointed out.

The Courts and Court Officers Bill

In the *Irish Press* on 13 March 1995 an article was published by *Mairead Carey*. The headline read 'Owen hints at changes in new Bill on judges'. It was reported that Justice Minister *Nora Owen* has hinted that there will be changes in the new legislation proposed for judicial appointments. It was stated that Mrs. Owen is currently considering the Court and Court Officers Bill which proposes to hand over the appointment of judges to an independent body. Mrs. Owen said yesterday that any appointments of

new judges would be done "taking into account proposals in the Bill as it now stands." It was also stated in the article that the Minister for Justice said "I have had a series of meetings with the Bar Council and the Law Society and I have been listening to some of their criticisms of the Bill and the workability of the Bill." She was preparing a memorandum for Government based on that review she explained. She went on to say "it is possible that there will be changes in the Bill as it was presented to the Dail before Christmas."

Criminal injury compensation

An article on 15 March 1995 was printed on the front page of the *Evening Press* with a headline 'Crime compo for all urged'. The article stated that the Government today faced demands to reintroduce criminal injury compensation for victims of the public after it was revealed that Gardaí have received £10.7m in compensation awards. The article stated "the solicitors' body and victims' support representatives urged that there should be compensation for all citizens after figures were released showing that over 600 Gardaí were compensated over the past three years." "It is a pity that the injuries suffered by ordinary citizens are not also recognised," said the Chairman of the Law Society Criminal Law Committee, *James MacGuill.*

'Minister to speed up court hearings'

An article was published in the *Evening Herald* on 15 March 1995 under the headline 'Minister to speed up court hearings'. The article reported that court cases will be dealt with more quickly under laws being drawn up by Justice Minister *Nora Owen.* It was reported that a new Criminal Justice Bill will be introduced to deal with court procedures which will reduce the number of remands and adjournments in court cases. It was reported that the Minister said she is considering extending remand periods and allowing remand hearings to be held at a court near prisons where accused people are being held. "The delays in our courts are totally unacceptable" she added.

Solicitors (Amendment) Act 1994

An article was published in *The Phoenix* on 17 March 1995 headed 'Legal Eagles' concerning the Solicitors (Amendment) Act, 1994. The article stated that although the Solicitors (Amendment) Act, 1994 came into effect on 4 November last, it has not necessarily had serious negative implications for the country's 4,000 solicitors. The article went on to say that many welcomed the Bill, since it simply made many of their modern business practices into statutory regulations.

It was stated that "It is generally accepted that it was a good Act, it takes steps to protect the client, it will do much to enhance the reputation of solicitors in the eyes of the public and it will make roguery in the legal profession virtually impossible." The article continued "to this end, under Sections 8 and 9 of the Act, new grounds of complaints against solicitors have been introduced."

The article stated that a spokesperson for the Law Society stated that "the Act provides for the investigation by the Society of complaints received from clients of the solicitor or from any persons on behalf of such clients, that the legal services provided were inadequate in a material respect and were not of the quality that could be reasonably expected of the solicitor or firm of solicitors."

The article also referred to Section 68 of the Act where solicitors must now provide fully detailed itemised bills for their work, giving precise details to their client of where their money has been spent. The article interviewed various solicitors and their views of the Act. Overall the article was a positive one for solicitors.

Call for judges to have training

After the handing down of the sentence in the X case there have been calls for judges to have training. In the *Irish Independent* on 22 March 1995 under the heading 'Womens group in campaign for judges' college'. It was stated that Justice Minister *Nora Owen* is to study plans for a judges training college aimed at ensuring greater consistency in decisions handed down from the bench. It was reported in the *Irish Press* on 22 March 1995 that judiciary must stay informed according to Minister for Justice Nora Owen.

Abortion Information Bill

The publishing of the Abortion Information Bill led to strong media coverage during the month of March. In an article on the front page of the *Irish Independent* on 23 March 1995 it was stated that "Legal Team to Argue Unborn case". The article stated that a separate legal team would represent the interests of the unborn in a Supreme Court hearing on the constitutionality of the Abortion Information Bill. In what is understood to be an unprecedented move, Chief Justice *Liam Hamilton* has appointed two legal teams to argue against the State in the hearing – one for the unborn, the other for the mother. It was stated that the challenge will open in the Supreme Court on 4 April and is expected to last four days. The team representing the rights of the unborn will be led by Law Society President *Paddy Glynn*, assisted by *Ralph Sutton, Peter Kelly* and *Mary Irvine.*

On the front page of the *Irish Times* on the same day, 23 March 1995, it was stated under the heading 'Supreme Court hearing on Bill in April'. It was reported that "arguing against the constitutionality of the Bill on the right to life of the unborn are *Mr. Ralph Sutton* SC, *Mr. Peter Kelly* SC, and *Ms. Mary Irvine*. The solicitor is *Mr. Patrick Glynn*, President of the Law Society."

Catherine Dolan

By Dr Eamonn G. Hall

In Praise of a Solicitor

If you read this piece, and you are a solicitor, and you have completed drafting a deed and you feel harassed by the system and feel (sometimes) perplexed by the multiplicity of our statutes and case law, and rage silently at the regulation of the solicitors' profession, and you feel perplexed by some provisions of the *Solicitors (Amendment) Act, 1994*, and you feel angry (sometimes) at the institutional Law Society, take heart, the deed you have drafted, or are about to draft, will last (subject to any misfortune of being lost or destroyed) for as long as the printed word survives.

If you feel proud of the words you have composed, if, for example, you feel proud of having grasped – in an intellectual sense – the essence of the prior title of a convoluted transaction, the words of *John Keats* (1795 – 1821) (who died at the tender age of 25 years unlike 98.9% of solicitors) are apt to serve as a source of consolation:

> "A thing of beauty is a joy forever,
> Its loveliness increases, it will never
> Pass into nothingness."

If you are worried by some of the current trends in legal life, you should take further heart from the final words of John Keats's poem:

> "Yes, in spite of all,
> Some shape of beauty moves away the pall,
> From our dark spirits."

If you are a sole practitioner, or the principal of a prestigious firm, the deed you have drafted will bear your name. If you are not in that category, your initials will be on the deed. The words of Walt Whitman (1819 – 1892) offer further comfort:

> "What am I after all. . . pleas'd with the sound of
> My own name? repeating it over and over;
> I stand apart to hear – it never tires me."

Our 150th Anniversary

It is appropriate here to mention that Sunday January 26, 1995 marked the 150th anniversary of the granting of the first Royal Charter to the Law Society of England and Wales. The Law Society of Ireland traces its origin back to the foundation of the Law Club in 1791 which later became the Law Society in 1830. In 1852 the Law Society of Ireland received its first Charter. It is appropriate to send fraternal greetings and congratulations to the Law Society of England and Wales. In a few years time we will also celebrate our sesquicentenary.

It is the commonsense of solicitors that saves organisations from falling foul of the law. It is the wisdom of solicitors that seems to be appreciated by so many.

Mr Richard Barr in the *Solicitors' Journal* of 17 March 1995, celebrating the 150th anniversary of the Law Society's charter, referred to the countless committees, societies, voluntary bodies and charities across the land which either have a solicitor serving on them or one in the background providing free help. He noted that it was often the common sense that solicitors brought to those organisations that saved them from falling foul of the law, from lapsing into chaos or even ferocious feuding. He observed that it was the wisdom (derived from seeing the human condition in all its reality) which solicitors bring into the turmoil of daily life which seems to be appreciated by so many.

We are not always seen as such, Mr Barr stated, but we are frequently the Davids fighting Goliaths, the runners of the extra mile or simply the best hope that clients have of making sense of a wicked world. The writer concluded that the real worth of the solicitors' profession lies, of course, in the fearless representation of the client's interests. When we do this, we inevitably make ourselves unloved by those who challenge those interests. Almost by definition, 50 per cent of solicitors will be hated – those on the other side of the case.

The *Solicitors' Journal* is running a "My Favourite Solicitor" competition which will be open to any individual or organisation who can nominate any solicitor, whether in private practice, public service or voluntary organisations. The criteria for the award will be:

- the benefit received by an individual or an organisation from the solicitor's work
- tangible benefit received by the client
- good client relations
- equitable use of the law
- efficient management of the case
- work above and beyond the call of duty
- high professional standards.

Readers who have reached the end of this piece may consider that they would be eligible for an award entitled, "My Favourite Solicitor". ❐

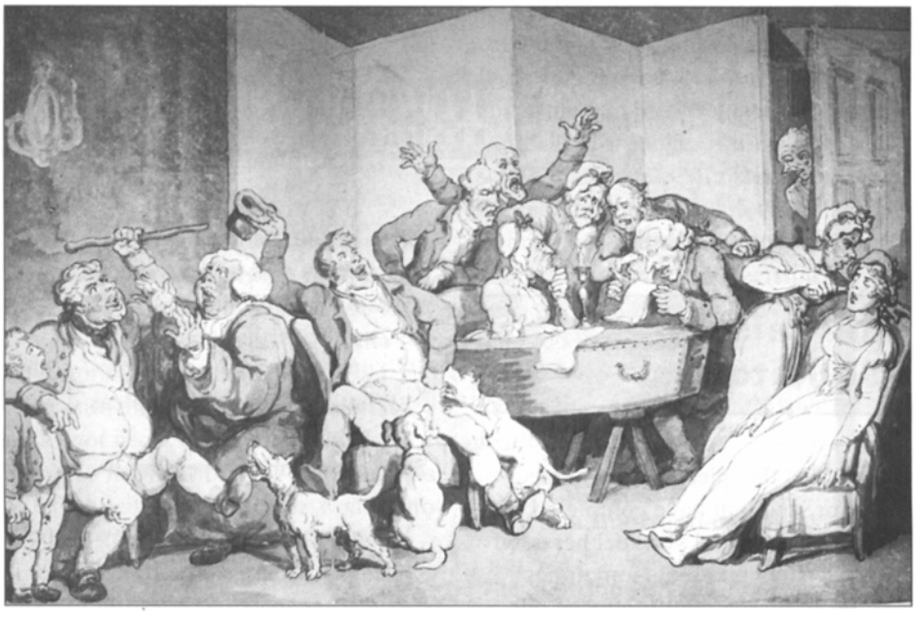
Stark Warning for Solicitors Drafting Wills

A solicitor who fails to draft a will promptly despite having instructions to do so is liable to an intended beneficiary. The House of Lords, by a majority of three to two, so held in the recent landmark decision of *White v Jones* delivered on February 16, 1995 and now reported at [1995] 1 All ER 691.

The principles involve in *White v Jones* perplexed many legal minds. The principles were seen as so important that it is understood that the Law Society of England and Wales agreed to pay the legal costs of both sides. It took the House of Lords eleven months to deliver judgment. The *All England Law Reports* reported the case on March 1, 1995 – two weeks after the delivery of the ruling. The case has been described as the most important solicitors' negligence case in many years.

The principles involved in the negligence case against the solicitors perplexed many distinguished legal minds. It took the House of Lords eleven months to deliver judgment. Solicitors must draw up wills with the minimum of delay.

On March 4, 1986, 78 year old *Arthur Barratt,* the testator, who had quarrelled with the plaintiffs, his two daughters, executed a will cutting them out of his estate. Subsequently, in June of that year, Mr. Barratt was reconciled with the plaintiffs and sent a letter to his solicitors giving instructions that a new will be prepared to include gifts of £9,000 each to his daughters. The solicitors received the letter on July 17 but nothing was done to give effect to the instructions for a month. On August 16, *Mr. John Jones*, a legal executive, employed by the firm of solicitors wrote an internal memorandum to a member of the firm's probate department requesting that a will or codicil be drawn up "as soon as possible". The following day, Mr. Jones went on holiday and on his return to work a fortnight later he made arrangements to visit the testator on September 17. However, Mr. Barratt, the testator, died on September 14, after an accident on holiday before the new will was drawn up.



Reading The Will *– Thomas Rowlandson, early Nineteenth Century, Boston Public Library.*

In due course, the first will, executed in March 1986, was admitted to probate. So there were two documents; the will and the letter of instructions for a new will. The letter was not witnessed as required by the appropriate legislation so it could not itself stand and take effect as a will. The family were unable to agree on how the estate should be divided. The daughters took the view that Mr. Jones's inexcusable delay was the cause of their not having received the £18,000 from their father's estate. Had the legal executive done what he should have done, the March 1986 will would have been revoked and replaced with a new will benefiting them. So they brought an action against the solicitors for damages for negligence.

Duty of Care to Whom?

The judge at first instance held the solicitors owed no duty of care to the plaintiffs and dismissed the action. The two daughters (the plaintiffs) appealed to the Court of Appeal which allowed the appeal on the grounds that a solicitor who was instructed to prepare a will for a client and, in breach of his professional duty, failed to do so, was liable in damages to a disappointed prospective beneficiary if the client died before the will had been prepared or executed. The Court of Appeal held the plaintiffs were each entitled to damages of £9,000.

The solicitors appealed to the House of Lords contending that the general rule was that a solicitor acting on behalf of a client owed a duty of care only to his client under the solicitor-client retainer, which was contractual in nature, that since the plaintiffs' claim was for purely financial loss any claim could only lie in contract and not in tort and there was no contract between the solicitor and disappointed beneficiary and that no claim lay in tort for damages in respect of a mere loss of an expectation which fell exclusively within the zone of contractual liability.

Special Relationship

The majority of the House of Lords (Lords Goff, Brown-Wilkinson and Nolan) held by accepting instructions to make a will, a solicitor came into a special relationship with those whom a testator intended to benefit under the will. In consequence, the law imposed on the solicitor a duty to intended

beneficiaries to act with due expedition and care in effecting the testator's instructions. Delivering the lead majority speech, Lord Goff said that it was open to the court to fashion an effective remedy for a solicitor's breach of professional duty to his client.

In effect, the majority of the House of Lords considered that there was a necessity for a remedy to fill a lacuna in the law and so prevent an injustice to disappointed beneficiaries which would otherwise occur. The House of Lords described the remedy as an extension of the principle of assumption of responsibility developed in *Hedley Byrne & Company v Heller & Partners Limited* [1964] AC 465.

The majority of the House of Lords extended the law of negligence in this manner by using the incremental approach advocated in *Caparo Industries plc v Dickman* [1990] 1 All E R 568. There, the House of Lords devised a test to determine whether in any situation a duty of care existed namely:

(a) forseeability of the damage alleged
(b) a close and direct relationship between the parties characterised as proximity or neighbourhood, and
(c) a requirement that it should be fair, just and reasonable to impose a duty on one party for the benefit of another.

It followed that the solicitors owed the daughters (plaintiffs) of the testator a duty of care and since their negligence had effectively deprived the plaintiffs of the intended legacies the solicitors were liable in negligence.

Counsel for the solicitors in the Court of Appeal had in the House of Lords conjured up the spectre of solicitors being liable to an indeterminable class, including persons unborn at the date of the testator's death. Lord Goff, in the leading majority speech, stated that their Lordships were concerned here with a liability which was imposed by law to do practical justice in a particular type of case. There must be boundaries to the availability of a remedy in such cases: but these would have to be worked out in the future, as practical problems come before the court. He observed that in cases like the present case liability was not to an indeterminable class but to the particular beneficiary or beneficiaries whom the client intended to benefit through the particular will. Lord Goff did state that if by any chance a more complicated case should arise to test the precise boundaries of the principles in cases of this kind, that problem could await the solution when and if such a case comes forward for a decision.

False Sense of Complacency

Many of us can be lulled into a false sense of complacency by dealing with a client through correspondence. The judgment emphasises that solicitors must draw up wills with the minimum of delay. ⌐

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The Burren Law School

by Brian Sheridan

On a visit to the magical landscape of the Burren in 1993,I came across what was described to me as "a monument to lawyers". It was the O'Dhalaigh Monument near Ballyvaughan. The discovery was music to the ears of a then member of the Public Relations Committee of the Law Society. On further investigation, I discovered that the Burren was, in fact, the site of three law schools in Medieval Ireland.

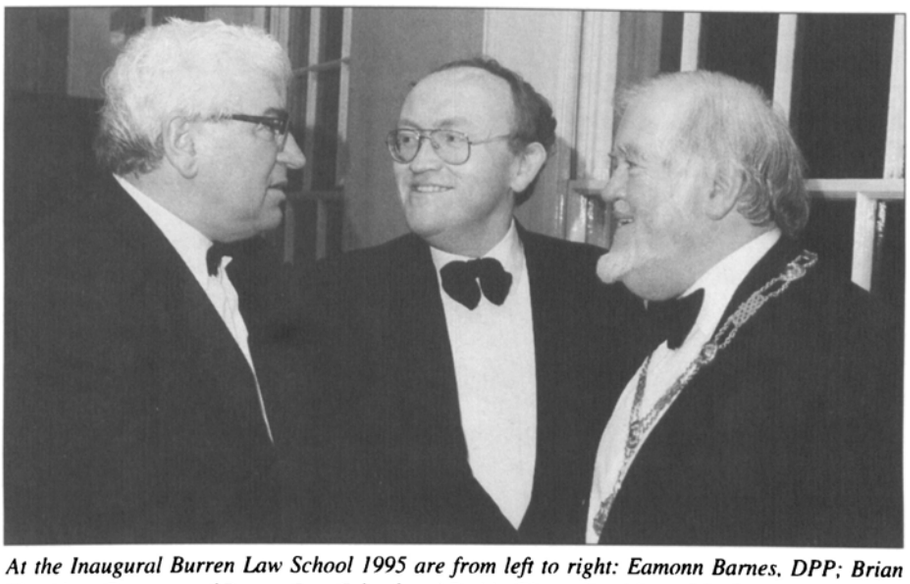
Further enquiries led me to the site of the O'Davoren Law School, the remains of which can be seen and are a public monument near Corkscrew Hill outside Ballyvaughan, Co. Clare. It was here that between the years of 1563 and 1569 Domnall O'Davoren and his pupils compiled a manuscript now known as "Egerton 88" which contains an invaluable glossary of Brehon Law and a variety of law texts, one dating back to the 8th Century. It is one of the primary sources of our knowledge of the Brehon Laws. It is presently in the British Library and large sections of it are yet to be translated.

In discovering the Brehon Laws, one is discovering a rich legal tradition. While many of me manuscripts date from the 12th to the 14th Century, linguistic analysis indicates that these refer to texts which were in existence as far back as 700 A.D.

It may surprise the reader, as it did me, that in 16th Century Ireland there were an established number of legal practices. Noted families such as the O'Breslins, the McEgans and the McClanceys were the most noted of these. They were lawyers to the Chieftains of their local "Tuaithe".

The O'Daverns were lawyers to the O'Loughlins, Princes of the Burren who had their seat at Newtown Castle, Ballyvaughan, Co. Clare which has recently been restored and its surrounding buildings converted into an International Art College. It was here in

The Brehon Lawyers



At the Inaugural Burren Law School 1995 are from left to right: Eamonn Barnes, DPP; Brian Sheridan, Convenor of Burren Law School and Paddy Glynn, President of the Law Society

February 1994, over a most enjoyable lunch, and assisted by liquid refreshment, I proposed the idea of reviving the concept of the O'Davern Law School. The idea met with swift approval by Michael and Mary Green, restorers of the Castle and hence the Burren Law School was born.

With the support of the Clare Bar Association and the voluntary assistance of many, the inauguration took place in April of 1994 when the first law school was opened by his Honour, Judge Anthony Harte (Northern Ireland) President of the legal History Society. The keynote address at the Seminar which was devoted to the theme of "Women in Irish Law" was delivered by Mr. *Mervyn Taylor* who addressed the broad issue of the introduction of divorce.

The second Burren Law School was devoted to the theme of "Crime and Punishment in Irish Law" and took place in April. It was opened by Mr. *Donal Carey* T.D., Minister for Western Development and the keynote addresses were given by Mr *Eamon Barnes*, Director of Public Prosecutions and by His Honour Judge *Michael Moriarty*. Dr. Muirin Ni Bhrolchain, lecturer in Celtic Studies at Maynooth University, gave the Brehon Law Perspective. There were contributions from *Paddy Glynn*, President of the Law Society, Prof. *William Duncan*, Dr *Art O'Connor* and *Kieran McGrath*, Social Worker which added to the lively debate.

The aims of The Burren Law School are fourfold.

- to provide a forum for legal discussion on topics of social interest.
- to develop an appreciation by lawyers and others alike of our rich legal tradition.
- to provide a forum for inter-disciplinary discussion in which lawyers speak to members of other professions on topics of mutual interest.
- to encourage knowledge of the Burren itself and the afternoons of the seminars are devoted to guided field trips to interesting sites.

A longer term objective is the creation of a trust to promote greater awareness of our legal heritage and to provide resources for its dissemination and in practical terms the translation of texts.

The Burren Law School has met with an extraordinarily enthusiastic response. I am particularly pleased that the Burren

Compensation Fund Payments – March, 1995

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Council at its meeting in March 1995.

	IR£
Malocco & Killeen, Chatham House, Chatham Street, Dublin 2.	207,500.00
John K. Brennan, Mayfield, Enniscorthy, Co. Wexford.	6,389.63
Diarmuid Corrigan, 6 St. Agnes Road, Crumlin, Dublin 12.	358.64
Anthony O'Malley, James Street, Westport, Co. Mayo.	1,570.00
David Fitzpatrick, 19 Main Street, Blackrock, Co. Dublin.	7,319.00
	£223,137.27

Compensation Fund Payments – April, 1995

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Council at its meeting in April 1995.

	IR£
Jonathan P. T. Brooks, 17/18 Nassau Street, Dublin 2.	175,583.54
John J. O'Reilly, 7 Farnham Street, Cavan, Co. Cavan.	6,431.71
	£182,015.25

Colm Price (right) Chairman of the Law Society's Conveyancing Committee, was an adjudicator for the 'National Property Journalist of the Year Awards 1994' presented by the Irish Auctioneers & Valuers Institute. He is pictured above at the awards presentation held during the IAVI's '95 National Conference with (from left): Tony O'Loughlin of Jones Lang Wootton, Dublin, President of the IAVI; Cliodhna O'Donoghue, Property Editor of the Irish Independent *who was awarded the 'National Property Journalist of the Year 1994' and Tommy Barker of the* Cork Examiner *who was awarded the 'Provincial Property Journalist of the Year 1994'.*

Law School has been such a success in terms of bringing together lawyers and other professionals to discuss topics of interest. It is from this discussion, in the tradition of the old law schools, that progress will be made in developing our legal structures.

It is little recognised how developed our legal system was in Medieval Ireland. The lawyer played a very important role and was a prominent participant in the social life of the period. This tradition continues today and is something we can be proud of. Perhaps we forget the contribution we have made and are making to society.

We owe a great deal of our knowledge of this period to the work of Professor Daniel Binchy, a compiler of "The Corpus Iuris Hibernici". His descendants are well known solicitors practising today. Others now carry on his valuable research.

The Burren Law School 1996 is devoted to the theme of "The Child in Irish Law" and will take place from 19 to 21 April 1996 at The Burren College, Newtown-castle, Ballyvaughan, Co. Clare.

For further information about our project, contact Brian Sheridan, at 01 – 269 2126. For further reading the text "A Guide to Irish Law" by Prof. Fergus Kelly is recommended.

The Professor Richard Woulfe Award Essay

1. Professor Richard Woulfe retired as Director of Education of the Law School last June after sixteen years of service. In recognition of his contribution to the Law School, the Law Society is sponsoring an essay named after Professor Woulfe for solicitors' apprentices.

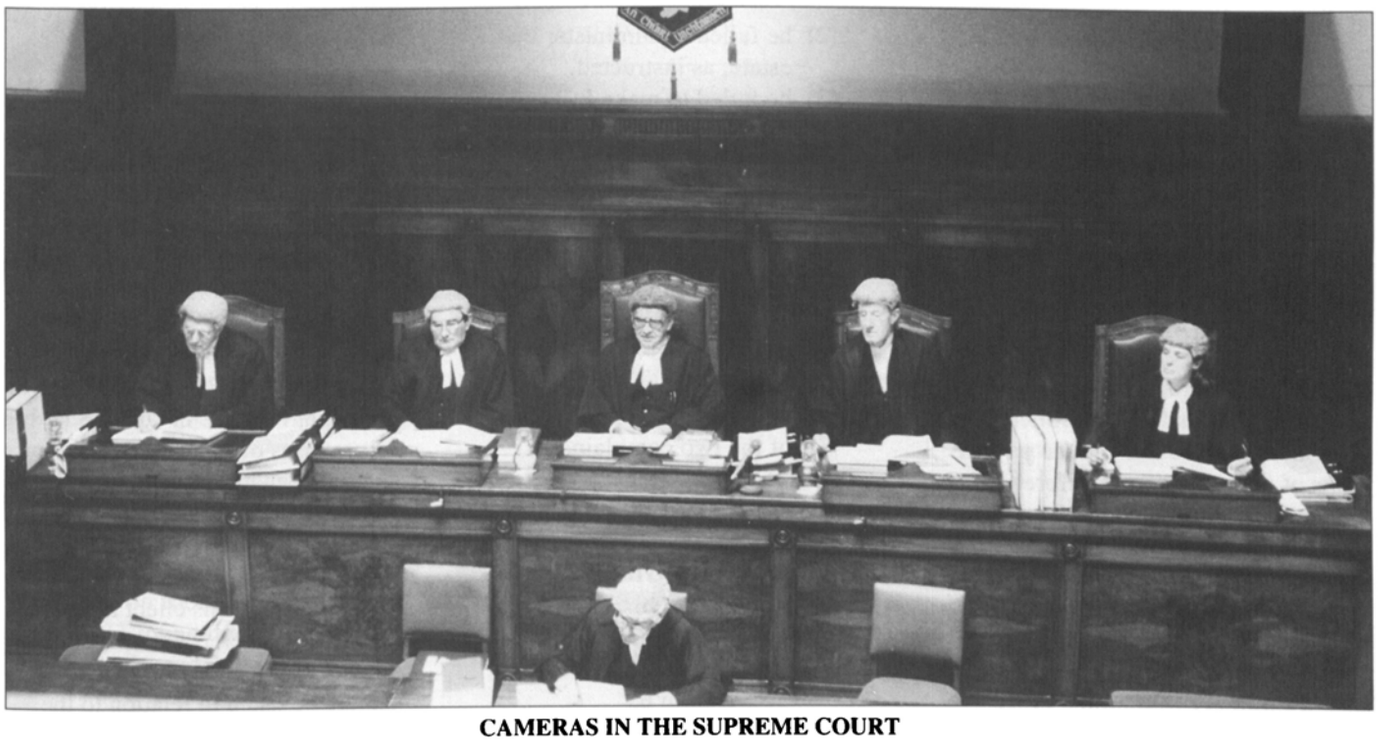
2. The topic for the essay is entitled: "What Reforms should be made to Modernise our Criminal Legal System?"

3. Contributions to this topic should be submitted to the Law School on or before 31 May 1995. The length of the essay should be no more than 4,000 words. There will be prizes of £500 for 1st Place; £300 for 2nd place and £200 for 3rd place.

Any queries relating to this essay competition can be referred to Harriet Kinahan in the Law School.

(Telephone No. 01 671 0200).

Cameras in the Supreme Court – History in the Making



CAMERAS IN THE SUPREME COURT

The Supreme Court in session at the start of the hearing to test the constitutionality of the Abortion Information Bill. From left: Mr. Justice Blayney; Mr. Justice O'Flaherty; the Chief Justice, Mr. Justice Hamilton; Mr. Justice Egan and Mrs. Justice Denham.

Photograph courtesy of the *Irish Times*.

History was made on April 4 when an RTE television camera was allowed into the Supreme Court for the opening of the constitutional challenge to the Abortion Information Bill.

It was the first time that a TV camera had been allowed to film a sitting Irish court. The pictures were subsequently used on RTE's 6.01 and 9 o'clock television bulletins.

Ireland has no statutory provisions relation to the making of vision recordings in court. In this respect, it is unlike England and Wales, where the 1925 Criminal Justice Act makes it a criminal offence to attempt to take any photograph in court. (The Act was passed 11 years before the first public television service began.) In Ireland, it is a matter for the judge in each individual case to decide whether such activity should be allowed.

While sketch artists have been permitted to operate in Irish courts on occasion, judges have – almost without exception – refused permission for the making of television recordings for non-judicial purposes.

In the past four years, the nearest RTE news came to televising the courts was a broadcast of the former Chief Justice, Mr Justice Finlay, with judges from Northern Ireland, presiding over a law students' moot court in the Supreme Court. RTE has also broadcast pictures of the interiors of the Four Courts (the Supreme Court, the High Court, the Round Hall) with nobody present. A report was also transmitted which included an interview with senior counsel in an empty High Court (on the subject of televising the courts).

RTE's legal affairs correspondent, Kieron Wood, who organised the pictures of the Supreme Court, said: "For some time, I've been anxious to open up the courts to the public, to let them see how justice is done in their name. On this occasion, I spoke to the Chief Justice and, because of the importance of the case, he agreed to allow cameras in to film the entry of the judges. We were also able to get a few pictures of solicitors and counsel before the judges came into court, but, as soon as the judges sat down, we had to leave."

Kieron, who's in his final year of study for the Bar, added: "I hope very much that this is just the beginning of a trend which will see more televised court proceedings. I accept that there are very real concerns that television cameras might interfere with the administration of justice, but I think that those can be addressed by the advisory committee which the Law Reform Commission has recommended should be set up to advise the Minister for Justice on this issue".

"It's clearly a matter which should be approached sensitively and carefully, but I believe that, at the end of the day, justice should not only be done, but be seen to be done."

Disciplinary Cases

Re: James M. Sweeney,
Solicitor, formerly practising as
James M. Sweeney,
14, New Cabra Road,
Phibsboro, Dublin 7.

The High Court Petition No. 8SA/1994.

On 4 July, 1994, the Acting President of the High Court ordered that James Sweeney, Solicitor, stand censured regarding his conduct as a solicitor and be fined £500 and that he pay the costs of the proceedings before the Disciplinary Committee measured in the sum of £315 and the costs of the Society of the petition and order when taxed and ascertained.

The Court had before it the report of the Disciplinary Committee of its hearing on 29 June, 1993 and 20 January, 1994, in which the Committee made a finding of misconduct in the light of the solicitor's admissions that:

a) he failed to respond to the correspondence of the Society;
b) he failed to attend before meetings of the Registrar's Committee on two occasions when requested to do so;
c) he failed to comply with the following undertakings given to the Registrar's Committee on 12 November 1992:

   (1) to immediately apply to the High Court to have a copy of a will proved;
   (2) to make arrangements to immediately discharge the funeral expenses of the Testatrix;
   (3) to be responsible for the costs involved in having the copy will admitted to Probate.

d) (1) he failed to extract the relevant grant of probate, as instructed.
   (2) he failed to administer the estate, as instructed.
   (3) he failed to make full and frank disclosure of the loss of the original will of the testatrix.
   (4) he led the two complainants to the Society to believe that he was administering the estate of the late testatrix, when he was not.
   (5) he failed to reply to the letters of the solicitor of one of the two complainants.

Re: Joseph Gilsenan
Practising as Gilsenans,
Ormond House,
179, Lower Rathmines Road,
Dublin 6.

The High Court Petition No. 6SA/1994.

On 5 July 1994 the acting President of the High Court affirmed the findings of the Disciplinary Committee of the High Court that there had been misconduct on the part of Joseph Gilsenan and ordered:

(1) that the said Solicitor pay a fine of £5,000.

(2) that he pay the Incorporated Law Society of Ireland £5,500 in respect of the costs incurred by the Society in the proceedings before the Disciplinary Committee.

(3) that he pay the Incorporated Law Society of Ireland the costs of the petition, to be taxed in default agreement.

The Court had before it the report of the Disciplinary Committee of the 29 June 1994 in which the Committee found that there had been misconduct on the part of the Solicitor in that he had:

1. failed to protect the interests of a named client

2. deducted fees and expenses from monies received from the said named client without clearing in advance the quantum of such fees and expenses and obtaining his client's authority to make such deductions

3. failed to advise the said client, as he should have done, in taking a letting of premises owned by the solicitor, that independent legal advice should have been taken in relation to the taking of that letting

4. failed to advise his client in relation to the letting referred to a 3 above that an independent valuation should be taken in relation to the rent payable

5. failed to have a company, in which he was beneficially interested, discharge a sum of £3,150 due to a venture in which his client was interested, which estimate had been accepted for the work

6. continued to act as a director of a company in which his client was interested after he had purported to resign as an officer of that company

7. in furtherance of his own interest did not give the independent legal advice to his client which is expected of a solicitor and which is the due of every client.

Re: Niall Joseph O'Connor
Practising as O'Connor Mohan & Co.,
12, Fairview Strand,
Fairview,
Dublin 3 and
4, Fitzwilliam Square,
Dublin 2.

The High Court Petition No. 11 SA/1994.

On 14 November 1994 Mr. Justice Keane ordered:

(1) That the said Niall Joseph O'Connor Solicitor do stand censured regarding his conduct as a solicitor

(2) That the said Niall Joseph O'Connor Solicitor do pay forthwith for fine to the said Society a sum of £2,500.00

(3) That the said Niall Joseph O'Connor do pay to the Society the costs of the proceedings before the Disciplinary Committee and also the costs of and incident to the said Petition and the Order when taxed or agreed upon.

The High Court had before it the report of the Disciplinary Committee to the High Court of the hearing conducted before the Committee on 9 June 1994 on foot of which the Committee found that the solicitor was guilty of misconduct in that he:

(a) failed to disclose to his clients until 26 February 1993 (approximately two years after the purchase of their property had closed) that he had closed the purchase notwithstanding the deletion by the vendor's solicitor of a clause regarded as fundamental to the contract by his clients;

(b) failed to furnish a copy of the contract referred to at (a) above to his clients despite repeated requests by them to do so, until 15th February 1993;

(c) failed to immediately advise his clients to seek separate legal advice when there was a clear conflict in his continuing to represent them in the matter;

(d) deliberately altered an opinion he had obtained from counsel on behalf of his clients dated 16th March 1993 to protect his own interests;

(e) prejudiced his clients' interest by the alteration of the opinion referred to at (d) above by the deletion and concealment of legal advice material to their interests;

(f) failed to reply to correspondence from the Society asking for an explanation in relation to the matter.

Re: Lorna Burke
Practising as Burke & Co.,
19, Eyre Street,
Galway.

The High Court Petition No. 27SA/1992.

On 1 March 1994 the President of the High Court ordered:

(1) that the said Solicitor do stand censured regarding her conduct as a solicitor;

(2) that the said Solicitor do pay forthwith a fine to the Society in the sum of £1,500.00;

(3) that the said Solicitor do pay to the Society the costs of the proceedings before the Disciplinary Committee measured in the sum of £1,575 and also the costs of and incidental to the said Petition to the High Court to be taxed in default of agreement.

The Court had before it the report of the Disciplinary Committee of 24 June 1992 in which the Committee made a finding of misconduct in that the Solicitor:

(a) As a partner in the firm of Frank Burke & Co.

i. was responsible for the delay in dealing with the administration of an estate;
ii. failed to protect and advance the interests of the beneficiaries by making and/or seeking authority for interim distribution of the assets of the estate;
iii. failed to properly supervise the said practice of Frank Burke & Co. so as to ensure that the interests of the beneficiaries of the estate were properly protected.
iv. failed to account for all sums received and distributed in respect of the said estate.

(b) As a sole practitioner from 17 December 1990 the solicitor:

i. failed to take all proper and necessary steps to complete the administration and distribution of the said estate;

ii. failed to have regard to the hardship caused to the complainant and residuary legatee in the handling of her requests for an interim payment;

iii. failed to make a proper distribution to the compalinant, when she did in fact make such interim distribution in or about the month of March 1990;

iv. failed to attend a meeting of the Registrar's Committee on 16 May 1991, when requested to do so;

v. failed to properly account to the said complainant in respect of the said interim distribution.

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PEOPLE AND PLACES

Pictured at the Law Society Dinner are (l-r): Paddy Glynn, President Law Society; Nora Owen TD, Minister for Justice and Mr. Justice Declan Costello, President of the High Court.

Pictured at the Law Society Dinner are (l-r): Lt. General G. J. McMahon, Chief of staff of the Army and Commissioner Patrick Culligan, An Garda Siochána.

Pictured at the Law Society Dinner are (l-r): the Lord Mayor of Dublin, John Gormley and Aidan Canavan, President of the Northern Ireland Law Society.

Members of the Parliamentary Committee recently visited Leinster House and attended sittings of the Dáil and Seanad. The visit was kindly arranged by Mervyn Taylor TD, Minister for Equality and Law Reform. The opportunity was also taken to meet opposition spokespersons Senator Cathy Honan and Michael Woods, TD.
Pictured from left: Margaret Byrne (Librarian and Secretary to the Committee); Fergus Applebe; Mervyn Taylor TD, Minister for Equality and Law Reform; Elma Lynch (Committee Chairman); Terence McCrann and Anglea Condon.

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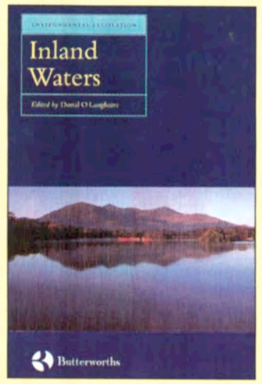

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"From the Four Courts"

Pictured at the Law Society Dinner are Council members Owen Binchy, Fergus Applebe and Past President William A. Osborne.

International Client Counselling Competition

Congratulations are due to Valerie Kennedy (36th professional course) and Mairin Stronge (37th professional Course). Valerie Kennedy and Mairin Stronge came second place in the International Client Counselling Competition which was held in Florida from 30 March to 2 April. They travelled to Florida with Bernie Walsh, Law School tutor to participate in the competition. They would like to thank their respective offices for allowing them the time off to travel to the competition. Valerie is an apprentice in English & Associates, Fermoy, Co. Cork and Mairin is an apprentice with Walker O'Carroll & Hogan, Athlone, Co. Westmeath.

Preparing for the International Client Counselling Competition (from left): Valerie Kennedy, competitor; Bernie Walsh, tutor; Mairin Stronge, competitor and James MacGuill, Chairman, Education Advisory Committee.

There were eight different countries competing in this competition. The competition gave the law school representative an opportunity to exchange views with law schools from other jurisdictions. The information and materials made available by other law schools should greatly facilitate improvement of our own communication skills module on the Professional Course.

Until quite recently the focus of solicitors' education has been on learning the law, researching cases and statutes, understanding legal principles, analysing hypothetical legal problems, and arguing for or against rather abstract propositions. On the whole, little attention has been paid to learning about clients. Clients however, are the *raison d'etre* for most solicitors and understanding the needs of clients must be an essential element of the solicitors' portfolio of skills.

In the last few years, law schools have begun to appreciate that it is possible to teach substantive law in a more practical context and have introduced into the curriculum what in the United States is called *client counselling* and in England is called *client interviewing*. The emphasis in such courses will vary, but the essential purpose is to enable the aspiring lawyer to see the client as a person with all the problems, anxieties, prejudices and concerns that clients have, rather than as a one dimensional hypothetical problem in respect of which they are asked to advise. The focus of the skill is to elicit information, or facts, from a "client" in an appropriate manner, being aware of the nuances of behaviour in an interview, to identify the apparent legal issues and to develop an appropriate strategy for further action.

Alongside these changes in legal education have developed a number of client interviewing/counselling competitions. The impetus for the competitions in the U.S. originally came from Professor Louis M. Brown of the University of Southern California in 1969.

"The structure of our own Professional Course has been altered considerably to take into account the need to enhance communication skills. On recent professional courses the time given over to communication skills has been increased to reflect a vital need for this skill for practising solicitors", says James MacGuill, Chairman of the Education Advisory Committee.

Interviewing competitions are held on the professional courses. As winners of these competitions, Valerie and Mairin were chosen to represent Ireland in the International Client Counselling Competition. The purpose and the format of the Competition is indeed to encourage law students to appreciate the need for effective interviewing techniques and become aware of a variety of different client dynamics including, for example, dealing with clients who may be emotionally demanding, or who introduce ethical dilemmas as well as having legal problems.

Special thanks are due to James MacGuill, Brian Sheridan and all the Law Society staff who helped in the preparation for the competition. Assistance was also provided by last years' competitors Phil O'Hare and Andrew Coonan. During his speech at the parchment ceremony on 7 April our President Patrick Glynn congratulated Valerie and Mairin. "It goes to prove that the students going through our Professional Course can hold their own on the international stage" he said.

Charities and Investment

Introduction

The Commissioners of Charitable Donations and Bequests for Ireland ("The Charity Commissioners") have recently issued a "Revised Form of Authorisation of Investments", the text of which follows this introduction.

This comprises a global authorisation for trustees of charities to invest in specified categories of securities, without the need for any application to be made to the Charity Commissioners. This is a very significant extension of the investment powers available to such trustees where their trust instrument does not already confer on them wide investment powers.

The power of trustees, whether charitable or not, to invest is primarily governed by the terms of the trust instrument. If the trust instrument is silent, then the trustees have to rely on statute and are restricted to the trust securities authorised by the Trustee Act 1893 as amended by the Trustee (Authorised Investments) Act 1958. These securities basically consist of Irish Government stocks, Bank of Ireland stock, AIB shares and deposit accounts with various institutions.

Section 32 of the Charities Act 1961 as amended by Section 9 of the Charities Act 1973 enables the Charity Commissioners to confer on charitable trustees power to invest their fund in such manner as the Charity Commissioners may think proper. It is on foot of these provisions that the Charity Commissioners have issued this form of authorisation.

In summary, in considering whether a proposed investment is authorised, the trustees of a charity should first refer to their trust deed; if this does not give them the required authority, they should next refer to the investments authorised by statute, and then to the Form of Authorisation issued by the Charity Commissioners. If the proposed investment is not authorised by any of the above, the trustees can still apply to the Charity Commissioners for authority to invest in a specific investment under Section 32 of the Charities Act 1961 as amended.

Text of Revised Form of Authorisation of Investment

Section 32 of the Charities Act, 1961 as amended by Section 9 of the Charities Act, 1973.

This form of authorisation supersedes all previous authorisations as and from the date hereof, but does not in any way affect the validity of transactions carried out under previous authorisations.

Trustees of charities may:-

(a) invest in any investment authorised by the Trust Instrument constituting their trust;
(b) avail themselves of this authorisation without any application to the Commissioners;
(c) continue to hold an investment not sanctioned by this authorisation if acquired under any previous authorisation.

If Exchange Control or other permissions are required, it is the duty of the trustees to apply for such permissions. The Commissioners will not answer any queries about any such permissions.

The Commissioners DO HEREBY ORDER that trustees of Charity Funds be and are hereby authorised:-

To invest the funds of the Charity in any or all of the following ways:-

1. The whole or any part of the fund may be invested in Government Stocks or other Trustee Investments as authorised from time to time by the Minister for Finance.

2. Up to 60% of the funds may be invested in the equity of Irish registered companies with a listing on the Irish Stock Exchange where the market capitalisation of the company exceeds IR£100 million at the time of the investment, limited to not more than 10% of the funds in any one such qualifying company.

3. Up to 25% of the funds may be invested in the equity of Irish registered companies with a listing on the Irish Stock Exchange where the market capitalisation of the company exceeds IR£50 million at the time of the investment, limited to not more than 5% of the funds in any one such qualifying company.

4. Up to one third of the funds may be invested in any Unit Trust which is authorised under the Unit Trusts Act, 1972 as amended by the Unit Trusts Act, 1990.

5. Up to 50% of the funds may be invested in the equity of companies which are part of the FTSE 100 index in the United Kingdom, limited to not more than 10% of the funds in any one such qualifying company.

6. Up to 50% of the funds may be invested in the equity of companies listed on any Stock Exchange of the European Community, The New York Stock Exchange, or the Tokyo Stock Exchange, where the market capitalisation of the company exceeds the equivalent of IR£600 million at the time of the investment, limited to not more than 10% of the funds in any one such qualifying company.

Notwithstanding the limitation on investment in any qualifying company in pursuance with the foregoing provisions, trustees shall be entitled to take up any bonus or rights issue accruing to such investment.

GIVEN under the Common Seal of the Commissioners of Charitable Donations and Bequests for Ireland.

This 15th day of November 1994.

Wills Containing Charitable Bequests

Section 52 of the Charities Act, 1961 as amended by Section 16 of the Charities Act, 1973

The following is a notice received from the Commissioners of Charitable Donations and Bequests for Ireland concerning the Commissioners role and practice in relation to the examination of wills containing charitable bequests.

Practitioners are referred to the Notice which appeared in the June, 1993 issue of the *Gazette* concerning the revised Probate Office practice for dealing with charitable bequests whereby solicitors applying for Grants of Probate of any Will containing a charitable bequest are asked to lodge a simple summary form with that office supplying details of all such charitable bequests. These forms are transmitted to the Office of the Commissioners of Charitable Donations and Bequests for Ireland where they are examined.

Under Section 16 of the Charities Act, 1973 a general exemption from publication is given unless the Board require publication to be made in any particular case.

As an alternative to the requirement for publication the Board may ask for evidence showing payment of a charitable bequest, or in the case of deferred or contingent bequest a letter of awareness from the charity concerned.

Practitioners are advised that failure to comply with their particular requirements will result in the Commissioners taking the appropriate action.

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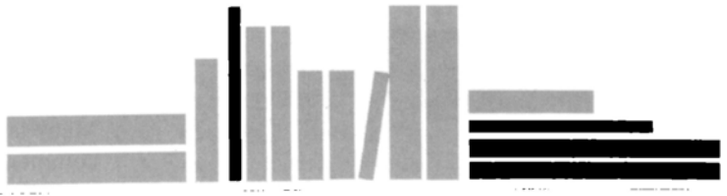


Chitty on Contracts (Twenty Seventh Edition)

Published by Sweet and Maxwell (RRP STG £225.00) General Editor: A. G. Guest CBE QC MA FBA.

The latest edition of this well known English textbook updates all the relevant legislation and case law since the last publication in 1989. It is published in two volumes. The first is entitled "General Principles", the second "Specific Contracts". Volume 1 has an excellent introduction covering aspects such as the nature and classification of contracts and includes a new section on the relationship between Contract and Tort.

The volume then proceeds on a logical path to deal in great detail with all the various aspects of a contract. It follows on with a consideration of remedies for breach of contract and restitution and concludes with a discussion on conflict of laws, a section which has been completely re-written to take account of the Rome Convention on the law applicable to contractual obligations, which has been implemented in the United Kingdom by the Contracts (Applicable Law) Act 1990.

Volume 2 deals with various specific forms of contracts. It opens with a detailed chapter on agency. The areas of carriage by air and land are also examined. The topic of employment contracts is given comprehensive treatment as are the areas of restrictive agreements, completion and the sale of goods.

In conclusion, this is a fine publication which would prove a valuable asset on any lawyer's bookshelf. However, it must be noted that this is an English textbook and the law as stated must be checked to ascertain its compatibility with Irish Law.

Ronan Baird

Your Rights At Work

By Eddie Higgins and Nuala Keher, Institute of Public Administration, Dublin, 1994, 240pp., pback, £4.99.

Your Rights at Work is divided into three parts. Part One covers the various employment law statutes, Part Two provides a comprehensive section on Joint Labour Committees and Part Three provides a listing of useful addresses and a glossary of industrial relations terms.

Up to date summaries of the various employment law statutes are provided to include the Terms of Employment (Information) Act, 1994 which has the requirement for detailed statements of terms and conditions of employment to be given to employees. Some of the summaries are particularly useful, for example the authors under the Payment of Wages Act, 1991 which prohibits non-agreed deductions from wages *(inter alia)*, have actually given examples of the computation of awards under the Act; the safety legislation is also well done with a summary listing of requirements for a safety committee depending on the size of the firm. If one was to criticise this section of the book it would be on the basis that the authors appear to have a slight hesitation in stating that certain legislation is repealed e.g. there is a reference under the Industrial Relations Act 1990 that the Trade Disputes Act, 1906 and the Amendment Act of 1982 are 'associated' with the 1990 Act. This is untrue as both the 1906 and 1982 Acts were repealed by the 1990 Act. It is stated in the section on the Minimum Notice and Terms of Employment Act, 1973 that reference should be made to the Terms of Employment (Information) Act, 1994. It may be slightly misleading as there is no clear statement stating that the original sections of the 1973 Act providing for the statement on terms and conditions of employment have now been repealed by the 1994 Act. However these minor points do not take away from the authors' good work.

Section Two in providing a summary of the Joint Labour Committees is no mean feat – most people do not have a clue what they are. Originally established under the Industrial Relations Act, 1946, JLCs provide for minimum rates of pay and conditions of employment for employees working in certain industries and services, for example the Law Clerks JLC. This section is really a wealth of information and makes fascinating reading for anybody who has an interest in labour history. In the age of CD ROM how many people know that employees working in the aerated waters, brush and broom, provender milling, shirtmaking, handkerchief and household piece goods and womens' clothing and millinery industries either exist or are entitled to minimum terms and conditions of employment. Any lawyer who may have to deal with queries on terms and conditions of employment in such industries and services must have a copy of this book.

Finally this book is recommended as a useful *vade mecum* on employment queries and it is extremely good value. The authors are to be complimented and should make sure that they keep this text up to date with future editions in this increasingly complex and growing area of law.

Frances Meenan

The Irish Jurist

Volumes XXV-XXVII, New Series, 1990 – 1992, Liber Memoralis, John M. Kelly, Edited by W.N. Osborough, Dublin, The Round Hall Press for the Irish Jurist Publishing Co. Ltd., 1994, ix + 352pp., IR£47.50 hardback, IR£35.00 paperback.

> "The discussion of constitutional questions throws a lustre round the bar, and gives a dignity to its functions. . . Lawyers are here emphatically placed as sentinels upon the outposts of the constitution, and no nobler end can be proposed for their ambition or patriotism than to stand as faithful guardians of the constitution, ready to defend its legitimate powers, and to stay the arm of the legislative, executive, or popular oppression."
>
> Justice *Joseph Storey*, Associate Justice of the US Supreme Court, 1811 – 1845, in an address to the Suffolk Bar, Boston, September 4, 1821.

I never had the privilege of meeting or speaking with *John Kelly*. He was a remarkable man who combined successfully the role of scholar, teacher, writer, linguist, practising politician, government minister and wit, in his relatively short live-span. He enjoyed the society of books and his fellow man. Those who never met John Kelly may enjoy his companionship through his writings. He was a great commentator who has permanently influenced legal thought in Ireland. He was a master of legal literature and it is appropriate that *The Irish Jurist, 1990 – 1992*, edited by Professor W.N. Osborough should be dedicated to the memory of John Kelly, the originator and founding editor of its current series.

Professor *R.F.V. Heuston*, Fellow Emeritus, Trinity College, Dublin in his touching tribute to John Kelly poses the question whether any other professor of jurisprudence held the office of Chief Whip of a parliamentary party? Professor Heuston notes that the mere fact that he held a position "calling for such knowledge and tolerance of human frailties rebuts the old jibe about academics and ivory towers". Mr. Justice Ronan Keane in his tribute describes John Kelly as the greatest legal scholar of his generation and considers his legacy in the context of the constitution.

Constitutional issues are to the fore in this edition of *The Irish Jurist*. *Mr. Sebastian Poulter*, Reader in Law at the University of Southampton writes on equality and ethnic minorities. Professor *James Casey* considers the Spanish Constitutional Court, a modern institution that began its work in July 1980. Mr. *Gerard F. Whyte*, Senior Lecturer in Law, Trinity College, Dublin, analyses education in the context of constitutional rights. Mr. *Gerard Hogan*, Lecturer in Law at Trinity College, Dublin reevaluates *Ryan v Attorney General* [1965] IR 294 in the context of unenumerated rights. Professor *David G. Morgan* considers Section 31, the broadcasting ban. Mr. Justice *Ronan Keane* writes on Martial Law in Ireland 1535 – 1924. Professor Osborough's theme is Roman Law in Ireland. Other contributors deal with aspects of jurisprudence.

This is a brief notice to readers informing them of the essence of the contents of *The Irish Jurist*. But some thoughts came to the fore on reading the work of the scholars. The time was when law and religion provided many unambiguous answers. We are now in a period of transition and great change. The sentiments expressed by an Archbishop of the Christian faith last week ring in my ears. He noted that there was a longing for the homogeneous and an allergy against the different. In law, stare decisis – the doctrine of precedent although revered by many, is falling into disuse. Should we adopt the Archbishop's motto when he urged his listeners "to celebrate life (substitute "law") that can't be lived by rote. Let's luxuriate in its complexities, in its bewildering ambiguities, excited by the thrill of working out things for ourselves. Let us celebrate our diversity. . ."

Many lawyers, judges and commentators are luxuriating in the complexities and bewildering ambiguities of the law. The "sentinels upon the outposts of the constitution", the writers in *The Irish Jurist* deserve our gratitude. In law, as in other spheres of life, it will never be easy to find unambiguous answers.

Dr.Eamonn G Hall

Environmental and Planning Law

By Dr. Yvonne Scannell, Publisher: The Round Hall Press. £65.00, hardback 584pp.

The speed at which Environmental Law has developed and the scope of its impact in Ireland, has caught many practitioners by surprise. Until relatively recently there has been no understanding of the need for environmental protection and there has been little appreciation of the need to control industrial developers, house builders, mine operators, farmers etc., Somehow we all felt that air, water and land would survive and that there would be plenty there for us, no matter what happened.

Article 2 of the Treaty of Rome encouraged the promotion of "an harmonious development of economic activities". As Dr. Scannell reminds us in her opening paragraphs, the Counsel of Ministers declared in November 1973 that this is an achievement which "cannot now be imagined in the absence of an effective campaign to combat pollution and nuisance or for an improvement in the quality of life and the protection of the environment".

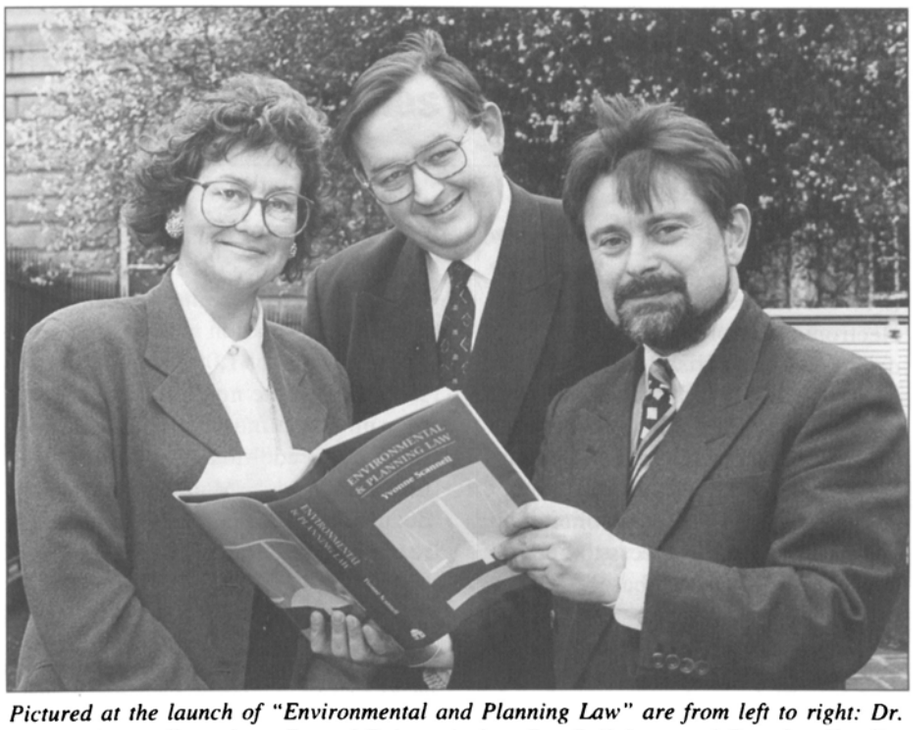
In twenty years since 1973 the EC has adopted over 450 measures for implementation of its environmental policies. These 'directives' are only incorporated into Irish Law in circumstances where the objectives

which they seek to achieve are not already a part of our domestic legislation.

Dr. Scannell is not slow to point out that the State has been less than even handed in the manner in which it has sought to implement directives which have negative financial and other consequences for itself. In this context, she deals as best she can, with Ireland's approach to environmental management and the remedies available for environmental protection. She draws attention to earlier mistakes, many of which have not been fully corrected. She cites instances such as the encouragement of open grates in Dublin during the oil crisis, intensification of farming and silage making without adequate pollution control, programmes for arterial drainage without a thought for wildlife and wet lands and the Money Point development carried out by the E.S.B. without any requirement for controlling polluting emissions. The remedies available for environmental protection are, to some extent, to be found in the Constitution, but to a greater extent in the Law of Torts and in Statute Law and Statutory Instruments which are comprehensively dealt with later on in the book.

Dr. Scannell's work deals with environmental issues but as the title suggests, there is also a significant and scholarly review of Planning Law. The chapters on Land Use Plans and on Development Control will be familiar to many with special interest in Planning Law, but the emphasis here is on the relationship between Planning and Environmental Law and the work takes a fresh and helpful look at this relationship.

A separate chapter has been devoted to "Special Controls" and this makes fascinating reading. The book is full of interesting information and it is certainly significant to realise that there are between 150,000 and 200,000 pre-1700 archaeological sites and monuments in Ireland. Be on the alert if you are acting in the purchase of building land! The National Monuments Act of 1930-1934 offers considerable protection for these sites. Reference is also made to the Derelict Sites Act 1990, the Forestry Acts 1948 to 1988, the Foreshore Act of 1933 and to many other Statutory Controls which are briefly but most usefully summarised.



Pictured at the launch of "Environmental and Planning Law" are from left to right: Dr. Yvonne Scannell, author; Gerard Bohan, Arthur Cox Solicitors and Brendan Howlin, Minister for the Environment.

Environmental Impact Assessment is well covered. The aim here is to prevent pollution to the source within the EU and to make the polluter pay. This form of Planning Control tries to ensure that the environmental implications of the proposed development are considered at the earliest possible stage in the planning process. The circumstances in which Environmental Impact Assessment is required is explained in this book and the wide ranging implications of this relatively new piece of legislation may not be appreciated by all practitioners.

Dr. Scannell has undertaken a comprehensive review of water pollution and has devoted almost 86 pages of her work to this important subject. Atmospheric pollution, waste disposal and noise pollution are dealt with also.

Environmental and Planning Law by Dr. Yvonne Scannell is a volume which should find it way into every Solicitor's Office. It is extremely readable and unlike some volumes in the planning field, this book is "user friendly". The headings, the index, the Case Law references and the Statute Law References are easy to follow and well set out.

This text book arrives at a time when environmental issues are becoming increasingly important and relevant to the practice of Law. It is equally valuable to the sole practitioner working in a peaceful country town as it is to the library shelves of the larger city firms. It covers environmental issues which affect many diverse interests such as farmers, developers, residents associations, multi-national companies and major operations carried out by the State. Dr. Scannell's work will be of invaluable assistance to our profession.

John Gore-Grimes

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TECHNOLOGY NOTES

LAWLINK – Bringing the Information Highway to Law

by Jerry Godsell*

LAWLINK, the nation-wide electronic network specifically designed for the Irish legal profession, was established with the active participation of the Law Society's Technology Committee. Its dual aims are to facilitate electronic communications amongst solicitors and provide remote access to both public and private databases.

Largely through the efforts of the Technology Committee, the majority of solicitors practices now have both computerised their accounting systems and adopted the use of word processing software. These developments, together with increasing commercial awareness of the "Information Highway", have led to a greater appreciation of the benefits to be obtained from electronic communications.

The overwhelming acceptance of the fax machine has proven the necessity for quick, immediate transfer of legal documentation. Though adequate for short messages, the inherent limitations of the fax become apparent when longer documents are transmitted. Firstly, since individual pages are faxed as images, they are not sent in machine recognisable form. Thus, in order to be processed by the recipient's word processor, they must be re-typed. This will cause delay and may inadvertently create errors.

Secondly, longer documents take significant time to transmit. Pages often have to be re-sent due to transmission errors and fax machines can be unavailable during peak times. When these problems occur office efficiency is degraded and costs are increased.

LAWLINK's E-Mail is the answer to these problems. Using a modem, documents can be sent directly from your computer to the recipient's. Modern modems cost significantly less than a fax machine and can transfer information at a higher speed. Transfer rates of 1,000 characters per second are quite normal, meaning that transmission times are significantly reduced. In addition to improving the transfer speed, E-Mail ensures that the document will be received in machine readable form and error free.

As well as its E-Mail service, LAWLINK also provides subscribers with access to a range of information sources. By accessing the Land Registry, solicitors can search the names index for an individual and have a copy folio transmitted directly back to their office. This eliminates delay and reduces the costs associated with manually retrieving the same information. By using LAWLINK to query the Companies Registration Office a subscriber has direct access to the pertinent facts concerning every registered company in Ireland. Since LAWLINK communicates directly with the relevant government agency our information is always the most current available.

As a member of LAWLINK, a solicitor can now receive the Legal Diary in electronic form. We have, with the co-operation of Mount Salus Press, access to every issue the evening before publication, so LAWLINK subscribers see it first! Our free, user-friendly software allows you to search the listings for any relevant item, once again saving time and reducing the possibility of error.

Now that more and more essential information sources have become computerised, there are increased opportunities for remote access. We at LAWLINK are committed, through our ongoing development programme, to continuously enhance the already significant benefits of the system.

As all LAWLINK messages, whether E-Mail or database queries, are transmitted over WIRTRADE's X.400 service, our subscribers are guaranteed a quick, error-free service. In addition since EIRTRADE conforms to international X.400 messaging standards LAWLINK subscribers automatically become part of the world-wide E-Mail community with all the advantages this entails.

**Jerry Godsell is Chief Executive of LAWLINK Ltd. He can be contacted at 19 Fitzwilliam Square, Dublin 2. Telephone 01 661 1954.*

Lady Solicitors' Golf Outing

The Annual Lady Solicitors' Golf Outing will take place at Kilkenny Golf Club on Friday, 25 August, 1995.

All last year's players will receive a circular at the beginning of July. If you did not take part last year, but would like details, please telephone 677 0335 with your name and address.

All participants must have a current handicap.

Wanted -

1) Full or part set of Irish Statutes;
2) Full or part set of Irish Reports;
3) Full or part set of Halsbury (any edition);
4) Full or part set of Butterworths Forms and Precedents;

or any of the above.

Box Number: 2525

Restriction of Company Directors and the Provisions of the Companies Act, 1990

by Andrew Walker, Barrister-at-Law

Part 1*

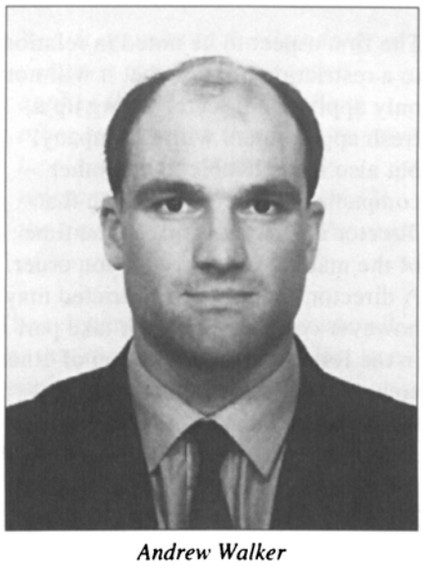
Recently Mr. Justice Murphy has indicated that in the course of the winding up of insolvent companies the provisions of the Companies Act, 1990 with regard to director restriction shall, as far as he is concerned, be enforced. This development has far reaching consequences for all directors, be they executive, non-executive, part-time or shadow directors, of such companies and is yet another area where company directors can face severe sanction from the court. This article proposes to consider these provisions and their effects on directors, the manner in which restriction can be avoided along with the procedural aspects of the area and indeed, the shortcomings of the legislation.

The statutory intent regarding director restriction is to avoid situations where directors would close down one insolvent company with numerous unpaid creditors, and set up the next day without sanction and without having to meet any capital requirements. In the UK such a scenario was neatly summarised by *Browne-Wilkinson V–C*[1] as,

> ". . . an attempt to carry on the same business on the same premises, leaving behind the creditors of the old business. This is exactly the kind of behaviour by directors that is most to be deplored in that it is the use of the fabric of a limited company to deprive creditors of their money and simply to change the cloak in which that is done from one company to the next."[2]

The Provisions

The provisions on restriction of directors which are found in Part VII of the Companies Act, 1990, came into force on the 1st August, 1991[3]



Andrew Walker

and apply to any company[4] if:-

(a) at the date of the commencement of its winding up it is proved to the court, or
(b) at any time during the course of its winding up the liquidator of the company certifies, or it is otherwise proved, to the court, that it is unable to pay its debts.[5]

It should be emphasised that the provisions apply to all insolvent liquidations, whether compulsory or voluntary. These provisions in respect of insolvent liquidations equally apply, with the necessary modifications, to receiverships[6]. The Act is silent on the extent of property to which a receiver must be appointed before the provisions are to apply[7], yet it appears that the receiver should be appointed over the whole of the company's property, as otherwise all receiverships would precipitate the restriction procedure.

In the UK it has been held[8] that where there are two events of insolvency, i.e. an administrative receivership followed by a winding up, that the first date of insolvency is to be applied in relation to any time limits that may arise. This seems unsatisfactory as the latter event, which will invariably be a winding up, will expose more on the internal workings of the company.

All persons at the date of the commencement of the winding up of such a company who are directors, or were directors at any time in the 12 months prior to such date, become liable under the Act. Shadow directors[9] are subject to such liability as well[10].

However the provisions are only applicable to companies wound up or placed in receivership on, or after August 1, 1991. As has been clearly accepted in this jurisdiction legislation will not operate retrospectively if it,

> *". . . takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past".*[11]

The imposition of a restriction order on a director who has resigned from his position prior to the operative date of the provisions would be tantamount to imposing on him such a disability for his prior actions and therefore such directors must be exempt from the Act. By way of example, therefore, a former director of a company that went into liquidation on November 1, 1991 and who resigned his position on 1 May, 1991 will not be liable to restriction under the Act.

Hence all directors of a company that goes into liquidation, or is placed in receivership and is shown to be unable to pay its debts, either at the time of the commencement of the winding up or receivership, as the case may be, or at any time thereafter, are liable to restriction under section 150. This section provides that:-

> *(1) The court shall, unless it is satisfied as to any of the matters*

specified in subsection (2), declare that a person to whom this Chapter applies shall not, for a period of five years, be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless it meets the requirements set out in subsection (3); and, in subsequent provisions of this Part, the expression "a person to whom section 150 applies" shall be construed as a reference to a person in respect of whom such a declaration has been made.

Nature of Restriction

First it is notable that the restriction is mandatory and that the onus of proof is squarely placed on the directors to show that they should not be subject to a restriction order. This provision to an extent contrasts with the position in respect of director disqualification. There mandatory disqualification subsists against a director who is convicted of an indictable offence involving the company, fraud or dishonesty[12], while in all other instances disqualification is at the court's absolute discretion[13]. Indeed where liability is sought to be imposed against an officer of a company for fraudulent or reckless trading [14], disqualification is still at the Court's discretion. Secondly, the period of the restriction is invariable at five years, regardless of the situation and appears to run from the date of the declaration[15]. Again this element of the restriction provisions contrasts with disqualification where the period of disqualification is ultimately at the discretion of the Court[16].

In the UK disqualification of a director of an insolvent company found to be,

". . . unfit to be concerned in the management of a company"[17],

ranges from a minimum of two years up to a maximum of fifteen years[18]. While this may seem more equitable and pragmatic, experience showed that such leeway lead to inconsistencies. Consequently a set of parameters was drawn up by the Court of Appeal with the disqualification period dependant on the gravity of each case[19]. The fixing of a time frame by the legislature here has therefore eradicated such inconsistencies arising in the application of section 150 on a case by case basis.

The first aspect to be noted in relation to a restriction order is that it will not only apply to a director taking up a fresh appointment with a company, but also is applicable to any other companies in respect of which that director is already acting at the time of the making of the restriction order. A director having been restricted may however continue to act, or take part in the formation or promotion of other companies if these companies meet the capital requirements of the section[20].

These are that the value of the nominal share capital of the company in which the restricted person is involved, must be at least £100,000, (in the case of public limited company), or £20,000, (for other companies). The Minister[21] may vary the amounts[22] and the amounts for companies of a different class or description[23]. These shares must be fully paid up and in cash. Allottees to these shares, or their subsequent holders[24], who do not pay the full amount are liable for the full amount of the share and any interest therein. Provision will be made however for any consideration applied[25]. These liabilities do not apply to the allotment of bonus shares unless the allottee,

". . . knew or ought to have known that the share was so allotted."[26]

It should be noted that the capital requirements equally apply to companies in which "restricted" directors are already a part of, and not merely companies they may in the future become concerned with. Consequently, a director at the time of his restriction order on the Board of another company that already meets these financial requisites will have to notify that company of his restriction order[27].

These requisites as to the financial structure of a company are to a large extent the rationale behind the legislation on restriction and the situation "whereby a fly-by-night director liquidates one company, leaving a trail of unpaid creditors behind, and then turns up in the business the following day, in the same premises with nothing having changed except perhaps the name over the door"[28]. An obvious drawback to the legislation is that a winding up will have to have occurred. Consequently a company that merely ceases trading will not be affected by the provisions of Chapter 1, unless a creditor or member of the company goes to the expense to see that the company is wound up.

It should be noted that the wording of section 150(1) prevents directors from continuing to act, as well as starting to act and hence a director of a number of companies, one of which is in an insolvent liquidation, leading to his restriction, will have to bear in mind the notification provisions of the Chapter[29], (see below). A restriction order however does not preclude a person taking part in the management of a company[30].

Restrictions on Section 150(3) Companies

Companies to which any person the subject of a restriction order,

". . . is appointed or acts in any way, whether directly or indirectly, as a director or secretary or is concerned in or takes part in the promotion or formation or that company"[31]

are themselves curtailed by the Act. However persons subject to such a restriction order are not to take on such an appointment or so act unless they have notified the company's registered office 14 days prior to their appointment or so acting that they are so restricted[32].

These "section 150(3) companies" are, first precluded from availing of the provisions of section 60 of the Principal Act[33] and thereby the giving of financial assistance for the purchase of shares unless the company's ordinary course of

business is the lending of monies or it so that company employees may acquire shares in a *bona fide* share scheme. The legislation is to prevent companies covered by section 150(3) from vitiating the capital requirements already placed upon it.

Secondly, the provisions of sections 32 to 36 of the Companies (Amendment) Act, 1983 are applied to such companies with some modification and alteration[34]. The net result of this is that a section 150(3) company must have all transactions independently valued and approved by ordinary resolution of the company when such transactions;

(i) involve the acquisition of non-cash assets worth at least a tenth of the company's share capital, and
(ii) the acquisition is from any subscriber to the memorandum, director or promoter.

The time periods laid down by the 1983 (Amendment) Act to such transactions are also removed[35].

Finally, a company to which s.150(3) applies, may not avail of the exemptions provided for in sections 32 and 37 to the prohibition of loans to directors, as allowed by section 31 of the 1990 Act[36]. Once again these provisions are to ensure that the capital requirements placed on companies by section 150 are not dissipated.

Companies that are subject to the above restrictions may however obtain relief,[37]

". . . in respect of any act or omission which, by virtue of that section, contravened a provision of the Companies Acts or to any person adversely affected thereby. . ."

and may be granted by the Court where it deems it 'just and equitable' and may be on terms and conditions deemed fit, yet it may extend to include exclusion of any such provision from that company. But, where a company has been notified by a person, under the requirements of section 155(5), that they are under a restriction declaration, it will not be afforded any such relief[38].

Liquidator's and Receiver's[39] Duties

These are set out in section 151 and provide that if,

". . . it appears to the liquidator of a company to which this section applies that the interests of any other company or its creditors may be placed in jeopardy by the relevant matters in subsection (2) the liquidator shall inform the court of his opinion forthwith. . ."

The relevant matters of subsection 2 are that a person, though subject to a restriction declaration, is directly or indirectly so acting as or has been appointed a director, secretary or promoter of that other company. The court on the receipt of the report can make whatever order it sees fit, including presumably a disqualification order. A liquidator who fails to report to the court in the circumstances outlined is liable to a summary fine of not more than £1,000 with a £50 daily default fine, or not more than £10,000 with a £250 daily default fine on indictment[40].

In relation to these provisions the question arises does the liquidator only report if, and when he forms the view that the requisite interests are being so jeopardised? Also it would seem that the potential penalties are very harsh given that a liquidator may be in no position to gauge whether those interests are being so imperilled. The section appears to be aimed at preventing a person, whom a liquidator views as being totally dishonest and irresponsible, from circumventing a restriction order by utilising the capital requirements outlet. Finally the section gives no time limits and this suggests that the liquidator must observe persons for the duration of their restriction.

Relief from a Restriction Order

A person in respect of whom a restriction order, or any order under section 151, has been made can apply to the court for partial or complete relief[41]. The applicant must give the liquidator, if the winding up of the company is on going, at least 14 days notice of the intended application and the application itself must be made within one year of the restriction declaration. The liquidator on receiving this notification must himself inform any creditor or contributory of the company, of which he is aware, that he has received such a notice. A failure to do this is an offence[42]. At the application for relief the liquidator or any creditor or contributory can appear and give evidence. Relief may be granted, where the court feels that is just and equitable but will do so on whatever terms and conditions it sees fit. Consequently a court may reduce the required levels of share capital under section 150(3) or shorten the restriction period.

Presumably a restricted person can only apply for relief in the 12 months after the imposition of the restriction order to ensure that a liquidator is still acting in respect of the company as there is no provision for creditor notification where no liquidator subsists. Any grounds an applicant will adduce for relief will have to be highly persuasive considering that the Court will have ordered restriction in the first place.

Enforcement

A person under a restriction order who acts in a manner prohibited is guilty of an offence[43] and if convicted shall receive a five year disqualification[44], or such other period the court may determine on the prosecutor's application[45]. Relief from this disqualification order is not available[46]. A disqualification order, or discretionary duration, may also be imposed where a person, though under restriction, is, or becomes a director of a second company (either by it complying with the capital requirements of section 150(3), or otherwise in contravention of a restriction), which itself is caused to be wound up within five years of the winding up of the company that lead to the restriction declaration initially. In such circumstances if it appears to the liquidator, or presumably a receiver, of the second company that

it is unable to pay its debts, either at the commencement of the winding up or at any time, he shall report those matters, i.e. the fact a restricted person was a director and the insolvent position of the company, to the court which then may impose disqualification[47]. Again failure to so report can lead to a maximum fine of £1,000[48].

Consequently the provisions cover the scenario where a liquidator, or receiver, of the company which lead to the restriction declaration, is unaware that the interests of the second company, or its creditors, had been jeopardised by the presence of the Board of the restricted person, and therefore made no report to the court under section 151. It should be noted that the penalty only arises where the person under restriction was a director, and not merely a promoter or secretary of the second company. Finally the five year time period runs from the date of the first company's winding up and not from the date of the restriction order.

Enforcement is therefore by potential disqualification on persons restricted and by placing liquidators in the position of watchdog and guardian of other companies' and their creditors', interests.

*Part II will be published in the next issue of the *Gazette*.

References

1. Re Travel Mondial (UK) Limited [1991] BCLC 120.
2. Ibid p.123.
3. IS 117/1991.
4. Including any foreign company established in the State, s.149(4).
5. s.149(1) Companies Act, 1990.
6. s.154.
7. The Companies Bill provided for a, "... *receiver of the whole or substantially the whole of the property of a company...*"

   but concern as to what constituted 'substantially the whole' and that a receiver would have to decide lead to the alteration. (Dail Special Committee Debate Col. 739, 29/3/90).
8. Re Tasbian Limited [1989] BCLC 720.
9. As defined in s.27.
10. s.149(5).
11. *O'Higgins C.J. Hamilton v. Hamilton* [1982] IR 466, 474 and expressly approved by Murphy J. in *Re Hefferon Kearns (No. 1) [1993] 3 IR 177.*
12. s.160(1).
13. s.160(2).
14. s.297A (as amended).
15. s.153(4).
16. ss.160(1) & (2).
17. CDDA 1986 s.6(1)(b).
18. Companies Director Disqualification Act, 1986 s.6(4).
19. Re Sevenoaks Stationers (Retail) Ltd. [1990] 3 WLR 1165, 1169.
20. s.150(3).
21. Minister for Enterprise & Employment.
22. s.158.
23. s.158(c).
24. s.156(6).
25. s.156(1).
26. s.156(3).
27. s.155(5).
28. Gerard McCormack "Director Disqualification and Restriction" Irish Law Times July 1989 p.168.
29. s.155(5).
30. s.160(1) (a).
31. s.155(1).
32. s.155(5).
33. s.155(2).
34. s.155(3).
35. ss.155(3) (a) & (b).
36. s.155(4).
37. s.157(1).
38. s.158(2).
39. By virtue of s.154.
40. s.151(3).
41. s.152.
42. s.152(5).
43. s.161(1).
44. s.161(2).
45. s.162.
46. s.161(4).
47. s.161(5).
48. s.161(5).

The Irish Society For European Law

Monday 22nd May, 1995 at 6.30 p.m. in Newman House, St. Stephen's Green Dublin 2

Vincent Power, Solicitor

on the Recent Judgment of the European Court of Justice on Abuse of a Dominant Position

Magill: Competition or Copyright? Confusion or Clarification?

WARNING Re: "Nigerian Letters"

Solicitors should note scams, with a Nigerian connection. Irish solicitors have received letters with a Nigerian address, where the solicitor is made a proposition. The fraudsters typically claim to be government officials attempting to unlock funds which have become 'trapped' during a previous regime. They also claim that because they are civil servants they are unable to deal directly with the funds but must seek 'an overseas partner' into whose account they will transfer millions of US dollars.

The solicitor is typically offered 30% of the amount and asked to send copies of the firm's headed notepaper and invoices stamped and signed, and the firm's bank details. The fraudsters can then use the bank account to remove money from the account.

BE WARNED.

SOLICITORS CONFIDENTIAL HELPLINE

IN 1994 OVER 250 SOLICITORS NEEDED HELP

THEY RANG 284 84 84

NEED HELP? JUST CALL 284 84 84

A Conveyancing Disaster – Waiting to Happen

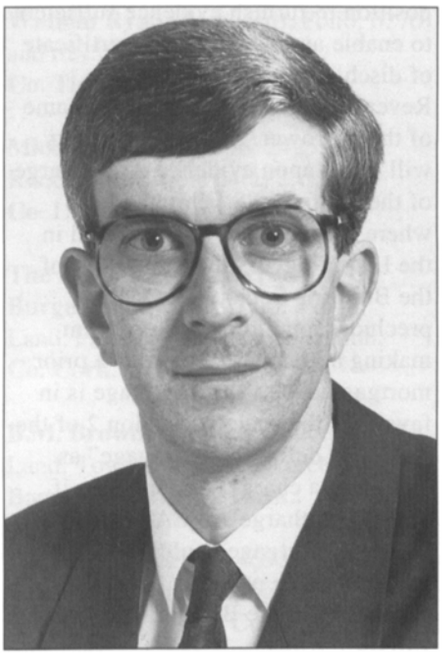
by Richard Grogan*

Section 146 of the Finance Act 1994 is a conveyancing time bomb, primed and ticking and waiting to explode in the face of any practitioner who fails to take the appropriate evasive action to avoid its devastating effects.

The Problem

The Finance Act 1994 introduced a provision which requires that no registration is to be effected in the Land Registry on any application where the title is based on possession unless a certificate issued by the Revenue Commissioners to the effect that they are satisfied that the property did not become chargeable to gift tax, probate tax or inheritance tax since 28 February 1974 or that any charge to tax has been discharged or will be discharged within a time considered by the Revenue Commissioners to be reasonable is produced to the Registry. The legislation has already trapped practitioners. While such applications usually involve agricultural land, the writer is aware of one case where a building estate strayed on to adjoining lands by a few feet. The only way the title could be rectified at that stage was by way of a claim for a title based on possession as there was some confusion as to who exactly was the owner of the adjoining lands.

The existing CAT legislation deems the abandonment of the title to lands to be a taxable event for CAT purposes and therefore results in potential CAT charges. The abandonment of a right falls within the definition of disposition Section 2 of the Capital Acquisitions Act. Prior to the Finance Act 1994, there was no obligation on the person acquiring title by way of possession to obtain a certificate of clearance from Capital Acquisitions Tax prior to registering their title in the Land Registry. While the value of the lands being acquired



Richard Grogan

can be reasonably small, the writer is aware that due to the aggregation rules, one unlucky home owner does come within the CAT net.

The writer has been advised by one practitioner of a case where a small portion of land was acquired by possession due to a change in a boundary fence agreed between neighbours to facilitate access to lands. This arrangement only came to light when the land was transferred to a child. As it was not possible to arrange for a deed from the original owner because of a change in the relationship between the transferee and the successor in title of the neighbour, it was considered that a claim by way of adverse possession would rectify the problem. Again, while the value of the land was minimal, the writer was advised it will result in a small CAT charge. However, the administrative difficulties in applying for a clearance certificate from the Revenue Commissioners to enable a title to be registered will delay registration and further will add to the expense in view of the necessity of applying for this additional clearance certificate.

Background

Prior to the Finance Act 1994, practitioners were only concerned with the preceding twelve year period in ascertaining whether a charge to capital acquisitions tax arose. This no longer applies to conveyances of land where the title is based on possession and an application for registration is made under the Land Registration Rules of 1972.

Section 47(2) CATA 1976 provides that the twelve year time limit applies where there is a *bona fide* purchaser or mortgagee for full consideration in money or money's worth. The property in such circumstances is not charged with tax as against a *bona fide* purchaser or mortgagee or any person deriving title from such a person.

Section 47(3) CATA 1976 has a further saving proviso that tax will not be a charge on property under Section 27(1) CATA 1976 where there is a *bona fide* purchaser or mortgagee for full consideration in money or money's worth without notice or a person deriving title from or under such a purchaser or mortgagee.

Effect of the Finance Act 1994

Firstly, doubts have been raised as to whether General Condition 15 of the standard contract for sale is sufficiently wide to cover a charge in respect of which a Section 146 Certificate is required. The condition requires a vendor to disclose, before the sale ". . . all . . . liabilities . . . which are known to the Vendor". This may well cover such a charge but, pending the issue of the 1995 edition of the Contract, Purchasers solicitors should insist on the inclusion of a special condition requiring the discharge of any such charge.

Secondly, the provisions of Section

47(2) and (3) CATA 1976 do not protect the purchaser.

Thirdly, from the purchaser's viewpoint, and more importantly, that of the purchaser's advisors, the Law Society's requisitions on title only require the vendor to discharge any charge to gift tax, inheritance tax or probate tax for a period covering the preceding twelve years. A purchaser relying on the current requisitions could only compel a vendor to furnish clearance certificates for a period commencing in 1983. The provisions of Section 47(3) CATA 1976 could not be relied upon even if the purchaser was unaware or would not be aware that a charge to tax arose outside the twelve year period covered by the requisitions. Accordingly a purchaser would have no recourse against the vendor and *ipso facto*, the disgruntled purchaser who now has to either refrain from registering the title in the Land Registry or discharge the back tax will undoubtedly turn to his practitioner to "resolve" the problem.

Accordingly, when purchasing title based on a possession a specific clause must be inserted in the contract and additional requisitions raised placing the obligation on the vendor to furnish full evidence of discharge of any gift tax, inheritance or probate tax arising since 28 February 1974.

A vendor's solicitor dealing with title falling within Section 146 should ensure that prior to a contract being furnished clear instructions from the Vendor are obtained and provision has been made to discharge any outstanding tax liability from 28 February 1974 which could affect the property. The vendor should be advised of the financial expenditure which this may entail.

The provisions of Section 146 FA equally apply where a person in possession of registered land whose title is based on adverse possession land and it is intended to register it in the Land Registry.

For a purchaser, the provisions of Section 146 Finance Act 1994 are all the more important when registration is compulsory either under the provisions of the 1964 Registration of Title Act, or because the purchaser is a statutory authority or the property is in a compulsory registration county.

A solicitor certifying a title to a lending institution, must be in a position to furnish evidence sufficient to enable an unconditional certificate of discharge to issue from the Revenue Commissioners in the name of the borrower. A building society will insist upon evidence of discharge of the tax from 28 February 1974 where the title is to be registered in the Land Registry. Section 22(4) of the Building Society Act 1989 precludes a building society from making a loan where there is a prior mortgage unless that mortgage is in favour of the society. Section 2 of the same Act defines a "mortgage" as including a charge. Accordingly if there is a "charge" to CAT, the society's mortgage could not be properly taken pursuant to the provisions of the Building Society Act 1989.

A major difficulty for the applicants solicitor is that the certificate under Section 146 Finance Act 1994 issues to the applicant and not the vendor. Accordingly, a full investigation and the disclosure of all dealings with the land between 28 February 1974 and the closing date is required and clearance certificates obtained.

Probate Tax

Since the Finance Act 1993, a purchaser of property requires evidence of the discharge of probate tax where a person dies after 17 June 1993. A difficulty arises however, where a deceased dies after 17 June 1993 and a surviving spouse becomes entitled to a limited interest only in the property created by the Will of the deceased. The tax borne on the property in which the limited interest subsists does not become reduced to nil but only becomes due and payable on the death of the person entitled to the limited interest by virtue of Section 115A (1) FA 1993. Where a property is being purchased subject to such a life interest, an appropriate tax clearance certificate in respect of that property will be required on the sale, unless the property is being sold under the provisions of the Settled Land Act, where a life tenant is consenting to the sale of property in which case a letter of comfort should be sought from the Revenue Commissioners. The letter should identify the deceased, the property in question, acknowledging the sale is being made where a spouse of a deceased obtained a life interest in property and confirming that the charge to tax will not arise until the death of the surviving spouse and that the liability will then attach to the executors of the original deceased spouse's estate. This letter should be requested from the Revenue Commissioners and a purchaser should not close without sight of same. In addition, the letter should be specific on the matters outlined herein.

Conclusion

Professional advisers, when dealing with a vendor, should make careful and comprehensive investigations of all taxation issues.

When dealing with a title based on possession, whether it is intended to register same in the Land Registry or not, a prudent professional adviser will insist upon clearance certificates in respect of all dispositions which could give rise to gift tax, inheritance tax or probate tax from 28 February 1974 to the date of completion.

Solution

While all practitioners are opposed to the tax evasion schemes in which applications based on possession (commonly known as adverse possession claims), were utilised in the past the introduction of the blanket prohibition on registration has caused and will continue to cause difficulties for conveyancers. The difficulty is that the Finance Act 1994 fails to recognise that there have always been a large number of genuine applications based on possession every year where the amount of land involved is minimal. The legislation has failed to provide a *de minimis* exemption nor has it excluded transactions where there is no

Continued on page 131

Lost Land Certificates

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 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.

Published: 28th April 1995.

Kathleen Keaney, Mweenish, Canna, County Galway. Folio: 55116; Townland: Mweenish Island; Area: 14(a) 0(r) 25(p). **Co. Galway.**

Cahill Estates Company Limited, 27 South Frederick Street, Dublin. Folio: 2887; Lands: Townland of Yellow Walls in the Barony of Coolock. **Co. Dublin.**

Daniel Reid, Folio: 3584; Land: Cornamucklagh; Area: 18(a) 3(r) 17(p). **Co. Longford.**

Bridget Mullins (deceased) Folio: 1935 and 1939; Lands: Old Abbey; Area: 83(a) 2(r) 6(p) (Folio 1935), 23(a) 1(r) 25(p) (Folio 1939). **Co. Limerick.**

John Gaffney and Winifred Gaffney, Folio: 7524; Land: Springhill; Area: 22(a) 1(r) 21(p). **Co. Queens.**

Patrick and Kathleen McInerney, Folio: 11139F; Land: Urlan Beg; Area: 2.593 acres, 9.831 acres. **Co. Clare.**

Andrew and Monica Gilchrist, Rathmoylan, Dunmore East, Co. Waterford. Folio: 11787; Land: Dunmore in the Barony of Gaultiere; Area: 32(p). **Co. Waterford.**

William Ryan (deceased), Folio: 6270 and 6273; Land: Lahesseragh. **Co. Tipperary.**

Michael Collins, Folio: 2425; Land: Knockbrack; Area: 24(a) 2(r) 3(p). **Co. Limerick.**

The Lord Mayor Aldermen and Burgesses of Cork, Folio: 29648; Land: Parish of St. Annes Shandon. **Co. Cork.**

B.M. Browne Limited, Folio: 11427L; Land: Townland of Ballycureen and Barony of Cork. **Co. Cork..**

Patrick Lane, Folio: 46929; Land: Townland of Ballincurrig, Barony of Orrery and Kilmore. **Co. Cork.**

Denis Dunne (deceased), Bungalow Dairy, Rathcoole, Co. Dublin. Folio: 17660; Land: Townland of Rathcoole in the Barony of Newcastle. **Co Dublin.**

Bernard Kerley (deceased), Folio: 1928; Area: 29(a) 1(r) 20(p). **Co. Louth.**

William Ryan (deceased), Folio: 3298; Land: Leivagh More; Area: 36(a) 3(r) 25(p). **Co. Tipperary.**

Bernard Cushen, Folio: 16374; Land: Hillcastle; Area: 1(a) 1(r) 5(p). **Co. Wexford.**

John McDonnell, Folio: 1589; Land: Barony of Arklow and County of Wicklow. **Co. Wicklow.**

Scwarzhaupt Limited, Folio: 4572L; Land: Townland of Mount Hovel and Barony of Cork. **Co. Cork.**

Miriam O'Leary, 106 Griffith Avenue, Drumcondra, Dublin 9. Folio: 1018L; Land: The property known as 106 Griffith Avenue situate on the south side of the said avenue in the parish of Clonturk, District of Drumcondra. **Co. Dublin.**

Eileen Burke (deceased), No. 11 "The Grove", Kingswood Heights, Belgard Road, Clondalkin. Folio: 10583F; Land: Townland of Garranstown or Kingswood in the Barony of Uppercross. **Co. Dublin.**

John Healy, 27 Esposito Road, Walkinstown, Dublin. Folio: 17277L; Land: Property on the north side of Ardmore Drive in the District of Artaine West, Parish of Artaine. **Co. Dublin.**

Mannix Smith, Marian, Yellow Walls, Malahide, Co. Dublin (Lissadel, Malahide Road, Swords, Co. Dublin). Folio: 3082, 3693, 3997, 6782; Land: Townland of Barrysparks in the Barony of Nethercross. Townland of Barrysparks and Crowscastle in the Barony of Nethercross – Folio 3997. **Co. Dublin.**

James Griffin and Eileen Griffin, 21 Cul-Na-Greine, Old Bawn, Tallaght, Co. Dublin. Folio: 36685L; Land: The property situate to the west of Belgard Road South in the Town of Tallaght, Townland of Oldbawn, Barony of Uppercross. **Co. Dublin.**

Michael Kiernan (deceased), Folio: 2124; Land: Smear; Area: 5(a) 2(r) 19(p). **Co. Longford.**

Fergus Boyle, Folio: 2725F; Lands: Meenmore; Area: 1(r) 4(p). **Co. Donegal.**

Michael O'Gorman, Folio: 14409; Land: (1) Ballybaun, (2) Ballygibbon, (3) Ballygibbon; Area: (1) 82.502 acres, (2) 78.756 acres, (3) 25.625 acres. **Co. Wexford.**

Patrick J. Lynch, Folio: 1018L; Land: Parish of Delgany, Town of Greystones. **Co. Wicklow.**

Eileen Twomey, 25 Father Matthew Road, Cork. Folio: 2744L; Land: Parish of St. Nicholas and County Borough of Cork. **Co. Cork.**

Thomas Herbert McElwaine, Folio: (1) 15598, (2) 15600; Land: Lissannymore; Area: (1) 15(a) 2(r) 2(p), (2) 19(a) 3(r) 12(p). **Co. Cavan.**

Pauline Clinton, Keadue, County Roscommon (12 Empire Way, Thornlife, 6108 Eastern Australia.) Folio: 13439; Land: Townland of Bushelloaf in the barony of Uppercross. **Co. Dublin.**

Veronica Lally, Folio: 1628; Land: Rootate; Area: 14(a) 0(r) 30(p). **Co. Louth.**

John J. Fleming, Folio: 5373; Land: Carrickbeg. **Co. Tipperary.**

Seamus and Philomena, Folio: 13539F; Land: Middle Borough; Area: 0.643 acres. **Co. Meath.**

James O'Reilly 181 Ardilaun, Portmarnock, Co. Dublin. Folio: 84590F; Lands: Townland of Bluebell in the Barony of Uppercross. **Co. Dublin.**

Eugene Lowry, Folio: 5808F; Land: Bree; Area: 0.109 hectares. **Co. Monaghan.**

Sydney Nagle, Folio: 3946R, Land: Townland of Clogher Demesne, Barony of Fermoy. **Co. Cork.**

John Gosling, Folio: 45F; Land: Ballyredid; Area: 2(r) 8(p). **Co. Tipperary.**

Michael Laffan, Folio: 10904; Land: Graigaheesha; Area: 64(a) 3(r) 2(p). **Co. Tipperary.**

Michael Goggin, Folio: 1875F; Land: Ballindinas; Area: 0.825 acres. **Co. Wexford.**

Marie Duggan and Anthony Gerard Duggan, Folio: 16835F; Land: Townland of Brooklodge, Barony of Barrymore. **Co. Cork.**

Thomas Kelly (deceased), Folio: 2758F; Land: Loughil; Area: 0.369 acres. **Co. Cork.**

Timothy O'Driscoll and Bridget O'Driscoll, Folio: 31744; Land: Townland of Ballymurphy South, Barony of Kinalea. **Co. Cork.**

James Nicholson and Sheila Fitzpatrick, Folio: 4627; Land: Townland of Ballygannon, Barony of Newcastle. **Co. Wicklow.**

Tadhg Gallagher (deceased), Folio: 24993; Land: Mosiness; Area: 1.294. **Co. Donegal.**

Patrick and Pauline McDowell, Folio: 4464F; Land: Ballyraglogh; Area: 0.256 hectares. **Co. Wexford.**

Iain McDongall, Folio: 2461F; Land: Torque; Area: 2.113 acres. **Co. Westmeath.**

Kathleen Brady, Folio: 4629; Land: Tonymacgilduff; Area: 23(a) 3(r) 0(p). **Co. Cavan.**

Wills

Kinsella, James M., deceased, formerly of Annaville, Tara Hill, Gorey, Co. Wexford, and late of 9 Avenue Court, Gorey, Co. Wexford, retired Bank Inspector. Would any person having knowledge of a will made later than 22 November 1990 by the above named deceased who died on 17 February 1995 please contact John M. Foley & Company, Solicitors, Bagenalstown, Co. Carlow. Tel: 0503 21219. Fax: 0503 21592.

Breen, Monica Mary (otherwise Maureen), late of 109 Homefarm Road, Drumcondra, Dublin 9, Spinster, deceased. Would any person having knowledge of a will executed by the above named deceased who died on 10 December 1994 please contact Arthur Cox, Solicitors, 41/45 St. Stephen's Green, Dublin. (Ref. WW). Tel: 6764661

McCarthy, Margaret (Peggy), Spinster late of 12 Lower Fitzwilliam Street, Dublin 2. Would any person having knowledge of a will executed by the above named deceased who died on 25 January 1995 please contact Kieran O'Reilly & Company, Solicitors, 13 Mespil Road, Dublin 4. Tel:668 8660, Fax: 668 8578.

Ronayne, Thomas V.F., deceased, late of 81 Dodder Park Road, Rathfarnham, Dublin 14. Will anyone having knowledge of the whereabouts of the will of the above named deceased who died on 14 February 1995 please contact Maurice E. Veale & Company, Solicitors, 6 Lower Baggot Street, Dublin 2. Tel: 01 676 4067, Fax: 01 676 3436.

O'Connor, Margaret, deceased, late of 6 Clontarf Road, Tullamore, Co. Offaly and 565 West 169 Street, New York, USA. Would any person having knowledge of a will executed by the above named deceased who died on 25 September 1994 at Upton House, Clara, Co. Offaly, please contact Hoey & Denning, Solicitors, High Street, Tullamore, Co. Offaly. Tel: 0506 21105, Fax: 0506 51634.

Nugent, Richard, late of Robinstown (otherwise Ballymorris), Granard, Co. Longford. Would any person having knowledge of the whereabouts of a will of the above named deceased who died on 21 July 1994 please contact Connellan, Solicitors, 3 Church Street, Longford, Co. Longford. Tel: 043 46440, Fax: 043 46020.

Deevy, Richard K., deceased, late of Holy Family Residence, Roebuck Road, Clonskeagh, Dublin 14. Would any person having knowledge regarding the location of a will dated 6 July 1989 and made by the above named deceased, who died on 31 July 1994, please contact Michael Glynn & Company, Solicitors, Central Buildings, O'Connell Street, Limerick. Tel: 061 418 518, Fax: 061 418 519.

Kennedy, Anne, late of Upper Grand Canal Street, Dublin. Would any person having knowledge of the whereabouts of a will of the above named deceased who died on 28 February 1986, please contact Messrs Cahill & Cahill, Solicitors, Castlebar, Co. Mayo. Tel: 094 25500, Fax: 094 25511.

Morton, Ruth, deceased, late of 5 Geoffrey Keating Road, South Circular Road, Dublin 8. Would any person having knowledge of a will executed by the above named deceased who died on 26 January 1987 please contact Kennedy McGonagle Ballagh, Solicitors, 20 Northumberland Road, Ballsbridge, Dublin 4. Tel: 660 9799, Fax: 660 9234.

Goggins, Patrick, late of 12 Mellows Avenue, Arklow (and formerly of 41 Malvern Road, Hansford, Birmingham 21). Would any person having knowledge of the whereabouts of the original will of the above named deceased, who died on 10 March 1995 please contact Tarrant and Tarrant, Solicitors, Law Chambers, Arklow, County Wicklow. Tel: 0402 – 32424.

Smyth, Mary Josephine (otherwise Josephine), late of 26 Dublin Street, Dundalk, Co. Louth. Would any person or solicitors having knowledge of a will made by the above named deceased, who died on 15 September 1994 at Louth County Hospital, Dundalk, Co. Louth please contact Brian Berrills & Company, Solicitors, 5 Francis Street, Dundalk, Co. Louth. Tel: 042 – 34219, Fax: 042 – 39338.

O'Driscoll, Humphrey, deceased late of Sutton House, Nursing Home, 112 Dublin Road, Sutton, Co. Dublin and formerly of Aughaville, Bantry, Co. Cork. Would any person having knowledge of the whereabouts of a will of the above named deceased, who died on 16 October 1994 please contact Early & Baldwin, Solicitors, 27/28 Marino Mart, Fairview, Dublin 3. Tel: 01 833 3097, Fax: 01 833 2515, ref: GG/4227.

Lost Title Deeds

B.C. Fahy, 39 Londonbridge Road, Dublin 4. Would any person having knowledge of the whereabouts of the Original Title Documents relating to 39 Londonbridge Road, Dublin 4, please contact Colman Sherry, Solicitor, The Square, Gort, Co. Galway – (091) 31383/Fax: (091) 31993.

IN THE MATTER OF THE REGISTRATION OF TITLE ACT, 1964 AND OF THE APPLICATION OF COLMAN BROWNE IN RESPECT OF PROPERTY KNOWN AS HOWTH VIEW, DALKEY COUNTY DUBLIN.

TAKE NOTICE that Colman Browne of Howth View, 99 Coliemore Road, Dalkey, County Dublin has lodged an application for his 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 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. 93DN24032. The missing documents are detailed in the schedule hereto.

Dated the 21st day of December, 1994.

M O'NEILL
EXAMINER OF TITLES

Schedule

Deed of Conveyance dated 27th July, 1835 Margaret Cullen and others to Gerrard Tyrell.

Deed of Conveyance dated 26th June, 1879 Gerrard Tyrell to William Austin Colclough.

Deed of Conveyance dated 19th October, 1895 John Colclough to William James Phillips.

Deed of Conveyance dated 27th November, 1899 William James Phillips to George F. Molloy.

Deed of Mortgage dated 20th April, 1918 Ellen Teresa Molloy to Hibernian Bank Limited.

Deed of Conveyance dated 7th May, 1919 Ellen Teresa Molloy to Hibernian Bank Limited.

Deed of Conveyance dated 29th September, 1919 Hibernian Bank Limited to William Maurice, Middleton Curtis.

Deed of Conveyance dated 16th June, 1925 William M. M. Curtis to Edward Monsell Wilson.

Deed of Conveyance dated 3rd January, 1973 Desmond Joseph Wilson to Sheila Gladys Wilson.

RE: LOST TITLE DEEDS TO THE PROPERTY KNOWN AS "VERONA", 110, LOWER KIMMAGE ROAD, DUBLIN 6.

Will any person having knowledge of the whereabouts of any title documents to the property held by the late Mary Bridget O'Connor and known as "Verona", 110 Lower Kimmage Road, Dublin 6, please contact Nelson & Company, Solicitors, Templeogue Village, Dublin 6W.

Schedule of Lost Deeds

Deed of Lease dated 5th May 1906, James Valentine Nolan Whelan to John McGlynn.

Deed of Mortgage dated 28th January 1907, John McGlynn to Belfast Banking Company.

Deed of Assignment dated 25th March 1907, Belfast Banking Company and John McGlynn to Walter Parkinson.

Deed of Mortgage dated 27th of October 1908, Walter Parkinson to Henry Dawson.

Deed of Mortgage dated 25th November 1908, Walter Parkinson to William Drayton.

Deed of Assignment and Release dated 22nd August 1910, Henry Dawson and Walter Parkinson to William Drayton.

Deed of Assignment and Released dated 22nd August 1910, William Drayton and Walter Parkinson to Francis McDonald.

Deed of Mortgage dated 22nd August 1910, Walter Parkinson to William Drayton.

Deed of Assignment dated 24th October 1910, Walter Parkinson to Francis McDonald.

Deed of Assignment dated 10th March 1913, William Drayton and Francis McDonald to William Lewis.

Deeds of Mortgage dated 14th March 1913, and 1st July 1914, William Lewis to National Benefit Life and Property Assurance Company Limited.
Deed of Assignment dated 3rd March 1920, William Lewis and the National Benefit Assurance Company Limited to Robert Hugh Hill.

Deed of Assignment dated 6th February 1934, Robert Hugh Hill to Josephine Mary O'Connor.

Grant of Probate in the estate of Josephine Mary O'Connor dated 2nd February 1962.

Deed of Assent by Sean O'Connor dated 7th June 1962 in the estate of Josephine Mary O'Connor.

Grant of Probate in the Estate of John Joseph O'Connor dated 26th June 1980.

Deed of Assent by Mary B. O'Connor dated 13th November 1980 in the estate of John Joseph O'Connor.

Original Vesting Certificate number GR3637/80 dated 4th December 1980.

IN THE MATTER OF THE REGISTRATION OF TITLES ACT 1964 AND OF THE APPLICATION OF CLETUS LEIGH JUNIOR AND CLETUS LEIGH SENIOR IN RESPECT OF PROPERTY TOWNLAND OF CRUAGH AND BARONY OF UPPERCROSS COUNTY DUBLIN.

TAKE NOTICE that Cletus Leigh Junior and Cletus Leigh Senior of The Old Barracks, Rockbrook, Rathfarnham, Dublin 14, The Bungalow, Rockbrook, Rathfarnham, Dublin 14 has lodged an Application for 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 at this Registry.

The Application will be proceeded with unless notification is received in the Registry within (21) twenty one days 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. 94DN24021 and 94DN24023. The missing documents are detailed in the schedule hereto.

Dated the 15th March, 1995

H.G. McCaffrey
Examiner of Titles

Schedule

Conveyance dated 27th September, 1921 Thomas Taylor and ors to John Leigh.

Employment

Position Available for Apprentice on the current professional course or who has recently completed the professional course in Galway firm. Apply to Box No. 31.

Solicitor 8 years p.q.e. with extensive defence litigation experience seeks position with a view to partnership/profit share arrangements – Dublin area. Reply to Box No. 33.

Miscellaneous

Ordinary Seven Day Publican's Licence for sale. Contact John P. Prior & Company, Solicitors, Cavan Street, Oldcastle, Co. Meath. Tel: 049 41971.

Northern Ireland Agents for all contentious and non-contentious matters. Consultation in Dublin if required, reasonable rates. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry, Tel: 080 693 61616 Fax: 080 693 67712.

London West End Solicitors will advise and undertake UK related matters. All areas – corporate/private client. Resident Irish solicitor. Reciprocal arrangement and fee sharing envisaged. Agency work also. Contact: Ellis & Fairbairn, 26 Old Brompton Road, South Kensington, London SW7 3DL. Tel: 0044 71 589 0141. Fax: 0044 71 225 3935.

Personal Injury Claims in England and Wales. Specialist P I solicitors with offices in London and Bermingham can assist in all types of injury claims. One of our staff is in Ireland for one week in every month. Legal aid available to clients that qualify. Contact David Levene & Co., Ashley House, 235-239 High Road, Wood Green, London N22 4HF, England. Telephone: 0044 81 881 7777 Fax: 0044 81 889 6395 and Bank House, Cherry Street, Bermingham, B2 5AL Tel: 0044 21 633 3200 and Fax: 0044 21 633 4344.

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Seven Day Intoxicating Liquor Licence Required Garavan & O'Connor, Solicitors, Main Street, Castlebar require seven day intoxicating liquor licence for client anywhere in Ireland. Top price paid. Tel: 094 24600, Fax: 094 23930.

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Office(s) To Let. Would suit solicitor or similar. Contact: Joe McCall, Byrne McCall & Company, Registered Auditors & Accountants, 27 Wicklow Street, Dublin 2.
Telephone 01 679 3327.

Wanted – Chance to make good as solicitor. Three years suspension completed. Any offer within 25 miles of Dublin. Practising Certificate available on application. Reply to Box No. 34 or telephone (091) 31614.

Experienced litigation solicitor seeks position Dublin area, part-time considered. Reply to Box No. 35.

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on all phases of litigation
available for assistance in
case preparation.

Contact
Walter H. Sweeney Esq.
Kill, Carrigart, Co. Donegal.
Tel: (074) 55748
or (074) 55801

A Conveyancing Disaster – Waiting to Happen

Continued from page 126

relationship between the person applying for registration of title based on possession and the person against whom it is proposed to extinguish their title. Hopefully, the legislators will consider amending this section to exclude the *bona fide* applications between unconnected parties from its all embracing provisions. Where *bona fide* applications are being made, the applicant is normally unaware as to whom they are acquiring title from.

The writer hopes this article will be of some assistance in highlighting the difficulty associated with Section 146 Finance Act 1994. Section 146 Finance Act 1994 is a disaster waiting to befall the unwary conveyancer who fails to appreciate its devastating effects.

**Richard Grogan BCL AITI Solicitor, is a Senior Consultant in the Taxation Department of Craig Gardner/Price Waterhouse.*

At the recent launch of Irish Law of Specific Performance at the Law Society were l-r: Prof. J.C.W. Wylie, Consultant Editor; John Farrell, author; The Hon. Mr. Justice Hugh O'Flaherty and Gerard Coakley of the book's publishers, Butterworths. A review of the book will be published in the Gazette at a later date.

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CHERBURY MEWS,
90 BOOTERSTOWN AVE., CO. DUBLIN
PHONE & FAX: (01) 2885352

Margaret Duggan ((O')Gorman) of 59 Cabinteely Avenue deceased 16th April 1995. Anyone with knowledge of a Will or information please contact William Fry Solicitors, Ref. EF.

AN EXPERT'S ADVICE ON GROWING OLD WISELY.

Asio otus (Long-eared owl). Photographed by Richard T. Mills.

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VOL. 89 NO. 4

MAY/JUNE, 1995

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GAZETTE

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Front cover: The Law Society representatives who made the submission to the Dail Committee on S.153 of the Finance Bill (l-r): *John Fish, Brian Bohan, Des Rooney* and *Ken Murphy*. The text of the submission is on page 139.

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Section 153 – Why We Fought

A disappointing feature of the recent battle over Section 153 of the Finance Bill was the fact that so few of the measures' proponents appeared to understand the special role which lawyers play in the administration of justice and why, as a consequence, it would have been wrong to require the legal profession to report their clients to State authorities for suspected breaches of the law.

The politicians, in particular, seemed shocked by the vehemence of the Society's opposition to the proposed measure. The Minister for Finance, *Ruairi Quinn,* TD, described the Society's position as "outrageous". Opposition finance spokesman, *Charlie McCreevy,* TD, said it was "disgraceful". A number of seasoned backbench deputies remarked that the lobby on Section 153 was the most intense they had ever experienced on an issue other than abortion.

Only one member of the Dail Select Committee on Finance and General Affairs, *Michael McDowell,* TD, made it clear that he completely understood and fully supported the strong line which the Society had taken in advising its members not to violate their clients' constitutional rights by complying with Section 153 in the period prior to its anticipated striking down by the Courts as unconstitutional.

Although the strength of the position taken by the Society meant that it was the legal profession which effectively led the opposition to Section 153 it was, of course, not just solicitors, but also accountants and tax advisers, who were opposed to it. IBEC advised the Government not to enact it as did the Chambers of Commerce of Ireland, the Institute of Directors and Small Firms Association among many others. Business commentators condemned it and many national newspapers ran editorials recommending it be dropped.

Indeed, other than from some members of his own party and one trade union, the Minister received few public expressions of support for his proposal to extend Mr. Justice Hamilton's Beef Tribunal recommendations far beyond auditors to include anyone engaged in supplying tax advice or assistance to companies. It was notable that at the Dail Committee debate the majority even of Government deputies expressed reservations about the proposal and suggested it be deleted.

In this *Gazette* we publish in full the submission made by the Society representatives on the first occasion in the history of the Oireachtas when a Dail committee has heard the views of interested parties as part of the law-making process. The invitation to make this submission and to answer Deputies' questions subsequently for an hour provided a welcome opportunity to communicate the professions point of view.

In response to questions about the propriety of the Society advising its members not to comply with the law, the Society's representatives made clear the position that it would, on the contrary, be the Minister and the Oireachtas who would be failing to comply with their obligations under the law, constitutional law, if Section 153 were to be enacted as applied to lawyers. The position taken by the Society was exceptional. Indeed the Society's representatives knew of no precedent for it. It was based solely on the need to protect the constitutional rights of clients, however, and accordingly it was a principled and appropriate measure in the circumstances.

Accused by one Deputy of seeking to obtain a competitive advantage for solicitors over accountants, the Society completely rejected any such motivation. Indeed, the Society viewed with concern the undermining of confidentiality in the relationship between *any* body of *bona fide* professional advisers and their clients.

The ultimate fate of Section 153 was its transformation into Section 172 of the Finance Act which puts on a statutory basis the long existing ethical position whereby solicitors must cease to act for clients who request assistance in engaging in illegal activity. The Society views this as an acceptable outcome in the light of what had been originally proposed in Section 153.

The Society's fundamental objection to Section 153, however, was that, as applied to lawyers, it undermined the citizen's constitutional right against self-incrimination and thereby represented a civil liberties issue of genuine significance. The right against self-incrimination is a badge of a free society. It would be a threat to the constitutional rights of every citizen if lawyers were made agents of the State rather than of their clients. Accordingly, the identification by the solicitors' profession of the unconstitutionality of Section 153 as originally drafted was a public service.

Much legal work is mundane. It is, however, the highest calling of the legal profession to stand between the State and its citizens when the rights of the latter are under threat. It is a role which does not endear lawyers to the State, but it is one which the profession has never shirked and which it did not shirk on this occasion. ❐

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Submission to Dail Éireann Select Committee on Finance & General Affairs on Section 153 Finance Bill, 1995

"History was made today when the Law Society became the first body to make its submission to the Dail Committee on the Finance Bill" – Evening Press, *10 May.*

The following is the text of the Law Society Submission:

We understand that this is the first occasion on which a Dail Committee has invited interested parties to attend before it to make submissions in relation to draft legislation. This is, therefore, a significant event in the history of the Oireachtas. It is an honour for the Law Society to be the first such interested party to be invited to make a submission to a Dail Committee and on behalf of the Society we wish to thank you, Mr. Chairman, and your Committee for the invitation to address you.

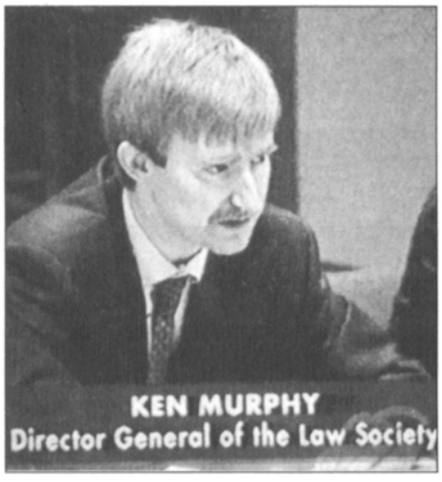
The Minister for Finance in his Second Stage speech indicated that there were quite detailed discussions with the accountancy bodies prior to the measure under consideration today being announced. We wish to place on record that the Law Society was not consulted in advance about section 153 of the Finance Bill, 1995. Nor have we been afforded an opportunity to make representations since its publication, other than by writing to the Minister. In those circumstances this invitation is particularly welcome.

The Law Society was established by Charter in 1888 and under Statute by the Oireachtas in 1954, as subsequently amended as recently as 1994. It is charged by the Oireachtas with being the representative and regulatory body for solicitors in Ireland. The solicitors' profession has a long and proud history of service to the people of Ireland. Perhaps the most important role that lawyers can play is to stand between the State and its citizens when the rights of the latter are under threat. It is a role which rarely endears lawyers to the State but is one which the profession has never shirked and which it will not shirk on this occasion.

One of the most disturbing aspects of section 153 is what we would term its 'slippery slope' dimension whereby the undermining of certain constitutional rights connected with lawyer/client confidentiality, once established, could be expanded on in years to come. Although the current proposal is confined to the tax affairs of companies, if the principle were established here, it is not difficult to envisage it being extended to the tax affairs of individuals and, indeed, beyond tax matters to other matters of issue between the individual and the State. It is because of this that the Society views section 153, as applied to lawyers, as a civil liberties issue of genuine significance.

Section 153 is a measure intended to assist the State to curb tax evasion. We wish to make it utterly clear at the outset that the Society, and the solicitors' profession whom we represent, in no way, shape or form condone tax evasion. We would condemn without hesitation any solicitor engaged, or assisting clients, in relation to tax evasion. Apart from the criminal penalties which such activity would attract, to be so engaged would be a matter of the most serious professional misconduct for a solicitor. It would be dealt with as such with the utmost severity by the Society and would be likely to lead to the ultimate sanction of the solicitor being struck off the Roll of Solicitors by the President of the High Court.

There have been some suggestions that the Society's opposition to section 153 indicates an ambivalence towards tax evasion and a desire to protect clients who may be guilty of it from being brought to justice. That is most emphatically not the case. Any such suggestion is a defamatory misrepresentation of the Society's



position and we deeply resent it. A lawyer's duty to defend an accused person must not be confused with sympathy for the crimes of which his client has been accused.

The Society is indeed opposed to the application of section 153 to lawyers but we have excellent grounds for being so opposed. We believe that it is profoundly wrong in principle to create an obligation on lawyers to report their clients to the Revenue Commissioners in violation of the confidentiality which has historically attached to information disclosed by a client to a solicitor. In its ultimate application it can be envisaged that solicitors would be compelled to give evidence in court against their own clients concerning information which had been revealed to the solicitor in confidence. Insofar as the Society can determine, such a law would be without precedent anywhere in the free world. Colleagues in other countries have been both amazed and shocked to hear from us that it was proposed to impose such an obligation on lawyers in Ireland.

The Society considers that section 153 is not merely wrong in principle but that it would create enormous difficulties in practical terms. Given that tax law is exceedingly complex and contains many grey areas, indeed even experts may profoundly disagree on what constitutes evasion, the application of this provision would create impossible practical dilemmas for lawyers. In addition, there is a real risk that clients would seek tax advice abroad rather than from advisers based in this country and that the measure would discourage foreign investment in Ireland.

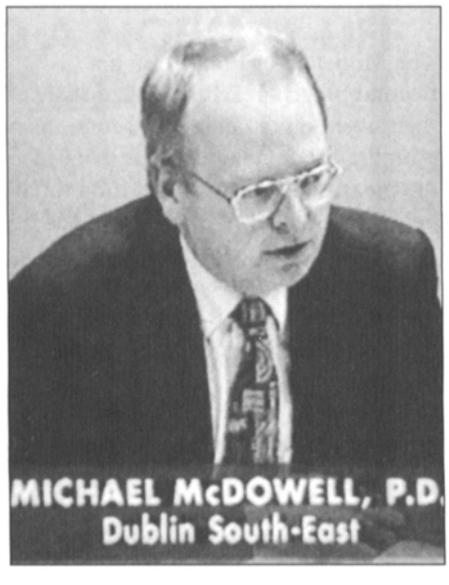
In order for anyone to obtain proper legal advice, it is necessary to make a full disclosure to the legal adviser. Accordingly, we would submit that it is wrong in principle to create a risk of undermining in a general way the public's trust and confidence in its lawyers.

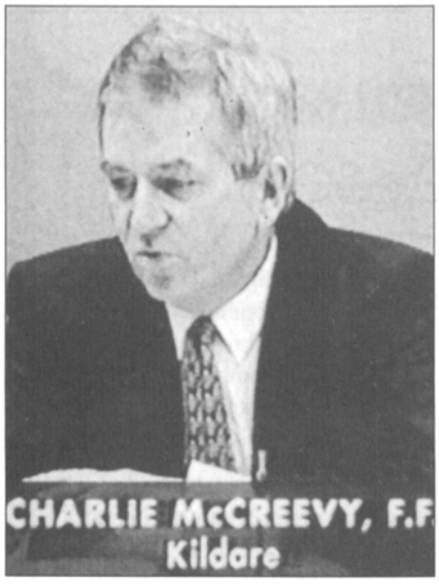
The members of this Committee have received a six-page submission from the Society setting out the grounds of many of the objections in principle and problems in practice which the Society's Taxation Committee sees in section 153. All of the points made above and made in the said document are considered by the Society to be important but are subsidiary to the primary point which now follows.

The Society's fundamental objection is that section 153, as it applies to lawyers, constitutes a serious erosion of the protection of citizens' rights in dealing with State authorities and violates rights protected by the Constitution of Ireland.

This view of section 153, as it applies to lawyers, occurred to the Law Society on first sight of the Bill on 12 April, 1995. The Society subsequently sought and obtained a fully argued opinion from two barristers who are recognised as unquestionably among the foremost experts on Irish constitutional law. This opinion unequivocally expressed the view that, insofar as it would apply to lawyers, section 153 trenches deeply and disproportionately on established constitutional rights and would be struck down by the courts as unconstitutional. Their grounds for reaching this conclusion in relation to section 153 are, in outline, as follows:-

1. Section 153 undermines the constitutional right against self-incrimination. The centuries-old common law right against self-incrimination has been explicitly recognised by the courts as a right protected by Article 38.1 of the Constitution. In addition the right against self-incrimination had been deemed by the European Court of Human Rights to be an essential feature of the right to a fair hearing under Article 6(1) of the European Convention of Human Rights. The right, which finds a classic expression in the fifth amendment to the Constitution of the United States and which is also recognised in European Union law, has been held by the courts in Ireland to be fundamental to the rules under which criminal trials are conducted and to come within the terms of the guarantee of a fair trial contained in Article 38.1. There has been a considerable body of case law on the application of the test of proportionality to the overriding of a constitutionally protected right and, following examination of this case law, the opinion concludes that, linked to the judicially established constitutional right of access to a legal adviser, it must be seriously doubted whether the Oireachtas could *ever* trench upon the right against self-incrimination in the manner suggested in section 153.
2. Section 153 undermines a client's right to legal professional privilege. A client's right to legal professional privilege, like the rule against self-incrimination, is a necessary aspect of the constitutional right of access to a lawyer. It is an essential feature of the rule of law and the proper administration of justice. A classic formulation of this appears in a judgment of the United States Supreme Court which our advisers believe would be followed by the





Supreme Court in Ireland, in the following terms:-

> *"If a person cannot consult his legal adviser without being liable to have the interview being made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance."*

Some of the potential objections to section 153 in relation to the client's right to legal professional privilege are mitigated by the *"in preparation for litigation"* saver in section 153(8). Even allowing for this and for the legal assistance/ legal advice distinction drawn by the Supreme Court in the *Smurfit Paribas* case, however, section 153 tenches deeply into clients' legal professional privilege to such an extent as to fail to respect a fundamental feature of the constitutional right of access to a lawyer.

These are *not* technical, merit-less, 'lawyers' points' by which legalistic special pleading is being invoked to frustrate a legitimate measure. An independent legal profession plays a crucial role in the administration of justice. If a citizen cannot have the existence and means of exercise of a right explained to him he effectively loses that right. The right against self-incrimination and a client's right to legal professional privilege are badges of a free democratic society. It is the rights of citizens, not simply of lawyers, which are under attack from this provision. It is a threat to the constitutional rights of every citizen if lawyers are to be made agents of the State rather than of their clients.

That this is indeed a civil liberties issue would probably be much more clearly identifiable if it was a measure proposed in the general area of criminal law rather than in the Revenue area. The principles at stake, however, remain the same. One must not lose sight of the fact that we are dealing here with potentially very serious criminal offences. If constitutional rights are to be impugned, there should be minimal restraint of the exercise of the protected right in the exigencies of the common good. The objective must be of sufficient importance to warrant overriding the constitutionally protected rights. On the legal advice to the Society, that is not the case here.

It was on the basis of this very strong legal opinion from constitutional law experts, to the effect that section 153 at is applies to lawyers is unconstitutional, (an opinion which according to newspaper reports has now been given to the Government by the Attorney General) that the Council of the Law Society at its meeting on 4 May 1995 decided to recommend to its members that they should not comply with section 153 if it is enacted.

This was not a decision taken lightly by the Law Society Council. It is obviously a major step for the Society to issue to its members a recommendation that they ignore statute law passed by the Oireachtas. It has done so only based on a compellingly-argued expert opinion, the conclusion of which is that it would, in fact, be the Oireachtas which would be failing in its duty to respect the Constitution by enacting section 153 as it would apply to lawyers. If section 153 were to be enacted then the Society would in all likelihood launch a constitutional law action immediately to have the provision, as applied to lawyers, struck down by the courts.

The Society accepts that the motivation of the Minister for Finance and of the Government in introducing this measure is entirely honourable. Their objective is laudable. The Society in no way condones tax evasion and would support any reasonable measure introduced by the Government to help curb it. However, it will not support measures which unreasonably and disproportionately undermine important constitutional rights of citizens.

If the Minister had restricted section 153 to auditors as recommended by Mr. Justice Hamilton in the Beef Tribunal Report, then the constitutional problems arising from the special role played by legal advisers in the administration of justice would probably not have arisen. As the Government clearly cannot proceed with legislation which is likely to be struck down by the courts as unconstitutional, the Society now calls on the Minister to either amend section 153 so that it will no longer apply to legal advisers or else to drop the section completely.

❐

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Half-Yearly General Meeting

The Half-Yearly General Meeting of the Law Society was held in Blackhall Place on 4 May 1995. The minutes of the AGM held on 24 November 1994 were adopted.

Finance Bill 1995

A special report was made by *John Fish*, Chairman of Taxation Committee, on the proposed S.153 of the Finance Bill 1995 (which has been replaced by S.171 since the Half-Yearly Meeting). The proposed section provided that any person who assists a company in the preparation or delivery of any information, declaration, return, record, accounts or other document which that person (including a solicitor) knows will be or is likely to be used for any purpose of tax, will be bound to comply with the requirements of this section. In particular that person will be obliged to inform the Revenue Commissioners where he believes that a tax offence has been committed even where that information has been disclosed to the solicitor on a separate occasion altogether.

John Fish pointed out that while the Law Society does not condone tax evasion, this section would undermine the traditional concept of solicitor/client confidentiality. Mr. Fish reported to the Half-Yearly Meeting that the Law Society was vigorously opposing the enactment of the section. Counsel's Opinion had been received by the Law Society that day. This was a strong compelling argument that the section was unconstitutional. In the light of this the Society would be recommending that Section 153, if enacted, should not be complied with by members.

He also referred to the fact that a press release had been issued on behalf of the Society in opposition to the section. A joint press release with the Consultative Committee of Accountancy Bodies – Ireland and the Institute of Taxation had been issued announcing the suspension of participation in the Taxation Administration Liaison Committee (TALC) pending resolution of the professions concern with Section 153 of the Finance Bill 1995. He stated that the Law Society had made a submission to the Minister on 28 April and a letter had gone out to each member of the profession asking for their support in lobbying the Minister. The discussion was opened to the floor. Speakers from the floor spoke in opposition to the section. The President asked the meeting whether they were in agreement with the policy being adopted by the Law Society. Full agreement was received from the floor.

Amendment to Bye-laws

The following amendments to the Bye-laws were put forward:-

(i) Facilitate the sending of statutory notices to members by way of document exchange.

(ii) Provide for the consideration and approval of the Society's annual accounts at the Half-Yearly General Meeting rather than at the Annual General Meeting, when the period being reported on is eleven months past.

The second amendment was opposed by *Leo Mangan*. He said that the accounts should be made available for discussion at the Half-Yearly Meeting but not adopted at that meeting. He was of the view that they should be adopted at the AGM. *Laurence Shields*, Chairman of Finance Committee said that it was unfair that the accounts should be discussed at two meetings. *Mr. Mangan* put forward that the amendments dealing with the Document Exchange be passed and the amendments concerning the Approval of the Accounts be left to the Review Group to deal with. This was seconded by *Terence Liston*. The amendments put forward by *Leo Mangan* were voted on by the meeting and it was defeated. The amendment to the Bye-laws as proposed was adopted.

Solicitors Retirement Fund

A report on the Solicitors Retirement Fund was made by *Gerald Hickey*. He reported that the fund had suffered a loss in 1994 due to problems in the U.S. market. However it had made a capital profit of £7 million in 1993. *Michael D. Murphy* from the floor said that the Fund should be marketed better to the profession.

Solicitors Benevolent Association

The report on the Solicitors Benevolent Association was made by the new Chairman *Tom Menton*. He paid tribute to the outgoing Chairman *Andy Smyth* and thanked him for his hard work and commitment on behalf of the SBA. *Mr. Menton* reported that there has been an increasing number of demands on the funds of the SBA in recent years particularly from younger members. In an effort to increase the funds of the SBA he suggested that members could increase their subscriptions; organise fundraising events or include a gift in their own will to the SBA.

Annual Accounts of the Society for the year ended 31 December 1994

Adoption of the accounts was proposed by *Laurence Shields* and seconded by *Ward McEllin*. A discussion of the accounts took place. This was followed by the election of auditors which was proposed and seconded.

Review Group

A report was made by the Chairman of the Review Group *Don Binchy*. He referred to matters being considered by the Review Group. There are as follows: the Society's representative role; services provided by the Society; services provided by advisory Committees of the Society; the

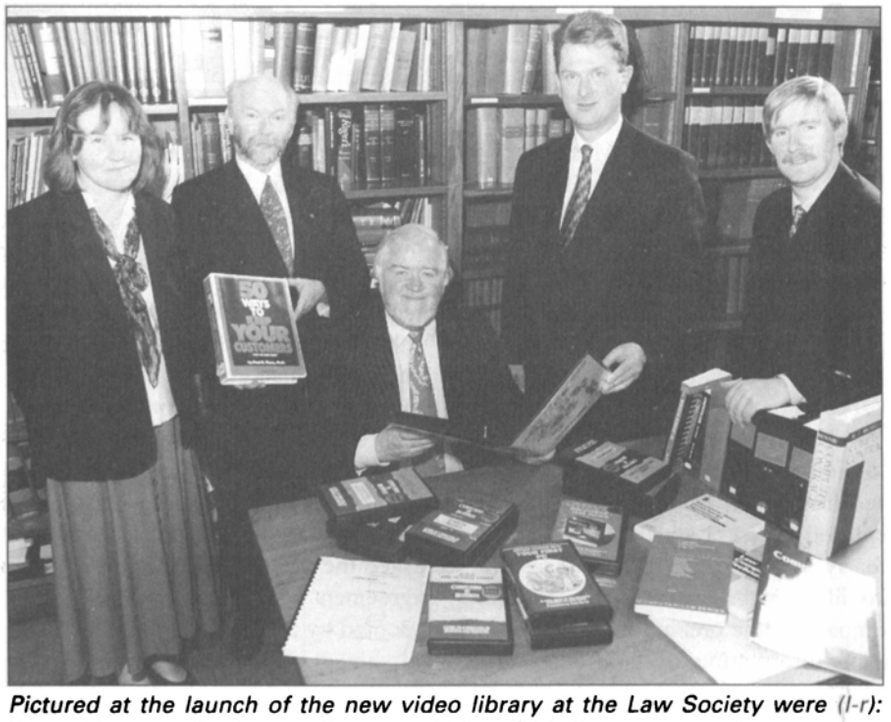
Society's regulatory obligations; public relations and education and admissions. Matters being considered by the Review Group on which written submissions are sought from the membership are the method of election to the Council; the method of election of officers; the number and size of Council Committees and the division of authority between the Council and the Secretariat.

The Chairman reported that the Review Group had received submissions from 13 members of the profession; 12 members of staff including a joint submission; 3 Committee Chairpersons and one former Director General. He noted that not one bar association had made a submission. He encouraged bar associations to have a special meeting on the issue of the Review Group. He called for more submissions to be made to the Review Group. He said he hoped that the work of the Review Group would result in a dynamic partnership between Council and the Committees and the executive staff.

The Review Group are to present a written report to the Annual General Meeting in November. The discussion was opened to the floor. Many speakers were of the view that the regulatory and representative roles of the Law Society should be separate. Other speakers felt that the *Gazette* could be used more effectively as a communication tool with the profession. On the issue of Continuing Legal Education *Duncan Grehan* was of the view that CLE should be mandatory. *Richard Grogan* concurred saying that other professional bodies have mandatory education and so should the Law Society. *Don Binchy*, Chairman of the Review Group thanked the members for their contribution and again asked for more written submissions. *Leo Mangan* said that he was very impressed with the staff submissions. He said that there were not enough submissions from members. He called on Council members and Bar Associations to make submissions.

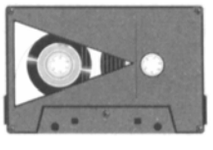
Scrutineers for ballot for Council for 1995/95 were appointed and the meeting was concluded. ❐

New Video Library



Pictured at the launch of the new video library at the Law Society were (l-r): Mary Gaynor, Assistant Librarian; Brian O'Reilly, Practice Management Committee; Paddy Glynn, President; Frank Nowlan, Technology Committee and Ken Murphy, Director General.

New Service



A joint initiative between the Technology Committee and Practice Management Committee has resulted in the establishment of a "Video" library within the Law Society's Library, designed to give practitioners easy access to videos and reference books on computer and practice management issues. Titles include:-

Management

* How To Create A Successful Business Plan
* How To Really Start Your Own Business
* Successful Negotiation
* The Service Challenge
* Creating A Winner?
* Telephone Courtesy & Customer Care
* How To Survive & Profit in Tough Times I
* How To Survive & Profit in Tough Times II
* How To Deliver Customer Service
* How To Run A Successful Family Business
* 50 Ways To Keep Your Customers
* Managing Time

Computers

* Getting Started with Your First PC
* How To Computerise Your Accounts
* How To Make the Most of Microsoft Windows
* Word Processing
* Developing a Business-Led Computer Strategy
* Computer Aided Design
* Teleworking
* Computer Security
* Desktop Publishing
* Databases
* Spreadsheets
* Networks

The Computers in Business videos were purchased from the proceeds of the Technology Committee's exhibition/conference and course held in 1994. Videos are available from the Law Society's Library on payment of a £20 refundable deposit for 10 working days. ❐

Section 153 Finance Bill 1995

The first article on the now-famous Section 153 of the Finance Bill, 1995 was published in the *Irish Independent* on 7 April, 1995. The article was printed prior to the publication of the Bill. The heading of the article was "Solicitors Warned: Tell the Taxman or face Prison". The article stated that lawyers and accountants will face jail sentences and heavy fines if they fail to tell the Revenue Commissions about tax dodging by their clients. It was reported that this measure will be included in the Finance Bill to be published next week by Finance Minister, *Ruairi Quinn*. The article also stated as a result of an interview by the writer of the article, *Brian Dowling*, with the Director General, "the move will spark widespread opposition from solicitors and last night the Director General of the Law Society, *Ken Murphy*, said that they would vehemently resist any attempts to include solicitors within the provisions of the Finance Bill."

The Finance Bill was published on 12 May and a press release was issued by the Law Society on 13 May.

The opposition of the Law Society was reported in the *Irish Independent*, *Irish Press* and the *Cork Examiner* on 14 April. The *Irish Independent* quoted from the press release that: "the Bill would have an "adverse affect" on the administration of justice because clients would be inhibited from disclosing to Irish Solicitors relevant information about their business affairs for fear of being reported to the Revenue Commissioners". The headline in the *Irish Press* read: "'Whistle-blower' Finance Bill roundly condemned". It was reported in the *Sunday Business Post* on 16 April that the new measures in the Finance Bill could be counter productive and lead to a greater concealment of fraud. *Business and Finance* published an article headed "The Informers Charter" which stated that the Law Society was "gravely concerned" about the Finance Bill. It stated that the rights of clients to confidentiality when seeking help from a solicitor would be seriously undermined if this proposal was enacted. The Southern Law Association issued a press release in opposition to S.153 on 19 April which was covered in the *Cork Examiner* on 20 April.

In the *Irish Times* on 21 April an article was published in the *Business Supplement* with the headline "TDs to Face Dilemma In Offering Tax Advice". The article quoted *Ken Murphy* as saying that the proposed section was "bad in principle, unenforceable, probably unconstitutional and may turn out to be counter productive". The *Sunday Business Post* published an article headed "Solicitors considering challenge on Finance Bill" on 23 April. The article quoted *Ken Murphy* as saying the "the Law Society in no way condones tax evasion and any advisors who get involved in tax evasion. Any solicitor found to be colluding with a client avoiding tax runs the risk of a charge of misconduct which carries the ultimate sanction of being struck off the Solicitors Roll by the High Court." The *Irish Independent* published an article on 27 April with the headline "The Professional As Informer" and it stated that lawyers and tax consultants are furious about provisions in the Finance Bill that could force them to 'shop' their clients for tax crimes or face jail sentences.

The Dublin Solicitors Bar Association issued a press release in opposition to S.153 on 1 May and this was covered in the *Irish Independent*, the *Irish Times* and the *Irish Press*. On 3 May a joint press release was issued by the Law Society, the Institute of Taxation and the CCABI. The press release stated that "the professional bodies announced that they were with regret suspending their participation from the Taxation Administration Liaison Committee pending the resolution of the professions concern with Section 153 of the Finance Bill 1995. This was covered extensively on the RTE TV 9 o'clock news and the story was carried in the *Irish Times* and the *Irish Independent* on 4 May 1995.

A press release was issued on 5 May by the Law Society based on an opinion of counsel that the section was unconstitutional which stated that solicitors would not comply with S.153 if enacted in its present form. In a live interview on Morning Ireland, Ken Murphy stated that legal advice had been obtained that Section 153 was unconstitutional and based on this compelling legal opinion, it had been decided by the Council of the Law Society that solicitors should not comply with Section 153 of the Bill. 98 FM news also carried a statement to this effect by Ken Murphy, Director General.

On 6 May 1995 the *Irish Times* printed an article headed "Quinn seeks advice on legality of tax move" with a subheading "threat of court challenge by Law Society prompts action". The article stated that a spokesman for the Minister said that the AG would be examining S.153 and that this move followed yesterday's Law Society recommendation that its members not comply with Section 153 if it is enacted as part of the Finance Bill next month. A front page article of the *Sunday Business Post* on 7 May with the headline "Tax Informer Plan Faces Collapse" was written by *Mark O'Connell* and *Aileen O'Toole*. It was reported that "The A.G. has advised the Government that any attempt to compel lawyers to report suspected tax improprieties under Section 153 of the Finance Bill is unconstitutional." The article stated that the Law Society, in particular, has advised its

members not to comply with Section 153. "This is based on a strong legal opinion which appears to be consistent with the advise which *Dermot Gleeson* has given to the Government," the article stated.

The *Sunday Independent* stated on 7 May "Mr Quinn given the widespread opposition of the various professional bodies to the Section and a warning from the Law Society that its provisions could be unconstitutional, would be well-advised to think again. He should withdraw the Section 153 provision until he can produce a better and more widely acceptable alternative."

On 10 May the Law Society made a submission to the Dail Committee on the Finance Bill. (see text at p139) The *Evening Press* reported that "history was made today when the Law Society became the first outside body to make its submission to the Dail Committee on the Finance Bill." Marketplace featured a report that evening on May 10 on S.153 of the Finance Bill and an interview was given by Ken Murphy. It reported on the submission made by the Law Society and the other professional organisations. The submissions to the Dail Committee were also featured on Oireachtas Report. On 12 May an article written by Ken Murphy was published in the *Irish Times*. The headline read "Opposition to Section 153 is an issue of civil liberties for solicitors."

On 17 May amendments to the Fiance Bill were published. Section 153 was replaced by S.172 which does not require solicitors to report clients. A statement from the Law Society which welcomed the changes was issued to RTE which was covered on 9 o'clock TV news. The following day in the *Irish Times* , it was reported that "Quinn exempts solicitors from tax evasion clause" and in the *Irish Press* that "lawyers let off in Finance Bill". The *Irish Independent* reported that "The Law Society gave the new provision a "cautious welcome" but said that its primary concern – that a citizen's fundamental right to avoid self-incrimination – was being respected in the new section."

Solicitors For Judicial Posts

In the *Irish Independent* on 8 April, there was an article published with the headline "Solicitor's Call for Judicial Posts" by *Frank Carron*. The article stated that solicitors should be considered for appointments to all courts, including the High Court and Supreme Court, the President of the Law Society said last night. The article quoted extensively from the press release issued on the day of the parchment ceremony. The article stated that: "the Law Society President pointed out that two years ago, Mr. Justice *Michael Sachs,* a former solicitor, was appointed a High Court Judge in Britain. In 1991, legislation was passed there to end the bars monopoly for senior judicial post. There was no logical reason why a solicitor should not be considered for judicial appointments to all courts here, he added". The *Sunday Business Post* on 9 April 1995 also carried extracts from the press release. The heading stated "Bar Monopoly Criticised". The article went on to say that the President of the Law Society, *Patrick Glynn* had called for an end to the monopoly endured by members of the Bar in seeking appointments as Judges to the Superior Courts."

Court Delays

In the *Irish Independent* of 5 April 1995 as a result of a media enquiry to the Law Society, an article was printed headed "Huge Court Backlog Leads to 'Appalling' Delays." The article was written by *Stephen O'Brien* and stated that family law cases in the Circuit Courts are facing delays of up to three years before they are heard while similar hold-ups await civil actions in the High Court, new figures gathered by the *Independent* have revealed. The article stated that the Law Society last night urged the Government to appoint more Judges of both Circuit and High Court level to clear the logjam of justice. The article stated that Law Society President, *Patrick Glynn* said: "The situation in the Circuit Court in relation to family law cases is very serious. Outside of Dublin, no more than one tenth of cases listed in any particular seating will be reached".

In an article published on the front page of the *Evening Press* on 1 May 1995, headlines reading "Legal Limbo for Victims". The text of the article dealt with the problem of court delays. The article written by *Chris Macey* quoted figures provided by the Law Society as regards the amount of time which cases are taking in the High Court and the Circuit Court.

In the *Irish Independent* on 6 May 1995, there was an article with a headline: "Courts need Independent Budget – Judge". The article was written by *John Maddock* and it stated that Judge Denham from the Supreme Court had said that the courts and judiciary should have their own modern management infrastructure and budget independent of the Department of Justice. It was reported in the *Sunday Business Post* on 20 May that more judges are to be appointed.

Investment Intermediaries Bill

An article was published in *Business and Finance* on 13 April 1995 with the heading "Solicitors Reject Investment Bill." The article stated that the Law Society is up in arms over plans to introduce a new requirement that solicitors report to the authorities any financial transaction carried out on behalf of a client. The article stated that the new duty, will greatly increase the administrative burden borne by solicitors while it could cost the Law Society between £300,000 and £400,000 a year. The article stated that: "it is proposed that the new Investment Intermediaries Bill, prompted by the need to control the activities of rogue brokers and other intermediaries, should also be applied to solicitors and accountants. Ken Murphy, Director General, pointed out in the article that the solicitors profession is already unique in having a large Compensation Fund available to clients who have suffered financial loss at the hands of the solicitors.

Inclusion of solicitors in the Investment Intermediaries Bill was strongly opposed by the Law Society.

It was reported in the *Irish Times Business Supplement* on 26 May that solicitors are not to be included in the Bill.

Capping

An article was printed in the *Irish Times* on 18 April 1995 by *Kieran Conway* with the headline: "Government Now Treads Carefully on the Capping of Insurance Awards." The article stated that the limitation of insurance awards for compensation paid following accidents was raised by the previous Government but has not been pursued in any vigorous way by this Government. The article reported the fact that the Department is commissioning a study of the insurance industry. The article pointed out that the unions are vigorously opposing the proposals. The article reported that according to SIPTU, the proposals flew "in the face of encouraging employers to reduce occupational accidents as the prime means of reducing insurance premiums". It also reported that MSF said that they were a "quick fix solution", that would not work. Fine Gael produced a discussion document that reproduced the arguments being made by the Unions and the law bodies in calling for attention to be focused instead on the cause of the claims – namely the high accident rate both on the roads and in the workplace. The article also stated that Mr. Quinn's speech last October was virtually contemporaneous with a Law Commission report in England which suggested that compensation levels were too low there and in many cases need to be doubled or, in other words pitched at precisely the level being awarded by the Irish Courts. The article quoted Law Society spokeswoman, Ms. *Catherine Dolan*, in saying that lawyers are waiting to see what the new Government does. The article went on to say that lawyers believe the issue had not gone away forever but concluded that perhaps not but the present indications are that it has gone away for quite some time.

An article was published in the *Evening Herald* on 10 May 1995 on the issue of compensation claims. The article stated that the Law Society is horrified at the idea of eliminating pain and suffering. "That is asking the victim to pay the price for satisfying a powerful interest group," says Ken Murphy, Law Society. The article continued to say that the real problem is not at compo – culture but a negligence culture, he believes. "We have been far too tolerant of low standards of health and safety in the workplace and bad driving on the roads. The main reason that insurance is expensive is not that awards are too high or that solicitors by advertising their services can promote a claim culture. The reason is that far too many accidents are caused by negligence". The article stated that Ken Murphy agreed that high insurance costs are a problem but the solution is not to reduce compensation to victims of negligence.

The Compensation Fund

An article was published in the *Irish Independent* on Friday 12 May 1995 on the Compensation Fund. The article gave information about how the Compensation Fund operates. The article quoted Ken Murphy in saying that: "it is not sufficiently recognised in these circumstances that anyone who loses money through the bad practices of a solicitor will be paid in full by the profession. This money is coming directly out of the pockets of solicitors. Individual members of the profession are paying towards the millions which must compensate for dishonesty," he said. The article went on to say that the Law Society maintains that the solicitors profession is "unquestionably" the most regulated profession in the country. The article stated that: in addition to the practising certificate and the annual £1,210 fee for it, seven full-time investigators are in place at the Society's headquarters of Blackhall Place, where they comb through the accounts of the country's 5,000 solicitors practices regularly: "we have seven full-time investigators and they thoroughly check the accounts of each practice at least once every five years," said the spokeswoman for the Society.

Catherine Dolan ❐

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The Attorney General's Office: The Model Legal Office of the Future?

By Dr. Eamonn G. Hall

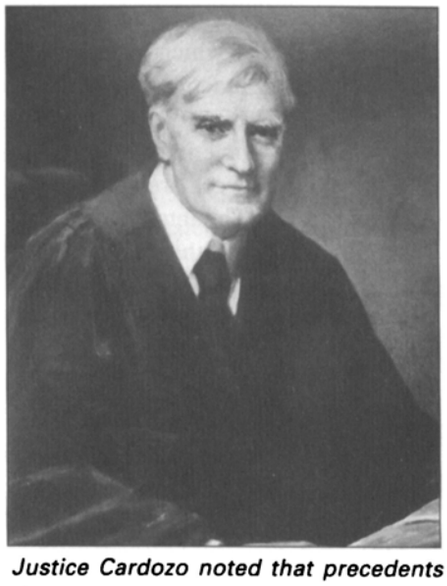
Introduction

Recently, the office of a powerful statesman came under scrutiny; the subsequent and inevitable "Report" was not favourable. The head of the Office spent nearly a quarter of his time trapped in staff meetings after discussing matters that had little to do with his primary objective. In terms of "marketing" its services, (among other Government Departments), the Office was described as a "dud". Mid-level officials were reported as going straight into the boss's office, persuading him to undo decisions that others thought had already been determined. Certain officials of the Office, who didn't fit into any box on the organisational chart, were held accountable to no one. Management had a reputation for ineptitude. Computer facilities were lacking. Subsequently, staff members were seen clutching a document labelled "Strategic Goals for 1995". There was active talk of striving towards a "zero-defect operation".

Whose office was described above? This was not, repeat not, the Office of the Attorney General of Ireland but the office of Clinton & Co, the current administration in the White House in Washington. {See "White House has Tapped a Businessman to Make Some Order From Chaos", *The Wall Street Journal Europe* February 15, 1995}. This illustrates a truism: if three wise men, or women, visited any of our offices with a view to "reviewing" operations, improvements may always be possible.

The Review Group

The Attorney General was described by *Kingsmill Moore J.* as "a great officer of State, with grave responsibilities of a quasi-judicial nature as well as of an executive nature". {*McLoughlin v Minister for Social Welfare* [1958] IR 1 at 17; see also *The Office of the Attorney General in Ireland* by Professor James Casey (1980). A second edition of the book is forthcoming}. As readers know, three wise men, Mr. *John Hurley*, Secretary, Public Service Management and Development in the Department of Finance (Chair), Mr. *Frank Murray*, Secretary of the Government and Mr. *Tim Dalton*, Secretary of the Department of Justice, carried out a review of the Office of the Attorney General at the end of last year. The report was published in February 1995. Incidentally, *McCann FitzGerald* and *Eugene F. Collins*, Solicitors, were thanked in the introduction for their assistance.



Justice Cardozo noted that precedents that are outworn may be decently discarded without affront to the sentiment that there shall be no breach of the legal order in the house of its custodians.

Recommendations of Review Group

The Review Group recognised that legal work undertaken by the Office of the Attorney General was very demanding in terms of knowledge and time and that the achievement of quality was of the "highest priority". The staff were stated to have "worked assiduously" in responding to the demands placed on them from the growing volume of legal activity, at both domestic and European levels. However, the Group considered that despite the best efforts of the staff, "the systems and procedures used [did] not enable the office to optimise output and performance to the extent achievable with modern systems". In certain areas, the Group found "major scope for improvements".

The preparation of a Strategic Management Plan encompassing both the Advisory Section, the Parliamentary Draftsman's Office together with the Office of the Chief State Solicitor was recommended. Apart from other management aspects, the Review Group considered that "the single greatest inhibitant to optimal function in the AG's Office [was] the undeveloped state of its information technology" . Truly, the same could be stated of many legal offices. In the Parliamentary Draftsman's Office, the Group considered there was a great need to extend the use of computer systems and databases in:

- researching and retrieving precedents and legal opinions;
- streamlining the process of drafting bills;
- streamlining the process of publishing legislation; and
- statute updating and indexing.

In the Advisory Section of the Office, great potential was stated to exist for the use of computer systems in

- accessing precedents and advices generated within the office;
- implementing case tracking, updating and reporting system;
- accessing legal databases (such as LEXIS, ITELIS, CELEX and others); and
- automating the registry system.

A qualified legal librarian was recommended together with information technology training for professional and secretarial staff. Continuing legal education was recommended as well as a structured system of appraisal for all staff.

Recruitment To Office

For some inexplicable reason, the question of recruitment of professional persons to the Office of the Attorney General has been a vexed and controversial issue. See for example, the Editorial in the *Gazette* of the Society, July 1994.

The Review Group recommended that "consideration be given to extending eligibility" for the relevant competition to solicitors as well as barristers. The Report noted that this had been the approach adopted for some time past by the United Kingdom Parliamentary Counsel's Office and had "proved very satisfactory there".

In this context, the Head of the Government Legal Services of England and Wales with the salary of circa £95,000.00 (not only subject to review, but more money may be available for an exceptional candidate) was publicly advertised in May 1995. The present holder, Sir *Gerald Hosker,* KCB, QC, with the title of Treasury Solicitor retires in October 1995. Reporting directly to the Attorney General, the Head of the Government Legal Services is responsible for the provision of legal services to Government Departments and other public bodies in England and Wales. As well as advising personally on legal issues, the holder of the Office heads a Department of about 540 staff who also give legal advice to a number of major departments, and provide civil litigation services. The Head of the Government Legal Service has oversight for about 1,100 lawyers in over 30 departments and agencies. The person appointed becomes Queen's Proctor, acting for the Crown in matrimonial and legitimatisation cases and will be appointed Procurator General.

Solicitors and barristers, with a background in public law are eligible to apply for the above post. The solicitor or barrister appointed will be accountable to Parliament for the department's expenditure currently about £50 million. Many Irish solicitors have been admitted as solicitors in England and Wales and are thus eligible.

Vacancies for Parliamentary Counsel in England and Wales were also advertised recently. The job description was exceedingly challenging:

> "Drafting Bills calls for an analytical mind, imagination, mental toughness, physical endurance, powers of persuasion and (a quality which may be acquired by practice) the ability to express oneself on paper. . . [The] pressure is sometimes intense, and the hours of work are not always predictable. The intrinsic interest of the work and the difficulties of the problems to be solved make the work stimulating and, when the pressure is great, arduous".

Solicitors and barristers were eligible. The successful solicitor or barrister would have a good honour's degree (which need not be in law) "or show evidence of comparable intellectual ability". Solicitors are eligible for appointment to the High Court in England and Wales. At the end of May 1995, an advertisement for the position of Senior Draftsman in the Office of the Attorney General appeared in the National Press. Solicitors and barristers were eligible for appointment. This was an historic moment. The Attorney Genera must be complimented. Solicitors and barristers must work together in harmony with the ultimate vision of making the world (and Ireland in particular) a better place in which to live.

Conclusion

Law is about creating, finding and using information. One might automatically assume that the new information technologies are ideally suited to law. Yet in mainland Europe, on-line law research has not been successful: it is perceived as both difficult to use and expensive. CD-ROM is more popular, but still limited in scope. No one should be too critical of the Office of the Attorney General for its perceived lack of information technology facilities. However, if all of the recommendations of the Review Group are implemented fully, the Attorney General's Office should become a *model* legal office.

❐

Conference on Preservation of Timber in Buildings at TCD

The first international scientific conference covering the new strategies for the preservation of timber, environmental laws and health effects in buildings will be held at Trinity College Dublin on 21 & 22 September 1995. The Conference will address the issues of green timber preservation, mycology, entomology, building construction and maintenance, health hazards and environmental policies. The delegate registration fee is £250. For further information contact the Conference Directors: *Dr. Jagjit Singh* or *Elizabeth McCausland* Tel: 0044 181 784 5717, Fax: 0044 181 784 5700.

New Apprenticeship Regulations

The Solicitors Acts, 1954 to 1994 (Apprenticeship and Education) (Amendment) Regulation, 1995 (S.I. No. 102 of 1995) came into operation on 1 May 1995.

These new Regulations were necessitated by certain of the provisions of Part V of the Solicitors (Amendment) Act, 1994 (which became effective on 4 November 1994), in particular section 42, which set out that the Society, may provide by regulations for the term or terms of service under indentures of apprenticeship not to exceed two years. The provisions of section 42 (which amended section 26 of the principal Act) came into effect on 4 May 1995.

The Two Year Apprenticeship

A person entering into indentures of apprenticeship after 1 May 1995 will have a term of apprenticeship of two years related directly to the period *of in-office training which follows the Society's Professional Course* and the sitting of the Final Examination – Second Part (FE-2). Existing apprentices who would otherwise have more than two years to run are now deemed to have no more than two years to run commencing from 1 May 1995. Existing apprentices with less than two years to run simply serve out the remainder of their apprenticeship. The new Regulations provide that apprentices who have completed at least eighteen months of their period of in-office training will be able to attend the Society's Advanced Course on full-time release from their master's office.

How soon can Existing Apprentices be Admitted to the Roll of Solicitors?

Existing apprentices will be entitled to apply to be admitted to the Roll as solicitors once they:-

(a) have attended the Professional Course and the Advanced Course; and
(b) have passed the Society's prescribed examinations including the Second Irish Examination, the Final Examination Second Part (FE-2) (taken in conjunction with the Professional Course) and the Final Examination – Third Part, (FE-3); and
(c) have satisfactorily completed a period of *at least eighteen months of in-office training* between the completion by the apprentice of the Professional Course and the commencement of attendance of the Advanced Course.

Execution of indentures and securing a place on the Professional Course

A person seeking admission to the Professional Course must *first* have registered with the Society his/her indentures of apprenticeship with a proposed master, the two year term of which commences after the person has completed the Professional Course and has sat all the required examinations in the FE-2. In order to ensure that this requirement does not 'tie up' the available pool of masters, the new Regulations provide that the Society, on application, may issue its consent to a practising solicitor becoming a master in the future even though that solicitor may already at the time of such application have the statutory maximum number of apprentices specified in section 47 of the 1994 Act (i.e., two apprentices together with one additional apprentice for every two assistant solicitors in his/her employment or in the employment of the firm) if, in the anticipated order of things, that solicitor will have no more than the maximum number of apprentices at the time the person concerned is expected to commence the period of in-office training after completing the Professional Course and sitting the FE-2.

Credit for in-office training prior to Professional Course

The new Regulations do not require a compulsory period of three months in-office experience prior to a person commencing the Professional Course, but do provide that the Society may deem a period of in-office training, up to a maximum period of three months, by a person either at the office of the intended master or at the office of another practising solicitor *prior* to that person attending on the Professional Course, to be equivalent to a period of in-office training served by that person as an apprentice *after* having duly completed at least eighteen months of the period of in-office training. The eighteen months in-office training period following the Professional Course is the 'core' of the apprenticeship.

Procedures and forms

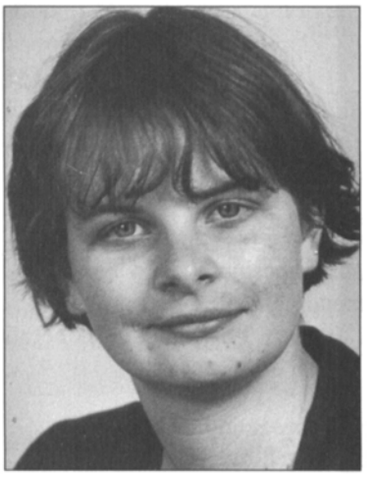
The procedures to be followed by a prospective apprentice in applying to the Society for consent to enter into indentures of apprenticeship remain substantially the same, but there are modifications to the prescribed documentation. A revised set of application forms including the substantially amended indenture of apprenticeship form appendices to the new Regulations.

The new indenture deed provides for three 'core' areas of practice in which the apprentice should receive instruction and experience (Conveyancing and Land Law, Litigation, and Probate and Administration of Estates) as well as two other areas of practice. There is a list of options set out in the indenture form.

Setting-Up in Practice Seminar

Pictured at the "Setting up in Practice Seminar" were (l-r): Paul Cagney, Charleville; Kate Colbert, Abbeyfeale; John S. O'Sullivan, Carlow; Mary Hall, Dublin; Michael Waters, Galway; John Hayes, Kilkenny; Katherine Hunter, Dublin.

The Practice Management Committee recently ran a very successful Setting-Up in Practice Seminar for 17 participants aspiring to set-up in practice. The seminar was workshop based and lasted a complete day. Topics covered included, market analysis, the financial realities, marketing your practice, client care, Solicitors' Accounts Regulations etc. Participants were from all parts of the country and, for the most part, were solicitors who had just set-up in practice or who were contemplating this move. The seminar is designed to raise more questions than it answers and to act as a forum for putting solicitors at the same stage of their development in contact with one another. The Practice Management Committee intend running these seminars every three/four months.



Hearty congratulations to *Finola O'Hanlon* who was recently made an associate of the Institute of Taxation having successfully completed all parts of the Institutes examinations. Finola is currently doing the **Diploma in Property Tax** course which is run by the Law Society and takes place over a twelve week period. The course is offered at weekends and is currently in its fifth run. To date, the diploma course has been offered in Limerick, Cork and Dublin. We are currently looking into running the course in the Mayo/Sligo region, likely to commence in the Autumn. **If you are based in the Donegal/Sligo/Mayo region please let us know if you would be interested.** Further enquiries from *Finola O'Hanlon* or *Harriet Kinahan* in the Law School.

Apprentice salary

The revised form of indentures includes a covenant that during the period of in-office training the master *must pay the apprentice* a gross salary of not less than the amounts recommended by the Society from time to time. The current recommended gross salary scales are £115 per week (during the first six months), £125 per week (during the second six months) and £135 per week (during the remaining period).

The new prescribed forms are available on request from the Law Society's Law School, Blackhall Place, Dublin 7. (DX 79 – Dublin; telephone 01 – 671 0200; telefax 01 – 671 0064)

Apprentices Record Breaking Performance

The Law Society Apprentices Athletics Club once again turned in a remarkable performance in the Irish University Track and Field Championships on the 21st of April last in Cork.

John Menton (Arthur Cox Solicitors) was the outstanding athlete of the meeting breaking two Championship records and winning four Gold medals. John shattered the old Discus record by four metres with a throw of 52.38m while he also bettered his own record in the Weight for Distance with a throw of 10.98 metres. John's other titles were in the Shot Putt (14.39m) and the Hammer throw (41.80m).

The Society was also well represented on the track by *Andrew Coonan* (Charles E. Coonan & Co) as he finished eighth in the 10,000 metres while *Eric O'Donnell* (McCann Fitzgerald) was fifth in the 5,000m.

Finally it would be wrong to finish without thanking our hosts U.C.C. especially as they are coached by none other than our own *Ray Shanahan* Solicitor (J.W. O'Donovan & Co.). Congratulations and thank you for a fine weekend to Ray and all in U.C.C.

Also many thanks to the Education Committee for their financial contribution towards the teams participation at the Championships.

John O'Connor

The Law Society Annual Conference 1995

A most successful Annual Conference was held in May in the Hotel Europe, Killarney, Co. Kerry. The conference was attended by over 200 participants including guests from the Law Societies of Northern Ireland, England and Wales, Scotland, New South Wales and Queensland. The conference opened with a very successful dinner on Thursday evening. The dinner was followed by entertainment provided by the world renowned Bunratty singers.

On Friday morning the business session was held. The keynote speaker was *Richard Haynes*. Mr Haynes is Managing Director of Haynes Consulting, which provides a business development and training consultancy to solicitors, accountants and other professionals in the UK. He advises professional firms on developing a marketing culture within their practices and teaches them the skills they need to sell in today's intensely competitive environment.

The keynote address was followed by a panel discussion. The panel members were *Aidan Canavan,* President of the Law Society of Northern Ireland; *Charles Elly,* President of the Law Society of England and Wales; *Kenneth Ross,* President of the Law Society of Scotland and *Maurie Stack,* President of the Law Society of New South Wales. The discussion was chaired by *Patrick Glynn,* President.

Keynote Speech – How to Develop Your Business

The keynote speaker commenced by explaining what marketing is: anticipating and satisfying the needs of your clients and prospects profitably.

Client Care

The following is an outline of the points which he made. Marketing will help you to expand your practice, increase client satisfaction and increase staff loyalty. There is a recognised oversupply of professional hours for sale. What is the result of this? – an increase in client power. Clients will now shop around. Every solicitor is running a business and must face up to marketing the firm. Choosing a professional is difficult because there is no product to show. A client makes a decision based on what he sees and hears. A professional makes an impression on clients by his/her own behaviour. If someone has a bad experience they tell more people than if they have a good experience. Looking after existing clients is fundamental to a successful business.

LAW SOCIETY CONFERENCE 1995 – BUSINESS SESSION
Left to right: Aidan Canavan, President of Northern Ireland Law Society; Charles Elly, President Law Society of England & Wales; Paddy Glynn, President, Law Society of Ireland; Kenneth Ross, President Law Society of Scotland; Maurie Stack, President Law Society of New South Wales and Richard Haynes, Keynote speaker.

Building Relationships

The keynote speaker identified four factors which people take into account when deciding on which professional to use: awareness (they must have heard of you), trust (they must trust you), need (they must need the service you are offering), the solution (you must offer the client a solution). The reality is that the most powerful way to increase business is by selling yourself. **You** must sell your practice. Building relationships with prospective clients takes time. It is not a sprint it is a marathon. One must develop a strategy for keeping in touch with potential clients. Methods of doing this include:

- sending a newsletter and following it up by telephone
- meeting them through intermediaries
- inviting them to a seminar
- writing to them with new information
- inviting them to a social or hospitality function.

You must ensure that you are the first firm potential clients think of when they need a solicitor.

Marketing Culture

A marketing culture does not create itself. It starts at the top of every practice and permeates downwards. Everybody in the firm must be client conscious. Every solicitors firm should have a client database. This should include all existing and potential clients. What work are you doing for them? What work are you **not** doing for them? The database should include a profile of each client. There should never be a key account. To every client, his account is the key account.

Why do clients complain about solicitors?

Solicitors often take on too much work and do not live up to the expectations of the client. There is often inadequate supervision of work given out to juniors. Solicitors are often guilty of bad communication. They do not let clients know what they are doing on the

clients behalf and how much it is costing the client.

Information and Training

A booklet of information is often a good idea. The booklet should include office hours; out of hours phone numbers; an explanation of fees and services on offer. It should invite clients to ask questions. A solicitor practice should invest in staff training. All staff should be well trained and hire the best receptionist you can afford. Business can be lost because the receptionist is not well trained. Look at how long clients are kept waiting in your practice. A simple factor like this can influence a prospective client. Anticipating and satisfying clients needs is the secret to a successful practice. The solicitors' profession is very competitive and one must use proven marketing skills to have a successful business in this competitive world.

Panel Discussion

The Panel Discussion commenced with *Maurie Stack,* President of the Law Society of New South Wales.

Maurie Stack is a litigation solicitor, and runs a large successful family practice. He said that when one is recruiting solicitors one must take into account their warmth for people. He also said that the name of a firm is important. It must change with the changing nature of the firm. His firm now called Stacks Law Firm produces merchandising items such as t-shirts, caps etc. and also indulges in T.V. advertising!

Kenneth Ross, President of the Law Society of Scotland said that most law firms in Scotland have not addressed the area of advertising. However, the Law Society of Scotland ran a promotional campaign to raise the awareness of solicitors among the public. The slogan ran "it is never too early to phone your solicitor". This was an extremely successful campaign. *Kenneth Ross* said that in Scotland there was a very liberal regime in regard to advertising. Unfortunately, a lot of advertising was done on the basis of dropping price and there is no bottom line as to how far some solicitors are prepared to go. *Aidan Canavan,* President of the Law Society of Northern Ireland said that a solicitor should not advertise a fee which is uneconomical to apply. It results in buying clients from other solicitors and the membership ends up paying for it by Professional Indemnity insurance.

Charles Elly, President of the Law Society of England and Wales said that most solicitors get most of their business by word of mouth. The Law Society of England and Wales gives the following advice to members – give a good service to existing clients and this convinces others to become clients. Spending money on getting new clients and not being able to cope is not to be recommended. The Law Society of England and Wales produces newsletters which members can send out to clients. *Marketing for solicitors* written by *Matthew Moore* has been published under the aegis of the Law Society. They help members to promote their practice and look after clients as this has the knock-on effect of reducing the number of complaints.

Aidan Canavan said that the Law Society of Northern Ireland has a Law Society Quality mark with regard to conveyancing. All solicitors who have the quality mark must carry out a conveyance in a particular way and officers of the Law Society check that this is so. *Pat O'Connor* from the floor felt that this may be seen as more regulation if the Law Society of Ireland introduced such a scheme.

In conclusion the keynote speaker said that solicitors need to communicate more effectively with clients. Solicitors should ask clients: why did they come here? and are they satisfied with the service transacted?

Social Events

A selection of activities were arranged for Friday afternoon. One could choose from: golf, fishing, a hike (specially arranged by *Brendan Walsh,* Solicitor), a tour of Muckross House or clay pigeon shooting and archery. On Saturday a most enjoyable trip across the Gap of Dunloe was arranged. This included a trip by pony and trap and a boat trip on the lakes of Killarney. The weather was favourable which added to the spectacular scenery. We all enjoyed Irish stew especially arranged at Lord Brandon's Cottage by the Society.

The Conference culminated with the Annual Conference Banquet on Saturday night with dancing to *Paddy Cole and his orchestra.* We all said our goodbyes on Sunday morning. The President *Paddy Glynn* was especially glad to see a number of younger members attending for the first time and he hopes that there will be more at next years conference.

See you next year.

Catherine Dolan
Public Relations Executive.

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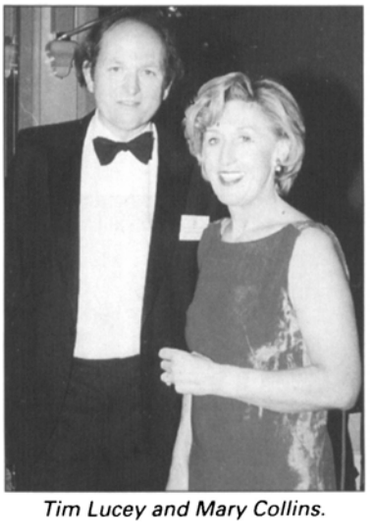
CONFERENCE GALA BANQUET 1995



Tim Lucey and Mary Collins.

Back row, l-r: Hilary Ross, Patricia Fish, Yvonne Chapman, Morag Ross. Seated (l-r): Ann Canavan and Marion Elly.

Back row (l-r); Seamus Downes and Fred Binchy. Seated (l-r): Mairead Danaher and Elizabeth Galvin

Phil McCarthy and Pat Daly

Brian McMahon and Caroline Dorny Goemans

Left to right: Rita O'Sullivan, Paddy Madigan, Patricia Madigan, Moya Quinlan and Rosie Mannion.

Left to right: Charles Elly, Aidan Canavan, Kenneth Ross and Richard Haynes.

Paddy Glynn with his wife Marye and daughter Lucinda.

The President, Paddy Glynn and his wife Marye thank all who attended the conference and made it such an enjoyable weekend.

PEOPLE AND PLACES

Pictured at the Law Society Annual Conference from left were: Justin O'Sullivan, President, Queensland Law Society; Paddy Glynn, President, Law Society of Ireland; A. Patrick Keogh, Solicitor, London and Charles Elly, President, Law Society of England and Wales.

Pictured at the Solicitors' Benevolent Association AGM in Blackhall Place are, back row, l-r: John O'Connor (Dublin); Aidan Canavan (President, Law Society of Northern Ireland); George Palmer (Junior Vice-President, Law Society of Northern Ireland); Sean Sexton (Dublin); Niall Kennedy (Tipperary); Michael Egan (Castlebar); Brendan Lynch (Carrick-on-Shannon). Front row, l-r: Rosemary Kingston (Belfast); Noelle Maguire (Dublin); Sheena Beale (Dublin); Tom Menton (Chairman, Dublin); Andrew F. Smyth (Dublin); Etta Nagle (Cork); Carmel Jenkins (Ballina) and Gerald Hickey (Dublin).

Pictured at the Parchment Ceremony on April 7 were from left: P. Frank O'Donnell, Past President of the Law Society, his son James who received his parchment and his wife Maeve O'Donnell.

Pictured at the Law Society Annual Conference were from left: Maurie Stack, President of the Law Society of New South Wales and his wife Deidre.

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Pictured at the Parchment Ceremony on April 7 were from left: Marianne Louise Ryan (Newquay, Burren, Co. Clare); Cormac Cummins (Foxrock); Imelda Tierney (Tuam, Co. Galway); Leslie Kelly (Mount Merrion) and Barbara Hickey (Foxrock).

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Stamp Duty Evasion

The Conveyancing Committee considers that the attention of members be drawn to the provisions of the following memorandum recently issued by the D.S.B.A.

Practitioners are reminded of the Statement of Practice regarding Stamp Duties issued by the Revenue Commissioners consequent upon the Finance Act 1991.

It has been brought to the notice of this Committee that breaches of the Revenue Guidelines are becoming increasingly prevalent particularly in transactions relating to the sale of residential properties inclusive of contents.

Practitioners should be aware that apportionment of sale considerations in such transactions only should be made on the basis that realistic and correct values are attributed to such contents based, if considered necessary, on valuations from reputable auctioneers. Any apportionments made on the basis of spurious or excessive valuations of contents in such transactions clearly constitute evasion and are in breach of the Revenue Guidelines. Practitioners also are reminded of the powers available to the Revenue Commissioners to impose substantial financial penalties and other sanctions not only against the parties involved in such transactions but also against their solicitors and other professional advisers.

Artificial Contract Prices for Loan Purposes

It also has been brought to the notice of this committee that there is an increasing prevalence on the part of purchasers engaging in and assisting the practice of deliberately inflating sale prices of properties in excess of their actual real prices to facilitate purchasers seeking and obtaining increased loans to finance purchase of properties.

This committee utterly condemns such practice which obviously not only is not in accordance with good conveyancing practice but also constitutes fraudulent and unprofessional conduct which would render practitioners assisting in such practice liable to serious sanctions by the Law Society.

Conveyancing Committee

Land Act 1965

Practitioners attention is drawn to the following:-

S.I. No. 56 of 1995

Land Act, 1965 (Additional Categories of Qualified Persons) Regulations, 1995

I, *Ivan Yates,* Minister for Agriculture, Food and Forestry, in exercise of the power conferred on me by Section 45(1)(X) of the Land Act, 1965 (No. 2 of 1965), and the Land (Transfer of Departmental Administration and Ministerial Functions) Order, 1977 (S.I. No. 28 of 1977), as adapted by the Agriculture and Fisheries (Alteration of Name of Department and Title of Minister) Order, 1977 (S.I. No. 31 of 1977), the Agriculture (Alteration of Name of Department and Title of Minister) Order, 1987 (S.I. No. 97 of 1987) and the Agriculture and Food (Alteration of Name of Department and Title of Minister) Order, 1993, (S.I. No. 11 of 1993), hereby make the following Regulations:

1. (a) These Regulations may be cited as the Land Act, 1965 (Additional Categories of Qualified Persons) Regulations, 1995.

   (b) The Land Act, 1965 (Additional Category of Qualified Person) Regulations, 1970 (S.I. No. 40 of 1970), the Land Act, 1965 (Additional Category of Qualified Persons) Regulations, 1972 (S.I. No. 332 of 1972), the Land Act, 1965 (Additional Category of Qualified Person) Regulations, 1983 (S.I. No. 144 of 1983), the Land Act, 1965 (Additional Category of Qualified Person) Regulations, 1994 (S.I. No. 67 of 1994) and these Regulations may be cited together as the Land Act, 1965 (Additional Categories of Qualified Persons) Regulations, 1970 to 1995.

2. For the purpose of the definition of a "qualified person" in Section 45 of the Land Act, 1965 (No. 2 of 1965), the following categories are hereby declared to be additional categories, namely:-

   (a) a person (other than a body corporate) whose principal place of residence is in a Member State of the European Communities or other European State which is a contracting party to the European Economic Area Agreement,

   (b) a body corporate incorporated in a Member State of the European Communities or other European State which is a contracting party to the European Economic Area Agreement and having its registered office, central administration or principal place of business within the territory of those States.

Given under my Official Seal, this 16th day of February, 1995.

IVAN YATES, TD,
Minister for Agriculture, Food and Forestry.

Conveyancing Committee

Landlord and Tenant (Amendment) Act 1994 Renunciation

THIS RENUNCIATION made the day of

WHEREAS:-

1. I (the Tenant) of

   have negotiated with

   (the Landlord) of
   to take a tenancy of the premises at
   which are a tenement within the meaning of the Landlord and Tenant Acts, for the term of years from the day of the terms of the proposed tenancy providing that the tenement shall be used wholly and exclusively as an office.

2. I have received independent legal advice in relation to this renunciation from . . . . . .

3. I have been advised that under the existing legislation I would, subject to the terms of that legislation, be entitled to a new tenancy in the premises at the expiry (or sooner determination) of the proposed tenancy.

NOW I, prior to the commencement of the proposed tenancy and under the provisions of Section 4 of the Landlord & Tenant (Amendment) Act 1994 DO HEREBY RENOUNCE any entitlement which I may have under the provisions of the Landlord & Tenant Acts to a new tenancy in the tenement on the termination of the proposed tenancy.

SIGNED by the said

in the presence of:-

Conveyancing Committee

Solicitors (Interest on Clients' Moneys) Regulations, 1995 Statutory Instrument No 108 of 1995

The Law Society of Ireland, in exercise of the powers conferred on them by section 73 of the Solicitors (Amendment) Act, 1994 HEREBY MAKE the following Regulations:-

1. (a) These Regulations may be cited as the Solicitors (Interest on Clients' Moneys) Regulations, 1995.

   (b) These Regulations shall come into operation on the third day of May 1995.

   (c) On the coming into operation of these Regulations, the Solicitors Professional Practice, Conduct and Discipline Regulations, 1986 (S.I. No 405 of 1986) shall stand rescinded.

2. (a) In these Regulations:-

   "deposit account" means a deposit account or a savings account or a deposit receipt account maintained in the name of a solicitor or his firm at a bank and designated as a client account of that solicitor or his firm;

   "interest" means, in relation to money received by a solicitor or his firm for or on account of a client, the amount of interest that would be earned if such money had been held as an individual amount in a deposit account of the solicitor's choosing at the bank (or, if more than one bank, the principal bank) to the practice of the solicitor for a period commencing seven days after the receipt by the solicitor or his firm of such money and ending when the solicitor or his firm actually pays out such money to, or on behalf of, such client.

   (b) Other words and phrases in these Regulations shall have the meanings assigned to them by the Solicitors Acts, 1954 to 1994.

   (c) The Interpretation Act, 1937 shall apply for the purpose of the interpretation of these Regulations as it applies for the purpose of the interpretation of an act of the Oireachtas, except insofar as it may be inconsistent with the Solicitors Acts, 1954 to 1994.

3. From the date of the coming into operation of these Regulations, a solicitor to whom regulations made under section 66 (as substituted by section 76 of the Solicitors (Amendment) Act, 1994) of the Solicitors Act, 1954 applies, shall, in respect of money received by him or his firm for or on account of a client:-

   (a) hold such money in a deposit account and shall account to the client for interest thereon while so held; or

   (b) shall account to the client for interest thereon.

4. Where money is received by a solicitor for or on account of a client, the client (without prejudice to any other legal remedy) may refer, or may require the solicitor to refer, any question relating to interest on such money to the Society, and the Society (after providing reasonable opportunity to the client and to the solicitor to make submissions to the Society on such question) shall determine such question and shall duly notify the client and the solicitor in writing of such determination.

5. A solicitor to whom Regulation 3 of these Regulations applies shall not be required to account to a client for interest on money received by the solicitor or his firm for or on account of the client, where the amount of interest would be less than £75 (seventy-five pounds).

6. Nothing in these Regulations shall:-

   (a) affect any arrangement in writing, whenever made, between a solicitor and his client as to the application of the client's money or interest thereon; or

   (b) apply to money received by a solicitor, being money subject to a trust of which the solicitor is a trustee; or

   (c) deprive a solicitor of any legal recourse or right, whether by way of lien, charge or otherwise, that the solicitor or his firm may have against a client's money standing to the credit of a deposit account.

7. Nothing in these Regulations shall require an accountant, in complying with regulation 22 of the Solicitors Accounts Regulations No 2 of 1984 (S.I. No 304 of 1984), to make an examination as to whether a solicitor has complied with these Regulations in relation to accounting to a client for interest on money received by the solicitor or his firm for or on account of the client.

Dated this 27th day of April, 1995

Signed on behalf of the Law Society of Ireland pursuant to section 79 of the Solicitors Act, 1954

PATRICK A. GLYNN,
President of the Law Society of Ireland

I consent to the making of the within Regulations pursuant to section 73(1) of the Solicitors (Amendment) Act, 1994.

Dated this 2nd day of May 1995

DECLAN COSTELLO,
President of the High Court

S.I. No. 27 of 1995 – European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995

On 1 February 1995 the Minister for Enterprise & Employment introduced these Regulations implementing Council Directive No. 93/13/EEC of 5 April 1993. As the Directive should have been implemented by 31 December 1994 the Regulations have been given retrospective effect from that date.

The essential feature of the Regulations is the prohibition of unfair terms in contracts concluded after 31 December 1994 between, on the one hand, a seller of goods or supplier of services who is acting for purposes related to his business (which includes a trade or profession and the activities of any government department or local or public authority), and, on the other, a **consumer**, being a natural person who is acting for purposes which are outside his business. Excluded from the scope of the Regulations are contracts of employment, contracts relating to succession rights and rights under family law and contracts relating to the incorporation and organisation of companies or partnerships.

The Regulations provide that a contractual term shall be regarded as unfair if it has not been individually negotiated and if, contrary to the requirement of good faith (as to the assessment of which, guidelines are set out in a Schedule to the Regulations), and having regard to the nature of the goods or services and all the circumstances attending the conclusion of the contract, it causes a significant imbalance between the parties as regards their respective rights and obligations under the contract, to the detriment of the consumer. A contact term is deemed not to have been individually negotiated where it has been drafted in advance and the consumer has not therefore been able to influence its substance.

In addition, an indicative and non-exhaustive list of the terms which may be regarded as unfair is contained in a further Schedule to the Regulations.

The assessment of the unfair nature of the terms of a contract may not be based on the definition of the main subject matter of the contract nor on the adequacy of the price of the goods sold or the remuneration for the services supplied.

A contractual term which is unfair will not be binding on the consumer; the contract itself will, however, continue to bind the parties, provided it is capable of continuing in existence without the unfair term.

Where contractual terms are offered to consumers in writing, the Regulations impose an obligation on the seller or supplier to ensure that they are drafted in plain, intelligible language. It is unclear whether a term which is not in plain language will be deemed an unfair term but the Regulations provide that if there is any doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.

Cormac O'Hanlon
Chairman
Company and Commercial Law Committee

Solicitors' Accounts Regulations – April 30 1995

Costs Received – Lodgment Procedures

On a number of occasions in the past, the Society's Compensation Fund has been exposed to risk because solicitor's practices have lodged monies received in respect of undischarged outlays to office account, and subsequently have had difficulty because of working capital constraints, effecting payments to the third parties to whom the monies were due.

In order to protect the Compensation Fund and to ensure compliance by practitioners with the Solicitors' Accounts Regulations, the Compensation Fund Committee on behalf of the Council of the Society have issued the following practice note,

which emphasises that monies received in respect of undischarged outlay should be lodged to client account.

Practice Note – Costs Received – Undischarged outlay

Where a solicitor receives monies for undischarged outlay due to third parties (e.g. stamp duty, counsel's fees, doctor's fees, engineer's fees etc) such monies – whether solicitor and client costs, or party and party costs – represent "client's money" as defined in Regulation 1 of the Solicitors' Accounts Regulations No 2 of 1984 and should be lodged to client account pursuant to Regulation 3 thereof. The relevant payments to third parties should be effected on an expeditious basis from the client account.

Where items of outlay are paid for by a solicitor who has not as yet been put in funds by the client in respect thereof, the payments advanced to third parties shall be effected from the office account.

Recommended procedure for lodgments

Where a remittance received by a solicitor includes payment both in respect of (i) undischarged outlay and (ii) solicitors fees and/or costs already paid out by the solicitor the recommended treatment is to lodge the entirety of the remittance intact to the client account. Then, (where a bill of costs or other written intimation of the amount of costs has been delivered to the client) a transfer may be effected from the client account to the office account to cover the amount of the solicitor's fee received, and any outlay which was discharged on behalf of the client from the office account and which has been recovered from the other side, or from the client. Payment to third parties for items of outlay which then remain due may be effected from the balance of monies held in the client account in respect thereof.

Geraldine Clarke
Chairman
Compensation Fund Committee

Northern Ireland Young Solicitors Association Annual Conference

The Annual Conference of the Northern Ireland Young Solicitors Association was held at the Manor House Country Hotel, Killadeas, Enniskillen from Friday 24 to Sunday 26 March 1995.

As always, the delegates from the "South" got a tremendous welcome and enjoyed very generous hospitality. There were fourteen Southern delegates including *Orla Coyne*, Chairperson of the Younger Members Committee and *Gavin Buckley*, Chairman of the Society of Young Solicitors. There were also representatives from Belgium, France, The Netherlands, Luxembourg, England and Wales.

The lecture topics were wide ranging and included "Advocacy Skills for Solicitors" with a most entertaining paper given by Reginald Weir Q.C. Neil Faris, a partner with Cleaver Fulton & Rankin solicitors in Belfast presented a very interesting paper titled "Regulating Risk – Environmental Issues for Lawyers".

The social activities started with a bus excursion to the local pubs in Enniskillen on Friday night. On Saturday afternoon there was a coach tour, golf, horseriding and clay pigeon shooting. This was followed by a banquet on Saturday evening which carried on well into the "wee small hours"!

The entire conference was very well organised and a great time was had by all. Full credit is due to *Jeremy Mills*, Chairman of the NIYSA and his hardworking committee.

We are sure that a number of our Northern colleagues will make the trip to the SYS Autumn Conference at Dromoland Castle on 3 – 5 November and thereby sustain the excellent relationship which has been built up over the past number of years. Long may it continue.

Robert Hennessy
Committee Member YMC/SYS

Joe Clancy, solicitor, receives a presentation of a basket of fairly traded products from Vivienne Cashin of 'Will Aid'. Will Aid was a fundraising event held in March when solicitors agreed to write wills for free – with customers making a donation to one of four charities: Gorta, Action Aid, Oxfam and Rehab. Joe Clancy was the solicitor who raised the most money for the charities.

Reporting the Courts

By Kieron Wood*

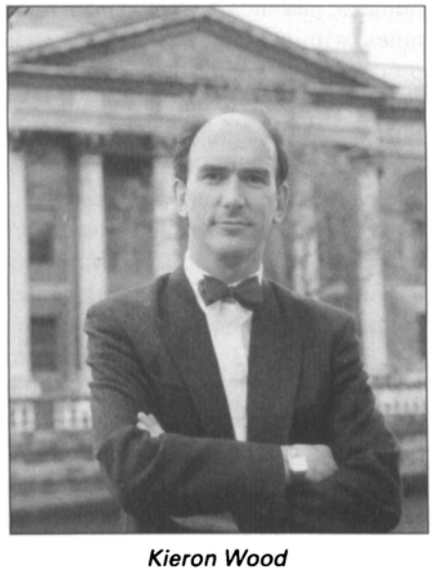
The recent broadcast on RTE news of pictures of the Supreme Court in session brought home to many people the gulf which separates the legal profession from the public.

For most people, those pictures of five Supreme Court judges listening to the opening of the Abortion Information Bill reference are the nearest they will ever get to the courts.

While Article 34.1 of the Constitution specifies that "save in such special and limited cases as may be prescribed by law, (justice) shall be administered in public", it's a fact that the vast majority of people in Ireland have never been inside a courtroom. Their knowledge of court proceedings comes from watching Rumpole of the Bailey, American TV soaps, the *OJ Simpson* trial and from what they see, hear and read in the Irish media. All the more reason, then, for ensuring that – in the absence of television cameras from all our courts – proceedings are reported accurately and in a form which is easy to understand.

It's all too easy for those involved in the law – including court reporters – to slip into such phrases as "reserved judgment" , "interlocutory injunction", "unlawful carnal knowledge" or even "jurisdiction" and to expect the public to understand what they mean. Most members of the public don't even know the difference between a solicitor and a barrister, and they wouldn't know *Anton Piller* from Phyllis Diller!

As the national broadcasting station, RTE has a special responsibility to cover the courts. But its coverage differs from that of the newspapers for several reasons. First of all, by the nature of radio and television, time is of the essence (another legal phrase!). Whereas the Irish Times may be able to devote two or three pages to an exceptionally important case or judgment, RTE news is restricted to, at the most, two and a half minutes for a television package and perhaps one and a half minutes for a radio package. That time is further reduced on some bulletins: a story on the hourly 2FM bulletins would rarely run longer than 45 seconds, while a story on the radio News At One would normally last no more than one minute. At an average of three words a second, that's 180 words to report, perhaps, a judgment that may run to 90 pages – two words per page!



Kieron Wood

The most outstanding exception to these fairly inflexible guidelines came two years ago with the television interview in the Kilkenny incest case. The woman at the centre of that case agreed to do an interview the day after her father was sentenced. The recorded interview ran for about half an hour. The television news chief sub-editor said he would take a three minute clip, if the content was exceptional. The interview was so harrowing and the interviewee so compelling that the piece ran for eight and a half minutes as the second story on the 6.01 TV bulletin. The extraordinary public reaction – as evidenced by the number of calls to RTE's switchboard – pushed the story into the top slot on the 9 o'clock news (an almost unheard-of occurrence) and the following day it made the front page of every national newspaper.

But, as a rule, time is tight on news bulletins, so stories have to be cut back to the bare essentials. As a result, there is a certain selectivity of detail in what can be reported. In criminal trials, for example, the normal practice is to report the opening of the trial, the closing and the sentence. That means that the prosecution case is fully reported whereas the defence case may not receive such complete treatment. In civic cases, often the plaintiff's case will be more fully covered than the respondent's. While the newspapers have a pooling arrangement which allows them to cover cases from beginning to end, RTE operates on its own with – as a rule – one correspondent (me!) covering all the courts, from the District Court to the Supreme Court. That can mean that cases are missed and it certainly means that coverage is more restricted than in the newspapers.

So how are cases chosen for coverage? Well, some cases are known about well in advance, such as the Article 26 reference to the Supreme Court. Other cases – particularly criminal cases – are followed through from arrest to the court of trial (and possible the Court of Criminal Appeal), with the remand dates being noted in the news desk diary throughout, so that an eye can be kept on the progress of the case.

The Legal Diary is an invaluable mine of material and is scanned avidly each morning, with well-known names being underlined as a possible source of stories. Occasionally solicitors or counsel will tip off journalists about forthcoming cases.

The most difficult stories to pick up are the *ex partes* which are not listed and where neither side is anxious for publicity. Some counsel are adept at picking a time and court when they believe reporters will not be around. It's a constant concern for journalists to try and pick up on such cases at an early stage, perhaps by following up the Four Courts rumour machine or by chatting to court officials who are almost unfailingly helpful.

Each morning, at about nine o'clock, I discuss the day's potential stories with the RTE news editor and a decision is made as to which ones merit coverage. On most days, a single story will stand out as being the most newsworthy. If, exceptionally, there are two or three stories beginning at the same time which *must* be covered, a reporter may be sent down from Donnybrook to liaise with me and split the workload.

Not infrequently, no single case stands out as exceptional and, on such occasions, it's a matter of watching several cases at once until one of them produces a story.

The average day of this legal affairs correspondent begins the night before, with consideration of needs of the next day's early morning radio bulletins. I might prepare an overnight audio package for the 8am and 9am bulletins, previewing a major case that's due to open, or covering a story with a midnight embargo (such as the publication of a report by the Law Reform Commission).

My day in court may begin with a 10am reserved judgment, with the 10.30 callover in the High Court or Circuit Court, or with the opening of a trial at 11am. The first major deadline is for the 1pm radio and television bulletins, although exceptionally I may file copy with the RTE news desk for the 11am or noon headlines on radio. Since the demise of Century Radio, the competition to be first with a story is not as fierce, and my main rivals are now the evening newspapers.

Although I have my own office only five minutes' walk away from the Four Courts, on Merchant's Quay, it's too far to go while a case is running. If I am covering just one story (on a good day!), I will file copy by mobile phone from outside the court, and possibly do a phone report for 2FM at the same time.

One of my most difficult tasks is to try and make sense of a case or a judgment in the short period between my arrival in court and my departure to prepare my package for the lunchtime bulletin. In the case of the Emerald Meats judgment, for example, Mr Justice Costello began giving judgment at 10.30am and finished at 12.40pm. Before I went into court that day, I had no idea whatsoever who or what Emerald Meats was. It wasn't a story I had ever covered before. But I had to assimilate and comprehend a judgment lasting two hours and ten minutes, and then – from shorthand notes, within about ten minutes – produce a one minute synopsis of the judgment for radio and television. Fortunately, the judgments of the President of the High Court are models of clarity and – unlike some judges – he does not speak in a whisper, so I had no difficulty hearing and understanding the main points of the decision.

Occasionally a judgment may be so obscure that the *ratio decidendi* is difficult to discern. That can result in misleading reports, which concentrate on the wrong central issue. In the United States and Canada, the courts employ liaison officers who assist journalists by providing advance information about judgments, with synopses of the decisions and off-the-record briefings about the importance and relevance of each judgment. Such a service would be an invaluable addition to the Irish courts and would help prevent erroneous or unbalanced coverage. The cost of such a service would be far less than the current cost of trials aborted after several days because of prejudicial newspaper stories.

Having reduced the case or judgment to a comprehensible and comprehensive minimum, my first task is to ensure that the story is filed. If I have time, I return to my office, where I have a computer and modem linked to RTE's Newstar computer system. If I don't have time for that, I file the copy by phone. Apart from the news, other programmes, such as the Pat Kenny Show, may be looking for an interview with me.

Again, if I have time, I do my audio for the News At One from the outside broadcast unit in my office. The OB offers studio-quality sound, while a telephone report may sound like a bowl of Rice Krispies on a bad day!

For the television package, pictures are obviously essential. This may involve asking a crew to shoot background pictures (for example of a crime scene), requesting the news library to produce file material of the personalities or places involved or booking a crew to shoot pictures before and after the court hearing. Sometimes people are happy to walk into court for the news crew. Too often, though, people involved in court cases (particularly criminal cases) do not wish to be filmed, and the crew is forced to follow the subjects until they leave the precincts of the court and can be filmed without risk of contempt. Unfortunately, such a course of action is not without personal risk and my crew and I have been threatened on occasions too numerous to mention!

Until April of this year, cameras had never been allowed into a sitting court, so, on occasion, there are simply no pictures available to cover a story. In that case, I fall back on the old reliables of the exteriors of the Four Courts from 1,001 different angles! (Even such apparently innocuous pictures are not without risk: on one occasion, while on our way to film from a rooftop opposite the Four Courts, the crew and I found ourselves stuck in the lift of a building under construction, with nobody around. Fortunately I had my mobile phone and was able to summon help!)

Having shot any background pictures, I then write a television script and do a voiceover and piece-to-camera, normally on the quays. That's sent

back to Donnybrook by courier, where television sub-editors cut the pictures in accordance with my instructions. RTE's mobile outside broadcast van has brought a new dimension to court reporting, as I may now also be required to do a live interview with the newscaster on the one o'clock news. That can be difficult, particularly when the earpiece doesn't fit, the traffic is so loud that I can't hear the questions and the local gurriers are all jumping up and down behind me, shouting abuse at the camera!

As well as exterior pictures, RTE now has a reasonably large file of pictures of the interior of the Four Courts, showing the Supreme Court, the Round Hall, the High Court and the Law Library. Those have all been filmed since 1990 with the permission of the former Chief Justice and the Bar Council. I believe they give an additional impact to stories that would otherwise be visually flat and uninteresting, by acquainting the viewing public with the interiors of their courts.

Graphics can add an extra visual dimension to a story, but they take time to prepare. They must also be absolutely accurate, so it's often necessary to check quotes against the text of a judgment.

Between one and two o'clock, I may do an interview for the News At One, file copy or check on other cases. At two o'clock, it's back into court for the continuation of the morning case. It's important to check that nothing vital was missed between the time I left to file the lunchtime story and the court rising for lunch. Occasionally a judge may make a ruling while I am out of court and, without the assistance of my newspaper colleagues, it would be easy to find myself unaware of the ruling and possibly filing a story which could be construed as contempt.

Another perpetual danger is defamation. In every case, both sides watch the RTE news reports carefully and, frequently, one side (usually the losing side in a civil case) is unhappy about the coverage. That can lead to threats of legal action against RTE. Fortunately – so far – there have been no successful defamation actions against RTE because of any story I have broadcast, but it is an ever-present concern.

Towards the end of the afternoon, I start to think about the evening bulletins. Most days, Today At Five will look for a report, which may be recorded in advance for broadcast on Radio 1 between 5pm and 6pm. The 6.30 radio bulletin generally looks for longer pieces than the News At One, so I file a new audio package from my office. I may do an updated voiceover and piece to camera for the 6.01 TV news. That piece will usually stand for the nine o'clock television news. Exceptionally, it may need to be re-edited.

On a quiet day, I try to get away from the office between 4.30 and 6.30 for lectures at the King's Inns. Afterwards, I return to the office to tidy up, answer correspondence, do my filing and prepare for the next day's work.

But, not infrequently, cases linger on beyond four o'clock. (In one case last year, at five past four on a Friday afternoon, a bored judge thoughtfully told senior counsel: "Let's leave it until Monday. Mr Wood has lectures to go to!")

In the past, juries in criminal cases could stay out until the early hours of the morning. But, following the trial of Private *Sean Courtney,* where we were still filming after 2am, juries are now generally sent to hotels around 8pm.

The work of a legal affairs correspondent is invariably interesting, occasionally tedious, infrequently dangerous, often wearing, but always varied. I shall miss it.

**Kieron Wood has been Legal Affairs Correspondent of RTE since 1990. He has just completed his final Bar exams.*

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International Association of Young Lawyers (AIJA)

ANNUAL CONFERENCE WASHINGTON 14 – 18 AUGUST 1995

The annual AIJA conference takes place this year in Washington D.C..

Typically AIJA conferences attract approximately 600 participants consisting of lawyers from about 50 countries representing major firms and sole practices. Among this year's subjects (conducted in English or French with simultaneous translation) are:

- Litigating against the State
- Family Law Mediation
- Options available to Foreign Bidders in Public Procurement
- How Brussels Works and How to Make it Work for You
- Arbitration of Intellectual Property Rights
- AIDS and the Law
- SATT Franchising and Distribution

In addition to a full work programme, the conference organisers have arranged an extensive social programme, including receptions, visits to the Smithsonian Institute and hospitality at the home of a local lawyer.

The conference is centred at the Mayflower Hotel and seminars and meetings take place in Georgetown University Law Centre. Cost to include attendance at all seminars, social events, receptions and dinner each night (Monday through Friday) is US$799, with a lower price for members under 30.

For further information or a brochure, contact Petria McDonnell, McCann FitzGerald, Tel: 01 – 829 0000. Brochures are also available from the Law Society desk at the Four Courts.

Solicitors' Benevolent Association AGM

At the recent AGM of the Solicitors Benevolent Association tributes were paid to *Andrew F. Smyth* on his retirement as Chairman, after four years in office. Mr Smyth had given very generously of his time to the work of the Association.

While the Association is administered from Dublin it covers the thirty-two counties of Ireland. Both *Aidan Canavan,* President of the Law Society of Northern Ireland, and *George Palmer,* Junior Vice President, were present at the AGM. There is a total of twenty-one Directors on the Board from all parts of the country who meet on a monthly basis. The Association is completely independent of both Law Societies North and South. Meetings are held in Belfast from time to time.

The newly elected Chairman is *Tom Menton,* Solicitor, of O'Keeffe & Lynch, 30 Molesworth Street, Dublin 2, who has served as a Director for a number of years. Mr Menton noted that since he had become involved in the Association the demand on the funds had steadily increased. Applicants for grants from the younger age groups have increased resulting in their families being dependent on the assistance of the Association for a longer period.

As a result of the increase in demand the Association is very grateful for donations from any source.

The main source of income is the subscriptions paid annually to the Law Society which funds the largest part of the monthly grants paid to beneficiaries. Donations are also received from various Bar Associations and as a result of Golf Outings. The Association is also grateful to the Society of Young Solicitors and the Younger Members Committee, both of which make donations. Others deserving the Association's thanks include individual members of the profession and a number of Solicitors' firms who make further donations in addition to their annual subscriptions.

Tom Menton (left) who was recently elected Chairman of the Solicitors' Benevolent Association, with Andrew F. Smyth, Senior Vice President of the Law Society and former Chairman of the SBA.

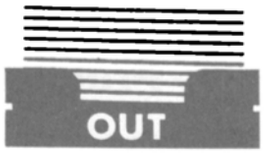
The work of the Association is conducted on a confidential basis. Currently about sixty grants are paid out each month. The total paid out in 1994 was £162,000. The circumstances of the applicants are very varied. Some are assisted in the short term until they are financially independent. Applicants in the older age groups tend to be long-term beneficiaries. All cases are reviewed each month by the Board. The Association has assisted on a number of occasions with grants towards the education of children at third level and it is particularly heartening to receive letters of appreciation from such beneficiaries when they have gone on to qualify. Where an applicant has an asset (such as a house) which cannot be readily realised without causing further hardship, grants may be paid in the form of a loan repayable on the applicant's death.

Solicitors are especially asked to remember the Association when making their own wills. Indeed they might also consider putting in a good word for their less fortunate colleagues and their dependents when clients are making wills. If the client was happy with the service he may be glad to show his appreciation by way of a bequest to the Solicitors Benevolent Association!

Geraldine Pearse
Secretary

THE LEGAL DIARY

Having regard to cost factors in the production of the Legal Diary the Minister has approved an increase in the 1995 subscription rate from £99.00 to £102.70.



Another month has passed and the Practice Management Committee still continues its work unabated and with undiluted enthusiasm in its wish and in its efforts to instill into the Profession the notion that good management techniques are just as important to a practice as excellence in the Law.

We hope we are getting the message across that in running a solicitors' practice one must be conscious of both the professional and business aspect. It is not just enough to do the job well but the client must appreciate that this was in fact the case. Awareness of good marketing principles is as important as client care which includes, in particular, the speedy handling of telephone calls and complaints. Financial arrangements must be crystal clear and payment for services should be obtained with the minimum of delay. Perhaps this greater awareness is in some small measure due to the efforts of this Committee.

I have been involved in Practice Management for three years now (probably doing less than most) and the hard work of the Law Society Staff on the Committee never ceases to amaze me. They seem to be doing ten things at once and on an equal number of Committees yet our work is always done without a murmur. We have also been blessed with good Chairmen of different styles but equally good humoured and effective. I have also noticed that while the official agenda varies only gradually from month to month as objectives are achieved the real melting pot for new ideas can be over a sandwich with *Justin McKenna* pouring the tea and *Brian O'Reilly* discussing his latest video.

Anyway back to reality for a moment and what has been done and what you are likely to hear about soon.

A. The Video Library was launched with pomp and ceremony on the 21 April 1995. (see page 144)

B. Another Q Mark Seminar was held on 31 May.

C. Solicitor Link still appears to be working well so if you wish to buy, sell or merge your practice you should contact *Cillian MacDomhnaill* in the Law Society and he will give you all the necessary details.

D. You now have your fourth Practice Management Note written by Justin McKenna so please read it and keep it in its binder. There are plans to have complete sets of these notes available at the end of each year just in case you have missed one.

E. We are still working on the Office Manual but this is hard work and will take plenty of time.

F. You will also be hearing about Law Link. This is a computerised On Line Service to the Land Registry and the Companies Office. On Line Legal Diary is also available with E Mail facilities. A Registry of Deeds Link should be available in the Autumn. These services will be useful to everyone with particular reference to our rural colleagues. Anyway more about his service can be obtained from Mr *Jerry Godsell*, Law Link. Tel: 661 1954.

G. You will also be hearing more about the Solicitors (Amendment) Act 1994 with particular reference to Section 68. There is enough material here, from a Practice Management point of view, to keep us going for twenty years. The general consensus both inside and outside the Committee seems to be that the proposed Contract/ Agreement furnished by the Society to assist with Litigation while helpful, could be revised. Even though the Act is now Law for several months many Colleagues are still finding difficulty in coming to grips with how to charge and how to make their charges clear to clients. This is an area where our Committee has a vital role for how can any business run effectively if the manner and method of charging is unclear particularly where Disciplinary Action can be taken if charges are "grossly unreasonable".

John Glynn

Selling Your Practice?

Why not use the services of the Law Society's Solicitor Link?

Information from:
Mr. Cillian MacDomhnaill
Finance & Administration Executive
The Law Society
Blackhall Place
Dublin 7.
Ph: (01) 671 0711

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Restriction of Company Directors and the Provisions of the Companies Act, 1990

by Andrew Walker, Barrister-at-Law

Part 2*

Avoiding Restriction

Broadly speaking a director will avoid a restriction order on one of two grounds. First on the basis that he,

> *". . . has acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions. . ."*[49]

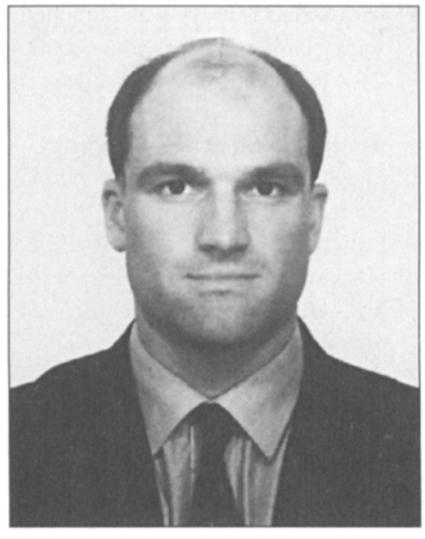
Secondly where, though subject to a restriction order, the person acts in respect of, is appointed to, or is involved in the formation or promotion of a company that meets certain financial requirements. These provisions are now looked at in turn.

The phrase "honestly and responsibly" provides in company legislation an outlet from penalties that could otherwise be imposed on persons.[50]

Recently in *Re Hefferon Kearns (No 2)*[51], *Lynch J.* made the following observation on the wording in its context there as absolving a director from liability for reckless trading.

"It seems to me that the expression "acted honestly and responsibly in relation to the conduct of the affairs of the company" is wider than the corresponding provisions in sub-s 3 of s.214 of the U.K. Act, [Insolvency Act, 1986] and the court in this jurisdiction is given specific power to relieve such a director from any personal liability whatsoever."[52]

The UK provision in respect of wrongful trading imposes a fairly stringent objective test by which directors are to be judged. It was held in *Re Produce Marketing Consortium*



Andrew Walker

Ltd. (No. 2)[53] that the test extended to judging the directors by the standards of what might reasonably be expected of a person fulfiling their functions and showing reasonable diligence in doing so. It was further held that in an applying the test the court will have regard to the functions to be carried out by the particular director and the particular company and its business.

In relation to restriction, while a subjective test it is submitted must be applied in relation to the "honesty" of a particular director, an objective test should govern the question of "responsibility". The parameters of this latter test remain to be set by the court in a case by case application of the provisions, but surely it is closer to the UK position of ascertaining,

". . . the levels of general knowledge, skill and experience which the director in question subjectively did possess and which objectively he ought to have possessed in view of the position held",[54]

than the wide berth afforded by Lynch J. which absolves reckless trading by a director on the basis that they acted within the ambit of s.297A(6) and with honesty and responsibility.[55] The rationale behind this is that it is hard to reconcile a director's conduct being reckless, yet at the same time responsible. Indeed *Murphy J.* has emphasised that responsibility must be shown.

The duties and powers of a director will invariably differ depending on the nature and size of the company involved, even where two companies are in the same line of business. For this reason it is difficult to postulate any sort of hard and fast criteria that will exempt a director from restriction. However it is of use to look at the decided cases on disqualification of directors to show what kind of actions may, and may not be tolerated.

First the sentiments expressed by *Browne-Wilkinson V–C* regarding the provisions on director disqualification in England[56] are applicable to restriction.

> *"The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to creditors and others."*[57]

He went on to state,

> *". . . ordinary commercial misjudgment is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity"*[58]

It is submitted that these criterion should be applied here in evaluating whether a director has been 'honest and responsible'.

In *Re Bath Glass*[59] it was stated that,

> *"the court must be satisfied that the conduct in question is sufficiently serious to lead it to the conclusion*

that the director is unfit and that is emphasised by the mandatory disqualification . . . to be imposed if that conclusion is reached"[60].

There it was found that while,

"imprudent and indeed improper in part although I think the directors' conduct to have been, . . ."[61]

a disqualification order would not be imposed.

Hoffmann J. in *Re CU Fittings Ltd*[62] said that,

". . . directors immersed in the day-to-day task of trying to keep their business afloat cannot be expected to have wholly dispassionate minds. They tend to cling to hope. Obviously there comes a point at which an honest businessman recognises that he is only gambling at the expense of his creditors on the possibility that something may turn up."[63]

Consequently a director who admits to, or is shown to have, entered into the realm of hazarding creditors' property should be more liable to restriction than one who at all times he attempted to preserve that property.

In *Re Cargo Agency*[64], a disqualification order was made where it was felt that the directors' remuneration was unreasonably high during the period of trading by the company when it was hopelessly insolvent. Cynical exploitation of the privilege of limited liability or gross incompetence would also constitute disqualification.[65]

Factors that have also militated against disqualification have been where a director has shown that he was acting on professional advice which was bona fide and proper[66]; that he has himself incurred personal losses in attempting to keep the company solvent[67] or that the company was insolvent only for a short period of time[68]. Though the cases relate to disqualification rather than restriction they express standards by which directors of insolvent companies should be governed.

Also of relevance are the comments of Lynch J. in *Re Hefferon Kearns (No.2)*[69], in relation to reckless trading where he held that section 297A,

". . . operates individually and personally against the officers (which includes the directors) of a company and the onus rests on the plaintiff to prove in relation to each of the defendants in this case that his conduct falls within the ambit of conduct prohibited or liable to be penalised . . ."[70]

Therefore a director should escape restriction if he can show responsibility on his behalf, notwithstanding the irresponsible actions or behaviour of the others directors. A failure however to rectify irresponsible conduct of which a director is aware of, will itself be deemed irresponsible[71].

On 'honesty' Lynch J., in *Re Hefferon Kearns (No. 2)*[72], commented,

". . . the first defendant, whilst acting honestly and bona fide in what he considered to be the best interests of the creditors, was in fact party to the contracting of debts by the company at a time when he knew that those debts, together with all the other debts of the company, including contingent and prospective liabilities, could not be paid by the company as they fell due for payment"[73],

i.e. he was a party to reckless trading. There the provisions of s.297A(6) were used to absolve the director from a finding of reckless trading. However while honest conduct may protect a director from liability for reckless trading, it is difficult to reconcile how a director can be both responsible and reckless simultaneously.

A court after concluding that a director has acted 'honestly and reasonably' may still, if it feels it is "just and equitable"[74], restrict the director nevertheless. This might arise for instance where the court takes the view, that though a person has at all times acted properly, they are simply not suitable for company directorships.

Finally in the context of a director seeking to exonerate himself from restriction there arises the question as to whether reliance can be placed on actions that pre-dated the statute. Recently Barron J.[75] stated that:

"In relation to the retrospective operation of statutes, two types of situation exist. The first is the enforcement of the terms of the statute to circumstances in existence as of the date of the statute. To do so is to give the Act retrospective effect. The second is the enforcement of its terms in relation to circumstances existing subsequent to its passing but having regard to events which occurred before its passing. To do so does not give the Act retrospective effect since the right being enforced is one given by the Act."[76]

Lynch J. in *Re Hefferon Kearns (No.2)*[77] felt that though liability for reckless trading could only be incurred on, or after the 29th of August 1990 (the operative date of s.297A), it did not follow that,

". . . I cannot have regard to acts done or omitted or knowledge acquired by the defendants before the 29th August, 1990 in deciding whether or not acts done or omitted between the 29th August and the 11th October, 1990, constituted reckless trading".[78]

In imposing liability for reckless trading the court has a discretion, whilst under s.150 there is no such option. A Court only has to evaluate the actions of a director prior to August 1, 1991 (if at all), from the perspective of whether the restriction should *not* be imposed. It is not concerned with whether the actions of that time justify restriction, merely whether they are capable of excusing the director from restriction. Consequently it would seem that directors will be able to point to their actions of pre-August 1, 1991 in establishing to the Court that they were acting "honestly and responsibly".

Sub-section 2 however excludes the provisions from directors appointed

by a "financial institution"[79] or a "venture capital company"[80]. However they too are subject to the provision that they act honestly and reasonably and therefore the provisions seem needless.

Civil Consequences of Acting while under Restriction

Any company may recover as a simple contract debt any consideration, or amount representing its value, paid over to a person who acted in relation to that company while under a restriction declaration[81]. Further if the person is so acting and,

> *". . . the company concerned commences to be wound up – (i) while he is acting in such a manner or capacity, or (ii) within 12 months of his so acting, and (c) the company is unable to pay its debts. . ."*[82]

they may be made liable for all the debts and liabilities incurred during the period he acted in contravention of a restriction order. An application for such personal liability may be made either by the company's liquidator or any of its creditors. Consequently the winding up may be after the five year restriction is over. It seems that personal liability may be sought even where the company has been notified of the restriction, under s.155(5), though presumably the court in those circumstances will grant some degree of relief.

Officers of a company which;

(1) has been notified of a restriction declaration by a person,
(2) continues business without fulfiling the capital requirements of section 150(3) within a reasonable period, and
(3) is wound up and at the commencement of the winding up is unable to pay its debts,

may themselves be personally liable for all the debts and liabilities of the company if they knew of or ought to have known of the notification to the company, though relief is available[83]. Applications for such personal liability can be brought by a liquidator, creditor or contributory of the company[84]. Any officer appointed to the company after it had met the requirements will not be liable. However there are no indications as to what constitutes a 'reasonable period' of time for compliance and consequently the court will have to decide each case on its facts but presumably it is longer than the 14 day notification period of section 155(5).

Finally any director, officer, member of a committee of management or trustee of a company who acts in accordance with any directions or instructions that are given by a person they know to be under restriction are themselves liable to a disqualification order[85]. The directions or instructions made however must be in contravention of the restriction order.

Procedure

A major flaw in the provisions on restriction is that neither the Act, nor the Rules of the Superior Courts, make any specific reference to the procedure which ought to be adopted in the bringing of a restriction application under section 150 before the Court. However RSC 0.75B of the Rules adopts procedures in respect of some of the applications that may arise in the restriction area.

First by RSC 0.75B r.3(aa) applications to have a person or officer made personally liable for a company's debts under sections 163(3) or (4), are by way of notice of motion. These will be on notice to the person against whom the order is sought and to the liquidator of the company, if he is not the applicant himself.

Secondly by RSC 0.75B r.5 ex parte applications may be brought where;

(i) it appears to the liquidator the interests of another company or its creditors are in jeopardy, s.151(1); or,
(ii) a company is seeking relief in respect of prohibited transaction, s.157(1); or,
(iii) a liquidator wishes to report the 'relevant matters' of s.161(5).

There is no indication of the procedure which should be followed where a receiver or liquidator wishes to have directors restricted in the first place, yet RSC 0.74 r.136 (as amended) provides,

> *"In any winding up an application . . . under any other of the section of the [Companies] Acts not herein expressly provided for, shall, in the case of a winding up by the court by made by motion on notice and in the case of a voluntary winding up by originating notice of motion."*

Consequently a liquidator in an insolvent voluntary liquidation should apply by originating notice of motion to High Courts 5 or 6. Murphy J. has expressed the view that the liquidator should notify all the directors of the insolvent company, presumably along with any person who resigned their directorship in the 12 months prior to the winding up, of the Act's provisions regarding mandatory restriction and that such notification be as soon as possible. Therefore in line with *Re G. & T. Garvey Limited*[86] such notification should occur in the six weeks between the winding up and the first application by the Liquidator in the Examiner's list. A liquidator therefore, after a search of the Companies Office, to ascertain the directors, should so notify. It would follow that creditors of the company should also be notified, as in the case where a person is seeking relief under s.152, so that they may outline to the court their attitude on the restriction of the director, or otherwise.

Early notification would appear to be the preferred course as applications for relief it is on notice to the liquidator and also under section 151 the liquidator is to report to the court if it appears to him that the interests of another company or its creditors are being jeopardised. These provisions would be rendered somewhat otiose if the director appearance and restriction were made at the final order stage, respectively.

It would also be more equitable to directors if they could explain their actions at a time when the events of the company's downfall were fresher

in their memories, and indeed delayed notification could prejudice a director if evidence to aid his case was no longer available.'

It would seem that a liquidator at the appearance by the directors may express his views on whether he feels there should be restriction or not. This view should also take into the account of the company creditors who are not on notice of the application. The difficulty here though is that an early notification and appearance of the directors may not however afford a liquidator sufficient time to draw adequate conclusions on the honesty and responsibility, or otherwise, of the directors. Finally the director may, by affidavit, set out how he at all times, in his view, acted honestly and responsibly. The expenses incurred by liquidators in these applications would seem to be part of the costs of the liquidation as a whole, while directors will have to bear their own costs, and indeed, if ordered, contribute to the liquidator's costs. The Companies Office keeps a register of all those persons restricted, noting such reliefs as may occur[87].

Conclusion

The 1990 Act therefore has very serious ramifications for the directors of companies involved in an insolvent liquidation or receivership. Persons who are on the Boards of numerous companies, like solicitors and accountants, could be severely prejudiced by the mandatory aspect of the legislation as every director of every company in an insolvent liquidation or receivership will have to satisfy the Court of their propriety in respect of that company's affairs. The scenario of companies collapsing with outstanding debts and yet re-appearing under a different guise soon after, at which the provisions appear to be aimed, are, it is submitted, situations adequately covered by the provisions on director disqualification and reckless trading. Indeed a director can be disqualified for breaching any duty he may owe[88], and these surely entail acting in an honest and responsible manner at all times.

The avoidance of *'phoenix syndromes'*, while being entirely laudable, with such mandatory provisions as section 150, place a high burden on directors and perhaps the legislation might have been more equitable had it instructed liquidators or receivers to apply where there was evidence of dishonesty or irresponsibility.

In addition it is regretted that applications with such potentially wide ramifications contain large procedural gaps and no specific mechanism for the bringing to the Court's attention the matters addressed by Part VII and are to evolve on such an *ad hoc* basis.

It may well be that the Company Law Review group will decide that the restriction chapter is too superfluous to justify the extra burden and cost it has imposed, both on liquidators and directors, and the area may soon be only a footnote in Irish Company Law.

**Part 1 was published in the April Gazette.*

References

49. s.150(2) (a).
50. s.297A (6) Companies Act, 1963 (as amended).
51. [1993] 3 IR 191.
52. Ibid p.225.
53. [1989] BCLC 520.
54. Palmer's Company Law p.15209 paragraph 15.460.
55. *Re Hefferon Kearns* (No.2) [1993] 3 IR 191,224.
56. Companies Act 1985 s.300, which were replaced by the provisions of s.6 of the CDDA 1986.
57. *Re Lo-Line Electric Motors* [1988] Ch. 477, 486.
58. Ibid p.486.
59. [1988] BCLC 329.
60. Ibid p.333.
61. Ibid p.340.
62. [1989] BCLC 556.
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64. [1992] BCLC 686.
65. *Re Douglas Construction Services Ltd.* [1988] BCLC 397.
66. *Re Churchill Hotel (Plymouth) Ltd* [1988] BCLC 341; *Re Majestic Recording Studios Ltd* [1989] BCLC 1.
67. *Re Douglas Construction Services Ltd* (op cit).
68. *Re CU Fittings Ltd* (op cit).
69. op. cit.
70. Ibid p.219.
71. *Jackson v. Munster Bank ex parte Dease* (1885) 15 LR Ir 356.
72. (op cit).
73. Ibid p.224.
74. s.150(2) (a).
75. *Kelly v. Scales* [1994] 1 IR 42.
76. Ibid p.44.
77. op. cit.
78. Ibid p.213.
79. Defined by s.150(5) as either a licensed bank or a company whose ordinary business consists of the giving of loans or guarantees in connection with loans.
80. Defined again by s.150(5) as a company so prescribed by the Minister for Employment and Enterprise and whose principal ordinary business is the making of share investments.
81. s.163(2).
82. s.163(3).
83. s.163(5).
84. s.163(4).
85. s.164.
86. High Court, *Costello J.* 22 November 1993.
87. s.153.
88. s.160(2) (c).

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CORRESPONDENCE

The Editor
The Law Society Gazette
Law Society
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Dear Editor

I would like to canvas the support of colleagues for a united approach to the Financial Institutions doing business in the State.

The purpose of the approach to the aforementioned Financial Institutions would be to seek their agreement, that henceforth they would make their various standards security documentation available to practising solicitors in the State on floppy disk under a licensing arrangement.

I would respectfully submit that in this stage of wide spread use of PC's that it is leading to inefficiency in solicitors offices (that are largely geared to using documentation generated from the data bases of PC's) that we are being forced to fill in relevant details of transactions in standard security documentation on manual/electronic typewriters.

I would be obliged to hear from colleagues interested in supporting the above mentioned proposed course of action. I confirm that I am copying this letter to the Secretaries of the various Bar Associations throughout the country.

Yours sincerely

Philip O'Riada
O'Riada & Company
Irish Farm Centre Building
Bluebell
Dublin 12
Tel: 450 6859
Fax: 450 6833

The Great Brazilian Challenge

Solicitor walks in the Jungle to raise funds.

In an effort to raise £150,000.00 for two well known charities, The Richmond Brain Research Foundation and The National Council for the Blind of Ireland, *Pat O'Connor*, a solicitor from Swinford has undertaken a walk of 200 kilometres in Brazil – *The Great Brazilian Challenge*. He was selected from over 300 applicants for a place on the forty member team. Pat believes wholeheartedly in both causes and he is fully committed to participating in this high profile event. *The Great Brazilian Challenge* will include the Rain Forest, Amazon River, Iguassu Falls and Rio de Janeiro and will take place in June. Pat has already raised £22,000 from members of the solicitors' profession, friends, acquaintances and the public in general. He would like to thank all those who have contributed. Anyone else who would like to sponsor Pat in his endeavour should contact him at: Pat O'Connor & Son, Market Street, Swinford, Co. Mayo. Tel: 094 51333, Fax: 094 23930. ❐

Estates of Deceased Social Welfare Assistance Recipients

Solicitors who are acting on behalf of the personal representatives of deceased social welfare assistance recipients, are reminded of the provisions of Section 280 (1) of the Social Welfare (consolidation) Act 1993 which places a requirement on the personal representative of deceased social welfare assistance recipients to notify the Department of their intention to distribute the estate and to provide the Minister with a copy of the schedule of the assets of the estate. See also insert in *Gazette*.

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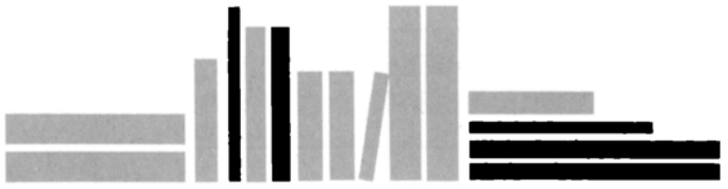

Irish Farmers Handbook 1995

Published by O'Sullivan & Co. Softback; 376pp; Price: £8.95.

This book was written by Martin O'Sullivan, Edmond Connolly and Hugh O'Neill, who are practising Agricultural Consultants in County Tipperary. The introduction states that "the authors have attempted to provide practical working aid that would benefit not only the farmer but also professionals dealing with farmers".

This is a book to be consulted when the need arises rather than being read from cover to cover. The book is divided into thirteen sections. Each of these sections is then further subdivided so that, for example, Section 10, Taxation, is broken down into further sub-sections dealing with income tax, value-added tax, capital acquisitions tax, capital gains tax, stamp duty, residential property tax, probate tax and P.R.S.I.

Of the fifteen sections in the book four will be of interest to the solicitor. These are the ones dealing with the Early Retirement Scheme; Milk and Livestock Quotas; Taxation; and Farm Business and Family Matters.

The Department literature in relation to the Farm Retirement Scheme is at times vague and uncertain. The chapter in relation to the Scheme follows the Department literature without attempting to simplify the requirements so as to make them easily understood. The reference on page 102 to the additional land which a transferee must acquire so as to satisfy the enlargement requirement of the Scheme is incorrect. Under the Scheme if a farming transferree takes over land from a transferor he "must expand the area of the agricultural holding as constituted on the 30th July, 1992, or on the date of the transfer whichever is the greater, by five hectares or 10% whichever is the greater". The example does not reflect this.

The 1994 milk quota regulations extend to thirty two pages together with twenty one pages of Schedules. The handbook has distilled this into five pages and in doing so loses some of the more important points which concern solicitors. While the book refers to the fact that the farmer may retain his quota where land is sold to a public authority or for use in the public interest for non-agricultural purpose it does not refer to applications which may be made to the Minister under regulation 7 whereby a farmer may sell a portion of his milk producing holding and retain the quota on the remainder provided he satisfies the criteria as laid down in the regulations.

While it describes itself as the 1995 handbook, the C.A.T. threshold amount as calculated uses the 1994 multiplier rather than the 1995. It makes no reference to the fact that the threshold amount will alter annually because of indexation.

There are some errors in the contents section. "Tourism" is referred to as being on page 93 whereas in fact it appears on page 92.

Despite the above criticism this is a book which will be of benefit to farmers in their dealings both with the Department of Agriculture; the Revenue and their legal advisers. For example, if a farmer has studied the section on transferring the family farm he will have an idea of the stamp duty and gift tax implications involved.

In its present format this is not a book which solicitors would be inclined to use by way of reference. There are no footnotes referring to the relevant sections of statutes and regulations in respect of the law quoted. Solicitors need to be able to refer to source law.

From the title it would appear that this book may be produced on an annual basis. In any revision the authors will have to decide whether to opt for the farming market or to make the book more legalistic and therefore more attractive to solicitors and other professionals.

Own Binchy

•*The Irish Farmers Handbook is available from O'Sullivan & Co., Clonmel Road, Carrick-on-Suir, Co. Tipperary or leading booksellers.*

Land Law in Ireland

by Andrew B. Lyall, Ph.D., Lecturer in Law, University College, Dublin. Pages 1104. Price: £47.50 (pb), £65 (hb).

Since the second edition of Wylie's *Irish Land Law* was published at the beginning of 1986, there have been enacted up to the end of 1993, in this jurisdiction alone, some eighteen statutes dealing with land law including the Status of Children Act, 1987, the Judicial Separation and Family Law Reform Act, 1989 and the "Planning Acts" of 1990, 1992 and 1993. There have also been a number of significant or interesting judicial decisions affecting the subject during the same period. These include, for example, *Gleeson* v *Feehan* [1993]. 2 IR 113 in which the Supreme Court, distinguishing *Drohan* v. *Drohan* [1981] ILRM 473, held that s. 45 of the 1957 Act (as substituted by s. 126 of the Succession Act 1965) applied to claims of persons beneficially entitled under a will, on intestacy or under s. III of the 1965 Act, against a personal representative administering the estate, but not to claims fly personal representatives against the estate, *Bank of Ireland* v. *Fitzmaurice* [1989] ILRM 452 which, by implication, cast doubt on *Gatien's* authority and *Re Dunne* [1988] IR 155 in which O'Hanlon J. had to consider a will which left freehold land subject to a condition that it was not to be transferred to "any member of the Meredith families of O'Moore's

Forest, Mountmellick" and held that the condition was void both for uncertainty and as against public policy!

If this massive new work had no other merit but the capacity to bring the reader up to date, it would still be worth buying. But it differs from its great predecessor not only because of the up-to-date material it contains but also because of its coverage. Apart from the fact that the land law the subject of this work is that of the Republic, this is chiefly because of the chapters on planning law, housing law and the law relating to family property. In the latter chapter, as Mr. Justice Blayney says in his foreword,

> Dr. Lyall analyses with admirable clarity the recent case law on the circumstances in which a wife may acquire the beneficial interest in the family home, the legal title to which is vested in the husband solely, and considers how the position has been affected by the powers given to the courts by the Judicial Separation and Family Law Reform Act, 1989 to make property orders when a Judicial Separation Order has been made.

In fact, in addition, in this chapter, the author explores, expanding topics such as the rights of persons living together and, finally, the Family Home Protection Act, 1976.

No other legal author known to this reviewer uses diagrams as freely as Dr. Lyall whilst a trait which distinguishes him from almost all other writers on real property is his frequent recourse to the economic analysis of legal notions. Whilst the attempt to explain legal forms and principles by reference to their historical origins is to be welcomed, Dr. Lyall is not always convincing in his economic interpretations of legal institutions.

It would, however, be captious, in view of this work's other qualities, to dwell on what may be no more than a reviewer's "blind spot". Whilst, as a pathfinder, Professor Wylie has prepared the way for all who write after him on the Irish law of real property, subject to this, this splendid book can stand comparison with *Irish Land Law* and impressed this reviewer as generally more readable.

J.M.G. Sweeney

E.C. Intellectual Property Materials

Editors: Anna Booy and Audrey Horton. Publishers: Sweet and Maxwell, 1994. £35 Stg. (pb).

When I first saw this book I thought – what a wonderful idea. Having been a student of Intellectual Property Law, I am aware that it is a nightmare compiling the myriad of seemingly endless materials emanating from Europe. This book does all that for you.

The fact that its title refers to EC Materials and not EU Materials, is not because it is out of date, the editors hasten to inform us! They believe that it is correct to continue to refer to EC Law since only law which arises under the provisions of the Maastrict Treaty is properly called EU Law and this book is based on provisions of the EC Treaty (Treaty of Rome) and legislation issued pursuant to that Treaty.

The introduction gives a very brief overview of the Institutions and Legislative Instruments of the European Community. The book is divided into the various areas of Intellectual Property interest, it includes Copyrights, Patents, Trademarks, Data Protection, Topographies of Semi-Conductor Chips and Designs.

It also includes a chapter on Competition Law and its effect on Intellectual Property.

It gathers together not only established Regulations, Decisions and Directives but also many proposed measures.

Every section includes an editorial comment, typically only one page long, which contains brief details of the history of the measure, its content, its practical significance and its time of implementation. The commentaries themselves are very handy for quick reference.

All in all it is a very useful reference book for anyone involved in the area of Intellectual Property.

Helen Sheehy BCL, LLM, Solicitor.

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Sub-committee on Career Development

The Society continues to be concerned about employment prospects for the increasing numbers of newly-qualified solicitors and in this context, a sub-committee of the Education Advisory Committee has been established under the chairmanship of *John Costello*. The group comprises two other Education Advisory Committee members, *Dudley Potter* and *Fionnuala Breen-Walsh* as well as *Philippa Howley* representing the Younger Members and *Seamus Cassidy*, Apprentice; executive staff members are *Raphael King*, Course Co-ordinator and *Geraldine Hynes*, Careers Advisor.

In the three meetings which have taken place to date, the focus has been firmly fixed on practical initiatives to alleviate the problems. The message is being conveyed to second and third level students and their career guidance counsellors that the profession is substantially over-subscribed and that those students who are committed to pursuing legal studies should ensure that they concentrate from an early stage on expanding their options rather than restricting them. This can be done by choosing degree courses that provide exposure to non-legal disciplines, e.g. business subjects or languages, as well as law. In addition, students and apprentices are being encouraged to engage in part-time courses which might enhance their employment prospects. A list of suggested courses is being compiled and will be available from the careers office in the Society from the end of May. The possibility of running certain courses in the Law School is also under discussion and it is envisaged that a management module which would be of wider application than the present Practice Management input will be incorporated into the Advanced Course in the near future.

The other main thrust of the sub-committee is in the area of marketing of solicitors for employment in the broad commercial sector. This is being done in the first instance by meeting directly with members of the business community to discuss the development of the role of solicitors in non-traditional areas of employment and to reinforce the message that having a solicitor on its staff or board would be a significant advantage to any organisation. Links have already been established with the Irish Business and Employers Confederation, the Institute of Personnel and Development and the Chambers of Commerce as well as individual companies and a number of executive recruitment consultants.

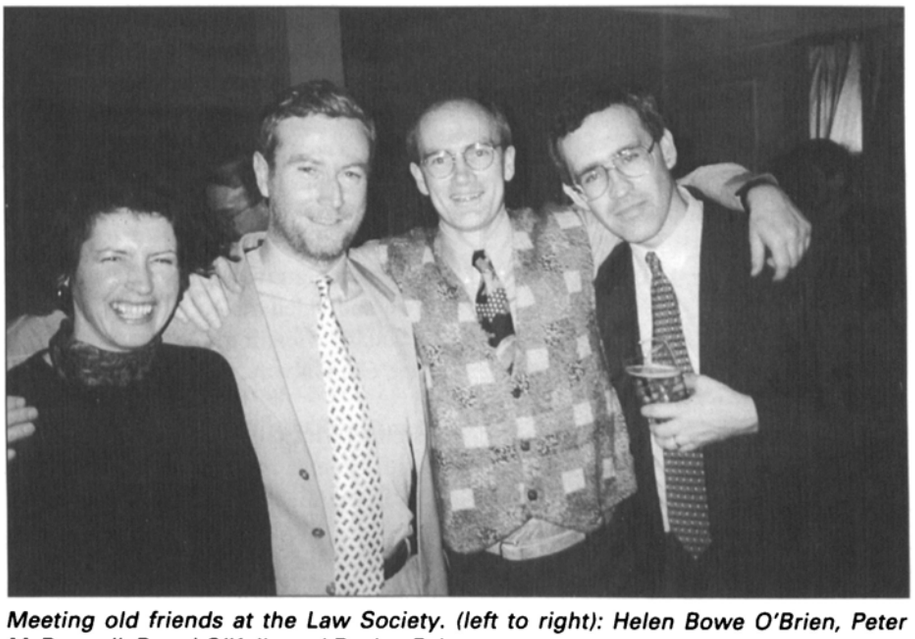
The committee will continue to meet each month and will be glad to receive suggestions or comments from interested parties; correspondence may be directed to the careers adviser or to any of the committee members c/o the Law School.

Geraldine Hynes was appointed Careers Advisor in February 1995. She was admitted to the Roll of Solicitors in 1993.

A Successful Reunion at the Law Society

A very successful twenty year reunion was held at the Law Society on 25 February 1995. Up to seventy solicitors and barristers attended the reunion all of whom commenced their legal career in 1973 and attended lectures at UCD, Belfield for the following four years. A special word of thanks to *Paul Romeril*, Consulting Engineer who sponsored the string quartet and to all the Law Society staff. We all enjoyed a meal provided by *Peter Redmond* and his staff and the bar staff quenched our thirsts. Thanks also to *Erin Barry* for organising the booking. A most enjoyable evening was had by all.

Donal O'Kelly, Solicitor



Meeting old friends at the Law Society. (left to right): Helen Bowe O'Brien, Peter McDonnell, Donal O'Kelly and Declan Foley.

Lost Land Certificates

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 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.

Published: 12th June 1995.

Martin Egan, Rathglass, Moygownagh, Ballina, Co. Mayo. Folio: 499; Townland: Rathglass; Area: 29(a) 3(r) 23(p). **Solr. Ref: JMG.MC. Co. Mayo.**

Michael and Treasa (orse Teresa) Kelly. Folio: 5949, 5950, 5956, 5954; Lands: Pollerton Little; Area: (Folio 5949) 15(a) 2(r) 33(p), (Folio 5950) 26(a) 2(r) 8(p), (Folio 5956) 21(a) 3(r) 22(p), (Folio 5954) 19(a) 1(r) 25(p). **Co. Carlow.**

Frances Heffernan (deceased), Folio: 13797; Land: Puddingfield; Area: 68(a) 1(r) 20(p). **Co. Tipperary.**

Michael Caplis, Folio: 1. 31707F, 2. 29855 closed to 39919; Lands: 1. Cooleen, 2. Cooleen. **Co. Tipperary.**

Bernard Duffy, Folio: 5431F; Land: Candlefort; Area: Property no. 1 4.533 Hectares, Property no. 2 1.351 Hectares. **Co. Monaghan.**

William Murray and Catherine Murray (deceased), of 24 Clonard Street, Balbriggan, Co. Dublin. Folio: 13112; Lands: Part of the property with the cottage thereon situate on the north side of Clonard Street in the town of Balbriggan, Townland of Tankardstown and Barony of Balrothery East. **Co. Dublin.**

James and William Coleman, Folio: 6433, 6448; Land: Kilcappagh; Area: Folio 6433: 15(a) 1(r) 27(p), Folio 6448: 11(a) 0(r) 4(p). **Co. Offaly.**

Industrial Development Authority (now Forfas) of Lansdowne House, Ballsbridge, Dublin 4. Folio: 3825; Land: Townland of Ballycoolen in the Barony of Castleknock. **Co. Dublin.**

John E. Vaughan, Folio: 9447; Land: of Ballyhoolahan East, Barony of Duhallow and County of Cork. **Co. Cork.**

John Joseph McEvoy (deceased), Folio: 4165F; Land: (1) Dunbell Little, (2) Bennettsbridge, (3) Bennettsbridge, (4) Ballyredding North; Area: (1) 2.752 Hectares, (2) 4.573 Hectares, (3) 6.634 Hectares, (4) 4.761 Hectares. **Co. Kilkenny.**

Hannah Kilkenny, Knock, Claremorris, Co. Mayo. Folio: 38437; Townland: Ballyhowly; Area: 0(a) 0(r) 23(p). **Co. Mayo.**

Kevin McHugh, Folio: 10678 (an undivided moiety at entry no. 4); Land: Newtowndarver. **Co. Louth.**

John Patrick Barron and Mary Ann Barron, Folio: 7101; Land: Moybella North; Area: 3(r) 0(p). **Co Kerry.**

Kathleen Canavan, (tenant in common of an undivided moiety), Folio: 26648; Townland: Headford; Area: 15.466 area. **Co. Galway.**

Michael McLoughlin, Folio: 40769; Land: Grange; Area: 3(r) 23(p). **Co. Donegal.**

Stephen Noel Hearne (Reg Owner Folio 1567), Patrick James Hearne (Reg Owner Folio 1559, 1570), Folio No. 1: 1567, Folio No. 2: 1559, Folio No. 3: 1570; Land: Leperstown; Area: (1) 35(a) 2(r) 15(p), (2) 32(a) 1(r) 38(p), (3) 38(a) 0(r) 4(p). **Co. Waterford.**

James Doherty, Folio: 8362; Land: Templemoyle; Area: 17(a) 1(r) 1(p). **Co. Donegal.**

Kanturk Iron Works Limited, Folio: 6939F; Land: Townland of Gurteenard Barony of Duhallow and County of Cork. **Co. Cork.**

Mary Ahern, Folio: 47668; Land: Barony of Imokilly and County of Cork. **Co. Cork.**

Patrick Marron, Folio: 1461; Land: Anny; Area: 8(a) 2(r) 24(p). **Co. Monaghan.**

Thomas and Nora O'Malley, Folio: 18565F; Lands: Part of the townland of Ballinfoila, situate on the north West side of the Galway-Headford Road in the Borough of Galway and Parish of Saint Nicholas. **Co. Galway.**

Bernard Coffey, Folio: 1565; Land: of Moortown Barony of Ikeathy and Oughterany. **Co. Kildare.**

Aidan Howlin, Folio: 2307F; Land: Ballaghblake. **Co. Wexford.**

John Kelly, Folio: 15092; Land: Illaunmeen; Area: 15(a) 0(r) 13(p). **Co. Tipperary.**

John O'Riordan and Breda O'Riordan, Folio: 13996; Lands: Barony of Fermoy and County of Cork. **Co. Cork.**

John Molloy, Folio: 7596; Land: Shudaun, Athenry, Co. Galway. **Co. Galway.**

Mary Louisa Crampton, Folio: 12865; Land: Clonbrown and Clonmel. **Co. Kings.**

Simon Keating (deceased), Folio: 17409; Land: Tellerought. **Co. Wexford.**

Hugh Reilly, Folio: 2378F; Land: Marshes Upper. **Co. Louth.**

Augustine Jennings, Folio: 76L (Revised); Land: Barony of Kinsale. **Co. Cork.**

Teresa Kelly, 26 Stella Maris, Ballysodare, Co. Sligo. Folio: 21136; Townland: Kilboglashy. **Co. Sligo.**

David Cashman, Folio: 43722; Lands: Townlands of Garranes and Leamlara Barony of Barrymore. **Co. Cork.**

Andres O'Connor of Kingswood, Clondalkin, Co. Dublin. (9 Brandon Road, Drimnagh, City of Dublin). Folio: 9723 and 2690L; Lands: Townland of Brownbarn in the Barony of Newcastle (Folio 9723) and property known as No. 9 Brandon Road situate on the south side of the said road in the Parish and District of Crumlin (Folio 2690L). **Co. Dublin.**

James O'Ferguson, c/o James C. Fagan, Solicitor, 57/58 Parnell Square West, Dublin. Folio: 16703; Land: Townland of Kilgobbin in the Barony of Rathdown. **Co. Dublin.**

Wills

Drumm, Shane Vincent, deceased, late of 217 Crumlin Road, Crumlin, Dublin 12. Would any person having knowledge of a will executed by the above named deceased who died on 19 March 1995, please contact Lewis E. Citron & Company, Solicitors, 4 Waldemar Terrace, Main Street, Dundrum, Dublin 14. Tel: 298 4624, Fax: 298 8309.

Heaphy, George, deceased, late of 27 Glenview Gardens, Farranshone, Limerick. Would any person having knowledge of a will executed by the above named deceased who died on 20 February 1995, please contact Connolly Sellors Geraghty Fitt, Solicitors, 6/7 Glentworth Street, Limerick. Tel: (061) 414355, Fax: (061) 414738 – Reference: MB.

Hurley, James, deceased, late of 45 Addison Road, Fairview, Dublin 3. Would any person having knowledge of a will executed by the above named deceased who died on 29 January 1995, please contact H.G. Donnelly & Son, Solicitors, 5 Duke Street, Athy, Co. Kildare. Tel: 0507 31284, Fax: 0507 31670.

Kane, John (Jack), deceased, late of Ballinree, Borris, Co. Carlow. Would any person having knowledge of a will executed by the above named deceased who died on 8 April 1995 please contact: Messrs John M. Foley & Company, Solicitors, Bagenalstown, Co. Carlow. Tel: 0503 21219, Fax: 0503 21592.

McGloughlin, Paul, deceased, formerly of 41 Leopardstown Park, Dublin but for the last five years of "Sean Og's", Market Street, Skibbereen, Co. Cork. Would any person having knowledge of a will executed by the above named deceased who died on 11 March 1995 please contact Timothy J. Hegarty & Son, Solicitors, 58 South Mall, Cork. Tel: 021 270351, Fax: 021 276580.

Any Solicitor having the possession of the Will of Timothy Fergus, late of Barrack Street, Loughrea, Co. Galway or Raford, Kiltullagh, Athenry, Co. Galway and formerly of England, please furnish details of same to the undersigned solicitors who are acting for his proposed Administrator. Florence G. MacCarthy, Solicitor, Loughrea, Co. Galway.

Moloney, Margaret, deceased, late of 36 Clonsilla Road, Blanchardstown, Dublin 15. Would any person having knowledge of the whereabouts of a Will executed by the above named deceased who died on 29 December 1994, please contact Joynt & Crawford, Solicitors, 8 Anglesea Street, Dublin 2. Tel: 01 6770335.

McMahon, David, deceased, late of Fortmiddle, Charleville, County Cork. Would any person having knowledge of a will executed by the above named deceased who died on 8 May 1994, please contact James Binchy & Son, Solicitors, Main Street, Charleville, Co. Cork. Tel: 063 81214, Fax: 063 81153.

Galbally, Cecil, deceased, late of Antonio Maura 23-2, Derecha 39005, Santander, Spain. Address in Ireland unknown. Would any person having knowledge of a will executed by the above named deceased who died on 25 January 1995, please contact Blaithin and Brian Fitzgerald, 32 Oulton Road, Clontarf, Dublin 3.

Melia, Peter, deceased. Would any relative of Peter Melia, late of Rose Cottage, Strawberry Beds, Chapelizod, Dublin 20 or anyone with knowledge of any relative of Peter Melia please contact McKeever & Son, Solicitors, 5/6 Foster Place, Dublin 2. Tel: 677 9681, Fax: 677 9099 (Reference: BY/BM).

Miscellaneous

Northern Ireland Agents for all contentious and non-contentious matters. Consultation in Dublin if required, reasonable rates. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry, Tel: 080 693 61616 Fax: 080 693 67712.

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Lost Title Deeds

NOTICE PURSUANT TO SECTION 17 OF THE LANDLORD AND TENANT ACT 1967 TO ACQUIRE FEE SIMPLE INTEREST

LANDLORD AND TENANT APPLICATION THE CIRCUIT COURT

SOUTH WESTERN CIRCUIT COUNTY OF CLARE

NOTICE OF APPLICATION TO THE COUNTY REGISTER IN THE MATTER OF THE LANDLORD AND TENANT GROUND RENT ACTS 1967 TO 1984 IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 17 THE LANDLORD AND TENANT ACT 1967.

GEOFFREY BROWNE and AIDAN O'HIGGINS as Executors of the estate of Bernard J O'Higgins deceased (Applicant)

AND

The Representative of the EDWARD SYNGE estate (Respondents).

WHEREAS the applicant is now entitled to a Lease-hold interest in ALL THAT AND THOSE part of the lands of Dough in the Town of Lahinch, in the County of Clare, as comprised in an Indenture of Lease dated the 27th of January 1845 and made between Edward Synge of the one part and John Doherty of the other part and therein described as that part of the lands of Dough now and for some time past in the tenancy and occupation of the said John Doherty containing in the front to the Post Office Lane 44 feet or thereabouts and in depth from front to rear 72 feet on the East and 66 feet 9 inches and a half on the West or thereabouts, to said measurements more or less, bounded on the North by Centre Lane, on the South by the Post Office Lane, on the East by Dynans holding and on the West by the Stable Lane, situate lying and being in the Town of Lahinch, Barony of Corcomroe and County of Clare, formerly known as 'Lysaght Lodge' and now known as 'Marino', Lahinch, County Clare.

WHEREAS the Respondents are the persons now and at all relevant time entitled to the fee simple interest in the said property and whereas the Applicants are desirous of having the matter of the acquisition by them of the fee simple interest in all matters relating therewith determined by the County Register for the County of Clare pursuant to the provisions of the said Acts.

TAKE NOTICE that on 22nd day of June 1995, at the hour of 12.00 noon or at the first available date thereafter Application will be made to the County Register for the County of Clare at the Courthouse, in the County of Clare, for an Order;

1. Determining that the Applicant is entitled to acquire the fee simple in the said property.

2. Determining the purchase price payable in respect of the said Application.

3. Determining the person or persons entitled to receive the said purchase money and in what proportion.

4. Appointing an Officer of the Courts to execute a conveyance of the fee simple interest on the said property in the event of the persons required by statute to convey the same refusing or failing to do so.

5. For payment of costs payable by the parties in respect of the said Application, such further or other relief that may be necessary for the purposes of such a conveyance.

Dated this 11th day of April 1995.

SIGNED; GEOFFREY BROWNE & CO.,
SOLICITORS FOR THE APPLICANT,
TYRONE HOUSE,
47 EYRE SQUARE,
GALWAY.

TO THE COUNTY REGISTRAR,
COURTHOUSE,
ENNIS,
CO. CLARE.

TO WHOM THIS APPLICATION MAY CONCERN.

Lady Solicitors' Golf Outing

The Annual Lady Solicitors' Golf Outing will take place at Kilkenny Golf Club on Friday, 25 August, 1995.

All last year's players will receive a circular at the beginning of July. If you did not take part last year, but would like details, please telephone 677 0335 with your name and address.

All participants must have a current handicap.

Prize Winners at Parchment Ceremony – April 7, 1995

Prizewinners at the Parchment Ceremony on April 7, (back row) l-r: Karen Holmes, Phena Byrne, Laura Delaney, John Houlihan, Education Officer, Ann Fitzpatrick, Mary Reynolds. (Seated) Niamh Hall and Michelle Doyle.

The Law School encourages and rewards academic excellence among students and accordingly, offers generous prizes across a broad range of subject areas. The following prizes were awarded at the Parchment Ceremony held on 7 April 1995.

1. **The Overend Scholarship,** awarded to the candidate who achieves the highest overall mark in the Final Examination – First Part, was awarded in 1994 to Ms. *Karen Holmes.*

2. **The Patrick O'Connor Memorial Prize,** in memory of Mr. *Patrick O'Connor,* Grandfather of the Chairman of the Education Committee, was awarded to Ms. *Anne Fitzpatrick* who achieved the highest mark in the Equity paper in the Final Examination – First Part 1994 sitting.

3. **The John Jermyn Probate Prize** is traditionally awarded to the apprentice who receives the highest mark in Probate on the Professional Course and this prize was very generously awarded, in person, by Mr. *John Jermyn* Senior to Ms. *Mary Reynolds,* 34th Professional Course, Ms. *Emer Byrne,* 35th Professional Course and Ms. *Laura Delaney* 36th Professional Course.

4. Ms. *Michelle Doyle,* who completed the 37th Professional Course in 1994, was awarded the **AIB Conveyancing Prize** in recognition of her outstanding results in Conveyancing in all Professional Courses run in 1994.

The Law Society itself awards prizes to the apprentices who receive the second and third highest marks in Conveyancing on their Professional Courses. The second prize was awarded to Mr. *Mark Mulany,* 36th Professional Course and third prize was awarded to Ms. *Elizabeth Treacy,* 36th Professional Course.

The Law Society also awards a prize annually to a student of the King's Hospital School who achieves the best overall grade in their Leaving Certificate and continues to pursue a career in law. This prize, certificate and medal for 1994 was awarded to Ms. *Niamh Hall,* who is reading her law degree in U.C.D.

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Asio otus (Long-eared owl). Photographed by Richard T. Mills.

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VOL. 89 NO. 5

JULY, 1995

LAW SOCIETY OF IRELAND

GAZETTE

FUNDAMENTAL REFORM OF COURTS & JUDICIAL SYSTEM?

THE CIVIL LEGAL AID BILL 1995

THE OCCUPIERS' LIABILITY ACT 1995

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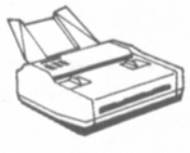

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Front cover: Clare Connellan, newly appointed Chairman of the Legal Aid Board. (See page 191).

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VIEWPOINT

Fundamental Reform of Courts and Judicial System?

The *Courts and Court Officers' Bill* – second time around – is soon to be reintroduced. Seven months into her term of office, the Minister for Justice, *Nora Owen*, has announced (20 June) that she has obtained Government approval to prepare a Bill that "will contain measures to achieve the most fundamental reform yet undertaken of the courts and judicial system". Therefore, the Minister can soon be judged on whether or not she can deliver, first legislatively and then financially, on the commitment in the *Programme for Government* of December 1994 to review the provisions of the 1994 Bill (published in October 1994) to ensure that measures would adequately address the need to tackle the backlog of cases to be heard in all courts. A more detailed consideration of the Minister's proposals must, of necessity, await the publication of the actual text of the new Bill, but the general thrust does generate some optimism that the Government intends to seriously address the existing delays and inefficiencies.

The Minister's announcement indicates that the new Bill will provide for the appointment of *three* additional Supreme Court judges and enable that court to sit in divisions of *five* and *three* judges at the same time. This proposal will replace the proposal in the old Bill to establish an intermediate court of appeal of limited jurisdiction. The Minister's indicated intention is that when the current arrears of pending Supreme Court appeals have been cleared it is proposed to abolish the Court of Criminal Appeal and to transfer its jurisdiction to the Supreme Court, which would then become the sole appeal court for all decisions, both civil and criminal, of the High Court and the Central Criminal Court.

This proposal to numerically expand the Supreme Court and to consolidate the final appeal process seems a sensible one. However, it does remain to be seen in the medium term whether a total of eight appeal judges will be sufficient to achieve the intended objective of reducing delays at that end of the courts system. Also, in relation to criminal appeals, the valuable 'mix' of experience at present generally achieved in the Court of Criminal Appeal should not be lost as a result of the absorption of that court into the expanded Supreme Court.

The legal profession must applaud the proposal to increase the complement of judges in the other courts – the High Court by two, the Circuit Court by seven and the District Court by five. Again, it must be queried whether those increases in numbers in the Circuit and District Courts will be sufficient if the jurisdiction of each of these courts is subsequently extended, unless also accompanied by the appropriate increase in back-up staff and facilities.

It is right that the Judicial Appointments Advisory Board as originally proposed, to advise the Government on appointments to judicial office, is to be expanded to include three (no doubt, pre-eminent) lay members nominated by the Minister for Justice and approved by the Government, in addition to senior members of the judiciary and representatives of the Law Society and the Bar Council.

The original Bill provided for a Courts Commission with undefined functions. This proposal is now being substituted by a "Working Group to report by 31 December 1995 consisting of representatives of the judiciary and of Government Departments to formulate proposals for the establishment of a Courts Commission". This Working Group will be sadly lacking in 'practitioner cred' unless it also contains solicitor and barrister representatives. Only time will tell whether or not this Working Group proposal is a formula for 'shelving' the clearly worthwhile Courts Commission concept.

According to the Minister, the new Bill is to contain a more extended list of proposals "to increase efficiency in the interests of users of the courts service" – such as extending the powers of the Master of the High Court and the Taxing Masters of the High Court (including the power to order the payment of interest on awards); widening the powers of the Superior and Circuit Court Committees to make rules requiring the parties in personal injury actions to disclose in advance reports of expert witnesses; making more flexible the jurisdiction of the High Court and the Circuit Court to hear appeals without geographical constraints; and, making more geographically flexible the criminal jurisdiction of the District Court. The new Bill will also restrict the right of a person charged with an indictable offence outside Dublin to opt for trial in the Dublin Circuit Criminal Court. The increase in the exercise of that existing right has in recent times given rise to a large backlog of pending trials in Dublin.

The prohibition on the wearing of wigs in court by barristers will survive into the new Bill. On that momentous day when this prohibition comes into effect, will we witness a flotilla of redundant forensic headgear floating down the Liffey from the Four Courts? Will the new Bill be silent on the use of judicial wigs in the three highest courts? And will solicitor judges sitting in the Circuit Court be wigged or unwigged?

The new Bill will also provide funds for judicial training courses arranged by the judiciary themselves "to enable judges to keep up-to-date with developments in a range of legal and other areas". This proposal makes

more sense than the original proposal which would have required those with ambition for judicial office to first patently manifest that ambition by attending training courses as a pre-qualification for possible appointment.

The Minister intends to provide in the new Bill for a uniform retirement age of 70 for newly-appointed judges of the three highest courts. District Court judges are to remain eligible for extensions of terms from age 65 to 70 and 72 will remain the retirement age for existing High and Supreme Court judges. There seems no good reason why the fixed retirement age for District Court judges should not also be 70, to obviate the present somewhat demeaning process of seeking Ministerial extensions. The standardisation of the judicial retirement age makes sense and would go some way towards changing any perception that judges should be judged otherwise than on their individual fitness to serve, irrespective of what court they belong to.

Finally, it is regrettable to note that, whereas she is proceeding with the original proposal to make solicitors as well as barristers eligible for appointment as Circuit Court judges, the Minister is apparently not willing to extend the eligibility of solicitors for appointment to the High or Supreme Courts. Perhaps, in the course of its passage through the Oireachtas, the new Bill will at least be amended to permit solicitor Circuit Court judges to be eligible for promotion to the Superior Courts after four years judicial service – as is the position in Northern Ireland. A solicitor who actually demonstrates his or her judicial abilities in the Circuit Court should at least be able to aspire to such a promotion. ❐

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President and Director General Visit Leitrim Bar Association

The President of the Law Society *Patrick Glynn* and Director General *Ken Murphy* visited Leitrim Solicitor's Bar Association on Tuesday 30 May. The President and Director General attended a meeting of the Bar Association and thereafter were entertained to lunch. They emphasised the importance of solicitors opposing measures such as Section 153 of the Finance Bill 1995. The fact that solicitors do so oppose such encroachments on the rights of citizens is very important. It was essential that the Law Society did so as a united body. This was very significant. It did not mean that solicitors were condoning tax evasion. The Director General and the President were congratulated by the President of Leitrim Solicitors Bar Association *Michael P. Keane* on the very sensible way they conducted this particular campaign and were assured that their efforts were much appreciated by solicitors all over the country. Mr. Murphy was congratulated on his appointment as Director General of the Law Society and on behalf of Leitrim Solicitors BarAssociation, Michael P. Keane, wished him every success in this onerous position.

Leitrim Observer

Some members of Leitrim Bar Association with the Director General and President:

Front Row: Mary Reynolds, Solicitor, Carrick on Shannon, Patrick Glynn, President, Law Society, Claire Moran, Solicitors Apprentice, (Cathal L. Flynn & Co), M.P. Keane, President, Leitrim Solicitors Bar Association (Flynn & McMorrow).

Back Row: Conal Gibbons, Solicitor (Cathal L. Flynn & Co), Ken Murphy, Director General, Law Society, Michael Keane, (Flynn & McMorrow), Peter Collins, (Thomas P. Burke & Co), Brian Toolan, (Walter P. Toolan & Sons, Ballinamore).

Photograph: John Keaney.

'No Solicitors Need Apply' – An Unacceptable Relic of History

The Law Society received substantial media coverage recently for two direct challenges to the unjustified exclusion of solicitors from appointment to certain posts reserved solely for barristers.

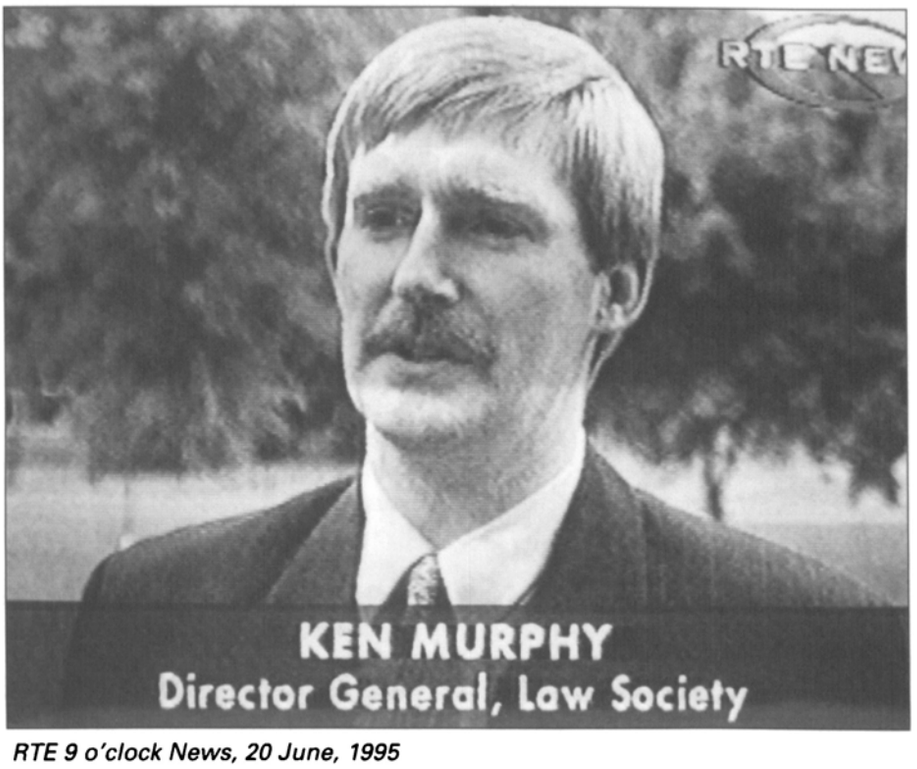
Solicitor Judges

On 20 June, 1995, the Minister for Justice announced a series of amendments to the Courts and Court Officers Bill 1994 which are so extensive as to transform it to a large extent into a new Bill. The new text has yet to be published. However, the Minister's press release was explicit in relation to many of the Bill's contents.

The press release recorded, among many other things, that the Bill would continue to propose lifting the prohibition on appointment of solicitors as judges of the Circuit Court. However, the exclusion of solicitors from eligibility for appointment as judges of the High Court and Supreme Court would be unchanged.

Within two hours the Society reacted with its own press release expressing disappointment that the Minister proposed to continue the unjustifiable exclusion of solicitors from eligibility for appointment as judges of the High Court and Supreme Court. This was reported the next day in *The Irish Times* and the *Irish Independent*.

The Society's Director General, *Ken Murphy*, gave a television interview to reporter *Kieron Wood* which appeared on the RTE 9 o'clock News on 20 June, 1995, in the course of which Mr. Murphy said "while the proposal to allow solicitors to be appointed as judges in the Circuit Court is to be welcomed, it should be followed through to its logical conclusion. Solicitors represent 80% of the legal profession and their continued exclusion from appointment as judges of the High Court and Supreme Court is a relic of history which operates against the public interest".



RTE 9 o'clock News, 20 June, 1995

Attorney General's Office

On Friday, 23 June, 1995, national newspapers carried an advertisement for the position of Senior Legal Assistant at the Attorney General's Office, the post which had recently become vacant with the retirement of Mr. *Matt Russell*. The job carries a salary of £75,047.00. The advertisement explicitly stated that the appointment was open to barristers only.

At a parchment conferring ceremony that afternoon the President of the Law Society, *Patrick Glynn*, expressed fury at the exclusion of solicitors from consideration for the position. He argued strongly that the experience of solicitors during their professional careers rendered them suitable for all positions in the Attorney General's Office.

He continued, "in addition to experience in legal matters such as drafting complex documents and advising clients, many solicitors run substantial offices with large turnovers and staff numbers and have extensive experience in management and administration. The difficulties experienced in the Attorney General's Office previously might not have occurred if an experienced solicitor/manager had been running that office. The Society will continue to press for equal treatment for solicitors and barristers for recruitment to all posts in the Attorney General's Office", he said.

The President's remarks were fully reported in *The Irish Times* and *The Sunday Business Post*. ❐

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The Occupiers' Liability Act 1995: Modification of Occupiers' Duty to Entrants

Dr. Eamonn G. Hall

Introduction

The Occupiers' Liability Act, 1995 became law on July 17, 1995. The principal objective of the Act is to simplify and clarify the law on occupiers' liability by giving it a firm statutory basis and to implement recommendations contained in the *Law Reform Commission's Report on Occupiers' Liability* (LRC 46-1994).

The law on occupiers' liability in Ireland has engaged the intellects of some of the great lawyers in this State. For example, in 1974 an advisory committee on Law Reform (established in 1966 and composed of representatives of the Benchers of King's Inns, the General Council of the Bar, the Law Society and the Law Faculties of Trinity College Dublin, University College, Dublin and University College, Cork) produced a report entitled *Reform of Law of Occupiers' Liability in Ireland* (Stationery Office, Dublin, Prl. 4403) which made certain recommendations in relation to the reform of the law on occupiers' liability. The thesis of Professor *Bryan McMahon*, solicitor, for the degree of Ph.D. from the National University of Ireland on *Occupiers' Liability a Comparative Study and Proposals for Reform* formed the essence of the 1974 Report.

Members of the Advisory Committee involved in the 1974 Report represented la crème de la crème of the legal profession at that time and included Mr. Justice *A. Ó Caoimh* (Chairman), Mr. Justice *John Kenny*, Mr. *John Cooke*, BL, Professor *R.F.V. Heuston*, Mr. *Eric A. Plunkett*, Solicitor, Mr. *Matthew Russell*, B.L., Professor *W.D. Finlay*, SC, Professor *Rory O'Hanlon*, SC, Mr. *Niall Osborough* and Mr. *J.C. Brady*, Solicitor.

Key Definitions

There are several key definitions in the *Occupiers' Liability Act, 1995*. One such definition is that of "occupier" who is defined in relation to any premises as meaning:

> "a person exercising such control over the state of the premises that it is reasonable to impose upon that person a duty towards an entrant in respect of a particular danger thereon and, where there is more than one occupier of the same premises, the extent of the duty of each occupier towards an entrant depends on the degree of control each of them has over the state of the premises and the particular danger thereon and whether, as respects each of them, the entrant concerned is a visitor, recreational user or trespasser".

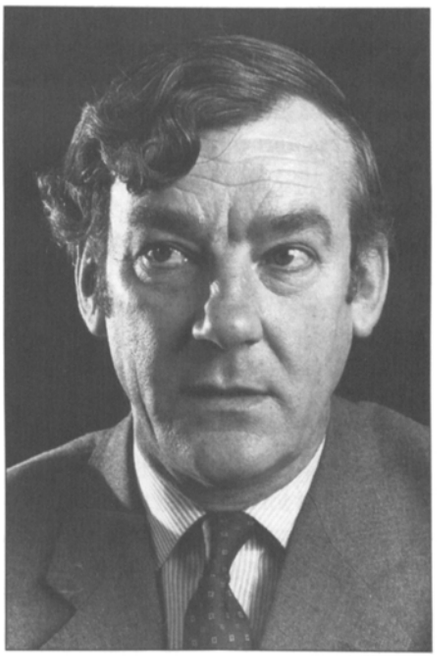
"Entrant" is defined in relation to a danger existing on premises as "a person who enters on the premises and is not the sole occupier". "Premises" is defined as including

> "land, water and any fixed or moveable structures thereon and also includes vessels, vehicles, trains, aircraft and other means of transport".

In the context of premises, "danger" is defined as meaning "a danger due to the state of the premises".

The main provisions of the 1995 Act

An occupier of premises now owes a duty towards three classes of entrant – visitors, recreational users and trespassers. The duty owed to visitors is to take reasonable care that they and their property do not suffer injury or damage by reason of any danger existing on the premises of the occupier ("the common duty of care") (section 3) – subject to restriction, modification or exclusion referred to below (section 5). The duty owed to the recreational users and trespassers is not to injure them intentionally or act with reckless disregard for them (section 4 of the Act).



Professor Bryan McMahon suggested reform as long ago as 1972.

As stated, in certain circumstances, occupiers are entitled to modify their duty by agreement or notice and, in all cases, depending on the particular circumstances, a warning may be sufficient to absolve an occupier from liability (section 4(2)(h) and section 5 of the Act).

Entering Premises to Commit an Offence

Where a person enters premises for the purpose of committing an offence or commits an offence while there, the occupier will not be liable for injury or damage unintentionally caused to

that person unless a court determines otherwise in the interests of justice. Attempted offences are also covered (section 4(3) of the Act).

Modification of Occupiers' Duty to Entrants

Occupiers may restrict, modify or exclude the level of the duty which they would normally owe to *visitors* by express agreement or notice, provided they act reasonably in so doing and, where a notice is involved, the occupier must take reasonable steps to bring the notice to the attention of visitors. If the notice is prominently displayed at the normal means of access to the premises, that will be *prima facie* evidence that the occupier has taken reasonable steps to bring it to the visitor's attention (section 5(2) of the Act).

The Occupiers' Liability Act, 1995 illustrates the importance of notices in modifying the duty of occupiers to entrants: notices will have to be simple, clear, reasonable and placed in prominent positions.

Any such restriction, modification or exclusion, however, will not allow an occupier to injure a visitor intentionally or to act with *reckless disregard* for a visitor or the property of a visitor.

In relation to a danger existing on premises, and in the context of the duty not to act with reckless disregard for the person or the property of a recreational user or a trespasser, in determining whether or not an occupier has acted with reckless disregard, regard will be had to several circumstances including "the nature of any warning given by the occupier or another person of the danger" (section 4(2)(h) of the Act).

However, there is a proviso in section 4 of the 1995 Act that where a structure on premises is or has been provided for use primarily by recreational users, the occupier shall owe a duty towards such users in respect of such a structure to take reasonable care to maintain the structure in a safe condition, provided that, where a stile, gate, footbridge or other similar structure on premises is or has been provided *not* for use primarily by recreational users, the occupier's duty towards a recreational user thereof in respect of such structure shall not be so extended.

An occupier who has taken all reasonable care when engaging an independent contractor will not be liable for injury or damage caused to an entrant by the contractor's negligence unless the occupier knows, or ought to know, that the work has not been properly done (section 7 of the Act).

Both common law and statutory provisions are preserved in the 1995 Act which impose responsibilities on particular classes of occupiers, for example, hotel proprietors, which are greater than those imposed by the 1995 Act. The Act also preserves the liability of occupiers under the present law for certain duties which they cannot delegate to independent contractors, for example, duties in relation to work which is inherently dangerous.

The Importance of Notices

The 1995 Act illustrates the importance of notices. Many of us have seen notices such as "Private: Trespassers will be prosecuted: By Order". In a chapter on trespassers, licensees and invitees, a writer once introduced the topic of the above notice with a quotation from *Tristram Shandy*.

> "Said my mother, 'What's all this story about?'
> – 'A cock and a bull,' said Yorick."

In practice, the notice "Trespassers will be prosecuted" had little significance. Trespass was, in general, a tort giving rise to civil proceedings.

Notices will have to be simple, clear, reasonable, placed in prominent positions and carefully drafted to enable occupiers to restrict, modify or exclude their duties under the 1995 Act.

❐

Compensation Fund Payments – May, 1995

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Council at its meeting in May 1995.

	IR£
Jonathan P.T. Brooks, 17/18 Nassau Street, Dublin 2.	72,111.32
John K. Brennan, Mayfield, Enniscorthy, Co. Wexford.	650.00
Malocco & Killeen, Chatham House, Chatham Street, Dublin 2.	185,000.00
Michael Collier, 2 Ross Terrace, Malahide, Co. Dublin.	1,620.35
Michael Dunne, 63/65 Main Street, Blackrock, Co. Dublin.	100,000.00
	359,381.67

Compensation Fund Payments – June, 1995

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Council at its meeting in June 1995.

	IR£
John K Brennan, Mayfield, Enniscorthy, Co Wexford.	1,527.92
Jonathan P.T. Brooks, 17/18 Nassau Street, Dublin 2.	460.00
	1,987.92

❐

Clare Connellan – A Profile

Clare Connellan, the Law Agent of ICC Bank, has recently been appointed as Chairman of the Legal Aid Board. She is the first solicitor to be appointed to this position which is a welcome and sensible development. She is also the first woman to be appointed to the position since it was held by *Mella Carroll* who is now a High Court judge. She is already enjoying the challenges of her appointment which is for an initial five year period. Clare took time out from her busy schedule to talk to the *Gazette*. She says there are many live issues facing the Board including the Civil Legal Aid Bill which is currently going through the Dail. "The Board has had a number of meetings already and its members are very enthusiastic", she said. "The Board has a very challenging and exciting future and we hope to continue to provide an efficient service and set up structures to deal with future expansion while ensuring the cost effectiveness of the Legal Aid Scheme." "This is all the more challenging" she continues "given that the annual budget has increased to £6,500,000 and the number of law centres in the last year has increased from seventeen to twenty-six. The Board now employs 75 solicitors and there is further expansion from 1996 planned."

Clare qualified as a solicitor in 1969. She worked in her father's practice in Ballyjamesduff in Co. Cavan until her father died and the family practice was sold. She then moved to Dublin where she worked with *Barry O'Reilly* of P.J. O'Reilly, Solicitors. "Barry O'Reilly was an excellent teacher. Not only did he teach me law, but he also taught me a great deal about organisation and administration of a practice", she said. He encouraged her to get involved in such organisations as the Dublin Solicitors Bar Association and the Society of Young Solicitors of which she became Chairman. She also served as a Council member of the Law Society for five years and during that time she was a founder member of the Younger Members Committee, Chairman of the Premises Committee and a member of the Education Committee and Education Advisory Committee. She is now a member of the Disciplinary Tribunal. She enjoyed her time on the Council but has had to give it up due to family commitments. She had twins at that time who are now 11 years old and another child who is 12 years old. She is married to Judge *Murrough Connellan*, a District Court judge who is also a solicitor.

About sixteen years ago she was appointed as a Solicitor in ICC Bank, specialising in the commercial area of the law. Again she says she was lucky to find herself working for another "excellent teacher in *Brendan O'Leary*". Initially she was promoted to Senior Solicitor, then to Deputy Law Agent and then Law Agent, the position which she currently holds. She has overall responsibility for providing legal services to the Bank. There are five solicitors and thirteen support staff within the Department. She feels that the financial services area has become so regulated that a strong in-house legal team is vital to financial institutions and indeed any large organisation. "A solicitor has a very important role in making a business successful", she said. There is an important role for solicitors to play in business nowadays and she feels strongly that they can add value to a business and be a viable part of a management team. The speed of business life today is such that the prior knowledge of the company and its business which the in-house lawyer possesses is extremely valuable. "To manage an in-house legal department you have to work hard at staying up-to-date with the law. You have to strive to streamline working procedures to ensure your department is operating efficiently and cost effectively and you have to communicate with your colleagues to ensure consistency of advices" she says.

Given that Clare has been with ICC for sixteen years, it is obvious that she thinks highly of her employers. "They have always facilitated me in getting involved in external activities" she said. She says that ICC Bank is a very quality service orientated organisation. "Solicitors must recognise that they are in a service industry – providing a good quality service to our clients must be a priority", she said. She also strives to provide a high quality service to the Bank by tying legal advice more closely to business objectives and ensuring that her Bankers are happy with the service they receive from the Law Department. Of course this in turn will impact on the quality of service which the customer gets from ICC Bank. She enjoys good relations with her colleagues in private practice and being in a specialised area is happy to help and give advice when asked.

I asked her view on women with demanding careers and how she herself juggles a demanding career with family life. "It can be difficult to come from managing 17 staff and have to start looking after three children the minute you walk in the door. I think I manage quite well – it is a matter of organisation and forward planning. All spare time is allocated to family but there are times I would love to have a little bit more time for myself" she answered. On the topic of opportunities for women at senior level, she feels it can be difficult to rise to ranks of senior management. "Women have to put in a lot more extra effort to get there" she said. ICC Bank has a policy of equal opportunities for men and women but despite this only two out of fourteen divisional managers are women. Happily things are changing but there is still progress to be made, she feels. Clare Connellan certainly has overcome any obstacles in her way. She has managed to achieve a tremendous amount during her legal career and as Chairman of the Legal Aid Board we wish her well.

Catherine Dolan ❐

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REVIEW OF OFFICIAL SECRETS ACTS

Dáil Select Committee on Legislation and Security

The Committee is to commence a review under its terms of reference of the Official Secrets Acts and all other statutory provisions which restrict access to information and is to report to Dáil Éireann with recommendations to bring these into line with the best international standards of public information provision.

In order to assist in its work the Committee would welcome submissions in writing from interested individuals or groups.

Submissions should be forwarded as soon as possible but no later than Friday, 1 September, 1995, to:

The Clerk,
Select Committee on Legislation and Security,
Kildare House, Kildare Street,
Dublin 2.

Charles Flanagan, T.D.,
Chairman of the Select Committee

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The Civil Legal Aid Bill, 1995

by Sabha Greene*

In March of this year the Minister for Equality and Law Reform, *Mervyn Taylor,* TD, introduced the Civil Legal Aid Bill in the Seanad[1]. The purpose of the Bill is to place the Scheme of Civil Legal Aid and Advice[2] on a statutory basis, but it provides for only limited improvements. This may be due to the fact that the Bill has been drafted in the absence of any formal evaluation of the 15 year old service. While the Free Legal Advice Centres have long campaigned for the Scheme to be placed on a statutory footing, it is regrettable that its inadequacies are to remain virtually intact.

Sabha Greene

It was in the late 1960s that the campaign for the introduction of legal aid in civil cases began to gain momentum, with the establishment in 1969 of FLAC, an organisation with the stated aim of campaigning for the introduction of civil legal aid. In 1975 the Coolock Community Law Centre was set up, to this day the only example of an independent community based law centre in Ireland. Soon after, in 1977 the Pringle Committee[3] made its report to the Department of Justice with the majority favouring the introduction of a comprehensive State service for those unable to afford private lawyers. The Committee went on to make recommendations for a scheme of civil legal aid and advice, which included the establishment of community based law centres, an active role in making recommendations for law reform, and an obligation to provide education services. However, it was not until the decision of the European Court of Human Rights in the 1979 case of *Airey -v- Ireland*[4] that the government established the Scheme of Civil Legal Aid and Advice. In 1980 the Minister appointed the Legal Aid Board and the first Law Centre was opened.

Since then the Department of Equality and Law Reform has been created and responsibility for civil legal aid moved to the new ministry. This marked a fresh commitment to legal aid and since his appointment the Minister has secured significant increases in funding. However, the nature of the service remains largely unchanged since its inception, and it has become an almost exclusively family law representation service, a fact evident from the most recent figures published by the Legal Aid Board[5]:

LEGAL AID CERTIFICATES AWARDED IN FAMILY LAW – 1,791

LEGAL AID CERTIFICATES AWARDED IN OTHER CASES – 63

This development is due to a number of factors. Firstly, many areas of law are excluded from the remit of the Board. For example, there is no legal aid for defamation, property disputes or debt enforcement. Not only are certain areas of law excluded but also certain types of case such as group actions or where the subject matter of the application is of "a kind commonly described as a test case". The Pringle Committee addressed this question and made the following conclusion:

> ". . . in a comprehensive scheme, legal aid should be available for all types of civil proceedings. There seems to us to be no logical basis on which any particular case category could be excluded. The merits of any case and the question of granting legal aid should be assessed, not by reference to the category to which it belongs, but by reference to the particular circumstances of the case."[6]

Furthermore, where the matter is to be dealt with at a tribunal, such as the Employment Appeals Tribunal or the Social Welfare Appeals Officers, the Scheme and the Bill provide that legal aid is to be refused, albeit that the Bill enables the Minister to include tribunals by Order in the future. However, during the recent Committee Stage of the Seanad's debate, a number of Senators successfully proposed an amendment to extend immediately legal aid to such tribunals.[7]

As well as the emphasis being firmly on the area of family law, civil legal aid has developed as a purely representational service. It was designed to assist those who wish to enforce a legal right but are unable to afford paid legal representation. Yet research clearly demonstrates that lack of finance is only one reason that people do not have access to the justice system. A lack of awareness of one's legal rights and obligations can be as great a factor in ensuring that people do not have equality of access. In its deliberations the Pringle Committee recognised that there are many reasons why people living in poverty are deterred from seeking the services of solicitors. Apart from a lack of finance they also identified a lack of awareness of one's legal rights as a reason why people do not approach lawyers. Similarly there is a lack of knowledge as to the services which are available. Many people affected by poverty do not see their problems as having a legal solution, for example housing or social welfare issues. Others, while recognising that

they do have a legal problem, do not go to a lawyer for assistance. This is caused by the cultural gap which exists between the two. Lawyers are from a different educational and social background than their potential clients, and there can be a perception that they have no understanding of the difficulties of those who come from a totally different environment.

The Committee recognised that each of the identified barriers had to be removed and, therefore, advocated a service which would be concerned with more than merely providing the public with access to lawyers and the courts. To date only the issue of cost has been addressed by the Scheme of Civil Legal Aid and Advice, and the current Bill will do nothing to ameliorate the situation.

Advice, assistance and representation are merely part of the picture. Rather a comprehensive service would seek to tackle all the factors which hinder full equality of access to justice. Education, research, and law reform must also be seen as essential for publicly funded legal services to be effective and comprehensive.

Education as to rights and services should be incorporated as part of the functions of the Legal Aid Board to counter the lack of awareness on the part of its clients. In addition, programmes of education as to legal rights are very important if progress is to be made in identifying unmet legal need.

The present Legal Aid Board is in an ideal position to study the effects of much social legislation and make appropriate recommendations. Reform of the law that causes problems may be a much more efficient way of dealing with a lot of people's problems than litigation.

FLAC has always advocated that law centres have an input from the communities they serve[8]. Community management committees could determine the priorities of the law centres in response to the needs of the local area, and such involvement would foster an understanding of the law and its uses. In the current Scheme there is provision for limited community consultation but this has been removed from the Bill.

Moreover, the Legal Aid Board which administers the Law Centres, has no input from representatives of the client group. Organisations such as the Combat Poverty Agency or Women's Aid have practical knowledge of the difficulties confronting those who must use the services of the Board and this experience is invaluable in ensuring effective delivery of publicly funded legal services. Indeed in the course of the Seanad's debates, many Senators proposed amendments to ensure that some element of control would be vested in those for whom the service is established. However, while accepting these arguments, the Minister refused to allow a statutory obligation to include such representation at Board level[9].

The Civil Legal Aid Bill, 1995, provides a unique opportunity for debate on the future and nature of publicly funded legal services in Ireland. The original Scheme was introduced as an immediate response to the decision in the Airey case, and within its remit it has developed as an excellent family law representation service. But that remit was never intended as a long term strategy for legal aid. It would therefore be regrettable if the experience of the past 15 years were to be largely ignored and the inadequacies of the current Scheme copperfastened into legislation.

Sabha Greene is the Administrator of Free Legal Advice Centres

Footnotes

1. Civil Legal Aid Bill, 1995. Presented by Senator *Maurice Manning*, 2 February, 1995.
2. Scheme of Civil Legal Aid and Advice, as amended, 1980 – 86.
3. Report to the Minister for Justice of the Committee on Civil Legal Aid and Advice. 14 December 1977.
4. *Airey -v- Ireland*. Judgment of the Court, 9 October 1979. 2 .E.H.R.R. 305.
5. Annual Report of the Legal Aid Board, 1992.
6. S.2.6.6., p 46, Report of the Committee on Civil Legal Aid and Advice, *ibid.*
7. Report on the Proceedings of the Seanad, *Irish Times*, 12 May 1995.
8. The Closed Door – A Report on Civil Legal Aid Services in Ireland, FLAC & Coolock Community Law Centre, 1987.
   A Submission to the Department of Equality & Law Reform on civil legal aid services in Ireland, FLAC 1994.
9. Official Debates of Seanad Eireann, 6 April 1995.

❐

Irish Solicitors Golfing Society

Captains Prize

The results of Richie Bennett's Captains Prize held at Courtown on 31 May 1995 were as follows:-

Winner	*Ciaran O'Connor* 41 points (H/C 17)
Second	*John Bourke* 41 points (H/C 11)
Third	Frank O'Donnell 40 points (H/C 24)

The Patrick's Plate

Winner	*David Alexander* 39 points (H/C 9)
Second	*Brendan Duke* 38 points (H/C 9)

Handicaps 13 – 28

1. *David Tansey* 40 points (H/C 15)
2. *Pat McGonagle* 38 points (H/C 17)

Director General's Cup

Winner	*Rob Cussen* 35 points (H/C 12)
Front Nine	*Rory Deane* 21 points (H/C 6)
Back Nine	*Kevin Byrne* 21 points (H/C 9)

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Tim O'Sullivan 37 points (H/C 24).

❐

CORRESPONDENCE

The Editor,
The Law Society Gazette,
Law Society,
Blackhall Place,
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Dear Editor,
On behalf of The National Council for the Blind and The Richmond Brain Research Foundation. I thank you for your very generous response to my request for sponsorship of me to walk 200 kilometres in aid of these two charities.

I am greatly honoured and humbled by the truly remarkable response that you and our colleagues made to my appeal. I am happy to carry the goodwill and generosity of the legal profession on the walk.

I had intended to respond to every person who contributed individually. Many of you indicated that an acknowledgement was not necessary. I think it important that I do acknowledge in general the very generous response of you my colleagues in law. I am sure you would prefer that I pay the £840.00 that it would cost to send individual acknowledgements to the two charities.

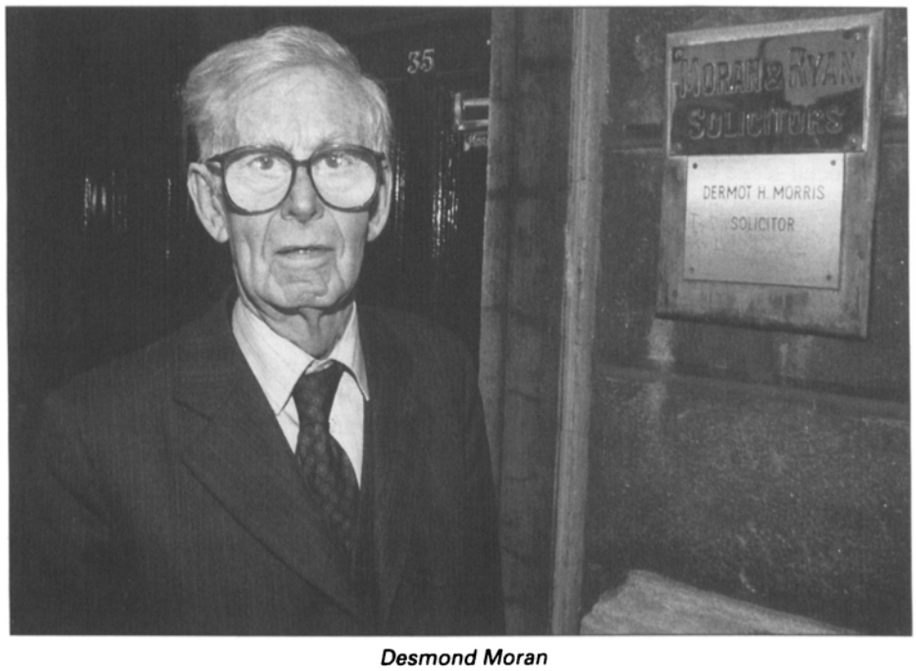
I am happy to advise that the total amount I received in sponsorship is £22,000.00.

With sincere renewed thanks to all of you.

Patrick O'Connor,
Solicitor,
Swinford.

Desmond Moran K.M., Solicitor – An Appreciation

Desmond Moran, who died on 1 October, 1994, was truly the doyen of the solicitor's profession in Dublin. He was admitted as a solicitor in 1931 and practised until the day of his death in his 86th year. Not merely did he engage in the practice of law as Moran & Ryan (Arran Quay) but he took a keen interest in the development of law and frequently made considered submissions on changes in the law to the Law Reform Commission, to the Law Society and (more recently) to the Lord Mayor's Commission on Crime. His views tended to be what nowadays would be viewed as right wing but they sprang from his personal rock-like sense of integrity and honour. Colleagues and clients alike had total trust in his high standards. A recent example of a strongly held view was that Desmond felt that the Criminal Law was overly protective of a person accused of a crime and he strongly argued for an easing of the burden of proof at present imposed on the prosecution.



Desmond Moran

As Sheriff for the County of Dublin from 1951 to 1978 he had the onerous task of running elections in all the Dublin County constituencies. His efficiency, his attention to detail, his strict compliance with statutory requirements and his impartiality were admired universally. Another of Desmond's civic commitments was to the Defence Forces in which he was a reserve officer since 1930 and was also a longstanding member of the Army Legal Services Club. Desmond became associated with the Order of Malta in 1953 and for the rest of his life served the order with loyalty and devotion. His service included being Vice-Director of its ambulance corps and successively Treasurer and Vice-President of the Irish Association and Regent of the Irish Sub-Priory.

To *Madeleine,* his children and grandchildren must go our sincere sympathy on their great loss, a loss perhaps tempered by the knowledge that he will be remembered with fondness by all who had the honour to know him.

P.S.

Criminal Law Committee Seminar

Speakers who participated in the recent seminar organised by the Criminal Law Committee l–r: Frank McDonnell, Niall Sheridan, Robert Eagar and James MacGuill.

The Criminal Law Committee of the Law Society held a Seminar at the Great Southern Hotel in Galway on 17 June. Fifty-one solicitors and apprentices from all over Ireland attended and greatly benefited from the excellent lectures given by *Robert Eagar, James MacGuill, Frank McDonnell* and *Niall Sheridan*. The topics covered were Drunk Driving Prosecutions, Advising Clients in Custody and the Criminal Justice (Public Order) Act 1994. One of the great benefits of the Conference was the lively question and answer session that followed each of the lectures.

The social scene was not neglected either. Galway is always a lively city and the participants had ample opportunity to discover some at least of its many pubs, discos and wine bars. The last official event of the Seminar was a dinner at which Judge *John Garavan*, who presides over the local District Court, made a very entertaining speech which greatly added to everyone's enjoyment of the evening.

Thanks are also due to *Benen Fahy*, Solicitor, of Galway who chaired the Seminar.

The Committee intends to hold a Seminar on 30 September in the Old Ground Hotel, Ennis, on the changes introduced by the 1994 and 1995 Road Traffic Acts, Advising Clients in Custody, Pre-trial Procedures and the law relating to Asylum Seekers. Application forms are available from *Patricia Casey* at the Law Society. Anyone who has any suggestions about topics which should be covered or possible venues for similar events in the future should contact *Patricia Casey*. ❐

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PEOPLE AND PLACES

Pictured at the Law Society Garden Party were l-r: James Nugent, SC, Vice-Chairman, Bar Council, Vera Cosgrave, Liam Cosgrave (former Taoiseach) and Anthony Ensor, Junior Vice President, Law Society.

Andrew F. Smyth, Senior Vice-President, Law Society, presents a painting to Walter Toolan, solicitor, in the presence of District Court Judge Oliver McGuinness and retired District Court Judge James Gilvarry.

Pictured at the Law Society Garden Party are Maeve Hamilton, The Hon. Mr. Justice Liam Hamilton, Chief Justice and Marye Glynn.

Pictured at the parchment ceremony on 23 June, 1995 are l-r: Professor Michael Hayes, Collette Hayes, Siobhan Hayes, Patrick Glynn, President, Law Society and Bruce St. John Blake, Council member, Law Society who presented Siobhan (apprenticed to him) with her parchment.

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Patrick McEnroe (McTiernan & McGowan, Sligo) who was presented with his parchment on 23 June, 1995, pictured with his wife, Sally and daughters Katie (13) and Anne (9).

NEW TITLES SUMMER 1995

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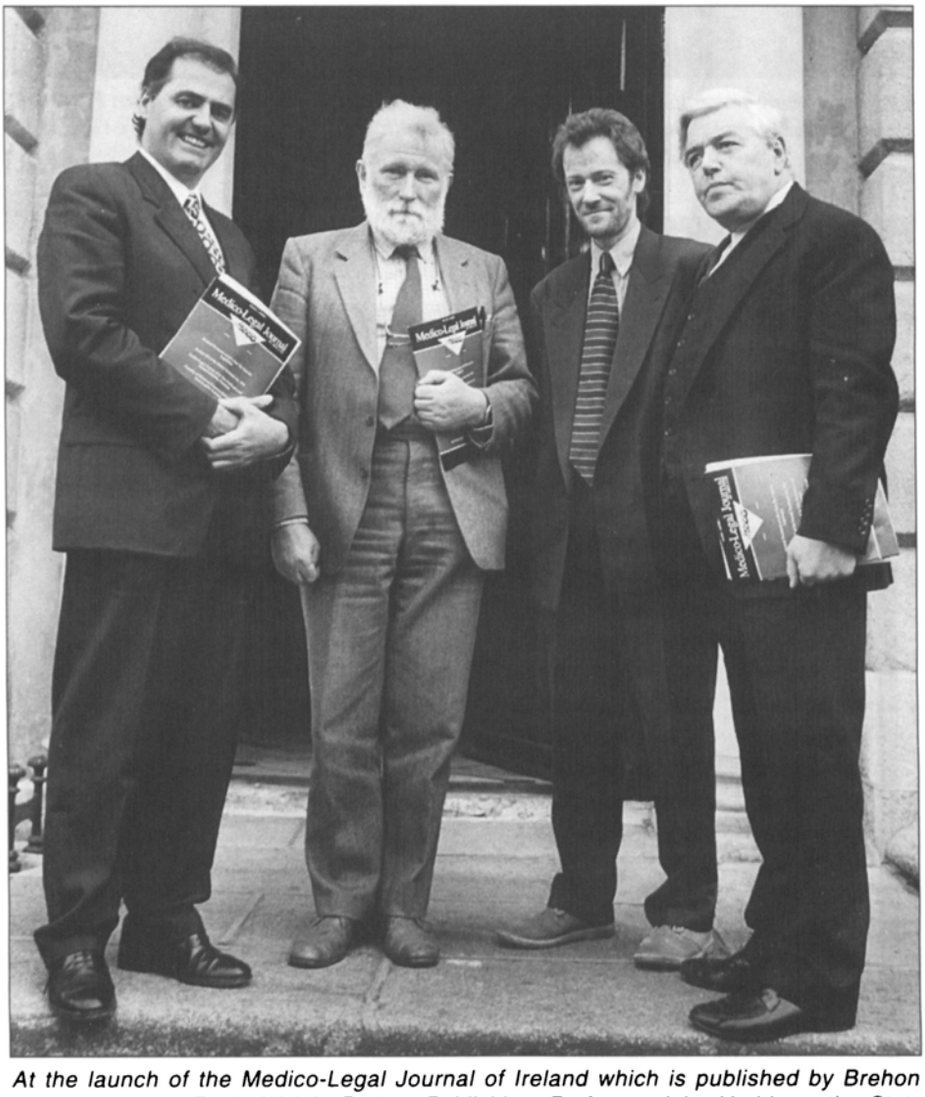
Pictured at a recent CLE seminar "Valuation of a Personal Injuries Action" were l-r: Speaker Neil Matthews, Branigan & Matthews; Seminar Chairman, Gerry Doherty, Chairman, Litigation Committee and James Nugent, SC, Vice-Chairman, The Bar Council.



At the launch of the Medico-Legal Journal of Ireland which is published by Brehon Publishing were Eddie Walsh, Brehon Publishing, Professor John Harbison, the State Pathologist, Bart Daly, Brehon Publishing and Patrick McEntee, SC.

Stress Management and the Legal Profession

by Professor Ciaran A. O'Boyle*

A few years ago, motorists caught in a tail-back on the M4 motorway would complete their journey into London by filing slowly past a greeting, daubed on the struts of a fly-over. Three huge words were splashed in white, one on each arch. The message read simply: 'GOOD . . . MORNING. . . LEMMINGS! Many of us fail to take control of our lives. We allow ourselves to be pushed along at a frenetic pace to a sad end. As the graffiti says: 'Death is nature's way of telling us to slow down'.

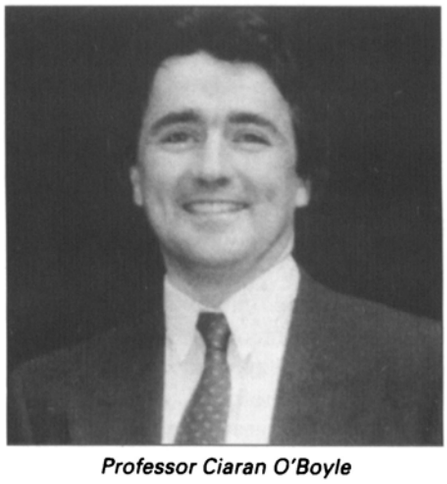
What is stress?

Stress occurs when there is a mismatch between our interpretation of the demands being placed on us and our ability to cope with those demands. Stress is not tied to a situation but to our interpretation of the situation. We judge situations as challenging or taxing and make the required adjustments in our emotions, thinking or behaviour to cope. When our coping resources are sufficient to meet the challenge we feel exhilarated by the successful achievement of a difficult task.

Most of us, however, think of stress as something which is harmful and unfortunately this is often the case. When the pressures of life and work exceed our ability to cope we suffer from negative stress or "distress". Conversely, just as an excess of demands can lead to stress, so can an absence of stimulation and challenge. This is the problem for people doing piece-work or for those who are under-promoted, who retire too early, or who find the boring nature of their jobs and the lack of personal fulfilment stressful.

What are the causes of stress?

The causes of stress can broadly be divided into four categories: traumatic events such as muggings, rapes and accidents; life events such as marriage, bereavement and changing job; daily hassles such as loosing one's keys, driving in heavy traffic, relationships and finally work.



Professor Ciaran O'Boyle

High workload, the need to work long hours, relationships with clients, colleagues and superiors, time pressures, financial worries, administrative duties and not having enough free time are common stressors in the legal profession. Change features prominently as a source of stress generally. The solicitor increasingly works as part of a team and is often called upon to fulfil a managerial role for which little training has been provided.

What are the effects of stress?

Stress may have emotional, psychological, physical and behavioural consequences and the symptoms differ from person to person. Chronic stress can result in burnout, a state of physical mental and/or emotional exhaustion which frequently occurs in the professions. The burned-out individual may become cynical, detached from clients and turn to destructive coping mechanisms such as alcohol and minor tranquillisers.

Stress management

If your work is creating a lot of stress, you have three options: quit and do something else; don't do anything and suffer; try to manage the stress. There are a number of approaches to the prevention and management of stress. You can concentrate on altering demands, you can increase your ability to cope, you can reinterpret the demands and your ability to cope or you can try dealing directly with the symptoms of stress, for example through exercise, relaxation or developing good support networks.

Altering Demands: Circle of Concern/Circle of Influence

Stephen Covey in his excellent book "The Seven Habits of Highly Effective People" provides a useful technique for distinguishing between the things over which you have influence and those which are outside your control. Start by drawing a circle and within its boundaries write all of the things with which you are concerned, that is with which you have a mental or emotional involvement. These might include your clients, your practice, your health, children, spouse, problems at work, the level of unemployment, the war in Bosnia, the political situation and so on.

As you look at your Circle of Concerns, it becomes clear that there are some things over which you have no control and there are others that you can do something about. These latter concerns can be represented by circumscribing them within a smaller circle; the Circle of Influence. By determining which of these circles is the focus of most of your time, you can discover whether you spend your life worrying about things over which you have no control or whether you deal with the concerns over which you have influence.

Proactive people work on the things they can do something about, that is within their Circle of Influence. The nature of their energy is positive, enlarging and magnifying, causing their Circle of Influence to increase. Reactive people, on the other hand, focus their efforts in the Circle of Concern. They focus on the weaknesses of other people, the problems in the environment, and the circumstances over which they have no control. The negative energy generated by this focus, combined with neglect in areas they could do something about, causes their Circle of Influence to shrink. We must try to live within our Circle of Influence. Remember, you can't change the past but you can ruin a perfectly good present by worrying about the future.

The Circle of Influence: altering demands/changing the situation

Most of us become aware of stress when it is acute and we attempt to cope when we are already experiencing symptoms. A proactive approach involves planning in advance and seeking to prevent stress by altering the demands which are placed upon us. Ask yourself "Is there anything I can do to change the situation to avoid or reduce stress?" The following examples and techniques illustrate this approach to stress management.

1. Deal with overload

Many people find themselves struggling to achieve more and more in less and less time. The solicitor, for example, may find himself seeing more clients, taking on extra activities and struggling to keep up with developments. In addition, he may find himself agreeing to do things for others which only increases the load.

2. Learn to say no

Most of us go through life operating under Myth of Obligation. We believe that if someone makes a request of us we are obligated to say "yes". We feel that we do not have the right to say "no" and doing so makes us feel guilty. However, if a person asks a question they are usually prepared for a "yes" or a "no". Ask for the request in writing. This will give you time to think and significantly cut down the number of requests. Be especially careful about agreeing to things on the telephone, the bane of the solicitor's life. There are five steps you can follow which make saying "no" easier.

1. Ask yourself "how do I feel about this request?" If you have a sinking feeling in your stomach because you do not want to do something, this is an early sign that you need to refuse.

2. Ask questions and find out what is involved before you agree.

3. After you have collected information about 1 and 2 above, decide. Don't be rushed. If you need to take time to think it over, do so. If someone pressurises you before you have had sufficient time to consider, refuse.

4. Explain, don't use excuses. The person may come back with a solution for your problem (excuse). An explanation says you would if you could but you can't.

5. Stick to your original decision even if the other person persists. Use the broken record technique "no", "no", "no". . .

3. Learn to delegate

One of the problems about high status occupations is that asking for help can be perceived as a sign of weakness. It is easy to take on the role of "Super Human". Many of us find ourselves doing tasks which should be delegated. This is particularly true of people who feel everything must be done perfectly and nobody can do it as well as they themselves. Think of all of the things you do and ask yourself honestly, whether you are the person who should be doing them. Trainee managers in some major US firms are pushed to increase their delegation by one extra task per week. A simple format for asking for help (having put aside the need to be Super-human) is 'Here's my situation. . . and what I need is. . .'

4. Identify the essential tasks

'What is the worst thing that would happen if I didn't get this done? How important is this meeting? Is it necessary for me to see clients at this rate or could I reduce the number of meetings? How is this activity progressing my goals in the longer term?

5. Avoid what can be avoided

Can the stressful situation be avoided entirely. Do I need the hassle of being involved in this or should I resign from the committee and free up time for other things? Can I reduce the stress of driving by avoiding rush hour? Can I schedule my "heartsink" clients for early in the day so that I do not spend the day with a sense of foreboding?

6. Learn how to confront people

Most of us feel uncomfortable when we think about confronting another person. Very often we don't have the skills to do it graciously and effectively. A situation may fester over a long period and the eventual confrontation may be explosive. The management consultant, *Barbara Braham,* suggests the DEAR technique for constructive confrontation.

D – Describe the situation as objectively as possible

E – Express your feelings and take responsibility for them

A – Ask specifically for what you need

R – Reinforce the other person by saying thank you.

7. Set goals

There is an old saying that many people aim at nothing and hit their targets with remarkable precision. Establishing goals in each major area of your life can significantly reduce your level of stress. Only by having goals can you determine what is important and what is not. For example, you may be seeing too many clients and be feeling

continually rushed; you're away too many evenings because of office or other commitments; and your spouse and children are missing you. What should you do?

Write down the various categories in your life; spouse, work, children, financial, recreation/exercise, extra-curricular committees etc. Determine what the stressors are in each category and plan your goals accordingly. Whatever you decide to do, make your plans specific and reasonable. Start with one or two at a time and expand them as you achieve progress. Review your goals monthly, occasionally modifying your goals if they aren't attainable. Keep at it.

Just as the stress process itself is dynamic, so too is stress management. For stress management to be effective there must be a continuous cycle of assessment, intervention and evaluation. There are no quick fixes here, rather stress management is a way of life. Taking control is the starting point for all stress management. As *George Bernard Shaw* put it in his play 'Mrs Warren's Profession': 'People are always blaming their circumstances for what they are. I don't believe in circumstances. The people who get on in this world are the people who get up and look for the circumstances they want, and if they can't find them, make them.' And example of working within the Circle of Influence!

**** Professor Ciaran A. O'Boyle is Professor of Psychology in the Medical School of the Royal College of Surgeons in Ireland. The material in this article was presented as a paper at the Annual Conference of the Law Society of Northern Ireland.***

❐

RESULTS OF SOCCER BLITZ RAFFLE

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2nd Prize – Yellow Ticket No. 43
3rd Prize – Blue Ticket No. 358

The winners can contact Orla Coyne at 872 3255.

Flowers of Scotland

Younger Members Committee – Visit to Scotland

Pictured on their visit to Scotland are l-r: Monica Leech, Younger Members Committee; Jan McCleen, Chairperson, Scottish Younger Lawyers Committee; Orla Coyne, Chairperson, Younger Members Coimmittee; Bailie Craig Roberton, City of Glasgow City Council; Philipa Howley, Younger Members Committee and John Campbell, Younger Members Committee.

During the weekend of 10/11 June the Scottish Young Lawyers played host to a "clan gathering" – of the legal variety – on the occasion of their annual conference. Delegates taking part were drawn from young lawyers groups in England, France, Belgium, Denmark and the Czech Republic. Six representatives from the Younger Members Committee attended from Ireland and were joined by two of our colleagues from the Northern Ireland Young Solicitors group.

Although the conference itself was held in Glasgow, Friday was spent on a working visit to Edinburgh which is the legal as well as the administrative capital of Scotland. Members of the Scottish Bar were on hand to explain the workings of the Scottish Legal System and to brief the party on the background of the cases being heard in the Court of Sessions.

It was of some interest to note that Scottish Barristers have evolved the practice of walking up and down their equivalent of the Round Hall to avoid eavesdroppers! If the current good weather continues this practice may well catch on in Dublin!

The weekend was not without its social events including a civic reception hosted by the Glasgow City Council.

The social highlight however, was the Highland Ceilidh at which the visiting delegations amused and entertained the hosts with our interpretations of Scottish dancing!

From an Irish point of view, it was very reassuring to discover that many of our concerns about working conditions within the profession and career prospects are shared by our fellow Europeans.

"Haste ye back" is the traditional Scottish farewell and the courtesy, friendship and hospitality of our hosts on this occasion were greatly appreciated by the Younger Members Committee, all of whom look forward to the return visit.

JC

L E G I S L A T I O N U P D A T E

PARLIAMENTARY COMMITTEE

1995 LEGISLATION UPDATE – *1 January 1995 – 10 June 1995*

No.	Title of Act and Date Passed	Commencement Date/s
1.	Ministers and Secretaries (Amendment) Act, 1995 (27 January, 1995) *Amends the Ministers and Secretaries (Amendment) (No. 2) Act, 1977, in order to provide for the appointment of 17 Ministers of State at Departments of State.*	27 January, 1995
2.	Adoptive Leave Act, 1995 (15 March, 1995) *Provides for the grant of adoptive leave to female employees and, in certain circumstances, to male employees for the purpose of child adoption; extends to them the protection against unfair dismissal conferred by the Unfair Dismissals Act, 1977, and provides for connected matters.*	20 March, 1995 (S.I. No. 64 of 1995)
3.	Social Welfare Act, 1995 (5 April, 1995) *Provides for the increases in the rates of social welfare payments announced in the Budget and for a number of other amendments to the Social Welfare Scheme.*	See Act for various commencement dates. Commencement Orders to be made for some sections. Section 11 (S.I. No. 93 of 1995); Section 14 (S.I. No. 112 of 1995).
4.	Heritage Act, 1995 (10 April, 1995) *Establishes An Chomhairle Oidhreachta, the Heritage Council, to perform certain functions in relation to the physical heritage.*	10 April, 1995 10 July, 1995 – Establishment Day (S.I. No. 177 of 1995).
5.	Regulation of Information (Services outside the State for Termination of Pregnancies) Act, 1995 (12 May, 1995) *Prescribes the conditions subject to which certain information relating to pregnancy termination services lawfully available outside the State may be made available in the State. Arises from the Fourteenth Amendment to the Constitution which affirms the right to obtain or make available such information subject to such conditions as may be laid down by law. Amends the Indecent Advertisements Act, 1889, and the Censorship of Publications Acts, 1929 to 1967, and provides for related matters.*	12 May, 1995
6.	European Communities (Amendment) Act, 1995 (23 May, 1995) *Establishes a Joint Committee on European Affairs by transferring the statutory functions exercised by the Joint Committee on Foreign Affairs in relation to the supervision of E.C. secondary legislation to the Joint Committee on European Affairs.*	23 May, 1995
7.	Road Traffic Act, 1995 (25 May, 1995) *Amends the disqualification requirements of section 26 of the Road Traffic Act, 1961 (as inserted by section 26 of the Road Traffic Act, 1994).*	25 May 1995
8.	Finance Act, 1995 (2 June, 1995) *Charges and imposes certain duties of customs and inland revenue (including excise); amends the law relating to customs and inland revenue (including excise) and makes further provisions in connection with finance.*	See section 179 of the Act and commencement sections of various chapters of the Act

Selected Statutory Instruments

1/1995 Solicitors (Form for Practising Certificate 1995/96) Regulations, 1995

2/1995 Solicitors (Practising Certificate 1995/96 Fees) Regulations, 1995

16/1995 Maternity Protection Act, 1994 (Commencement) Order, 1995

27/1995 EC (Unfair Terms in Consumer Contracts) Regulations, 1995

55/1995 Criminal Justice Act, 1994 (Commencement) order, 1995

56/1995 Land Act (Additional Categories of Qualified Persons) Regulations, 1995.

69/1995 Local Government (Planning and Development) Regulations, 1995

75/1995 Local Government (Planning and Development) (No. 2) Regulations, 1995

86/1995 Road Traffic Act, 1994 (Commencement) Order, 1995. *Ss.40, 41 and 47 of the Act came into operation on 19 April, 1995; s.43 came into operation on 1 June, 1995. See also S.I. No. 222 of 1994 Road Traffic Act, 1994 (Commencment) Order, 1994, and S.I. No. 350 of 1994 Road Traffic Act, 1994 (Commencement) (No. 2) Order, 1994.*

87/1995 Road Traffic Act, 1961 (Section 103) (Offences) Regulations, 1995

89/1995 Road Traffic Act, 1994 (Section 41) Regulations, 1995

102/1995 Solicitors Acts, 1954 to 1994 (Apprenticeship and Education) (Amendment) Regulations, 1995

104/1995 Criminal Justice Act, 1994 (Section 32 (10)(a)) Regulations, 1995

105/1995 Criminal Justice Act, 1994 (Section 32 (10)(b)) Regulations, 1995

106/1995 Criminal Justice Act, 1994 (Section 32 (10(d)) Regulations, 1995.

108/1995 Solicitors (Interest on Clients' Moneys) Regulations, 1995

124/1995 Solicitors (Amendment) Act, 1994 (Commencement) Order, 1995. *Ss.16, 17, 18, 22, 23, 25 and 58(3) came into operation on 12 May, 1995.*

129/1995 EC (Retirement of Farmers) Regulations, 1995

144/1995 Stamp Duty (Particulars to be Delivered) Regulations, 1995.

145/1995 Capital Gains Tax (Multipliers) (1995–96) Regulations, 1995.

Margaret Byrne, Librarian.

❐

Younger Members meet Southern Law Society

The Younger Members Committee of the Law Society in conjunction with the Southern Law Society, held a Seminar/Social get together in the Imperial Hotel on Friday the 24th March last at 6.00 pm.

This arose out of discussions which had taken place between the Southern Law Association and the Younger Members Committee of the lack of information that certain younger members of the Society felt that they were not obtaining in relation to the work and aim of the Younger Members Committee.

This year, we have not only a number of Council members on our Committee, but actually one of the Council members, namely *John Shaw* is also a member of the Review Group which has been set up by the Law Society to review the internal workings of the Law Society, and how possibly they can be changed to reflect the ever changing needs and views of their profession.

There was a very good response, approximately 40-50 Younger Members turned up in the Imperial Hotel and the talk which was given by *Orla Coyne* was very informal in relation to the Younger Members Committee, what work it has done, its aims and events that it holds throughout the year.

A further talk was given by *John Shaw* in relation to his work on Council, and more particularly the Review Group which is up and running at present.

After the talks, people were encouraged to meet with the speakers, and in fact a number of people did approach the speakers requesting further information in relation to the Younger Members Committee, and also in relation to other matters which directly affected them as apprentices and as younger members.

After the serious discussions, activity or a more light hearted nature took place around the free bar and certain members subsequently adjourned to a popular hostilary in Cork, where it appears half of the legal profession in Cork adjourn to after their weeks work on a Friday evening.

A note of thanks must also be given to *Frank Daly*, Council Member who attended the talk, and subsequently also partook of a few libations after the discussions.

Also, a word of thanks to *Pat Casey* who was instrumental in organising this meeting between the Younger Members and the Southern Law Association, and we thank him and them for all their kind hospitality.

❐

Recent Criminal Law Cases

Compiled by *Colette Carey*

Mindful of the needs of busy criminal law practitioners who require concise information on recent developments in case law, the Criminal Law Committee proposes that a synopsis of judgments handed down in recent selected cases will be published on a regular basis. The following constitutes the first such selection.

Court of Criminal Appeal:

1. **People (DPP) -v- *Sean Breen*, Applicant**

   The Applicant's conviction by the Special Criminal Court on charges of possession of ammunition was **quashed**. The Court of Criminal Appeal held that oral admissions ought not to have been allowed in evidence. It also held that basic fairness had been denied to the Applicant by the failure of the Gardaí to administer a caution – *People (DPP) -v- Shaw* [1982] IR applied.
   {Per *Egan J.*, 13 March 1995}

2. ***People (DPP) -v- Z*, Applicant**

   The Applicant had been convicted in Dublin Circuit Court on pleas of guilty to two charges of unlawful carnal knowledge of a girl under the age of 15. The complainant was the young woman at centre of the "X" case. Consecutive sentences of seven years penal Servitude (14 years *in toto*) had been imposed. On appeal the sentences were **varied** by the Court of Criminal Appeal to concurrent terms of four years penal servitude. The Court held that this was not a case where consecutive sentences were warranted and that seven year sentences were excessive in the circumstances of the case and on the basis of sentence imposed in similar offence cases over the last five years. A concurrent sentence of 12 months on a plea of guilty to indecent assault was **affirmed**.
   {*O'Flaherty J.*, 14 March 1995}

3. **In re: Section 2, Criminal Procedure Act, 1993 People (DPP) -v- Meleady and Grogan, Applicant**

   The Applicants' convictions in Dublin Circuit Court for assault and malicious damage were **quashed**. It was held that newly discovered facts (within the meaning of the 1993 Act) rendered the trial unsafe and unsatisfactory. However, a re-trial was not ordered as sentence had already been served. An application for a certificate under s.9 of 1993 Act that a miscarriage of justice had occurred was refused. The court reviewed the jurisdiction of the Court of Criminal Appeal. An application was made for a s.29 Cert (leave to appeal to S.C.) and for costs pending.
   {*Keane J.*, 22 March 1995}

4. **People (DPP) -v- Noel Fowler, Applicant**

   The Applicant had been convicted in the Dublin Circuit Court on a charge of handling. A larceny count had been withdrawn from the jury's consideration at the direction of the trial judge. It was held by the Court of Criminal Appeal that there was sufficient evidence for larceny and receiving (as an alternative) to be considered by the jury. The court also considered the treatment of alternative counts in an indictment. The conviction was **quashed** and no re-trial was ordered as sentence had already been served for handling.
   {*O'Flaherty J.*, 24 February 1995}

5. **People (DPP) -v- Vincent Connell, Applicant**

   The Applicant's conviction in the Central Criminal Court on a charge of murder was **quashed**. The provisions of the Criminal Justice Act 1984 (and Regulations thereunder) relating to treatment of persons in custody were considered. The court held that an inculpatory statement of the Applicant ought not to have been admitted in evidence. The court further held that there had been a breach of the Applicant's constitutional right of access to a solicitor. No order made directing a re-trial. Judgement was reserved on an application for costs.
   {*Egan J.*, 3 April 1995}

6. **People (DPP) -v- Christopher O'Donnell, Applicant**

   The Applicant's conviction in the Special Criminal Court on a charge of possession of explosives was **upheld**. The court found that the necessary legal powers of search under Section 30 had been invoked before the explosives were revealed. There was no causative link between the search and the production of the explosives. S.29 Certificate was **granted** by the Court of Criminal Appeal on 16 March 1995.
   {*O'Flaherty J.*, 28 February 1995}

Courts-Martial Appeal Court

1. **In the Matter of C., Appellant**

   The Appellant had been found guilty by Court-Martial of committing conduct to the prejudice of good order and discipline. The Appeal Court considered the principle enunciated in *Buckley* (CMAC 28/7/93 Finlay C.J.) viz. the

court's entitlement to avail of its own experience and knowledge to consider not only whether conduct was to the prejudice of good order and discipline but also whether the accused would have known it to be so. The Courts Martial Appeal Court held that there was no ground of appeal on the basis that the Court Martial had exceeded its jurisdiction, holding that under s.119 of the Defence Act 1954, both the Appellant and the bandsman with whom the conduct had been committed were at all times subject to military law. The right to privacy was also considered. The Courts Martial Appeal Court held that there was **no basis to challenge the finding of the Court Martial and the appeal was dismissed**.

An application to have the appeal heard *in camera* was refused, the court ruling there is no power given in the Courts Martial Appeals Act 1983 to exclude the public. Leave to appeal to the Supreme Court **was refused**. ❐

Garden Party

CLASP (Concerned Lawyers for the Alleviation of Social Problems) cordially invites you to a garden party at The Law Society premises, Blackhall Place, Dublin 7 on Friday, 28 July, 1995 at 6pm – 9pm.

Refreshments and music will be provided. All proceeds will be distributed to charities for homeless young persons.

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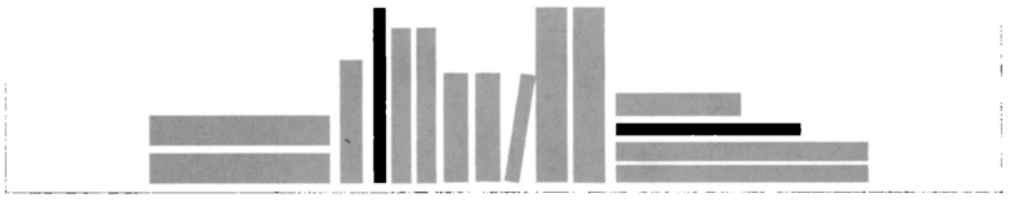
BOOK REVIEWS



Gill & Macmillan Annotated Constitution of Ireland With Commentary

Edited by J.Anthony Foley and Stephen Lalor. Published by Gill & Macmillan, Dublin 1995, Softback, pp353. £14-99.

In his Foreword to this work, Mr. Justice O'Flaherty points out that for any new book to be worthwhile, it must either deal with entirely new subject matter not previously covered, or adopt a new perspective on a subject already established.

There have been, of course, over the years, many learned commentaries on the Irish Constitution. This book does not purport to compete with the mainstream legal texts on the subject (there are, for example, very few references to decided cases), nor does it deal with the political background to the drafting of the Constitution. Rather, the specific focus of this commentary is on the development of the Constitution through its various amendments.

Since the Constitution was adopted in 1937, there have been thirteen amendments made to it, one in 1939, one in 1941 and all the rest since 1972. The book contains a complete collated text of the Constitution incorporating these amendments. There is a clever method of presentation which shows the original text, the parts of it which have been deleted, and those parts which have been added. It is thus possible at a glance to ascertain what the text of the Constitution was at any given time. This brings the book up to page 160.

The second half of the book goes through the various amending Acts and contains selected extracts from the Oireachtas debates which describe the background to each amendment. As the editors, who are both Civil Servants, point out in their Preface, these extracts were chosen "to be either representative or interesting. Sometimes a lone voice made a point not touched upon by other speakers but which seemed to be of interest. On other occasions, brief reference was made to very diverse areas of interest and it seemed necessary to mention these subjects in passing only".

Appendices deal with the development of judicial awareness of the Constitution, the 1967 Report of the Committee on the Constitution and a Chronology of significant dates and events.

This book will undoubtedly be of value to those interested in Irish history generally and in the Irish Constitution, its history and development in particular. It is a useful reference source for information not readily found elsewhere. Statistics of the total electorate, total poll, votes for and against etc. show the support for each of the constitutional amendments. Proposed amendments which were not passed are also described.

As for the legal practitioner, as previously mentioned, this book does not purport to compete with the established legal texts, nor does it do so. However, the collated text of the Constitution is certainly a useful feature. The extracts from the Oireachtas debates provide "a flavour of the legislative arena from which the constitutional amendments emanated". They provide an understanding of the background to the amendments which should be of assistance to practitioners in crafting arguments for future cases.

Karl Hayes

Terrell on the Law of Patents

Fourteenth Edition, Sweet & Maxwell, Hardback, 1040pp. Stg£148.00.

The many previous editions of this work indicate that Terrell is regarded by lawyers and patent attorneys alike as the standard text-book on patents. Until the thirteenth edition the work was equally so regarded by Irish practitioners. That edition and the one under review are perhaps of less relevance because of the sweeping changes made by the UK Patents Act, 1977 and latterly by the Irish Patents Act, 1992. The thirteenth edition appeared in 1982 and was the first to deal with the 1977 Act. The thirteenth edition appeared in 1982 and was the first to deal with the 1977 Act. Before then there was little difference in substance between the now repealed UK Patents Act, 1949 and its repealed Irish counterpart, the Patents Act, 1964; apart from the rather innovative Irish provisions of the time on the question of absolute novelty. There are now greater differences between the respective countries' legislation even though in substance both still remain similar. Thus the UK 1977 Act contains elaborate provisions in relation to employees' inventions and the compensation allowable to employees for inventions devised by them but which legally belong to their employers. No such provisions exist in the Irish 1992 Act. Conversely, the Irish legislation allows for the grant of "Short term" patents, i.e., patents granted for ten years duration for inventions without the need on application to satisfy the Patents Office of the novelty of the invention. Short term patent protection is not available under the UK Act.

The Irish Controller's Sixty-Sixth Annual Report for year 1993

highlighted the enormous reduction in the volume of Irish patent applications following Ireland's ratification of the European Patent Convention during 1992. This is due to the fact that, since ratification, Ireland can be designated for patent protection in applications filed centrally with the European Patent Office in Munich. Inventors seeking protection for their inventions in this country need no longer make application direct to the Irish Patents Office. In 1991, the last full year of operation of the 1964 Act, 4,580 applications were filed. In 1993, the first full year of operation of the new 1992 Act, that figure had dropped to 1,017 of which 533 applications were for short-term patents. A proportionate reduction was experienced in the United Kingdom following their ratification of the Eruopean Patent Convention in 1977. This has meant that a knowledge of the law, practice and procedure under the European Patent Convention and the Patent Co-Operation Treaty is now of pre-eminent importance for the practitioner. It is a criticism of the latest edition of Terrell that it still concerns itself primarily with the law, practice and procedure before the UK Patents Office; though it must be said there is a useful summary of European practice and procedure. With the rapidly declining importance of national Patent systems it is likely that the next edition of this work will be more heavily biased towards a treatment of the law, practice and procedure before the European Patent Office and the Patent Co-Operation Treaty.

Martin Tierney

Leading Cases on the Laws of the European Communities

Sixth Edition, Edited by D. Curtin, M. van Empel, E.L. Volker and J.A. Winter, Europa Institute, University of Amsterdam, Kluwer Law and Taxation, Publishers, Deventer, The Netherlands, 1994, xix + 795pp.

The late and celebrated *Karl Llewelyn* (1883 – 1962) Columbia Law School's renowned professor, spokesman for the American Realist Movement, best known for his writing on jurisprudence, commercial law, legal anthropology and legal education, as well as the architect of the *Uniform Legal Code*, once told a group of incoming law students:

> "The hardest job of the first year is to lop off your common sense of justice, to knock your ethics and your sense of justice into temporary anaesthesia. You are to acquire the ability to think precisely, to analyse coldly, – and to manipulate the machinery of the law. It is not easy thus to turn human beings into lawyers."
> (K. Llewelyn, *The Bramble Bush*, 1930).

Whilst recognising that sometimes a sense of justice will not assist a young lawyer in understanding why a promise not supported by consideration will be unenforceable, I profoundly disagree with the generality of the sentiments expressed by Professor Llewelyn. A common sense of justice, basic common sense and a sense of ethics, should be the hall mark of a lawyer at any age.

Reading through the cases in *Leading Cases of Laws of the European Communities*, I am impressed with the application of the common sense of justice, hence my introduction.

Professor Schermers, one of the initiators of the project has retired and has been replaced by Professor *Deirdre Curtin* of the Europa Institute of the University of Utrecht.

Due to space restrictions, I shall only refer to the chapter headings all of which are sub-divided into sections. The headings are: Foundations of Community Law; Institutions and Powers of Delegation; Judicial Protection; The Relationship Between Community and National Law; The Four Freedoms; Competition Policy; Community Policies; and External Relations including the Common Trade Policy.

The present writer regrets the omission of general introductions to each topic and references to further reading but understands that the editors must keep the book within tolerable proportions.

Practitioners can aspire to gain a true insight into the implementation of European Law by reading this book; they have available to them a handy source of basic reference material.

Dr Eamonn G Hall

The Law Reform Commission Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents

Law Reform Commission, Dublin, 1995, xiii + 133pp., Softback, £10.

This Report examines the case for Ireland becoming a party to the Hague Convention of 5th October 1961 or, to give the Convention its full title, the Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents. The Convention was adopted at the 9th Session of the Hague Conference on Private International Law in that year and although the Convention has remained open for signature by the State since then, Ireland has not seen fit, up to the present time, to ratify it. Of the existing member states which comprise the European Union, only Ireland and Denmark have failed to ratify the Convention.

The achievement of the Convention was to simplify the procedures – usually tedious and frequently complicated – which had to be complied with in order that a foreign public document executed in one country would be accepted in and given legal effect to in another country in which it was received and intended to be acted upon. The simple formula was to substitute for legalisation a new form of certification described in the Convention as an *apostille*. Anyone familiar with having such a document legalised in Ireland will be aware of the chain of verificatory signatures (and seals) which must be applied to it in order to render the document effective

in the country in which it is to be produced. For those who are not so familiar, the Report supplies a step by step description of the procedures involved. Space does not permit of the procedure being described in this article.

The Report is concerned with the abolition of legislation in the context of the processes which are carried out by the diplomatic or consular agents of the country in which a foreign public document has to be produced in order to authenticate the signature of the person who purports to verify the due execution of the document on behalf of the state from which it has emanated. In the case of a foreign public document executed in Ireland and intended for use abroad, this is done by a member of the consular staff acting on behalf of the Secretary of the Department of Foreign Affairs. The signature (and stamp) of the Department is then verified (or legalised) by an appropriate consular officer at the embassy in Ireland (or, in some cases, London) of the country in which the document is to be produced and acted upon. If Ireland should decide to ratify the Convention, the authentication of the due execution in Ireland of a foreign public document intended to be produced in and acted upon in another state would be by means of an apostille. Under the Convention an apostille must be applied by the "Competent Authority" in the state who is nominated and appointed for that purpose. The signature and seal (or stamp) of the Competent Authority to the apostille certificate would be accepted without further verification by the diplomatic or consular agents of the foreign state. There is much debate in the Report as to who might be nominated as the "Competent Authority" in Ireland and whether there is a case for the appointment of a number of persons or bodies to act as such Authority. The Commission concludes, and so recommends, that there should be a sole Competent Authority and that the Department of Foreign Affairs would be eminently suitable for such a role on the basis of its long experience – going back to the foundation of the State – and its satisfactory performance of the work which legislation involves. The Report identifies the areas in certain regulations and statutory instruments including the Rules of the Superior Courts in which amendments would require to be made in order to accommodate the apostille certificate in lieu of legislation.

The Commission recommends that Ireland should ratify the Hague Convention of 5th October 1961 and that one central Competent Authority should be appointed for the purpose is issuing, applying and recording apostilles and, as previously stated, that the Department of Foreign Affairs should be appointed to that role. The recommendations in the Report will, I believe, be warmly welcomed by various commercial, exporting and legal interests including the Faculty of Notaries Public in Ireland who, for well over a decade, have campaigned for Ireland to ratify the Convention.

Our many years of practice as a lawyer, I have found that reports published by the Law Reform Commission provide a succinct, yet comprehensive, review of the evolution and development of the law on the particular subject under review and its current status. This invariably saved me many hours of tedious and time-consuming research. The Report reviewed above supplies the reader with all he or she will ever need to know about the legislation of foreign public documents and the advantages which would be against if Ireland were to introduce the apostille system as the means of verifying the due execution of such documents. I strongly recommend the Report to lawyers and notaries whose work involves them in the preparation of or advising on foreign public documents.

E. Rory O'Connor

Offences Against the Person

by Peter Charleton, BL. Publisher: Roundhall Press, 1992, 415pp, hardback. £45.00 (hb), £25.00 (pb).

"Offences against the Person" was the first volume in the Irish Criminal Law Series, a series which "seeks to provide a comprehensive account of the entire body of criminal law in force in this jurisdiction". Such a series is long overdue. When I was a student I resented having to rely on foreign textbooks, supplemented by a few photo-copied decisions of the Irish Courts, when studying a system of law that was developing independently of its English equivalent. The Irish Legislature often slavishly follows English statutes when enacting new legislation but our judiciary has developed a more liberal jurisprudence, due presumably to the fundamental rights provisions of the Constitution.

This book is extremely well researched and states the law clearly and fairly. Every practising lawyer should have a copy for this reason. However, even the academic lawyer and student will find it useful in that the author often engages in a comparative survey of the relevant law in other jurisdictions and he is prepared to indicate how the law could be changed to bring it more into line with his own views.

It is worth noting at this juncture that the liberal jurisprudence in this country does not always find favour with the author. When referring to the "*Whelan* case" on joint possession, in which the accused were acquitted because the Court could not be certain that *all* of them were guilty, he is quick to show how this particular "problem" can be "rectified". Similarly, he is not at all impressed with the *"MacEoin"* decision where the Irish courts, in contradistinction to all other common law jurisdictions, have accepted a subjective test as opposed to an objective test in relation to provocation. Furthermore, he is inclined to quote foreign judgments to underpin his own view of the law as it is here – I would caution that, unless the Irish courts have effectively decided on a specific point of law in a judgment, we cannot be sure that they will necessarily

accept the law as laid down in, for instance, a Manitoba Court.

The author advocates reform in different aspects of this particular branch of the law. In general I am in favour of reform but it seems to me that in recent times the Oireachtas has outdone itself in producing more and more draconian legislation. For instance, the Firearms and Offensive Weapons Act 1990, which is dealt with very well in this book, has created a number of new offences carrying prison terms. The Criminal Justice (Public Order) Act 1993, and the Criminal Justice (Sexual Offenses) Act 1993 have followed suit. Even now our politicians are engaging in cheap talk about abolishing the right to silence and changing the bail laws without, it seems to me, any investigation as to the effect such changes will have on our criminal law and justice system. This book states the law up to the 13 June, 1991. *Peter Charleton* is an intelligent and articulate author. When he comes to prepare a revised edition (and I would suggest that the time for a revised edition is fast approaching) he will have to deal with this new trend which challenges the rule of law as we know it and diminishes the rights of the citizen. Hopefully he will use his vast knowledge of the law here and elsewhere to deal with this new situation and to put it into perspective alongside the constitutional and civil rights of the citizen.

Michael Staines.

Irish Medical Law

David Tomkin and Patrick Hanafin, The Round Hall Press, Dublin, 1995, 299pp, £37.50 (hb).

This book will be useful for most solicitors and doctors. The table of contents shows how many important topics legitimately come under the banner of medical law and this is the first Irish attempt to provide a comprehensive survey and introductory guide to medical law in Ireland. The book is introductory, because a book of 300 pages could not treat consent, confidentiality, civil claims, criminal law, mental patients, pharmaceuticals, coroners and the many other topics in the book in full detail. Necessarily very detailed texts have been written on most of these individual subjects. The limitations of space have not reduced the book's value greatly however, as the authors provide ample references to relevant detailed textbooks and other material from home and elsewhere (mainly England).

The occasional unnecessary use of academic jargon (eg reference to the "traditional voluntarist contract model" in the context of civil claims against doctors) may puzzle or annoy some readers. Also lawyer's phraseology such as "the instant case" is unhelpful in a book which will be read by many non-lawyers. In the main however, the book is easy to read and digest, and it will help solicitors to advise on difficult issues that arise in medical law.

The authors' academic expertise equips them well to discuss theories applicable to important issues in the book and this helps the reader to appreciate the rationale behind many of the relevant legal principles and rules. Sometimes, however, the authors have surprisingly refrained from suggestion for change. For example the authors have not, in my opinion, fully discussed the practical difficulties which have arisen from the Supreme Court decision in *CK -v- An Bord Altranais*. This enables doctors and other professionals to obtain a full High Court trial of disciplinary matters that include issues of disputed fact which have already been the subject of a hearing and determination by a statutory based disciplinary tribunal. Because of the great expense and delay caused by the duplication of function of the tribunal and the court, reform is urgently needed.

The book includes useful appendices. These outline the history and structure of the Irish health services and the various relevant professions. Also (for doctors) relevant legal terms are explained. Given the range and complexity of medical terminology, the authors have wisely resisted the temptation to include a guide to medical terms, as short guides to medical terms can be misleading and time wasting.

Roderick Bourke

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PRACTICE NOTES

Discharge of Vendors' Mortgages on Completion of Sales

The Conveyancing Committee recommends that where Vendors' Solicitors desire their clients to avoid the expense of bridging loan finance to provide funds to discharge any Mortgage affecting their title, they should insert a Special Condition in Contracts for Sale requiring that payment of the balance of the purchase money be provided by the Purchasers in the form of two Bank Drafts – one to effect redemption of the Mortgages affecting Vendor's title and the other covering the balance of the purchase price. It is not acceptable for the Vendor's solicitor to simply undertake to discharge the Mortgages from the proceeds of sale.

In this regard attention is again drawn to previous recommendations at pages 11.4 and 11.13 of the Conveyancing Handbook.

Conveyancing Committee

Fixed Charge on Book Debts – Notices to Revenue Commissioners

Arising from the amendment to Section 115 of the Finance Act, 1986 by Section 174 of the Finance Act, 1995 as summarised in the notes on the Finance Act included with this issue of the Gazette, practitioners should note the necessity when taking a fixed charge over book debts for a lender to consider whether notice of the creation of the charge should be served on the Revenue Commissioners. The effect of such a notice will be to limit the secondary liability of the charge holder to the amount of VAT/PAYE which the chargeor company has failed to pay after notification to the charge holder from the Revenue Commissioners of any liability arising. If such a notice is to be served it must be served within twenty one days of the date of creation of the charge and is effected by furnishing the Revenue Commissioners with a copy of the Form 47 in respect of the charge to the Office of the Collector General of the Revenue Commissioners at Sarsfield House, Limerick, Attn. Mr. *Brian Jones.*

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Lost Land Certificates

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 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.

Published: 21 July, 1995.

Brendan Needham, Dooleague, Co. Mayo. Folio: 4785F; Land: Part of the townland of Dooleague situate in the Barony of Baunishoole shown as Plan 29 on Registry Map (OS 78/13). **Co. Mayo.**

Francis Fintan Byrne, 58 Sandyford, Co. Dublin. Folio: 2094L; Lands: Property known as "Sunny Side" on the West Side of Public Road leading from Sandyford to Carrickmines in the Townland of Woodside, Barony of Rathdown. **Co. Dublin.**

James O'Gorman and Eilis O'Gorman, Folio: 54550F; Land: Townland of Ballymaclawrence and Barony of Fermoy. **Co. Cork.**

Owen O'Brien, Folio: 23202; Land: Rockbarton; Area: 5(a) 1(r) 0(p). **Co. Limerick.**

Noel Scott, Folio: 10832; Land: Barony of Talbotstown Upper. **Co. Wicklow.**

Andrew Donovan, Folio: 26308; Lands: Townland of Baurnahulla, Barony of Carbery West (East Division). **Co. Cork.**

Patrick Small, Cregduff, Corrandulla, Co. Galway. Folio: 16776F; Lands: 1. Cregduff 5.799 acres, 2. Cregduff 26.819 acres (one undivided 1/4 part), 3. Cregduff 42.544 acres (one undivided moiety), 4. Cregduff 0.981 acres, 5. Cregduff 0.063 acres, 6. Cregduff 1.131 acres, 7. Cregduff 1.294 acres, 8. Cregduff 0.219 acres, 9. Cregduff 1.331 acres (one undivided moiety), 10. Cregduff (one undivided moiety) 1.244 acres, 11. Cregduff 0.613 acres. **Co. Galway.**

Patrick Collins and Aileen O'Regan, Folio: 22818F; Land: Townland of Carrigaline West and Barony of Kerrycurrihy. **Co. Cork.**

Most Reverend Vincent Hanly PP, Very Reverend John Canon Feeley, Reverend John Scally, Folio: 51492; Townland: Ballin; Area: 1(a) 0(r) 23(p). **Co. Galway.**

Thomas Naughton, Folio: 16373; Townland: Creeharmore (Parts); Area: 24(a) 0(r) 32(p). **Co. Roscommon.**

Michael O'Driscoll, Folio: 28734; Lands: Townland of Glenawilling, Barony of Imokilly. **Co. Cork.**

James Joseph Crowley, Cloonfad, Leitrim P.O., Carrick-on-Shannon; Folio: 15757; Land: Bellanaboy; Area: 27(a) 0(r) 16(p). **Co. Leitrim.**

Patrick Lane, Folio: 2948; Land: Ballaghbehy; Area: 41(a) 0(r) 20(p). **Co Limerick.**

Michael Kelly (deceased), Folio: 6624; Land: Lisheen; Area: 3(a) 3(r) 1(p). **Co. Tipperary.**

Martin Davoren, Corcullen, Moycullen, Co. Galway. Folio: 20832F; Townland: Corcullen; Area: 0.572 acres. **Co. Galway.**

John Sweeney (deceased), Folio: 32R; Land: Derryreel; Area: 16(a) 0(r) 39(p). **Co. Donegal.**

Thomas Lavin, Folio: 12850; Townland: (1) Srananoon (2) Iimpaun; Area: (1) 15(a) 0(r) 25(p) (2) 1(a) 1(r) 20(p). **Co. Roscommon.**

Monica Mary Hughes, Drumnacool, Boyle, Co. Sligo. Folio: 22703; Townland: Cartronlena; Area: 1(a) 0(r) 8(p). **Co. Sligo.**

Elizabeth Farrell, Folio: 3847; Land: Derrymany; Area: 138(a) 2(r) 15(p). **Co. Longford.**

Angus Buttanshaw and Gillian Perdue, 69 Orwell Gardens, Rathgar, Dublin 6. Folio: 67644F; Land: Property known as 69 Orwell Gardens in the townland of Rathfarnham and Barony of Rathdown. **Co. Dublin.**

James Cormack, Folio: 5263; Land: Shinglis; Area: 5(a) 3(r) 0(p). **Co. Westmeath.**

John Fortune, Folio: 2725F; Land: Ardcavan; Area: 3.838 acres. **Co. Wexford.**

Daniel Ryan (deceased), Folio: 3627; Land: Keelogues; Area: 13(a) 1(r) 31(p). **Co. Limerick.**

Francis Doolan and Vivienne Doolan, Folio: 2134F; Land: Dunboyne; Area: 0(a) 1(r) 0(p). **Co. Meath.**

Justin Durkan and Nuala Durkan, Folio: 1952L; Land: Townland of Kill West, Barony of Salt South. **Co. Kildare.**

Wallace Diver, Folio: 27503; Land: Gortnaskeagh; Area: 41(a) 3(r) 30(p). **Co. Donegal.**

John J. Feehily, Mountyard, Scramogue, Roscommon. Folio: 29285; Land: Townland: (1) Graffoge, (2) Northyard, (3) Cloonshannagh, (4) Cloonshannagh, (5) Cloonshannagh; Area: (1) 15(a) 1(r) 0(p), (2) 2(a) 0(r)

11(p), (3) 2(a) 3(r) 28(p), (4) 8(a) 0(r) 32(p), (5) 2(a) 0(r) 2(p). **Co. Roscommon.**

Michael Hannon, Folio: 24846; Townland: Ballyvorgae Beg; Area: 1(a) 1(r) 26(p). **Co. Clare.**

Patrick Mary O'Kane, Oatlands House, Bunnyconnellan West, Ballina, Co. Mayo. Folio: 36801; Land: Townland of Bunnyconnellan West; Area: 7(a) 1(r) 35(p). **Co. Mayo.**

John Martin McDonnell and Mary McDonnell, Callow, Foxford, Co. Mayo. Folio: 2141F and 16468; Townland: (1) Callow, (2) Callow; Area: (1) 2(a) 0(r) 36 (p), (2) 2(a) 0(r) 20(p). **Co. Mayo.**

Patrick Buchanan (deceased), Folio: 40918; Land: Rathmelton. **Co. Donegal.**

Patrick J. Walsh, Rathedmond, Ballinrobe, Co. Mayo. Folio: 48964; Townland: (1) Rathedmond (2) Rathedmond. Area: (1) 56(a) 1(r) 0(p), (2) 1(a) 1(r) 6(p). **Co. Mayo.**

Cornelius McNeill, Folio: 567; Townland: Part of the lands of Carboghil containing together thirteen acres three roods and ten perches or thereabouts and part of the lands of Cloonfinlough now known as Carboghil containing thirty perches or thereabouts both statute measure situate in the barony of Roscommon and County of Roscommon. **Co. Roscommon.**

Seamus Byrne, deceased, and Brendan Byrne, as tenants in common. Folio: 7751; Land: Barony of Ballinacor South. **Co. Wicklow.**

Edward Bowers and Rosemary Gannon, both of 26 Seabury Meadows, Malahide, Co. Dublin. Folio: 62658F; Land: Townland of Yellow Walls in the Barony of Coolock. **Co. Dublin.**

Wills

Greally, Michael and Rose Anne, both late of Granahan Martin, Strokestown, County Roscommon. Would any person having knowledge of a will executed by either of the above named deceased whose deaths took place on 23 March 1995 and 13 October 1988 respectively, please contact Timothy J. C. O'Keeffe & Company, Solicitors, Abbey Street, Roscommon. Tel: 0903 26239.

Hynes James, deceased, formerly of Rallykaystown, Lusk, Co. Dublin, farmer. Would any person having knowledge of a will made by the above named deceased who died on 6 January 1995, please contact Ms. Margaret McGreevy, General Solicitor for Minors and Wards of Court, Aras Uí Dhalaigh, Inns Quay, Dublin 7. Tel: 01 – 872 5555, extension 231; Fax: 01 – 872 2681.

Treanor, Annie, deceased, widow, late of Cloughfin, Emyvale, County Monaghan who died at Sacred Heart Home, Clones, on 9 April 1987. Would any person having knowledge of a will executed on 1 August 1985 by the above named deceased, please contact Patrick J. O'Gara, Solicitor, 14 Mill Street, Monaghan.

Richard, James, deceased, late of Underwood Villa, Rochestown, Cork. Would any person having knowledge of a will executed by the above named deceased who died on 10 June 1995, please contact Margaret Campbell-Crowley, Solicitor, Carriglee, The Marina, Blackrock, Cork.

Slattery, Sheila, late of Newcastle, Co. Wicklow. Would the Solicitor who made my late mother's will in 88/89 please contact me. Much appreciated Robert Slattery. Ph. 281 0543 or 281 9119.

Lost Title Deeds

Ryan, Daniel, deceased. Would any person having knowledge of the whereabouts of the Original Title Documents relating to 8 Orchard Terrace, otherwise 8 Upper Grangegorman, North Circular Road, Dublin 7. Owner Daniel Ryan, Deceased. Please contact Daniel C. Maher, Solicitors, Bank of Ireland Chambers, Lombard Street, Westland Row, Dublin 2. Tel: 677 8020; Fax: 677 8330.

Woulfe, Brigid (otherwise called Bridget) Eva, late of 20 Casimir Road, Terenure, Dublin 6. Will any person having knowledge of the whereabouts of any title documents to property held by the above named at 20 Casimir Road, Terenure, Dublin 6 please contact Anne McKenna, Solicitor, of 1 Ontario Terrace, Rathmines, Dublin 6.

Kelly, Christopher, deceased, Kelly, Patrick, deceased, and Kelly, Josephine, late of 30 St. Thomas Road, South Circular Road, Dublin 8. Would anyone having knowledge of the whereabouts of title deeds referable to the above referred to property (as owned at relevant times by the above named and/or one more of them) please contact the undermentioned Solicitors viz:- Rutherfords, 41 Fitzwilliam Square, Dublin 2.

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Miscellaneous

Northern Ireland Agents for all contentious and non-contentious matters. Consultation in Dublin if required, reasonable rates. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry. Tel: 080 693 61616 Fax: 080 693 67712.

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Solicitor's Practice Wanted. Practitioner Retiring. Flexible Arrangements. Dublin Area. Confidentiality Assured. Reply to Box No. 50.

Powell, Nancy (Nora) deceased. Would any person knowing the whereabouts of any next of kin of the above named deceased please contact O'Sullivan & Associates, Solicitors, 10 Herbert Street, Dublin 2. Tel: 661 0924; Fax: 661 0531.

Solicitors Practice, Midlands Area for sale. Confidentiality assured. Reply to Box No. 51.

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VOL. 89 NO. 6

AUGUST/SEPTEMBER, 1995

LAW SOCIETY OF IRELAND

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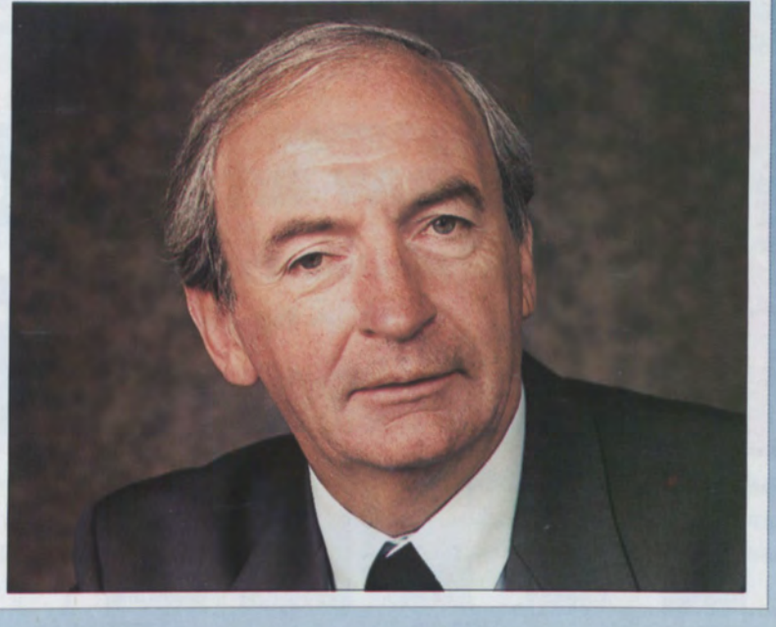

VIEWPOINT – A RIGHT TO DIE?

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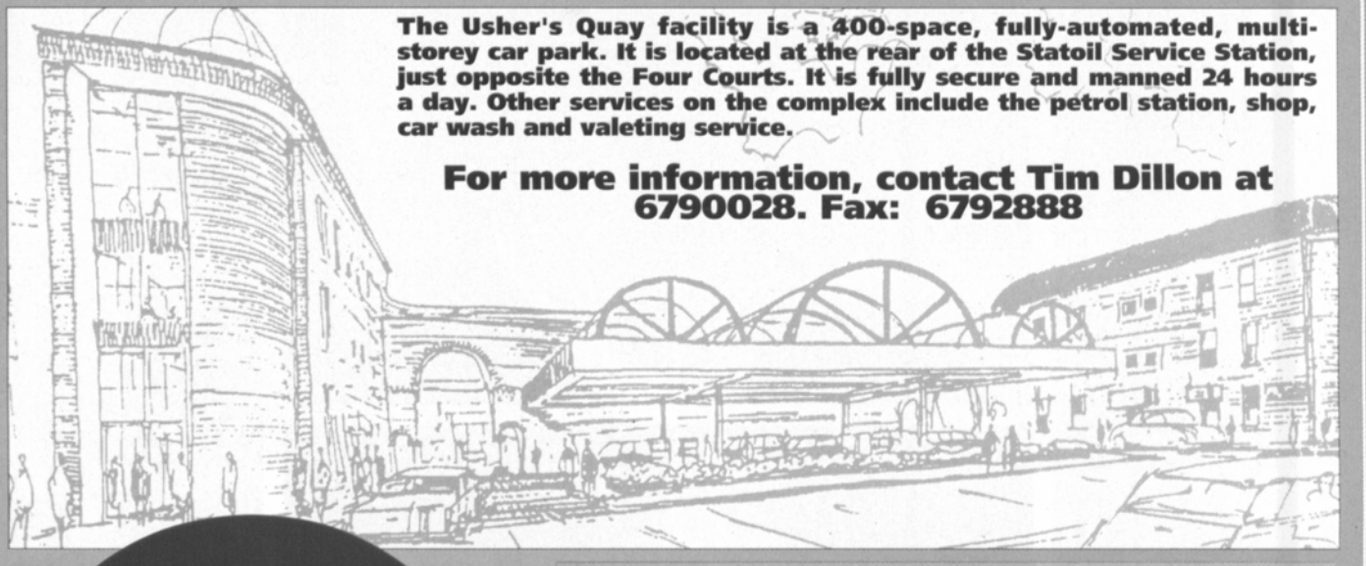

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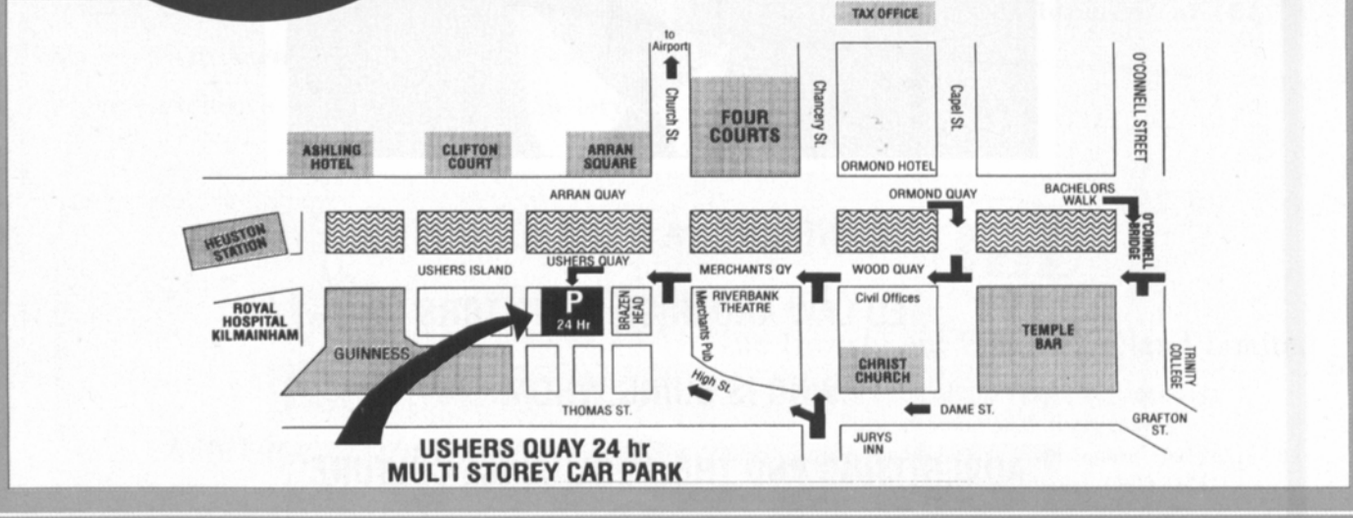

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Front cover: *Brendan Walsh,* Solicitor and *Michael O'Driscoll,* Solicitor, who were recently appointed Sheriffs of Dublin City and Cork County, respectively.

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A Right To Die?

The Supreme Court in session.

In a landmark decision (in re a Ward of Court) on July 27, 1995, the full Supreme Court (by a four to one majority) upheld the earlier High Court Judgment (Lynch J) consenting (on the application of the ward's family) to the withdrawal and termination of abnormal artificial means of nourishment from a ward of court in a near permanent vegetative state ("PVS"), thus ceasing to prolong her life. This case exemplifies the burden placed on judges called on to decide a legal issue which also has a profound moral dimension.

Medical science and the means of health case have nearly doubled life expectancy in the last fifty years. Yet, along with increased longevity and the wonders of modern medicine, new problems, legal and ethical, have been created. For example, the body can now be kept 'alive' long after the brain is dead.

The ward in this case is now a woman in her mid-forties, who some twenty-three years ago suffered very serious brain damage in the course of what should have been a routine gynaecological operation. Since then, she has been near-PVS in an Irish hospital, where she has been kept alive only by means of a life support feeding system.

This is the first time that the Irish courts have had to decide the issue of whether it is lawful to withdraw a life support feeding system from a patient, which would, as a consequence, result in the patient's death. Issues relating to the discontinuance of tube-feeding or the turning-off of ventilators have been judicially considered in the USA (in some 90 court applications in 24 states) since being first considered in the high profile *Karen Quinlan* case in 1976. Most of those court applications in the US have been granted and similar applications have been granted by courts in Canada, New Zealand, Australia and South Africa. In the United Kingdom, in November 1992, the House of Lords unanimously held that it was lawful to withdraw the life support feeding system of Anthony Bland, a long unconscious victim of the Hillsborough football stadium disaster.

In its deliberations, the Supreme Court considered whether the personal rights protected by the Constitution would include the right to refuse medical care or treatment and whether the right to life included the right to die a natural death (as opposed to having life terminated or death accelerated). The Court decided that the ward's personal rights were not lessened or diminished by her incapacity and that the responsibility for their exercise and vindication rested with the Court (rather than the next of kin) to make the decision, with the first and paramount consideration being the well-being, welfare and interests of the ward. The Supreme Court majority accepted that the true cause of death in the event of withdrawal of nourishment would be the original injuries sustained.

The Supreme Court decision, even though grounded on the Irish Constitution, gave consideration to precedents from the other common law jurisdictions where the issue of withdrawal of a life-support feeding system had been addressed. It appears that such decisions in those other jurisdictions have not resulted in a flood of court applications. In the UK, only five similar applications have been made since the 1992 House of Lords judgment in the *Bland* case.

The Supreme Court (following the *Bland* judgment and a number of the American judgments) decided that the use of a gastrotomy tube for feeding purposes constituted "medical

treatment", but (per *Blayney J*) "that normal food and drink would never be categorised as medical treatment"; and that, therefore, if the ward could have taken food and drink in the normal way no order to terminate such feeding would have been made.

However, the decision related to a patient who was near-PVS but not fully-PVS, and the fact that the ward had a minimum degree of cognition weighed heavily with *Egan J* in his minority judgment. The fully-PVS patient is able to breathe unaided and the patient's digestion continues to function but such a patient cannot see, hear, taste or smell, is incapable of voluntary movement, cannot speak or communicate in any way and feels no emotion. In the present case, the Supreme Court concluded that the ward appeared to have some small awareness of longstanding nurses but was not at any time able to show any recognition of any member of her family who had visited her regularly over the last 23 years.

The majority judgments of *Hamilton CJ* and *O'Flaherty J* carefully distinguished between euthanasia, "which involves positive assistance towards the termination of life" and "the withdrawal of invasive medical treatment in order to allow nature take its course". Two theologians gave evidence in the High Court that the application by the ward's family was a morally acceptable one although a third theologian gave evidence to the contrary – an indication of the complexities of the theological questions involved. However, all four majority judgments emphasised that the decision was based on the particular facts of the case and that applications of a similar nature in the future would have to be decided on a case by case basis.

Understandably, considerable comment and analysis, both supportive and critical, have followed in the wake of the Supreme Court decision, not least from members of the medical and nursing professions who are on the front line of the actual treatment of patients such as the ward in this case. The legal kernel of the decision may be summarised as follows:-

1. that in certain circumstances the (ward of court) patient who is fully-PVS or near-PVS may have artificial food and hydration withdrawn by order of court where there is no prospect of improvement, so that the patient can be allowed to die naturally, provided that the court decides that it is the patient's best interests for that to happen;

2. that no such order can be made which might effect the old, the infirm, or the mentally-handicapped, although the dividing line between those categories of patient and a near-PVS patient did not arise for decision in the case;

3. while *Lynch J* (in the High Court) and *Denham J* (in her individual Supreme Court judgment) considered possible guidelines which could be followed by the courts in future cases, the overall majority decision did not lay down any such guidelines other than that future decisions would have to be made having regard to the individual facts of each case.

Whilst it is the right of any concerned person or body to critically comment on a court decision such as this, the fact remains that the Supreme Court decision in this case constitutes a statement of the law on the issue involved. As a democratic state we profess to abide by the Rule of Law and in doing so to recognise the individual's constitutional right to act, within the law, in accordance with his or her conscience. Insofar as recent media statements of the Medical Council and the Nursing Board (An Bord Altranais) may have done so expressly or impliedly, it seems inappropriate that an individual doctor or nurse, who in conscience feels able to comply with the law as expounded by the Supreme Court, should be threatened with possible disciplinary sanctions for so doing. This sequel to the Supreme Court decision emphasises that the Rule of Law requires that the legal and the moral dimensions of an issue should be clearly distinguished one from the other.

Apprentices Client Interviewing Competition

The Law Society will run a Client Interviewing Competition in November 1995, in conjunction with the International Client Counselling Competition and in accordance with their rules and regulations. The winning entrants will be entitled to compete in the *International Client Counselling Competition* which is due to be held in Australia in March 1996.

The International Competition is affiliated to the International Bar Association. Ireland has been successfully represented at the Competition on two occasions. Last year's entrants, *Valerie Kennedy* and *Mairin Stronge* performed exceptionally well and were placed second to Australia in the Competition which was held in Florida in March 1995. This was against strong opposition from America, Scotland, England and Wales, Northern Ireland and Canada.

The Irish Competition will be run on the basis of a two member team. Entrance is restricted to apprentices who attended the 35th, 36th, 37th and 38th Professional Courses.

The entrance fee per team will be £10. The members of the winning team will each receive a prize of £1,000. Of this sum £200 will be paid to them personally and £800 will go towards their expenses in competing in the International Client Counselling Competition.

The closing date for the Competition is Friday 6th October 1995. Please complete the entry form distributed in this Gazette if you want to take part.

In the event that there are sufficient entrants from either Cork or Galway, it may be possible to hold regional heats in these areas.

Solicitors Advertising and the 'Negligence Culture'

Small Firms Association and Law Society Clash on Injury Claims

An article with the above headline was published in the *Irish Independent* on the 28 July, 1995. The Small Firms Association (S.F.A.) had issued a statement claiming that the so called 'no foal no fee' service offered by solicitors was responsible for engendering a compensation culture in the economy and calling for a Government inquiry into solicitors activities. However, the Law Society hit back stating that the problem was not a 'compo-culture' but a 'negligence culture'. Instead of attacking solicitors who bring claims for injured clients, the Law Society said that the S.F.A. should address its attention to the cause of the problem which is the unacceptably high level of accidents at work in this country. The Society pointed out that no less than 11,700 people were reported by the Department of Society Welfare of having been awarded injury benefit 1993 and that fatal injury in the work place in Ireland that year was three times higher than in the U.K. These figures were taken from the Law Society press release which was issued on the 27 July, 1995. The article quoted the Director General of the Law Society, *Ken Murphy* saying that criticism of the 'no foal no fee' system was misplaced because without a proper civil aid system, it is the only way 'impecunious' clients can have access to justice.

Solicitors and Advertising

The 15 August, 1995 issue of the *Irish Independent* carried an article headed "Solicitors Face Clamp Down On Chasing Clients". This article resulted from an interview with *Pat O'Connor*, member of the Law Society Council. It stated that curbs on advertising by solicitors are being considered as a means of applying the 'brakes on ambulance chasers' within the profession. It recorded that the issue is being examined by a committee under the Chairmanship of Cork State Solicitor, *Barry Galvin* and that the new guidelines are being considered which would prevent solicitors actually seeking out personal injury victims and encouraging them to sue. It was now time for review of the 1988 regulations.

As a result of the article in the *Irish Independent* on the 15 August RTE Television requested an interview with *Ken Murphy*, Director General of the Law Society. In preparation for this, a short statement was issued to RTE clarifying the issue of solicitors and advertising. It was stated by the Society that there is a review currently being conducted by the Society of its' advertising regulations, and that it is being undertaken in the light both of seven years experience of the existing advertising regulations and the recent Solicitor's Act. In addition, there has been some concern about so-called 'ambulance chasing' type advertising undertaken by a small minority of solicitors. The Society said that the question is one of striking a balance between making the public aware of the services provided by solicitors on the one hand and on the other hand protecting the public from advertising which maybe a misleading or in bad taste. A televised interview with *Ken Murphy* was featured on the RTE *'Six-One' News* and the *9.00pm News*.

'Morning Ireland'

Ken Murphy was interviewed on *Morning Ireland* on 16 August, 1995. He confirmed that a review of the advertising regulations by the Law Society was taking place. He pointed out that the current advertising rules which have been in existence for seven years and needed to be reviewed in the light of experience. He said "we intend to have stronger rules to deal with the forms of advertising that we already consider to be objectionable". He pointed out that the new regulation may require additional text to provide clarification when use is made of terms equivalent to 'no foal no fee'. He did insist, however, that the Society viewed taking cases on a 'no foal no fee' basis as both perfectly legitimate and necessary in the context of a country which does not have civil legal aid which would give access to justice to people with plaintiff personal injury actions. The interviewer, *John Murray*, asked "isn't the 'no foal no fee' system anyway encouraging the whole compensation culture that applies here?" *Ken Murphy* replied "We think that in fact what we have in this country is a negligence culture rather than a compensation culture and that the real issue to be addressed is the level of accidents that take place and the severity of injuries. It really is blaming the messenger if people are going to attack solicitors for simply doing their job of ensuring that people who have been injured through the negligence of others got adequately compensated".

> ***"We think that, in fact, what we have in this country is a negligence culture rather than a compensation culture and that the real issue to be addressed is the level of accidents that take place and the severity of injuries. It really is blaming the messenger if people are going to attack solicitors for simply doing their job."***
>
> ***– Ken Murphy, Morning Ireland, 16 August 1995.***

'Negligence Culture'

In the *Irish Independent* on the 17 August, 1995 IBEC hit back at claims by the Law Society that there is a 'negligence culture' in Ireland. The article stated that "Law Society head *Ken Murphy* last night stood by his claim that there is a negligence culture here". Employers would not settle

claims unless they believed courts would find them guilty of negligence he said. IBEC, according to the article, welcomed the Law Society's proposal to curb advertising by solicitors and to put an end to 'ambulance chasing'.

An article was published in the *Irish Times* on the 19 August, 1995 by *Carol Coulter*. The headline read "Calls For Curbs on Solicitors Ads". "Proponents defend the 'no foal no fee' practice as giving the poor access to civil law" she states. She continues "the question of solicitors advertising has become a contentious one, with the employers' association IBEC and the insurance industry accusing the profession of contributing to a 'compensation culture'". The article went on to say that the Law Society is examining the issue, and will be issuing new guidelines to replace those it issued in 1988, when it first became legal for lawyers to advertise. The article examined the different issues involved and concluded that: "It is likely that, when the Law Society's new regulations come into force, the nature of solicitors advertising will change. But it is arguable whether this will change the volume of litigation. The attitudes which have produced a high level of litigation in Ireland extend beyond the legal profession".

An article was published in the *Sunday Business Post* on 20 August, 1995 with the heading "Compo Culture Debate Heats Up". The article stated that *Ken Murphy*, Director General of the Law Society stirred up a hornet's when he suggested on *Morning Ireland* that personal injury claims arose from a negligence culture rather than a claims culture. The article quoted *Ken Murphy* who stood over his *Morning Ireland* statement and said he would not automatically accept statistics from a vested interest group like IBEC unless he had the opportunity to examine the authority for them. "So much can be done with statistics" he said. The article stated that there is an oversupply of solicitors and that industry argue that this influx of newly-qualified practitioners will push more solicitors towards personal injury claims, which are quite lucrative and viewed as easy money. *Ken Murphy* said, "We have been told by the Government that we have to operate an open-access policy in terms of admissions to the profession. Solicitors will have to develop every area of potential business and this (personal injury cases) is one of them." The article concluded with the words of the Director General "but solicitors cannot invent claims. Either people have been injured by the negligence of others and are entitled to claim, or they have not. The number of solicitors does not affect that essential reality".

An article was published in the *Irish Independent* on 21 August, 1995 with the headline "Employers Clash with Solicitors on Injury Claims". The article stated that "a new row about Ireland's high rate of injury claims erupted last night as employers organisation IBEC said the problem had its roots more deeply embedded in the compensation culture than in deficient safety standard in the work place". The article continued: "However, a Law Society spokeswoman hit back last night, saying damages would not be awarded unless there was negligence. If IBEC was concerned about the level of damages, employers should look to their own safety standards" she added.

The Director General participated in a debate with *Neil McGuinness*, an IBEC spokesperson on health and safety, on the RTE 1 radio programme *'Between the Lines'* on 22 August, 1995. *Neil McGuinness* claimed that the record of Irish business on accidents in the work place was better in the UK. *Ken Murphy* took issue with the statistics figures being used. He pointed out that such authorities as the Minister of State for Labour Affairs, Ms Eithne Fitzgerald and Mr Eugene Carney, Industrial Engineer of SIPTU, have researched and found that only 15% of reportable accidents in Ireland are actually reported. He contended that fatal injury statistics are much more reliable and they show that fatal workplace injuries in Ireland in 1993 were three times higher than the UK. As a matter of probability it follows that serious and minor injury risk is also substantially higher in Ireland than in the UK. The European Commissioner had found that Ireland had the lowest perception of risk in relation to safety in the workplace of any state in the EU. He said that employers will not pay out damages unless there is negligence and that no claim can be sustained unless there is negligence. He stood over his claim that there is a 'negligence culture' in this country and employers should increase safety levels if they want to reduce the number of claims instead of blaming solicitors. The Director General hit out at IBEC's 'compo culture' campaign saying "The health and safety record here is nothing to be proud of and quite frankly the Law Society and solicitors are getting a bit fed up with IBEC seeking to blame solicitors. The level of claims is high, the level of negligence is high and IBEC should be addressing cause of the problem, not its symptom".

In an article in the *Irish Independent* on 23 August, 1995 it was reported that the unions had now clashed with employers on safety. The article stated that "an estimated 3,000 Irish people died in the work place over 25 years – as many as in the North troubles", the country's largest trade union said yesterday. SIPTU safety officer, *Sylvester Cronin*, claimed thousands of accidents in the work place went unreported every year and said the onus was on employers to reduce the cost of claims". "There has been no outcry about the carnage in the work place", said Mr. Cronin, who insisted Ireland had four times as many work-related fatalities per capita as Britain.

Catherine Dolan.

Solicitors Confidential Helpline

JUST CALL

284 84 84

Who is Suing Whom?

by Dr Eamon G Hall

Introduction

The word "Convention" (with a capital "C") perplexes many lawyers and, perhaps, some judges. The *Brussels Convention,* the *Lugano Convention* and the Rome Convention trip off the tongues of some of our learned brothers and sisters. The time was when generations of lawyers could complete their entire legal studies (including a university degree) without hearing the word "Convention" ever mentioned. Those days are gone.

Whilst not pretending in any sense to be an expert in these matters, it is appropriate to mention what is understood by some of the above Conventions. The *Brussels Convention* is generally understood as meaning the *EC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* (1986) which was given effect to in Ireland by the *Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988.* A foreign judgment is enforceable in Ireland if it has been rendered by a court of competent jurisdiction. The 1988 Act has been amended to take account of the assession of Spain and Portugal (the 1989 *Assession Convention*) and also to bring the 1986 EC *Brussels Convention* into line with the *Lugano Convention* which governs the *Enforcement of Judgments between EC and EFTA* (European Free Trade Association) member states. This was given effect in Ireland by the *Jurisdiction of Courts and Enforcement of Judgments Act, 1993.*

The *Brussels Convention* has also been supplemented by the 1990 *Rome Convention.* The *Rome Convention,* made between Member States of the European Communities, relates to the simplification of procedures for the recovery of maintenance payments. See generally, *Peter Byrne,* the *European Union and Lugano Conventions on Jurisdiction and Enforcement of Judgments,* Baikonur (1994).

Twinkle Egan, Barrister-at-Law

What does all the above lead to in the context of who is suing whom? Ms. Twinkle Egan, barrister-at-law, King's Inn, Middle Temple and New York State, has proposed an imaginative and constructive scheme for a *Centralised European Union Convention Cause Book and Judgment Registry Database.* Ms. Egan is the owner of the intellectual property rights in the scheme, she has assigned her European interest therein on behalf of "the many varied and different peoples who live on the island known as Ireland" to the European Union subject to and in consideration of the European Union providing the full capital funding for the setting up of the scheme in Ireland.

What is Involved?

If proceedings are instituted in Ireland under the *Brussels Convention* against, for example, an English company for damages caused by faulty goods, there is only a record of those proceedings in Ireland. Yet at the same time, proceedings could be instituted in Germany under the Convention against the exact same English company for similar faulty goods. Again, there would only be a record of those proceedings in Germany. There is at present no record of either set of proceedings which would appear in any search or check undertaken by anyone in England against the English company. Under the proposed scheme, the key information contained in the Irish and German files would be transferred onto a centralised database for on-line access for interested parties.

The Data

The data stored about each Convention case would be submitted and made available in a standard tabular form, set out as follows:

Centralised European Union Convention Cause Book and Judgment Registry Database

1. Country of Origin
2. Name of Plaintiff
3. Date of Issue
4. Record No.
5. Domicile of Defendant
6. Name and Full Address of Defendant
7. Classification of Subject Matter Under the Convention Tick appropriate box

   A.
   B.
   C.
   D.

8. Breach of International Standard Number if applicable

   S.I. No. etc.

9. Status of Proceedings

   Date of:-
   Issue
   Service
   Live
   Dead
   Settled
   Judgment/Order given
   Judgment/Order appealed
   Judgment/Order registered
   Judgment/Order transmitted

10. From the Commission, if appropriate

    1. Date of investigation
    2. Date of recall
    3. Date of upgrade of I.T.

The database would integrate legal procedures throughout the EU domestic courts and would facilitate the administrative efficiency of legal processes. The proposed scheme has been endorsed by the Bar Council of Ireland, the Law Society of Ireland, the Stock Exchange, the Insurance Institute of Ireland, the Insurance Federation of Ireland, Telecom Eireann and the Industrial Development Authority (IDA). The IDA has recommended a pan-European feasibility study be carried out.

Ms. Egan argues that such a scheme is necessary because the European Union, with adhesion of the European Free Trade Association States comprise in excess of 370 million people – over a fifth of world trade. Notwithstanding the 1986 *Brussels Convention* as amended and extended, no simple, speedy and cost-effective centralised infrastructure linking together the partner states exists to implement the *Brussels Convention*. Thus, argues Ms. Egan, the full benefits of the single European market are not being realised. Mr. Egan argues that a *Centralised Cause Book and Registry Database* is required:

- to protect and access quickly an individual's claim in a product liability action;
- to enforce a foreign judgment without delay;
- to stimulate capital investment and its protection throughout the EU;
- to enable the EC Commission to monitor the compliance of companies and their products with international standards and to act on breaches.

Element of Concern

Officials in the European Commission have expressed concern in the context of data protection that a registry of cases actually in progress could be open to abuse by vexatious litigants or those seeking to effect the credit worthiness of a company or private individuals by the institution of actions without foundation or containing inaccurate data.

The Commission official argued that this would be particularly difficult in the lower courts where actions are often instituted by litigants themselves with a less strict appreciation of relevancy and competency. The Commission noted in a 1993 comment that just as an accused is presumed innocent until proven guilty and is entitled to the full protection of the law, likewise a defendant should be presumed creditworthy or solvent until a judgment indicates otherwise. The information on a registry to the effect that actions are being pursued against a person or company could destroy its credit status or ruin its chances of a contract or even employment in the case of an individual. The Commission considered that world-wide agencies already exist which collect information at all levels from courts about judgments already given in any case after the period for appealing against the judgment has expired.

Conclusion

Frances Bacon wrote: "Knowledge itself is power." In the field of law, knowledge is of paramount importance. We hear and read of tele or virtual presence, cyberspace, the global village and although technology has transferred these concepts into reality, the "machinery" of the law is lagging behind. Ms. Egan's proposal is both imaginative and simple. With or without backing from the Commission of the European Communities, Ms. Egan's proposal deserves to be implemented.

If you have Internet access to the Worldwide Web, the full scheme and background material can be viewed at the following uniform resource locator: http://web.rtc-tallaght.ie/staff/academic/law. ❐

Legal Aid Panel – Dublin Metropolitan District

The Legal Aid Panel for the Dublin Metropolitan District has become very unwieldy as many of the practitioners whose names appear on it do not, in fact, practise criminal law in the Dublin District Courts on a regular basis. As the panel is so large and so out of date, District Judges cannot use it when assigning legal aid cases.

As a matter of professional courtesy and good practice, you are therefore asked to check to see whether or not your name is on the panel and if it is not your intention to practise criminal law in the Dublin District Courts in the near future, you are asked to write to the County Registrar, *Michael Quinlan*, at Green Street Courthouse, Dublin 7, to ask him to remove your name from the panel.

Of course, if you remove your name from the panel now, there is nothing to stop you putting your name back at a later stage if you decide that you wish to do so.

Criminal Law Committee

Tax Briefing

Tax Briefing is a quarterly publication produced by the Office of the Inspector of Taxes in which they feature a wide range of topics of interest to practitioners who would deal with tax related issues in their practices. In the past this publication has produced very helpful guidelines on matters which would be of interest to those dealing with conveyancing, landlord and tenant law, estate planning and administration, company law and the myriad of other taxes and issues which impact daily on a solicitor's practice. This publication is free and can be obtained by writing to Maureen Moore, Editor – Tax Briefing, Office of the Chief Inspector of Taxes, Setanta Centre (Fourth Floor), Nassau Street, Dublin 2.

Taxation Committee

PARLIAMENTARY COMMITTEE

1995 LEGISLATION UPDATE – *10 June 1995 – 31 July 1995*

No.	Title of Act and Date Passed	Commencement Date/s
9.	Stock Exchange Act, 1995 (14 June, 1995) *Enables the Central Bank to act as the supervisor of the Irish Stock Exchange and of any stock exchange that may by established in the jurisdiction in the future. The Central Bank will also authorise and supervise the Irish member firms of an approved exchange. The Act will meet obligations in respect of stock exchange member firms arising under EU Directives regulating investment firms. Repeals the Stock Exchange (Dublin) Act, 1799, and the Stockbrokers (Ireland) Act, 1918.*	Commencement Order/s to be made. 1 August, 1995 – sections 6, 50 and definition of statutory functions in s.3 (S.I. No. 206 of 1995.)
10.	Occupiers' Liability Act, 1995 (17 June, 1995) *Amends and extends the law relating to the liability of occupiers of premises (including land) and certain other property for injury or damage to persons or property while on or in such premises or other property. Implements many of the recommendations contained in the Law Reform Commission's Report on Occupiers' Liability (LRC 46-1994).*	17 July, 1995
11.	Investment Intermediaries Act, 1995 (4 July, 1995) *Provides for the authorisation and supervision of investment business firms and investment product intermediaries by the Central Bank and by the Minister for Enterprise and Employment. Implements EU Directives on Investment Services and Capital Adequacy; amends the Companies Act, 1990.*	1 August, 1995 – all sections other than Part IV and s.51; 1 November, 1995 – Part IV, other than s.28(4) (S.I. No. 207 of 1995)
12.	Criminal Law (Incest Proceedings) Act, 1995 (5 July, 1995) *Provides that notwithstanding section 5 of the Punishment of Incest Act, 1908, in any proceedings under that Act the verdict or decision and the sentence (if any) shall be announced in public but the identity of the parties will not be revealed. Addresses the ruling of the Central Criminal Court (D.P.P. v W.M., Carney, J., 1 and 17 February, 1995) that section 5 of the Punishment of Incest Act, 1908, precludes the making public of the verdict and sentence (if any) in a case of incest. Amends the Punishment of Incest Act, 1908.*	5 July, 1995
13.	Tourist Traffic Act, 1995 (5 July, 1995) *Enables Bord Failte Eireann to delegate to a contractor the majority of its inspection and associated functions and powers under the Tourist Traffic Acts 1939 – 1987 in relation to registration and grading of tourist accommodation, and under the Intoxicating Liquor Act, 1988, in relation to special restaurant licences.*	5 July, 1995
14.	Arterial Drainage (Amendment) Act, 1995 (17 July 1995) *Amends and extends the Arterial Drainage Act, 1945, to empower the Commissioners of Public Works to undertake drainage schemes in catchment areas and to undertake works to prevent or relieve localised flooding including flooding in urban and residential areas.*	17 July, 1995

15.	Minerals Development Act, 1995 (17 July, 1995) *Makes statutory provision for renewals of mineral prospecting licences and for the validation of licences renewed to date since the enactment of the Minerals Development Act, 1940; updates the original penalties for offences under the 1940 Act.*	17 July, 1995
16.	Transfer of Sentenced Persons Act, 1995 (17 July, 1995) *Provides for the transfer of sentenced persons between the State and places outside the State. Ratifies the Council of Europe Convention on the Transfer of Sentenced Persons (1983) and gives effect to the Agreement on the Application among Member States of the European Communities of the Council of Europe Convention (1987).*	17 July, 1995
17.	Package Holidays and Travel Trade Act, 1995 (17 July, 1995) *Gives effect to Council Directive 90/314/EEC of the 13/6/90 on Package Travel, Package Holidays and Package Tours; amends the Transport (Tour Operators and Travel Agents) Act, 1982.*	Commencement Order/s to be made.
18.	Local Government (Delimitation of Water Supply Disconnection Powers) Act, 1995 (18 July, 1995) *Delimits the powers of sanitary authorities to disconnect domestic water supplies for non payment of services charges.*	18 July, 1995
19.	Casual Trading Act, 1995 (18 July, 1995) *Provides for the control and regulation of casual trading, devolving many of the functions formerly of the Minister for the Environment to local authorities. Repeals the Casual Trading Act, 1980, and makes transitional arrangements.*	Commencement Order/s to be made.
20.	An Bord Bia (Amendment) Act, 1995 (20 July, 1995) *Increases the membership of the Board and provides that one ordinary member shall be appointed on the nomination of the Minister for the Marine. Amends An Bord Bia Act, 1994.*	20 July, 1995
21.	Electoral (Amendment) Act, 1995 (20 July, 1995) *Provides for the number of members of Dail Eireann, revises the Dail Constituencies in light of the 1991 census returns and implements the recommendations contained in the Report of the Dail Constituency Commission, 27 April, 1995 (Pn. 1619).*	20 July, 1995
22.	Ethics in Public Office Act, 1995 (22 July, 1995) *Provides for the disclosure of interests by people holding public office or employment, and deals with gifts to office holders and with personal appointments by office holders. It also establishes an independent Commission and a Select Committee in each House of the Oireachtas to oversee its provisions. Amends the Prevention of Corruption Acts, 1889 to 1916.*	Commencement Order/s to be made and Resolutions of the Dail and Seanad to be passed. See section 1(2) of the Act.
23.	Social Welfare (No. 2) Act, 1995 (25 July, 1995) *Makes changes in the Social Welfare Code so as to ensure that no spouse will be disadvantaged in terms of his or her social welfare entitlements as a result of his or her legal status being changed from married, separated or deserted to divorced.*	Commencement Order/s to be made.
24.	Consumer Credit Act, 1995 (31 July, 1995) *Gives effect to Council Directive 87/102/EEC of 22/12/86, as amended by Council Directive 90/88/EEC of 22/2/90, on consumer credit. Repeals all existing consumer credit, hire purchase and hiring legislation and provides one unified piece of legislation – repeals the Hire Purchase Acts 1946 – 1980, the Moneylenders Acts 1900 – 1989, repeals and amends certain provisions of the Sale of Goods and Supply of Services Act, 1980, amends and extends the Pawnbrokers Act, 1964, and provides for connected matters.*	Commencement Order/s to be made.

Selected Statutory Instruments

158/1995 EC (Term of Protection of Copyright) Regulations, 1995.
Harmonises the term of protection of copyright of literary, dramatic, musical and artistic works at the lifetime of the author and a period of 70 years after the author's death, in accordance with Council Directive 93/98/EEC

184/1995 Finance Act, 1994 (Commencement of Sections 93 and 96 (a)) Order, 1995 *Gives effect to section 4A, Value-Added Tax Act, 1972. Those provisions relate to the treatment of VAT chargeable on long-term lettings of developed property. Came into effect on 7 July, 1995.*

188/1995 Housing (Sale of Houses) Regulations, 1995
Governs the sale by housing authorities of tenanted dwellings to tenants.

189/1995 Employment Regulation Order (Law Clerks Joint Labour Committee), 1995
Made by the Labour Court on the recommendation of the Law Clerks Joint Labour Committee, fixes statutory minimum rates of pay and regulates statutory conditions of employment as from 1 August, 1995, for certain workers employed in solicitors' offices.

Margaret Byrne
Librarian

Law Books for Tanzania

The Chief Justice of Tanzania on a recent visit to the Law Society expressed an interest in receiving textbooks for Tanzanian lawyers. Would any interested firm who may be weeding out superseded editions of textbooks please send a list of the books in the first instance to: *Margaret Byrne*, Librarian, the Law Society of Ireland, Blackhall Place, Dublin 7.
Fax: 01 – 677 0511.

Mrs. O' – A Tribute

It is hard to comprehend that Mrs. O' is now retiring after forty-nine years of service with the Society, of which she has been so much a part for so long. For most of us who entered the profession between 1946 and 1978 the recollections of our student days are inextricably linked with the O'Reillys – Willie and Dymphna. During that thirty-two year period that they (and for part, their solicitor son, Brian) lived in Solicitors Buildings (Four Courts), Willie was the warden and Dymphna was the 'materfamilias' to all who attended there for meetings of the Solicitors Apprentices Debating Society (SADSI). Their sitting room in the basement was a Speaker's Corner/ Bewleys/Las Vegas all rolled into one.

On the move to the newly renovated Blackhall Place premises in 1978, Dymphna took on the role of 'minder' of the many overnight guests who stayed there, a role she continued even after Willie sadly passed away in November 1993.

Now after nearly fifty years of association with the Society, Dymphna has decided that it is time for her to retire. In her retirement, she will be sustained by the certain knowledge that she has the affection of everyone in the solicitors' profession who had the honour and pleasure of knowing her. The plaque on the ex-auditors' board erected in their honour in the Blackhall Place lecture hall will give permanent recognition both to the status of the O'Reillys as the only two honorary auditors of SADSI and to their significance in the lives and memories of so many of us.

Thanks, Mrs. O!

MVOM

Mrs. O'Reilly's (written) response to Law Society presentation

"In all sincerity I am overwhelmed by your generosity. For what's left of my life be it long or short, I'll have so many memories.

Willie and I never considered money, in the little we did do for you – you were our children and we did it for love. Mick [O'Mahony] and Andy [Smyth] will agree – the Law Society was more sombre and conventional by the time Cillian [MacDomhnaill] arrived.

Helen [Kirwan-Davitt] claims you people were unique and we'll never see your like again, and I agree with her. It was the age of innocence. Max [Neville], seeing Jim O'Keeffe with his arm on a shelf in the Library was afraid he had it around Maura Simons [Roche].

Larry [Branigan] breaking it off with Nessa [Gibbons-Doyle] because the Equity Examiner (the SADSI Annual Scandal Magazine) said they were studying matrimonial procedures in the Library. The Bruce [Blake], Grace [Hanna-Blake], Helen [Kirwan-Davitt] triangle and Helen weeping on Andy's shoulder.

Mick's loyalties were divided on Monday nights. Stay to entertain the chairman and guests or join the poker game in No. 3 Consultation Room. Being Mick there was no dereliction of duty – he looked after his guests and saw them safely off the premises.

I hope to be back in Manor Place in a month to six weeks – Beaumont who have been so good to me have promised me a home help and of course I have my best friend, Margaret, next door.

Give my sincere thanks and love to the Council and tell them how grateful I am."

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- **"Afters" catered for.**
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- **Attractive location for photographs.**

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Telephone: 01-6685001

The Irish Kidney Association is the only national organisation working solely in the interest of patients with chronic kidney disease.

More and more Irish families are relying on the financial and psychological support they receive from the Irish Kidney Association.

Since 60% of the patients are unemployed the IKA is called on to help with the basic family requirements - rent, electricity, school books and uniforms, drugs and sadly of all burial expenses.

Research, purchases of life saving equipment and printing of the donor cards help improve the quality of life of the patients.

This voluntary organisation is a registered charity and we badly need your help.

Donations and bequests to:-

Irish Kidney Association
'Donor House',
156 Pembroke Road, Ballsbridge, Dublin 4.
Phone: 01 - 6689788/9 Fax: 01 - 6683820

Prohibition on lodging for collection of unendorsed third-party cheques – Section 76(17), Solicitors (Amendment) Act, 1994

Undertakings

A solicitor should not give any undertaking in respect of clients' monies whether in contentious business or otherwise unless either –

(i) he makes it clear to the recipient of the undertaking that his undertaking could be frustrated by the client refusing to endorse the relevant cheque or negotiable instrument pursuant to section 76(17) of the Solicitors (Amendment) Act, 1994; or

(ii) he obtains an irrevocable authority from the client to endorse the relevant cheque or negotiable or non-negotiable instrument on behalf of the client to enable the solicitor to collect the proceeds of the relevant instrument or lodge to his client account as the case may be.

Even if there is no undertaking involved relative to a client's business a solicitor might deem it prudent to be able to collect or negotiate a cheque or other negotiable or non-negotiable instrument in the course of acting for a particular client.

Proper Procedure

In order to comply with section 76(17) in the above circumstances a solicitor receiving a cheque drawn in favour of a client or in favour of another person (other than the solicitor himself, his firm or a partner) should do one or other of the following:-

(i) have the client or other person personally endorse the cheque in favour of the solicitor or his firm (even if there is an authorisation in place unless it would unreasonably delay compliance with the undertaking or the implementation of the relevant business); or

(ii) with the prior authorisation of the client (or other person), endorse the cheque in favour of himself or his firm *per pro* (i.e. on behalf of and with the authority of) the client (or other person) pursuant to section 91(1) of the Bills of Exchange Act, 1882 (which provides that – "Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.") e.g. an endorsement as follows: "[Solicitor's signature] *per pro* [Payee's name as on cheque]. Pay [Solicitor's Practice Name]."

The Society strongly recommends that all solicitors should observe the spirit as well as the letter of section 76(17) of the Solicitors (Amendment) Act, 1994, and that authorisations from clients to endorse cheques or negotiable or non-negotiable instruments should not be obtained as a matter of course but should only be obtained in circumstances where the prompt conduct of the client's business makes it necessary for the solicitor to endorse cheques or other negotiable instruments instead of having this done by the client.

Authorisation

I, [Name and address of client or other person in whose favour cheque is drawn] hereby irrevocably authorise you [Name and address of solicitor or solicitor's firm] as my agent/agents to endorse in your favour or in favour of your firm per pro myself, that is to say, on my behalf and with my authority, any unendorsed cheque or other negotiable or non-negotiable instrument drawn in my favour or belonging to me which you receive in your capacity as my solicitor, to enable you to collect same to any designated client bank account kept by you or otherwise negotiate same.

Dated this day of 1995.

Signed .....

Witness .....

Adequate Supervision of Apprentices

For the Attention of all Master Solicitors and their Apprentices

The Law Society has received a number of complaints regarding the excessive responsibility which is being delegated to apprentices at the early stages of their training, and in particular prior to attending their initial training course in the Law School.

Masters are reminded that apprentices must receive an adequate level of supervision at all times in the course of the apprenticeship. If the master is unable himself/herself to give such supervision, appropriate alternative supervision should be arranged. This, in the first instance is the responsibility of the master. In the initial stages of training the Society strongly recommends that the master should accompany the apprentice to the closing of at least a few sales before such apprentice can attend a closing alone. It is not the duty of the solicitor acting on the opposite side of the transaction to train the apprentice of a colleague.

The Society strongly disapproves of apprentices carrying out duties in an unsupervised manner, possibly to the detriment of the clients concerned and to the reputation of the profession at large. Furthermore, without the requisite level of supervision and training, the risks of claims against a firm's Professional Indemnity Insurance could be substantially increased.

In addition members are also reminded that it constitutes discourteous and unprofessional behaviour to send an apprentice to close a sale without the consent of one's colleague on the other side of the transaction. This is the case even if the apprentice is in the latter stages of his/her training.

Education Committee
Education Advisory Committee
Conveyancing Committee

Particulars Delivered (P.D.) Forms

All solicitors' offices recently have been furnished by the Revenue Commissioners with a specimen supply of the new Particulars Delivered (P.D.) forms which will come into operation on 1st September 1995 together with a helpful explanatory memorandum. It is hoped that practitioners will find the new forms convenient and user-friendly.

The Conveyancing Committee strongly recommends that henceforth practitioners themselves should not complete the new P.D. forms which, *inter alia*, require details of tax reference numbers of the parties involved in conveyancing transactions to be furnished but should ensure that the forms are signed by the parties themselves. It is the unanimous view of the Committee that, in their own interests, practitioners should not assume the responsibility of completing the new Particulars Delivered Forms.

Conveyancing Committee

Information Returns – Personal Injury Awards

The Finance Act 1992 Part 7 introduced automatic reporting requirements for traders, professionals, agents and other relevant persons as defined. A Statement of Practice was issued by the Revenue Commissioners on the 28 October 1992 (SP-IT1/1992). Modifications of these reporting requirements for Solicitors were summarised in Tax Practice Notes volume 1 issue 2 (August '93).

The Revenue Statement of Practice clarifies the reporting obligations applying to the specified categories of persons. Under the category "persons in receipt of income belonging to others" it provides that Court awards/settlements need only be returned to the extent that they include specific non-capital amounts for loss of earnings or profits or other income amounts. Following representations from the Law Society, the Revenue Commissioners have since confirmed that in personal injury cases, where an award/settlement may include special damages for past or future loss of earnings, no information return is required save and except in the following circumstances.

1. Payments made without deduction of tax under a loss of profits/ emoluments insurance policy. For example:
   - an insurance policy taken out by an employer to provide against an obligation to pay compensation on sickness, injury or death of an employee or against the employer's general liability to pay compensation for occupational injuries;
   - a policy taken out by an employer which insures against loss of profits consequent upon the sickness, accident or death of an employee;
   - a policy of insurance taken out by an employee or self-employed individual which provides for continuing benefit (whether or not capable of being commuted) during disablement through accident or sickness;
   - a sick pay scheme/arrangement or Trust Deed which provides for continuing benefit (whether or not capable of being commuted) during sickness or disablement through accident or sickness;
   - permanent health insurance policy taken out by an employee or self-employed individual.
2. Structured settlements where the payments constitute annuities or annual payments which have not already been subjected to deduction of tax when received. This would only apply in the (rare) event that the Court, in lieu of a lump sum, awarded an annual income for life or during disability.
3. To the extent that there is yearly interest, interest on the award or part of the award or interest for late payment (only the interest element need be returned and again only if it exceeds £500.00 in a year).

Taxation Committee

Discovery – Releasing Copy Documentation

Notwithstanding that the Rules of the Superior Courts do not oblige solicitors to furnish copies of documents which are the subject of Discovery, it is recommended that solicitors, upon being requested to do so, should furnish copies of Discovery documentation on a reciprocal basis upon payment of a reasonable photocopying fee.

There will be cases where this may not be possible because of the volume of documentation involved. In those cases, this general recommendation will not apply but solicitors are urged to deal with their colleagues in such cases on a reasonable basis. Where documentation is being furnished, it should be presented in chronological or some otherwise reasonable order.

Litigation Committee

Re: Return Of Completed Building Contract/ Agreements for Sale

The Conveyancing Committee has received a complaint from a member that a firm of builders operating in the Dublin area have apparently instructed its solicitors not to return the parts of the building contract and agreement for sale executed by the builder/vendor to the purchasers solicitors until the closing.

Such a practice is clearly unacceptable. A solicitor acting for a builder/vendor who receives such instructions from his client should firstly advise his client that this practice is deemed unacceptable by the Conveyancing Committee and if the client persists in instructing the solicitor not to return completed contracts until the closing then the builder/vendor's solicitors is under an obligation to advise the purchasers solicitors when sending out the building agreement and contract for sale, that these documents will not be returned completed by the builder/vendor until the closing date.

A solicitor for a purchaser is in considerable difficulty in preparing a certificate of title for a lending institution if that solicitor is not in possession of parts of the contract completed by the builder/vendor.

Conveyancing Committee

THE SICK AND INDIGENT ROOMKEEPERS' SOCIETY "DUBLIN'S OLDEST CHARITY"

Since 1790 we have been helping Dublin's poor. Please help us to continue with a bequest or donation.

34, Lr. Lesson St.
Dublin 2.
Telephone: 6769191

Irish Lawyers Fishing Club Trip

Enjoying themselves on the Lawyers Fishing Club weekend were, front row l-r: Simon McAleese, James Orange, Robert Ramsey and John Purcell; back row l-r: Stephen Beverley, James St. John Dundon, Michael O'Byrne, Patrick Molloy, Robert Mathisson, Garnet Orange and Barry Segrave.

This year's Irish Lawyers Fishing Club Pilgrimage to the West took place from the 18 to the 21 of May. Ten hardy, perhaps foolhardy, souls ventured forth again to do battle in search of the elusive brown trout of Loch Conn. The group met at Hineys Pub in Crossmolina. Most of the resulting hangovers had dissipated by lunchtime the following day and by Friday evening *Stephen Beverley* and *Robert Ramsey* (both UK) had landed seven fish, keeping two while *Patrick Molloy* (Dublin) kept the Irish flag flying with two fine fish of about a pound and a half each. Despite massive amounts of freely rising trout, the rest of the group had little luck with only *James St. John Dundon* (Dublin) landing and returning a small fish. A splendid meal at Susan Kellett's, Enniscoe House rounded off the day. Saturday saw an altogether more determined group take to the water. At the end of the day, *Michael O'Byrne* (Kells) had landed a cracking fish of two and a half pounds while *James St. John Dundon* and *Simon McAleese* (Dublin) had kept three fish. *Garnet Orange* had a good trout of about a pound and *Messrs. Beverley and Ramsey* had a superb day landing ten fish, keeping six and missing literally scores of others. Gallantly fighting a rear guard action were *John Purcell* (Cork - a former champion on this trip), *Jim Orange* (Dublin) and *Peter Matthison* (UK). Another beautiful meal at Enniscoe followed. Guest of the Club was *Barry Segrave* who did such a fine job looking after all the anglers. Wine flowed freely. Prizes were presented with *Messrs. Molloy and Beverley* taking best of Irish and UK respectively and *Robert Ramsey* following in third place. Speeches were delivered with great aplomb with much thanks and praise for both food and fishing. Noted Galway bon viveur and raconteur *Paddy Daly* put in a surprise late appearance and joined with gusto in the magnificent repast. *Messrs. Dundon and McAleese* were elected to form next years Committee. Roll on May 1996!

Michael O'Byrne
Irish Lawyers Fishing Club

English Agents: Agency work undertaken for Irish solicitors in both litigation and non-contentious matters – including legal aid. Fearon & Co., Solicitors, Westminster House, 12 The Broadway, Woking, Surrey GU21 5AU.
Tel: 0044-1483-726272.
Fax: 0044-1483-725807.

Agricultural Law Association Meeting
Venue: Oxford
18-22 September 1995
Contact: Priscilla Frost, Oxford Conference Management
10b Littlegate Street, Oxford OX1 1QT
Phone: 01865-794727
Fax: 01865-794695

29th Australian Legal Convention
24-29 September
Brisbane, Queensland

Annual Law Services
See notice on page 252

District Court Practice of Criminal Law
30 September, 10.30 - 5.30 p.m.
Old Ground Hotel, Ennis, Co. Clare
Contact: Patricia Casey, Law Society

Younger Members Committee Race Night
Thursday 19 October, 8.00 p.m.
Members' Lounge, Law Society
Contact: *Joan Doran,* Law Society

Fourth JURISTEUROPE Convention
Theme: Personal liability of company managers & their advisers.
26/27 October, 1995
Lille, France
Contact: Mary Kinsella, Law Society for brochure

Aviation Law Association of Australia & New Zealand National Conference 1995
Venue: Perth, Western Australia
29 October – 1 November 1995
Contact: Promaco Conventions Pty. Ltd.
P.O. Box 890, Canning Bridge
Western Australia 6153.
Phone: 09-364-8311 Fax: 09-316-1453

Society of Young Solicitors
Solicitors & Barristers' Conference
Venue: Dromoland Castle
3-5 November 1995
Contact: Declan O'Sullivan, Martin E. Marren & Co., 10 Northumberland Road, Dublin 4. DX 58
Phone: 01 - 668 6266

International Bar Association Energy & Resources Law '96
Venue: Prague
24-29 March, 1996
Contact: IBA
Phone: 171-629-1206 Fax: 171-409-0456

CLE Courses

Essential Pension Planning Tips & Traps
14 September, 6.00 - 8.30 p.m.
Blackhall Place

Drunk Driving Offences
21 September, 2.00 - 5.00 p.m.
Imperial Hotel, Cork

Environmental Law and its Implications in Conveyancing Transactions
26 September, 6.30 - 8.30 p.m.
Blackhall Place

Valuation of a Personal Injuries Action
6 October, 2.00 - 5.30 p.m.
Blackhall Place

The Role of Discovery
11 October, 5.00 - 8.30 p.m.
Blackhall Place

Judicial Review (Lecture 1)
12 October, 6.30 - 8.30 p.m.
Moyne Institute, Trinity College

Practical Implications of the Package Holidays & Travel Trade Act 1995
17 October, 6.30 - 8.30 p.m.
Blackhall Place

Judicial Review (Lecture 2)
19 October, 6.30 - 8.30 p.m.
Moyne Institute,
Trinity College

Pre-trial Procedures & Conduct of an Action
25 October, 5.00 - 8.30 p.m.
Blackhall Place

SPECIAL NOTICE

The Duty of Personal Representatives under the Social Welfare Legislation

Solicitors will have received a practice note from the Department of Social Welfare in relation to the Duty of Personal Representatives under the Social Welfare Legislation with their June *Gazette*.

Included in the practice note was a list of the Regional Social Welfare Inspectors.

The Department has been delighted with the response from practitioners, some of whom were apparently unaware heretofore of their obligations in this regard. However, we have been advised by the Department that a considerable number of solicitors are contacting Social Welfare Officers in relation to estates which are not within their own area. **We would ask practitioners to please ensure that they contact the appropriate Social Welfare Officer in each instance.**

Queries of a general nature can be dealt with by the Pension Services Office of the Department whose address is:

The Department of Social Welfare
Pension Services Office
College Road
Sligo

Telephone: Sligo (071) 69800 or Dublin (01) 874 8444.

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1996
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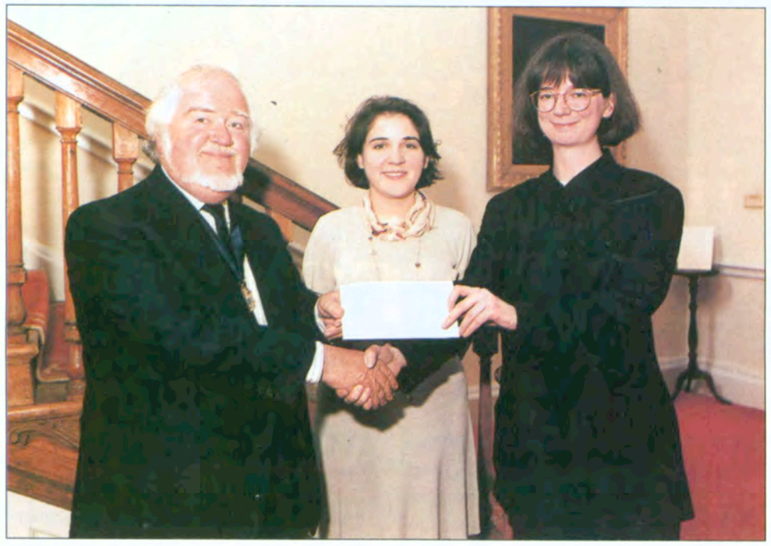
PEOPLE AND PLACES



Recently the Law Society presented a cheque for £5,000, the proceeds of voluntary donations by practiising solicitors, to FLAC. A further £3,960 was contributed to FLAC by direct donation by practising solicitors. The photograph shows the President of the Law Society, Patrick Glynn presenting the cheque to Iseult O'Malley, Chairperson, FLAC and Sabha Greene, Administrator, FLAC (centre).

Pictured at the launch of the revised edition [1995] of the Law Society General Conditions of Sale are l-r: Paddy Fagan, Colm Price (Chairman) and Eric Brunker of the Conveyancing Committee. See also page 250.

Pictured at a recent presentation to the Law Society by John Maher, Past President of the Law Society (centre) of a set of drawings of Blackhall Place. Also pictured are Patrick Glynn, President, Law Society (left) and Andrew F. Smyth, Senior Vice President, Law Society.

Pictured are Oisin Murphy (Actons) tennis winner, Elizabeth Cruise (Croskerrys), Captain of the winning soccer team; Orla Coyne, Chairperson, Younger Members Committee and Deirdre McKnight (Reddy Charlton & McKnight) tennis winner. (See also article on page 252.

OVER-TAXED?

OUT NOW!

Over-taxed with clients' taxation problems?
Or your own?

Look to Butterworth's ***"TAX GUIDE 1995-96"***, the lawyer's complete, in-depth guide to taxation in Ireland.

Newly updated to this year's Finance Act (including the new reliefs for renewal of tourist resort areas), ***"TAX GUIDE 1995-96"*** will keep you fully abreast.

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"100 metres from the Four Courts"

A presentation was made recently to Mrs. Dymphna O'Reilly on her retirement from the Law Society. Pictured with Mrs. O'Reilly are l-r: Brian O'Reilly, Solicitor (Mrs. O'Reilly's son); Michael V. O'Mahony, Past President, Law Society; Andrew F. Smyth, Senior Vice President, Law Society; Ken Murphy, Director General and Cillian MacDohmnaill, Finance & Administration Executive. (See also page 229).

FREE SKI HOLIDAY TO AMERICA

SKIING IS FUN!!

White Mountains, New Hampshire, U.S.A.

Those of you who have experienced a ski holiday have a responsibility to your colleagues to warn them that it is addictive enough to carry a Government health warning!

No other holiday offers such a terrific all round experience – from the exhilaration of careering down the slopes, to the joy of exploring the local terrain, not to mention the compulsory apres ski get together, the terrific company, "craic" and, for those who can stand the pace ..... wild discos into the wee small hours!!

Michael Stein Travel is the leading travel agent in the Ski holiday market in Ireland. We've got something to suit everyone and every pocket, from budget priced apartments to top quality hotels, self catering to full board. Our package holidays cover all the major European resorts and this year we yet again are offering, the exciting White Mountains of New Hampshire with the "Boston Ski Party".

Michael Stein Travel caters equally for the experienced and novice skier, for the young and singles as well as for families. Groups are our specialty with very attractive deals and discounts available. Call us first if you want to arrange a group..... or join one.

Our resident ski specialist is Hugh who can advise you on everything to do with your holiday.....from boots to bars!!

A SIMPLE COMPETITION FOR ALL TO ENTER

The Prize

- One week's skiing holiday for two in America (January 1996)
- Flight ex Dublin/Shannon to White Mountains of New Hampshire
- Accomm. for 7 nights on a Half Board basis at Woodward's Motoring
- Lift Pass for 6 days
- Ski & Boot Hire

The Prize is sponsored by Michael Stein Travel, 77 Lower Camden Street, Dublin 2.

SKIING COMPETITION

Q1. The Solicitors (Amendment) Act 1994 was enacted in November 1994. True ❑ False ❑

Q2. The Law Society building is the former Blue Coat School. True ❑ False ❑

Q3. Blackhall Place is in Dublin 8. True ❑ False ❑

Q4. The phone number of Michael Stein Travel is _____

Name: _____

Address: _____

_____ Tel No: _____

Completed entry forms should be returned to:
Holiday Competition, The Law Society Gazette, c/o 4 Iona Drive, Dublin 9.

Closing date for the receipt of all entries for the competition is midday Monday, September 25th

The prize is non transferable.

Irish Solicitors Golfing Society

Presidents Prize

The results of Paddy Glynn's Presidents Prize held at Castletroy Golf Club on the 14 July, 1995 were as follows:-

Winner *Diarmuid Kilcullen* 42 points (H/C 22)
Runner up *Danial McGrath* 40 points (H/C 7)

The Ryan Cup

Winner *Bill Hartnett* 40 points (H/C 8)
Runner up *Alan Mitchell* 39 points (H/C 9)

Handicaps 13 – 18

Winner *Frank Heffernan* 38 points (H/C 17)
Runner up *Padraig Harris* 37 points (H/C 21)

Front Nine

Winner *Joe Moloney* 21 points (H/C 2-)

Back Nine

Winner *Bobby Cussen* 21 points (H/C 6)

Veterans Trophy

Winner *Padraig Gearty* 34 points (H/C 13)

Over 30 miles from Castletroy.

Winner *Paul Eustace* 37 points (H/C 18). ❑

YOUNGER MEMBERS' COMMITTEE

RACE NIGHT

THURSDAY, 19 OCTOBER 1995

Members' Lounge, Blackhall Place.

First Race 8.00 pm sharp.

Contact Joan Doran at the Law Society to book your party's table

European Union Law and Irish Solicitors

by Vincent Power*

Introduction

The aim of this article is to discuss the practice of European Union[1] law by solicitors in Ireland. The article examines the practice of the European Courts[2] as it relates to Irish solicitors but also takes a much broader view to discuss the practice of EU law generally by solicitors in Ireland. The practice of the European Courts *appears* to play a very small part in the daily lives of Irish solicitors in terms of the number of solicitors who practise before those courts. Nonetheless it is clear that the jurisprudence of the European Courts is applied every day by Irish solicitors in advising their clients.

It is difficult to discuss the general topic of solicitors practising EU law in Ireland. It would be easier to discuss a particular case of a discrete area of the law but instead one is faced with the more difficult task of presenting the "big picture". Yet, by looking at the "big picture" one occasionally finds interesting details which would otherwise go unnoticed. Inevitably, an article such as this contains personal views which may not be shared by everybody but which can give rise to some discussion and debate afterwards.

It is useful to start with a sobering statistic. There are probably no more than ten solicitors in private practice in Ireland who derive all or most of their fee income from the practice of EU law. This is after 22 years of membership of the European Community and despite the fact that virtually all solicitors who have qualified in the last decade or so have been exposed to EU law in one form or another.

Why should Irish Solicitors be concerned with EU Law?

If there are not more than ten solicitors practising EU law on a full-time basis in Ireland then is it the case that solicitors have no need to worry about EU law? Why should solicitors be worried at all about what happens in the European Courts? Are there not, in relative terms, only a very small number of cases before the European Courts anyway which are of direct Irish interest each year?

Vincent Power

While there maybe only a small number of solicitors in Ireland who practice full-time in the area, there is no doubt that EU law is relevant to *all* 4,180 solicitors with practising certificates in Ireland.

The first and most basic reason why all solicitors need to be concerned about EU law relates to professional negligence. Failure to address an EU law aspect of a case may well result in a suit for negligence. To take three examples: first, advice given on an exclusive distribution agreement which fails to incorporate the relevant rules of EC competition law on such agreements would give rise to a suit in negligence; secondly, failure to advise a public authority on the EU public procurement rules could also give rise to a negligence action; and, thirdly, a failure to advise a client on the application of an EC Directive could also be negligent.

Secondly, and more importantly, one can help people by invoking EU law.[3] The recent social welfare cases admirably demonstrate the value of EU law to *individuals*.[4] Advice on rights of residence can assist EU nationals who wish to settle in other Member States.[5] It is well-known that people are beginning to retire to Ireland from other parts of the EU so Irish solicitors may be called upon to give advice to these people on their entitlements under EU pension law and EU social security law.[6]

Thirdly, clients demand and deserve assistance in the area of EU law. Irish solicitors must do more to explain and educate their clients about the implications of EU law. A significant part of the legal profession's service to society is to inform the public about the implications of EU law. Instead, some Irish clients by-pass Irish solicitors to go to lawyers abroad because they do not know that a competent service can often be provided by Irish solicitors or they believe that a foreigner must be able to provide a better service – it is noteworthy that using a foreign lawyer does not always guarantee a greater chance of success than using Irish lawyers. Similarly, many clients do not appreciate their rights under EU law and wrongs often go unremedied.[7] It is important that Irish solicitors assist their clients in conducting an EU legal audit of their businesses. Such an audit can include an assessment of the client's competition law practices, marking and labelling procedures, pension schemes, employment rules and so on.

Most clients are blissfully unaware of areas such as competition law, public procurement, employee rights and so on.

Fourthly, an understanding of EU law generally and the practice of the European Courts particularly is imperative even to understand some areas of Irish national or municipal law. An obvious example is that it is impossible to adequately advise on Ireland's Competition Act, 1991[8] without understanding the underlying EC competition law rules: notifications to the Irish Competition Authority require citation of the judgments of the European Courts while the Competition Authority itself cites EC precedents in its own Decisions. Another example is environmental law where it is impossible to understand some of the recent Irish legislation on the environment without appreciating the purpose and effect of the underlying EC Directives and the judgments of the European Courts. Indeed, the judgment of the European Court of Justice in *Marleasing v La Comercial*[9] means that it is not possible to review national implementing legislation without regard to the underlying EC Directive.

Fifthly, the jurisprudence and practice of European Courts sometimes present an opportunity to circumvent the rules of national law in such matters as procedural time-limits.[10] EU law also provides compensation in some circumstances for breaches of EU competition law.[11] The European Courts can provide another court of appeal.[12]

Finally, there is the small matter of fees which can be earned from the application by Irish solicitors of the jurisprudence of the European Courts. Some solicitors have carved out niches within their own practices in such areas as the EC law relating to milk quotas, social welfare and fisheries law. Other solicitors have occasionally had a particular case which has led to a "baptism of fire" but often an abiding love of the subject lingers for many years after the case is over. However, the whole area of EU law is still a largely untilled field for Irish lawyers. In the case of EU law, there is not only a niche in the market but there is also a market in the niche.

How can Irish Solicitors utilise the Practice and Jurisprudence of the European Courts?

Thijmen Koopmans, a former judge of the European Court of Justice, has written that "one might say that the [European Court of Justice] is the European lawyers' hobbyhorse. . . It would indeed be difficult to discuss any important area of Community law without referring to the Court's contribution to its development."[13] It can also be said that it would be impossible to practise as a solicitor advising on EU law without having regard to the practice and jurisprudence of the European Courts.

In practice, Irish solicitors do not have adequate access to the *European Court Reports* or the *Common Market Law Reports*. There are very few subscriptions in Ireland to these periodicals. There are very few court libraries around the country with a stock of these law reports. Greater efforts need to be made by all concerned to ensure greater access to such materials by the establishment of regional libraries and there is a need for some Universities to open the European Documentation Centres to solicitors.

It is clear that not every member of either branch of the Irish legal profession has availed sufficiently of the opportunities which are presented by EU law. There are very few legal practitioners (of either branch) who specialise in the area. Yet, there is no shortage of opportunities presenting themselves because there are developments in European law on a daily basis and there are few areas of the law which change as rapidly and as dramatically as EU law.

The practice of the European Courts is of interest to solicitors other than the commercial or the litigation solicitor. The private client solicitor or the criminal law solicitor[14] can avail of the jurisprudence of the European Courts. It is important to realise at the outset that EU law is often "masked" as Irish law. This is often the case because a Directive has been implemented by way of a Statutory Instrument or a Statute and people rely on the Statute or Statutory Instrument alone. It is surprising how few lawyers realise how such a Statute or Statutory Instrument ought to be interpreted in the light of the underlying Directive. Cases such as *Marleasing*[15] seem to be almost unknown to many lawyers.

It is useful to reflect on how a solicitor practising in Ireland comes across EU law in practice.

Discrimination

If an EU national is discriminated in regard to some matter covered by the EU Treaty then an Irish solicitor can clearly assist that client to remedy the wrong.[16]

Trade in Goods

Provisions such as Articles 30 and 34 of the EC Treaty arise quite frequently in practice. This is particularly so in terms of advising manufacturers who want to export to other Member States as well as to domestic sellers who want to challenge the importation of goods from abroad on the basis that the goods ought not to benefit from the provisions on free movement of goods (for example, because of Article 36).

Employment

A solicitor can assist a national of another EU Member State who is trying to take-up employment in Ireland but is prevented from doing so by virtue of some impediment placed upon him or her by the Irish authorities.[17] If an Irish worker wants to work in another EU Member State then the worker must be provided with an Irish passport or any other appropriate documentation.[18] If a worker from another EU Member State comes to Ireland then s/he is entitled to reside here.[19]

Establishment of a Business

A solicitor can assist a national of another EU Member State who is trying to establish a business in Ireland but is prevented from doing by virtue of some impediment placed upon him or her by the Irish authorities.[20]

Availing of Foreign Services

A solicitor can assist someone in Ireland who wants to avails of services which are available from abroad more cheaply or because they are simply not available in Ireland.[21]

Free Movement of Capital

It is well-known that EU law protects the free movement of capital and, from time to time, Irish solicitors and courts have had to deal with the EC law aspects of free movement of capital.[22]

Anti-Competitive Arrangements

Arrangements between undertakings which prevent, restrict or distort competition in the common market or any part of the common market are prohibited[23] and void[24] unless exempted by the European Commission.[25] This rule, embodied in Article 85 of the EC Treaty,[26] is perhaps one of the two most useful provisions of the EC Treaty for solicitors in practice. It is often a very good defence mechanism in that it sometimes allows parties to extricate themselves from contracts by virtue of the fact that the contracts are legally void and unenforcable.

Abuse of Dominance

Any abuse of dominance by one or more undertakings having a dominant position in the common market or a substantial part of the common market is prohibited and no exemption can be obtained from the European Commission. This rule, embodied in Article 86 of the EC Treaty,[27] is the second of perhaps the two most useful provisions of the EC Treaty for solicitors in practice. It is often a very useful way for smaller Irish companies to combat the abusive conduct of larger and more powerful foreign undertakings – various Irish examples include *B&I Line/Stena Sealink (Holyhead), Irish Continental Group/CCI de Morlaix (Port of Roscoff)28 and London European Airways/SABENA.*

Public Undertakings

Article 90 of the EC Treaty tries to ensure that undertakings which are publicly-owned regulated or privileged do not evade the EC rules on competition. Article 90 of the EC Treaty is aimed at controlling the behaviour of public undertakings and undertakings to which Member States grant special or exclusive rights.

State Aid

Articles 92 to 94 of the EC Treaty relate to State aids. State aids are advantages (such as subsidies, tax breaks and soft loans) conferred by a Member State on undertakings.

Article 92 prohibits, as a general rule, State aids that distort competition but goes on to specify those aids that will or may be compatible with the common market. Article 93 provides that the European Commission will supervise State aids. Article 94 provides for the Council of Ministers to adopt appropriate regulations for the application of Articles 92 and 93.

Employee Discrimination

If a worker in Ireland is being discriminated against in terms of pay on the basis of gender then clearly an Irish solicitor can assist the worker to avail of the protection of Article 119 of the EC Treaty and the growing jurisprudence of the European Courts in this area.

Preliminary References

The "preliminary reference" procedure under Article 177 of the EC Treaty is an important part of the practice of an Irish solicitor involved in EC law in Ireland.[29]

Litigation

The Judgments Convention can facilitate the institution and prosecution of civil litigation where there are different jurisdictions involved.

The Euro-Defence is a much undervalued weapon in the armoury of a litigation solicitor. It is very useful to be able to say to the plaintiff in a contract dispute "but your contract is void under Article 85(2) – you have no case."[30]

Employee Protection

It is still commonplace for Irish solicitors to be consulted by workers who have lost their jobs because their employer has been acquired. Solicitors can provide practical assistance in terms of the application of the Acquired Rights Directive.[31]

Public Procurement

Public procurement is the body of EC law which restricts the freedom of public bodies to award contracts. There is always a fear that public authorities will tend to place contracts with national suppliers where possible. There is an entire code of law, embodied primarily in Directives, which regulates the whole area of public procurement in such areas as public works and public services. Some Irish solicitors seem to be largely unaware of this area and this is somewhat surprising. Every solicitor now has an opportunity to assist clients who lose or fail to win public contracts by virtue of these rules. For example, if a company fails to win a contract then the process can be upset and the loser may be able to obtain damages by virtue of a breach of the public procurement code. Similarly, an undertaking competing in a market can seek to obtain more 'public' business by virtue of seeking to upset the current purchasing practice of a public customer. Examples such as *Dundalk/Wavin Pipes*[32] demonstrate the importance of EU public procurement law in practice in Ireland.

Recognition of Foreign Qualifications

Many Irish students are studying at universities abroad and inevitably

there will be questions arising in the future over the recognising of foreign degrees, diplomas and qualifications. A solicitor should be familiar with the jurisprudence of the European courts in this area.[33]

Marketing

Quite frequently, Irish solicitors are consulted about labelling and marking requirements both *offensively* in terms of products which are to be exported from Ireland to elsewhere in the EU and *defensively* trying to stop the importation into Ireland of products from elsewhere in the EU.

Agriculture

It is surprising that in a country with as strong an agricultural base as Ireland that there has not been more work for Irish solicitors in the area of EC agricultural law.[34] Milk quotas and headage payments have provided some work but other areas seem to be *terra incognita.*

Consumer Protection Law

Solicitors who do consumer protection work ought to be very much aware of the jurisprudence of the European Courts as well as the measures adopted on such issues as product liability, product safety, advertising, timeshares, doorstep selling, consumer credit, unfair contract terms and package holidays.

Contract Disputes

With the growth of international contracts, there is no doubt that the Rome Convention of 1980 will be of more assistance and interest to lawyers.

Transport

Transport is an extremely important area of EU law. Transport represents 7% of the combined GDP of the EU which is more than agriculture. Irish road hauliers as well as Irish aviation and shipping companies provide work to Irish solicitors in this area. More importantly, some Irish solicitors are now advising international clients in the area of EU transport law.

Intellectual Property

Patents, trademark, copyright and other intellectual property rights cannot be seen solely in the light of national law. Recent cases such as *Magill* clearly demonstrate that a solicitor advising on intellectual property cannot ignore EC competition law.

Welfare

Welfare law has been a growth area in recent years and Irish solicitors who deal with private clients should familiarise themselves with the jurisprudence of the European courts as welfare law.[35]

Fisheries

EC fisheries law is particularly important in Ireland. Solicitors in coastal areas should be familiar with EC fisheries law. While there are solicitors with excellent reputations in the subject, there is still room for others!

Conclusion

There are many other opportunities for the solicitor to apply the jurisprudence of the European Courts in practices. This article has only examined a few of the cases.

Part II of this article will be published in the October issue of the Gazette.

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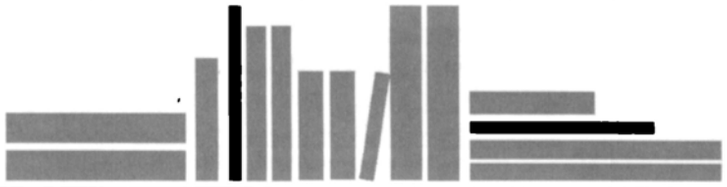
References

1. The term "European Union" or "EU" is used in this paper to include the combined legal regimes of the European Community, the European Coal and Steel Community, the European Atomic Energy Community as well as the Treaty on European Union.
2. The term "European Courts" is used in this article to describe the Court of Justice of the European Communities ("ECJ") and the Court of First Instance ("CFI").
3. See Van Hamme, "Human Rights and the Treaty of Rome" and Power, "Human Rights and the EEC" in Heffernan (ed.) *Human Rights: A European Perspective* (1994) at pages 70 and 81.
4. A case with an interesting Irish angle was *Chief Adjudication Officer v Twomey* [1992] 2 CMLR 571. Other examples include *Warmerdamesteggerda* [1991] 2 CMLR 86; *Newton v Chief Adjudication Officer* [1992] 1 CMLR 149; *Johnson* [1991] 3 CMLR 917; and *Clarke v Chief Adjudication Officer* [1987] 3 CMLR 277.
5. O'Caoimh and Barry, "The Development of the Free Movement of Persons towards European Citizenship" (1993) IJEL 98.
6. E.g. cases such as *Secretary of State for Social Security v Thomas* [1993] 3 CMLR 880.
7. Including the right to sue a Member State for damages for failure to implement a Directive; see Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italian Republic* [1991] ECR I-5357, [1992] IRLR 84.
8. Act No. 24 of 1991.
9. Case C-106/8 [1992] 1 CMLR 305, [1992] IRLR 84.
10. *Emmott v The Minister for Social Welfare* [1991] 3 CMLR 894, [1991] IRLR 387.
11. Case C-106/89 *Marleasing v La Comercial International de Alimentacion SA* [1990] ECR I-4135, [1992] 1 CMLR 305, [1992] IRLR 84 and Case 14/83 *Von Colson v Land Nordrhein-Wesfalen* [1984] ECR 311, [1986] 2 CMLR 430.
12. E.g. *Grogan v SPUC* [1991] 3 CMLR 849.
13. Koopmans, "The Future of the Court of Justice of the European Communities" (1991) 11 *YEL* 15 at 15.
14. Case 186/87 *Cowan v Le Tresor Public* [1989] ECR 195, [1990] 2 CMLR 613 and *Meagher v Minister for Agriculture and Food* [1994] 1 IR 329, [1994] I ILRM 1.
15. See above.
16. EC Treaty, Art.6.
17. EC Treaty, Art.48.
18. See Dir. 68/360, Arts. 2 and 3. See Case C-113/89 *Rush Portugesa Limitada v ONI* [1990] ECR I-1417, [1991] 2 CMLR 818.
19. Dir. 68/360, Art. 2.
20. EC Treaty, Art. 52.
21. *Grogan v Society for the Protection of the Unborn Child* [1991] 3 CMLR 849; Cases 286/82 and 26/83 *Luisi and Carbone v Ministero de Tesero* [1984] ECR 377, [1985] 3 CMLR 52; and *Cowan v Tresor Public* see above.
22. See *East v Cuddy and Cuddy*, Circuit Court, Sheehy J., unreported, 11th Nov. 1985.
23. EC Treaty, Art. 85(1).
24. EC Treaty, Act. 85(2).
25. EC Treaty, Art. 85 (3).
26. A comparable (but not identical) provision is contained in Art. 65 of the ECSC Treaty.
27. A comparable (but not identical) provision is contained in Art. 66 of the ECSC Treaty.
28. Unreported Decision of the European Commission, 16th May 1995.
29. McMahon and Murphy, *European Community Law in Ireland* (1989), Chap. 12.
30. Cf. *Dunlea v Nissan* [1993] IJEL 146.
31. Dir. 77/187.
32. Case 113/80 *EC Commission v Ireland* [1981] ECR 1625.
33. E.g. Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097, [1989] 1 CMLR 901 and Case C-340/89 *Vlassopoulou v Ministerium Justiz* [1993] 2 CMLR 221.
34. See cases such as *An Bord Bainne Co-operative Ltd v Minister for Agriculture* (1987) 2 JIEL 37.
35. Cousins, "The EEC Social Security Regulations in Ireland" (1992) 2 IJEL 105.

BOOK REVIEWS



The Law of Passing-Off

By Christopher Wadlow. Published by Sweet & Maxwell, London. Second Edition; 1994; 625pp; hardback; £98.00 stg.

This is the second edition of Christopher Wadlow's book, which when first published in 1990 was an extremely welcome arrival since it is, if not the only, then one of the very few texts devoted entirely to the tort of passing-off. The cover of this new edition is somewhat intimidating in its black and green severity but this belies the content which is well laid out, clear and easy to find one's way around. There is a useful "plan of the book" section which explains Mr. Wadlow's lay-out of the text and indeed if only those four pages were read, one would have gathered the essence of passing-off.

The book is unusual for an English text in that it cites cases from most of the common law jurisdictions of the world. Since the tort of passing-off is an ever growing one and the Courts in Ireland have always been open-minded in accepting case law from other common law jurisdictions as persuasive precedent, Mr. Wadlow's book as a work of reference for Ireland, even though not specifically designed for us is extremely useful in that regard.

The introduction deals with the essential elements of the tort, then charts the history and growth of the tort from the early eighteenth century and compares passing-off with the concept of unfair competition. The next sections deal in detail with the bones of the tort, goodwill, damage and misrepresentation. There is a section on distinctiveness and get-up and a useful section on character merchandising. Finally defences to the tort of passing-off and remedies for enforcement are explained. The text is straight forward, clear and succinct to read and the chapters are laid out in sections which are easy to cope with. I was unable to dream up a set of facts the answer to which was not contained and easily found among the pages of this book.

On the negative side, the table of cases is not without its faults. On a trawl through, initially for mention of Irish cases, I checked paragraph 2.19 for a reference to *An Bord Trachtala -v- Waterford Foods*, reported at [1994], Fleet Street Reports. However no mention is made at all in paragraph 2.19 of the case. Thus riled, I abandoned my search just for mention of Irish cases and unfortunately found a number of other such editing errors. *Ciba-Geigy Plc. -v- Park Davis & Co. Limited* [1994] FSR8 is nowhere to be found at Paragraph 4.13, but in the paragraph above, at 4.12. *United Biscuits (U.K.) Limited -v- Burton Biscuits Limited* [1992 SFR14] is not in fact the case mentioned at paragraph 6.60 in spite of what the table of cases says. Rather it is *United Biscuits -v- Irish Biscuits* [1971] I.R. 16 which is cited at paragraph 6.60 where College Creams and Cottage Creams were held not to pass-off one another in appearance, size or texture since their outer packaging was distinctive. This case however receives no mention at all in the table of cases. Such errors are regrettable in a tome costing STG£98, and although these are presumably not Mr Wadlow's mistake, perhaps he will consider challenging his editor prior to commencing work upon the third edition to check it more carefully.

Since the tort of passing-off has no statutory basis at all, per force, Mr. Wadlow's text leads the reader from case to case and the only real criticism I would have, is that his text is a little light on comment about the cases and he rarely gives his view as to how he believes matters should evolve. This judgment is, however, perhaps a little harsh since the book is, because of this, an extremely useful one for the practitioner and one which, overall, I highly recommend as an addition to any solicitor's practice.

Carol Plunkett.

Case Law of the European Court of Human Rights, Volume III, 1991 – 1993

By Vincent Berger, Dublin, The Roundhall Press, xvi + 454 pp; IR£47.50; hardback.

The Chinese philosopher Confucius, (551 – 479 BC) in the Li Chi wrote of the Great Commonwealth where all men are brothers. He wrote that within this Great Commonwealth, virtuous and able men are elected to office, mutual confidence is demonstrated and peace obtained. In this land, people would regard other people's parents, families and states as their own; the old could enjoy their old age, the young were free to grow and employ their talents, the helpless, widows and widowers, the lonely, the orphaned, the crippled and the deformed would all be provided for. Confucius continued that labour was not to be used for selfish purposes; persons content at work would not be involved in banditry or rebellion and as a result "even outer gates need not be closed". This was to be "the state of Great Unity".

Confucius was writing about human rights and although the perfect Commonwealth has not come about, Mr. Justice Brian Walsh in his preface to Dr. Berger's book notes that it is evident in the years under review that the European Court of Human Rights has earned

the "respect and confidence of the free peoples of Europe". The European Court of Human Rights, the first international court of fundamental rights, its judges and officials deserve our gratitude. Four hundred and forty eight judgments were delivered by the Court up to the date of publication of Dr. Berger's book.

This third volume of the case law of the Court between 1991 and 1993 illustrates the growing number of judgments of the Court. Summaries of judgments are set out in the book identifying all the stages in the Court's reasoning. The facts and complaints of the applicants are set out together with the legal arguments and there is a specific bibliography at the end of each case.

Great credit is due to Dr. Berger, Head of Division at the Registry of the European Court of Human Rights, Professor at the College of Europe at Bruges and Warsaw, encouraged by Mr. Justice Brian Walsh, Judge of the European Court of Human Rights. Praise is appropriate for The Round Hall Press for making this series of reports available to the world. This series of reports can be recommended without qualification.

It is appropriate that the series is published in Ireland. Sir John Davies wrote in his *Discovery of the True Causes why Ireland was never entirely brought under Obedience to the Crown of England until the beginning of His Majesty's [King James the First] Happy Reign:*

> "There is no nation of people under the sun that doth love equal. . . justice better than the Irish, or will rest better satisfied with the execution thereof; although it be against themselves, so as they may have the protection and benefit of the law where upon just cause they do desire it."

What noble words!

Dr. Eamonn G. Hall.

The Law of Private Companies

By Thomas B. Courtney, Solicitor, assisted by G. Brian Hutchinson, Barrister at Law. Published by Butterworths, Dublin, 1995, lxxix, 916pp, hardback, £65.00.

Mr Courtney's *The Law of Private Companies* comes at an important point in the development of Irish company law. The book is right up to date and will serve as a timely reminder to participators in the current review of company law of the extent and complexity of a law which, arguably, could be kept at a simpler level.

Mr Courtney's book recognises that what we consider as company law breaks down effectively into three strands of law, first the law of the organisation and management of companies, secondly securities law and finally insolvency law. By restricting his remit to the private company he has avoided the requirement of explaining the intricacies of Irish securities law as they apply to public companies. (At the most recent count there were fewer than 500 public companies in Ireland of which fewer than one third were either listed or had a quote on one of the subsidiary markets of the Stock Exchange.)

The book therefore concerns itself with the law applicable to the vast majority of Irish companies. That said, in the final chapter of the book there is a very good comparative overview of company law as it affects public companies which is as thorough as any found in company law textbooks generally. The book can and should therefore be viewed as a comprehensive company law textbook.

The book contains a most readable introduction setting the private company in a historical context. It also contains a definitive list of applicable Irish legislation which reminds one of what Mr Justice Keane had to say at a conference on the 1987 Companies (no 2) Bill which became the 1990 Companies Act: he pointed out the Irish acceptance of every "juggernaut that comes down the Westminister assembly line".

The Law of Private Companies then deals with the formation and registration of the Company, the consequences of incorporation and circumstances where the separate legal personality is disregarded. It then deals with the constitutional documentation of a private company and the capacity and authority of the company to contract. There is a valuable discourse on pre-incorporation contracts which we in Ireland have had for 25 years longer than our closest neighbour.

The book deals comprehensively with matters of corporate governance – the status of members and directors, the duties of directors and the concept of membership. There is an important chapter on the transfer of shares in private companies. This is important law given that many disputes in private companies revolve around the transferability or non-transferability of shares. This leads into shareholder's remedies which are well dealt with.

Borrowing and giving of security is dealt with thoroughly which leads into the enforcement of charges and receiverships through examinerships to winding up.

One chapter deserving special mention is that relating to investigation of private companies. In view of our constitution and the perception that investigations can constitute quasi-judicial processes, it is important that this law is thoroughly understood. It is very readable indeed.

This book is a magnificent work and is essential reading for solicitors. I would add also that, unusually for a book of this size, the indexing is thorough and accurate.

Paul Egan.

The Law Reform Commission Consultation Paper on Intoxication as a Defence to a Criminal Offence

This publication from the Law Reform Commission comprises five chapters culminating in provisional proposals for reform in the area under consideration.

The content of the first chapter provides information by way of introduction to the subject. It is clear that the intoxication defence has its roots in a series of nineteenth century English cases culminating in the *Director of Prosecutions v Beard* in 1920. This case established that evidence of drunkenness which renders the accused incapable of forming specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had that intent. This decision was subsequently interpreted in the House of Lords decision of the *Director of Prosecutions v Majewski* which distinguished two forms of intent, specific intent and basic intent. However, the matter is not as simple as that and one must also consider other factors such as self induced intoxication as opposed involuntary intoxication. Other factors which require consideration are the issues of intoxication/insanity and intoxication/addiction.

The historical development of the defence of intoxication is dealt with in Chapter Two and it is clear that the Common Law, in its formative period, was little concerned with the mental processes of the offender. Prior to the nineteenth century intoxication was not a defence to a criminal charge.

The Commission then proceeds to consider, in chapter three, the law in other jurisdictions together with an indepth consideration of *Majewski* culminating, in Chapter Four, with a consideration of recommendations for reforming the intoxication defence in other jurisdictions.

In Chapter Five the Commission makes it provisional proposals for reform by recommending (a) that self induced intoxication should never ground a defence to any criminal charge or, alternatively, (b) that the offence should be that of doing the proscribed act while intoxicated and that on conviction the accused should be liable to the same punishment as that provided by law for the offence charged, except for murder where the punishment should be as for manslaughter.

By way of an interesting aside the *Irish Independent* of the 11 April 1995 reports that the President of the Association of Garda Sergeants and Inspectors recently accused the Law Reform Commission of "foot dragging" with its study aimed at overhauling the current bail laws. He is reputed to have expressed the view that the Commission had spent most of the past year considering the "non issue" of the use of drunkenness as a defence to a criminal offence!

Ronald J Lynam

Contract Cases and Materials

by Robert Clark and Blanaid Clarke; Publisher: Gill and Macmillan; 1075 pp; Price £30.00; softback.

Contract Cases and Materials is an impressive collection of extracts from caselaw, articles and relevant legislation. *A Casebook on Irish Contract Law* by *Brian Doolan* (which has the same publisher as Clark(e)'s book) dealt exclusively with Irish Case Law and provided a very useful source book for students. The new book by *Robert Clark* and *Blanaid Clarke* is three times as long as Brian Doolan's book and purports to be a Course book for students, especially for those without easy access to a law library. The focus on the needs of students is somewhat surprising in that the Clark(e) book will be of great use to practitioners with its wide ranging sourcing of materials from not just Ireland but also other common law jurisdictions. Doolan's book is more modest and concise but perhaps is a better source book for a student who does not have substantial amount of time to devote to each area of contract law and yet wishes to gain some understanding of the judicial reasoning behind the principle as enunciated in the contract text books.

Contract Cases and Materials will be extremely useful for practitioners. For a modest investment one obtains a diverse collection of materials with which to better understand the intricacies of various aspects of contract law. As the authors point out in their preface, some areas of contract law do not yet have the benefit of modern Irish precedents and therefore foreign cases are very useful to practitioners charting possible courses of action for the Irish courts.

Given the size of the book, at 1,072 pages, one would expect that all areas of contract law would be comprehensively covered. However, there are some noticeable gaps. For example, despite devoting fourteen pages to agency in the context of privity of contract, the authors do not give any extracts from the EC Directive on self employed commercial agents or the Irish implementing legislation. While statutory limitation of freedom of contract is addressed, no mention is made of the impact of European Law in this area, other than to refer to the unfair contract terms directive and the travel directive at page 384 of the text. One would have expected that relevant provisions of the directive on self employed commercial agents and the software directive, to name but two, would have also been mentioned given their mandatory requirements.

Another problem with *Contract Cases and Materials* is the lack of a subject index. While Doolan's book runs only 328 pages its (admittedly short) index is useful in locating relevant cases at a glance. Conversely *Contract Cases and Materials* has no subject index whatsoever and this limits the accessibility of the materials contained in the book. The print in Clark(e)'s book is also quite difficult

to read as it is small and on bright white paper.

The authors readily admit their dislike for areas such as infants contracts and gaming contracts and therefore the treatment of these topics is limited. The authors complain of these areas as being shunned or being educationally incoherent. However, the Supreme Court decision is *Flynn v Deneiffe* clarified Irish Law regarding the tests to be applied in deciding whether a project amounts to a lottery and the judgment deserves to be quoted in the Materials book. Far from being an arcane area, the subject is one which is important for any practitioner advising advertising agencies, marketing companies or commercial clients seeking to expand their customer base. Likewise, the area of infant contracts while frustrating in terms of endeavouring to achieve a common thread of logic in the various judgments, needs to be understood in its intricacies. This is particularly so for those who advise in the entertainment area, an increasingly important part of Irish economic life. A practitioner cannot refuse to give advice to a film production company which wishes to engage the services of a child actor or to a 17 year old musician presented with a recording contract simply on the basis that the law to our mind does not make sense.

The international nature of Irish trade requires that practitioners have a knowledge of what admittedly might to termed to be private international law but nevertheless is important for contract. No mention is made of the applicable legislation which implements the *Rome Convention* on the Law applicable to contractual obligations.

My carping should not take away from the tremendous work which has gone into the book. It will be a very useful addition to the library of any practitioner as well as being a handy companion for Robert Clarke's *Contract Law in Ireland.*

One of the most helpful chapters is that in relation to restraint of trade. The authors have successfully combined judicial decisions, statutory provisions and rulings of the Competition Authority to give an integrated approach to the topic. The coverage given is extremely extensive, amounting to sixty eight pages with helpful notes added by the authors in each section of their treatment of the topic. Competition Law is quickly developing and the Competition Authority has issued a number of Category Licenses since Contract and Materials was produced.

Another area which receives extensive treatment from the authors is that of damages. Chapter 19 is structured so that one considers the reasons for the award of damages in a breach of contract situation before considering possible heads of loss. Consideration of loss of expectation damages is candidly entitled "assessment of damages as guess work". As well as relevant cases, the authors have also included useful extracts from various articles, such as O'Driscoll's article on the rule in *Bain v Fothergill* and various extracts from *McGregor on Damages.*

Kevin Hoy

The Irish Statutes 1310 – 1800

(Facsimile reprint of the 1885 revised edition, with a special introductory essay by W.N. Osborough), Publisher: The Round Hall Press, Dublin, 848 pp, hardback, £120.

In 1885 the Irish Office at Westminister published an edition of the statutes passed in the parliaments held in Ireland between 1310 (the third year of the reign of *King Edward II*) and 1800, the year of the Act of Union, the third article of which provided that "the said united kingdom be represented in one and the same parliament".

The Irish Statute Law Revision Acts of 1878 and 1879 had clarified what enactments "may be regarded as spent or [as having] ceased to be in force otherwise than by express and specific repeal by Parliament or [as having] by lapse of time and change of circumstances, became unnecessary" and had drawn attention to the necessity of clarifying the status of statutes, ordinances and other materials of the parliament. The work in the drafting of those Acts would have facilitated the preparation of the edition.

What is now republished is a record of the statute law, as specifically adopted by Irish parliaments, in force in Ireland then. The utility, in present day terms, of most of the statutes now reprinted (of course many more of which have since been repealed in the course of the next century) is rather marginal, although the Act for Prevention of Frauds and Perjuries of 1695 is of course still of relevance, and the Oireachtas earlier this summer repealed the 1799 "Act for the Better Regulation of Stockbrokers" enacted, with a purpose which is recognisable 200 years later, to secure that "proper persons only will be permitted to act as stockbrokers".

The 1885 revised edition does not include the text of statutes that were then clearly spent or had been expressly repealed at any time up to 1885, but does contain a most useful list of all the statutes which had been enacted by parliament in Ireland between 1310 and 1800.

The volume might best be seen as a collection of "curious and authentic documents in the public history of this kingdom", in words used by the editor of an earlier edition of statutes first published in 1765.

What is of greatest value is the introduction, in about 20 pages, by Professor *W.N. Osborough.* It is a masterly summation of the legislative history of Ireland up to the Union and of the status of legislation enacted at Westminister up to 1782 which had application also in Ireland, and also of the background to previous editions of Irish statutes. Before the first of these was published early in the seventeenth century *King James I* had complained that trying to discover the state of Irish law "was no better than walking in darkness".

A footnote about the desuetude of statutes recalls the debate in the Senate in 1971 on a new statute prohibiting forcible entry of premises, when *Desmond O'Malley*, then Minister for Justice, rejected the arguments of Senators *Mary Robinson* and *John M. Kelly* that fresh legislation on the subject was superfluous, having regard to the English statutes on the subject passed in 1381 and 1391.

We must hope that the Round Hall Press continues to expand its catalogue of works of Irish legal historical interest, and that its enterprise in republishing this work with a new introduction is rewarded in the market place.

Daire Hogan

Professional Negligence Law Reports

Editor Bart D Daly BL; Publisher: Brehon Publishing, Dublin, 1995, 524 pp., hardback, £125.00.

The law of negligence simpliciter is dealt with in detail in all the standard text books on the subject. Professional negligence however contains many varied and complex aspects of the law of negligence generally and while there are English text books written exclusively on the subject there is no Irish equivalent which deals with the subject in a comprehensive manner.

The law in the UK and Ireland has not always run side by side in relation to certain legal principles governing professional negligence and accordingly it would be a dangerous practice to follow without question all of the principles laid down in the standard English text books. It is a natural consequence accordingly that there have, in the past been differences in the application of the basic principles in the case law as between the UK and Ireland with the result that, while there are many similarities, the practitioner must be aware also of where the differences lie. For example, in one of the landmark Irish cases of *Ward v McMaster (1988)* which centered on an allegedly negligent survey and valuation, the Supreme Court followed the English case of *Anns v Merton London Borough Council (1978) A C*, which has since been over-ruled in the UK.

A case-book on professional negligence dealing with the Irish jurisdiction exclusively is accordingly a work of immense value to practitioners due to the absence of any comprehensive Irish text book on the subject and the large number of previously unreported cases. The editor states that he hopes that this volume will give practitioners all the important reported and unreported Judgments in the area of professional negligence between the years 1968 and 1993.

Part 1 comprises a selection of previously unreported Judgments during this period involving the negligence of auditors, auctioneers, architects, doctors, engineers, solicitors, stockbrokers and others. *Part 2* comprises a selection of head notes from the landmark reported cases.

While no case book can be read in isolation from a text book source there can be no doubt but that this compilation is an extremely useful work for practitioners in this area who can refer to the particular case law in conjunction with other source material whether from a UK or Irish source. There is a subject index which enables the reader to identify the profession concerned when seeking source material and there is a list of statutes considered in the judgments reported.

The reader is of course reliant on the editor's statement that this volume gives practitioners all the important reported and unreported Judgments in the area of professional negligence and, relying on that statement, this is a book which any practitioner who practises in this field for either plaintiff or defendant will find of great benefit.

Michael Tyrrell.

NEW TITLES
AUTUMN 1995

The Law of Contract

RAYMOND FRIEL

This is an innovative book on contract law with considerable emphasis on a comparative treatment of the subject. It examines all major areas of contract drawing not only upon English authority and Irish observance but also the diversity of the Common Law as operated in the United States, Australia and Canada. Attempts have been made to reflect the ever closer European Union and the need to create a European legal ethos if we are to play a full role in the integration process.
Publication date: September 1995
ISBN 1-85800-066-1; paperback £29.95
1-85800-054-8; hardback £47.50

Drunken Driving and the Law *(2nd edition)*

MARK DE BLACAM

This is a thoroughly revised and updated edition of this definitive work, first published in 1986. It explains the changes made in relation to offences by the Road Traffic Acts 1994 and 1995, the two statutes forming the basis of the law in this area. It also outlines the relevant court procedure from the commencement of charges, the hearing in the District Court, through to the appeal to the Circuit Court and other review proceedings.
Publication date: September 1995
ISBN 1-85800-047-5 paperback £22.50

Competition Law Source Book

TONY O'CONNOR (EDITOR)

This first volume in the series covers decisions of the Competition Authority in the period 1991–4 and provides:
• All major decisions (with headnotes) under relevant subject headings
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• Procedural guidelines with samples of the requisite Competition Authority forms
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Publication date: October 1995
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The Asthma Society is pleased to acknowledge the financial support of Allen & Hanburys Ltd in funding the cost of this advertisement.

Society of Young Solicitors Conference

The Society of Young Solicitors of Ireland, Spring Conference 1995 was held at Adare Manor, Adare, Co. Limerick on Friday, 10 March 1995 through to Sunday, 12 March 1995 and was attended by over 170 young and not so young Solicitors.

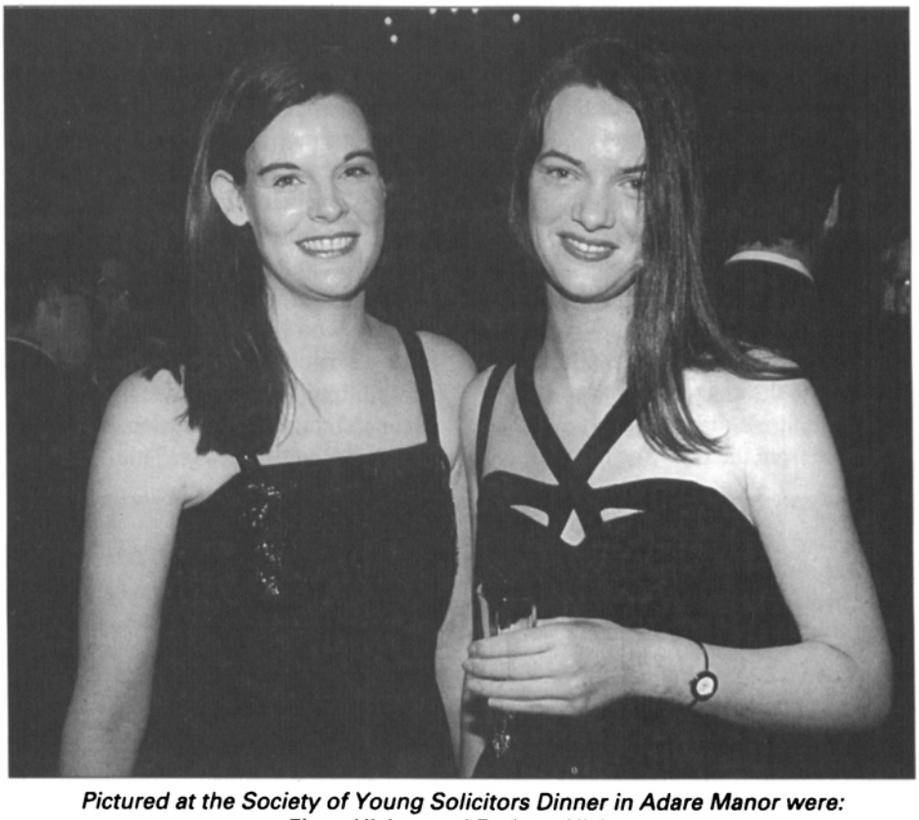
We were delighted to welcome a number of solicitors from Scotland, England, Northern Ireland and Holland who travelled to attend the Conference

The Lectures were both informative and thought provoking. *John Loosemore* of Loosemore Planning Services in Cardiff gave a paper on Practice and Development "How to get new Business" which was highly entertaining. He said that firms today need to identify the type of client they wish to target and the kind of service they seek to provide in order to develop a client base and a clear marketing strategy. He suggested a number of marketing options including press releases, corporate entertainment, questionnaires to clients and brochures.

The second topic of the day was, "Family Law – Property Division and other areas in need of reform". It was addressed by *Brian Gallagher* of Gallagher Shatter. Mr. Gallagher's lecture centered on the Judicial Separation and Family Law Reform Act 1989 and how this would be affected by the 1994 Family Law Bill.

In the beautiful weather the delegates enjoyed horseriding, archery and clay pigeon shooting in the grounds of Adare Manor. Delegates also enjoyed helicopter rides over both counties Kerry and Limerick.

The Saturday night Banquet was also a great success and we were honoured to have Right Honourable Mr. *Liam Hamilton*, Chief Justice and his wife *Maeve*, the President of the Law Society of Ireland, *Patrick Glynn* and his wife *Marye* and the Secretary of the Limerick Bar Association *Pat Barriscale* and his wife *Kay*. After dinner, delegates enjoyed blackjack and dancing until dawn.



Pictured at the Society of Young Solicitors Dinner in Adare Manor were: Fiona Hickey and Barbara Hickey.

We would like to thank our sponsors, in particular the Investment Bank of Ireland without whose continued support the Conference would not continue. We are also extremely grateful to our other sponsors, namely Behan & Associates, Rochford Brady, Norwel Computers Services Limited, Jurys Hotel Group Plc., Doyle Court Reports, Golden Pages, CFI On-Line Limited, Norwich Union, Dooleys, Senior Sassis, Castletown Press, Baileys, Brady & Company, Solicitors Financial Services, Sweet & Maxwell and Legal & General.

Walter Beatty
Public Relations Officer

SOCIETY OF YOUNG SOLICITORS

SOLICITORS AND BARRISTERS' CONFERENCE

3rd to 5th November 1995
at Dromoland Castle,
Newmarket-on-Fergus, Co. Clare

Conference rate –

Dromoland Castle	£145.00
Clare Inn	£99.00

Full details in the October issue of the *Gazette*.

Booking forms available from
Declan O'Sullivan,
Martin E. Marren & Co.,
10 Northumberland Road,
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New General Conditions of Sale Issued

On 1 September, 1995, the Law Society's Conveyancing Committee wrote to every solicitor's practice in the State to announce the completion of a comprehensive revision of the Society's standard conveyancing contract the 'General Conditions of Sale – Particulars and Conditions of Sale by Private Treaty or by Auction'.

This new 1995 edition replaces the 1991 edition and incorporates many amendments required by changes in the law and in conveyancing practice together with some other improvements. An explanatory memorandum drawing attention to the changes was also sent to every solicitor's practice and is available from the Law Society with each purchase of the 1995 edition (contact *Linda Dolan* – price £24.20 for 50, incl. VAT). Production of the 1991 edition has been discontinued.

The issuing of a new edition of the General Conditions of Sale is a significant event for every conveyancer. In this instance it is the product of very lengthy and detailed work by the Conveyancing Committee, led this year by Chairman, *Colm Price*, and in particular by committee members *Paddy Fagan* and *Eric Brunker* who undertook the drafting of the revisions incorporated in the new edition. The committee is also at an advanced stage in its revision of the Standard Requisitions on Title. ❐

Pictured at the recent launch of Irish Stamp Duty Law, at the Law Society were l-r: David Donegan, co-author; The Hon. Mr. Justice Declan Costello, President of the High Court; Raymond Friel, co-author and Gerard Coakley, General Manager, Butterworths.

Compensation Fund Payments – July, 1995

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Council at its meeting in July 1995.

	IR£
Peter M. Fortune, 38 Molesworth Street, Dublin 2.	11,094.05
Malocco & Killeen, Chatham House, Chatham Street, Dublin 2.	4,410.00
Anthony O'Malley, James Street, Westport, Co. Mayo.	10,600.84
John K. Brennan, Mayfield, Enniscorthy, Co. Wexford.	1,940.00
Michael Dunne, 63/64 Main Street, Blackrock, Co. Dublin.	250.00
Jonathan P.T. Brooks, 17/18 Nassau Street, Dublin 2.	68,740.00
	97,034.89

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IN

A Review of: 'This is Your Practice' – the video

OUT

by Brian O'Reilly, Solicitor

The use of video as a medium for teaching management skills has been popular for some years in industry. Its success can be attributed to the ability of the format to create thought provoking and easily disseminated information.

There are unfortunately few management videos available to the legal profession but one such is *"This Is Your Practice"*, produced by the British Solicitors Mutual Defence Fund. This video, which is satirical, very direct and wickedly funny involves a parody on the ITV programme *"This Is Your Life"*. It follows the professional life of a mythical solicitor, Miles Platting (played by John D. Collins) who is "surprised" while dining in Fountains Restaurant by Andrew Amos (played by Peter Tilbury) brandishing "The Red Book".

Miles Platting has the British national record for professional indemnity claims standing at 15 in number over his professional career and Miles is led from the restaurant with the usual ceremony to the studios across the road where he meets former partners of, and many of the previous claimants against, his practice.

This video is brilliantly shot in a superbly realistic setting based in every detail on *"This Is Your Life"*. The tight and well-written script pulls no punches and whilst we are left laughing at the plight of Miles Platting we examine our own consciences as we review the litany of mistakes made by him over the years.

Before winding up the proceedings, Andrew Amos declares that he is happy to announce that Miles Platting, Record Holder, is about to receive notification of a 16th claim and all celebrate his strangle-hold on the record.

The point of the production is very simple, that despite the pressures that we as practitioners undergo, good administration and careful file husbandry is an essential element in the successful claim-free practice. In 1990, there were claims to the value of £120 million in England. The obvious truth is stated – that if there were fewer claims there would be lower premiums.

This production, which lasts about 15 minutes, should be viewed by every member of every solicitor's practice in Ireland.

Footnote: *"This Is Your Practice"* is available for rent from the Law Society Library, Blackhall Place. The deposit is £15.00 for two weeks. ❐

Placements sought in Solicitors' Offices for Overseas Lawyers

The Council of the Bars and Law Societies of the European Community (CCBE) is co-operating with the Council of Europe on the THEMIS No. 7 project on assistance to lawyers in Central and Eastern European Countries and the New Independent States (of the former Soviet Union). Firms interested in taking lawyers from these countries on 1 weeks study visits (travel and expenses paid by the Council of Europe) should contact:

Veronica Williams,
CCBE,
Rue Washington 40,
B–1050 Brussels,
BELGIUM.

Tel: 00322 – 6405804
Fax: 00322 – 6477941

The German Bar Association is seeking firms willing to take young German lawyers for a 6 month traineeship period. This would form part of the trainee's two year period of post law school practical training in legal work required before admission to practise.

Contact: *Martina Errens,*
DeutscherAnwaltVerein,
Adenauerallee 10,
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Younger Members Soccer Blitz

The Younger Members Committee held their annual Soccer Blitz on Saturday, 24 June 1995. The weather was superb, and the response to entry into the Blitz was so great that in fact a number of teams had to be refused entry as the allocated number of places were filled very quickly.

The sun scorched down on the competitors, however, some of them took respite in the bar and in the Gym where the Rugby World Cup final was being shown. Thanks to modern technology, the link between the pitches and the Gym was maintained by the gentle encouragement of *Orla Coyne*, that certain teams were requested on the pitch now!!!

The first kick off was at approximately 10.15 am, and all matters were concluded at approximately 7.00 pm. The winners of the Blitz were an amalgamation of Croskerrys and L.K. Shields & Company, who beat Actons in a very hard fought match.

Entries were also taken on the day for the American Tennis Tournament, mixed doubles, and the winners were Oisin Murphy (Actons) and Deirdre McKnight (Reddy Charlton & McKnight).

I would like to thank on behalf of the Committee our very generous sponsors, Coopers & Lybrand, who have recently come into the picture to help sponsor the event, and especially to Mr. *Richard Lane*, of Coopers & Lybrand for his generosity and support on behalf of Coopers & Lybrand.

The efforts of *John Campbell, Philippa Howley, Eddie O'Connor, Monica Leech, Graham O'Hanlon*, members of the YMC, ensured the smooth running of the competition must be noted. The results of the raffle are:

1st Prize – winning ticket Blue, no. 167.
2nd Prize – winning ticket Yellow, no. 43.
3rd Prize – winning ticket Blue, no. 358.

These prizes can be collected by contacting *Orla Coyne* of Gerard O'Keeffe & Company, Chairperson of the Younger Members at 872 3255.

I would also like to thank all the people who bought tickets on the day, and hopefully next year, we will see everybody at the event once again.

A final note, for people to put into their diary, our forthcoming Race Night which will be held in Blackhall Place on Thursday, 19 October.

Orla Coyne.

Michaelmas Law Term 1995
ANNUAL SERVICES

All **members** of the Legal Profession are invited to attend the **Michaelmas Law Term Annual Services:-**

ON FRIDAY, 29th DAY OF SEPTEMBER, 1995 at:
The Mosque,
163, South Circular Road, Dublin 8. **at 1.00 p.m.**

ON SATURDAY, 30th SEPTEMBER, 1995 at:
The Synagogue,
Adelaide Road, Dublin 4. **at 10.00 a.m.**

ON SUNDAY, 1st OCTOBER, 1995 at:
Greek Orthodox Church,
46, Arbour Hill, Dublin. **at 11.00 a.m.**

ON MONDAY, 2nd OCTOBER, 1995 at:
St. Michans, Catholic Service,
Halston Street, Dublin. **at 10.00 a.m.**

St. Michans, Protestant Service,
Church Street, Dublin. **at 10.15 a.m.**

and are invited by kind invitation of The Benchers of the Honourable Society of Kings Inns to coffee at **Kings Inns**, Constitution Hill, Dublin 7, at 11.30 a.m. on Monday, 2nd October 1995.

Lost Land Certificates

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 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.

Published: ???????????? 1995.

Nitrigin Eireann Teoranta, Folio: 12046; Land: Townland of Tiknock, Barony of Arklow. **Co. Wicklow.**

James Ryan (deceased), Folio: (1) 5612, (2) 5613; Lands: Boolanunane, Hollyford; Area: (1) 49(a) 3(r) 13(p), (2) 20(a) 2(r) 4(p). **Co. Tipperary.**

Elizabeth McCormack, 32 Lambay Road, Glasnevin, Dublin 9. Folio: 426F; Land: A plot of ground situate on the East side of Lambay Road in the Parish and District of Glasnevin; Area: (Hectares) 0.038. **Co. Dublin.**

Thomas Murphy and Maureen Murphy, 1214 Kilnamanagh Estate, Tallaght, Co. Dublin. (7 Edenmore Gardens, Raheny, Dublin 5). Folio: 58547L; Land: The Property known as 7 Edenmore Gardens situate in the Parish of Raheny and District of Raheny North. **Co. Dublin.**

Eqimar Ireland Limited, Folio: 2673F; Land: Derreendrislagh; Area: 0(a) 0(r) 26(p). **Co. Kerry.**

Frances Lyons, 44 Woodford Drive, Monastery Road, Clondalkin, Co. Dublin. Folio: 40848F; Lands: Site No. 44, Road No. 8, Woodford, Monastery Road, Clondalkin in the Townland of Knockmitten and Barony of Uppercross. **Co. Dublin.**

Patrick and Mark O'Sullivan, Folio: 3102; Land: Motabower; Area: 53(a) 3(r) 24(p). **Co. Wexford.**

Noel & Elsie Foley, Folio: 9833F; Land: Sliguff; Area: 0.813 acres. **Co. Carlow.**

Hannah Ahern, Folio: 11131; Land: Curragh; Area: 27(a) 2(r) 31(p). **Co. Limerick.**

Margaret and Patrick Gargan, Folio: 4729 (now 17976F); Land: Teevurcher. **Co. Meath.**

Thomas Joseph Beston, Folio: 4023F; Lands: Coolbooa; Area: 13.302. **Co. Waterford.**

Eugene Reilly, Folio: 20185 and 20174; Land: Situate at Fartan Upper containing 8(a) 2(r) 16(p) and 2(r) 36(p) and lands situate at Fartan Upper containing 6(a) 3(r) 8(p) respectively. **Co. Cavan.**

Maurice Dwan, Folio: 5865; Land: Brackbawn; Area: 65(a) 1(r) 35(p). **Co Limerick.**

Florence P. McCarthy, Folio: 8767; Land: Barony of Ibane and Barryroe. **Co. Cork.**

John Walsh, (as tenant in common of an undivided moiety). Folio: 619L; Solr. Ref: DM/W/9. **Co. Carlow.**

James Nolan, Folio: 750 (now 507F); Land: 1. Drummin, 2. Kilbride; Area: (1) 31(a) 3(r) 4p), (2) 18(a) 2(r) 31(p); Solr. Ref: DM/N/44. **Co. Carlow.**

Sylvester Leech (Junior), Folio: 13094; Land: (1) Kilwarden (2) Kilwarden (3) Kilwarden; Area: (1) 3(a) 2(r) 15(p), (2) 18(a) 1(r) 21(p), (3) 3(a) 0(r) 38(p). **Co. Meath.**

Willie Gallagher, Folio: 34313; Land: (1) Magheragallan, (2) Magheragallan (3) Ardnagappary; Area: (1) 2.718 acres, (2) 17(a) 0(r) 29(p), (3) 1(a) 1(r) 31(p). **Co. Donegal.**

Albert Siev (deceased), Folio: 7741; Land: Kilpedder East. **Co. Wicklow.**

Andrew Quinn (deceased), Folio: (1) 787, (2) 1737, (3) 2464; Land: (1) Drumcreeghan and Drumhillagh, (2) Drumcreeghan and Drumhillagh, (3) Drumcreeghan and Drumhillagh; Area: (1) 21(a) 2(r) 14(p), (2) 9(a) 0(r) 19(p), (3) 10(a) 2(r) 18(p). **Co. Monaghan.**

Charles Blake, Folio: 27752; Land: No. 1 Townland of Leitrim More (Part), Barony of Bear and County of Cork, No. 2 Townland of Ballynahown, Barony of Bear and County of Cork. **Co. Cork.**

Rosemary Cahill (deceased), of Broomfield, Malahide, County Dublin. Folio: 177; Land: Townland of Broomfield in the Barony of Coolock. **Co. Dublin.**

Michael Doyle Junior, Folio: 3373F; Land: Ballyart; Area: 6.181 acres. **Co. Wexford.**

John Denis O'Shea, Folio: 13914; Land: Prop. 1. Rossdohan, Prop. 2. Rossdohan, Prop. 3. Rossdohan; Area: Prop. 1. 16(a) 1(r) 5(p), Prop. 2. 1(a) 2(r) 19(p), Prop. 3. 0(a) 0(r) 13(p). **Co. Kerry.**

Gerard McMahon, Folio: 3256F; Land: Drumbracken; Area: 0.630 hectares. **Co. Monaghan.**

Geraldine Reid, 12 Beechgrove, Booterstown, County Dublin. Folio: 44425F; Land: 12 Beechgrove, situate in the Parish of Booterstown and Borough of Dun Laoghaire. **Co. Dublin.**

Samuel Hayes and Margaret O'Driscoll, Folio: 2305F; Land: Townland of Ballincollig and Barony of Muskerry East. **Co. Cork.**

Liam and Margaret Burke, Folio: 3557F; Townland: Town of Abbeyleix; Area: 0.224 acres. **Co. Queens.**

Raymond Rowan (deceased), 7 Westbrook Road, Highfield Park, Dundrum, County Dublin. Folio: 2857L; Land: Property known as 7 Westbrook Road, Dundrum situate on the West Side of the said road in

the Townland of Churchtown Lower and Barony of Rathdown. **Co. Dublin.**

John Patrick Prunty (deceased), Folio: 417R; Land: Drumgorry; Area: 29(a) 3(r) 11(p). **Co. Cavan.**

Stephen Lawlor (deceased), Folio: 3551 (closed to 567F); Land: Ballybeg Little; Area: 60(a) 1(r) 30(p). **Co. Carlow.**

William Scanlan, Folio: 11421; Land: Garravane Upper; Area: 42(a) 1(r) 11(p). **Co. Limerick.**

Michael and Frances O'Connor, Folio: 13353F; Land: Coolclogher; Area: 0.400 acres. **Co. Kerry.**

Samuel Hanna (deceased), Folio: 12965; Land: Liscenan; Area: 21(a) 1(r) 0(p). **Co. Monaghan.**

Matthew Dunne (deceased), Folio: 9491; Land: Brockra; Area: 2(a) 0(r) 0(p). **Co. Laois.**

Vincent P. McGovern and Nora McGovern, of Ballyvary, County Mayo. Folio: 18526; Land: Bellavary (part); Area: 2(a) 0(r) 0(p). **Co. Mayo.**

Joseph and Delia Howe, Folio: 4370F; Land: Part of the Townland of Tullyglass situate in the Barony of Bunratty lower shown as plan 52 edged red on the Registry Map, (O.S. suppl map 'F'). **Co. Clare.**

Joan O'Brien, John Anthony McCarthy, Folio: 34299; Land: Gortalassa; Area: 0(a) 1(r) 32(p). **Co. Kerry.**

Paul Hogan, of 5, The Rise, Mount Merrion, County Dublin ("Rockfield", 2A Hyde Park, Blackrock, County Dublin). Folio: 34225L; Land: Townland of Kilbogget in the Barony of Rathdown. **Co. Dublin.**

Catherine Ryan, Folio: 11176F; Lands: 1 & 2 Kilcommon More North; Area: (1) 11.594 acres, (2) 3.594 acres. **Co. Tipperary.**

Wills

McWilliams, Ellen Mary, deceased, late of 11 Frascati Park, Blackrock, in the County of Dublin. Would any person having knowledge of a will executed by the above named deceased who died on 26th March 1995, please contact O'Neill & Company, Solicitors, 12, Carysfort Avenue, Blackrock, County Dublin. Tel: 288 2100, Fax: 283 3627.

In the estate of Eileen Kelly, deceased, late of "Ayrfield House", Celbridge Road, Leixlip, Co. Kildare and formerly of 333 St. Michael's Estate, Inchicore, Dublin 8 and formerly of 73 Upper Drumcondra Road, Dublin 9. Will any person having knowledge of a will executed by the above named deceased who died on the 25th day of May, 1995 please contact John Shee & Company, Solicitors, 28 Parnell Street, Clonmel, Co. Tipperary. Telephone number 052 - 22900.

Leonard, Eileen, late of 43 Esker Lawns, Lucan, County Dublin. Would any person having knowledge of a will executed by the above named deceased who died on the 23rd of February 1995, please contact Patrick F. O'Reilly & Company, Solicitors, 9/10 South George's Street, Dublin 2, (Reference: T/L/9), Telephone No. 679 3565 or Fax No. 679 3421.

Lost Title Deeds

IN THE MATTER OF THE REGISTRATION OF TITLE ACT, 1964, AND OF THE APPLICATION OF *BREDA MORNING* (FORMERLY BREDA BUCKLEY) IN RESPECT OF PROPERTY KNOWN AS 89 RAPHOE ROAD, CRUMLIN, DUBLIN 12.

TAKE NOTICE that *Breda Morning* (formerly Breda Buckley) of 89, Raphoe Road, Crumlin, Dublin 12 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 at this Registry.

The Application will be proceeded with unless notification is received in the Registry within (21) twenty one days 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. 95DN10761. The missing documents are detailed in the Schedule hereto.

Dated the 24th day of July 1995.

H.G. McCaffrey
Examiner of Titles.

Schedule:

Original Lease dated the 31st December 1937, *William John Good* of the First Part, The Irish Civil Service (Permanent) Building Society of the Second Part and *John Leo Buckley* and *Catherine Buckley* of the Third Part.

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VOL. 89 NO. 7

OCTOBER, 1995

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GAZETTE

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DIPLOMA IN PROPERTY TAX FOR SOLICITORS

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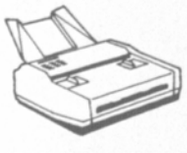

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Front cover: *John Lavery* (sitting) and *David O'Brien* shortly after winning the Heineken Fireball World Championship on Dublin Bay.
Photograph: David Branigan.
(See page 271)

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Case Report

Alison Bloomer and Others v The Law Society of Ireland, Ireland and the Attorney General – 1994 No. 5680P High Court [Brief summary of judgment of Laffoy J delivered on 22nd day of September, 1995]

The plaintiffs comprised 35 law students of the Queens University, Belfast (QUB). They sought various declarations against the Law Society, Ireland and the Attorney General seeking like recognition and exemption from the Society's Final Examination – First Part (FE-1) as was afforded to law graduates of the National University of Ireland, the University of Dublin and the University of Limerick. The plaintiffs also sought damages (including aggravated and/or exemplary damages) for conspiracy and/or breach of duty and on several other grounds.

Among the Court's conclusions on questions of fact were the following:

- The law taught for the QUB LL.B. degree was the law of Northern Ireland and the degree reflects an inferior state of the knowledge of the law of the Republic of Ireland than a law degree from a university established in the State.
- The Society does not teach substantive law in its courses.
- As conceded by Counsel for the plaintiffs during the hearing, the Society would be justified in requiring a law graduate of QUB to take and pass Constitutional Law in the FE-1.
- The Society's Education Committee had decided to reject the plaintiffs' application because they were of the opinion that its course content was not in the law of this jurisdiction and for no other reason.
- The evidence did not establish any conspiracy, malice or improper motive on the part of the Society.
- By contrast with the Institute of Professional Legal Studies in Northern Ireland, which operates an annual numerical quota, the Society operates an open policy in relation to admission.
- The Society's concern about numbers relates to the capacity of its educational infrastructure to cope rather than any policy or motivation to restrict access to the profession of solicitor.

The Court accepted the Society's contention that there was only one real issue in the proceedings, namely, whether Regulation 15 was valid. Regulation 15 of the Society's 1991 Education Regulations created a system of exemptions for law graduates of universities in the State from the FE-1 (the Society's entrance examination).

The Court's key findings on matters of law were as follows:-

European Community law issues

- Contrary to what was contended by the plaintiffs, neither Articles 48, 49, 52, 59 or 60 of the EEC Treaty were relevant to the case.
- Article 6 of the EEC Treaty, which prohibits both direct and indirect discrimination on the grounds of nationality, was relevant.
- Regulation 15 was liable to operate mainly to the detriment of nationals of another Member State of the Community.
- A broad view of the function of the Society must be taken showing that there are two routes to qualification as a solicitor in this jurisdiction. The first route involved passing the FE-1 or being exempted from it by a law degree followed by the completion of an apprenticeship and the Blackhall Place training course. The second route involved qualifying as a lawyer in another Member State and transferring as a qualified lawyer under Council Directive No. 89/48/EEC (known as 'the Mutual Recognition of Higher Education Diplomas Directive').
- When the Society implemented that Directive in 1991 it was expedient to absolve solicitors who qualified in Northern Ireland or in England and Wales from testing in their knowledge of Irish law to ensure that the hundreds of Irish solicitors then working in England and Wales could benefit from a reciprocal approach.
- As a result, the Society applied a difference in treatment to a QUB LL.B. graduate and a Northern Ireland solicitor even though both would probably have an inferior state of knowledge of the law of this jurisdiction than, say, a law graduate of UCD.
- This difference of treatment could not be objectively justified and, having regard to the evidence, total denial of exemptions from FE-1 to law graduates of QUB, as applied by Regulation 15, indirectly contravenes the prohibition on discrimination on the grounds of nationality in Article 6 of the EEC Treaty, exceeded the powers of the Society under the relevant section of the Solicitors Acts and was invalid.

Irish Constitutional Law

- The Court held that none of the several grounds argued by the plaintiffs constituted an additional ground of invalidity based on the Irish Constitution.

Consequences of Invalidity of Regulation 15

- Based on several High Court and Supreme Court authorities the Court held that its function in such circumstances was strictly limited to declaring the relevant provision invalid. The Court could not re-write the provision. Whether or not it should be replaced was entirely a matter for the Law Society.
- The effect of the invalidity of Regulation 15 was that no provision now existed for exempting any person from the FE-1.
- There was no evidence that any of the plaintiffs had suffered any loss or damage.
- All the reliefs claimed being refused, the plaintiffs' claim was dismissed with costs awarded to the Society, Ireland and the Attorney General.

As the plaintiffs have appealed this judgment to the Supreme Court, with a provisional hearing date of 12 Dec., 1995, it would not be proper for the *Gazette* to comment on it at this time. ❐

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LAWBRIEF

The Law Clerk

Dr. Eamonn G. Hall

In former times, it was considered that the clergy and druidical priests were great lawyers. In fact, "clerk" is derived from the Latin word *"clericus"*, a churchman, clergyman or ecclesiastic. One of the definitions of the word "clerk" in the current *Oxford English Dictionary* is "a man (or woman) of book learning, one able to read and write: a scholar". However, the dictionary qualified this most noble definition by adding that that specific meaning of the word "clerk" is now archaic.

Remuneration, or more precisely, the lack of it in sufficient measure, has been one of the principal concerns of law clerks – now often designated legal executives. But then all professions demonstrate a similar concern. In an address in January 1894 Mr. Spray, the honorary treasurer of the United Law Clerks' Society in an address referred to in the *Irish Law Times and Solicitors' Journal* (vol. XXVIII, 1894 p.54) doubted whether any noteworthy writer of fiction before Dickens featured a law clerk. Mr. Spray found sixteen references to law clerks in the works of Charles Dickens but proceeded to illustrate his references to literature by considering that law clerks had made no progress since Charles Dickens's day at least in the matter of remuneration. He did note that in 1894 it required greater effort and a higher level of intelligence than ever before for a law clerk to obtain a post in a lawyer's office. Some aspects of life never change.

The term "law clerk" has a significant meaning in the United States. The "law-clerking" institution in the context of the US Courts began in 1882 when Justice *Horace Gray* hired a recent Harvard Law School graduate to assist him in his judicial office. Law clerks' duties in the US Supreme Court include reading, analysing and preparing memoranda for the justices. In ruling on cases to be selected for review, justices often rely on their clerks' summaries and recommendations.

Photographed at the conferring ceremony of Fellowships of the Irish Institute of Legal Executives on April 25, 1988 were from left to right, front row: Chief Justice Thomas Finlay, Master Harry Hill, SC, Veronica Duffy, Fellow, William Finnerty, Fellow, James Ivers, Director General, Law Society, John Kelly, Fellow. Second row: Brendan Byrne, Fellow, Francis Colgan, Fellow, James Bradshaw, Fellow and Dr. Eamonn G. Hall, Solicitor.

In January 1894, Mr. Spray, the Treasurer of the United Law Clerks' Society noted that in 1894 it required greater effort and a higher level of intelligence than ever before for a law clerk to obtain a post in a solicitor's office. Some aspects of life never change.

Law clerks often assist US Supreme Court justices in the preparation of written judgments. Some may say that the clerks from time to time write the entire judgment for some justices but this is nothing to be derided if the law clerk has sufficient intelligence and ability and is supervised by the judge. The law clerks in the US Supreme Court are expected to be *discreet* but the Court could not manage its current case-load without their assistance. Each US Supreme Court justice may have four law clerks, two secretaries and a messenger. Most law clerks have attended prestigious law schools and have graduated at the top of their class. Many of the law clerks subsequently become law school professors and three have become US Supreme Court judges.

There is the Institute of Legal Executives in London, a professional body representing legal executives and responsible for training legal executives employed in England, Wales, Northern Ireland and many overseas countries. Accordingly, legal executives in those countries have their own recognised status and role within the legal profession and often enjoy a responsible and rewarding career. The Institute of Legal Executives was formed in 1963 with

the support and co-operation of the Law Society of England and Wales. The Institute has branches throughout England, Wales and overseas including Bermuda and Hong Kong. The Institute publishes *The Legal Executive Journal* which provides information on all changes in the law, points of practice and articles and legal topics all of which are essential to those performing legal services. Unfortunately, legal executives in Ireland are not as active in this regard although an Institute was formed some few years ago.

In Ireland, the *Employment Regulation Order, (Law Clerks Joint Labour Committee) 1995*, (S.I. No. 189 of 1995) has fixed the statutory minimum rates of remuneration and has specified statutory conditions of employment of workers in relation to whom the Law Clerks Joint Labour Committee operates. The effective date of the order is August 1, 1995.

Pursuant to the *Industrial Relations Act, 1946 to 1990* any agreement between a law clerk, typist etc. and his/her employer for payment of wages less than the minimum rate or for conditions of employment less favourable than the statutory conditions of employment is void. The minimum rates for wages are to be payable clear of all deductions except any deductions lawfully made under any enactment for the time being in force.

The penalty for payment less than the statutory minimum rates is a fine not exceeding £750.00 for each offence. The penalty for non-compliance of the statutory conditions of employment by the employer is a fine not exceeding £750.00 for each offence. An employer of any worker to whom a minimum rate is applicable is required to keep for a period of three years such records as are necessary to show whether or not the provisions of the *Industrial Relations Act 1946 to 1990* are being complied with. Penalty for non-compliance is a fine not exceeding £500.00. Notices containing minimum rates of pay and conditions of service are to be publicly displayed in the office of the employer.

Further enquiries should be addressed to ***The Secretary, Joint Labour Committees Section, The Labour Court, Tom Johnson House, Haddington Road, Dublin 4*** (Phone 660 8444 Extensions 301, 303 and 304).

Beware Scams

Several readers have drawn our attention to the face that another spate of scam letters and faxes from Nigeria are arriving on solicitors' desks.

Although the letters tell a variety of implausible stories of enormous sums of money which can be released from Nigeria with a little assistance from the solicitor in question, usually with a promised 'cut' for the solicitor of many millions of dollars, a constant request is for information relating to the solicitor's bank account numbers. Unfortunately, for those who might supply their bank account numbers, it is for the purpose of making withdrawals rather than lodgments that these numbers have been sought!

It is hard to believe that any solicitor would be so naive as to supply such information in response to one of these requests. The *Gazette* has warned against this in the past. Just one more time, however, we will strongly advise solicitors not to respond to these 'get rich quick' offers made to you with fraudulent intent.

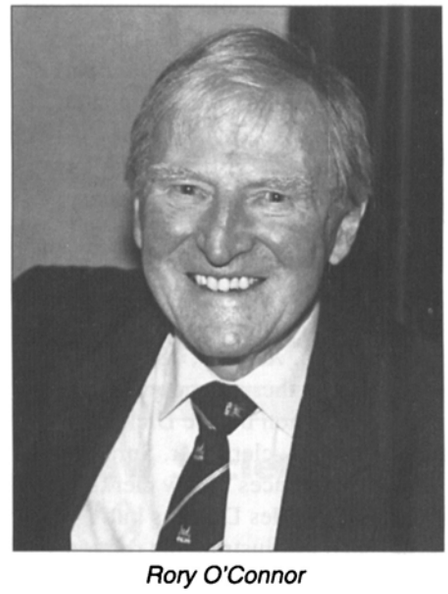
Rory O'Connor – An Appreciation

Rory died on 11 June 1995. We all thought of him as one who would never be absent from the legal world he loved. From his admission as a solicitor in 1943 he passionately upheld the honour and dignity of his chosen profession, readily accepting the onerous duties of membership of the Law Society, it's Council and of it's Disciplinary Committee and at the same time advising and counselling fellow members in regard to their problems with unstinted energy and expertise.

The Dublin Solicitors Bar Association benefited from his membership for all his professional life. He served on its Council and as its Treasurer and was honoured to be elected its President. The Association will long remember him. As a member of an established legal family he followed his father in the practice at Upper Ormond Quay in Dublin, where he gave of his all for his clients.

A family man, he devoted himself unstintingly to his wife and children, and, in more recent times, to his many grandchildren.

To his friends he was ever affable and supporting and his hospitality knew no bounds.



Rory O'Connor

We sympathise with his wife, *Dickie*, his children, *Helen, Gay, Marie, Rory, Louise, Barry, Philippa* and *Peter* and with his grandchildren, as well as with his sisters *Kitty* and *Mabel* and his brothers *Jimmy* (solicitor) and *Paddy*.

We shall all mourn the loss of one of nature's gentlemen.

E.O.S.

Disciplinary Cases

The High Court – 1995 No. 4SA

In the matter of James M. Sweeney a solicitor formerly carrying on practice under the style and title of James Sweeney, 14, New Cabra Road, Phibsboro, Dublin and now of F. H. O'Reilly & Co. Dublin.

On 24 July, 1995 the President of the High Court considered two disciplinary matters in relation to the above solicitor, being 3572/DC.1347 and 3572/DC.1348. In respect of both matters the President made an order censuring the solicitor, *James M. Sweeney,* regarding his conduct as a solicitor. In respect of 3572/DC. 1348 the President ordered that the solicitor pay a fine to the Society in the sum of £500. In respect of 3572/DC.1347 the President ordered that the solicitor pay the costs of the hearing before the Disciplinary Committee and the costs of the High Court. The President made no order in respect of the costs relating to 3572/DC.1348 before the Disciplinary Committee.

The President had before him two reports of the Disciplinary Committee both dated 27 April 1995 in respect of the two matters referred to above, which were before the Disciplinary Committee on 10 November 1994.

In relation to 3572/DC.1347, on the basis of admissions by the solicitor the Committee was of the opinion that there had before misconduct on the part of the solicitor in that he:

a. failed to inform his client that he had not instituted proceedings within the statutory period;

b. failed to inform his client that he had received a defence to the proceedings instituted pleading the Statute of Limitations;

c. informed his client that the case was listed for hearing when he knew that this was not true;

d. failed to make full and frank disclosure of his delay in instituting those proceedings;

e. failed to reply to the Society's correspondence and to furnish the Society with an explanation in relation to his non compliance with his client's instructions;

f. failed, when requested to do so, to attend before the Registrar's Committee of the Society on two occasions;

In relation to 3572/DC.1348 the Committee on the solicitor's admissions was of the opinion that the solicitor was guilty of conduct tending to bring the profession into disrepute in that he had:

a. misappropriated clients' monies, including £7,347.91 being part of a residuary estate for his own use and benefit;

b. caused a deficit to occur on the client account in the sum of £7,347.91;

c. failed to administer the estate concerned in a timely manner or at all, notwithstanding the instructions to do so;

d. failed to respond to his client's correspondence and instructions;

e. failed to reply to the Society's correspondence and to furnish the Society with an explanation in relation to his non compliance with his client's instructions;

f. failed, when requested to do so, to attend before the Registrar's Committee of the Society on one occasion.

The High Court – 1994 No. 12SA

In the matter of Joseph Quirke a solicitor formerly carrying on practice under the style and title of Quirke & Co. Church Street, Midleton, Co. Cork and

in the matter of the Solicitors Acts 1954 and 1960.

On 24 July, 1995 the President of the High Court made an order on consent that the above named Joseph Quirke stand censured regarding his conduct as a solicitor and pay a fine to the Society in the sum of £2,000 together with the costs of the proceedings before the Disciplinary Committee and the High Court.

The President had before him a report of the Disciplinary Committee dated 25 October 1994 in respect of a hearing conduct on 28 July 1994. The Committee found that the Solicitor had been guilty of misconduct in that he had:

a. falsely represented to a solicitor colleague that he was acting for a third party in relation to a claim, when he was not;

b. concealed from his solicitor colleague the identity of his true client;

c. procured that his solicitor colleague process a claim in the name of the third party concerned when the said third party had never instructed the solicitor to bring any claim;

d. continued this concealment from his solicitor colleague that he was not in fact acting for the said third party notwithstanding the receipt of a letter dated 19 December 1991 from his solicitor colleague referring to the third party as "our mutual client. . .";

e. caused his solicitor colleague the professional embarrassment of having to write to the defendants in the claim on 30 July 1992 informing them that he did not in fact act for the said third party concerned despite previous correspondence;

f. falsely represented to his solicitor colleague that a claim by the said third party had been settled with her solicitor, when it had not;

g. paid out of settlement monies received from the defendants on behalf of another third party, the sum of £1,112.53 to another client of his office;

h. falsely represented to the defendants by way of production of a letter of 2 September 1991 and a further letter of 10 September 1991 that he was acting in a claim against them for another third party, when he was not;

i. falsely represented to the defendants by way of a letter dated 31 October 1991 that he had instructed the said third party to take the motor vehicle in question to a certain garage.

❐

"Family Law in Ireland – Code of Practice"

The Family Law and Legal Aid Committee is delighted to announce the publication of "Family Law in Ireland – Code of Practice", which is circulated with this Gazette.

The Committee hopes that the Code will be of assistance to solicitors practising in the area of family law both with regard to their overall approach to a case and to particular problems which arise as a case progresses.

Additional copies are available, free of charge, from the Society by contacting *Erin Barry* or *Linda Kirwan.*

"21 Years of Irish Murder"
Guest speaker: *Dr. John Harbison,* State Pathologist
Venue: New Law Library, Church Street, Conference Room A
19 October at 5.00 p.m.
Young Bar Association

Younger Members' Committee Race Night
Thursday 19 October, 8.00 p.m.
Members' Lounge, Law Society
Contact: *Joan Doran,* Law Society

Fourth JURISTEUROPE Convention
Theme: Personal liability of company managers & their advisers.
26/27 October, 1995
Lille, France
Contact: Mary Kinsella, Law Society for brochure

Aviation Law Association of Australia & New Zealand National Conference 1995
Venue: Perth, Western Australia
29 October – 1 November 1995
Contact: Promaco Conventions Pty. Ltd.
P.O. Box 890, Canning Bridge
Western Australia 6153.
Phone: 09-364-8311 Fax: 09-316-1453

Society of Young Solicitors
Solicitors & Barristers Conference
Venue: Dromoland Castle
3-5 November 1995
Contact: Declan O'Sullivan, Martin E. Marren & Co.
10 Northumberland Road, Dublin 4.
DX 58
Phone: 01 - 668 6266

Seminar: "The Irish Criminal Lawyer in Europe"
Venue: Blackhall Place
Saturday, 25 November 9.30 a.m. – 1.00 p.m.
(Booking form enclosed with Gazette)

35th Legal Symposium – Queensland Law Society & Bar Association of Queensland Annual Conference
1 – 3 March 1996
Venue: Surfers Paradise, Queensland, Australia
Contact: Nina Psaltis, Queensland Law Society GPO Box 1785 Brisbane, QLD 4001 Tel: 07-3233-5888 Fax: 07-3221-9329

International Bar Association Energy & Resources Law '96
Venue: Prague
24-29 March, 1996
Contact: IBA
Phone: 171-629-1206
Fax: 171-409-0456

CLE Courses

French Language Classes for Solicitors
Each Tuesday beginning 10 October – 12 December
Venue: Blackhall Place
Contact: Barbara Joyce or Luke Brockie (Alliance Francaise)

Practical Implications of the Package Holidays & Travel Trade Act 1995
17 October, 6.30 - 8.30 p.m.
Blackhall Place

Judicial Review (Lecture 2)
19 October, 6.30 - 8.30 p.m.
Moyne Institute, Trinity College

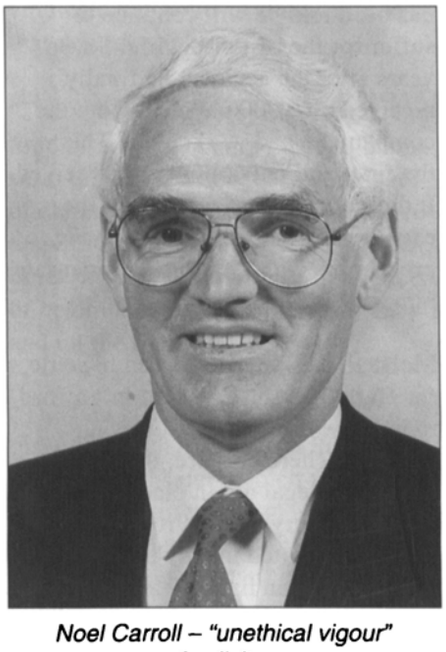
Pre-trial Procedures & Conduct of an Action
25 October, 5.00 - 8.30 p.m.
Blackhall Place

Residential Advocacy Course
3 – 5 November
Bellinter House, Navan, Co. Meath

Tax Implications of Commercial Transactions (series)
Saturday mornings 8 Nov, 9 Dec, 13 Jan, 10 Feb, 26 Feb.
Blackhall Place

Law Society "sick of being made a scapegoat" by Dublin Corporation

On both the pages of the *Irish Times* and the *Gerry Ryan Show* on RTE Radio recently, Dublin Corporation's spokesman, Noel Carroll, made allegations of "unethical" conduct by solicitors. However, he failed to either produce evidence to support the allegations or withdraw them as subsequently demanded by Law Society Director General, *Ken Murphy*.



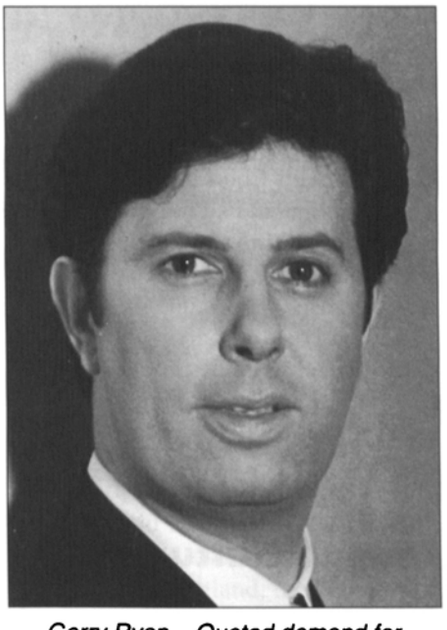
Noel Carroll – "unethical vigour" of solicitors

The Irish Times

In an *Irish Times* article, the first of a two-part series entitled 'The Compensation Carousel'; Mr. Carroll was reported as saying that Dublin Corporation's annual damages bill had already climbed to £6m in the current year. "We have taken a two-pronged approach to defending ourselves" he continued. "Firstly, we are keeping records of everything we do and how often we do it. But we have also been very vigorous in our criticism of the 'no foal no fee' system offered by solicitors and of things like the lack of censure for false claims".

Mr. Carroll proceeded to accuse solicitors of pursuing claims against the Corporation with "unethical vigour" and insisted that the Law Society needs to "get its house in order" on what he saw as a moral issue.

The same *Irish Times* article reported the Law Society's Director General, *Ken Murphy*, as unrepentant about the role of his members in giving the Corporation a hard time. "We totally reject the notion that there are a lot of spurious claims being made, and we are sick of the Law Society being made a scapegoat by bodies like Dublin Corporation. We have repeatedly asked *Noel Carroll* to show us evidence of solicitors bringing false claims to the Corporation with little or no response."



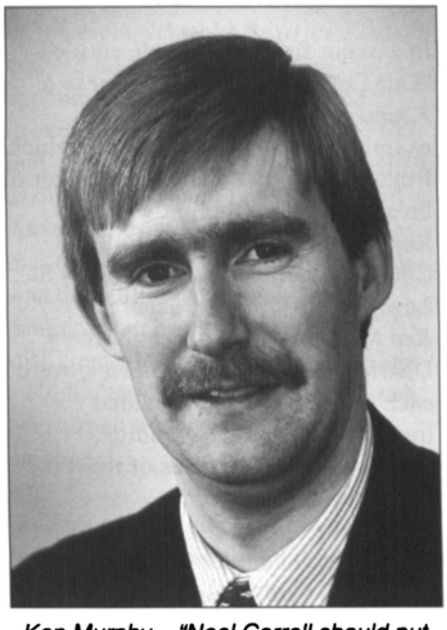
Gerry Ryan – Quoted demand for evidence

"The no-fee system is not only perfectly legitimate, it is absolutely necessary in the absence of any civil legal aid scheme, to provide access to justice for people who have suffered injury through the negligence of others", *Ken Murphy* continued. "The employers and public bodies who are complaining so loudly now are suffering because they got away with low standards for so long. All they have to do to protect themselves is provide reasonable care."

The Gerry Ryan Show

On the day following the *Irish Times* article, *Noel Carroll* gave a live telephone interview to RTE Radio 1's *Gerry Ryan Show*. He complained of a claims culture "of epidemic proportion" and which had "run off the Richter scale".

He stood by his quoted remarks in the *Irish Times* about claims being pursued with "unethical vigour" by solicitors. *Gerry Ryan* quoted to him Ken Murphy's demand that Mr. Carroll produce evidence of these allegations. Mr. Carroll implicitly rejected any responsibility to do this with the words "that's real legal talk".



Ken Murphy – "Noel Carroll should put up or shut up"

On the following day, *Ken Murphy* gave a 20-minute interview to the *Gerry Ryan Show* in which he outlined the copious evidence of low standards of health and safety in the workplace and on the roads in Ireland. He contended that Ireland suffers from a "negligence culture and not a claims culture".

Asked by *Gerry Ryan* about Noel Carroll's claims of "unethical" behaviour by solicitors, *Ken Murphy* recalled that Mr. Carroll has been challenged to either substantiate or withdraw such claims in the past both on *Morning Ireland* two years ago and later when he was invited to lunch in Blackhall Place. "Not a dicky bird" had been heard in response.

The Director General continued "if *Noel Carroll* is going to go around making allegations repeatedly as he does that solicitors are involved in improper and unethical behaviour then he really has a responsibility to provide some evidence of it and if he doesn't provide evidence of it then we are entitled to conclude, and I think your listeners are entitled to conclude, that he has no evidence of it".

"In this regard", *Ken Murphy* now challenges the Dublin Corporation spokesman, "it is time for *Noel Carroll* to either put up or shut up.

Business and Finance

In a major five-page article entitled "Our Creaking Courts", *Business & Finance* of 28 September, 1995, examined in detail the extent to which Ireland's Courts system is in danger of breaking down. Dublin County Registrar, *Michael Quinlan,* Bar Council Chairman, *James Nugent* SC, Law Society Director General, *Ken Murphy* and President of the District Court, *Peter Smithwick,* were each interviewed and provided insights into the underfunding, delays and inefficiencies of the Courts system.

In an editorial on the subject *Business & Finance* said "the much-promised new Courts Bill proposes to place the administration of the Courts in the hands of a new executive agency leaving the judges free to concentrate on their judicial functions. Inevitably this has encouraged the legal conservatives to express fears that such an agency would undermine judicial independence. Baloney. Our judges are not administrators. The sooner they are stripped of this role the better it will be for plaintiff, defendant and ultimately, the judges themselves."

Evening Herald

In the course of an article on a mature law graduate's frustration with the statutory Irish exam, Law Society Director General, *Ken Murphy,* expressed sympathy with the intending solicitor's apprentice caught, as are all others, by this 1920s legislation.

"The Law Society believes this is an anachronistic law", he said. "You don't have to do an exam in Irish to work as a doctor or dentist or architect and we have for a long time sought the support of politicians to change the rule."

Morning Ireland

On 2 October, 1995, the morning of the opening of the new legal year, the President of the Dublin Solicitors Bar Association, *Michael D. Murphy,* hit out on the *Morning Ireland* radio programme against the delays in the courts. He pointed out that it now took six times as long between setting down and hearing of a case in the Dublin Circuit Court as it did in 1991. The Government had not heeded the warnings that this would happen when the Circuit Court jurisdiction was increased. He could not understand the reason why legislation to try to deal with the problem, first published last autumn, had not yet progressed.

Compo Culture Myth

The following article by *Kieran Conway* appeared in the *Irish Independent* on September 1, 1995 and is reproduced by kind permission.

Often unjustly blamed in a society rife with compensation claims that may be bogus, genuine accident victims and lawyers are starting to hit back against public cynicism, says *Kieran Conway.*

At the height of the latest controversy over Ireland's alleged 'compo culture,' a furious *Michael McHugh* rang the *Marian Finucane* programme and asked to say something on behalf of the victim. He told passionately of how he was injured in an industrial accident in Poland.

While working on a construction site he was injured by a crane and left with severe spinal injuries to the neck. He was helicoptered off the site and later flown to hospital in London. Surgery was considered too dangerous to perform and his neck was instead put into plaster cast for three months.

This was in 1978, and, all these years later, he is, he says, still suffering. He has been told he will continue to suffer for the rest of his life. Seven years after the accident he finally received a £6,000 payment from the company he had worked for. This was the first, and only, money he received. It did not, he says, even cover the expenses he had incurred in trying to process his claim, far less compensate him for his injuries.

McHugh says he was forced to settle for £6,000 because he couldn't afford to proceed through the courts in England. There, as here, there is no scheme of legal aid in place for personal injury cases. Prospective barristers wanted money in advance in order to take on his case and he simply did not have it.

His reasons for ringing the *Marian Finucane Show* was to defend the existing 'no foal, no fee' practice, under which lawyers agree to pursue cases for clients who have no money but, the lawyers feel, good cases. McHugh's point is that, had such a practice existed in Britain at the time – it now does – his case would have had the chance of being vigorously pursued and he would have had the chance of receiving adequate compensation.

The strength of his defence is matched by representatives of the Law Society who are fed up with charges that they are contributing to a compo culture by ambulance-chasing practices. In response to adversaries that range from employers' organisations like

IBEC and the Small Firms Association to Corporation spokespersons, its director-general, *Ken Murphy*, has invented the phrase 'negligence culture'.

According to Mr Murphy: "Compo culture is a propaganda term being used by certain vested interests here who are trying to evade their responsibilities.

"If there's high level of claims it's because there's a high level of accidents caused by negligent employers, and that is the problem they should be addressing rather than attacking those who are trying to vindicate the rights of those injured by that negligence.

"The solicitors' profession is sick and tired of attempts being made to blame solicitors for the allegedly high level of claims in this country," and is "fed up with being made the scapegoat for other peoples' tolerance of low levels of health and safety in the workplace and on the roads.

"The fact is that Ireland is a risky place in which to live, and the levels of health and safety which we as a society seem prepared to accept both in the workplace and on the roads inevitably leads to their being a large number of claims."

Rejecting figures released by IBEC which suggest the level of work-related accidents is low here, *Ken Murphy* said he wasn't "going to accept figures from a vested interest" and has produced evidence from SIPTU and from other studies which suggests the opposite. There is considerable under-reporting of accidents in the workplace, he argues, and a truer picture can be gleaned from the figures for fatal accidents at work which, with an average of 60 fatalities a year, is four times that in Britain.

On the roads, meanwhile, according to Murphy, "a motorist has a 50pc higher risk of being killed than in Britain and a 20pc higher risk of serious injury."

As to the charge that there is a high level of spurious claims: "how can this be when claims are tested by the courts? There is no question of awards being made without negligence being, in the overwhelming number of cases, fully established. Employers who make payments do so either because a court has found them to be negligent or because they believe a court would find them to be negligent."

Lawyers say that those who argue the contrary are either being disingenuous or don't know what they're talking about. "In 'no foal, no fee' cases," one says, "prospective clients are, effectively, chosen by solicitors rather than the other way round, in the sense that no solicitor is going to agree to bear the risk of taking a case unless he or she is convinced that, firstly, the client has suffered an injury, and, secondly, that it was caused by negligence.

"The client has to submit to a medical examination by doctors for the defendants, which may suggest either that no real injury was sustained or else that it is being exaggerated. They may also commission reports from engineers and other experts to challenge the argument that the injury was caused by their man's negligence."

The key argument of the lawyers is that without 'no foal, no fee', which involves the solicitor assuming the risk of litigating, a great many people would be denied access to justice because, as *Michael McHugh* discovered in England, they couldn't afford to take on the rich and powerful.

If this looks like lawyers claiming to be Robin Hoods it is not an image they are unhappy with. Indeed, according to *Ken Murphy*, the only ones defending workers these days are the lawyers and the unions.

And not just workers. Among cases run in recent years on a 'no foal, no fee' basis were a number of high-profile medical malpractice suits.

When *William Dunne* was born severely brain-damaged in 1982 at the National Maternity Hospital, his parents began a seven-year legal battle which included a High Court victory, a Supreme Court appeal, and a retrial during which a number of dramatic court room developments cast serious doubt on the hospital's evidence and following which he was awarded $400,000 in an out-of-court settlement.

The case could never have been run without the willingness of his lawyers to bear the risk of not being paid.

Kenneth Best, brain-damaged after receiving a whooping cough vaccine back in 1969, sued the Wellcome Foundation and a doctor, losing in the High Court but winning on appeal to the Supreme Court, where he was awarded record damages of £2.75m.

And the lawyers do bear a real risk because they must prove negligence. When eight-year-old *Beatrice Lindsay* entered hospital in 1982 for a routine appendix operation, she suffered irreversible brain damage similar to that of the woman in the recent right to die case. Though the Professor of Anaesthetics at UCG gave evidence that the likely cause of her condition was the withdrawal of oxygen to a dangerous degree, this was not sufficient to establish negligence and a High Court award of $319,000 was overturned by the Supreme Court on appeal.

Modern Irish negligence law is peppered with important judgments that followed 'no foal no fee' cases and where justice would never otherwise have been done. It seems the lawyers are now determined to trumpet the fact.

After years of relative quiescence on their part, apparently in the belief that the merits of the system were self-evident to the public, they have now taken the offensive.

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Cover Story – Lavery and O'Brien win Sailing World Championships

by *David Branigan*

Blackrock solicitor *John Lavery* and his crew *David O'Brien* realised a two-year ambition at the beginning of September on Dublin Bay when they won the Heineken Fireball World Championships. With the European title firmly under their belt from the week before, the Dun Laoghaire duo sailed a close series of seven races against stiff international competition.

Lavery and *O'Brien* have campaigned together among the world's best sailors and were trying for Olympic qualification several years ago. Having competed in the Flying Dutchman (FD) class, the pair turned to the Fireball dinghy when the FD was dropped from the games format.

The build-up to the European and World Championships at the National Yacht Club, their own home club saw over 100 hours of intensive training on the water since early Spring. Their regime would typically start at 6.00 am with the two sailors heading down to the club, scaling the fence and rigging their dinghy to practise as the rush-hour traffic on Dublin's southside was starting to build.

A particularly demanding boat, the Fireball is renowned for exciting high performance sailing and speed of crew manoeuvres becomes the difference for winning or losing. At events and championships, *Lavery* and *O'Brien* had coaching from previous champions in addition to tuning sessions with other competitors.

The result of their effort and preparation was particularly apparent in the first race of the worlds series when the Irish crew opened an immediate lead of several seconds. But while this would ordinarily count as the average finishing difference between the leading boats, they went on to score a valuable psychological advantage by winning that race by a massive four minutes and 20 seconds.

But their victory was never certain due to some tough competition in the 89 boat fleet from 13 countries. Although clear favourites, the Irish boat was under constant pressure from Britain's *Colin Goodman* and *Jim Turner* who remained a threat to the end. However, *Lavery* and *O'Brien* held their own and sailed ashore to a heros' welcome from a crowd of well-wishers. The double title win has been hailed as the best result for Irish sailing in years and the highlight of the season. ❐

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Have you joined the Lady Solicitor's Golfing Society? If not, please send £5 membership fee to the Secretary, *Caroline Crowley*, Hayes & Sons, 15, St. Stephen's Green, Dublin 2.

If you are not a member you will not be circularised with details of the Society's Annual Outing.

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News from the Criminal Law Committee

The Committee will be holding a Seminar entitled **"The Irish Criminal Lawyer in Europe"** in The Law Society, Blackhall Place, on **Saturday, 25 November 1995** between 9.30 a.m. and 1.00 p.m.

A booking form is enclosed in this issue of the *Gazette*. The topics covered will include 'Practising Abroad' and 'Taking a case to the Court of Human Rights' and the speakers will include practitioners from other jurisdictions.

This is an important Seminar as most solicitors do not fully appreciate the relevance of the EU in their daily practice and the importance of introducing a European dimension.

The cost to participants is **£20.00** and it is hoped that there will be a very good attendance.

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Memories of 50 Years in Practice

Approaching my 50th year as a solicitor, I would like to refer to a few memorable facts which occurred during my early years in practice, to indicate how styles and approaches in the 40's and 50's differed from approaches and styles as we approach the 21st century.

Shortly after commencing to practice, I was called to the offices of M/s French and French of 7, St. Stephen's Green, Dublin, where the principal was Captain English, and ex-British Army Officer, and a solicitor.

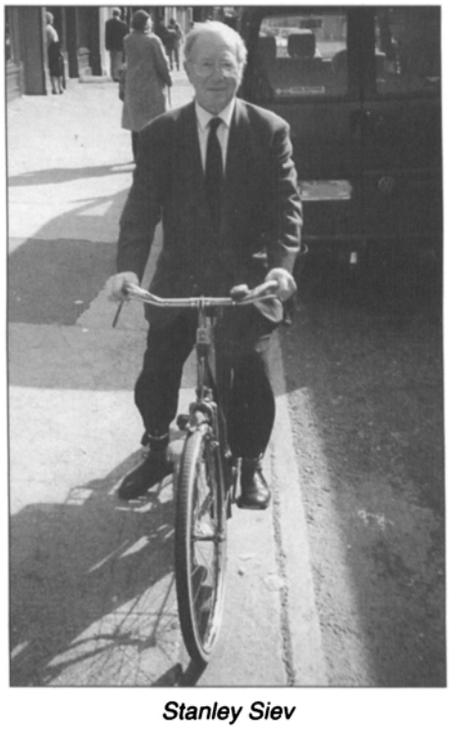
I was very friendly with him and he decided to give me some initial guidance.

Accordingly, in his very polished Oxford accent he said – "Stanley, remember when you write letters, when you speak to people, always remember to be a gentleman, for you have now entered a "genteel" profession".

Some years later, it must have been in the 50's, a lady came to see me. After being my client for some time, she commented to me on one occasion, "Mr. Siev one of the most important relationships between a solicitor and a client is the art of conversation. It is most important that a solicitor should always "converse with a client", never "converse to a client". I have noticed you allow me to talk to you and you talk directly to me, if only all solicitors would do that".

The comment was most interesting.

As my practice increased in complexity, it became necessary at times to instruct Senior Counsel, the equivalent of KC or QC in England. When the British left Ireland in 1921, no further KC's or QC's were appointed, but there were still some practising barristers in Ireland who retained their British titles, having acquired them in pre-1921 days. One such man was *Charles Campbell,* who was a brilliant KC. He must have been in his middle or late sixties when I began to instruct him. A "gentleman" to the tips of his fingernails, he had an immense practice, but always, when perusing papers and pleadings in particular he would not hesitate to spend time, one might say, a waste of time, but I now say, the mark of perfection; checking, to cross the t's and dot the i's, inserting commas, semis and other punctuation marks. I used to marvel at his tranquillity, the respect he received from all, and his ease and gentility in Court and yet devastatingly precise in his soft voice,



Stanley Siev

metaphorically knifing witnesses under his cross-examinations. I was so sad when more than 25 years ago, he suddenly started to age, an old man in his eighties, and he died. Not one case did I lose under his expert advice, which I always accepted and respected.

One of my earliest cases in which I was opposed by another young solicitor called *Rory O'Connor,* about my age, took place before Justice O'Flynn, of the Dublin District Court. I cannot now recollect what the case was about, but Rory and I went for each other "hammer and tongs". Suddenly, the Justice announced he was going to retire to his Chambers for about ten minutes. He did so and a few minutes later his clerk came over to the table and said "the Justice wishes to see you both in his Chambers". So we went there and in no uncertain terms he told us that solicitors have a duty to contest their client's causes in Court to the best of their "objective" abilities, but there is no place for "subjective" confrontations in the legal profession. "Now return to Court and conduct your cases as true professional gentlemen". Which we did and fought hard for our respective clients and we remained friends ever since.

One final word concerning another Solicitor. His name was *Archibald Clarke,* who was a very well known Dublin solicitor. He was already a very elderly man when I qualified. He always attended Court in full formal morning dress, even to his shiny tall hat.

He had a keen sense of humour and was very popular among his colleagues. On his death, as far as I can recollect in 1947, an era terminated in Irish legal history.

Before it is too late, when many of the stories will be forgotten, if my colleagues would care to send to me any anecdotes, stories, events etc. an attempt could be made to put them in book form and have a book published.

Up to the late forties, lawyers had time, the profession was not so materialistic. Pressures were non-existent and practices were conducted very easily, yet seldom delayed.

Maybe my age group no longer fits in and it is soon time to "pass on".

Stanley Siev

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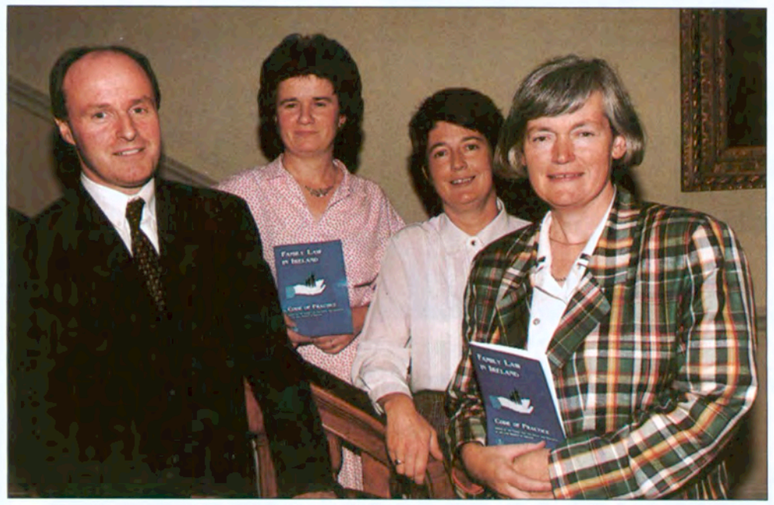
PEOPLE AND PLACES

At the presentation of Diplomas in Property Tax ceremony in the Law Society on 8 September were Norah O'Mahony, Solicitor, who received her Diploma, with here fiance, Dr. M. J. O'Mahony. Also pictured is Harriet Kinahan, Law School and James MacGuill, Chairman, Education Advisory Committee.

Just received from our Australian correspondent, former Presidents Gerry Hickey and Maurice Curran photographed at Doyles Fish Restaurant on Sydney Harbour, in a brief moment of relaxation from the rigours of the Interntional Bar Association Bi-annual Conference.

David Costello who was presented with his Diploma in Property Tax at the ceremony held on 8 September 1995, pictured with his father, The Hon. Mr. Justice Declan Costello, President of the High Court and Pat O'Connor, Chairman, Education Committee.



The Family Law and Civil Legal Aid Committee recently launched a new publication "Family Law in Ireland – Code of Practice". Pictured are committee members l-r: Eugene Davy, Pauline O'Reilly, Muriel Walls and Joan O'Mahony who are all members of the Family Law and Civil Legal Aid Committee.

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"100 metres from the Four Courts"

Muriel Walls, winner of the Lady's Golf Competition, was recently presented with The Quinlan Perpetual Trophy by Moya Quinlan. Also pictured are left to right: Barbara Cotter, Keyna McEvoy and Helan Boland.

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European Union Law and Irish Solicitors

by Vincent Power*

Part II

Irish solicitors practising before the European Court of Justice

Irish solicitors can appear before the European Courts.[36] Few have availed of the right to appear before the Courts. Yet, what is stopping solicitors from doing so?

In many ways, appearing before the European Courts will be far less important for Irish solicitors than knowing what the Courts have decided so that the law can be applied in practice.

Solicitors in practice invoke the jurisprudence of the European Courts on a daily basis in advising their clients. I know from my own practice that one often has regard to the jurisprudence of the European Courts without ever needing to have recourse to the courts.

It is a widespread misconception among many solicitors, even after 22 years, that one has to go to the European Court of Justice to strike down an Irish law on the basis that it is in breach of EU law. It is a pity that all solicitors do not appreciate that they can utilise the Irish courts or, sometimes more importantly, bring the case to the attention of the European Commission which can often give a more expeditious and effective remedy.

How can Irish solicitors avail of the opportunities? What are the practice resources and marketing tools required?

Why is it that many Irish solicitors do not avail of these opportunities?[37] In part, there are a number of self-imposed impediments which are difficult to overcome and in part, the obstacles are not so easily removed.

Irish solicitors should play to their strengths.

There is a tendency for solicitors in Britain and Ireland to focus on their home market and by "home market" they often mean the city, town or village in which they live. Irish lawyers should see themselves as being in the export/import business. Irish-based lawyers can market their services internationally and avail of the opportunities afforded by EU law – to a client in Chicago it matters not whether you are in Achill or Athens.

EU law suits the Irish legal training. It has been difficult for English lawyers to contemplate that legislation enacted by the sovereign Parliament in Westminster could be overridden by EU law[38] – however, the Irish lawyer has little difficulty in understanding and appreciating that legislation enacted by the Oireachtas can be overridden by the Constitution.

European Union law is not new to Irish lawyers. In fact, Ireland has been a member for the last 22 years and therefore has a very good headstart on States as diverse as Finland, Austria, Sweden as well as the Associated States which may one day join the EU.

Some Irish-based clients are importing their legal services, particularly in the area of EU law, from abroad. They believe that a service provided by a Brussels-based firm or a London-based firm must always be better than an Irish-based service. This is probably a relic of a post-colonial attitude rather than the result of any serious evaluation of the services which can be offered by some Irish-based lawyers. However, Irish-based lawyers must do as much as possible to dispel such notions.

It is imperative for all solicitors to recognise that EU law is not some specialist doctrine which only arises in particular circumstances and can be left in a cupboard to be brought out on special occasions. EU law is not a Victorian child. It has been written that "a common misapprehension among lawyers in the United Kingdom is that European Community law is a set of regulations which apply only in certain areas of specialised practice, like competition law and international trade."[39] The same could be said about Irish lawyers. Many Irish solicitors believe that an essential prerequisite for the application of EU law is that there must be a foreigner involved in the case. We have been reared on far-fetched scenarios of an Irish person driving a German car with defective brakes (made in Spain) crashing into an Italian driver in a Swedish car on the Franco-Belgian border when a Dutch cyclist on a British bicycle pulled out in front of the Irish driver to avoid a Danish motorcyclist wearing an Austrian helmet whose brakepads (made in Portugal) are defective.

So many EU law cases involve nationals of only one Member State. *Emmet, Fracovich, SPUC* and so on all involved nationals of one Member

State. EU law is already here. In fact it is estimated in the United Kingdom, and I do not believe the position is much different in Ireland, that "over a third of *existing* UK legislation arises from an obligation to implement EC law and this proportion is likely to increase."[40] There is no doubt that this trend is likely to increase – it has been reckoned almost 70% of future business law is likely to be derived from the EU.[41]

Offices

In an age of global communication there is no great need for a solicitor's firm/practice to be physically located in various offices throughout Europe.

Keep in Touch with Developments

EU law can be difficult. It is evolving rapidly. It is highly specialist in many areas. The sources are not always easily available. It is important to keep abreast of developments in the official journal, the *European Court Reports/Common Market Law Reports,* the specialist journals and the multitude of other sources.

The competition law rules relating to joint ventures clearly demonstrate that solicitors cannot advise solely on the basis of the jurisprudence of the European Courts. The competition law rules on joint ventures are largely the rules elaborated by the European Commission rather than the European Courts.

Access to EU law books is again extremely important. The various European Union Documentation Centres around the country should be availed of by solicitors. There is no area of the law which has resulted in and needed such an outpouring of legal literature as EU law. It is imperative, if Irish solicitors are to keep abreast of developments, to actually read the literature.

Be Professional

It is difficult to dabble in EU law. It is better to come to grips with a particular area rather than seeking to be an expert in everything – just as it is not possible to be an expert in every branch of Irish law, it is even more difficult to be an expert in all areas of EU law.

Keep an Open Mind

Keep an open mind. Too often, Irish solicitors tend to think of taking all cases to court. Mention of EU law means a call to Luxair! It may not be the simplest, most expeditious or indeed the best strategy to institute court proceedings. Negotiation between the parties based on EU law may be the better strategy. Or a complaint to the European Commission may be more appropriate.

Conferences

Conferences are an important way not only of marketing but also of educating oneself. At conferences one often hears insights which go beyond what is available in the textbooks.

Find the Quickest and Best Solution for the Client

There have been some cases taken from Ireland to the European Court of Justice. However, one must seriously consider whether a solicitor advising a client is always wise to recommend taking a case all the way to the European Court of Justice. The procedure is, in some cases, somewhat long and tortuous when you include the national appellate process as well.

Client Base

The firm's existing client base is often extremely useful in developing an EU practice. It is always much easier to sell a new service to an existing client than to sell an existing service to a new client.

Areas of Opportunity/New Opportunities

Competition law continues to be useful to Irish solicitors in trying to develop an EU practice. Recent cases such as the *Irish Continental Group/CCI de Morlaix (Port of Roscoff)* demonstrate how an Irish company (Irish Continental Group) can, within a very short space of time, seek a European solution to the practical commercial problem of getting access to the port of Roscoff. The whole procedure took from 8 February 1995 to 16 May 1995. How long would it have taken had the matter gone to court?

Compliance Programmes

Notifications to the European Commission on competition law matters are important and can be critically important to ensure the enforceability of an agreement and the avoidance of penalties. Solicitors often over-dramatise the whole EC competition law procedure and this often means that clients are put off by the complexity and cost of the procedure. Instead, solicitors can market competition compliance programmes to their clients.

Lobbying

Many English and Irish solicitors appear to think that "lobbying" is just not cricket. They believe that this is somewhat beneath their professional standing. Yes, inappropriate lobbying is inappropriate. However, solicitors can assist their clients no end by skillful, tactful and appropriate lobbying or influencing. Some solicitors' firms in the UK have established specialist lobbying groups or units.[42] If is often possible to influence a draft measure which is about to be adopted by the European Commission so as to avoid a problem down the road. Quite obviously, lobbying of the European Courts would be wholly inappropriate but lobbying of other institutions may be very effective for a client.

Conclusions

Changes are needed.

Let us turn for a moment to the education of Irish solicitors in the realm of EC law.[43] The system of teaching EU law to Irish students is, in general (there are exceptions), somewhat misguided. There is too much emphasis on the constitutional, institutional, historical and political aspects of the EU. While these areas are very important, a greater emphasis should be placed on the substantive, practical and procedural aspects of EU

law. A course must prepare a student for perhaps 40 years of professional life and must therefore still equip the lawyer to practise in the area by teaching the *European Legal Method*. For example, it is difficult for some common lawyers to struggle with concepts such as "agreement" in Article 85 of the EC Treaty and not read into the term the concept of contracts.

EU law is not remote law. It is wrong for us to keep talking about "Brussels"/"over there"/"Europe"/ "Eurocrats" and so on. EU law is here.

The European Commission will continue laying golden egg proposals, fines and decisions. There are limitations. It is vital to recognise ones limitations in terms of experience, expertise and resources. There is a great need to play down the high political element.

Many clients are put off by the political nature of EU law and the enormity of the EU system. It is true that, in certain areas of EU law, the political dimension is more apparent than it may be in municipal law but it is much less so than in the case of public international law. Similarly, the EU institutional apparatus is enormous but institutions such as the European Courts and the European Commission are extraordinarily open and transparent in the way in which they deal with the public. It is therefore clear that solicitors should not be worried about dealing with such a regime but should instead assist their clients in realising that the system can work to their advantage.

The English Law Society has assisted its members by publishing a book entitled "Solicitors and the European Union: Making EC Law Work for your Client". It would be very useful if the Law Society of Ireland were to follow the example of their English counterpart and produce a book which would distil the practice of the European courts and present real-life examples, checklists and guidance for Irish solicitors. For example, a check-list of the EC implications of various transactions and common situations which arise in practice.

In conclusion, Irish solicitors do not spend a great deal of their time before the European Courts. However, every Irish solicitor who ever has to practice or advise on EU law must pay particular attention to the jurisprudence and practice of the European Courts.

**Vincent Power is a solicitor in A&L Goodbody, Solicitors. He practises in the firm's EU and Competition Law Department.*

References

36. Lasok, *The European Court of Justice: Practice and Procedure* (2nd ed., 1994), pages 124 – 129.
37. See the excellent paper by Temple Lang in *The Legal Implications of 1992* (1988). See also miscellaneous articles including Guy, "How to Attract European Clients" *Gazette* 90/13, 31 Mar. 1993 and Jacobs' interesting article "Preparing English Lawyers for Europe" (1992) ELRev.232.
38. Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433, [1990] 3 CMLR 1; on appeal C-221/89 [1991] 3 CMLR 589.
39. O'Neill and Coppel *EC Law for UK Lawyers* (1994), page 3.
40. The UK Department of Trade and Industry, *Review of the Implementation and Enforcement of EC Law in the UK* (1993) at page v para. 1.
41. *Ibid*, page 41, para. 4.14.
42. For example, Clifford Chance has recently established such a group.
43. See Pertek, "The Europe of Universities" (1992) 11 *YEL* 257.

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Diploma in Property Tax for Solicitors

As part of its continuing Legal Education Programme, the Law Society, in response to a growing need in the legal profession, instituted the Diploma in Property Tax Course in October 1992. This was the first comprehensive post-qualification diploma course which has been set up to date. We are happy to report that the course has been extremely successful. Participating solicitors have found that it has greatly enhanced their confidence and competence in dealing with the myriad of tax implications on property transactions.

To date we have run five courses and a total of 125 solicitors have received diplomas. The most recent awards ceremony took place in the Law Society on the 8 September, when the Chairman of the Education Committee, *Pat O'Connor* presented diplomas to 32 solicitors mainly from the Munster and Dublin regions.

A most encouraging development has been the delivery of this diploma course both in Cork City and in Limerick University. The Education Committee remains committed to the need to provide relevant continuing legal education programmes both in the Law Society and in the provinces. We are currently planning to run the course in the Sligo/Mayo region to commence before the end of this year.

The Society is particularly indebted to *Brian Bohan*, Solicitor and member of the Taxation Committee, for his foresight and expertise in the development of this diploma course The other consultants are *Ray Shanahan* of J.W. Donovan & Co., Cork, *Paraic Madigan*, Matheson Ormsby Prentice, as well as our accountancy colleagues *David Smyth, Paula Oliver* and *Terry Oliver*.

Ernst and Young sponsor a very generous first prize of £500 for the solicitor who achieves the best overall mark on each Diploma Course. *Brian Bohan* presented these prizes to *Michael Noonan*, Rathkeale, Co. Limerick and *Finola O'Hanlon*, Law School tutor at the recent awards ceremony.

First prize winners in the Diploma in Property Tax Course were Michael Noonan (Limerick class) and Finola O'Hanlon (Dublin class). They were presented with their prizes by Brian Bohan, Solicitor and member of the Taxation Committee. Also pictured is Pat O'Connor, Chairman, Education Committee, Law Society.

The following solicitors were awarded Diplomas:

Limerick Class

1. *Michael Noonan* (First Place)
2. *George Bruen*
3. *Suzanne Bugler*
4. *Catriona Carmody*
5. *Ursula Condon*
6. *John Cooke*
7. *Aidan Crowley*
8. *Philip Culhane*
9. *Isabel Donnellan*
10. *William Donovan*
11. *Conor Glendon*
12. *Patrick McDermott*
13. *Rosemary Moore*
14. *Paul Morris*
15. *Stephen Noonan*
16. *Siobhan O'Neill*
17. *Marguerite Philips*
18. *Michael Sherry*
19. *Elizabeth Walsh*
20. *Mary Cashin*
21. *Shaun Elder*
22. *Sara Horan*
23. *Mary Murphy*
24. *Helen O'Reilly*

Dublin Class

1. *Finola O'Hanlon* (First Place)
2. *Patrick Callanan*
3. *David Costello*
4. *Deirdre Curtis*
5. *Peter Dineen*
6. *Anne Kelly*
7. *Patrick Larkin*
8. *Grace McFadden*
9. *Laura McGinley*
10. *Norah O'Mahony*
11. *David Rafferty*
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Michael Dunne, 63/65 Main Street, Blackrock, Co. Dublin.	64,156.00	*St. John Donovan*, "Lawcus", Stoneyford, Co. Kilkenny.	212.43
John K. Brennan, Mayfield, Enniscorthy, Co. Wexford.	3,594.28	*Vincent O'Donoghue*, 95 St. Stephen's Green, Dublin 2.	46,904.32
			164,293.71

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Professor *Marchenko*, Vice-Rector of Moscow State University & Adviser to Russian Constitutional Court;
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New Circuit Court Rules

Statutory Instrument No. 216/1995 came into existence on the 1st October 1995. These new Rules provide for changes in procedure in the following areas:

(a) The issue of Civil Bills and other originating documents prior to service.

(b) Renewal of Civil Bills.

(c) Lodgment procedures.

(d) Delivery of Defence without the necessity of lodging same in the Circuit Court Office, with consequent changes in applications for Judgment in default of Defence and applications for summary Judgment.

Issues of Civil Bill

The Rules provide that every Civil Bill or originating document must be issued from the Circuit Court office. It will be sealed, dated and marked with the Record Number. It must be accompanied by a copy and a Request for Entry. It will then be returned to the solicitor for service in the normal way. Some County Registrars have suggested that the issue of Civil Bills will be expedited if practitioners were to enclose an addressed envelope with the Civil Bill.

Filing of Documents:

The Defendant's solicitor enters an Appearance in the usual way, that is by filing same with the County Registrar and serving it on the Plaintiff's solicitor. No further pleadings are filed by either party, in other words it is not necessary to file the Request for Particulars, the Replies to Particulars, nor is it necessary for the Defendant to file the Defence. These documents are, of course, exchanged between the parties, but not filed in the Circuit Court Office.

The Notice of Trial is filed in the Circuit Court Office and of course served on the other party.

Books of Pleadings:

A book of pleadings will clearly be required for the Judge who is to try the matter. The practice varies from Circuit to Circuit. In default of there being any practice, the recommendation of the Litigation Committee is that the party serving the Notice of Trial should have available to lodge on the Trial date a full book of pleadings, set out chronologically and in legible form. This books of pleadings can be handed in on the day, unless the Court otherwise directs.

Renewal of Civil Bills:

The Civil Bill shall be in force for 12 months after the date of issue. The Plaintiff prior to the expiration of that 12 months, may apply to the County Registrar to renew the Civil Bill.

If the 12 months has expired an application to extend time to renew must be made to the Court.

When an application to renew is made, either the Court or the County Registrar (as appropriate) must be satisfied that reasonable efforts have been made to serve the Defendants.

On satisfying the County Registrar or the Court the document may be renewed for another six months.

The Defendant, where a Civil Bill has been renewed, may serve a Notice of Motion to set aside such Order prior to entering an Appearance.

Service of Civil Bills:

Service in the normal course of events will be by registered post, save if there is a Summons Server appointed to the area. The Summons Server's fee where one has been appointed is £25.00.

Lodgements

A Defendant may at the time of entering an Appearance made a Lodgment which he alleges is sufficient to satisfy the Plaintiff's claim. Such lodgment may also be made at any time after the Entry of an Appearance, but in any event, no later than:

Dublin Circuit – At least eight weeks before the hearing date mentioned in the Notice of Trial

Outside Dublin – At least eight weeks before the date on which the case is first due to be heard.

The practice of making notional lodgements should be discontinued. No possible advantage now derives from the making of a notional lodgment.

Motions for Judgment in Default of Defence

There are consequential amendments to the procedure for obtaining Judgment in default of Defence in the office. The Plaintiff or his solicitor must lodge an Affidavit verifying that an Appearance has been entered and no Defence has been delivered. This takes the place of the former Certificate of No Defence. The Affidavit regarding the non-delivery of the Defence must be enclosed with the Notice of Motion.

Other Provisions

It is recommended that practitioners should familiarise themselves in full with Statutory Instrument 216/95.

Section 4(5) Value-Added Tax 1972 Effect of Section 122(A), (B) Finance Act 1995

When a supply of property is liable to VAT the charge extends to the whole of the property, including the site. No difficulty should arise in this regard when a purchaser is dealing with a single vendor. A difficulty could arise when a purchaser acquires his interest in the site from one person and has contracted with another person to carry out the building work on the site.

To meet this situation, Section 4(5) The VAT Act 1972 provides that a landowner who does not himself engage in any development work can, nevertheless, be treated as a taxable person in certain circumstances. The most common example of the application of this provision relates to the granting of building licences. Under such an arrangement, a landowner, in consideration of the payment of a site fine by a builder, permits the builder to erect a building on the site and undertakes to convey an interest in the site to the builder's nominee (i.e. the house purchaser).

In those circumstances, the landowner is regarded as a taxable person and is accountable for VAT, firstly, on the site fine, and secondly, on the value of any interest conveyed to the purchaser.

In addition, if a house purchaser bought an undeveloped site from a company and then entered into an agreement with a related company to build a house on that site, the original section 4(5) ensured that VAT was payable on the disposal of the site.

Between 1972 and 1994, Section 4(5) of the VAT Act operated successfully to combat tax avoidance schemes of this nature. However, in an Appeal hearing in 1994, the subsection was found to be defective. Section 122 of the Finance Act 1995 revised the wording of section 4(5) to take account of this Appeal decision. It ensures that the sale of a site, as part of an overall agreement to develop it, continues to be taxable. This is in line with long-standing Revenue practice in this area. The new wording of section 4(5) is simply intended to maintain the status quo obtaining between 1972 and 1994.

The sale of an undeveloped site is not affected by this provision and will continue to be free from VAT unless disposed of in the precise circumstances outlined above. Thus, the new provision will not apply, for example, where a parent makes a gift of a site to a child, nor, generally, even where a parent sells a site to a child. Nor will the new provision apply where the parties to a gift are unrelated.

Taxation Committee.

New General Conditions of Sale (1995) Edition

At their recent meeting the Conveyancing Committee considered a number of applications received from practitioners seeking the permission of the Law Society to input the new General Conditions of Sale in their entirety on to their WP or computer data bases for general use by their offices in conveyancing transactions.

Having considered the matter at length, the Committee unanimously decided to recommend that the Law Society should not grant its consent to such applications as it considered that the adoption of such practice would place an unnecessary additional burden on other solicitors who would be required to ensure that the reproduced copies of the Contract would replicate in all respects the standard printed General Conditions of Sale. Furthermore, it was the unanimous view of the Committee that the use of the new Form of Contract as produced by WP's would add significantly to their bulk with little or no saving in financial costs to practitioners adopting this practice.

The Committee is satisfied that the universal use by the profession of the new Contract in its standard printed form will be in the best interests of practitioners as it will lead to an overall standardised procedure being adopted by the profession in conveyancing matters.

The Committee is aware of the existing widespread practice of the first four pages of the Contract being placed on WP data bases. The Committee accepts the practical benefits of this practice and approves of the practice provided that the General Conditions of Sale in their entirety are appended to the first four pages of Contract.

In this regard, the Committee emphatically repeats the recommendation expressed in clear terms both in the letter to the profession from the Chairman on the launch of the new Contract and also in the explanatory Memorandum accompanying the new Contract that the new Form of Contract in its entirety be used by practitioners.

The Committee requests that in their own interests practitioners accept and put into practice the Committee's recommendation in this matter.

Note:

There is a recommendation within the marginal note to General Condition 36 that certain matters be dealt with expressly by Special Condition. Practitioners are reminded that a corresponding recommendation extends to issues arising under any of the General Conditions, including, *inter alia,* points of difficulty or doubt on warranties or compliance or as to the existence or nature of conditions referred to in General Condition 36 itself. In the latter connection the Committee considers it important for an intending Vendor, prior to contract, to put the prospective Purchaser in possession of all material information in the spheres of Planning, Building Control and kindred legislation, and that any inability to fulfil the requirements of General Condition 36 be dealt with through the medium of Special Condition.

Conveyancing Committee

Documents Lost by An Post

The attention of members is directed to the brochure "Registration/ Insurance/Compensation" published by An Post.

The registered post system is effectively an insurance scheme. The basic registration fee yields maximum compensation of only £20.00. However, it is possible to insure post for an amount higher than the standard registered post fee. The compensation paid is directly related to the registration fee.

Before compensation is paid, An Post must be satisfied that the loss occurred in the post.

However, it should also be noted that compensation does not extend to consequential loss. An Post have indicated that a claim for registration fees incurred in replacing a document may succeed, but a claim for professional fees or loss to the client, would not succeed.

Niall G. Casey,
Professional Purposes Committee.

Pension Codes

In this age of acronyms, particularly those of the Department of Social Welfare, a helpful guide has been provided by Council Member, *Owen Binchy*, with the assistance of the Pensions Services Office which is located at College Road, Sligo, Tel: (071) 69800 / (01) 8748444, Fax: (071) 69926 / (01) 7043417.

Pension Code	Pension Type	Pension Description
01	OACP	Old Age Contributory Pension
02	OANCP	Old Age Non-Contributory Pension
03	RP	Retirement Pension
16	FFUEL	Free Fuel Allowance
21	PRETA	Pre-Retirement Allowance
23	CARERS-INV	Carer's Allowance Invalidity, Longford
24	CARER'S	Carer's Allowance PSO Sligo
68	BPP	Blind Persons Pension
64	SCP	Survivor's Contributory Pension
06	WNCP	Widows Non-Contributory Pension
07	ORCP	Orphan's Contributory Pension
08	ORNCP	Orphan's Non-Contributory Pension
10	DWB	Deserted Wife's Benefit
11	DWA	Deserted Wife's Allowance
12	SWA	Single Woman's Allowance
13	LP(UMP)	Lone Parents (Unmarried Parents)
14	PWA	Prisoner's Wife's Allowance
15	OIB	Occupational Injuries Benefit Widows
18	LP(WP)	Lone Parents (Widow's Pension)
19	LP(SSA)	Lone Parents (Separated Spouses Allowance)
25	LP(PSA)	Lone Parents (Prisoner's Spouses Allowance)

Owen Binchy

The Law Society Announces a New Joint Venture with the Alliance Francaise

The Law Society is delighted to announce the introduction of a new *Diploma in Legal French* in association with the Alliance Francaise Dublin – the French Institute. The Diploma is a practical qualification and will appeal to all solicitors and apprentices who wish to enhance their understanding of the French legal system.

Many members of the profession are aware of the opportunities offered by increasing EU co-operation and a considerable number of practices have developed links with colleagues in Belgium, France and Canada. The benefits to be gained from increased contact with our EU partners are numerous and too often we hesitate due to lack of knowledge of the legal system or language.

One way to develop ones professional knowledge in this area is by studying for this new practical qualification. It is envisaged that on completion of the programme, successful participants will be able to conduct business ably and proficiently with French-speaking lawyers and business people.

The *Diploma in Legal French* will be taught by native French lawyers and lecturers who have trained in Ireland and France. The course will be certified by the Paris Chamber of Commerce, a prestigious body with world-wide recognition. The main modules will focus on the French legal system, Civil Law and Commercial Law.

The course, which is organised by the Law School's *Raphael King*, is open to both solicitors and apprentices who have completed their Professional Course and all participants will need to demonstrate a high degree of fluency in French prior to starting the programme.

Full details of the entry requirements and admission assessments are set out in the enclosed brochure.

Important Computer Virus Warning

The world's first virus to infect and spread via data files has been discovered in Ireland. Up to this, all viruses had been spread by programmes and it was completely safe to swap documents. Users of Microsoft Word for Windows should not swap documents without putting the proper procedures in place.

For further formation, contact *Kevin Hanley* at Priority Data Systems on (01) 284 5600.

More Value for Money from Solicitors Financial Services

SFS improve their fee structure and expand their service

Since its formation five years ago, Solicitors Financial Services has been very successful in providing financial services to clients of solicitors.

As new legislation, particularly the Investment Intermediaries Act 1995, impacts on the financial services industry, solicitors have become more conscious of the need to ensure that their clients receive "professional advice".

The provision of financial services is now an important part of the solicitor's role as professional advisor.

To assist solicitors in this role and to provide quality service to their clients, Solicitors Financial Services have revised their services and fee arrangements.

At the recent launch of the restructured Solicitors Financial Services were l-r: Tom Kennedy, Irish Pensions Trust; Ken Murphy, Director General, Law Society; Sinead Burke, Irish Pensions Trust; Justin McKenna, Director, SFS; Andrew F. Smyth, Senior Vice President, Law Society and Peter Prost, Managing Director, Irish Pensions Trust

Membership

Fee: £25.00 + VAT per annum per firm which provides:

1. An attractive Legal Indemnities Insurance Package.

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3. Marketing Guide (including standard client letters).

4. Access to independent professional advice on all aspects of financial planning for solicitors and their clients, such as:

   - Inheritance/Gift Tax Planning.
   - Financial aspects of Partnership Planning.
   - Lump Sum Investments.
   - Fee based Pension Audit Service.
   - Redundancy/Retirement Counselling.

Commission Sharing Arrangement

On the transaction of business with Solicitors Financial Services by a solicitor's client, payment of an additional annual administration fee will entitle the solicitors to an equal share of any income generated. Scale of administration fees as follows:

No. of Solicitors	Administration Fee
1	£50.00 p.a.
2	£90.00 p.a.
3 – 5	£125.00 p.a.
6+	£175.00 p.a.

Please Note: The Administration Fee can be deducted from the income generated.

Promotional material is provided separately as required:

- Display Stand & Brochures £70.00 + VAT
- Subsequent Brochure Refills £40.00 + VAT
- Wall Plaque £40.00 + VAT
- User Manual £10.00 + VAT

How to Join/Renew Membership:

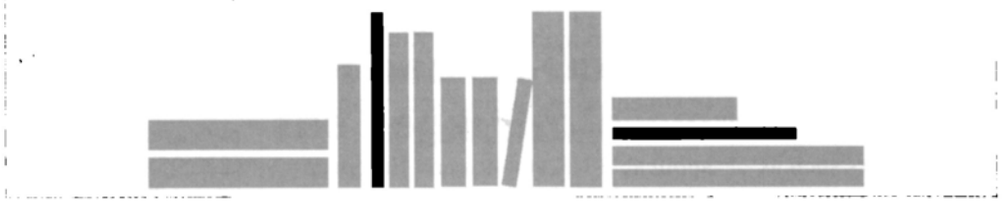
Each firm will receive a Brochure and Application Form. However, should you mislay it, please contact either:

Tom Kennedy
Solicitors Financial Services
Irish Pensions Trust
25/28 Adelaide Road, Dublin 2
Tel: 01 – 676 7591

Erin Barry
Solicitors Financial Services
Blackhall Place
Dublin 7
Tel: 01 – 671 0711

❐

BOOK REVIEWS



The Rainmaker

By John Grisham. Published by Century, London, 1995; hardback, IR£16.50.

Are lawyers good people? *John Grisham*, the legal story teller, probably the most popular author in the world, would likely concede that a small minority of them are. His five previous books (*A Time to Kill, The Firm, The Pelican Brief, The Client* and *The Chamber*) have all been best sellers worldwide and have sold over 60 million copies in the English language.

John Grisham was a lawyer from Mississippi, who discovered that writing about lawyers opposing racism, the Mafia, corporate thuggery, devious cops and district attornies, and the death penalty, can generate more money than actually practising as a lawyer. For Grisham, as long as most of his lawyer characters are characterised as short on ethical principles and greedy, the individual lawyer fighting the uphill battle for justice and the just cause – can be the heroic subject of each of his books.

The Rainmaker is Grisham's latest and arguably his best yet. It is written in the first person and probably reflects more than his earlier books why he feels being a writer critically commenting on the American legal profession is more fulfiling than actually being a liberal, humane, crusading lawyer in the Southern United States. A good example of that criticism is the following reference to the big firm lawyer character:

> ". . . Drummond bills two-hundred fifty bucks an hour for office work, three-fifty when in court. That's well below New York and Washington standards, but it's very high for Memphis. He has good reason to talk slow and repeat himself. It pays to be thorough, even tedious, when billing at that rate."

His liberal, crusading streak is demonstrated by his *Rainmaker* hero reasoning as follows:

> "My model juror is young and black with at least a high school education. It's ancient wisdom that blacks make better plaintiff's jurors. They feel for the underdog and distrust white corporate America. Who can blame them?"

The Rainmaker is about a law student, *Rudy Baylor*, who loses a job offered to him in a Memphis law firm before he starts due to it being taken over by a larger firm, just before his Tennessee bar examination. Heavily in debt, Rudy struggles on and becomes a lawyer, with his first trial in court a 'bad faith' case against an insurance company which has rejected a health insurance claim in respect of a boy dying of leukaemia who would probably have been saved if he could have had, in time, a very expensive bone marrow transplant from his twin brother. The insurance company is represented by the big law firm who took over Rudy's would-be employer, which enables his anger at the insurance company's treatment of his client to be also directed at the big firm – thus providing a convenient vehicle for the author to engage in criticism of the *'modus operandi'* of the large impersonal practice defending by all means, fair or foul, the unmeritorious client.

At the end of the trial which is the central theme of the book, Rudy (aka Grisham?) reflects: "Right now, though, I'm sick at work, I want to get on a plane and find a beach" – perhaps the tired wish of many trial lawyers the world over, but only capable of being fulfiled or afforded by a small minority of them, perhaps like Grisham himself.

John Grisham is a very good story teller, even if you feel his heroes are what the author would really wish himself to be. Irish solicitors and barristers can enjoy the book, comforted by the 'atlantical' distance between what allegedly happens in the practice of law in America and what, of course on a much higher moral plane(!), happens here.

Michael V. O'Mahony

The Law of Extradition in the United Kingdom

By *Michael Forde*. Published by Round Hall Press. Second Edition (1995) 261pp; hardbook, £42.50.

The law on the extradition (surrender) of persons from one jurisdiction to another has undergone significant change in both the United Kingdom and Ireland in the last decade. Change reflects varying political situations arising from, though not limited to, the Anglo-Irish Agreement of November 1985, the "political offence exception" (one of the most controversial aspects) of extradition law, and the far-reaching Convention on the Suppression of Terrorism (Council of Europe, 27.1.1977). The Convention, signed by all 21 member states of the Council (including Ireland), specifies offences not be regarded as or connected with a political offence or inspired by political motives. This effectively restates earlier decisions in cases such as *Quinn v Wren [1985] I.R. 322* which decided that members of organisations dedicated to overthrowing the State by unlawful means could not claim the benefit of the political offence exception [Section 50 (Irish) Extradition Act, 1965]. Procedural changes reflect the need for a uniform system of

extradition generally, while maintaining a balance between international obligations and the avoidance of human rights abuses – the latter in relation to matters such as race, religion, nationality or political opinion which are generally outlawed for extradition purposes.

Practitioners (and students) of extradition law will be aware that extradition between Ireland and the United Kingdom is governed by a special extradition regime, that is, a reciprocal system for the backing and enforcement of warrants issued in both jurisdictions. This accords with Article 28 (3) of the 1957 European Convention on Extradition which provides that parties to the Convention, in place of the Convention scheme, can deal with extradition between them by way of a reciprocal backing of warrants (rendition) system. The (U.K.) Backing of Warrants (Republic of Ireland) Act 1965 applies, as does Part III of the (Irish) Extradition Act 1965 as since amended by the Extradition (European Convention on the Suppression of Terrorism) Act, 1987, the Extradition (Amendment) Act 1987 and the Extradition (Amendment) Act, 1994.

The author advises readers that the text is confined to extradition from the United Kingdom [the United Kingdom means England, Wales, Scotland and Northern Ireland], the Isle of Man and the Channel Islands to all countries and places in respect of which extradition arrangement exist; the author equally advises that the text does not deal with extradition to nor on how persons are dealt with in these countries once extradited there. Therein lies a challenge for the author in producing a text comparable with the expectation created by the current title.

Extradition is a highly complex and sensitive area. For practitioners and students of international law, human rights and criminal jurisprudence, any text condensing the speciality law of a particular jurisdiction is to be recommended and provides an opportunity for comparative study. The author's text on The Law of Extradition in the United Kingdom is comprehensive in its background and treatment of the subject and, for ease of access, contains the text of applicable UK statutes and European Conventions.

Tom Cahill

Road Traffic Law and Practice

3rd edition; Dobbs and Lucraft; Price £58.00; Publisher: Sweet and Maxwell, London.

This is now a well established book produced biannually. It is written by two practising barristers. Like all books on the subject it grows in size. This 1995 edition is 70 pages larger than the 1993 edition. It is divided into four parts: A. Offices; B. Statutes; C. Statutory Instruments; D. Appendices.

It is part A that is of most use to the Irish practitioner. This use, and this caveat applies to all English books, must be selective and comparative. There are now very significant variations in the wording between the Irish 1961 – 95 Acts and the English 1984 – 1992 Acts. These are particularly noticeable in the detailed and difficult field of intoxicants; also in dangerous driving, where in England, there is now a statutory definition (S.2A of RT Act 1988). I note with interest that despite this book being recently published it does not include *R -v- Strong* (1995) Crim L.R. 428, a very important case on the condition of a vehicle as an ingredient of a dangerous driving charge. I note also a curious duplication of a table of shortest stopping distances at page 839 and again inside the back cover 34 pages later. The book is beautifully presented, of course.

This book has many merits. It is much more concise than the five volume Encyclopedia produced also by Sweet and Maxwell. In relation to the content and format of the book the authors might consider dividing it into two parts – like "Wilkinsons" that great favourite of mine, but now out of date. However, I have to say for practical usefulness (bearing in mind my caveat above) and value for money (£22.95) I would go for McMahons "Road Traffic Law" (Blackstone Press 1994).

Robert Pierse

Head Injury Management

by Dr Martina O'Connor McEnroe. Published by Headway Ireland Ltd., 130pp, softback, £5.00

This information manual on head injury is designed for the family of a head injured person and was sponsored by Headway Ireland Limited which is a support group for the families of persons who suffer from brain damage.

The book has also been grant-aided by the Health Promotion Unit of the Department of Health.

It is intended to answer typical questions which normally arise when someone you know sustains head injuries and does so in a clear and straightforward way.

It explains in detail and with illustrations what happens if one sustains these injuries and explains to the reader what to expect as a result of these injuries.

It deals with many technical terms in a most understandable way and contains a glossary of the more common technical terms which one might come across.

A solicitor dealing with personal injuries litigation would find this book invaluable. ❐

Notice

Please note that effective immediately, the cost of inserting a Lost Will notice will cost £36.00 plus VAT at 21% and Lost Title Deeds £50.00 plus VAT.

Notice of Lost Land Certificates remain at £18.00 plus VAT.

TECHNOLOGY NOTES

The Internet and Its Opportunities for the Legal Profession

Each year, the Technology Committee organises an exhibition and conference dealing with an aspect of technology which has implications on how lawyers manage their office and which tries to anticipate technology issues which will be of interest to clients. No one can have failed to notice the raised profile of the Internet in the past 12 months. The media have latched on to the idea of the Internet as a symbol of the advances in communications and computing and large numbers of commercial organisations now do a significant amount of business over "the Net".

The commercialisation of the Internet has implications for lawyers as well as their client and it is hoped that this year's conference will give some insight into the opportunities the Internet offers to lawyers. The conference will be of interest to those in small and medium sized practices as well as the larger offices as all have clients whose business will be affected in the communications revolution. The benefits which electronic communications have to offer the lawyer's practice does not distinguish between large and small offices.

The conference will take place in The President's Hall, Blackhall Place, Dublin 7 on Friday 10 November 1995. The CLE brochure enclosed with this copy of the *Gazette* contains full details of the conference program. The conference brings to Ireland some of the leading figures involved in formulating government and commercial policy concerning the "Information Superhighway" and its use by business interests. The importance of the conference is underscored by the fact that it will be chaired by *Dermot Gleeson* SC, Attorney General.

Leading London barrister *James Behrens* has recently published a major report on the use and potential of electronic communications for lawyers. He will give an outline of his findings and the uses the lawyer can make of electronic communications. Law librarian *Síobhán Heney* will give a talk on the sources of legal information available in the Internet, exploring those which can be accessed at no cost and the benefits of the pay as you go services. *John O'Donnell* will raise some of the legal issues which should be drawn to the attention of businesses when using the Internet in the course of their day-to-day commercial activities.

In the afternoon sessions, *Paul Vandoren*, a senior official of the European Commission will give an outline of the perspective of the European Commission concerning the Internet and its development. *Brad Smith*, the Senior European Attorney with Microsoft, the world's largest software house, will conclude the formal part of the conference with a presentation of the business potential which the communications revolution has to offer. There follows a Question and Answer session which will allow delegates to revisit some of the issues which were covered in the course of the day.

An exhibition of equipment will run concurrently with the conference. The exhibitors are mainly suppliers who specialise in supplying equipment to the legal profession. On display will be a range of equipment designed to address the needs of members of the legal profession and experts who will be happy to discuss the potential benefits of software and hardware with those attending the exhibition. All members of the profession are invited to attend the exhibition for whom admission is free.

JOD

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Lost Land Certificates

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 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.

Published: 26th October 1995.

Thomas Joseph Hogan, Folio: 27741F; Land: Shannabooly. **Co. Limerick.**

Patrick and Marie O'Gorman, Folio: 3964F; Land: Ballard. **Co. Wicklow.**

Michael Murphy and Susan Murphy, Folio: 3249F; Land: Puttagahan. **Co. Kings.**

Cornelius Keohane, Folio: 20845; Land: Maulagallane. **Co. Cork.**

Joseph Stapleton, Folio: 34295; Land: Durbas Ieile; Area: 5 Peirse. **Co. Tiobrad Abann.**

(1) Annie Heasty, (2) William Robert Heasty, Folio: (1) 5365, (2) 5357; Lands: (1) Newgrove, (2) Tullycroman; Area: (1) 8(a) 1(r) 0(p), (2) 11(a) 0(r) 20(p). **Co. Monaghan.**

Owen McEneaney, Folio: 2869F; Land: Mullinarry; Area: 0.231. **Co. Monaghan.**

Edward Long, Lelia Street, Limerick. Folio: 3913; Land: Ballycar North, in the Barony of Tulla Lower. **Co. Clare.**

Noel Connell, No. 6 The Pinewoods, Newport Road, Westport. Folio: 188F; Land: Townland: Westport Demesne (Situate to the West side of the road leading from Westport to Newport in the town of Westport). **Co. Mayo.**

Mary Owens, Folio: 9335F; Townland: Stonepark; Area: 0.402 acres. **Co. Roscommon.**

Philomena Synnott, Folio: 18267; Land: Wotton; Area: 1(a) 0(r) 0(p). **Co. Meath.**

Thomas Joseph Walsh and Henry Walsh, Corbo, Kilrooskey, Roscommon, County Roscommon. Folio: 17037; Townland: Corbo (part); Area: 36(a) 1(r) 20(p). **Co. Roscommon.**

Francis Brady, Folio: (1) 14747, (2) 13322; Land: Ardra; Area: 23(a) 3(r) 30(p), (2) 12(a) 2(r) 24(p). **Co Cavan.**

Kathleen Kingston (deceased), Folio: 10397; Land: (1) Curry Gurry, (2) Glasshouse; Area: (1) 5(a) 3(r) 30(p), (2) 8(a) 3(r) 8(p). **Co. Kings.**

Patrick Gorman (deceased), Folio: 3942; Lands: Monatore and Oldtown. **Co. Wicklow.**

Mary Gilmartin, Folio: 12481; Land: Dunmore; Area: 0(a) 1(r) 23(p). **Co. Kilkenny.**

D. Dennehy Limited, Folio: 3908F; Land: Carrigtohill. **Co. Cork.**

Michael McGrath and Bridget McGrath, Folio: 16804; Land: Kilfane East; Area: 3.619. **Co. Kilkenny.**

Mary McDaid (deceased), Folio: 22078; Land: Killyverry; Area: 5(a) 0(r) 39(p). **Co. Donegal.**

Peter Brady and Katherine O'Neal, Folio: 598F. **Co. Kings.**

Charles Robert Boyd, Keel East, Keel P.O. Westport, Co. Mayo. Folio: 1036F; Townland: Keel East; Area: 1(a) 3(r) 14(p). **Co. Mayo.**

Arthur F. D'Arcy (deceased), Taney House, Taney Road, Dundrum. Folio: 11384; Land: Townland of Jamestown in the Barony of Rathdown. **Co. Dublin.**

David John Berry (deceased), Folio: 3680; Land: Knocknamena. **Co. Cork.**

Basil Birch Bagster (deceased), 37 Copeland Avenue, Clontarf, Dublin. Folio: 2016L; Lands: Property known as No. 37 Copeland Avenue situate on the east side of Copeland Avenue in the Parish and District of Clontarf. **Co. Dublin.**

Liam Plunkett, Folio: 522L; Land: Situate on the East of the Wexford Road in the Urban District of Arklow. **Co. Wicklow.**

James O'Keeffe, Folio: 964; Land: Spelshertown; Area: 74(a) 2(r) 38 (p). **Co. Wexford.**

Elizabeth Dolan, Folio: 1188; Land: Beihy; Area: 6(a) 2(r) 22(p). **Co. Leitrim.**

Raymond Aidan Guare, Folio: 2810; Land: Selloo; Area: 43(a) 3(r) 15(p). **Co. Monaghan.**

Wills

Babtiste, Morrison Mona, deceased, late of 12 Waterloo Road, Ballsbridge, Dublin 4. Married woman deceased, would any person having any knowledge of a will executed by the above named deceased who died on 25 June 1993 please contact Eugene F. Collins, Solicitors, 61 Fitzwilliam Square, Dublin 2. Telephone: 676 1914.

Buckley, Sheila, deceased late of 19 Park Lane, Tralee, Co. Kerry and formerly of Kilviladonig, Ventry, Tralee, Co. Kerry and Brendan House, Brendan Road, Donnybrook, Dublin 4.

Will anybody having any knowledge of a will in relation to the late Sheila Buckley please contact Mr Patrick Rowan of McKeever Rowan, Solicitors, 34 Fitzwilliam Square, Dublin 2, telephone 661 1048 or 661 1049 fax 661 1054.

O'Hanlon, Denis, late of 11 Chalwood Estate, Blarney, Co. Cork. Would any person having knowledge of a will executed by the above named deceased, who died on 10 April 1995, please contact Daniel Murphy & Co., Solicitors, 30 South Terrace, Cork. Tel: 021 – 319494.

Lost Title Deeds

O'Brien, Beatrice, deceased. Would any person having knowledge of the whereabouts of the original Title Documents relating to premises at Dublin Street, Lanesboro, County Longford, owner – Joseph W. O'Brien, please contact Peter H. Jones & Co., Solicitors, Goff Street, Roscommon, telephone: (0903) 26925, fax (0903) 25354.

Employment

Solicitor with very extensive experience in company, banking, property and general commercial areas seeks return to mainline professional practice in Dublin area; short term assignments considered. Reply to Box No. 70.

Solicitor required, exp. conv./probate, to work 3-4 mornings p/w for sole practitioner, Dublin 4. Own Practising Cert. preferable. Reply in confidence to Box No. 71.

Vacancy for Solicitor William M. Cahir and Co. have a vacancy for a Solicitor in their Litigation Department. The successful applicant must have a minimum of three years experience in High Court, Circuit Court and District Court Litigation. Salary will be commensurate with experience. All applications in writing to the above Solicitors, 36 Abbey Street, Ennis, Co. Clare.

Solicitor, late 20s, currently working for financial institution seeks either to purchase a practice or to enter into partnership in Cork City/environs. Confidence Guaranteed. Reply Box No: 72.

Miscellaneous

Northern Ireland Agents for all contentious and non-contentious matters. Consultation in Dublin if required, reasonable rates. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry, Tel: 080 693 61616 Fax: 080 693 67712.

London West End Solicitors will advise and undertake UK related matters. All areas – corporate/private client. Resident Irish solicitor. Reciprocal arrangement and fee sharing envisaged. Agency work also. Contact: Ellis & Fairbairn, 26 Old Brompton Road, South Kensington, London SW7 3DL. Tel: 0044 171 589 0141

Personal Injury Claims in England and Wales. Specialist P I solicitors with offices in London and Birmingham can assist in all types of injury claims. One of our staff is in Ireland for one week in every month. Legal aid available to clients that qualify. Contact David Levene & Co., Ashley House, 235-239 High Road, Wood Green, London N22 4HF, England. Telephone: 0044 181 881 7777 Fax: 0044 181 889 6395 and Bank House, Cherry Street, Birmingham, B2 5AL Tel: 0044 121 633 3200 and Fax: 0044 121 633 4344.

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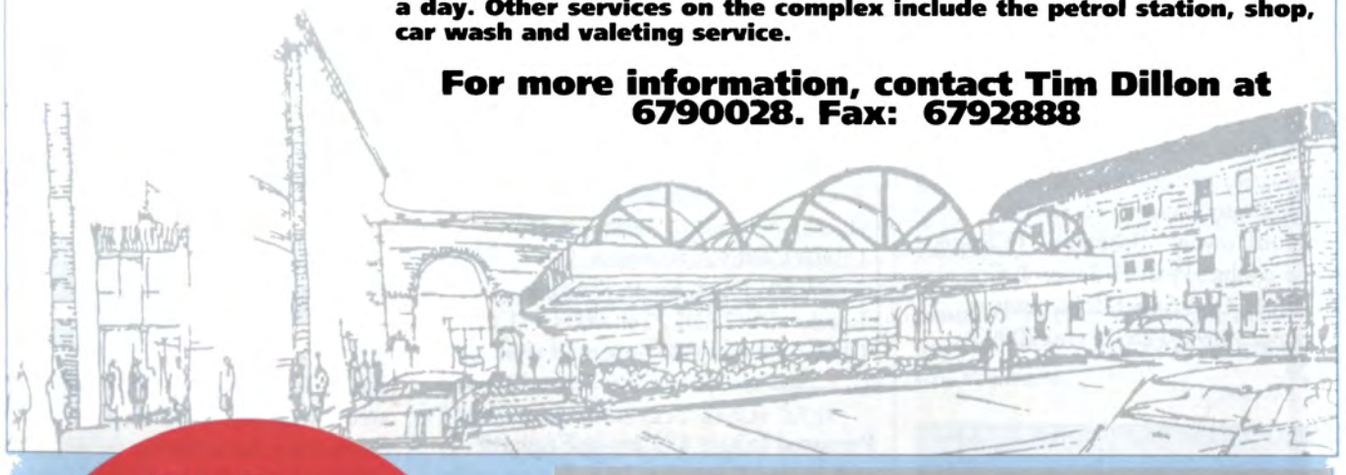

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VOL. 89 NO. 8 NOVEMBER, 1995

LAW SOCIETY OF IRELAND

GAZETTE

VISIT TO THE COURT OF JUSTICE

FAMILY LAW – NOT FOR THE POOR?

MEDIAWATCH – THE ISSUE OF EXEMPTIONS

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Front cover: *Judge John Murray* of the European Court of Justice and *Patrick A. Glynn*, President of the Law Society. See also page 310.

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VIEWPOINT

Family Law – Not for the Poor?

Whatever the result of the Divorce referendum may be, it is acknowledged that marital breakdown is likely to continue to be a feature of Irish society in the foreseeable future. The recent publication *Sociological Study of Marital Breakdown and Family Law in Ireland* by *Tony Fahey* and *Maureen Lyons* is therefore most welcome.

As has been pointed out more than once by the Law Reform Commission and other interested parties, all areas of proposed law reform in Ireland are bedevilled by the absence of reliable and up-to-date statistics. The authors of the Study have indeed drawn attention to the absence of reliable statistics and their research has relied heavily on information supplied by solicitors practicing in the family law area. It is pleasing to find the authors so generous in their thanks to the solicitors who assisted them and it is clear that without this assistance the Study could not have moved forward.

What is both interesting and disturbing about the Study is that it reveals the existence of a two-tier system operating in our courts and it is difficult to describe this as anything other than one stream of justice for the financially underprivileged and another for those better off. Although the authors are rightly cautious about the available statistics they do suggest that at least twice as many family law cases are dealt with at District Court level than at Circuit Court level. The authors conclude in their study that a significant percentage of those involved in marital breakdown use the District Court to obtain barring and maintenance orders only and do not proceed to seek a judicial separation order in the Circuit Court. It also appears that many of those who have recourse to the District Courts do so without legal assistance. Were it not for the assistance obtained from District Court Clerks, it is clear that even the barring and maintenance orders procedure would not function as relatively efficiently as it does. Our Civil Legal Aid system, in spite of recent improvements, still appears to be out of reach of many financially underprivileged citizens.

Barring and maintenance orders have become the *de facto* means of separation for a majority of those in marital breakdown situations who come to the courts. In one sense this is as well because the various Circuit Courts around the country clearly at present cannot cope even remotely with the existing number of pending judicial separation cases. Mediation is certainly not a major factor in the resolution of disputes. The study shows that only 1 in 3 clients or private solicitors attended mediation and only 1 in 8 of Legal Aid clients. Even allowing that the State-funded pilot mediation scheme is Dublin-based, these are disappointing figures.

It is not right that the judicial separation process should in reality be accessible only to the property-owing and better off section of the community. Nobody would convincingly argue that the District Court with its present workload, complement of judges and facilities, would be a satisfactory locus for the final determination of all the ingredients of judicial separation cases, including issues concerning children and property – all of which require more time for consideration than is available in that Court. Even if mediation and other means of resolving marital disputes outside the Courts system grow and prosper, there will always be family law cases which will require the intervention of the Courts. It is clear that the 1989 Judicial Separation Act, (soon to be replaced by the 1995 Family Law Act) has not by its mere passing provided a convenient forum for adjudication of marital disputes for a significant percentage of those involved in such disputes.

The Law Reform Commission is currently preparing its Report on Family Courts following in the wake of its Consultation Paper. The Fahey and Lyons Study will no doubt give it significant food for thought in making its recommendations which hopefully will be for an accessible system of justice for all those unfortunate enough to be involved in marital breakdown.

■

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WORKING GROUP ON A COURTS COMMISSION

The Minister for Justice, Mrs. Nora Owen, T.D., has established a Working Group to review the operation of the Courts system and, in the light of this review, to consider the matter of the establishment of a Commission on the Management of the Courts as an independent and permanent body with financial and management autonomy (as envisaged in the Government's Policy Agreement entitled "A Government of Renewal"). The Working Group, which is being chaired by Mrs. Justice Susan Denham, has advisory and recommendatory functions and will ultimately be submitting a report to the Minister.

The terms of reference for the Working Group are as follows:

1. To review

(a) the operation of the Courts system, having regard to the level and quality of service provided to the public, staffing, information technology, etc;

(b) the financing of the Courts system, including the current relationship between the Courts, the Department of Justice and the Oireachtas in this regard;

(c) any other aspect of the operation of the Courts system which the Group considers appropriate.

2. In the light of the foregoing review, to consider the matter of the establishment of a Commission on the Management of the Courts as an independent and permanent body with financial and management autonomy (as envisaged in the December 1994 document entitled "A Government of Renewal").

3. To have investigative, advisory and recommendation functions and to make a reports (and any interim reports and recommendations as they see fit) to the Minister for Justice on the foregoing matters.

The Working Group invites submissions from interested groups and individuals on issues relevant to the above terms of reference.

Submissions, in writing, should reach the Secretary to the Working Group, at the address quoted below, not later than 22nd December, 1995.

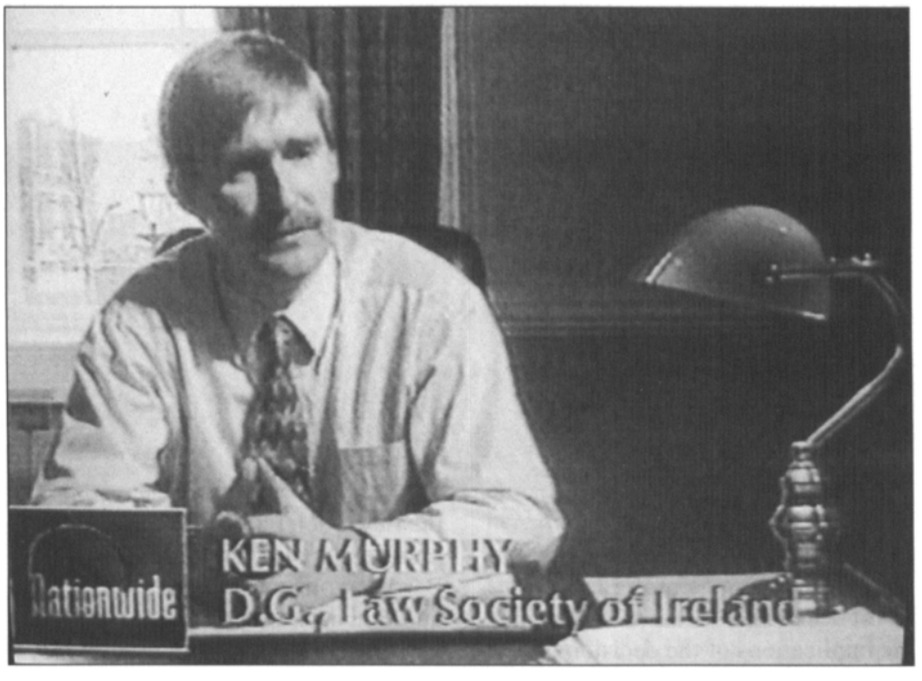
Secretary to the Working Group,
Room 307,
Department of Justice,
72-76 St. Stephen's Green,
Dublin 2.

After Bloomer – The Exemptions for Law Graduates Issue

The Judgment

The Judgment in the case of Bloomer & Ors v The Law Society, Ireland and the A.G. (a case note of which was published in the October *Gazette*) was reported in the national newspapers on 23 September 1995. It was reported in the Irish Independent under the heading 'Judge Decides All Students Must Take Law Society Exam'. The article stated that legislation exempting Irish University Law Graduates from having to sit the Entrance Exam of the Law Society of Ireland had been struck down by the High Court. It went on to say that the ruling arising out of an action by graduates of Queens University, Belfast who had sought a similar exemption status on the grounds that they had been discriminated against, was handed down yesterday by Miss Justice *Mary Laffoy*. The article continued: "dismissing all the claims of the 35 Belfast students, who had sued the Law Society and the State for damages, Judge Laffoy went further and toppled the entire exemption regime as it applied to all graduates within the State. Miss Justice Laffoy held that the Belfast graduates had been discriminated against under EU law. However, it followed from her Judgment that the legislation under which the exemptions were granted was invalid. She found that Regulation 15 of the Society Regulations was *ultra vires* the powers of the Society were invalid".

In the Irish Times on 25 September 1995, an article was published under the headline 'Students to Appeal Exemption Judgment'. It stated that the Queens University Law Students whose High Court action resulted last weekend in the loss of exemption for law graduates from the entrance examination to the Law Society will appeal the Judgment to the Supreme Court. In the Irish Times on 6 October 1995, it was reported that a date of December 12 had been provisionally fixed for the Supreme Court appeal.



The Pat Kenny Show

On 18 October 1995, *Ken Murphy* was interviewed on RTE Radio 1 by *Pat Kenny* along with *Loughlinn Deegan*, President of UCD Students Union. Loughlinn Deegan stated that it was very understandable that law students who got very high points to get into law courses are annoyed that they are not going to get the benefit of exemptions into Blackhall Place to the professional training course for solicitors. He said that the students want the Council of the Law Society to make some kind of provision to protect the admission of law students who came into College on the understanding that they would get the exemption. *Pat Kenny* then turned to the Director General, *Ken Murphy* for his reaction to the High Court Judgment. *Ken Murphy* said that the Society had taken its stance in the Bloomer case on the grounds of educational standards. However, as a result of the judgment, one of the Society's Regulations was struck down. The Director General continued: "we are very conscious of the difficulties facing people who were in the system already and who were not anticipating that this would be the situation they would face. We are trying to come up with a solution to it and we are taking further legal advice at the moment to determine what is actually legally possible for us to do." *Pat Kenny* queried the position of people who opted for law on the basis that they would have the exemption. *Ken Murphy* replied "well that is precisely the difficulty we face. While we have heard a great deal about the legal principle of "legitimate expectation", it is not something which is very clear in its extent as applied to circumstances like this. Whether it would go back even as far as the people you describe, that is again something about which we are awaiting definitive legal advice."

Council Meeting – 20 October

A statement was issued by the Law Society on 20 October 1995 as follows "the Council of the Law Society wish to express its deep concern at the position in which

proposed entrance to the Society's Law School have found themselves consequent upon the recent High Court decision. A detailed review of the implications of the decision is being carried out by the Society and the concerns of those most immediately affected are foremost in the Society's considerations. A Special Meeting of the Council will be held on Tuesday 31 October next to specifically address these concerns and the consequent legal issues raised by the High Court decision. Because the High Court Judgment is under Appeal to the Supreme court, the Law Society must abide by its legal advice that it cannot take any other action at this time."

This statement was reported in the *Irish Times* on 21 October in an article headed 'Law Society to Meet on Entrance Issue'. The statement was also covered in the Irish Independent of 21 October 1995.

Irish Times Editorial – the issue of legal training

The editorial of the Irish Times on 24 October dealt with the issue of legal education. It referred to the fact that the recent High Court decision on the issue of entry procedures to the Law Society's training course for solicitors is a symptom of a much wider malaise; and one that involves not just the Law Society but also the Kings Inns', the equivalent training body for Barristers. It stated that the whole question of how students are admitted to both professional bodies, how they are selected, who is eligible for selection and the adequacy of the training provided has been the subject of controversy and public concern for several decades. The editorial referred to the fact that the present debate is understandably centred on the plight of the recent law graduates but that the Law Society has to comply with the courts ruling pending the outcome of the Supreme Court decision and the Appeal by the Queens University students. The editorial referred to the Fair Trade Commission Report which dealt with the issue of legal training. The editorial stated "five years on the problem is far more acute than when the Commission reported". It concluded that: "it is time the whole question of legal education, both at university level and in terms of professional training was examined. Only a Government can initiate such an examination."

Education and Living Supplement

In the Education and Living Supplement of the Irish Times on the same day October 24 there was an article on the problem of numbers entering both the barristers profession and solicitors profession. The article pointed out that the recent High Court ruling – striking down a crucial exemption for law graduates seeking training as solicitors – has highlighted a crisis in the legal professions. The article questioned whether the crush for entry into an overcrowded area is in the public interest and asked whether it is in the public interest for lawyers to have such complete control over access to qualifications – and for universities to keep creating courses.

The article continued that the system is clogged up with a backlog of previous years law graduates still seeking places. The article went on "since the granting of the exemption to law graduates, according to *Ken Murphy*, Law Society Director General, the Society has been staggering under the weight of increasing numbers of graduate applicants. Waiting lists are in the hundreds and waiting time for a law graduate to gain admission to the course has ranged from one to one and a half years; The Society now runs five separate intakes to the course over each two year period." The article quoted *Paul O'Connor,* Dean of UCD Law Faculty. He does not see anything intrinsically wrong, as a general principle in the Law Society operating an entrance exam for law graduates, providing it does so for sound education reasons and to maintain standards in the profession rather than as a 'crude device' to limit numbers.

Statement issues after Special Council Meeting

The Law Society Council met on 31 October 1995 to discuss the issue of the effect of the Bloomer case. On 1 November a press release was issued which outlined the decision taken. The press release stated that the Law Society decided it was reasonable and appropriate that certain university law graduates whose eligibility for entry to the Society's professional training course had become legally uncertain in consequence of a High Court Judgment of the 22 September 1995, should have that legal uncertainty removed. The decision applied to:-

(i) persons who had received a proported exemption from the

Society's standards entrance examination pursuant to a regulation which was found invalid by the High Court;

(ii) persons who had obtained a degree in law on or after 22 September 1990 (i.e. within the last five years) from one of the recognised Universities in the Republic of Ireland which, if the exemption regulation had not been found invalid, would have entitled them to an exemption from all or part of the FE-1 but who had not have of been given such an exemption prior to 22 September 1995;

(iii) persons who obtained a degree in law on or after 22 September 1990 from the Queens University, Belfast, which would have entitled them to an exemption from the FE-1 if the Queens University, Belfast, had been one of the Universities listed in the invalid exemption regulation. An applicant who has obtained a degree in law from the Queens University, Belfast, will in any event be required to pass an examination in Constitutional Law to be set by the Society.

The graduates in the above categories must apply for an exemption to the Society by 1 March 1996. A notice was published in national newspapers both in the Republic of Ireland and in Northern Ireland. See page 326 of this *Gazette* for notice.

The Society made no decision on 31 October in relation to law undergraduates. It was stated in the press release that this would be considered at the next meeting of the Council of the Society on 24 November.

The press statement was covered in the Irish Independent on 3 November 1995 under the heading 'Law Society Compromises over Exam Exemptions'. It was reported that the Society had modified its regulations so that the graduates who are affected can apply to the Society before March 1 next if they want to be exempted from the requirement to sit the Entrance Exam. The Director General of the Law Society, *Ken Murphy*, said that "the Society's decision was designed to eliminate potential unfairness arising as a consequence of the High Court Judgment." In the Irish Times the press statement was covered in an article with the heading 'Law Society Modifies its Rules' on 3 November 1995. This article stated "that the Apprentice Solicitors Steering Committee expressed delight at the Law Society's decision. It means the 66 law graduates due to begin the course in three weeks will not have to sit the exams as many of them had feared." It was also reported that "a spokesman for the QUB law graduates who took the High Court action said they were "relatively happy" with the Law Society's decision but that it fell short of the intention of their case which was to secure exam exemptions for all QUB law graduates."

RTE 1 Radio News, 2 November

The decision by the Council was the topic of the RTE 1 Radio News at 6.30 p.m. on 2 November. The item referred to the fact that a recent High Court decision removed the exemption from the Blackhall Place exams that all law graduates in the Republic had enjoyed since 1989. It was reported that "now the Society has restored the exemptions for people who have already received their law degrees here and extended it to Northern Ireland graduates but those still studying for degrees may not receive the same treatment." The item also reported that the Society has postponed a decision of students still in University until later this month and that this decision had angered the Union of Law Students of Ireland, Chairman, *Loughlinn Deegan*. *Loughlinn Deegan* was interviewed and said "while much as they might hide behind the various High Court decisions, I think, the simple motivation is numbers, they regard there as being too many solicitors in this country and they are very eager to try and cut down on the numbers of people entering the profession and this is providing them with the ideal opportunity to do that." *Ken Murphy* was interviewed in response to this and said "I think it very important to emphasise that this is not the attitude of the Law Society. It has always been a question of maintaining standards of people entering the legal profession and going on to practise law on the Irish public. We have a statutory obligation to maintain those standards and it is very interesting to read the High Court Judgment in that regard, in its finding that essentially the motivation that the Society had for making its decision in relation to the Queens graduates was standards and standards alone, not controlling the numbers entering the profession."

Nationwide RTE 1 TV – the issue of numbers

On the RTE TV programme *Nationwide* on 3 November there was a special feature on the problem of numbers in the solicitors profession. The feature explored the reality of making a living in the profession and pointed out that there are too many solicitors, too few jobs and for the present law graduates there are great difficulties in finding an apprenticeship. The Director General of the Law Society was interviewed and said "we would say that the rate of growth in the profession is such that it can't be sustained in terms of providing a livelihood for people who are seeking to enter it. We are trying to redress it in two ways, firstly by means of information such as this, to ask people to check out the realities of what faces them before they commit themselves to seeking a life in the profession and, secondly, we are seeking to amend our education course to see if we can provide students with other skills and knowledge which they could apply in other areas of the economy outside of private practice, because there are simply no jobs there." Various law students outlined the problem of getting into the legal profession. *Barbara Cotter*, recruitment partner with A & L Goodbody was also interviewed and said "I think it is very difficult for them to get apprenticeships. I would see it from the side of receiving applications every year for apprenticeships and this firm alone would receive 300 applications every year and that would be for about eight or ten places, so you would, after interviewing, offer apprenticeships to about eight or ten law students." *Ken Murphy* concluded that "the law seems to obviously have an extraordinary attraction which is difficult to rationalise, and we can only conclude that people are choosing to seek to enter the profession on the basis of illusions, both about what the opportunities are and what the actual lifestyle could provide for them."

The case of Alison Bloomer and others v Incorporated Law Society of Ireland, Ireland and the Attorney General was reported in the Law Reports of the Irish Times on Monday November 6, 1995.

Catherine Dolan ■

Solicitors Confidential Helpline

In September 1993 it started to become clear that with the ever increasing strains both professional and personal imposed upon the profession a service to help solicitors deal with the pressures of a modern practice was required.

The group of solicitors spearheaded by members of the Dublin Solicitors Bar Association examined various methods by which such a service could be set up.

In April 1994 the Solicitors Confidential Helpline became operational. The Helpline was organised as a Confidential Telephone Service to provide a listening point for solicitors' problems fears and worries.

Anybody wishing to use the Helpline should dial Dublin 01 – 284 8484. On dialling this number the solicitor will obtain the names of two practitioners together with their telephone number either of whom he or she can ring to discuss any particular problem.

The practitioners who have kindly volunteered to man the Helpline operate a one week term duty each year and therefore two different solicitors man the service each week.

The Confidential Helpline is entirely independent from the Law Society and any matter discussed on the Helpline is done so on an entirely confidential basis. If the solicitor seeking help wishes to consult more formally with the duty solicitors or with any other practitioner then any such arrangement is subject to the normal solicitor/client relationship.

To date the Helpline has received over 400 calls from members of the profession. These calls have concerned problems of a professional, personal and financial nature. It appears that many of the difficulties for practitioners stem from solicitors being either over worked with their existing case load or finding that their income has diminished substantially in recent years. It certainly appears that the running of a practice in the last ten years has become increasingly more complex and stressful.

It is interesting to note that a similar service is operated within the United Kingdom. In the UK there are only approximately 100 solicitor volunteer helpers for a profession covering 35,000.

The Organising Committee would like to thank all the practitioners who have assisted by becoming consultants, the Law Society for their financial support of the Scheme and *Mary Rigney* the Secretary of the Dublin Solicitors Bar Association for her organisational skills in helping the Scheme run so smoothly.

Any practitioner who is in need of assistance for any reason should ring 284 8484.

Steering committee: *Michael Irvine, Elma Lynch, Hugh O'Neill, Rory O'Donnell, Daire Murphy.*

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Reporting the Words of the High Priests

by Dr. Eamonn G. Hall

Judges have an unique influence on Irish life. One learned jurist noted that the "earliest judge was a ruler who uttered the divine command and was king and priest combined". Professor *Robert Heuston*, the doyen of judicial biographers considered that the judge "belongs to a priesthood for ever". To-day, of course, the word "priest" includes a priestess – the female judges of our courts.

Photographed at the recent launch of The Irish Digest 1989 – 1993 at the King's Inns are l–r: Julitta Clancy, editor and compiler; Chief Justice Liam Hamilton; Carroll Moran, Editor, The Irish Reporting and Michael McDowell, SC, TD, Chairman of the Law Reporting Council.

May judges leave literary legacies to posterity. Barristers and others are paid to report the decisions of the judges of the Superior Courts to ensure the survival of the doctrine of precedent.

Regular law reporting in Ireland can be traced back to 1615, to the reports of Sir *John Davies*, then Attorney General for Ireland. Little was published subsequently until the middle of the eighteenth century. But many early series of reports were inaccurate. Chief *Baron Pollock* remarked about Espinasse's Reports: "Mr. Espinasse was deaf. He heard one half of a case and reported the other." In *Hodgins v Hanrock* (1845) M & W 120 at 123, the same Chief Baron proclaimed "You may find authority in the modern reports for many propositions that are not law". In the previous century, Chief Justice Holt ejaculated: "See the inconveniences of these scrambling reports: they will make us appear to posterity for a parcel of blockheads." [*Slater v May* (1704) Ld. Ray m. 1071 at 1072].

The Incorporated Council of Law Reporting for Ireland ("the Law Reporting Council") is a body charged with reporting the decisions of the judges of the Superior Courts in Ireland. The Law Reporting Council is now in its 129th year of continuous service. A formal council was established in 1866. The Solicitor-General for Ireland, Sir. *H.E. Chatterton*, the eldest son of a Cork solicitor, played a leading role in establishing the Council and chaired the early meetings.

The Law Reporting Council may be described as a joint venture between members of the judiciary, the Attorney General, the Inner Bar (Senior Counsel) the Outer Bar (Junior Counsel) members of the Law Society, and the Department of Justice. Many solicitors have played a significant role as members of the Council. In recent times these include Mr. *John F. Buckley*, Mr. *Peter Prentice*, Mr. *Fergus Armstrong*, Mr. *M. Tyrrell*, Mr. *William Earley*, Mr. *Michael V. O'Mahony*, Mr. *Michael Staines*, Mr. *Ken Murphy*, Director General and Mr. *Terence McCrann*. The writer, has also been associated with the Council for some time. The present chairman is Mr. *Michael McDowell*, S.C., T.D. and the Editor of the Reports is Mr. *Carroll Moran*, B.L. The Law Reporting Council publishes *The Irish Reports*, digests of cases and other legal publications.

One of the most scathing attacks on *The Irish Reports* emanated from Lord Justice Christian, a most unusual man who had "a belief in his own superiority both in conscientiousness and intellect" which often brought him into conflict with his brother judges. The Lord Justice Christian in *The Irish Law Times and Solicitors' Journal (1887)* 11 ILT SJ 358 noted that *The Irish Reports* were "utter nonsense", that the pages were filled with "dry, bald, disjointed twaddle" and that "this miserable little pamphlet" was replete

with "mischievous delusions". He compared the members of the Council to "the great people who sometimes appear in the prospectuses of bubble companies" and concluded that the entire series of reports was "a parcel of trash, a wanton waste of ink, paper and printing". Such similar condemnations have never been uttered in the history of law reporting to date.

The Law Reporting Council celebrated the publication of its most recent digest, *The Irish Digest 1989 – 1993** in the Kings Inn's on Wednesday, October 18, 1995. The current digest contains in approximately 1,850 columns all cases reported in *The Irish Reports 1989 – 1993*, *The Northern Ireland Reports 1986 – 1991* and *The Irish Law Reports Monthly 1989 – 1993*. The Digest includes a table of all cases followed, overruled or considered, a table of all statutes cited and judicially interpreted and enforced and a table of European Communities legislation, Human Rights conventions and international agreements cited and judicially interpreted and enforced together with statutory instruments.

**The Irish Digest 1989 – 1993* may be obtained from the Business Manager, Law Reporting Council, 1st Floor, The Four Courts, Dublin 7 at £65.00 per copy plus £3.00 post and packaging. ■

Limerick Bar Association recently hosted a dinner in honour of Patrick Glynn, President, Law Society. Pictured are l–r: Judge Kevin O'Higgins, Judge Kevin Lynch, James I. Sexton, President, Limerick Bar Association, Patrick Glynn, President, Law Society and Judge Dermot Kinlen.

Inge Clissman, SC (left) and Clare McKenna pictured in Prague where the Dublin Solicitors Bar Association recently held their conference.

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First Review of the Courts System since 1927

The Working Group on a Courts Commission, established by the Minister for Justice, Mrs. Nora Owen, TD, had its first meeting on 6 November, 1995. The Working Group is chaired by Mrs. Justice Susan Denham of the Supreme Court.

In a statement issued on the establishment of the Working Group, the Minister for Justice said that the Group would be engaged in the first root and branch examination of the courts system since it was set up in 1927. The Group would provide the opportunity "for a thorough examination of the courts system to ensure that it is meeting the needs of today's society", she said.

The Working Group decided that it would meet weekly and that its first act should be to invite submissions from interested individuals or groups in the terms of the notice which is published on page 298. In addition or as an alternative to making submissions to the Working Group, any members of the solicitors' profession who have specific proposals on how the courts system should be reformed are invited to communicate them, preferably in writing, to Ken Murphy, Director General of the Law Society.

The members of the Group are: Mrs. Justice Susan Denham, Supreme Court; Mr. Justice Ronan Keane, High Court; Mr. Justice Kevin O'Higgins, Circourt Court; Mrs. Justice Catherine McGuinness, Circuit Court (Family Law); Judge Peter Smithwick, District Court; Mr. Anthony Hederman, Chairman of the Law Reform Commission; Mr. Ken Murphy, Director General of the Law Society; Mr. James Nugent, S.C., Chairman of the Bar Council; Mr. Ken Wright, Management Consultant; former Attorney General Mr. John Rogers, S.C.; Ms. Roisin McDermott, Chairwoman of Women's Aid; Mr. Kevin Duffy, ICTU Assistant General Secretary; Mr. Caoimhin O hUiginn, Department of Justice; Mr. Colm Breslin, Department of Finance; Mr. Richard Barrett, Attorney General's Office.

The Honourable Mrs. Justice Susan Denham.

Company Formations – Investment Business Services

The Investment Intermediaries Act came into effect on 1 August, 1995. This legislation provides for the regulation of firms or individuals ("Investment Business Firms") who engage in investment business or give investment advice ("Investment business Services"). It implements the Investment Services Directive and applies many of the principles in the Insurance Act, 1989, to general investment business.

The Central Bank has asked the Society to ask solicitors involved in company formation to alert clients involved in providing *"investment business services"* to the provisions of the Investment Intermediaries Act, 1995.

Under the Act any firm, whether corporate or non-corporate, which falls under the definition of an *"investment business firm"* requires an authorisation from either the Central Bank of Ireland or the Minister for Enterprise and Employment. The nature of the activities undertaken by an investment business firm determines which supervisory authority is appropriate. Whether a company is resident or non-resident in the State, is irrelevant in determining whether it falls under the provisions of the Act, its activities are the determining factor. Engaging in investment business activities specified under the Act without appropriate authorisation is a criminal offence. ■

Lady Solicitors Golf Society Outing at Kilkenny, 25 August 1995

Results

Captains Prize and Quinlan Trophy – *Muriel Walls* (16) 39pts

Second Prize – *Keyna McEvoy* (30) 38pts

Third Prize – *Barbara Cotter* (32) 38pts

Gross – *Virginia Rochford* (12) 24 Gross pts

Visitors Prize – *Joan Binchy* (16) 40pts

Sheila O'Gorman Trophy – *Maura Derivan* (36) 34pts

First Nine – Helen Kilroy (21) 21 pts

Second Nine – *Eimear Cowhey* (28) 22pts

Officers 1995/96

Captain	*Mary Gleeson*
Secretary	*Caroline Crowley*
Treasurer	*Diana Jamieson*

Post-Death Inheritance Tax Planning Still Alive

By *Eamonn O'Connor* A.I.T.I., Solicitor*

X died a widow on the 29 July 1990 leaving an Estate with gross assets of approximately £730,000. Under the terms of her Will, she left her entire Estate after payment of liabilities to her cousin, Mrs Y, who was resident, ordinarily resident and domiciled in England. Trustees of the Will were given power to run the period residence and lands for a period of up to five years from the date of death of the Testatrix.

At the date of death of X the assets in her Estate comprised the following:

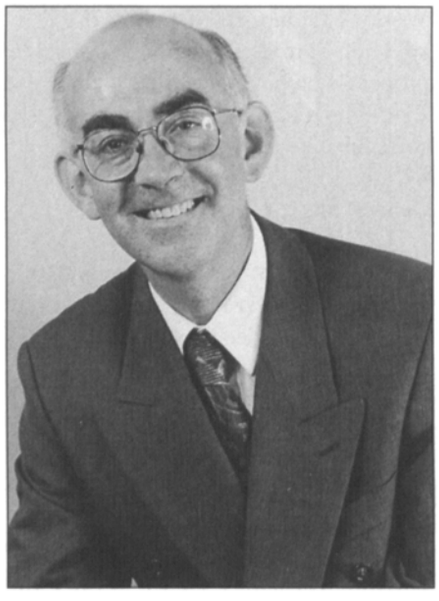
1. Agricultural property (land and residence) (34%)	£300,000
2. Non-agricultural property	£430,000
	£730,000

Mrs Y owned a residence in England valued at £150,000 Sterling.

On the death of X a liability to inheritance tax arose amounting to approximately £298,000.

However, under the Capital Acquisitions Tax Act, 1976 agricultural relief is available for "agricultural property" which is the subject of an inheritance and is taken by "a farmer" as defined. "Agricultural property" as defined (before 11 April 1994) generally included agricultural land – and farmhouses and mansion houses (together with the lands occupied therewith) as are of a character appropriate to the property.

"A farmer" means an individual who is domiciled and ordinarily resident in the state and in respect of whom at the valuation date not less than 75% (80% since 31 May 1991) of the market value of the property to which he is beneficially entitled in possession is



Eamonn O'Connor

represented by the market value of property in the state which consists of agricultural property, livestock, bloodstock and farm machinery.

At the date of death of X Mrs. Y was not ordinarily resident and domiciled in Ireland and only 34% of her entire property comprised agricultural property. Consequently, Mrs. Y would not be entitled to Section 19 relief, as a farmer.

However, practitioners should be aware that it is possible to re-organise the assets of the successor to avail of Section 19 relief during the course of the administration period.

Firstly, Mrs. Y transferred her U.K. home worth £150,000 Sterling to her spouse for natural love and affection. This transfer was tax neutral both in the U.K. and Ireland.

In this particular case the Trustees were advised to expend £77,000 on restoring the period residence which was in a poor state of repair. In addition, the Trustees were further advised to purchase £60,000 worth of livestock during the administration period.

The successor Mrs. Y took up permanent residence in Ireland on 1 July 1992 and formed the intention of creating a permanent home in this country and accordingly acquired a domicile of choice as set out in sworn affidavits. A valuation date was selected in mid-September 1992 and the Inheritance Tax Return submitted to the Revenue Commissioners within the statutory period. The Inheritance Tax Return claimed agricultural relief as, on the valuation date, 77% of the assets of Mrs. Y *now* represented agricultural property and the successor had also acquired on the valuation date a domicile of choice in Ireland.

The property as revalued on the valuation date comprised:-

1. Agricultural Property (land residence), livestock, farm machinery	£558,200 (77%)
2. Non-agricultural Property (after deductions of liabilities)	£159,640
	£717,840

During the course of the following two years, the Revenue Commissioners challenged the Section 19 claim on the following grounds:

1. The power of the Trustees to expend Estate monies on refurbishment of the residence and livestock purchase.

2. The appropriateness of the valuation date selected and

3. Whether the successor could acquire a domicile of choice distinct and separate from that of her domicile of dependency of her spouse which was in England and Wales.

With regard to (1) it was pointed out that the Trustees were given the widest powers in relation to the residuary Estate in the Will of X.

In relation to (2) the Revenue Commissioners opinion was that the 21 March 1991 (the date of issue of the Grant of Probate) was the earliest upon which the Trustees were entitled to retain the lands for the benefit of the successor. However, the dictum of Lord Fleming in the *Lord Advocate -v- Wotherspoons Trustees* 1930 SLT 82 states clearly that "retainer is something of an analogous character to actual delivery or payment" and as the Estate of the deceased had not been administered in March 1991 then it was not possible for the residue of the Estate to be in existence at that date. Accordingly the valuation date selected was not in the circumstances of the administration inappropriate.

In relation to (3) the spouse of Y, Mr. Y had a domicile of origin in New York, while Mrs. Y had a domicile of origin in a domicile area of England and Wales. After some time abroad and subsequent to their marriage in 1968 they returned in 1970 to England and set up home. Mr. Y accordingly acquired a domicile of choice in England and Wales.

Section (1) (2) of the Domicile and Matrimonial Proceedings Act 1973 provides that where immediately before the Section came into force (1 January 1974) a woman who was married and then had her husband's domicile by dependence was to be treated as retaining that domicile as a domicile of choice if it is not also her domicile of origin, unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of the Section of the Act. As already mentioned Mrs. Y took up permanent residence in Ireland on 1 July 1992 with the intention of establishing a permanent home here and accordingly acquired a domicile of choice in this country.

The UK case of *IRC -v- Duchess of Portland* (1982) *1 All ER 784* considered the effect of Section 1(2) of the 1973 Act mentioned above. The Section operated to deem the Duchess as retaining her husband's English domicile unless or until she changed that domicile by the acquisition or revival of another domicile after the coming into force of Section 1(1). *Nourse J.* was of the view that she could only free herself from the shackles of dependency by choosing to leave her husband for permanent residence in another country". He rejected the notion that spending 10 – 12 weeks annually in Quebec amounted to permanent residence and that she did not abandon her domicile of choice in England and Wales imposed on her by the Act of 1973. The same tests apply to the facts in the Mrs. Y case but *she did* take up permanent residence in Ireland and acquired a domicile of choice here.

With regard to the concept of domicile of dependency the Irish Domicile and Recognition of Foreign Divorces Act 1986 provides in Section 1 that:

"The domicile of a married woman shall be an independent domicile and shall be determined by reference to the same factors as in the case of any other person capable of having an independent domicile and accordingly the rule of law whereby upon marriage a woman acquires the domicile of her husband and is during the subsistence of the marriage incapable of having any other domicile is hereby abolished".

The Section states further that Section 1 above applies to the parties of every marriage irrespective of where and under what law the marriage has taken place and irrespective of the domicile of the parties at the time of the marriage. Furthermore the Supreme Court held forcefully that the concept of the domicile of a married woman being the same as that of her husband did not survive the enactment of the Constitution and was specifically contrary to Article 40 (1) per *O'Hanlon J.* in *W.V.W.* [1993] ILRM 294; [1993] 2 IR 476. Accordingly the two tests required to establish a domicile of choice namely Animus and Factum were satisfied by Mrs. Y on 15 September 1992. However, her husband Mr. Y retains his domicile of choice in England and Wales.

Finally in Spring 1995 as a result of Mrs. Y having acquired at the valuation date:

A. A domicile of choice in Ireland and

B. having converted non-agricultural property to agricultural property,

Mrs. Y qualified for Section 19 relief as £150,000 (i.e. £300,000 – 50%) now dropped out of charge at 55%, thereby saving £82,500.

Eamonn O'Connor is a solicitor with S.S. & E. Reeves, Solicitors, Dublin, and is a member of the Law Society's Taxation Committee. ■

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PARLIAMENTARY COMMITTEE

1995 LEGISLATION UPDATE – *1 August 1995 – 6 November 1995*

No.	Title of Act and Date Passed	Commencement Date/s
25.	Netting of Financial Contracts Act, 1995 (1 August, 1995) *Provides for the enforceability of netting, between two parties only, in relation to financial contracts in accordance with the terms of a netting agreement.*	1 August, 1995
26.	Family Law Act, 1995 (2 October, 1995) *Enables the Courts to make financial, property and other ancillary orders in or after proceedings for judicial separation; enables such orders to be made in certain cases where marriages are dissolved or where the spouses become judicially separated under the law of another State; restates the law, with amendments, on the powers of the court to make declarations in relation to the status of a person's marriage; raises the minimum age for marriage to 18 years and provides for notice of marriage; makes further provision in relation to maintenance under the Family Law (Maintenance of Spouses and Children) Act, 1976.*	Commencement Order/s to be made
27.	Fisheries (Amendment) Act, 1995 (6 November, 1995) *Provides that the Minister for the Marine may, following a request from a fisheries board or after consideration of a management report on a board, appoint a Commission to carry out functions of that board; amends and extends the Fisheries Acts 1959 to 1994.*	6 November, 1995

SELECTED STATUTORY INSTRUMENTS

215/1995 Circuit Court Rules (No. 1), 1995. *Came into operation on 1 October, 1995. Provides for procedures in relation to making applications to the Circuit Court under section 27 of the Local Government (Planning & Development) Act, 1976, as amended by section 19 (4) (g) of the Local Government (Planning & Development) Act, 1992.*

216/1995 Circuit Court Rules (No. 2), 1995. *Came into operation on 1 October, 1995. Provides (a) for the issuing of Civil Bills or other originating documents prior to service and for the renewal of such Civil Bills or other originating documents; (b) for the amendment of procedures in relation to the payment into Court of and the payment out of lodgements in satisfaction of claims; (c) for the delivery of a Defence without the necessity of lodging same in the Circuit Court Office with consequent changes in applications for judgment in default of Defence and applications for Summary Judgment.*

235/1995 Package Holidays and Travel Act, 1995 (Commencement) Order, 1995. *Section 5 of the Act came into operation on 1 September, 1995; all other sections came into operation on 1 October, 1995.*

243/1995 Rules of the Superior Courts (No. 1), of 1995. *Came into operation on 2 October, 1995. Adds a new rule 1(q) to order 11 – Service out of the Jurisdiction – to provide for proceedings brought to enforce any foreign judgment or foreign arbitral award.*

245/1995 Local Government Act, 1994 (Commencement) Order, 1995. *Section 22 of the Act which provides for the making of regulations relating to the conduct of local elections, came into operation on 19 September, 1995.*

255/1995 Stock Exchange Act, 1995 (Commencement) (No. 2) Order, 1995. *Brings the Act into operation on 29 September, 1995, other than sections 6, 50 and the definition of "statutory functions" in section 3 which were brought into operation on 1 August, 1995, by S.I. No. 206 of 1995.*

258/1995 Child Care Act, 1991 (Commencement) Order, 1995. *Brings section 4, section 6(3) and 6(4), sections 12 to 48, sections 68 and 70 and sections 75 to 78 of the Act into operation on 31 October, 1995. For earlier Commencement Orders see S.I. No. 292 of 1991; S.I. No. 123 of 1992; S.I. No. 264 of 1992; S.I. No. 349 of 1992.*

259/1995 Child Care (Placement of Children in Residential Care) Regulations, 1995.

260/1995 Child Care (Placement of Children in Foster Care) Regulations, 1995.

261/1995 Child Care (Placement of Children with Relatives) Regulations, 1995.

The above three Child Care Regulations prescribe various requirements to be complied with in accordance with the relevant provisions of the Child Care Act, 1991. All three came into operation on 31 October, 1995.

266/1995 EC (Milk Quota) Regulations, 1995. *Came into operation on 4 October, 1995. Replaces the EC (Milk Quota) Regulations, 1994 (S.I. No. 70 of 1994).*

267/1995 Casual Trading Act, 1995 (Commencement) Order, 1995. *Brings sections 6 and 17(1) (b) of the Act into operation on 16 October, 1995, and brings the Act, other than sections 6 and 17(1) (b), into operation on 1 May, 1996.*

282/1995 Ethics in Public Office Act, 1995 (Commencement) Order, 1995. Brings the Act into operation on 1 November, 1995, in accordance with section 1(2)(a)(i) of the Act. *Resolution of the Dáil passed 26/10/95, in accordance with section 1(2)(b), appointing 1 January, 1996, as the date for coming into operation of Parts II, III, V and VI of the Act in so far as they relate to Dáil Éireann and its members, the Clerk of Dáil Éireann, Committees of Dáil Éireann, joint committees of Dáil and Seanad Éireann, the Chairman and Deputy Chairman of Dáil Éireann.* ■

Irish Trends in Quality Systems Development 1995

Thirty one organisations were awarded the IQA's Quality Mark for the first time in 1995. Seven of these are unique in that they are also first-time awards for the related industrial sector and therefore represent a significant advancement for Irish industry in general. From past experience, the IQA are confident that other organisations, motivated by the desire to overcome the relative competitive disadvantage, will follow the leader's example resulting in overall improvement in Irish quality standards.

Pictured at the presentation to recipients at the Royal Hospital Kilmainham, Dublin on Wednesday 25 October were representatives from four solicitor firms who received the awards (from left) Philip O'Leary (FitzGerald O'Leary, Cork), John Coughlan (Coughlan & Co, Newbridge), Sean Conlan, Chief Executive IQA, Alan Synnott (Alan Synnott & Co, Dublin) and Niall Farrell (Patrick J. Farrell & Co, Newbridge).

The Irish Times

Law Report
Index
1989 - 1994

This is an index of all judgments published in **The Irish Times Law Reports Section on Monday.**

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A Visit to the Irish Lawyers in Luxembourg and Brussels

The President, Patrick A. Glynn and the Director General, Ken Murphy, recently visited the Irish lawyers in Luxembourg and Brussels. Here is the Director General's 'diary' of that visit.

Monday, 23 October

The President and I depart Dublin Airport by the 10.45 a.m. Virgin/Cityjet flight to Brussels on the first leg of our 'State visit' to the European Court of Justice in Luxembourg. We will be guests of the Irish Judges with all our expenses paid by the Court.

It is the first time that this official invitation has been extended to representatives of the Law Society. Apparently the Bar have availed of it previously, perhaps more than once. This year, however, things are different. Can the change possibly have been influenced by the fact that the Irish member of the Court of Justice and the President of the Law Society both hail from Limerick?

We meet MEPs *Mark Killilea* and *Mary Banotti* on the flight. They are already well familiar with the brand new terminal building which has transformed Brussels Airport from one of the shabbiest to one of the smartest airports in Europe.

At 4.00 p.m. local time our connecting flight arrives in an unexpectedly warm and sunny Luxembourg. Our hotel is directly across the road from the ghastly building that houses the Court of Justice.

The President remembers a restaurant which he thinks is named 'le chateau' to which he was brought by the younger members of the Luxembourg Bar on a previous visit. The taxi driver tells us no restaurant of that name exists. By coincidence we pass right by it as we explore Luxembourg's 'old town'. It turns out to be named 'Um Plateau' and can be highly recommended.

Tuesday, 24 October

Anthony Collins, BL, is the senior *referendaire* to Judge *John Murray*. He has taken great trouble to provide us with a comprehensive programme of meetings and briefings for the next day and a half. We meet him at the front door of the main court building, known as the Erasmus Building, at 9.00 a.m. precisely. By 9.30 a.m. we have been briefed on the morning's case by the assistant to Advocate General Jacobs and are seated in the Court of Justice. The case turns out to be one of major importance involving allegedly illegal state aid granted by France to its Post Office which is distorting the international express courier service.

The arguments are succinct, clear and, even in translation, well presented. Major questions of legal principle are asked and cleverly argued. Listening is an interesting experience which contrasts with previous visits we have made to the Court when it was difficult to stay awake.

There is a break in the proceedings at 11.00 o'clock and all the advocates go outside for coffee. A 9.30 a.m. start with a mid-morning coffee break. How different from the home life of our own dear courts.

Our programme next brings us to the office of *Nial Fennelly* who was appointed Advocate General of the European Court of Justice in January of this year. Advocates General play a key role in developing the jurisprudence of the Court. They have the status of judges and Nial is the first Irish lawyer ever to hold this post. He welcomes us most warmly in his office with its breathtaking view over several square kilometres of vividly yellow and orange coloured autumnal forest. We have coffee with him and his *cabinet* of young Irish lawyers who tell us how things are done 'out here'.

Several more intensive briefings on the European Courts system follow before we escape to lunch in the judges' dining room. After lunch our visit to the Judges' chambers is completed when we are again very warmly received, first by *John Murray*, Judge of the European Court of Justice and then by *Donal Barrington*, Judge of the European Court of First Instance, and their staff of European law specialist Irish barristers, solicitors and academics. Each is generous with their very scarce time and provide us with real insights into their lives and work in Luxembourg, while we reciprocate with nuggets of news from home.

Dinner this evening is a most enjoyable affair in yet another excellent Luxembourg restaurant where we are hosted by the three Irish judges and their wives.

Wednesday, 25 October

Luxembourg

There is no such thing as a free dinner and, accordingly, the relentless schedule of education meetings resumes. We are swept at 30 minute intervals from one court official to another, each patiently explaining a separate aspect of the inevitably complex courts system which services, through a dozen working languages, the European Union law dispute resolution process for 15 member States and 340 million citizens.

Today the judges are all involved in a case in which the German Government is challenging the legal basis for the European Union's GATT agreement in relation to bananas. This banana agreement, surprisingly to us, is a matter of intense political controversy in Germany where it has even been suggested that, if it does not like the Court's judgment, Germany will unprecedently refuse to comply with it. We hear that a group of German theologians have condemned the European Union's banana regime as "immoral"!

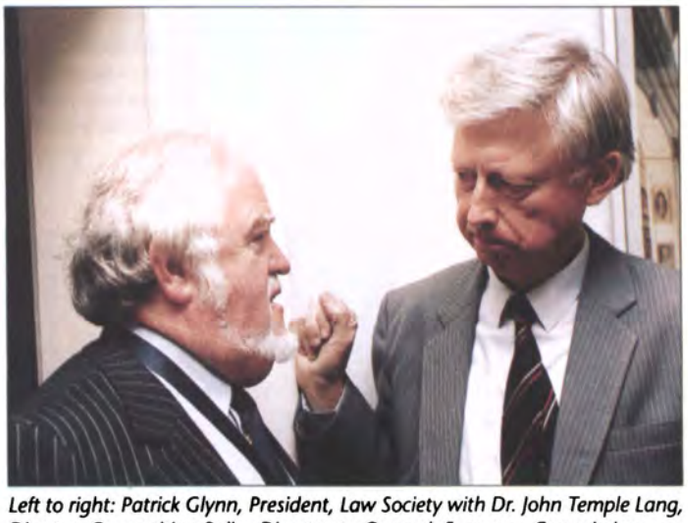
The unusual legal nature of the case requires all of the advocates general as well as all of the judges to sit and hear it. This is the first time that this fullest of court divisions has sat since the accession of Austria, Sweden and Finland.

Continued on page 315

A VISIT TO THE COURT OF JUSTICE, LUXEMBOURG AND IRISH LAWYERS IN BRUSSELS

Left to right: Judge Donal Barrington of the European Court of First Instance; Ken Murphy, Director General, Law Society; Judge John Murray of the European Court of Justice; Patrick Glynn, President, Law Society and Advocate General Niall Fennelly of the European Court of Justice.

Left to right: Anthony Collins, Referendaire; Noreen Mackey, Researcher; Niamh Hyland, Referendaire; Judge John Murray; Anthony Whelan, Referendaire; Elizabethann Wright, Referendaire; Ken Murphy, Director General, Law Society; Noel Travers, Referendaire.



Left to right: Patrick Glynn, President, Law Society with Dr. John Temple Lang, Director, Competition Policy Directorate General, European Commission.

Left to right: Karen Holmes, McCann FitzGerald; Ken Murphy, Director General, Law Society; Maurice Byrne, Byrne & Associes; Damien Collins, McCann FitzGerald; Patrick Glynn, President, Law Society; Maree Gallagher, Byrne & Associes and Bernard O'Connor, Stanbrook & Hooper.

Left to right: Michael Collins, Committee of Regions, with Karen Holmes, McCann FitzGerald.

Left to right: Bernard O'Connor, Stanbrook & Hooper; Maree Gallagher, Byrne & Associes; Patrick Glynn, President, Law Society; Maurice Byrne, Byrne & Associes and Alan Davis, Deloitte & Touche.

PEOPLE AND PLACES

Swapping Rolls *– Rachel Hussey, a former barrister, who received her parchment as a solicitor at the Parchment Ceremony on 20 October, 1995, with her husband, Paul Binchy, BL, a former solicitor. Rachel was called to the Bar in 1989, the same year that Paul was admitted to the Roll of Solicitors. Paul was called to the Bar on 13 October, 1995.*

Pictured at the launch of the second edition of his book "Road Traffic Law in Ireland" is Robert Pierse with the Minister for Justice, Nora Owen TD and Mr. Justice Dermot Kinlen. This second edition brings the law up to date, including the 1994 and 1995 Road Traffic Acts. Robert Pierse is a senior partner in Pierse & Fitzgibbon, Listowel.

A portion of the proceeds from the sale of the Lawyers' Desk Diary produced by Oisin Publications was presented to the chairman of the Solicitors' Benevolent Association, Tom Menton by Sean O'hOisin. Also pictured is the President of the Law Society, Patrick Glynn.

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"100 metres from the Four Courts"

A lunch was hosted recently by Marye Glynn for the wives of Past Presidents of the Law Society. Pictured are back row l–r: Eileen Monahan, Therese Nash, Mary Grace Blake, Noelle Anne Curran, Ann Smyth, Detta Pigot, Carmel Killeen, Joan Houlihan, Joan Osborne, Maeve O'Donnell, Shirley Carrigan, Dorinda Hickey and Frankie Beatty. Front row l–r: Muriel Overend, Ruth Margetson, Marye Glynn, Joan O'Donnell, Pat Maher, Joan McD Taylor.

The Law Society of Ireland recently hosted a meeting of the Presidents, Secretaries and Vice-Presidents of the Four Home Law Societies. Pictured are back row l–r: Robert Sayer, Senior Vice-President, Law Society of England & Wales; Ken Murphy, Director General, Law Society of Ireland; Michael Davey, Secretary, Law Society of Northern Ireland; Kenneth Pritchard, The Secretary, Law Society of Scotland; John Hayes, Secretary General, Law Society of England & Wales. Front row l–r: Mary Keane, Policy Development Executive, Law Society of Ireland; Martin Mears, President, Law Society of England & Wales; George Palmer, Junior Vice-President, Law Society of Northern Ireland; Patrick Glynn, President, Law Society of Ireland; Andrew F. Smyth, Senior Vice-President, Law Society of Ireland; Alan Boyd, President, Law Society of Scotland; Grant McCulloch, Senior Vice-President, Law Society of Scotland and Aidan Canavan, President, Law Society of Northern Ireland.

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A VISIT TO THE IRISH LAWYERS IN LUXEMBOURG AND BRUSSELS

Continued from page 310

Nial Fennelly subsequently confides that, while there was no difficulty on the bench when the submissions were being made in French or English, a switch to German caused most of the judges to reach for their translation headsets only to find that there was not a sufficient number to go around!

All of the Irish legal staff gather to say farewell. After photos and speeches from *Judge Murray* and *Paddy Glynn*, we depart reflecting on the substantial amount that we have learned, on the extraordinarily generous hospitality we have enjoyed and on the very able team with which the Irish legal profession is represented in Luxembourg.

Brussels

The pace of the train from Luxembourg to Brussels is reminiscent of Paddy Glynn's party piece 'The West Clare Railway'. It seems to actually get slower the closer we come to Brussels. When we eventually arrive we find the centre of Brussels paralysed by marches and demonstrations by the teachers and students of Wallonia who are protesting against cutbacks. Many streets are cordoned off by riot police.

Accordingly, we arrive a little late for our reception for the Irish lawyers in Brussels. This reception is being hosted by the Law Society though organised by the Brussels Association of Irish Lawyers (BAIL).

The reception is held in the office of *Maurice Byrne*. Maurice has relatively recently done something probably unique for an Irish solicitor by establishing the law firm of Byrne, Devries, Feron & Wouters. The firm occupies spacious premises on the very elegant Square Vergote. I view Maurice as one of the Brussels 'old guard', although he is younger than I am, as he was already well established when I arrived here in 1988 for my four-year Brussels posting with A & L Goodbody.

It is a pleasure to meet up with him again together with many other familiar faces from that exciting period in Brussels.

Damian Collins, secretary of BAIL, was in the Brussels office of Clifford Chance in 1988 but shortly afterwards he established the McCann FitzGerald Brussels office where he is still the partner in charge. *Bernard O'Connor* is now a partner in the specialist European law firm of Stanbrook & Hooper. He informs me that he is shortly due to argue a case in front of the European Court of Justice. Not many Irish solicitors have done this. What is even more impressive, however, is that he will be making his arguments in the 'language of the case' which happens to be Italian!

Miriam Murphy, the President of BAIL, is a legal adviser to ITT World Directories. She has to leave the reception after an hour as she has an early flight the following morning to attend a business meeting in Lisbon. *Ursula O'Dwyer* of Coopers & Lybrand is also well-travelled. The last article I saw from her in the European Competition Law Review was based on her experience setting up a company law system in Kazakhstan. Barrister *Brian Hartnett* is a Brussels-based partner in the US law firm Squire, Saunders & Dempsey. *Antoinette Long*, now with the Confederation of Food & Drink Industries, served for a couple of years in the early 1990s as the first editor of our *Gazette's* Eurlegal supplement.

However, the majority of the 40-plus Irish lawyers attending the reception are not from the 'old guard' but represent a 'new wave' comprising solicitors and a few barristers working for international law firms or EU institutions together with some solicitors' apprentices, students and *stagieres*. Most appear to be prospering in Brussels although there is talk of times being tough for lawyers here as everywhere else.

Almost all Irish lawyers seeking opportunities in Brussels will sooner or later find their way to the door of *John Temple Lang*. John has dispensed kindly and practical career advice to generations of Irish lawyers arriving in the capital of Europe. I overhear him advising yet another new settler at the reception. He is the most distinguished Irish Euro lawyer of them all – it is over 30 years since he wrote his first book on the subject – with decades of experience in the Legal Service of the Commission rising to the position of Director in DG IV, the competition policy directorate general. John would make an excellent judge of the Court of Justice if an Irish government had the vision to appoint him.

Paddy Glynn particularly enjoys catching up with *Michael Collins*, formerly of his own firm of Leahy & O'Sullivan in Limerick and formerly also of the front row in the President's beloved Old Crescent rugby club. Crescent are riding high at present and much talk of Limerick rugby ensues.

The President's excellent speech is an extempore reflection on the subject of the Irish legal diaspora. In the travels of his Presidential year he has encountered Irish solicitors all over the globe. The purpose of our visit is to show that the Law Society of Ireland has not forgotten its dozens of members in Brussels or its hundreds of other members scattered elsewhere around the world for that matter.

Damian Collins' speech makes it clear that the BAIL members deeply and genuinely appreciate the first ever visit from the President and Director General of the Law Society with its proof that the Irish solicitors in Brussels are remembered in Blackhall Place. Should we put a light in the window?

Thursday, 26 October

The flight back to Dublin is not until the afternoon which allows time for a pre-arranged courtesy call on European Commissioner *Padraig Flynn* in his office on the eighth floor of the Breydel Building. The Commissioner for Social Affairs is in his usual ebullient form. As a former Minister for Justice, he has a good grasp of issues affecting the solicitors' profession. Yes, he readily agrees, there are far too many entering the profession each year. No, however, he is unable to comply with our tongue-in-cheek request for a grant from the EU Social Fund for this hard pressed profession!

We are joined at the meeting by *Karen Banks*, a solicitor with many years' experience in the Legal Service of the Commission. She is now both the only lawyer and the only female member of Commissioner Flynn's *cabinet*.

Karen, like the other Irish lawyers we met generally in both Luxembourg and Brussels, is working hard but enjoying life in an immensely challenging international legal environment. Their success is something of which the Irish legal profession can be justly proud.

Ken Murphy

Admission of Proof of Computer-Generated Evidence

by Caroline Fennell*

Recent developments in information technology have posed a major challenge to the rules of evidence. These rules and precepts, it is often alleged, are very much the child of a different era, and can only with grave difficulty, if at all, accommodate the more modern manifestations of information. One might think of the information revolution and its accommodation by the rules of evidence in terms of a legal dinosaur struggling to come to terms with complex changes in the environment in which it operates. Moreover for many lawyers the difficulty is twofold, having themselves to come to terms with what the actual changes themselves comprise. What this paper proposes to do, is to examine the more obvious and likely areas of impact for the trial system and its future operation, of challenges from the world of informatics, to how we conduct legal business.

1. Modern Developments in the Provision and Form of Evidence: An Account of Historical Developments and their Accommodation.

In considering the admissibility of computer generated evidence in court, it is useful to look at the area of law most analogous to computer, or machine generated evidence as it might be termed, which is that of *documentary evidence*. It is pertinent to recall that the admissibility of documentary evidence has itself made the transition from 'documents' which were chiselled in stone or metal to the written word with which we are now familiar. Many documents to-day may of course themselves be computer generated, though that may not be evident on their face.

Photographs, tape recordings, and videos have all been considered to be documents for the purposes of determining their admissibility in evidence at trial. Inscriptions on tomb stones have been held to be documents. The definition of 'document' therefore is somewhat expansive although it has been described for the purposes of admission as being that of an object on which is inscribed a visible writing, the meaning of which is in issue.

Caroline Fennell

In *R v Daye*[1], Darling J. defined a document in the following terms:

. . . Any written thing capable of being evidence is properly described as a document and . . . It is immaterial on what the writing may be inscribed. It might be inscribed on paper, as is the common case now; but the common case once was that it was not on paper, but on parchment; and long before that it was on stone, marble, clay, and it might be, and often was, on metal.

Nowadays it would be reasonable to assume that the words bear a somewhat wider meaning. To-day's equivalent of paper is often a disc, tape or film and conveys information by symbols, diagrams and pictures as well as by words and numbers.

2. Rules of Evidence and the Accommodation of Computer Generated Evidence.

Computer-generated evidence may be treated as either real or hearsay evidence. In *R v Wood (1982)*[2] it was held that a computer print-out is an item of real evidence and not hearsay if the computer in question is used as a calculator, a tool which does not contribute its own knowledge but merely does calculations which can be performed manually. Nyssens[3] comments that if it is hearsay, the evidence should be subject to the normal rules affecting hearsay evidence. However, some evidence which has been electronic in source, process and result, with *no* human intervention in the process may be considered real evidence, and presumed reliable. In both cases, however, Nyssens emphasises it is important to establish that the computer was functioning properly, or that the document was unaffected by any malfunction.

It is useful to consider the approach of the English courts to this issue in a number of recent decisions. Although it is not always entirely clear whether the evidence is being admitted as a statutory exception to the hearsay rule, or as real evidence, the approach to computer generated evidence generally, and the difficulties posed by its classification and assessment are hallmarks for future implementation of Irish law.

In *R v Neville*[4] the admissibility of a computer print-out-microfiche of a telephone bill was in issue. The mobile telephone was hired from Talkland, a subsidiary company of ICL. A different company Racal, carried out the telephone operations. The Racal computer automatically recorded the date, time and duration of each call and sent the details to Talkland whose computer in turn produced an itemised

bill to the hirer. When the bill was paid, the printout would be stored on microfiche. The evidence was deemed admissible at trial and on appeal. The court would seem to have taken the approach that because of the automatic nature of the process, the statement was not hearsay, although they would still have found it admissible as such (under statutory provisions). Evidence as to the proper functioning of the computer was given, (although an issue was raised unsuccessfully on appeal as to the competence of the witness concerned to so testify). A commentary in the Criminal Law Review, suggests such testimony would have been necessary in either the event of the evidence being real or hearsay.

"There is no reason of principle for distinguishing between admissible hearsay and non-hearsay statements offered as evidence of a fact stated therein. Each is equally vulnerable to improper use or improper operation of the computer."[5]

R v Spiby[6] concerned the admissibility of a computer printout from a telephone logging system in a hotel that automatically recorded the hotel room from which the call was made, external line used, date, time and duration of the call, number to which the call was made and the charges for the call. The Court of Appeal decided that the printout was real evidence, and made the point, that the inherent difference about purely computer generated evidence is that the computer generated evidence is not subject to human error and thus is real evidence. Here the Court of Appeal accepted the evidence of the hotel manager that the computer system was working properly.

In *R v Shepherd*[7], the House of Lords considered the issue in the case of Ms. Shepherd who was convicted of stealing food and clothing items from a Marks & Spencer store. Evidence was offered of the till rolls from the store's sales on that day. The tills were connected by a central computer, which recorded and stored information as sales were made. The Court of Appeal considered the till rolls to be computer evidence, and felt that given the breadth of the statutory definition 'even an old fashioned cash register would have to be treated as a computer', although neither that court nor the House of Lords decided that the till rolls were computers. The till rolls were operated by hand and not all that different from an old fashioned cash register, with certainly a large margin of human error possible, which Nyssens suggests could have been brought to light, as a factor in deciding what is and is not a computer. The Court of Appeal had taken evidence from a security guard who had examined the till rolls, that the computer was operating properly. The House of Lords considered whether he was properly qualified to so testify, and concluded that he was at least as qualified and familiar with the system as the manager in *Spiby*.

Although the Court of Appeal recognised the risk of computer error, and held that even purely computer generated evidence should be subject to verification that the computer was operating properly, and to that extent overruled *Spiby*. It is unfortunate that neither it nor the House of Lords took the opportunity to clarify whether the evidence *was* produced by a computer, and what evidence there was to show it was functioning properly.

R v Cochrane[8] comes closer to resolving the issue of what qualification should be required in order for an expert to testify about the functioning of a computer. The facts here concerned a building society inadvertently crediting C's account with more than he had paid in. A number of withdrawals were made before the error was discovered – computer printouts or till rolls were admitted in evidence at trial the question arose on appeal as to whether there was a need for the Crown to produce expert evidence of each stage of the mode of operation of the computers involved in each transaction. Two computers were involved here: the cash point machine and the mainframe computer. None of the Crown witnesses knew anything about the working of the latter. The Crown had therefore failed to adduce adequate evidence to enable the Court to properly rule that the till rolls were admissible evidence; and in the absence of the till rolls the Crown's case could not be proved. In a commentary in the Criminal Law Review,[9] the point is made that the Court is not in a position to take judicial notice of the way in which a complex instrument such as a computer functions, and so it may be necessary for a foundation to be laid for the admission of a document by producing evidence as to the nature of the functions of the computer. Since the evidence in this case failed to surmount this initial hurdle, the court was in no position to go on to the next question of whether the relevant statutory provisions (section 69 of the Police and Criminal Evidence Act 1984 – PACE) applied to computer evidence of this type, or whether it is to be dealt with by application of the common law presumption that mechanical devices may be assumed to be working properly.

3. Admissibility of Documentary Evidence under the Criminal Evidence Act 1992.

So what of the provisions of common law and statute in Ireland regarding the admissibility of machine or computer-generated evidence? Irish law does not contain any specific provisions relating to computer evidence. Computer generated evidence is subsumed under documentary evidence, to the extent that it comprises business records. It is interesting to note that Tapper[10] queries whether the best solution might indeed not be to introduce a regime where there is no distinction between manual and computer records or business and private documents. Currently although Irish law makes no separate provision for computer documents, the distinction between business and private documents is central to the 1992 Act.

Part II of the Criminal Evidence Act 1992 introduced changes governing the admissibility of documentary evidence in criminal proceedings. The interpretation section of that Act, section 2, defines **document** to include:

'(I) map, plan, graph, drawing, photograph

(II) reproduction in permanent legible form by a computer or other means (including enlarging) of information in normal legible form'.

Information is defined to include any representation of fact, whether in words or otherwise.

Information in non-legible form is stated to include information on microfilm, microfiche, magnetic tape or disk.

Hence it is clear that computer-generated evidence is covered by the Act, and it is noteworthy that section 30 makes provision for copies to be tendered, thus abrogating the Best Evidence in this context. Section 30 provides that where information contained in a document is admissible in criminal proceedings, the information may be given in evidence, whether or not the document is still in existence, by producing a copy of the document, or of the material part of it, authenticated in such manner as the court may approve. It is immaterial for these purposes how many removes there are between the copy and the original, or by what means (which may include facsimile transmission) the copy produced or any intermediate copy was made. Document here includes a film, sound recording or video-recording. Although it does have the merit of resolving issues as to admissibility of faxes, (so much a feature of everyday life), this provision does demonstrate a touching faith on the part of the Legislature in the veracity of technology, and the ability of the court to judge authenticity, something which, particularly in the case of video evidence, is notoriously difficult as tampering is difficult to detect. Computer generated evidence can be more readily verified, particularly with the introduction of audit trails and discs with a 'worm' (write once read many) facility, yet the question is begged as to whether all computers have such a facility, and whether the courts will be aware of same and judges and juries remain underwhelmed by technology?

Section 5 of the Criminal Evidence Act governs the conditions under which documentary evidence will be admissible under the Act. Information contained in a document shall be admissible in **criminal proceedings** as evidence of any fact therein of which direct oral evidence would be admissible if the information:

(a) was compiled in the ordinary course of a business
(b) was supplied by a person . . . Who had personal knowledge of the matters dealt with and
(c) if information in a non-legible form that has been reproduced in permanent legible form, was reproduced in the course of the normal operation of the reproduction system concerned.

Sub-section 6 of section 5 then goes on to provide that where information is admissible in evidence by virtue of this section but is expressed in terms that are not intelligible to the average person without explanation, an explanation of the information shall be admissible if given orally by a person competent to do so, or in a document signed by such a person.

Section 6 of the Act sets out the criteria required to be provided in such a certificate when a party to criminal proceedings wishes to give evidence by virtue of section 5. The certificate has to state *inter alia* that the information was compiled in the ordinary course of a specified business. In the case of information in non legible form, the certificate must state that it has been reproduced in permanent legible form, stating that the reproduction was effected in the course of the normal operation of a specified system. The certificate must be signed by a person who occupies a position in relation to the management of the business in the course of which the information was compiled or who is otherwise in a position to give the certificate, and is then evidence of any matter stated or specified therein. Section 7 provides that notice shall be given of intention to give information under section 5, and objection can be taken by the other party by again serving notice prior to trial.

Section 8 deals with admissibility and weight. It is interesting to note that information that is admissible by virtue of section 5 shall not be admitted, if the court is of opinion that **in the interests of justice** the information or that part ought not to be admitted. In considering the latter the court shall have regard to all the circumstances, including:

whether the information is **reliable**, whether the document is **authentic**, and any risk, having regard in particular to whether it is likely to be possible to controvert the information where the person who supplied it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in **unfairness to the accused** or, if there is more than one, to any of them.

Finally in estimating the weight to be attached to the information, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its **accuracy** or otherwise. Section 9 goes on to provide that any evidence that would normally be admissible as to the credibility of the supplier of the information as a witness shall be admissible here.

A number of points arise in relation to these provisions, many of which have been echoed in the previous English decisions, relating to such matters as the qualifications and suitability of the provider of the cert, and the significance of its supplementation with the oral testimony of the individual concerned. The whole question of the ability of the counts to adjudge accuracy and reliability is also a matter of potential dispute, as is the question of the relationship of traditional rule of evidence and advocacy (cross-examination, confrontation etc.) to **fairness to the accused** and the consequent ability to ensure same in the context of such modification of the process as is envisaged by the Act.

In the context of fairness to the accused and quite apart from the constitutional dimensions in Ireland, particularly in the context of criminal proceedings, it is interesting to note relevant decisions in the English context. In *R v Caldwell & Dixon*[11] the issue arose in the context of a video recording of a robbery used

to facilitate the identification of the accused by police officers previously acquainted with the accused. Although the claim that the evidence should have been excluded was unsuccessful, it was held that the same warnings that would apply to visual identification evidence should be given in relation to video, so that the evidence could be excluded under PACE, if it would adversely affect the fairness of the proceedings. The Court was also of the view that procedures should be instituted for regulating video showings where there are already known suspects. In *R v Bailey & Smith*[12] evidence obtained by the use of listening equipment was at issue. The accused here exercised their right to silence, and were placed in a cell together where listening equipment had been installed. The police acted as if their placement together was not desired and occurred because of an unco-operative custody officer. The evidence was not excluded here, **PACE** seeming to have made little difference to the traditional attitude of the English courts to the exclusion of evidence because of the *manner* in which it was obtained. (*R v Mason*[13] was distinct in that the trick was played on the solicitor also). It is questionable however, whether the Irish courts would prove so sanguine.

4. Future Developments:

'Image-based' Evidence

Future developments in this area will inevitably impact on the ability of the rules of evidence to cope with ever more complex means of producing, translating and interpreting information. Computer-generated hypothetical re-enactment of the killings in the *O.J. Simpson* case have been produced by a Californian company for instance, and although not actually used in that case, it is believed to be the first time the technology has been produced in connection with a murder trial.[14]

The development of electronic means of obtaining imagery of scenes or events has led to a significant increase in the use of *imagery derived evidence* in court. Because of the emergence of new ways of recording events, "imagery" has replaced "photography" in referring to evidence that is given from pictorial records such as photographs, tv, video, low level systems and infra-red cameras. Since many pictures that could be used in the detection of an offence and the prosecution of an offender are of poor quality, as a result perhaps of incorrect siting, operation or maintenance of the camera, imagery enhancement devices are available and these can be used to improve important aspects in the picture. Software for enhancement is easily handled these days within PCs. Once the enhancement is completed, high quality laser printers provide photographic quality hardcopy. Yet again in this area a challenge is posed not simply in terms of admissibility, but also the ability of the legal adversaries and the system itself to query, interpret and adjudge the material. In a recent article in the New Law Journal[15], an expert in the area warns:

"Using enhanced pictures to provide evidence has distinct dangers. It is possible, but difficult, to falsify photographic negatives but since enhanced imagery is now handled in digital form, it is comparatively easy to rearrange pixels, make some disappear and create others. Thus features like moles on a person's face can be removed or falsely "painted" on. Moreover, distances and perspective can be altered making a short, fat person look taller and thinner and so on. . . The important safeguard however is to preserve the original in certified form. Given that this is done, a skilled imagery analyst should be able to replicate the effect and validate or negate the evidence."[16]

Making the point that the science of imagery analysis is in the same category as forensic science, the author warns that it requires human judgment and thinking power to extract relevant evidence and states that attempts to automate this process have been largely unsuccessful. The following comments of that author might well have emanated from a lawyer, providing a neat assimilation of science and law:

"In a balanced system of justice, there is clearly a need to give to the defence the same expert imagery support, as enjoyed by the prosecution; so that evidence may be both produced or challenged where appropriate.

In forensic work, the opinions and findings of one expert may not be the same as those of another expert looking at the case from a different perspective and perhaps using different methodology. Imagery analysis sometimes requires similar judgment and it is sensible to obtain an independent second opinion."[17]

Coupled with all these difficulties is the fact that the extensive police powers which are and will continue to be necessary in the fight against computer generated crime, involve extensive powers of search and seizure and inevitable problems of proof, for instance in the realm of 'computer pornography' (use of electronic means by which indecent, obscene or pornographic images may be stored, transmitted and viewed). The implications of same for the constitutionally mandated role of the Irish courts in the protection and vindication of individual rights (a duty superior to that of crime control-witness the statement by *Finlay C.J. In D.P.P. v Kenny*[18]) remain to be tested, and may well provide a focus for the future clash of the concerns and cultures of the legal and scientific worlds.

5. Summary

Nyssens[19] summarises the issues involved in our courts' approach to computer-generated evidence as follows:

"There are a number of preliminary questions that the court must pose before moving on to consider the facts revealed by computer generated evidence. The nature of machine-generated evidence is different than that produced by a human being. Real computer evidence can be considered protected from the element of human error; evidence which has a human source or role in processing is only as good as the people involved."

Either way she contends that it is

important to consider the following issues:

1. Whether the document was produced by a computer;
2. What degree of human error could have affected the resulting document;
3. What evidence exists to suggest that the computer system was working properly at the relevant time;
4. In any case where computers have been involved in the production of documents, it must be proven, quite apart from the question of whether the source of the information was reliable, that the computer was operating properly at the relevant time, or at least that any malfunction did not adversely affect the documents in question;
5. What understanding of the computer does the person have who is offering testimony as to the proper functioning of the computer; and
6. Although the witness testifying need not be an expert, especially in the event that the evidence is given orally in court and thus subject to cross-examination, neither should it be easy to have evidence admitted by virtue of producing a witness whose poor qualification to testify then only reflects on the weight given to the evidence after admission. The person's qualifications should constitute a hurdle to admissibility in the first place.

Although focussed on the English position as modified by PACE, Nyssens suggestions could, with profit, be adopted in relation to the framework provided by the 1992 Act. It is certainly true that the parameters currently drawn for the reception of this kind of evidence are insufficient.

The lack of clarity in this area is all the more regrettable given the recent level of appreciation and awareness of those involved in the legal (and indeed the scientific) world of the dangers of the potential clash of the respective cultures and the difficulties inherent in the accommodation and analysis of scientific evidence in the context of adversarial structures.

In a recent research study carried out for the Royal Commission on Criminal Justice on the role of forensic science evidence in criminal proceedings, adjudging the ability of our legal system to come to terms with new worlds of knowledge, the respective aspirations of lawyers and scientists were identified:

"Both experts and lawyers regard themselves as assisting the court in the administration of justice, but experts do not share lawyers' commitment to an adversarial framework"[20]. As noted in the report the adversarial trial is not designed simply to facilitate the communication of scientific knowledge to the court. The conclusion of the research study on the role of forensic science evidence in criminal proceedings serves as a timely and cautionary reminder of what values and rights are after all at stake here.

"The complexity of the process of scientific evidence production . . . and the consequent evaluative difficulties, indicate the need to regard *all* scientific evidence with caution. Although science can have great utility in a forensic context the risk of over-reliance is obvious and attested to by the recent miscarriage cases. Our research suggests that the potential for error resides in all cases in which forensic science evidence is utilised. Defence solicitors and triers of fact, in particular, should be made aware of its limitations."[21]

6. Conclusion

What then is the the best defence of the rules of evidence, so often and readily relegated to archaic status in the face of a rush to assimilate and adopt, in all aspects of life that which makes things go faster or what we think of as better? The best defence is ultimately that which addresses the question of the *suitability* of those goals of efficiency or speed, for the process of adjudication of legal disputes or the resolution of innocence or guilt. Perhaps these questions are simply ones we are not any better at, despite the march of time of the evolution of scientific processes. Indeed as we have seen, the hasty adoption of the latter in the forensic realm results in miscarriages of justice of a notorious type. It may well be that a successful defence of the traditional rudiments of evidence must still be mooted by lawyers in the light of scientific progress and machine dominated fields of information. Such a stance is taken by McEvoy,[22] and is perhaps an appropriate note to end on:

Of course hostility to the hearsay rule has other sources. It is not difficult to produce examples of its operation that are an affront to common sense. It may be felt that a modern jury is capable of giving hearsay proper weight. But the exclusion of evidence is a component of fair procedure, most obviously in the case of "prejudicial" evidence. And how can anyone, even a juror, know how to properly weigh evidence untested by cross-examination?

The voice of the advocate, when faced with infomatics, may still make that point.

Caroline Fennell is a Statutory Lecturer in Law at UCC.

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Appreciation to Judge John Cassidy and his wife Eileen

It is with great sadness, but also with a real sense of privilege, that I have responded to this invitation to write an appreciation of the late Judge *John Bernard Cassidy* and of his wife, the former Senator *Eileen Cassidy*.

Although their death in a motor accident in October was sudden and shocking, it lacked the element of tragedy because their lives had been so fulfilled and fruitful.

I had known the late Judge Cassidy almost all his (and my) professional life. He was, of course, the foremost exponent of the law relating to intoxicating liquor in Ireland and I came to know him first as friendly adversary and later as ally and mentor in this field. When *John Cassidy* pronounced on the Licensing Law, he spoke, as it were, ex cathedra; no problem was incapable of resolution once he applied his learning and expertise to the matter.

It was during the course of these exercises on behalf of our clients, that I became acquainted also with his family, (one of whom, *Pamela*, later became my apprentice).

His wife *Eileen* was appointed by former Taoiseach, *Jack Lynch*, as one of his nominees to the Senate, in which capacity she served for some years, with distinction.

It was to the satisfaction of all who had had the pleasure of working with *John Cassidy* and who had met his wife, when his career culminated in his appointment to the Circuit Court Bench some nine years ago.

Judge Cassidy was a man of quiet, courteous charm. He inspired enormous confidence, and affection, in his clients and his wife was in every way his intellectual equal.

As I came to know them better, however, it became clear to me that their greatest achievement, and the one in which they took the most joy and satisfaction, was in their wonderful family. Each of their children has attained a maturity which is uniquely his or hers alone and they have nevertheless remained a family, united and mutually supportive to a very high degree.

In extending sympathy, then, to the family, on the death of their parents, I can confidently say that they have all fulfiled their parents aspirations for them, and I believe that in that knowledge they will find their comfort in the years to come.

Judge Thelma King

The Cassidy family

Three of the Cassidy children are solicitors, Pamela and Isobel work in Clifford Chance in London. Frank is a senior Solicitor in the Chief State solicitors office. Constance is a very active member of the bar.

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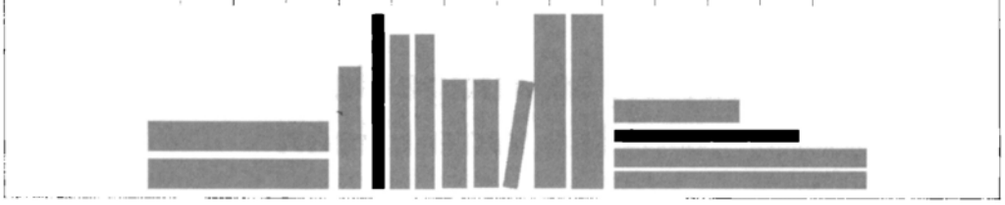
BOOK REVIEWS



Succession Law in Ireland

By James C. Brady. Published by Butterworths, 2nd Edition, 1995, 364pp., hardback, IR£45.00.

As a former student of Professor Brady, I will always remember his abiding enthusiasm for his subject matter, his clarity of thought, his detailed analysis of statute law and case law, his erudite commentary on judicial decisions and his call for law reform, where appropriate.

All these qualities as a lecturer, are in evidence in his second edition of "Succession Law in Ireland" which is essential reading for the general practitioner or Probate specialist.

This edition contains a very useful commentary on the decision of the House of Lords in *White -v- Jones* [1995] 1All ER 691, where the Court held that solicitors are liable to compensate legatees where omitted from a Will which had not been drafted expeditiously in accordance with the testator's instructions. Professor Brady believes this decision would be followed in Ireland.

Professor Brady also analyses a decision of *O'Hanlon J.* in *Lynch -v- Bourke and A.I.B.* [1990] IR1*. The decision gives a salutary warning to those who believe that joint accounts are adequate Will substitutes. *O'Hanlon J.* applied the doctrine of a resulting trust in a case where a lady died having earlier opened a joint bank account with her niece. The Judge held the monies in the Joint bank account belonged to the deceased lady's estate. However, while following an earlier Supreme Court decision, *O'Hanlon J.* disputed the correctness of that Supreme Court decision and Professor Brady queries whether a resulting trust should operate in the area of joint bank accounts, if there is no evidence of the donor intending a resulting trust.

Professor Brady also discusses the Court of Appeal decision in *Sen -v- Headley* [1991] Ch 425, where the Court held that title deeds could be the subject matter of a *donatio mortis causa*. He believes that this decision would be followed in the Irish Courts.

In the area of law reform, the author discusses the time limit for bringing a Section 117 application. He says that there should be some extension of time allowed, where the child is under a disability and that this omission must rank as an oversight which cries out for amending legislation.

He also strongly supports the Law Reform Commission Report of the Hague Convention (LRC36 1991), so that in general, the law that supports a person's succession is his nationality or habitual residence.

In relation to assents, Professor Brady believes that the wide and unqualified language of Section 51 of the Succession Act was intended to protect purchasers irrespective of the length of time between the death of the owner and the sale of the owner's property. He queries the correctness of Irish decisions which held that the validity of assents could be questioned twenty years after the death of the owner without proof that there were unpaid debts still outstanding.

In summary, any problems regarding the Succession Act, 1965, which a practitioner may have, are likely to be discussed in a clear, analytical and thorough fashion by Professor Brady in his book. All the major cases up to mid 1995, involving the Succession Act and many English and other common law cases regarding Succession Law in general, are also referred to in detail. As an academic, Professor Brady is not slow to criticise the judiciary for certain decisions and his criticism is always well reasoned.

This work is a superb example of how a legal text book should be written and all practitioners and academics owe a great debt to Professor Brady for sharing his erudition with us.

John Costello

**** See Supreme Court's decision of 7 November, 1995, which reverses the High Court decision. This became available after the Review was written.***

Explorations in Law and History

Irish Legal History Society Discourses, 1988 – 1994. By W.N. Osborough (ed), Dublin, The Irish Academic Press in association with The Irish Legal History Society, 1995, xiv + 193pp., hardback, IR£24.95.

Professor *W.N. Osborough,* Professor of Law at University College, Dublin and Joint Secretary of the Irish Legal History Society in his address at the inauguration of the Society on February 12, 1988 told the story of a workman in a deserted graveyard in County Down engaged in deepening the fading letters on an old tombstone, to preserve a little longer, from total oblivion, the memory of some obscure name. The image was most apt.

Law, in the context of the common law and certain statute law, constitutes a government of the living by the dead. Accordingly, we cannot forget the dead and their influence on our jurisprudence. A page of history is often worth many folios of logic.

Professor *Paul Brand,* Judge *A.R. Hart,* Dr. *Colum Kenny* and Mr. *W.D.H. Sellar,* the contributors to this present volume – the fourth in the series published by The Irish Legal History

Society, deepen (in a metaphorical sense) the fading letters on the tombstones of Irish legal history so that facets of the history of Irish law and its legal system are presented to new generations.

Professor Brand describes the fortunes of the judicial bench in the medieval Irish lordship. Judge Hart presents a portrait of King's sergeants at law in Ireland over the centuries and considers the many facets of the life of *Audley Mervyn* who was elevated to the rank of prime sergeant in 1660. Dr. *Colum Kenny* writes on the history of the Four Courts up to 1796, almost a period of two centuries and also contributes a paper with the title "Irish ambition and English preference: chancery appointments, the fate of *William Conygham Plunkett*". Mr. Sellar analyses marriage, divorce and the forbidden degrees, canon law and Scots law.

Professor Osborough and The Legal History Society must be commended. There is intrinsic merit in studying legal history for its own sake, but paraphrasing another, legal historians in illuminating the past, illuminate the present, and in illuminating the present, assist in illuminating the future.

Dr Eamonn G Hall

Criminal Evidence

By Richard May. Published by Sweet and Maxwell, London. Third edition, 1995; hardback: £58.00 stg.

New editions of this book are appearing at intervals of just over four years. Phipson remains the standard work on the law of evidence. As with all the other volumes in the Common Law Series these are not produced with a degree of frequency that makes them readily useful. The problem with this book is a National one. It relates more to the diligence of the parliament of the United Kingdom in reviewing their existing law for the purpose of changing it than with the similar enthusiasm displayed in this jurisdiction: that does not exist.

The Constitution has had the most far reaching effect on the law of evidence in this country. Those aspects of the common law which it has touched remain the areas which are vital for day-to-day criminal litigation. Many of the rules of the common law might be regarded as suspect viewed from the scope of a broad constitutional principle that the purpose of the courts is to administer justice. What "justice" is has depended to a large extent on interpretation of the notion of what might fairly be regarded as a proper and logical exercise of the right of access to the courts. With one exception that movement has all been in favour of the accused. The reason for this is that the prosecution were debarred from appealing rulings in criminal cases save in the exceptionally limited circumstance of an appeal from the Central Criminal Court to the Supreme Court, now abolished (for whatever reason) by the Criminal Justice Act, 1993. In *The People (DPP) v JT* a mother was mistakenly called on the prosecution of her husband for incest against their daughter. The facts she gave were hardly critical to the course of the hearing since they consisted merely of a recitation of the date of birth of the child and its patrimony. The accused, however, representing himself, and in an excess of enthusiasm, cross-examined his wife about a number of matters including their prior sexual history receiving an answer as to its similarity to the allegation now made by her daughter. Under the rules of common law a spouse could not be called against the other save in circumstances where that act of violence had been directed against the spouse, and not against her children. The Court of Criminal Appeal overturned that rule of common law in favour of a more logical interpretation whereby the right of access to the court implied within it the right to defend and vindicate one's constitutional rights by giving relevant evidence. It would have been interesting to note what the Supreme Court might have made of an appeal, subsequently withdrawn, whereby the full rigors of the hearsay rule were to be subjected to a simple test of logic. Since, for example, a Bonded Warehouse was under the control of the Revenue Commissioners it would be inappropriate to apply the full silliness of the House of Lords ruling in Myers (1964) whereby evidence of stock could only be given if all of the stock takers were called as to their personal scrutiny of the contents of the warehouse. That situation was overtaken by the Criminal Justice (Evidence) Act, 1992 and what remains a principle will probably now lie dormant in the light of further statutory reforms. The big issue in Irish criminal litigation is the admissibility of evidence. In regard to this work it is well that we note that:

1. The Judges Rules of 1918 remain in force in this jurisdiction. They were subsequently heavily amended in the United Kingdom and were then replaced in total by the Police and Criminal Evidence Act, 1984 and, in that form, do not even merit a mention in this work.

2. The right to silence, such as it is, remains a rule of the common law which continues in force in this jurisdiction. The only change made is contained in sections 15, 16, 18 and 19 of the Criminal Justice Act, 1984. The first two sections make it an offence to withhold information regarding a firearm that is in the possession of a person or stolen property in the possession of a person. The sections which allow inferences to be drawn from the failure of an accused person to account for objects or marks found on him and for his presence in a particular place are cast in such obscure language that they remain 11 years after the passing of the Act virtually unexplained to any jury. Provisions along the line of those requiring a person to account for his movements under the Offences Against the State Act, 1939 continue to have a certain internal logic but every other attempt at cutting down the right to silence has been, whether fortunately or not, given to us in incomprehensible form. In the United Kingdom the Criminal Justice and Public Order Act, 1994 makes substantial modifications of the right of silence. Similarly the procedure at fraud trials has been substantially

modified in the manner which met with some approval by the fraud committee in Ireland.

3. It is virtually impossible to have illegally obtained evidence excluded in the United Kingdom whereas, in Ireland, it is the most fertile ground of argument in a criminal trial that might lead to an acquittal of the accused.

This book contains a superb analysis of the Criminal Evidence Act, 1898 which is mirrored by the Criminal Justice (Evidence) Act of 1922 in this jurisdiction. The distinction between "original" and "hearsay" evidence is explained in the masterly fashion in the chapter on the exceptions to the rule against hearsay. The common law rules on confession are usefully found in chapter 10 but then, stray into the waters of the 1984 Act which submerges any relevance that the treatment may have to Ireland. The question of privilege remains within the realm of the common law but the exceptions grafted onto it in Ireland, by reason of the fundamental constitutional right of access to the court, have led to a situation which would be unthinkable in the United Kingdom whereby original Garda reports furnished to the Director of Public Prosecutions in a criminal case can be subsequently discovered by an accused who takes civil proceedings in respect of an alleged wrongful conviction (Breathnach, 1991). Similarly, we have our own individualised rules in relation to identification which do not depend on a statutory basis as in the United Kingdom. Video link evidence is admitted in similar circumstances to those obtaining in the Criminal Evidence Act of 1992. There is no rule whatsoever which corresponds to that set out in *The People (AG) v O'Brien (1966)*. This rule requires the exclusion of evidence taken in deliberate breach of an accused's constitutional rights; ignorance of the law does not excuse such conduct and the question is therefore often only one related to a technical breach of a prisoner's rights. This led in 1992 to the acquittal of one *Elizabeth Yamanoah* notwithstanding marks on her body which a jury subsequently regarded as linking her beyond reasonable doubt with packets of cocaine found in the possession of another individual in the car park of the hotel where she was staying.

This book is extremely well written and logically set out. It gives enough information in relation to every aspect of the United Kingdom law of evidence to allow a practitioner ready access to the materials needed to formulate an argument. Its emphasis is on modern legislation and modern decisions and its bias is clearly in favour of the practical application of the rules, as opposed to their academic discussion. However, with the exception of the sections which relate to the conduct of a trial in court, corroboration, similar fact evidence, hearsay (to some extent) and the character of the accused it is probably somewhat outside the scope of what is so relevant as to require purchase. Those sections that are of relevance, however, and the sections which mirror the statutory modification introduced by the Criminal Evidence Act of 1992 are so well done as to offer a ready guideline as to the manner in which the law might be argued, and so developed, in this jurisdiction.

Peter Charleton

The Family Business in Ireland

by Philip Smyth and Peter Leach, Published byBlackwater Press; 226pp., Paperback; Price: £9.95

The Family Business published by *Simpson Xavier* is a study by *Philip Smyth* and *Peter Leach* of the structure of family business in Ireland. This Irish edition was published by Blackwater Press. The first edition was published in the UK in 1991.

Family businesses in Ireland and elsewhere have been much in the news in recent times as boardroom rows even in the most private of family businesses and companies have become headline news.

When these rows have progressed to litigation there is then the spectacle of the personal idiosyncrasies of family members being laid bare to the curious and unsympathetic gaze of members of the public, with obvious distressing results to the family members.

Mr Smyth and Mr Leach in these ten chapters attempt to study the strengths and weaknesses of family firms and explore the problems which will arise just because they are family firms and gives at the end of each section interesting short case histories of various family firms. They do not pretend that their solutions apply to every case and stress the need for flexibility.

They endeavour to give advice. I did at one point feel that not only was that advice on the basis of a business level but almost ventured into Marriage Guidance Counselling! I don't believe it was intended that they stray into this area, but it was an interesting aspect of their perception of family businesses.

One minor criticism would be that the book was slightly disjointed in places and did on occasions give contra-advice, but perhaps this would be inevitable in a book contributed to by more than one person.

This book also explores the expansion of the business into the next generation and does in my view give very good advice on dealing with passing on to the next generation which makes it essential reading for all – even solicitors – whose sons and daughters may be qualified as solicitors and are hoping to enter the family practice.

There is a foreword by *Sir John Harvey-Jones MBE* and a most interesting commentary by Fergal Quinn who makes the point that while our Constitution exalts the family as a unit, our laws both fiscal and economic have tended to ignore the importance of the family business.

In the small print the book discreetly recommends that anyone who wishes to pursue seriously any of the courses outlined, should contact their personal advisers or Simpson Xavier.

The cartoons, attributed to *Sandy Peters*, were in my view brilliant, very much to the point – sometimes to the point of cruelty.

Perhaps many of the more recent public family rows brought to the door of the Court might have been avoided if the protagonists had taken the trouble to read this book.

Elma Lynch

The Law Society's Hall – An Architectural History 1823-1995

by Finch Allibone and Lynn Quiney. Published by the Law Society of England and Wales.

If one likes old buildings and halls and their history, one cannot but be impressed by the architectural history of the Law Society's Hall by *Finch Allibone* who is curator of the Royal Institute of British Architects and *Lynn Quiney* who is the Librarian of the Law Society. It is a history of the actual building which now houses the Law Society and its various developments and alterations since it was first commenced.

The research which obviously went into the preparation of this history is admirable and impressive. It is quite obvious from reading this volume that there was a wealth of archival material available as plans and costings and sketches are illustrated in the history.

In 1823 a committee placed advertisements inviting designs from architects for the original building and *Lewis Vullimny* was declared the winner and was given the commission of the first part of the Law Society Building. *Lewis Vullimny* remained as the Law Society's architect to implement his design for many years thereafter. There were other architects who assisted the Law Society in the development after Vullimny's death and they in their own way adapted and developed the building.

These additions and adaptations since 1823 were necessary to accommodate the increasing functions and numbers in the profession which are extensively described in the history. One must agree with a particular sentence in the history "the contrast between the elegant simplicity of the Vullimny's and Holden's designs and the cluttered hotel style of the decor shocks the architecturally correct observer".

While I have not personally visited the building and my only function is to review the publication, I must admit to being somewhat shocked.

Elma Lynch

A Brief History of the Law Society

by David Sugarman. Published by The Law Society of England and Wales

The Law Society of England and Wales celebrated 150 years of its existence this year on the 26th of February.

It was a special anniversary for the Law Society as 150 years before then the Society surrendered its first Royal Charter and in its place the Crown granted a new Charter which constituted the foundation document of the Society. In order to celebrate this, the Law Society has published a brief history under the authorship of *David Sugarman* who is a Professor of Law at Lancaster University.

It is a short history of the development of the solicitors' profession in England since the 1550s to the present day and the development of the Society and its functions. When one reads it, one cannot but have admiration for the bravery and foresight of the original promoters of the Law Society and indeed its history also mirrors a social history of the developments both in England and Ireland during that period. The more recent developments are particularly interesting and while it is not an in-depth study, it is certainly a bird's eye view of history.

Its crowing glory in my view is the photograph of Mr Justice Sachs who practised as a solicitor in Manchester and became the first person to be appointed a High Court Judge who had not previously qualified as a barrister.

Elma Lynch

Negligence & the Teacher

By Oliver Mahon B.L. Published by the Ennis Teachers' Centre, 1995; softback, 100 pp. IR£5.00.

Although this book is primarily intended as a guide to teachers and those involved with the supervision and organisation of groups of children, the book is also of immense use to legal practitioners dealing with cases of schools' negligence.

The first chapter in this book contains a very lucid explanation of the fundamentals of the law of negligence. This is followed by a more detailed chapter which considers cases involving schools negligence actions. From a presentational point of view this chapter deserves especial praise. The author uses the typical school day as a scheme within which to categorise the various incidences of negligence evident from the case law. The third chapter looks at the relevance to schools of the *Safety Health & Welfare at Work Act 1989* and this is followed by what is modestly described as a "note" on Insurance. The fifth and final chapter contains practical suggestions for a "suit-proof" school. A perusal of this chapter alone would provide an invaluable education for any solicitor faced with a request from teachers or those charged with the supervision of children for professional advice on how to avoid negligence actions. In the hallowed spot on the classroom wall formerly reserved for the 1916 Proclamation there should now hang a framed and abridged version of this chapter!

Negligence and the Teacher is an extremely useful addition to the library of any solicitor dealing with cases of schools negligence whether on the plaintiff or defence side. As a publication whose style is not cramped by academic pretension it is to be particularly welcomed as, hopefully, the first in a series of specialist texts on the practical but nonetheless fascinating topic of the legal dimension of education.

Donncha O'Connell

"Negligence & The Teacher"
By **Oliver Mahon B.L.**
Available from The Ennis Teachers' Centre
Price £5.85/Copy Inc. Postage
Tel: 065 / 21161 Fax: 065 / 42930
E-Mail: kkennedy@iol.ie

Long Term Storage of Documents

Concern has recently been expressed about the danger of print degenerating or even falling off documents – especially wills – which have been printed on laser printers.

Regarding the technical side of the durability of laser print, the paper used is the critical factor although there are other factors to be taken into account also. If the paper's acidity falls below 7.0pH (neutral) there is a danger of letters falling off. With a laser printer the toner ('ink') is electrostatically attached to the surface of the paper and thus can peel off without damaging the paper beneath. The toner can be removed by certain solvents and plastics such as the plastics used in certain vinyl storage folders or wallets. Archival requirements should be discussed with one's paper supplier because some archival demands are more stringent than others and may require a specific degree of alkalinity and chemical stability. Rough handling and folding of the paper is not recommended. As laser print technology has only existed for a few years so the effect over a period of (say) 60 years storage in a will safe is unknown. Laser print can also be affected by wet conditions where both paper and toner could absorb water causing the print to fall off. Documents should be stored in good dry storage conditions.

Obviously the use of a dot matrix printer or a daisywheel printer which physically impresses the print into the paper would be preferable for very long term storage.

Inkjet and bubblejet printers apply ink to the paper which soak in and therefore should be more stable for archival purposes. However these printers are a relatively recent innovation and so it has not been possible to say whether print will fade over a long period in storage.

It is equally important to realise that even though the print on a will may be stable, if the will is stored in an envelope which itself has a high acidic content this will adversely affect the print on the document.

Where the long term storage and preservation of legal documents e.g. wills, is involved generally one should follow professional archival principles in the creation and care of records which must be permanently preserved by:-

- printing on acid free paper;
- binding should follow accepted archival methodologies;
- storage should be to a reasonable standard in acid free covers and boxes;
- in an environmentally controlled area.

Further reading

The Practice Development Committee of the English Law Society have formally considered these problems and the Committee's comments were published in (1995) English Gazette, 8 March, at page 31.

Henry C.P. Barry

Law Society of Ireland
Final Examination – First Part
NOTICE

This Notice concerns persons who have obtained a degree in law on or after 22 September 1990 (which included, as part of the degree course, the passing of examinations in any five or more of the following eight subjects: Company Law, Constitutional Law, Contract, Criminal Law, Equity, European Union Law, Real Property, Tort) from any one of the following Universities:

(i) the University of Dublin;
(ii) University College, Cork;
(iii) University College, Galway;
(iv) University College, Dublin;
(v) the University of Limerick;
(vi) the Queen's University of Belfast.

Applications are invited, prior to **1 March 1996**, from such persons who seek to be exempted from the requirement to sit the Society's Final Examination – First Part.

NOTE:

1. An applicant who has passed five, six or seven only of the eight subjects listed above, as part of his/her degree course, will be required to pass an examination in the remaining subject or subjects to be set by the Society.
2. An applicant who has obtained a degree in law from the Queen's University of Belfast will, in any event, be required to pass an examination in Constitutional Law to be set by the Society.

An application form (including applicable criteria and conditions) is available on request from:

Albert Power,
Law School Principal,
Law Society of Ireland, Blackhall Place, Dublin 7.

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Dear Editor

I refer to the article entitled "Civil Legal Aid Bill, 1995", published on page 193 of your July '95 issue of the *Gazette* and written by *Ms. Sabha Green.*

The article contains the *appaling* statement that "Lawyers are from a different educational and social background than their potential clients". The context of Legal Aid in which it was used does not in any way mitigate its ugliness. Neither is it accurate.

I will not labour the point by argument; the statement speaks for itself.

Yours sincerely
Eamonn Gavin

A Reply to Eamonn Gavin

Dear Editor

The article entitled "Civil Legal Aid Bill 1995" was intended, in part, as an outline of the barriers facing those living in poverty who are seeking access to justice. FLAC believes that it is only in this way that we can set about finding solutions to ensure equal access for all.

This, then, was the context in which the point was made. It was a statement based on fact and empirical evidence. It was in no way intended to be read as pejorative.

While, accepting that not all lawyers are from a different educational and social background as those clients who are reliant on legal aid services, FLAC believes that it is accurate to say that this is the case most of the time. Firstly, the majority of lawyers have obtained a university degree, while the majority of those living in poverty have not. This is a clear difference in the level of education. Secondly, the most recent complete figures *(1993 Source – Higher Education Authority)* for the socio-economic breakdown of full time university students show that 69% come from a farming, professional, employer, salaried or non-manual background. Therefore, it is reasonable to infer that those lawyers who have a degree are very likely to have come from an advantaged background.

This should not be taken to mean that lawyers have no understanding of the problems facing those living in poverty. The legal profession has a long history of providing *pro bono* work to those unable to afford private services. However, for those in disadvantaged communities, there is a real difficulty in approaching lawyers due to this difference in educational and social background.

Sabha Greene
Administrator
Free Legal Advice Centres

Dear Editor

I first entered General Practice in 1980 and over the past 15 years I have had personal experience of an increasing demand for medicolegal reports from solicitors. My annual number of court attendances has increased. This year, for the first time, I was requested by two firms of solicitors, to attend the High Court, to give evidence at two separate cases, on the same morning. Medicolegal work now constitutes a significant portion of my workload. My experience is not unique and would be replicated by many of my peers in general practice.

Apart from the increased workload, I am struck by the number of solicitors now requesting a specialist referral for the purpose of compiling a medicolegal report. My experience would suggest that this is a growing practice. These requests are based on the assumption that a specialist report will carry more weight in court.

I believe the assumptions underlying these requests are open to question. The request for specialist referral stems from poor understanding of the respective role of the generalist and the specialist. It is assumed that because of higher degrees and hospital based practice, that his evidence is of a superior quality. There is no disputing the specialist's depth of knowledge of his speciality, however they lack the broad general view of the generalist. We live in an era of subspecialisation within the specialities. It has been said, with some justification, that we now have specialists who know more and more about less and less. The specialist will certainly have very complete knowledge about a patient when the individual is under his care in the hospital setting. However surely the professional providing continuous whole person care is in a better position to provide information of interest to the legal profession. The General Practitioner will usually have a pre-accident history of the patient and can make informed comments about changes to the individual's health and lifestyle over a long time scale. The specialist lacks this unique perspective.

These comments are not intended as a criticism of my hospital based colleagues but rather an attempt to clarify their different perspective. It is not an attempt to state that on type of doctor is better than another but simply to illustrate our differing but complimentary roles. It is also important to state that General Practice is recognised by the Medical Council, as an independent speciality in its own right with its own post-graduate training programme and post-graduate qualifications. For many years now General Practice has attracted the brightest and most able of our medical graduates.

I would clearly differentiate between a report obtained from a specialist involved in treating a patient and a report requested from a specialist to

bolster the medicolegal evidence. it would appear to me that these two different reports are being equated as being of equal importance and I contend that they should not. The latter report lacks the subtlety of the former since the specialist involved in treating the individual has observed the patient over time rather than gathering as much information as he can in one consultation in order to produce an expert opinion. I would respectfully suggest that all judges should differentiate between these two types of report and weigh the evidence accordingly.

Most of the illness that exists in society is dealt with at primary care level without ever being referred to secondary or hospital care. Similarly, many of the cases of personal injury are dealt with in the community and do not require the services of a specialist for assessment. Therefore requests for specialist opinion are involving a level of care inappropriate to the patient's medical needs. This growing practice is introducing a distorting factor into medical practice whereby patients are being referred because of legal demand rather than medical necessity.

Perhaps members of the legal profession should reassess the appropriateness of requesting specialist referral.

Yours sincerely

Dr. Leonard Condren

■

Notice – Joint Planning Examination – April 1996

The Joint Examination, set by the Law Society of England and Wales and the Royal Town Planning Institute (RTPI) in the guise of the Joint Planning Examination Board (JPEB), is to be held in April 1996.

The examination is open to qualified legal practitioners and successful candidates in the examination will, subject to satisfying the practice requirements, be able to apply for Legal Associateship of the RTPI. Candidates will be given the opportunity of answering the papers set in terms of either English, Scottish, Northern or Republic of Ireland law.

Solicitors practising in England and Wales who sit the examination in terms of English law and who satisfy the selection criteria may also apply for membership of the Law Society's Planning Panel.

Closing Date for Applications is 1 February 1996

Candidates will be expected to have knowledge of current Acts, Regulations, official circulars, etc. and also material relevant to the subject matter of the Syllabus published from time to time. Questions may be set on legislation or other official documents which are published up to three months before the examination.

Enquiries and requests for information should be made to *Paul Dempsey*, Professional Accreditation, Ipsley Court, Berrington Close, Redditch, England, B98 0TD, DX 19114, tel: 0171 242 1222 extension 3283, or 01527 517141 (local calls).

Compensation Fund Payments Out – October 1995

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Council at its meeting in October 1995.

	IR£
Peter M. Fortune, 38 Molesworth Street, Dublin 2.	1,000.00
James C. Glynn, Dublin Road, Tuam, Co. Galway.	5,415.00
Thomas J. Furlong, Lower Main Street, Letterkenny, Co. Donegal.	2,503.78
John K. Brennan, Mayfield, Enniscorthy, Co. Wexford.	5,609.37
Thomas B. Murphy, Castle House, Castle Street, Mullingar, Co. Westmeath.	4,000.00
	18,528.15

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Registration of Title Act, 1964

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

Published: 24 November 1995.

Maurice Walsh, Folio: 43663; Land: Knockwater and Carrigacunna. **Co. Cork.**

James Ward, Folio: 11735; Land: Trooperstown. **Co. Wicklow.**

Terence Brennan, Folio: 362; Land: Ballinakill; Area: 3(a) 1(r) 15(p). **Co. Queens.**

Owen J. Kennedy and Mary Kennedy, of 108 Foxwood, Swords, County Dublin. Folio: 45973L; Land: Townland of Swords demesne in the Barony of Nethercross. **Co. Dublin.**

Patrick Roche, (tenant in common of three 1/8 shares), Folio: 3595; Land: 1. Ballybrannis, 2. Kiltrea, 3. Newtown; Area: 1. 31(a) 2(r) 39(p), 2. 58(a) 0(r) 10(p), 3. 6(a) 2(r) 5(p). **Co. Wexford.**

Marie Collins of 211, Carriglea Estate, Firhouse Road, Dublin. Folio: 41225F; Land: The property known as 5, Balally Hill, Dundrum in the Townland of Balally and Barony of Rathdown. **Co. Dublin.**

Brigid McDonnell (deceased), Folio: 9136; Land: Lislea; Area: 8(a) 1(r) 38(p). **Co. Louth.**

Gerard Rowan, of 27 Hawthorn Drive, Lisbeg Lawn, Renmore, County Galway. Folio:19595F; Townland: Stradbally North; Area: 0.319 (acres). **Co. Galway.**

Wolf and Margit Fischer, Folio: 17456; Land: Ardun; Area: 5(a) 2(r) 29(p). **Co. Donegal.**

Peter Brady and Katherine O'Neal, Folio: 598F; Land: Killeigh Road, Tullamore. **Co. Kings.**

Annie Walsh of Glencoh, Rosmuck, County Galway. Folio: 307R; Townland: Glencoh; Area: 28(a) 2(r) 17(p). **Co. Galway.**

Charles Bailey (Deceased), of 1 Brandon Road, Crumlin, Dublin. Folio: 2686L; Land: Property known as No. 1 Brandon Road situate on the south side of the said road in the Parish and District of Crumlin. **Co. Dublin.**

Patrick Fitzsimons, of 4 Weston Park, Churchtown, County Dublin (Ashwood Farm, Glenamuck Road, Carrickmines, Dublin 18). Folio: 19078; Land: Townland of Glenamuck North in the Barony of Rathdown. **Co Dublin.**

Margaret O'Donohoe, Marcella Higgins, Margaret Fleury and Philomena Doherty, Folio: 1202; Land: Aghamore; Area: 15(a) (r) 39(p). **Co. Longford.**

Patrick Mel Hamill, Folio: 11244; Lands: Prop. No. 1. Gorteen, Prop. No. 2. Tattynaskeagh; Area: Prop. No. 1. 0(a) 1(r) 37(p), Prop. No. 2. 22(a) 0(r) 9(p). **Co. Louth.**

Mary Toner, Folio: 5091F; Land: Ross. **Co. Kings.**

Kathleen Kent (Deceased), Folio: 883; Land: Waterpark. **Co. Cork.**

Martin and Marian Finucane, Folio: 678F; Land: Derrypatrick; Area: 0(a) 1(r) 20(p). **Co. Meath.**

John M. Fitzpatrick and Carol Fitzpatrick, Folio: 6985F; Land: Cornagower East. **Co. Wicklow.**

Roger Harty, Folio: 23280; Land: Doon West; Area: 0(a) 0(r) 28(p). **Co. Kerry.**

George Percy, Folio: 5662; Land: Ballylonnan; Area: 116(a) 2(r) 38(p). **Co. Kings.**

Mary Walsh, Folio: 167L (now Folio 982L); Land: Carlow Urban District; Area: 0.125 acres. **Co. Carlow.**

John A. Dowling, Folio: 5143F; Land: Linkardstown; Area: 0(a) 2(r) 7(p). **Co. Carlow.**

Seamus Concannon and Josephine Concannon, Summerfield, Claregalway, Co. Galway. Folio: 28165; Land: The part of the land of Townparkes with the dwelling house thereon, situate on the north side of Waterlane in the Town of Galway, Barony of Galway and County of Galway, measuring in front of Waterlane 16ft 6". **Co. Galway.**

Ann and Sylvester Kehoe, Folio: 12901F; Land: Rathnapish. **Co. Carlow.**

Patrick Rooney, Folio: 1363F; Land: Leckanarainey; Area: 2.263 acres. **Co. Leitrim.**

John Synnott, Folio: 13471; Land: Desart Demesne; Area: 34(a) 1(r) 35(p). **Co. Kilkenny.**

James Sinnott (Deceased), Folio: 20243; Land: Part. **Co. Wexford.**

Austin Kerin, Rushaun, Kilnamona, Co. Clare. Folio: 5190. **Co. Clare.**

Thomas Roche, Folio: 9247F; Land: Templeowen. **Co. Carlow.**

Wills

McGinty, Fr. Eugene, deceased, late of 52A Bulfin Road, Inchicore, Dublin 8, 15 Seaview Park, Shankill, County Dublin and St. John of God Hospital, Stillorgan, County Dublin. Would anybody having knowledge of a will made by the above named deceased who died on the 8 September 1993 at St. John of God Hospital, Stillorgan, County Dublin please contact Messrs O'Keeffe & Lynch, Solicitors, 30 Molesworth Street, Dublin 2. Reference E.A.

Hayes, John, (otherwise Sean) deceased late of Flat 7, 51 Upper Leeson Street, Dublin 2, and formerly of Moyne House, Hollyford, Co. Tipperary. Would any person having any knowledge of a will executed by the above named deceased who died on the 16 day of September, 1995 please contact M/s English Leahy & Associates Solicitors, 8 St. Michael's Street, Tipperary Town, telephone 062-52577, fax 062-52729.

Connelly, Laurence, Cuishmaighmore, Furbo, Spiddal, Co. Galway who died on 28 December 1984 at Merlin Park Hospital, Galway. Would any person having knowledge of a will executed by the above named deceased please contact Sandys & Brophy, Solicitors, 6 Sea Road, Galway. Tel: 091-582546/581351, Fax: 091-583392.

James John, Kerr, (deceased) late of Springfield, Tamnay, Letterkenny, Co. Donegal, Farmer. Would any person having knowledge of a will executed by the above named deceased who died on the 26 of September, 1995 please contact Messrs. Coakley Moloney, Solicitors, 49 South Mall, Cork. (Reference: E.G.) Telephone: 021-273133, Fax: 021-276948.

Mellerick, Denis, (deceased) late of "Haloyon", Curraheen, Conna, Mallow, County Cork and formerly of The Curragh Army Training Camp, The Curragh, County Kildare. Would any person having knowledge of a will executed by the above named deceased who died on the 7 day of October, 1995 please contact Healy Crowley and Co., Solicitors, 9 O'Rahilly Row, Fermoy, County Cork. Telephone: 025-32066, Fax:-025-32231.

Lombard, Norah Mary, in the estate of Norah Mary Lombard, late of 73, Vernon Avenue, Clontarf, Dublin 3. Would any person having knowledge of a will executed by the above named deceased who died on 30 May 1995 please contact Michael J. Lucas & Son, Solicitors, 45 Upper Mount Street, Dublin 2. Telephone No: 676 2101, Fax No: 676 6345.

Creegan, William, (deceased) late of Derrintober, Drumshambo, County Leitrim, (formerly of 283, Richmond Road, Dublin 3 and 13, Northbrook Avenue, North Strand, Dublin 3). Would any person having knowledge of the whereabouts of any will of the above named deceased who died on the 14 day of October 1995, please contact Michael E. Hanahoe & Company, Solicitors, 21 Parliament Street, Dublin 2. (REF 5). Telephone: 01-677 2353.

Lost Title Deeds

IN THE MATTER OF REGISTRATION OF TITLES ACT 1964 AND OF THE APPLICATION OF ELIZABETH ROGERS AND WILLIAM ROGERS IN RESPECT OF PROPERTY 9 SUNDRIVE ROAD, COUNTY DUBLIN.

TAKE NOTICE that Elizabeth Rogers and William Rogers of 8 Old Cabra Road, Dublin 7 has 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. 95DN03822. The missing documents are detailed in the schedule hereto.

Dated the 13 March 1995.

H. G. McCaffrey,
Examiner of Titles

Schedule:

Original Lease dated 30 October, 1946 Dublin Corporation to Michael Green. Various Assignments on title up to and including Assignments dated 29 June, 1988, Thomas Cafolla and Pauline Cafolla to William Rogers and Elizabeth Rogers.

Ormesdale, 12C, Thorma by Road

Would any person having knowledge of the whereabouts of the original Title Documents relating to Ormesdale, 12C, Thormaby Road, Howth, County Dublin, please contact Michael E. Cusack & Co., Solicitors, Castleview House, 22 Sandymount Green, Dublin 4. Telephone: 668 7855, Fax 668 7081.

Salter, Francis, deceased. Would any person having knowledge of the whereabouts of the Original Title Deeds relating to No. 23 Meath Place, Dublin 8, please contact Bourke & Co., Solicitors, 169 Drimnagh Road, Walkinstown, Dublin 12. Telephone: 456 1155, Fax 456 1176.

Lost Title Deeds

Northern Ireland Agents for all contentious and non-contentious matters. Consultation in Dublin if required, reasonable rates. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry, Tel: 080 693 61616 Fax: 080 693 67712.

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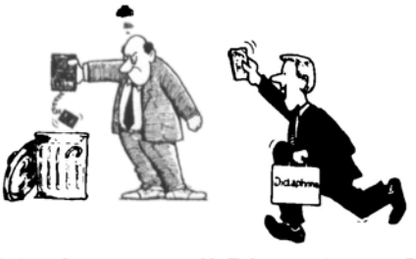

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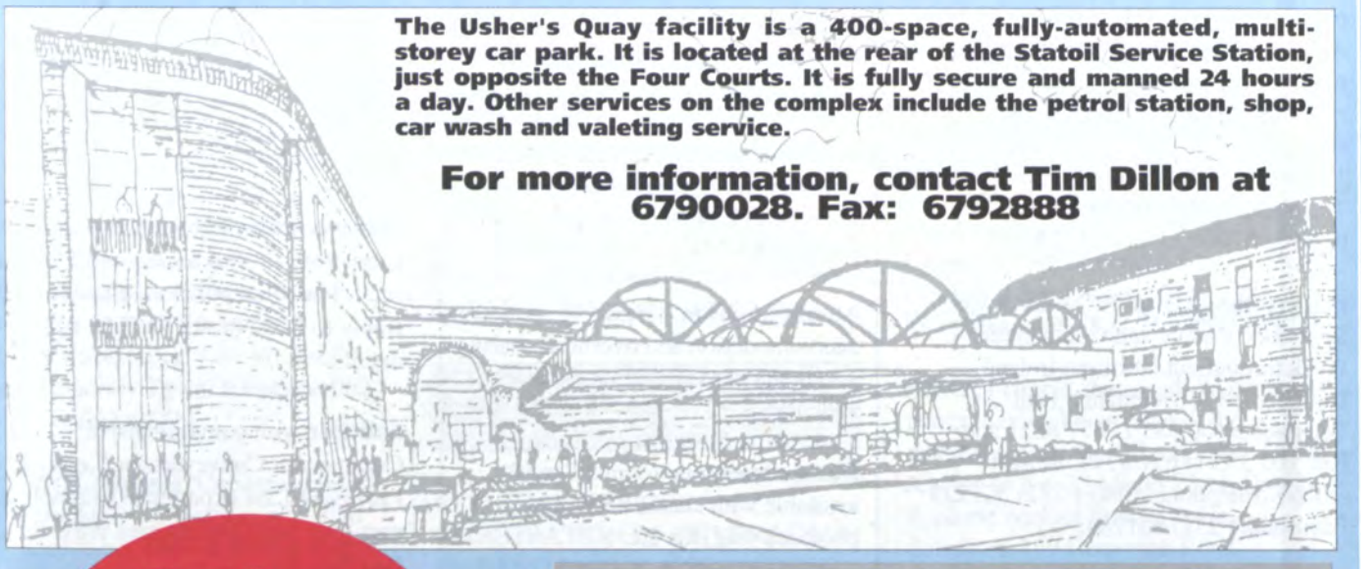

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VOL. 89 NO. 9 DECEMBER, 1995

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GAZETTE

THE NEW PRESIDENT

SOLICITOR JUDGES – SOME PROGRESS

PROFESSIONAL INDEMNITY INSURANCE REGULATIONS

OCCUPIERS' LIABILITY ACT, 1995

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VOL. 89 NO. 9 DECEMBER 1995

LAW SOCIETY OF IRELAND

GAZETTE

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Solicitor Judges – Small but Significant Steps in the Right Direction

As far as the Law Society is concerned, this has always been essentially a public interest issue. It is unquestionably in the public interest to widen the pool of legal talent and experience from which new judges of the High Court and Supreme Court could be drawn by opening such judicial appointments to all lawyers with the ability to fill them.

At the committee stage of the Courts and Court Officers Bill the Minister for Justice, under intense pressure from the Dail Committee On Legislation and Security, introduced an amendment to provide that, for the first time, any solicitor who is appointed as a Circuit Court judge and serves as such for four years will be eligible for appointment as a judge of the High Court or Supreme Court. By introducing this measure the Government has taken a small step in the right direction although it has missed an opportunity to go the whole road.

The public interest would have been better served if the Government had accepted the unanimous all-party recommendation of a Dail Committee and had opened the full range of judicial appointments to solicitors. In the Dail Committee debate all eleven contributors called on the Minister to discard the relic of history which restricts High Court and Supreme Court judicial appointments to barristers. The Chairman of the Committee, *Charles Flanagan*, TD, described the debate as having been won not on points but "by a knockout".

The proposer of the amendment that solicitors should be eligible for all judicial appointments. *Alan Shatter*, TD (FG), provided a very well-researched and passionately argued opening to the debate. An example of his research was the fact that he was able to quote, in support of the principle embodied in his amendment, a speech which had been delivered almost twenty-five years ago in the Dail debate on the Courts Bill 1971 by the then junior Deputy, now Taoiseach, *John Bruton*, TD.

It is worth recording the names of the other ten members of a football team of deputies who supported *Alan Shatter* in the 11 – 0 rout that followed. They were *John O'Donoghue* (FF), *Liz O'Donnell* (PD), *Willie O'Dea* (FF), *Jim O'Keeffe* (FG), *Michael Woods* (FF), *John Browne* (FG), *Derek McDowell* (Lab), *Dan Wallace* (FF), *Michael Ferris* (Lab) and *Charles Flanagan* (FG).

This remarkable unanimity of a Dail Committee, which was subsequently referred to by experienced deputies as "unprecedented", can be attributed to three things. First, there were five solicitors on the Committee, second, all of the Committee members had been well briefed in advance by the Law Society and, third, the merit of the argument itself was overwhelming.

The Minister said that she found it very difficult to respond to the debate. She admitted that the arguments put to her by the Committee were "compelling" and she never in fact, even on subsequent committee days, sought to rebut them. It is the view of the Society that this was because no reasonable or logical rebuttal to these arguments exists.

In the end, however, it would seem that the majority view at the Cabinet table held out against the pressure from the Dail Committee, although the Government was compelled to concede the principle of solicitors becoming eligible for appointment to the superior courts provided they first serve four years in the Circuit Court. In addition the Government also made a commitment to shortly establish a Working Group to report within a year on all aspects of the issue of eligibility for appointment as judges of the superior courts.

Of course these concessions are not sufficient either to satisfy the public interest or that of the solicitors' profession. It remains the Law Society belief that there is no justification whatsoever in principle or in logic for the continued exclusion of solicitors, 80% of the legal profession, from consideration for appointment as judges of the High Court or Supreme Court. Ireland should have been brought into line with current practice in Britain, Australia, New Zealand and almost every other jurisdiction across the world in which a divided profession of solicitors and barristers continues to be found. 'Parity of esteem' should have been fully established, discrimination brought to an end and the 1990 Fair Trade Commission Report's recommendations implemented in full.

On the other hand, the issue was aired as never before both in the political arena and in the media. Small but significant concessions were made. Although it falls far short of the decision which the solicitors believe should have been taken by the Government, the Society nonetheless welcomes the Minister's announcement about a Working Group. The Society assumes that this Working Group will examine the issue in a speedy and balanced way and that the Government will quickly thereafter enact the legislation which the Working Group's recommendations will require.

With the opening up to solicitors of the Circuit Court bench and the opening of a route to the High Court and Supreme Court, it can now surely be only a matter of time before the remaining monopoly on judicial appointments is ended in the public interest. ■

The Solicitors Acts, 1954 to 1994 (Professional Indemnity Insurance) Regulations, 1995 (S.I. 312 of 1995)

These Regulations implement Section 26 of the Solicitors (Amendment) Act, 1994 and provide for the following:

1. The coming into effect of the Regulations on *1 December 1995*, subject to transitional provisions for the practice year 1996, (from now on coinciding with the calendar year) taking account of the reality that most solicitors currently hold twelve month Professional Indemnity cover (of at least £250,000) up to dates expiring during 1996.

2. The establishment, membership and functions of the Professional Indemnity Insurance (PII) Committee; its membership comprising two-thirds Council members together with representatives of the "qualified insurers" either as full members or as "participating observers".

3. Apart from employed solicitors providing legal services only to and for their non-solicitor employers (i.e. full-time in-house solicitors), any solicitor applying for a practising certificate from 1 January 1997 will have to furnish to the Society written confirmation from a "qualified insurer" of there being in force relating to him/her the "minimum level of cover" for the duration of the practice year (i.e., the calendar year) in respect of which such practising certificate so applied for relates.

4. As and from a solicitor's next insurance renewal date during 1996, the "minimum level of cover" is to be £350,000 for each and every claim (including claimants' legal costs) unlimited in the aggregate ("in respect of any act or omission of the insured which gives rise to a claim or which the insured considers may give rise to a claim and is duly notified to the qualified insurer concerned during the practice year in question"), together with the insured's own legal costs; subject to such increases as may be specified by the Council from time to time. [*Note:* (1) Where the PII Committee specify as appropriate (usually where the Assigned Risks Pool is involved) the minimum level of cover may be the lesser form of cover of £350,000 "in the aggregate"; (2) These Regulations are only concerned with what the minimum level of Professional Indemnity cover for each solicitor should be; and whatever Professional Indemnity cover higher than the minimum an individual solicitor or firm of solicitors choose(s) to have, and from what insurer, is entirely a matter for that solicitor or firm.]

5. The minimum level of cover must be obtained from a "qualified insurer", meaning an insurer who enters into a form of agreement with the Society as set out in the Schedule to the Regulations and who agrees to have "approved indemnity terms" (i.e., policy conditions) as set out in the Appendix to the Regulations.

6. If a solicitor with a current practising certificate changes his/her status during the practice year (i.e. moves from one solicitor's practice to another) he/she must notify the Society and verify that his/her minimum level of cover continues for the remainder of that practice year.

7. A solicitor who is refused the minimum level of cover by at least three qualified insurers (to include the Solicitors Mutual Defence Fund), or who is in effect so refused by the quotation to him of very onerous terms or premia ("constructive declinature"), may apply to the PII Committee for admission to the "Assigned Risks Pool", which comprises all the qualified insurers for the time being. [*Note:* Subject to certain requirements relating to the payment of a premium deposit of 200% of the preceding year's minimum level of cover premium (actual or estimated by the Assigned Risks Pool Manager and to a Risk Management Audit of the practice, the Assigned Risks Pool may provide the minimum level of cover to the solicitor concerned. There is provision for an appeal to the High Court by a solicitor who is refused cover by the Assigned Risks Pool.]

8. The maximum period a solicitor can remain in the Assigned Risks Pool is two practice years. [*Note:* It is unlikely that there will be many situations where a solicitor, even with an indifferent Professional Indemnity claims record, will be unable to get Professional Indemnity cover from one of the qualified insurers. However, the detailed provisions relating to the operation of the Assigned Risks Pool reflect: (i) the need to ensure that a solicitor is not *unreasonably* prevented from practising by reason of not being able to get the minimum level of cover necessary to obtain a practising certificate; and, (ii) the concerns of the qualified insurers who will in the final analysis be required to provide the minimum level of cover to a solicitor who may be a very bad insurance risk.]

9. The Society will be required to maintain an "insurance record", available to the public, containing the name of the qualified insurer providing the minimum level of cover to each solicitor who is issued with a practising certificate. ■

FOUR COURTS CONSULTATION ROOMS

Please note that the charges for the above will be as follows, with effect from 1 January, 1996:-

- **2 hours – £30**
- **All Day – £100**

The telephone system, telephone booths and ground floor rooms have all been upgraded in the last 18 months.

This increase will enable the completion of refurbishment work to the rooms.

The Law Society in Review

Andrew F. Smyth

On 24 November 1995 I had the honour and distinction of being elected to the Presidency of the Law Society. I wondered as I took office what changes would take place during my year of Presidency as a natural follow-up to the Review Working Group's Report.

I must congratulate those who made submissions to the Review Working Group as they were both constructive and clearly seen as beneficial to the profession as a whole.

There are many facets of the Review which would require further discussion and consideration and it was for this reason that I asked at the Annual General Meeting that such submissions should be made to the Review Committee at the earliest possible date so that they in turn can prepare an updated document for further consideration by the Council of the Law Society. I would ask you to attend to this matter urgently so that we in turn can report back to the membership by 7 March as promised.

Education is very much on the mind of the profession and it is true to say that the Education Committee have worked extremely diligently and, in my view, absolutely fairly in making decisions which obviously impact upon students already in the system and hoping ultimately to come into the system. I would like to assure those who may feel otherwise that decisions in the education area are not made lightly and certainly are taken only after intensive discussions. As there are so many different parties involved, it would be totally unsustainable were a decision or decisions taken which might merely fulfil the ambitions of one section to the possible detriment of others. The overall good of the profession must at all times be considered and, as I have already indicated, the interests of those wishing to join the profession must also receive the most sympathetic and careful consideration. I must also stress that every effort must be made to attain very high standards for admission to the Law School and this will at all times be a major consideration for the Education Committee. In the aftermath of the Bloomer decision in the High Court the committee has made what I regard as extremely correct decisions and will deal with outstanding issues in due course.

The implementation of the Courts and Court Officers Bill will, of course, be welcomed by the profession despite reservations about the non-admissibility directly of members to the position of judges of the High and Supreme Courts. The right of members of the profession to nomination to the Circuit Court is welcome and it is to be hoped that in the very near future they will take their place on the various Circuits around the country. It is to be hoped that the appointment of more judges will be followed by adequate administrative back-up and indeed better facilities for the practise of law. I would like to take this opportunity to personally thank Mrs. *Nora Owen*, Minister for Justice, for her willingness to meet with the various delegations from the Law Society and to discuss, in a reasoned and practicable way, the genuine concerns of the profession. It is also fitting that I should acknowledge with thanks the considerable co-operation which the Society has obtained from the members of her staff in that regard.

I would be anxious during my term of office to endeavour to promote the profession so that it is presented in a more favourable light to the public. While there is no doubt that some of the adverse publicity is merited, my own feeling is that it is only a very small percentage of the profession who bring this about and that the vast majority of practitioners fulfil their clients' requirements with a very high degree of professionalism and expertise. I regard each member of the profession as his or her own best PR Executive and I am satisfied that with the correct degree of effort and goodwill the public view of the profession can be altered with resultant benefit to both the profession and the public alike.

I wish to say at the commencement of my term that I am available to any member of the profession should he or she wish to contact me and if I can assist in any way to assuage the fears or ease a burden then I am only too willing to do so. I realise that in saying this I may be leaving myself open to a fairly intensive degree of cross-questioning, but I must firstly acknowledge that I am President of *your* profession, that I am *your* representative and it is only by listening to the members of the profession that I can adequately carry out such representation.

I thank each and every one of you for placing your trust in me and look forward to a fruitful year.

Andrew F. Smyth

■

PARLIAMENTARY COMMITTEE
1995 LEGISLATION UPDATE – *November 1995*

No.	Title of Act and Date Passed	Commencement Date/s
28.	Industrial Development Act, 1995 (8 November, 1995) *Provides, for the development of industry; extends the powers of Forfás and its agencies; establishes County Enterprise Boards; amends the Industrial Development Acts, 1986 to 1993, and the Shannon Free Airport Development Company Limited Acts, 1959 to 1991.*	27 November, 1995, for all sections except sections 3 and 4 which will come into operation on 1 January, 1996 (S.I. No. 308 of 1995).
29.	Irish Medicines Board Act, 1995 (15 November, 1995) *Establishes a statutory body, the Irish Medicines Board, which will replace the National Drugs Advisory Board. The Irish Medicines Board will licence medicinal products, act as the competent authority as provided for in EC Directives relating to medicinal products, grant permission for the conducting of clinical trials, inspect the processing of blood and blood products.*	Commencement order/s and establishment order to be made.

SELECTED STATUTORY INSTRUMENTS

279/1995 Finance Act, 1994 (Commencement of section 89(1)) Order, 1995. *Appoints 27 October, 1995, as the commencement date for s.89(1), Finance Act, 1994. Section 89(1) provides that bets placed on-course in respect of events taking place off-course are to be relieved of off-course duty.*

282/1995 Ethics in Public Office Act, 1995 (Commencement) Order, 1995. *Brings the Act into operation on 1 November, 1995, in accordance (i) with s.1(2)(a) of the Act. Resolution of the Seanad passed 15/11/95 appointing 1 January, 1996, as the date for coming into operation of Parts II, III, V and VI of the Act in so far as they relate to Seanad Eireann and its members, the Clerk of the Seanad, Committees of Seanad Eireann and the Chairman and Deputy Chairman of Seanad Eireann. Dail Resolution passed on 26/10/95 appointing 1 January, 1996 for the coming into operation of the same Parts of the Act as they relate to Dail Eireann and its members etc.*

288/1995 Maintenance Act, 1994 (Commencement) Order, 1995. *Brings the Act into operation on 25 November, 1995.*

296/1995 Local Government Act, 1994 (Commencement) (No. 2) Order, 1995. *Brings certain provisions of the Local Government Act, 1994, relating to local elections and local authority membership, into operation on 13 November, 1995. See S.I. 296 for details of the sections.*

305/1995 District Courts (Service of Summons) Rules, 1995. *Provides that a summons may be served by delivery by hand, by any member of an Garda Siochana, other than the person on whose behalf the summons purports to be issued, in accordance with the provisions of s.22(1) (c) of the Courts Act, 1991. Comes into operation on 30 November, 1995.*

312/1995 Solicitors Acts, 1954 to 1994 (Professional Indemnity Insurance) Regulations, 1995. *Implements the provisions of s.26 of the Solicitors (Amendment) Act, 1994. Comes into operation on 1 December, 1995.*

Margaret Byrne, Librarian

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LAWBRIEF

The Judge Over Your Shoulder – Judicial Review in Profusion

The number of judicial review cases grows year after year. Such is the plethora of judicial review cases that The Irish Digest 1983 – 1993, published by the Law Reporting Council, contains summaries of 135 reported cases under the heading of Judicial Review. Many hundreds of judicial review cases have not been reported because they do not add to our jurisprudence.

Judicial review is causing a quiet revolution in Irish law. Yet many practitioners are unaware of the remedies under Order 84 of the *Rules of the Superior Courts, 1986*, the prime vehicle for judicial review.

"Generations of solicitors never studied the practice and procedure in relation to judicial review. Knowledge of the judicial review procedure was considered solely a matter for barristers. Accordingly, many solicitors remained in complete awe of the procedure".

The concept of judicial review of administrative action is exemplified in the remedies of *certiorari, mandamus* and *prohibition* which were formally referred to as State Side Orders. Before the foundation of the State these orders were collectively known as prerogative writs. Generations of solicitors never studied the practice and procedure in relation to judicial review. Knowledge of the judicial review procedure was considered solely a matter for barristers. Accordingly, many solicitors remained in complete awe of the procedure.

The development of judicial review as a system of administrative law is certainly one of the pre-eminent achievements of the Irish Courts in recent times. In many senses, judicial review has become a citizen's "weapon" in the modern democratic state. *Albert Venn Dicey*, the Victorian jurist, would have regarded the development of judicial review in these islands as a form of legal blasphemy. But in many senses, judicial review has emerged as a counter-weight to the growth of executive power in all its various guises.

In Ireland, the concept of judicial review is a process which is employed in two specific legal contexts. Firstly, it is a process whereby laws as enacted by the Oireachtas can be reviewed by the High Court and Supreme Court and struck down as invalid if inconsistent with the 1937 Constitution. This aspect of judicial review is proclaimed explicitly and implicitly in several provisions of the Constitution. Secondly, judicial review is a procedural process whereby an aggrieved person can seek relief in the public law domain. In essence, in this context, judicial review is a speedy remedy whereby the supervisory jurisdiction of the High Court is invoked in relation to decisions made in the exercise of powers conferred by public law.

Many public and statutory bodies are subject to control by judicial review. These include, where appropriate, Ministers and Government Departments, the District and Circuit Courts, local authorities, statutory tribunals and semi-state bodies when exercising their statutory powers. The public law remedies of *certiorari, mandamus* and *prohibition* cannot be used to determine the private rights of parties nor can these public law remedies be used to determine disputes in relation to bodies that derive their authority from contract or the consent of their members. This was confirmed in the leading case of *Colquhoun v D'Arcy* [1936] IR 641 where it was held that the General Synod of the Church of Ireland could not be restrained by the public law remedy of *prohibition* as the Synod derived its authority from contract and the consent of its members and not from the common law or statute. Further, the public law remedies of *certiorari, mandamus* and *prohibition* do not automatically apply to aggrieved persons in their relations with public bodies. These public law remedies apply only to public bodies

in the exercise of their public law functions.

Certiorari is the most popular form of judicial review. *Walsh J* in *The (State) Lynch v. Cooney* [1982] IR 367 (a judicial review case) quoting *Kenny J* referred to "this great remedy of *certiorari*". *Certiorari* is the appropriate remedy in the public law domain in the following circumstances:

- Where is a want or excess of jurisdiction e.g. no legal authority to make decision;
- Where there is an error apparent on the face of the document recording the decision;
- Where there is disregard of the essentials of justice e.g. where the elements of natural or constitutional justice were ignored in the procedure followed by the tribunal or body in question;
- Where bias is demonstrated in the decision making process;
- Where there is fraud.

The above list is not exhaustive. The flexibility of *certiorari* and its capacity for development should be noted. One our great judges, Kenny J observed in *The (State) Healy v. Donoghue* [1976] IR 325 at 364:

> "The cases in which this . . . order of [certiorari] may be granted cannot and should not be limited by reference to any formula or final statement of principle, the strength of this great remedy is its flexibility."

General Procedure

There are two stages in the procedure for judicial review. First there is the application for leave to apply for judicial review and, where the leave to apply for judicial review is granted there is the second stage, the formal application for judicial review i.e. the substantive hearing. An

Judge Kenny stated that cases in which certiorari may be granted should not be limited by reference to any formula or final statement of principle.

application for a declaration or injunction may also be made by means of an application for judicial review. Such relief will be granted if the court considers it would be just and convenient to do so. Damages may be awarded to the applicant for judicial review where the applicant has (a) included in the statement in support of his or her application for leave, a claim for damages arising out of any matter to which the application relates; and (b) the court is satisfied that if the claim had been made in a civil action the applicant would have been awarded the damages.

With the exception of planning appeals, an application for leave to apply for judicial review (the first stage in the process) by is made by motion ex-parte, in the High Court. The procedure is relatively straightforward grounded upon the following specimen document:

THE HIGH COURT

JUDICIAL REVIEW

A.B. APPLICANT

and

C.D. RESPONDENT

(a) Applicant's name:

(b) Applicant's address:

(c) Applicant's description:

(d) Relief sought: for example: Certiorari, Declaration, Damages, and such other relief as this honourable court shall deem appropriate;

(e) Grounds upon which such relief is sought: for example:

The Respondent purported to discipline the applicant without allowing or permitting the applicant to attend the disciplinary hearing and refused to allow the applicant to be represented legally despite requests to do so;

(f) Name and registered place of business of solicitors for Applicant:

(g) Applicant's address for service within the jurisdiction (if acting in person):

Dated this day of

Signed:

Applicant/Solicitors

Secondly, an affidavit should accompany the above statement verifying the facts relied upon in the

application for leave. Such an affidavit is set out in same format as the above document.

If necessary in an emergency, a solicitor/applicant could seek the relief sought in the house of a High Court Judge. The statement and affidavit need not be typed in a true emergency but normally the solicitor obtains from the Central Office of the High Court a judicial review number before proceeding and then formally makes an ex-parte application normally on a Monday. After leave is granted (which it normally is if a person has a *prima facie* case) you bespeak the order granting leave and proceed by Notice of Motion for a date 14 days hence. Normally the case is adjourned periodically to allow the opposing party to submit a *Statement of Opposition*. Then a date is fixed for the substantive hearing.

Further aspects of judicial review may be dealt with in subsequent issues of *The Gazette* ■

The Disciplinary Committee Annual Report for 1994/1995

Committee: *Walter Beatty, Chairman*
W.B. Allen
Clare Connellan
Andrew O. Donnelly
Terence Dixon
Michael Hogan
Donal Kelliher
Eugene McCague
Moya Quinlan
Grattan d'Esterre Roberts

Between 1 September 1994 and 31 August 1995 the Disciplinary Committee met on 25 occasions.

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

NEW APPLICATIONS:	44
Law Society	
Prima facie cases found	27
At Hearing	
Misconduct	15
Misconduct – adjourned to consider recommendation	2
Applications dismissed	2
Adjourned	4
Awaiting inquiry	4
Private	
Prima facie cases found	4
Prima facie cases not found	12
Awaiting *prima facie* decision	1
At Hearing	
No Misconduct	1
Misconduct	1
Leave to withdraw after inquiry directed	1
Awaiting inquiry	1

APPLICATIONS FROM PREVIOUS YEARS:	34
Law Society	
Prima facie decision adjourned	1
At Hearing	
Misconduct	9
No Misconduct	1
Adjourned	1
Private	
Awaiting a *prima facie* decision	2
No *prima facie*	9
At Hearing	
No Misconduct	1
Inquiry adjourned	7
Date of inquiry to be fixed	1
Leave to withdraw after inquiry directed	2

SUBJECT MATTERS OF COMPLAINTS

Solicitors Accounts Regulations
Fraud
Conveyancing
Probate

In previous years it was customary to outline some of the main grounds upon which the Committee found misconduct. In view of the fact that the results of hearings before the President of the High Court are now published in the Law Society *Gazette* the necessity of setting out these grounds is no longer necessary.

THE HIGH COURT

Cases presented to the High Court between 1 September 1994 and 31 August 1995	4
Censured, fined and costs	3
Censured and costs	1
Awaiting presentation to the High Court	25

Fines ranging from £500 to £2,500 were imposed in the appropriate cases.

The year under review has been marked by an apparent decrease in the number of cases coming before the Disciplinary Committee. However it should be mentioned that new applications ceased to come before the Disciplinary Committee from 12 May 1995, when the Disciplinary Tribunal came into operation pursuant to S.I. No. 124 of 1995.

All the usual hardy annuals such as breaches of the Solicitors Accounts Regulations, failure to comply with undertakings, correspond with clients, colleagues and the Society, and to carry out clients' instructions appeared with their usual regularity. In addition to the foregoing the Committee encountered some of the most serious and weighty complaints ever to come before it. While only a small number of solicitors were involved it is nevertheless disquieting to find that members of the solicitors profession have brought the profession into disrepute by misappropriating substantial sums of clients' funds, misleading the High Court and their professional body in relation to the deficit in clients' funds, knowingly producing false documents to the High Court and committing acts of perjury. As officers of the Court solicitors have an onerous responsibility to behave in a fashion that is honourable and above reproach. Clients are justifiably frustrated when their legal representatives fail to provide a proper and adequate service. This feeling of frustration is often compounded when solicitors disregard the Society's communications and on occasions mislead it.
Over the years the Committee has

noted that a number of complaints before it arose because the solicitors concerned, while aware of their difficulties, failed to seek help and allowed matters to deteriorate. This year was no exception and it is regrettable that solicitors encountering problems in administering their practices hesitate in contacting colleagues or the Law Society at an early stage for advice and assistance.

As already indicated the Disciplinary Committee has now been superseded by the Disciplinary Tribunal. All applications made after 12 May 1995 must now come before the Tribunal, which consists of ten practising solicitors and five lay members nominated by the Minister for Justice to protect the interests of the public. One feature of the Tribunal, which distinguishes it from the Committee, is that where it finds there has been misconduct on the part of the respondent solicitor, it shall have the power, by order, to do one or more of the following:-

(a) to advise and admonish or censure the respondent solicitor.
(b) to direct payment of a sum, not exceeding £5,000 to be paid by the respondent solicitor to the Compensation Fund.

(c) to direct that the respondent solicitor shall pay a sum, not exceeding £5,000 as restitution or part restitution to any aggrieved party, without prejudice to any legal right of such party.

(d) to direct that the whole or part of the costs of the Society or of any person appearing before them, as taxed by a Taxing Master of the High Court, in default of agreement, shall be paid by the respondent solicitor.

Where the Tribunal recommends a more severe penalty such as suspension or strike off, then it will report the matter to the President of the High Court, who has the power to impose the appropriate sanction.

In the period under review *Elma Lynch, Andrew F. Smyth* and *William A. Osborne* resigned as members of the Committee. I would like to take this opportunity to record my thanks to them for their hard work and dedication to the Committee over the years. I would also like to welcome *Clare Connellan, Andrew O. Donnelly* and *Eugene McCague* to the Committee, which will continue to function pursuant to the Solicitors Acts 1954 and 1960 until all applications at present before it have been concluded. In addition to the new members appointed the remaining members were reappointed for a further five years in order to finalise the work of the Committee.

I would also like to express my thanks to the members of the Committee who not alone give up many valuable hours attending Committee meetings, but also spend many hours reading papers relating to each case which sometimes run into thousands of pages. Ms. *Mary Lynch,* Clerk to the Committee, was always of enormous assistance to all members of the Committee and her dedication ensured that the Committee worked efficiently and effectively during the year.

Walter Beatty
Chairman

■

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The Irish Institute of Legal Executives: A Reply

The article by Dr. *Eamonn G. Hall* entitled "Lawbrief" in the October 1995 *Gazette* which outlined the meaning and historical references of the term "clerk" and "law clerk" particularly in relation to those in the United States and the UK was noted with great interest.

We wish to up-date Dr. *Eamonn Hall* and indeed your readers on the present position of The Irish Institute of Legal Executives.

The Irish Institute of Legal Executives was formed in 1987 and incorporated in April 1992 as a company limited by guarantee, not having a share capital. As stated, the first Fellowships were awarded in 1988. Dr. Hall states that the Irish Institute has not been as active as its English counterpart. It should be pointed out that the UK Institute which was formed in 1963 took thirty-two years to achieve its current status.

We are trying to create a greater awareness of our Institute – of its activities and the recognition of the status of its members and their roles within the legal profession.

We too are publishing a quarterly newsletter which provides information on the changes of law, points of practice and discussion vis-a-vis legal topics. The latest edition (August 1995) was circulated to most solicitors' offices in the Republic of Ireland.

It is noted with regret that most Irish law firms do not make provision for the training of staff or in the development of their knowledge or practical skills. This is a very basic requirement which should be provided in a very structured way.

The Irish Institute of Legal Executives is also a professional body representing "legal executives" with very high standards and

Pamela O'Loughlin F.I.I.L. Ex.

operating under a strict code of rules for all its members. We are endeavouring to create and be responsible for the training of such legal executive to enable all members work in tandem with members of the Law Society.

Rome was not built in a day but we do not intend to take thirty-two years either!

It has taken time to establish and identify the role of our members and architect the present structure of the Institute. In the near future, we expect to be offering, Diplomas and Certificates and later Degrees to student Legal Executives. We are negotiating with various colleges in relation to the formation of customised courses which will be particularly aimed towards the needs of the Irish Legal Executive.

Our intention is to embrace a far wider range of membership than was previously envisaged. We wish to represent every person who is not a Solicitor or Barrister but who has a thirst for legal education and/or has extensive legal experience.

Whilst we would agree wholeheartedly with Dr. Hall's statement that "the lack of sufficient measure" of renumeration for "law clerks now often designated as legal executives" is one of their "principal concerns", we wish to point out that we are *not* a trade union. The Memorandum of the Irish Institute of Legal Executives Limited clearly states ". . . the Institute shall not support. . . . any regulation or restriction which if any object would make it a trade union".

The educational levels and standards of experience behind each level of membership approved by our Institute entitles a member to use initials ending with I.I.L.Ex. This distinguishes our members from existing "Law Clerks" and will in time command the renumeration worthy of that title as they gain recognition and respect by employers. It should be well known and established that a person who uses these letters after the title of Legal Executive, duly issued and approved by our Institute will hold clearly defined skills of knowledge and practice.

We look forward to reading Dr. Hall's follow-up article of the next year or so when our hard labour bears fruit!

We wish legal employers to take note of the fact that no member of our Institute is allowed to use the letters F.I.I.L.Ex. or M.I.I.L.Ex. unless they hold a current annual practising certificate which has been issued by the Institute. We would also point out that we do not support the use of the term "legal executives" by non-members.

We appreciate all the support we have received to date from solicitors, barristers, members of the judiciary and all others who have assisted us.

We look forward to receiving letters of enquiry, 'phone calls, requests for

application or general comments at our address at:-

Newmount House, Rere 22-24 Mount Street Lower, Dublin 2. Tel: (01) 849 2593.

Our quarterly I.I.L.Ex. newsletters are available to non-members at a small annual subscription.

Pamela O'Loughlin F.I.I.L.Ex.
Chairperson

Solicitors Confidential Helpline

JUST CALL

284 84 84

ISO QUALITY AWARD FOR DUBLIN SOLICITORS

At the presentation of the ISO award to Michael V. O'Neill & Son, a Dublin-based firm were l–r: Frances Foley, Ann Brennan, Martin McCoy of Advanced Quality Solutions, Peter McDonnell, Ruairi Quinn, TD, Minister for Enterprise & Employment, Susan Leech, Quality Controller, Tom Byrne, NSAI and Kathy M. Kelly.

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The Employment Register

The Law Society Employment Register comprises a list of qualified solicitors who are available for employment or interested in changing jobs. The register is administered by the careers adviser who is also a solicitor and it caters for full-time, part-time and locum positions both within and outside private legal practice. There are at present 125 solicitors on the register, of whom 48 qualified in 1995, the remainder ranging in experience from one to 20 years.

Those wishing to employ a solicitor simply telephone the careers adviser and give details of their specific requirements. Selected CVs are then sent to the prospective employer who makes direct contact with the candidates to be interviewed. The clearer the specification given, the greater the likelihood of success; the highest success rate is achieved when the employer discusses the vacancy directly with the careers adviser at an early stage in the process.

Solicitors who are seeking employment are asked to complete a standard form giving details of their qualifications and experience and their requirements in terms of location etc. This information is entered and held on a confidential databank; it is used only for the purpose of selecting suitable

Geraldine Hynes

candidates for specific vacancies and matching them with employers' specifications. Applicants also supply a number of copies of their curriculum vitae which will be sent to employers as and when appropriate vacancies arise. In order to ensure that the information on file is up-to-date, all solicitors on the register are obliged to re-register by telephone every three months and must advise the careers adviser of any change in their availability.

The latest available statistics on successful placements relate to the six-month period ending 31 August 1995. During this period, the following placements were made through the register:

Full-time:	
private practice:	19
corporate sector:	6
Temporary/locum/part-time:	
private practice	10
corporate sector (including public service)	8
Total	43

A considerable proportion of solicitor recruitment in this country is conducted through the Law Society register. Those employers who have used the system are aware of the benefit to them in terms of convenience as well as the considerable saving of time and money involved. Requests are dealt with on a same day basis as far as possible and the process can be completed in a very short time. There is no charge involved but those who use the service are asked to update the careers adviser on progress and outcome. Courtesy and cooperation in this respect are vital for the effective running of the system.

Geraldine Hynes, Careers Adviser, can be contacted at 671 0200. ■

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Solicitors Take to the Hills

When I looked out my bedroom window at nine o'clock on the morning of Sunday, 12 November, the idea of a five hour hike in the Wicklow Mountains suddenly held little appeal. Ever the optimist however, I decided to venture out and brave the elements and miraculously by the time we reached Enniskerry the weather began to clear and had in fact cleared completely by the time we commenced the hike at Old Bridge on the end of Lough Dan.

The seventeen hardy souls who ventured out that Sunday were rewarded with a beautiful hike around the Lough Dan area.

Scarr was an appropriate name for the main climb of the day, one very steep section leaving many of us physically scarred by the time we reached the summit. However, make it we all did and were rewarded with spectacular views of the Wicklow Mountains and of Lough Dan itself. I don't think I have ever seen the autumn colours so vibrant in Ireland. New England eat your heart out.

Our hike leader, *Cillian MacDomhnaill*, decided on the most direct route down the mountain and this in fact proved almost as difficult as the ascent. Negotiating our way through thick heather, waist high in some places, was indeed very challenging and I think all of us were glad of our hiking boots on that occasion as such a descent can be tough on the ankles.

Our descent eventually led us to our lunch spot overlooking Glenmacnass Waterfall and river which had over the preceding few days been transformed into a raging torrent. No water shortage here; *Frank Feeley* take note!

Our route back took us to the river which flows through the valley at the west side of Lough Dan which river we followed until we reached a small oak copse and from there we followed the path across country back to Old Bridge.

Solicitors' hillwalking group

To round off the afternoon, those of us who had brought a change of clothes adjourned to a local hostelry in Roundwood to pay our respects to Uncle Arthur and let me state that Uncle Arthur is alive and well in Roundwood!

Many thanks to *Frank Nowlan* for organising the hike and in particular to *Cillian MacDomhnaill* for leading us so expertly, even if he was making up the route as he went along!

There will be a further hike in January. If you are interested in going please contact *Frank Nowlan* at 667 1666 or *Cillian MacDomhnaill* at 671 0711 for further details.

Andrew Clarke

LAWYERS DESK DIARY 1996

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Irish Solicitors' Bar Association London 1995 Charity Ball

by Cliona O'Tuama*

The Irish Solicitors Bar Association's sixth annual Charity Ball was held on Saturday 14 October, 1995.

Once again the Ball was held in the magnificent surroundings of the Dinosaur Hall at the National History Museum in South Kensington, London. This spectacular venue has proved so popular with our members and supporters that a change of venue would probably lead to a dramatic drop in attendance! The proceeds of the ball were donated to the NSPCC – the charity devoted exclusively to the problem of Child Abuse and deprivation.

Due to the tremendous success of the 1994 Ball, there was a flood of applications for tickets for the 1995 Ball. As in previous years the evening began with a champagne reception, kindly sponsored by AIB Bank, who have always been generous supporters of the Association.

During the reception we had a new item at the Ball, an "evening out tree". Many of the leading restaurants and hotels in London had donated dinner vouchers and tickets had been provided by theatres and cinemas. Anyone paying £20 received an envelope from the tree containing a dinner voucher or tickets. I had persuaded most of the leading Irish restaurants in London to donate dinner vouchers and the NSPCC committee members had kindly obtained the others. The items on the tree ranged from sets of cinema tickets to a voucher for a £150 meal at the London Hilton. The tree was stripped of all its envelopes very quickly and raised a startling £760.

After the reception everyone flocked in to the stunning Central Hall of the Museum, at the centre of which is a huge dinosaur, which was at that point emerging from a mist (created by dry ice) bathed in a green light. (Green is also the colour of the NSPCC's logo and was therefore appropriate on all fronts)!

After an excellent dinner, I had the pleasant task of thanking all those who had contributed to the success of the Ball by taking tables or advertisements or by having donated money or items for the auction or raffle. *Jan Moore*, the chairman of Westminster NSPCC then made a short speech thanking me for having chosen the NSPCC as beneficiary. There then followed the star attraction of the Ball, the "grand charity auction".

I had been delighted when I had heard that *Philip Lee*, who is now running a European law practice in Dublin, and his wife *Una Hand* were coming to the Ball and I persuaded Philip to be the auctioneer. Philip was the person who had first suggested to me many moons ago in 1989 that Irish solicitors in London should run an annual event for charity and he and I had organised the first two Charity Balls together. It has indeed been a daunting task running the Balls since Philip's return to Dublin in 1990! Having worked in London for several years, Philip knew many of the people at the Ball and was the ideal auctioneer, being able to exhort everyone by name to increase their bids during his star performance!

Due to the tremendous appeal of the NSPCC, many valuable and interesting items had been donated for the auction. *Oliver Kehoe*, one of the group present from Bank of Ireland, very kindly donated two stand tickets for the England v. Western Samoa match with Bank of Ireland hospitality included. By far and away the most popular item in the auction was a weekend's sailing in Dublin Bay which had been kindly donated by *Adrian Lee*, a London-based banker with *JP Morgan*, whose wife *Jane McHugh* is a very active committee member of the NSPCC.

The successful bidder in the end was

Philip Lee, Solicitor, and Cliona O'Tuama, President, Irish London Solicitors Bar Association, conducting the charity auction at the Association's Ball.

European law barrister *Conor Quigley*, who, although based in London, hails from Belfast and is a frequent visitor to Dublin. Conor generously paid £1,000 for the pleasure of taking his friends aboard Adrian's boat "Janey Mac II".

Dillon Gallery, a leading Irish art gallery in London, had very kindly donated a painting for the auction as publicity for their forthcoming modern Irish exhibition. This oil on canvas of the West of Ireland landscape by *Brian Byrne*, one of the gallery's most sought-after artists, fetched £900.

Thanks to Philip's cajoling and not letting the hammer fall on any item until he had extracted the last pound, combined with the generosity of those present, the auction raised the truly amazing sum of £5,680! This was way beyond all expectations.

Another fund-raising item was the raffle for which many valuable prizes

Continued on page 357

Butterworths

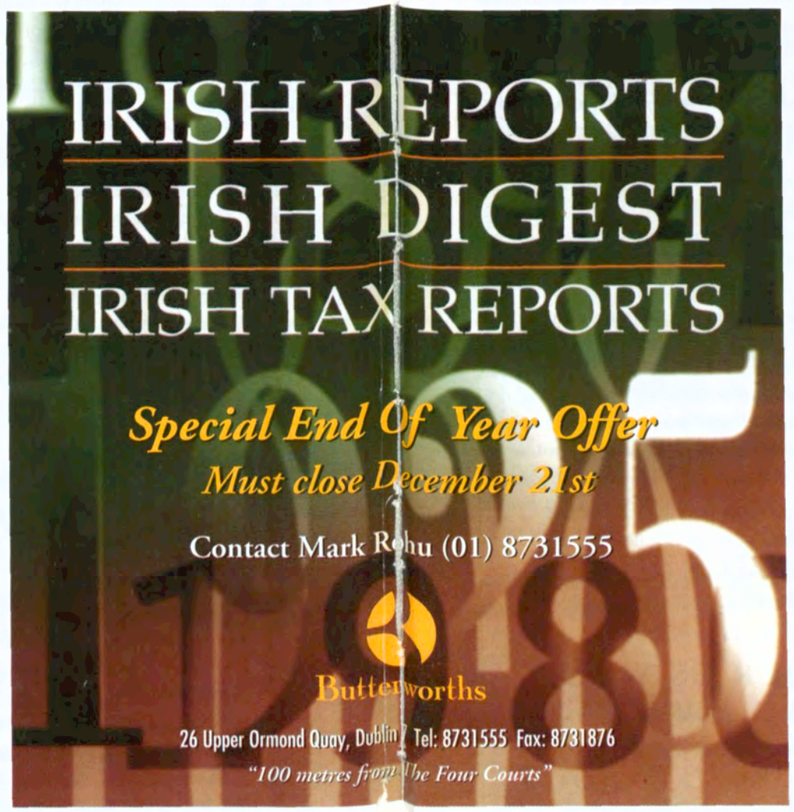
PEOPLE AND PLACES

Andrew F. Smyth, President of the Law Society (right); Patrick A. Glynn, then President of the Law Society (second from right) and Ken Murphy, Director General (left) were recently admitted to the Roll of Solicitors in Northern Ireland by The Right Honorable Sir Brian Hutton, Lord Chief Justice of Northern Ireland. Also pictured is Aidan Canavan, then President, Law Society of Northern Ireland.

The President of Ireland, Mrs. Mary Robinson with The Honorable Mr. Liam Hamilton, Chief Justice, pictured inspecting the new Bench in the Supreme Court.

The Younger Members' Committee recently presented a cheque representing the proceeds of the Race Night and Soccer Blitz to the Solicitors Benevolent Association. Left to right: John Campbell, YMC member; Tom Menton, Chairman, Solicitors Benevolent Association; Orla Coyne, then Chairman, YMC; Robert Hennessy, YMC member and Joan Doran, Secretary, YMC.

At the recent Irish Solicitors Ball in London were l-r: Conor McDonnell, Sheena Eustace, Paul Gill, Jacqueline Heffernan, Mark Barr, Carol Dillon, Paul Eustace, Fiona Mulcahy, David Dillon, Brenda O'Higgins, Kieran Cowhey and Mary Canning.



The President of Ireland, Mrs. Mary Robinson, recently attended the 900th anniversary celebrations of the founding of St. Michans Church. Pictured with the President at a subsequent reception in the Round Hall of the Four Courts are Patrick A. Glynn, then President of the Law Society and Justin McKenna, President, Dublin Solicitors Bar Association.

New Circuit Court Rules

Statutory Instrument no. 216/95 effective since 1 October 1995.

Lodgements:

Solicitors should note that the new Rules provide that a lodgement may be increased *once* up to at least 8 weeks before:

(a) the hearing date mentioned in the Notice of Trial, in the Dublin Circuit.

(b) the date on which the case is first due to be heard, in Circuits outside Dublin.

Litigation Committee

VAT Commentary

Appendix 3 (para 5) of the VAT Commentary outlines the tax treatment of pre-payments for services where the service itself may not be completed until a later date viz. S19 (2) of the Act requires that VAT must be accounted for on the pre-payment where it is lodged to the solicitor's office account. However, this situation does not arise for solicitors as the Solicitors' Accounting Regulations require that pre-payments (e.g. retainers, counsel's fees etc.) be lodged to client account until the costs have become properly due by reason of the relevant work or professional commitment having been rendered.

Taxation Committee

Compensation Fund Payments Out – November, 1995

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Council at its meeting in November 1995.

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OUR FINANCIAL ASSISTANCE IS NATIONWIDE

Occupiers' Liability Act 1995

by Professor Bryan McMahon*

With the passing of the Occupiers' Liability Act 1995 a debate which has lasted in this country for over twenty years has at last come to a legislative conclusion. The criticism of this branch of the law surfaced not only in the legal journals of the state, but latterly became a political issue which surfaced in the popular media as well. Undoubtedly, the high profile which this branch of the law assumed in recent years was aided by the fact that farmers, apprehensive about their legal position, closed off their lands to ramblers, hillclimbers, picnicers and tourists in an effort to highlight their concerns and protect themselves from possible suits.

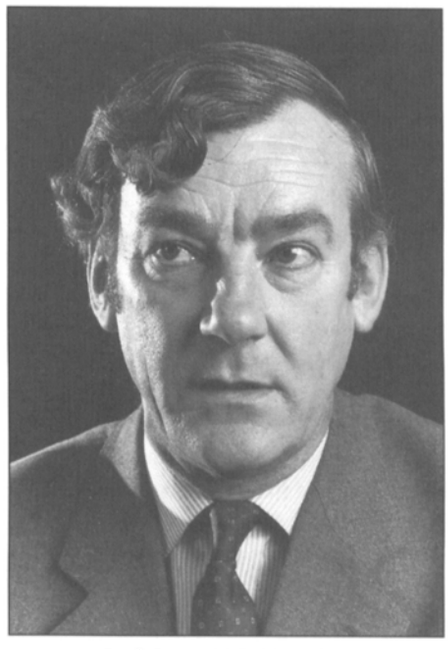
Rightly or wrongly, the farming community in recent years perceived that they were vulnerable when persons were injured on their lands. The law on Occupiers' Liability had been seen to be problematic as far back as 1967 when the matter was considered by the Advisory Committee on Law Reform which eventually reported in 1971; more recently the subject was considered by the Law Reform Commission who published a Report on the topic in April 1994.

The Occupiers' Liability Act 1995 is a radical reform of the law and is best appreciated now if it is not viewed in its historical context. The new Act can be compared with, and in some instances echoes the old common law, but it is better for the practising lawyer now, to approach the new Act carrying no historical baggage with him or her.

Under the new law, persons who come onto another persons premises are divided into three categories:

(i) "Visitors",
(ii) "Trespassers",
(iii) "Recreational Users".

Briefly speaking, the occupier owes a duty of care ("the common duty of



Prof. Bryan M.E. McMahon

care") to a visitor, and this duty is defined in the Act as a duty "to take such care as is reasonable in all the circumstances. . . . to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon". This duty of care is akin to the standard of care in ordinary negligence, and like the ordinary duty in negligence it may be affected by the plaintiff's own contributory negligence. More interestingly the occupiers' "common duty of care" may be reduced when the injured visitor is on the premises in the company of another person who may be expected to supervise the visitor, such as would be the case where a child visitor is accompanied by its parent, its supervisor, or its minder.

By and large a "visitor" means an entrant who is lawfully on the premises of the occupier, and is there either at the invitation or with the permission of the occupier or at the invitation or with the permission of a member of the occupiers' family. It would also include persons who were present on the premises by virtue of an express or implied term in the contract, or persons who are on the premises as of right. Such lawful entrants are owed a duty of reasonable care.

"Trespassers" and "Recreational Users", however, are not treated so generously under the Act. To such persons the occupier owes a duty not to injure such a person intentionally and not to act with reckless disregard for their safety [S4(1)].

In determining whether the occupiers' conduct was reckless or not, all the circumstances have to be taken into account, and specifically mentioned in the Act are the following circumstances:

(i) Whether the occupier knew or should have known of the danger on the premises;

(ii) Whether the occupier knew or should have known of the likelihood of the persons presence on the premises or their likely presence in the vicinity of the danger on the premises;

(iii) Whether the danger was one which the occupier might reasonably be expected to provide protection for the entrant;

(iv) The burden on the occupier of eliminating the danger, taking into account the difficulty, the expense or the impracticality of removing the danger;

(v) The character of the premises and the desirability of maintaining the tradition of open access to a premises of such a character for such an activity;

(vi) The conduct which the entrant may be expected to take for his own safety;

(vii) The nature of any warning given by the occupier;

(viii) Whether or not the person injured was on the premises in the company of another person or under the supervision of another person.

Section 4, subsection 3 provides that the occupier does not owe the duty – not to injure intentionally or be reckless – to persons who enter premises for the purpose of committing an offence or where present on the premises commits an offence. Such persons can only recover from the occupier when a court determines that recovery is "in the interest of justice".

Part of the reason why the reforms in this area were brought about was because the farming community feared that "recreational users" on their land and without their knowledge might sue in respect of injuries suffered as a result of dangers on the land. It is for this reason that the Act classifies "recreational users" together with trespassers and accords them only the low standard of care which the word "reckless" implies. A "recreational user" is defined in the Act as an entrant who is present with or without permission or implied invitation free of charge, including entrants to national monuments under the National Monuments Act 1930, for the purpose of engaging in a recreational activity. Excluded from this definition of a "recreational user" however, are members of the occupiers' own family who are ordinarily resident on the premises and also entrants who are expressly invited onto the premises or who are permitted onto the premises for social reasons by the occupier or a member of his family. Such lawful entrants are categorised in the higher group of visitors.

The recreational user therefore must be engaged in a "recreational activity" and this, according to the Act, includes any such activity conducted in the open air including any (sporting activity), scientific research and nature study so conducted, exploring caves, visiting sites and buildings of historical, architectural, traditional, artistic, archeological or scientific importance.

The scheme of the Act groups recreational users, as defined above, with trespassers and declares that the only duty owed to such persons by the occupier is not to intentionally injure them or be reckless in their regard.

There is one exception to this general rule and that is where a structure or premises is provided by the occupier for use primarily by recreational users. In this case the occupier shall owe a duty to take reasonable care to maintain the structure in a safe condition. The Act, however, makes clear that where a stile, gate, footbridge or other similar structure is on the premises, but is not there for use primarily by recreational users, the occupiers' duty is not extended in that case. Accordingly, if a Local Authority provides a playground with swings, etc., it will still be obliged to take reasonable care to make sure that the structures are maintained in a safe condition. Farmers on the other hand, do not have the higher duty in respect of stiles, footbridges etc., which although on their property are not primarily there to facilitate recreational users.

The duty that the occupier owes to visitors and to trespassers and recreational users may be extended by the occupier by express agreement. On the other hand, the occupier can only restrict or modify his duty towards visitors and then, only if:

(i) it is reasonable in all the circumstances;

(ii) in the case of an occupier restricting his duty by notice he has taken reasonable steps to bring the notice to the attention of the visitor.

In this connection, if the occupier prominently displays the notice at the normal means of access to the premises, he shall be presumed to have taken reasonable steps in this regard. Moreover, the restriction or modification which the occupier attempts to impose on the lawful visitor can not fall below the standard due to the trespasser or recreational user. In other words, the occupier may restrict or modify the duty to take reasonable care, but such notice or restriction can not reduce his obligation below the level due to trespassers, so that even if he has an effective notice restricting his liability he will still owe to the lawful visitor the duty not to be reckless or not to intentionally injure them while on these premises. This is effect is the minimum standard owed to all entrants. Finally, the Act provides that, where the visitor has been warned of the existence of a danger, this fact in itself does not absolve the occupier in all cases, unless the warning was enough to enable the visitor to avoid the injury or damage that were caused. It further provides (S6) that any such contractual modification by the occupier will not bind the entrant who is a stranger to such contract.

Section 7 of the Act provides that the occupier of premises shall not be liable for injury or damage caused by a danger existing on the premises due to the negligence of independant contractors, provided the occupier has taken care in the selection of the independant contractor and ought not to have noticed that the work was not properly done.

Finally, it is provided in the legislation that the Act does not affect any enactment or rule of law relating to self defence or liability imposed on the occupier in any other capacity, such as his capacity as an employer, hotel proprietor, the hirer of transport, or as a carrier, or as the bailor in the contractors bailment, neither does the Act alter the common law duty imposed on an occupier for torts committed by another person where the duty imposed on the occupier was of a non delegable nature.

For the practitioner who was raised with the common law categories of invitees, licensees and trespassers, and who had to grapple with some of the technical rules and concepts such as "unusual dangers" and "concealed dangers", it might be helpful to align the provisions of the new Act with the common law rules. Firstly the new Act departs from the traditional classification of entrants into the following categories of: (a) Contractual Invitees, (b) Invitees, (c) Licensees, (d) Trespassers.

The new Act by and large treats the first three categories now as "visitors", and extends to them a duty on the part of the occupier to take reasonable care in relation to the state of the premises. Trespassers survive as an identifiable group, but now under the new Act the standard of care owed to them is not that which was given to them in *McNamara v E.S.B.* ([1975] IR 1), but rather the old common law standard to be found in earlier cases such as *Addie*

and Sons Ltd v Dumbreck ([1929] AC 358), and in *Donovan v Landy's Ltd* ([1963] IR 441). In determining what is reckless it would appear that these old precedents which had been rendered obsolete by *McNamara*, will now be revisited for their pronouncement on what the law considered to be "reckless". The 1995 Act does, however, make this search somewhat easier in that at S4 (2) it identifies certain factors which a court will take into account in determining what is or is not reckless. The third new category under the Act is that of "recreational users", and these are classified in terms of standard of care, with trespassers. It can be said therefore, that persons who are categorised as invitees and licensees benefit from the new Act in so far as their position is now clarified and the standard applicable to them is raised from the common law standard to that of reasonable care. The courts will not have to grapple with the concept of "unusual dangers" and "concealed dangers", or with the distinction between actual knowledge and constructive knowledge. Secondly, it is fair to conclude that trespassers under the new Act lose out in so far as the standard owed to them now is much less than it was under the *McNamara* rule. Thirdly, "recreational users" also lose out in so far as such persons under the pre 1995 situation might have expected in many cases to be classified as licensees, or if they were deemed to be trespassers they would be entitled to reasonable care if they were foreseeable. Finally, because the occupier can now modify his obligations to lawful visitors, the concept of notices will become more important from the occupiers' point of view. If the occupier wishes to avail of such modification he must show that the modification is a reasonable one, but in this connection reasonableness will be assumed if the notice is prominently displayed at reasonable points of the property.

In conclusion the changes brought about by the Occupiers' Liability Act 1995 do not totally insulate occupiers from being sued by persons who are injured on their property. Certainly it may make recovery more difficult in some cases, but the risk, although smaller, still remains. This factor alone means that both occupiers and persons exposed to injury still need to consider insuring themselves to guarantee full peace of mind. In the case of occupiers this means Public Liability Insurance and in the case of "visitors" and "recreational users" it may involve personal insurance. In fact if the insurance option had been more fully availed of by both occupiers and visitors, the legislative amendments contained in the Occupiers' Liability Act 1995 might not have been necessary in the first instance.

**This article was commissioned by the Parliamentary Committee.*

****Professor Bryan M.E. McMahon, Law Faculty, University College Galway, and of the firm, Houlihan McMahon, 9/10/11 Bindon Street, Ennis, County Clare.***

■

Low Letter Boxes a Health Hazard

How would you like to have to get down on your knees to open your front door? How would you like to have to carry a bag full of mail and then bend down to a letter box at the bottom of a door in order to deliver the mail every day of the week?

Postman Christy Lacey begins his morning delivery in Dublin. He balances his full bag of mail while bending to reach the letterbox. A large estate of similar halldoors with low letterboxes lies ahead.

An Post ask that if keyholes are not at the bottom of the door, why put a letter box there? It does not save money and makes little or no sense.

"Low letter boxes in doors are a growing concern for An Post delivery staff. Badly placed letter boxes can have a detrimental effect on the health and safety of staff delivering the mail. It means that you have to bend down virtually to the ground level while carrying a bag of mail, in order to place letters in the boxes," said *Michael McCabe,* Manager in An Post Letters Division.

"The Standard Specification ISI 195 was drawn up by the Irish Institute for Industrial Research and Standards in 1976 which recommended a standard height for letter boxes in doors should be 1700mm from ground if you are standing outside the door. In other words the letter box should be in the centre of the door" he explained.

"We are contacting the appropriate bodies to ask them to stop the practice of fitting low letter boxes in doors. There are no extra costs involved in putting the letter box in the middle of the door. It only takes a little consideration for those who have to use it. We are confident that those affiliated to organisations and associations including the Construction Industry Federation, Home Builders Association, door and porch manufacturers and importers will take on board these standards when designing, purchasing and fitting doors as well as the Royal Institute of Architects of Ireland who design and plan houses and solicitors who negotiate the purchase of new homes," Michael said.

A special information leaflet is available from An Post highlighting the standard specifications for the letter boxes.

■

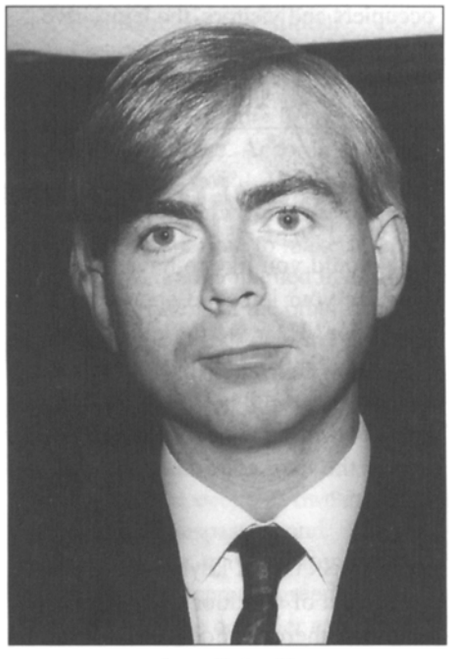
Immigration and Citizenship Law – Need for Reform

By Peter Finlay BL

Few would disagree that the State has a constitutional duty to protect its citizens and that one of the ways in which this obligation arises is in the control of immigrants and refugees as well as the selective conferment of citizenship on non-nationals. However, the statutory mechanism by which this aim is achieved, contained in the Aliens Act, 1935 and the Irish Nationality and Citizenship Acts 1956 – 93 has, in the past, and will continue to generate legal difficulties as well as political controversy.

The legal antecedents of the Aliens Act 1935 are to be found in two UK statutes, the Aliens Restrictions Act, 1914 and the British Nationality and Status of Aliens Act 1914. The first of these 1914 Acts was, as the title suggests, a restrictive measure aimed at controlling the movement of aliens in and out of the United Kingdom during a time of war. In such national emergency Parliament gave His Majesty's government power to introduce measures prohibiting aliens from landing or embarking in the UK, together with other powers of deportation. The provisions of Section 5 of the 1935 Act are identical, in large part, to Section 1(1) of the Aliens Restriction Act, 1914. While that UK Act was later repealed, Ireland has continued to rely on the provisions of the 1935 Act. It is curious too that in the same section of the 1935 Act a widely drafted discretion was conferred on the Minister for Justice, whereby the Minister was entitled to introduce an Order providing for the deportation of an alien together with other restrictions "whenever he thinks proper."

In the Dáil debates of 1935 both Eamon de Valera and Frank Aitken were anxious to give assurances that the 1935 Act would not be used as an instrument of immigration control in



Peter Finlay BL

Ireland in the everyday sense, but would be reserved to the control of aliens in *emergency* situations. However, in recent years, at least, it has been the practice of the Department of Justice to rely heavily on these provisions of the 1935 Act to control non-EU nationals moving to this country.

As a means of controlling what appears to be an unfettered discretion granted to the Minister for Justice in the 1935 Act, it was considered necessary by the Oireachtas to insert in the Act a requirement that the Minister introduce an Order by way of statutory instrument, before being entitled to rely on any of the deportation provisions. However, today, this procedure by way of Order seems rarely if ever to be followed. More often the Department of Justice, when it wishes a non-EU national to depart from the country, simply issues a letter giving the person twenty-one days to leave. This, they argue, is not a form of deportation but merely a request. The standard letter usually includes the phrase "if you fail to comply with this request, arrangements will be made to deport you within twenty-one days." Not surprisingly this form of letter is usually interpreted by its recipients as an ultimatum to leave the country within twenty-one days. No reference is made to an appeal or to any procedure whereby a non-citizen may dispute his perceived removal.

This formed part of the reason why the High Court, in a recent decision *(Tang and others v the Minister for Justice and others, Flood J. unreported, October 1994)* now under appeal to the Supreme Court, quashed a decision taken in this manner requesting a married man and his family to immediately leave the country. This is consistent with the approach of the Supreme Court in an earlier decision in 1988, *Fajujonu v The Minister for Justice, Ireland and the Att. Gen. [1990]* 2IR, 151 in which two Irish born children of a Nigerian father and a Moroccan mother sought to assert a right to remain and live with their parents in the State. In that case, the Court held that the Minister for Justice could exercise his power to deport the family, only after undertaking an enquiry into the constitutional rights of the Irish born children on the one hand and his duty to protect the State on the other. Having satisfied himself that the presence of the parents constituted a sufficiently serious threat to the State, steps then could be taken to remove the family. While the Court was sensitive to what could be called the broader duties of the State towards all its citizens, the Court also manifested concern at the prospect of a law-abiding family being unilaterally ejected from the State pursuant to the administrative provisions of the Act of 1935.

Equally, some of the statutory provisions dealing with Irish citizenship found in the Irish Nationality and Citizenship Acts 1956 – 93 do not bear close scrutiny. While

it would appear that very wealthy non-EU Nationals willing to invest heavily in Irish companies for at least five years need not worry too much about the application of these Acts, their provisions are otherwise stringently applied to all aliens who seek to become Irish citizens. Again, it is interesting to examine the British Nationality and Status of Aliens Act 1914. In particular Section 2(1) of that Act empowered the Secretary of State to grant a Certificate of Naturalisation to an alien who satisfied certain criteria set out in the Act. When we look at the equivalent provision in the Irish statute of 1956 (mainly Section 15), the Minister for Justice is conferred with an additional power to decide these matters as inserted by the phrase "in his absolute discretion". The use of this expression attempts to put decisions relating to the naturalisation of non-citizens beyond the scope of the Courts. It is unlikely however, that an Irish Court would accept it was precluded from judicially reviewing decisions in this area.

In the last two to three years a number of naturalisation cases have been brought in the High Court and are awaiting decision. The presence of an "absolute discretion" as found in the Act is uncommon in Irish statutory language and in view of the trend of judicial opinion in recent years in the area of administrative law the phrase (and particularly the word "absolute") must now be considered obsolete and can not safely be relied upon by the Minister for Justice when dealing with questions of naturalisation and citizenship.

Finally, at an administrative level, it appears that applicants who apply for naturalisation in this country often find themselves waiting for very lengthy periods of time, up to two years in some cases, before receiving a negative reply. It is not unusual for a non-EEC national who has resided in the State for up to ten years to be refused without any stated reasons. No acknowledgement is given for the contribution such a person may have made to the State, in the form of taxes paid, investments made or other social contributions. Most EU countries have statutory mechanisms in place to deal with immigration and naturalisation cases by way of tribunals and appeals procedures. Such a mechanism in Ireland would guarantee fairness of treatment to all our immigrants while at the same time permitting the Minister for Justice to exercise her duty to protect the State in a reasonable and even-handed manner. ■

London Ball – *continued from page 349*

had been donated. As in previous years, the first prize in the raffle was two return air tickets to New York, kindly donated by Aer Lingus. The tickets were won by an American couple living in London who were delighted to win the chance of a free trip home for Thanksgiving or Christmas!

Other items in the raffle included a weekend for two at Ballymaloe House, two return tickets to Dublin on Virgin Atlantic CityJet and a superb piece of crystal donated by Bank of Ireland. There were many smaller items including a bottle of the 'hard stuff' which had been donated by a new Irish pub in London, Waxy O'Connor's! The raffle raised over £1,300.

I was very grateful for the generosity of several major Irish law firms and commercial institutions, who supported the Ball by hosting corporate tables, taking advertisements in our souvenir programme, making financial donations or donating items for the raffle.

As before, McCann FitzGerald were there in force, led by one of their London-based partners, *John Cronin*. Also there was *Roddy Bourke*, a litigation partner in McCanns, who had assisted with the organisation of earlier Balls when he worked in London.

Another leading Irish firm with an office in London Matheson Ormsby Prentice supported the Ball once again and their corporate table was hosted by *Stanley Watson*, the firm's resident London partner.

Two other major Irish law firms with offices in London are William Fry and A & L Goodbody. Both firms had very kindly sent me generous donations to benefit the NSPCC and A & L Goodbody was represented by partner *Stephen Hamilton*.

It is very encouraging that the Ball has the support of the four Irish firms with offices in London.

Newcomers to the Ball this year were Dublin firm Dillon Eustace, who also took a corporate table. There were more partners from Dillon Eustace at the Ball than from any other law firm or institution! I hope that they will now become regular attendees.

I was pleased that *Justin McKenna*, the incoming president of the Dublin Solicitors Bar Association was also at the Ball. The London-based partners of some of the leading New York firms were there, including *Peter Finlay*, an Irish solicitor who now runs the London office of White & Case. *Peter Kelly SC* was one of the many members of the Irish and English Bars present.

Other major corporate attendees and contributors included Aer Lingus, AIB Bank, Anglo Irish Bankcorp, Bank of Ireland, Bord Failte, Irish Permanent and Virgin Atlantic CityJet. Thanks are due to all of them and to the many other supporters of the Ball, including the members of the Association who attend regularly.

Irish solicitors and other *Gazette* readers who have not yet come to the Ball might consider doing so in future years! The best news of all is that the Ball succeeded in raising over £10,000 to benefit the NSPCC. My many sleepless nights in the run-up to the Ball were not in vain when the Ball produced such a wonderful result for this very worthwhile charity.

Cliona O'Tuama is President of the Irish Solicitors' Bar Association in London.

■

National Quality Award for Solicitor

At a presentation ceremony of National Quality Awards in Dublin on November 28 last, Swinford firm P. O'Connor & Son was presented with the National Irish Quality Association (IQA) Quality Award in the service sector section by the President, Mrs. Mary Robinson. This is the first time a National Quality Award has been made to the legal profession. In 1993 the firm was awarded the Quality Mark for service by the Irish Quality Association and has increased its percentage rating following the IQA audit in each year since then.

The National Quality Awards, awarded annually to the top ten performers in the IQA's Quality Mark audit, were presented to winners at a reception in Dublin, by President Mary Robinson. Award winners typically score highest above the national average in their industrial sector and show a marked improvement in quality over their previous year's performance.

Pictured at the presentations were l-r: Eddie O'Connor, President IQA; President Mary Robinson; Patrick O'Connor, O'Connor & Sons, Solicitors, Swinford, IQA National Quality Award winner and Sean Conlon, Chief Executive, IQA.

P. O'Connor & Son has its principal office situated at Market Street, Swinford, Co. Mayo and sub-offices in the town of Kiltimagh and Belmullet. The firm has seven solicitors working in its offices complemented by law clerks and secretaries. Patrick O'Connor is the principal of the firm. He was admitted to the Roll of Solicitors in 1974 and has been a member of the Council of the Law Society since 1978 where he is currently Chairman of the Education Committee. He served as Junior Vice President in 1993. He is an associate member of the Chartered Institute of Arbitrators (Irish branch) and in recent years was admitted as a solicitor to the Roll of Solicitors in Northern Ireland, England and Wales.

The National Quality Awards are presented annually to the top ten performers in the IQA's Quality Mark (Q-Mark) audit as rated by the audit scores. Award winners typically score highest above the national average in their sector.

On receiving his award, Pat O'Connor said: "The provision of a quality legal service is of prime importance to the solicitors and staff of the firm and to myself. Solicitors are now competing with other professions, firms and bodies in the provision of services. It is the quality of that service which always has in the past and increasingly in the future will ensure that the public are better served by an independent highly qualified and efficient profession of solicitors who give a quality service to their clients". He urged his colleagues in the profession to join the Irish Quality Association and that they should seek to obtain the "Q" mark for their firms. "It is a worthwhile exercise for the solicitors involved and their staff which gives substantial satisfaction for the achievement attained", he said.

In his address, Sean Conlon, chief executive of the IQA said: "The leaders of Ireland Inc. must realise that people power i.e. the quality of people employed, will be the powerhouse of the future. No matter how good the product or service is today, it is ultimately the quality of the people employed, and how well they are managed, which will make or break the organisation in the future. Therefore, top management must effect a radical and real change of attitude to the concepts of employee involvement."

Sean Conlon continued: "The total quality movement has shifted the emphasis on product/process quality assurance to improving people management i.e. employee involvement for improvement. The challenge lies in being able to show employees that they are valued and thereby add value to the process. Throughout the world, it is recognised

that individuals and teams are the key to successful change in organisations."

Dr. Eddie O'Connor, the recently appointed president of the IQA and Managing Director of Bord na Móna said: "It must be recognised that poor quality costs as much as 20% of a company's sales revenue and that improved quality of goods and services goes hand-in-hand with improved productivity, lower costs and increased profitability. Therefore, strategic planning for quality, and quality improvement programmes, through a commitment to excellence in manufacturing and services, are becoming more and more essential to the well-being of our nation's economy".

Each year, ten National Quality Awards are presented, eight Regional Awards for manufacturing and two Service Quality Awards. All current Quality Mark holders – approximately 351 – are in contention for an Award. ■

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A Report on the Activities of FLAC for 1995

The Free Legal Advice Centres (FLAC) celebrated the 25th anniversary of our services this year. The occasion was marked with a reception attended by President *Mary Robinson*. This was an opportunity to thank our friends, members and, in particular, volunteers from both the past and present.

1995 was also important in that the Minister for Equality and Law Reform published the long-awaited Civil Legal Aid Bill which purports to place the Scheme of Civil Legal Aid and Advice on a statutory basis. FLAC, together with the Coolock Community Law Centre, mounted a significant campaign to lobby for an extension of the scope of the Bill. FLAC met with legislators, gave evidence to Oireachtas committees, held public meetings and briefed the press. One of the main successes of this campaign was that test cases will no longer be excluded from the remit of the Legal Aid Board.

Meanwhile, as always, the FLAC telephone helpline continued to provide the essential advice and referral service. In the period January to September 1995 we have already handled over 4,000 calls. Many more queries are dealt with by the volunteers in our 17 evening advice clinics throughout the Dublin and Cork areas.

Moreover, there was great demand for our representation service for cases before the Employment Appeals Tribunal and Social Welfare Appeals Officers. While comprehensive statistics are not yet available for 1995, to date we have acted in over 30 such cases.

In the area of social welfare, we continued to lobby for an independent appeals system for those claiming Supplementary Welfare Allowance similar to that available to those on the mainstream social welfare payments. We were also in a position to begin to develop our work in the area of money advice.

FLAC has always maintained an emphasis on the training of information givers and this year we were invited to participate in the National Social Service Board's nationwide training programme. FLAC provided trainers on different aspects of employment law, social welfare law and advocacy.

Seminars were another feature of our training services in 1995. In January we held our annual labour law event, in conjunction with the union MSF, on sexual harassment, the Transfer of Undertakings Directive and the Maternity Protection Act, 1994. In May there was a major conference on the consequences of divorce, with speakers examining pension legislation, property and social welfare issues and the effects on children. More recently, in response to requests from the volunteers, the topics were a practical guide to family law in Ireland and civil legal aid.

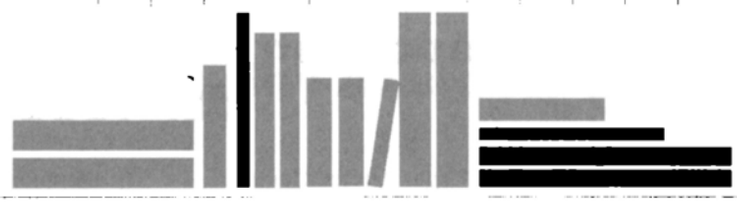
Publications remained a large part of our work. At present, work is being finalised on the fifth title in our series of guides to social welfare payments, namely "A Guide to Sickness Payments". Furthermore, our leaflet "Know Your Rights" is going into a second edition this year.

FLAC has an essential role to play in the provision of legal services to those unable to afford private practitioners. This work requires the encouragement and help of the legal profession. The ongoing support of solicitors is greatly heartening to us and we would like to take this opportunity to thank you for continuing to assist in 1995.

Sabha Green, Administrator

■

BOOK REVIEWS



Irish Stamp Duty Law

by David Donegan and Raymond Friel. Published by Butterworths; 445pp; IR£60.00 hardback.

Unlike all other taxes, stamp duty applies to instruments and not transactions and an instrument is chargeable to duty only to the extent of that which is achieved by the instrument. Donegan and Friel in their attractive and very readable textbook, Irish Stamp Duty Law explain the principles underlying stamp duty and light up a clear path for the reader through the maze of duties, reliefs and related case law spanning more than a century. The book introduces the reader to the Irish Legal System and legal terminology. The relationship of the Common Law and Equity and the diverse legal concepts relevant to the determination of tax are explained. The reader is then brought through the main heads of charge ranging from conveyance on sale, contracts, leaseholds, capital duty, reliefs on re-construction or amalgamation of companies, mortgage bonds, bills of exchange and the various reliefs and exemptions. A separate chapter devoted to the charge and calculation of stamp duty is a useful review of topics dealt with in greater detail elsewhere in the book.

The revised Heads of Charge are set out at appendix 9 which contains useful notes including reference to deleted provisions (e.g. Bond/Covenant was deleted by F.A. 1992). The other appendices include Revenue Statements of Practice, a variety of revenue/company office forms, stamp duty regulations, statutory declaration for companies relief, exemptions from stamp duties and EU Capital Duty Directive.

The concept of "Beneficial Ownership" is important not only for Stamp Duty but also for Capital Gains Tax and Capital Acquisitions Tax and the implications of the case of *Tempany v Hynes* will be of particular interest to the reader. In that case, *Kenny J* (*O'Higgins C.J.* concurring) in an obiter to his judgment stated that a Vendor who signs a contract becomes a trustee of the beneficial interest "to the extent only to which the purchase price is paid"!

Separate chapters are devoted to stampable contracts and leasehold interests. Section 59 Contracts (most commonly good-will) are now compulsorily stampable; and a restraint-of-trade agreement is treated as the sale of good-will. A useful check-list for agreements for the purchase of a business is included. The chapter on leasehold interests differentiates between a memorandum recording a rent increase and the instrument by which the increase is effected i.e. the lease with the rent review clause (and did you know that a rent review clause is stampable at £1.00!). Leases where the rent is related to turnover or otherwise unascertainable are dealt with and we are reminded that consanguinity relief does not extend to leases. Case law is cited in determining what are tenants fixtures.

There are a number of typographical errors and the index should be extended to do justice to the text. Settlements (and particularly the valuation of limited interests) were not dealt with in the depth I would have expected. Although the book does not contain footnotes, there is ample reference to authoritive case law or relevant legislative provisions throughout the text which is further generously illustrated with examples.

The FA 1991 (the 100th anniversary of the Stamp Act!) put stamp duties on a mandatory footing. Self-assessment was also introduced thus entailing a range of new surcharges for late payment or under-valuations. Persons "employed or concerned in or about the preparation of any instrument where the facts are not fully and truly set forth" are liable to statutory negligence! Practitioners will always be concerned to advise their clients on the stamp duty implications of any document and how a proposed transaction may be structured so as to mitigate duty. As an up to date and lucid synthesis of the current law of stamp duties I recommend this book to solicitors and students alike.

Desmond Rooney

Judicial Review: A Thematic Approach

Edited by Brigid Hadfield, Dublin, Gill and Macmillan, 1995, xxv + 408pp, paperback, IR£25.00

Peter O'Brien, fifth son of *John O'Brien* of Elmsvale, County Clare, was called to the Irish Bar in 1865. He was a Roman Catholic, married *Annie Clarke* from Bansha, County Tipperary, became a Queen's Counsel in 1880, later third Sergeant, then Solicitor General and Attorney General for Ireland. Appointed Lord Chief Justice of Ireland, he was created a baronet in 1881 and subsequently a peer as *Baron O'Brien* of Kilfenora in the early days of this century.

One day in Tralee, the Lord Chief Justice decided to attend Mass in state in his magnificent colourful robes. An observer noted: "The Lord Chief Justice walked up the aisle looking for all the world as though he had called to leave a card on the Almighty." Such was (and perhaps still is) the perceived power of the judiciary. This is an apt (if slightly irreverent) introduction to this short notice on

Judicial Review: A Thematic Approach.

The development of judicial review has been one of the pre-eminent achievements of our times. Apart from the election of the legislature, judicial review is the citizen's legal "weapon" in a modern democratic state. The "supervision" of the legislature and public bodies is the core element of judicial review. Judicial review has emerged as a counterweight to the growth of executive power.

Professor *Brigid Hadfield,* professor of public law at Queen's University, Belfast, has brought together in this book contributions from various scholars who examine judicial review, from various perspectives, in the jurisdictions of England and Wales, Scotland, Northern Ireland and the Republic of Ireland. Judicial review in the context of the environment, education, local government, the criminal process, prisons and national security are the subjects of individual chapters. Mr *Gerard Hogan,* barrister and Fellow of Trinity College, Dublin, has contributed a chapter on the law of judicial review in this jurisdiction.

There is considerable similarity in the law and procedure of judicial review in the United Kingdom and Ireland with some notable differences particularly on the public/private law divide.

Lord Woolf in his preface to the book states that the majority of administrative lawyers practising in the High Court in London "are abysmally unaware" of the decisions on judicial review in the other jurisdictions that have similar law and procedure in relation to judicial review of administrative actions. This book will assist in remedying that lacuna.

Judicial Review: A Thematic Approach is an authorative practice-oriented text written by a distinguished group of lawyers expert in the field of judicial review.

Dr Eamonn G Hall

The Law of Termination of Employment

by Robert Upex – Fourth Edition Sweet & Maxwell p.p. 482 £75.00 stg

The first sentence of the preface of Prof. Upex's latest edition explains why to a very great extent, his excellent work is of limited relevance to Irish lawyers. He states "So great have been the changes in Employment Law since the previous edition of this book that it is tempting for commentators to resort to hyperbole in describing them". While these changes have arisen through many important Court decisions in the UK and from the European Court of Justice, Prof. Upex goes on to refer to the legislative changes in the UK. These legislative changes have led to a significant widening of the difference between Irish and British employment law. The legislature in the UK has shown commendable attention to detail in building proper structures and frameworks for the operation of primary legislation. This is notably lacking in Ireland. While the primary legislation has many similar features the detail and operational framework is so significantly different as to make it very difficult to find parallels in Irish law.

This is a very substantial work and is both comprehensive and well written. It is, however, as I have stated, of limited appeal in Ireland. There is some useful information to be found here that is not readily available elsewhere. An example is the question of references for former employees which is given a chapter to itself at the end of the book. While it consists of only four pages it is a useful summary of current law and makes reference to the House of Lords Decision in *Spring v Guardian Assurance plc.* The chapter opens with the statement that an employer is not obliged to provide a reference for an employee. In the Spring case the majority of the Law Lords stated that a term may be implied into certain contracts of employment that a reference will be furnished. Prof. Upex refers to that view at the end of the chapter. In not linking the initial statement and the later statement there is a danger the reader will stop at the first sentence and go no further.

The work is broken into four sections. The first section consists of eight chapters on statutory rights. Given the statutory differences between the two jurisdictions this chapter is of little use except where it relates to the transfer of an undertaking. The information here is well presented but great care must be taken to ensure that general principles sought to be applied in Ireland do not arise from the UK Domestic Regulations but rather from the EU Directive given the significant differences between our Regulations and the UK equivalent. Prof. Upex has an eye for the practical issues relevant to legislation and this allows him to give neat summaries of what might otherwise can be complicated law. His piece on the transfer of undertakings is a case in point. He manages to accurately summarise the *Secretary of State for Employment v Spence* and *Litster v Forth Drydock & Engineering Company Limited* (In Receivership) in the space of one and a half pages. He does what all good teachers should do which is to highlight the area in which a problem might arise and point the reader in the direction of where the relevant law will be found. He avoids any social or political dimension to his approach or comments. The chapter on redundancy is only of use in Ireland in its references to the definition of redundancy itself quoting some useful case law not easily found elsewhere. The definition is different to the Irish equivalent but has sufficient parallel to make some of the precedent case law of use to us. As with almost every aspect of this book the practitioner using it must be very familiar with the equivalent Irish law in order to spot sometimes very subtle differences. Statutory definitions are dealt with in excellent detail but again one has to first understand the parallels with Irish legislation before definitions can be relied on. The definition of "the date of dismissal" in chapter 5 is not appropriate to Irish law whereas the definition of "lock-out" is useful and parallel case law such as *Tramp Shipping Co-operation v Greenwich*

Maritime Inc. and *Express and Star Limited v Bunday* are quoted and could be of considerable use in an Irish context.

Part II consists of three chapters on common law rights. Two of these chapters deal with wrongful dismissal and are helpful given the parallel between the two common law jurisdictions. The third chapter is entitled "Dismissals governed by public law" and consists of a useful summary of the UK law of Judicial Review.

Part III consists of two chapters on procedural considerations the first of which must be avoided by Irish lawyers as it relates solely to UK statutes. The second chapter on insolvency of an employer is of limited use.

The fourth and final part of the book relates to problems after termination dealing in the main with restrictive covenants in contracts of employment. As restrictive covenants in Ireland have been significantly affected by the provisions of the Competition Act this chapter is also of limited value. Prof. Upex is to be congratulated on a job well done. His book, however, can only be recommended to Irish practitioners where they already have a detailed knowledge of the subject matter.

Gary Byrne

The Theft Acts

by Edward Griew; 7th Edition; published by Sweet and Maxwell; price: £21.95.

It is five years since the last edition of this book and it will be a welcome complement to students and practitioners interested in this area of the law. It contains a re-written chapter on appropriation in theft and considers the provisions for enlarging jurisdiction of courts in England and Wales.

While its content is limited to the law of England and Wales it brings the reader right up to date taking account, as it does, of the UK Criminal Justice Act 1993.

Justin McKenna

"The Law of Contract"

By Raymond J Friel. Published by the Roundhall Press 1995; 345pp; paperback: £29.95; hardback: £47.50.

"The big print giveth and the small print taketh away"

So commented an anonymous clergyman many years ago. Contract has been a fruitful source of legal comment, discussion and writing down through the ages. Because of the massive volumes on the subject the need for small print seemed to become ever more important. In recent years this outlook may have changed and the recent European Directive on Unfair Contract Terms illustrates the changing complexion of contract law Although the author refers to the role this directive will play in the application of exclusion clauses in the future he does not elaborate.

Mr Friel begins in his preface by stating the obvious. The area of contract law is already well served by major legal writers both here and in England. What makes this book any different? To begin with, he gives us an exceptionally readable book. Tomes on contract law usually giveth copious quantities of small print. By his use of footnotes and careful reference to cases and statutes he has succeeded in giving us an uncluttered text.

Most of the major works in contract have a long tradition. This longevity the author tells us has led to an evolution of analysis rather than a revolution. The book attempts to advance new approaches to old problems. To achieve this the text assumes that English law does not operate as a precedent in this jurisdiction. Therefore, examples are taken from other common law jurisdictions, in particular the United States, Australia and Canada. He often makes extensive reference to the *Restatement of the Law, Second, Contracts.* A restatement is a general statement of legal principle in a given field of law, drawn up by members of the legal profession in the US using existing case law but advocating reform where necessary. It is not binding in any court, but it has been instrumental in the development of US Law. Further extensive use is made of the Uniform Commercial Code as a commentary of the law in the US. These sources are used to advance the debate on the general reform of contract. Mr Friel asks us to look upon the scope of contract as a field of analysis. He explains that the contracts concerning the relationship of employer/employee are not dealt with to any great extent for a number of reasons which effectively preclude their use as analogous logic for extrapolating general principles in contract law.

Generous reference is given to sources of material including the works of other authors on the Irish law of contract. Wide use of case references is exemplified by reference to the judgment of *Carroll J* in the 1991, in the unreported case of *Parkgrange Investments v Shandon Park Mills* on the topic of offer and acceptance and the 1984 case of *Tradax (Ireland) Limited v Irish Grain Board Limited* on the issue of what constitutes a note or memorandum for the purposes of the Statute of Frauds and whether acceptance of part of the goods is sufficient to form a contract.

If the book succeeds as a vehicle for reform then we must await the analysis of future judgments where *obiter dicta* will be borrowed from these covers. Legislation in Ireland in this area will be determined by policy decisions made in Brussels. As for practitioners it may be dangerous to rely solely on some of the pronouncements contained in the book. As an example I refer to a short piece under the title *"Subject to contract"*. The succinct style of the author does not enable him to give

this topic a full airing. That may be for another volume.

Mr Friel's other work most commonly referred to by practitioners is his co-execution of *Irish Stamp Duty. The Law of Contract* will sit comfortably on the shelf beside it.

Justin McKenna

Telephone Courtesy and Customer Service

The video uses humour and practical tips to highlight the basics of good telephone technique. It covers voice inflection right through to the art of negotiation. The objective of the video is to highlight the importance of good telephone etiquette and give practical tips to improve client service.

It emphasises that the telephone is not just an instrument but the primary means of inter-acting with clients. It believes that you can *"sense a smile down the line"*. There are some good tips on how to handle *"difficult"* callers.

While there are better videos on telephone handling, these are more expensive, this is worth a look. It is for everybody in the practice, not just the receptionist – including (especially) managing partners.

Duration: 25 minutes. Videos are available for hire from the Library for £20 (refundable deposit) for two weeks. ■

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Dublin University Law Journal
Volume 16, 1994

ANTHONY KERR & GERARD HOGAN (EDITORS)

This journal covers a broad range of subjects and areas of interest. It contains a mix of key articles, case and comment and important book reviews. Volume 16, published in December 1995, brings the DULJ up to date to 1994. Its articles include:

- 'Execution of Commercial Documents' by Paul Kearney
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Volume XXVII-XXX (1993-1995)

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Published: December 20, 1995.

Philip and Audrey Champ, Cappabeg Cottage, Whitegate, County Clare. Folio: 27262; Townland: Drummaan East; Area: 0(a) 0(r) 20(p). **Co. Clare.**

James Brett, Patrick Brett, John Brett, as to one quarter share each. Folio: 10755; Land: Kiltinan; Area: 166(a) 2(r) 31(p). **Co. Tipperary.**

Michael Shanahan, (deceased) Folio: 1904 (closed to 39101); Land: Shanballyduff; Area: 28(a) 1(r) 8(p). **Co. Tipperary.**

John O'Keeffe, Folio: 17516 (now 10992F); Land: Kyle East and Courtnabooly. **Co. Kilkenny.**

Teresa Lynch, of 85 Nutley Lane, Donnybrook, Dublin 4. Folio: 10007F; Land: Townland of Cunard in the Barony of Uppercross. **Co. Dublin.**

Michael Stapleton, Folio: 1330; Land: Drumtrasna; Area: 6(a) 2(r) 12(p). **Co. Tipperary.**

Andrew Doherty, Folio: 12381; Land: Gransha; Area: 16(a) 3(r) 39(p). **Co. Donegal.**

Joseph Mulholland, Folio:5297F; Land: Marshes Lower. **Co. Louth.**

Michael O'Donnell (deceased), Folio: 16953; Land: Prop. 1. Meenaneary; Prop. 2. Meenaneary (ten undivided 34th parts); Area: Prop.1. 33(r) 0(r) 2(p); Prop. 2. 231(a) 3(r) 20(p). **Co. Donegal.**

Michael McPhelim (deceased), Folio: 7125; Land: Abbeylands; Area: 4(a) 2(r) 12 3/4(r). **Co. Donegal.**

Edmond King (deceased) Folio: No. 1, 11176; No. 2, 11182; Lands: No. 1 Carrow, No. 2 Carrow; Area: No. 1, 25(a) 1(r) 6(p); No. 2, 32(a) 2(r) 32(p). **Co. Limerick.**

Catherine Smyth, Folio: 2282F; Land: Dunleer; Area: 0.081 acres. **Co. Louth.**

Brian Patrick Deignan, of 83 St. Lawrence Road, Clontarf, Dublin 3 (Hillcrest, Rogerstown, Lusk, County Dublin). Folio: 6116; Land: Townland of Rogerstown in the Barony of Balrothery East. **Co Dublin.**

Luke McGuinness, Folio: 15102F; Land: Prop. 1, Piercetown; Prop. 2, Piercetown; Area: Prop. 1, 41.250 acres; Prop. 2, 13.125 acres. **Co. Meath.**

Annie Varley, Hampstead Ballymacward, Co. Galway. Folio: 22793; Townland: (1) Cloongawna, (2) Cloongawna (one undivided Eighty-fifth part of part, (3) White Park (one undivided eighty-fifth part of part), (4) Hampstead; Area: (1) 30(a) 3(r) 4(p), (2) 26(a) 2(r) 8(p), (3) 57(a) 3(r) 38(p), (4) 10(a) 0(r) 34(p). **Co. Galway.**

Patrick Kelly, Folio: 12626F; Land: Prop.1, Kilcooly; Prop. 2, Kilcooly; Area: Prop. 1, 0.225 acres; Prop. 2, 0.188 acres. **Co. Meath.**

Parkway Properties Limited, of 81 Main Street, Blackrock, Co. Dublin. Folio: 85458F; Land: Townland of Kilnamanagh in the Barony of Uppercross. **Co. Dublin.**

Denis Murphy, Folio: 6150F; Land: Knockdromin; Area: 0(a) 0(r) 16(p). **Co. Limerick.**

Eugene Delaney and Anne Delaney, 185 Sunday's Well, Naas, Co. Kildare. Folio: 14592F; Land: Part of townland of Naas East. **Co. Kildare.**

John P. McManus, 22 Woodview, Killimer, Kilrush, Co. Clare. Folio: 10741F; Townland: Part of the townland of Doonagurroge situate in the Barony of Clonderalaw shown as Plan 81 on the Registry Map (O.S. 68/9). **Co. Clare.**

Wills

Nolan, Louise, late of 43 Churchtown Cottages, Beaumont Avenue, (otherwise 43 Beaumont Avenue), in the City of Dublin. Would any person having knowledge of a will executed by the above named deceased who died on 20 April 1979, please contact O'Duffy Quinn & Company, Solicitors, 56 Blessington Street, Dublin 7. (Telephone 830 3811 – Fax 830 9600).

Flitterman, Sonia, deceased, late of 76 Rathdown Park, Terenure, Dublin 6W, widow. Would any person having knowledge of a will made by the above named deceased who died on or about 22 October 1995, please contact forthwith Rutherfords, Solicitors, 41 Fitzwilliam Square, Dublin 2, Telephone 678 5914 Fax: 661 2071.

Jordan, Gerard, deceased, late of 30 Carnew Street in the City of Dublin. Would any person having any knowledge of the whereabouts of the original will executed by the above named deceased who died on 27 November 1994, please contact Damien Maguire and Company, Solicitors, Leinster House, Main Street, Maynooth, Co. Kildare. Telephone: (01) 628 6720.

Madden, Maureen, deceased, late of 234 Phibsboro Road, Phibsboro, Dublin 7, housewife. Would any solicitor or person having knowledge of the whereabouts of the will of the above named

deceased who died on 6 October, 1994, please contact John J. O'Hare & Co., Solicitors, Merchant's House, 27/30 Merchant's Quay, Dublin 8, (Ref JS) Telephone: 01-677 6791 or Fax: 01-679 7237.

Murphy, Rosa Marguerita (otherwise Rose Marguerita) deceased. Late of Stella Maris, Blackrock, Co. Louth. Widow. Would any person having knowledge of a will executed by the above named deceased who died on 30 June 1995 please contact James H. Murphy & Son, Solicitors, 17 Francis Street, Dundalk. Telephone: 042 34037.

Kearns, Francis C., deceased, late of 13 Pearse Brothers Park, Ballyboden, Dublin. Will anyone having knowledge of the whereabouts of the will of the above deceased who died on 19 October, 1995 please contact Maurice E. Veale & Co., Solicitors, 6 Lower Baggot Street, Dublin 2. Telephone: 01 676 4067, Fax: 01 676 3436.

Parish, Eileen Mary, deceased, formerly of "Abbeyvale", 111 Howth Road, Dublin 3 and lately of St. Mary's Hospital, Phoenix Park, Dublin. Date of Death – 7 November 1995. Would any solicitor having knowledge of the whereabouts of a will for the above deceased, please contact: S.G. Murphy & Co., Solicitors, 858/868 Shore Road, Greencastle, Newtownabbey, County Antrim BT36 7DQ. Telephone: 08 01232 365595.

Kerr, Victor Desmond, deceased late of 11/12 Talbots Inch, Kilkenny. Would any person having knowledge of a will executed by the above named deceased who died on 14 July 1994, please contact Phelan Prescott (Ref C/D) Alton House, 4 Herbert Street, Dublin 2 – 676 4502.

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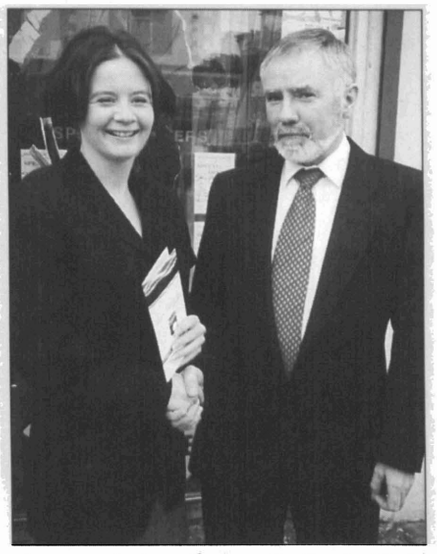

Congratulations to Danella Brady (Tony Taaffe & Co., Solicitors, Finglas) who was the winner of the free ski holiday to America competition which was held in the August/ September issue of the Gazette. *Danella is pictured receiving her prize from Hugh Cooling of Michael Stein Travel, sponsors of the competition.*

LAW SOCIETY OF IRELAND

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Recent Irish Cases

Edited by Raymond Byrne, BCL, LLM, BL, Lecturer in Law, Dublin City University

The following case summaries have been reprinted from the *Irish Law Times and Solicitors Journal* with the kind permission of the publishers.

John Doe and Barbara Doe, Joseph Dowling and Mary Dowling v. Armour Pharmaceutical Co. Inc., Baxter Health Care Corporation and Myles Laboratories Inc.: Supreme Court (Finlay CJ, O'Flaherty, Egan, Blayney and Denham JJ) 9 March 1994

Private International Law – Forum Conveniens – *Claims of negligence in the manufacture and preparation of a blood clotting product – Initiation of proceedings in New York – Decisions of New York courts that New York was* forum non conveniens *subject to condition that plaintiffs should be at liberty to recommence proceedings there if Irish courts declined jurisdiction – Proceedings commenced in Ireland but stay sought by plaintiffs on ground that claims would be more conveniently tried in New York – Whether stay in the interests of justice*

Facts The plaintiffs brought proceedings against the defendants in New York for negligence in the manufacture and preparation of a blood clotting product which was intended for use by haemophiliacs. The New York courts acceded to motions brought by the defendants that the actions should be dismissed on the ground of *forum non conveniens*. These orders were subject to a number of conditions, including agreement by the defendants that they would not prevent the plaintiffs from returning to the New York courts in the event of the Irish courts declining to accept jurisdiction. After commencing proceedings in Ireland, the plaintiffs then brought motions seeking, *inter alia*, declarations that the claims would be more conveniently and properly tried in New York and that the High Court decline jurisdiction, and an order staying proceedings in Ireland pending the determination of the issues in New York.

Held by the Supreme Court (Blayney J; Finlay CJ, O'Flaherty, Egan and Denham JJ concurring) in dismissing the appeal: (1) In considering an application for a stay where a dispute arises as to the appropriate forum for the litigation, the test to be applied was whether or not justice required that the action should be stayed. *MacShannon v. Rockware Glass Ltd* [1978] AC 795 and *Attorney General v. Arthur Andersen and Co.* [1989] ECC 224 approved. (2) On the facts justice did not require that the plaintiffs' actions should be stayed. (3) It would be unjust for the defendants to have to face a further trial of the issue as to what was the appropriate forum for the case. Proceedings had already been instituted in New York and the courts of that jurisdiction, which had been chosen by the plaintiffs, had decided that it was *forum non conveniens*. If they had been dissatisfied with these decisions the plaintiffs should have appealed against them. Subsequently seeking a stay in the High Court on the grounds that Ireland was *forum non conveniens* was, in effect, an attempt to have the decisions of the New York courts reversed by an Irish court. This was an unjust manner of proceeding in respect of the defendants because it required them to meet a claim which could have been appealed in New York and also run the risk of an appeal in Ireland.

Reported at [1994] 1 ILRM 416

D. v. Director of Public Prosecutions: Supreme Court (Finlay CJ, O'Flaherty, Egan, Blayney and Denham JJ) 17 November 1993

Criminal Law – Trial – Prohibition – Indecent assault – Inaccurate reporting of evidence in the media – Jury discharged and re-trial ordered – Subsequent prejudicial media coverage – Whether Director of Public Prosecutions should be prohibited from pursuing further prosecution in the matter – Constitution of Ireland 1937, Articles 38.1, 40.3

Facts The applicant had been charged with indecently assaulting a young girl in a boat off the Donegal coast on a date unknown between April and November 1988. His trial on this charge came on for hearing before the Dublin Circuit Criminal Court on 27 July 1992. As a result of inaccurate reporting in two of the national daily newspapers of the evidence adduced at the trial, the jury was discharged and the editors of these papers summoned to court to explain their conduct. At this hearing, counsel for the Director of Public Prosecutions (DPP) remarked that as a result of this inaccurate reporting, a 'patently guilty man had gone free.' The combination of these events ensured that the case received widespread publicity, with one Sunday newspaper in particular running a series of highly charged feature articles on the case. The applicant sought to prohibit the DPP from proceeding with a re-trial on the basis that the likely prejudice engendered in anyone who read these articles was such as to make it impossible for him to receive a fair trial and also that, by reason of the delay which had occurred from the time of the date of the commission of the alleged offence and any subsequent re-trial, he was prejudiced in the preparation of his defence to this charge. In the High Court Carney J granted the relief sought and held that anyone who had read these articles would not be suitable for jury service in any trial of this matter.

Held by the Supreme Court (Blayney and Denham JJ; O'Flaherty J concurring, Finlay CJ and Egan J dissenting) in allowing the appeal: (1) The right of an accused to a fair trial is of fundamental constitutional importance, and the question which the court must answer is whether there is a real risk that the applicant would not obtain such a fair trial because of the coverage of the case in the media. (2) The appropriate burden of proof on an applicant in establishing the likelihood of an unfair trial is to show that there is a real or serious risk that there will be an unfair trial. *Finucane v. McMahon* [1990] 1 IR 165 applied. (3) While it was possible that a member of the jury would remember reading the article and associate it with the instant case and feel sympathy towards the victim, the applicant had failed to show that there was a real or serious risk that the jury would be prevented from returning an impartial verdict in the case. (4) To hold otherwise would be to imply that jurors would ignore their oath and duties as jurors as well as the charge of the trial judge to well and truly decide the case on the evidence adduced during the course of the trial alone and not to allow themselves to be influenced by any matters extraneous to the trial itself. *Per* Denham J: While the court must give some consideration to the community's right to have an alleged crime prosecuted in the usual manner, on the hierarchy of constitutional rights, there is no doubt that the applicant's right to fair procedures takes precedence over the right of the community to have an alleged crime prosecuted.

Reported at [1994] 1 ILRM 435

Trustees of Kinsale Yacht Club v. Commissioner of Valuation: Supreme Court (Finlay CJ, O'Flaherty and Blayney JJ) 10 February 1994

Valuation – Marina attached to piles driven into the sea bed – Marina capable of being detached from piles and moved to another location – Finding that marina constituted a fixed mooring – Property falling within one of the categories of fixed property deemed to be rateable hereditaments – Another category containing exemption in respect of constructions affixed to land used for sporting purposes – Valuation (Ireland) Act 1852 – Valuation Act 1986, s. 2 – Valuation Act 1988, s. 5

Facts S. 2 of the Valuation Act 1986 provides that for the purposes of the Valuation (Ireland) Act 1852, property falling within any of the categories of fixed property specified in the schedule to the 1852 Act, as inserted by the 1986 Act, shall be deemed to be rateable hereditaments in addition to those specified in s. 12 of the 1852 Act. Reference no. 2 of the schedule refers to 'all lands developed for any purpose other than agriculture, horticulture, forestry or sport, irrespective of whether or not such land is surfaced and including any constructions affixed thereto which pertain to the development' and reference no. 4 refers to 'all fixed moorings, piers and docks.' The trustees of Kinsale Yacht Club were the owners of a marina which comprised a floating wooden platform attached to piles which were partially driven into the sea-bed. The platform could be detached from the piles and moved to another location. In a judgment delivered on 12 October 1992 ([1993] ILRM 393) Barr J held that the marina was a fixed mooring. The words 'all lands' in reference no. 2 included land comprising the sea-bed and so the marina was a development of land for sport. Accordingly, by virtue of reference no. 2, the marina could not be regarded as a rateable hereditament. Finally, Barr J concluded that the matter should be sent back to the Commissioner of Valuation so that it could be valued. The Commissioner of Valuation appealed.

Held by the Supreme Court (Finlay CJ; O'Flaherty and Blayney JJ concurring) in allowing the appeal: (1) While the 1986 Act was not a taxing or penal statute, by deeming the categories of fixed properties referred to in the schedule to be rateable hereditaments in addition to those mentioned in s. 12 of the 1852 Act, s. 2 constituted a platform or necessary statutory precondition intended to lead to the fresh imposition of liability and thus had to be given a strict interpretation. *Inspector of Taxes v. Kiernan* [1981] IR 118 applied. (2) S. 2 provided without any ambiguity that property falling within any of the categories of fixed property specified in the schedule was deemed to be a rateable hereditament. If a particular property fell within one of these categories of fixed property no further enquiry had to be made as to whether it fell into any of the other categories. (3) The decision of the High Court that the marina was a fixed mooring was a determination of a mixed question of fact and law which had not been challenged on appeal. In the light of this finding it was inevitable that the marina fell within one of the categories of fixed property listed in the schedule. (4) It was not illogical or capricious that the 1986 Act should make all forms of fixed mooring rateable hereditaments by virtue of reference no. 4 while preventing certain constructions affixed to land developed for the purpose of sport from being rateable hereditaments by virtue of reference no. 2. *Per curiam:* An inconsistency existed as between the wording of reference no. 1 and reference no. 2 insofar as it was unclear whether something which would be deemed to be a rateable hereditament under reference no. 1 would still be rateable even though it appeared to be capable of being exempted under reference no. 2, but this inconsistency did not arise in the instant case.

Reported at [1994] 1 ILRM 457

Peter Pringle v. Ireland and the Attorney General: High Court (Murphy J) 19 November 1993

Practice – Res judicata – *Issue estoppel – Challenge in civil proceedings to conviction by Special Criminal Court affirmed by Court of Criminal Appeal – Final nature of determination by Court of Criminal Appeal of any appeal or other matter – Whether circumstances in which a court of first instance could be asked to review or set aside the decision of a court whose judgment is expressed to be final – Courts of Justice Act 1924, s. 29 – Constitution, Article 34.4.6°*

Facts S. 29 of the Courts of Justice Act 1924 provides that the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final. On 27 November 1990 the plaintiff was convicted by the Special Criminal Court of robbery and the murder of a garda acting in the course of his duty. He was sentenced to 15 years' imprisonment for the robbery and to death in respect of the murder. In May 1981 the plaintiff's application for leave to appeal was refused by the Court of Criminal Appeal. On 27 May 1981 the President of Ireland, acting on the advice of the government, commuted the death penalty to 40 years' penal servitude. By a letter dated 18 June 1981 the secretary to the Minister for Justice informed the Governor of Portlaoise Prison that the government's decision to advise the President to commute the death penalty had been made on the understanding that the full 40 years would be served without remission. In 1992 the plaintiff commenced civil proceedings in which he claimed that his prosecution, trial, conviction and sentence were conducted, carried out and imposed in a manner repugnant to the Constitution and in violation of his rights. The defendants claimed that the matters raised by the plaintiff in his statement of claim had already been adjudicated upon by the Special Criminal Court and the Court of Criminal Appeal and were thus *res judicata*, that the matters now raised by the plaintiff could have been raised by him at his trial and so he was estopped from raising them now, that the plaintiff's proceedings were an abuse of the process of the court and that he did not have the necessary *locus standi* to challenge the various statutes which he sought to impugn.

Held by Murphy J in ordering that the proceedings should be stayed until the statement of claim was amended: (1) A conviction secured in a criminal court of competent jurisdiction cannot be set aside or reviewed in civil proceedings, least of all in civil proceedings conducted in a court of subordinate jurisdiction. (2) The word 'final', whether used in Article 34.4.6° of the Constitution (in conjunction with the word 'conclusive') in relation to the Supreme Court or in the Courts of Justice Act 1924 in relation to the Court of Criminal Appeal, puts the decision of the court to which the word relates beyond review by any other judicial body. (3) Whilst it might be appropriate to consider fresh evidence where a litigant was seeking a civil remedy in civil proceedings, this was not the case where the purpose of the civil proceedings was to reverse the judgments of the criminal courts. In any event, even if the plaintiff was permitted to proceed here it would transpire that the case which he sought to make was based partly on legal arguments which were always available to the plaintiff and his legal advisers and partly upon an analysis of facts and documents which were available to the plaintiff and his legal advisers at the time of the criminal proceedings. *Kelly v. Ireland* [1986] ILRM 318 distinguished. (4) There was a distinction between the decisions of the courts and the implementation, variation and com-

mutation of the penalties which they impose. The effect of the penalty imposed or the manner in which it was altered were not governed by the terms of the 1924 Act. Accordingly the plaintiff was not necessarily barred from pursuing a claim for declaratory relief in relation to irregularities or wrongdoings concerning the death penalty which had been imposed on him, the manner in which it was imposed on him and the circumstances in which it was claimed that the commuted penalty was to consist of 40 years' penal servitude without remission. (5) Likewise the plaintiff's claim regarding his allegedly wrongful transfer to different prisons during his trial in the Special Criminal Court did not constitute a challenge to his conviction by means of civil proceedings. However, before this matter could be pursued there would have to be substantial amendments to the pleadings.

Reported at [1994] 1 ILRM 467

Rashad Fares v. John Wiley: Supreme Court (O'Flaherty, Egan and Blayney JJ) 22 October 1993

Practice – Security for costs – Negligence claim for personal injuries arising out of road traffic accident – Plaintiff resident in another country and with no assets in Ireland

Facts On 25 September 1987 a collision occurred between the defendant's motor car and the plaintiff, who was a pedestrian crossing the road. The plaintiff, who was resident in Libya and did not have any assets in Ireland, sought damages for personal injuries. The defendant denied liability and brought an application for security for costs. This was refused by MacKenzie J on 26 November 1990 on the grounds that it would be open to the trial judge to find both parties at fault and to grant the application would be to deny the plaintiff his right of action simply because he lived in another country. The defendant appealed.

Held by the Supreme Court (O'Flaherty J; Egan and Blayney JJ concurring) in allowing the defendant's appeal: (1) *Prima facie* a defendant establishing a *prima facie* defence to a claim made by a plaintiff residing outside the jurisdiction has a right to an order for security for costs. However, this is not an absolute right and the court has to exercise a discretion based on the facts of the individual case. *Collins v. Doyle* [1982] ILRM 495 approved. (2) The defendant had put forward evidence that he had a good defence to the plaintiff's claim. Although the plaintiff was not impecunious, this was an appropriate case in which to make an order for security for costs. *Per curiam:* Given the facts and surrounding circumstances the case appeared to be modest in nature. Accordingly a modest sum should be fixed by way of security for costs.

Reported at [1994] 1 ILRM 465

News Datacom Ltd, British Sky Broadcasting Ltd and Sky Television plc v. David Lyons t/a Satellite Decoding Systems, Satellite Decoding Systems & Co., Satellite Systems Ltd, Satellite Decoding System (1986) and Marie Molloy: High Court (Flood J) 20 January 1994

Injunction – Interlocutory – Copyright – Infringement – Computer program – Satellite broadcasting – Encrypted signal decoded by means of device activated by card containing computer program – Cards marketed by the defendants capable of activating decoder and unscrambling signal – Allegation of infringement of copyright in the computer program – Fact that defendants' card could achieve the same result as the plaintiffs did not raise a serious question as to whether copying had occurred – Copyright Act 1963 – European Communities (Legal Protection of Computer Programs) Regulations 1993

Facts The second and third named plaintiffs transmitted their television signals by satellite in a scrambled form so that they could not be received on a standard television but only on one which had been adapted through the addition of a decoder activated on the insertion of a 'smart card'. This card carried a computer program, consisting of an algorithm, a source code and an object code, which would unscramble the encoded television signal and allow the user to see and hear the material transmitted by the plaintiffs. The plaintiffs made these cards available to persons who paid subscriptions. From time to time the plaintiffs altered the computer program by inserting a completely new algorithm and when this was done each subscriber would have to obtain an altered card in order to view the transmitted material. In 1993 the first named defendant started to sell a card which had not been produced or authorised by the plaintiffs but which could unscramble their television signals. Whenever the plaintiffs changed their algorithms the defendants succeeded in producing a card capable of unscrambling the amended signal within a relatively short time thereafter. The plaintiffs sought an interlocutory injunction to restrain the defendants from infringing the plaintiffs' copyright in the software used in the decoders and the cards. In particular it was claimed that the defendants' card had to contain a copy of, or at least a part of, the algorithm and other components from the plaintiffs' card and that the plaintiffs' algorithm was so complex that it was completely improbable that the defendants' card could have been produced in any way other than through direct access to and copying of the plaintiffs' computer program.

Held by Flood J in refusing the relief sought: (1) A person seeking the grant of an interlocutory injunction must show that there is a fair *bona fide* question to be tried. *Campus Oil Ltd v. Minister for Industry and Energy (No. 2)* [1983] IR 88 applied. (2) Where an interlocutory injunction is sought in a case of alleged copyright infringement, the plaintiff must adduce some positive evidence which at least gives rise to the implication that copying has taken place. However, such evidence does not have to establish copying as a matter of probability. (3) The plaintiffs had not offered any scientific basis for their claim that, given the complicated nature of their algorithm, the only explanation for the identical result achieved by the defendants' card was copying. While the defendants' computer program could perform the same function as the plaintiffs', this did not constitute direct evidence that there was a similarity in the programs themselves. *Thrustcode Ltd v. W.W. Computing Ltd* [1983] FSR 502 approved. (4) The fact that the plaintiffs changed their algorithms on a regular basis and that the defendants were able to produce a card capable of unscrambling the amended signal within a relatively short time thereafter made the plaintiffs' claim that the only explanation for such functional similarity was copying highly improbable and gave weight to the defendants' claim that they had not infringed the plaintiffs' copyright. (5) While an interlocutory injunction is a discretionary remedy, the mere fact that the conduct of the defendant is questionable as a matter of ethics or morality was not a sufficient basis for the grant of such an order.

Reported at [1994] 1 ILRM 450

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.

ADMINISTRATIVE

Winter Time Order 1994 (SI No. 395 of 1994)

This order (relating to the years 1995, 1996 and 1997) varies the periods of winter time (and consequently summer time) as provided for in the Standard Time (Amendment) Act 1971. The Order has the effect of causing summer time to begin one week later in 1995 and two weeks later in each of the following two years. Summer time will end one week earlier in 1995. The Order also provides that the change from one period of time to another will be at 1a.m. and not at 2a.m. as was previously the case. The Order gives effect to EU Directive 94/21/EC (of 30 May 1994).

AGRICULTURE

Milk (Regulation of Supply) (Establishment of National Milk Agency) Order 1994 (SI No. 409 of 1994)

This Order establishes the National Milk Agency as and from 30 December 1994. The Cork and Dublin District Milk Boards are abolished by SI No. 410 of 1994 and SI No. 411 of 1994 respectively. The Order brings into effect the Milk (Regulation of Supply) Act 1994: see (1995) 13 ILT 45.

COMMERCIAL

Terex Equipment Ltd v Truck and Machinery Sales Ltd: High Court (Barron J) [1994]1 ILRM 557

Bills of Exchange–Payment for Equipment–Bills Dishonoured–Allegation of defective equipment and fraud–Whether agreement to waive bills–Whether allegation of fraud could defeat validity of bills–Whether stay should be granted–Bills of Exchange Act 1882.

European Communities (Non–Life Insurance) Framework Regulations 1994 (SI No. 359 of 1994)

These Regulations give effect to the Third Non–Life Insurance Framework Directive (92/49/EEC–OJ No. L 228/1) which institutes a single authorisation system of supervision of insurance undertakings operating throughout the European Communities whereby insurance undertakings transacting business on either a cross-border or branch basis will be subject to the overall supervisory control of the supervisory authority where their head offices are located. The Regulations require non-life insurance undertakings to furnish information and statistical documents necessary for supervision purposes to the Minister. The Regulations introduce revised rules for the valuation of underwriting liabilities and assets and revised requirements for localisation of assets. The regulations provide that any significant increase or decrease in shareholdings in an insurance undertaking will be notified in advance to the Minister. The Regulations also include certain information requirements which insurance undertakings must disclose to policyholders when an insurance contract is being effected. Insurers underwriting third party motor insurance will continue to be subject to existing requirements including the necessity for services insurers to appoint a claims representative in the State to handle third-party insurance claims. The Regulations incorporate a number of consumer protection measures including provisions which oblige insurance undertakings to comply with the general good requirements of the State as specified. These Regulations have the effect of amending or modifying certain provisions of the Insurance Acts 1909 to 1989 and previous Regulations made under the European Communities Act 1972. The Regulations came into force on 8 December 1994.

European Communities (Life Assurance) Framework Regulations 1994 (SI No. 360 of 1994)

These Regulations give effect to the Third Life Assurance Framework Directive (92/96/EEC - OJ No. L 360/1) which institutes a single authorisation system of supervision of insurance undertakings operating throughout the European Communities whereby insurance undertakings transacting business on either a cross-border or branch basis will be subject to overall supervisory control of the supervisory authority where their head offices are located. The Regulations also implement relevant provisions of the Second Life assurance freedom of services Directive (90/619/EEC - OJ No. L330). The Regulations require life assurance undertakings to submit statutory returns to the Minister for Enterprise and Employment in the format set out in the Schedules to these Regulations. They also require an actuarial investigation to be carried out annually and introduce revised rules for the valuation of underwriting liabilities and assets and revised requirements for localisation of assets and the treatment of reinsurance. The regulations provide that any significant increase or decrease in shareholdings in an insurance undertaking will be notified in advance to the Minister. The Regulations introduce a mandatory fifteen–day 'cooling off' period for policyholders taking out most types of life assurance. The Regulations also introduce disclosure requirements for insurers obliging them to furnish information about the insurance company as well as information about the commitment and pertinent changes during the term of the insurance contract. The Regulations contain provisions which oblige insurance undertakings to comply with the general good requirements of the State as specified. They also provide for reciprocity measures regarding life assurance activities in third countries. These Regulations have the effect of amending or modifying certain provisions of the Insurance Acts 1909 to 1989 and previous Regulations made under the European Communities Act

1972. The Regulations came into force on 8 December 1994

COMPANY

In re Holidair Ltd: Supreme Court (Finlay CJ, O'Flaherty, Egan, Blayney and Denham JJ) [1994] 1 ILRM 481. Examinership–Borrowing powers of examiner–Debenture–Floating charge–Charge over book debts described as a fixed charge–Obligations to pay proceeds into account to be designated by trustee under debenture–Failure to designate account and companies permitted to use proceeds of book debts in ordinary course of business–Receiver appointed in respect of companies–Subsequent appointment of examiner–Letters designating account into which proceeds of book debt should be paid sent to companies. Whether action taken to realise security–Crystallisation of floating charge on appointment of examiner–Companies (Amendment) Act 1990, ss. 5(2)(d), 7(5), 9(1), 9(4), 29(2), 29(3).

ENVIRONMENT

Air Pollution Act 1987 (Marketing, Sale and Distribution of Fuels) (Cork) Regulations 1994 (SI No. 403 of 1994)
These Regulations bring into effect a prohibition on the marketing, sale and distribution of bituminous coals within the restricted area of Cork and set certain standards for allowable fuels within that area. The prohibition does not apply to certain operations involving the storage of prohibited fuels within the area and their transport or delivery through the area. The Regulations also make provision for their enforcement by Cork Corporation and Cork County Council within their respective functional areas and provide controls in that regard (keeping and examination of records etc.). The Regulations also revoke the Air Pollution Act 1987 (Marketing, Sale and Distribution of Fuels) (Cork) Regulations 1993 (SI No. 294 of 1993) which prohibited the sale of slack and required retailers to have a supply of smokeless or low-smoke fuel for sale in the designated area of Cork. The Regulations came into effect on 13 February 1995.

HEALTH AND SAFETY

European Communities (Machinery) Regulations 1994 (SI No. 406 of 1994)
These Regulations implement Council Directive 89/392/EEC, as amended by Council Directive 91/368/EEC, on the approximation of the laws of the Member States relating to machinery to provide additional essential health and safety requirements to cover the risks being run by persons being lifted. They also deal with safety components (Council Directive 93/68/EEC) by harmonizing the provisions concerning the affixing and use of the CE marking (cf (1994) 12 ILT 296). The aim is to remove barriers to intra Community trade in the area of machinery and safety components. The Regulations apply to machinery and safety components which are first placed on the market or put into service in the Community on or after 1 January 1995. They replace the European Communities (Machinery) Regulations 1992 (SI No. 246 of 1992), which are revoked. They also revoke the European Communities (Wine-Ropes, Chains and Hooks) Regulations 1979 with effect from 1 January 1995. The European Communities (Roll Over and Falling Object Protective Structures for Construction Plant) Regulations 1990 (SI No. 202 of 1990) and the European Communities (Self-Propelled Industrial Trucks) Regulations 1991 (SI No. 12 of 1991) are both revoked with effect from 1 January 1996.

Safety, Health and Welfare at Work (Chemical Agents) Regulations 1994 (SI No. 445 of 1994)
These Regulations implement Council Directive 88/642/EEC and Commission Directive 91/322/EEC on the protection of workers from the risks related to chemical agents at work. The Regulations define a chemical agent and outline the duties of employers in relation to the prevention and limitation of exposure of employees to chemical agents in the workplace. There are also requirements in relation to information, training and consultation of employees. The Regulations came into effect on 25 January 1995. Current occupational exposure limits in respect of about 600 chemical agents which come within the scope of these Regulations are set out in a Code of Practice issued by the Health and Safety Authority. The Regulations and Code of Practice were made under the Safety, Health and Welfare at Work Act 1989.

Safety, Health and Welfare at Work (Pregnant Employees Etc.) Regulations 1994 (SI No. 446 of 1994)
These Regulations implement the occupational safety and health provisions of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. The Regulations came into effect on 30 December 1994 and were made under the Safety, Health and Welfare at Work Act 1989. On the implementation of the other elements of the 1992 Directive, see the Maternity Protection Act 1994: (1995) 13 ILT 15.

PRACTICE AND PROCEDURE

Bula Ltd & Ors. v Crowley & Ors.: Supreme Court (Finlay CJ, Egan and Denham JJ) [1994] 1 ILRM 495. Discovery–Legal professional privilege–Exemption from privilege–Restrictions on exemptions from privilege.

REVENUE

Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations 1994 (SI No. 353 of 1994)
These Regulations set out the medical criteria, certification procedures, repayment limits, forms and other matters necessary for the purposes of giving effect to s.92 of the Finance Act 1989 which provides for tax concessions for disabled drivers and disabled passengers. The Regulations came into effect on 1 December 1994.

ILT DIGEST

OF LEGISLATION AND REPORTED CASES
Compiled by DAVID BOYLE

[In this issue, we begin a new-style ILT Digest, which incorporates a number of different elements from previous regular features as well as new material not previously covered in the ILT. This new format ILT Digest will include coverage of all legislation, whether Bills, Acts or statutory instruments as well as reported decisions of the superior courts. – ed.]

ADMINISTRATIVE LAW

Heritage Bill 1994
This Bill, the title of which has been amended in Committee from the Heritage Council Bill 1994, aims to establish a body to be known as An Chomhairle Oidhreachta. The purpose of this body will be to promote public interest in and knowledge of the national heritage which shall include architectural heritage, flora, fauna, wildlife habitats, landscapes, seascapes, wrecks, geology, heritage gardens and parks and inland waterways. The Bill provides for the establishment and composition of this body and provides for the exercise by the Minister for Arts, Culture and the Gaeltacht of functions in relation to the national heritage.

Ministers and Secretaries (Amendment) Act 1995 (No. 1 of 1995)
This Act, passed on 27 January 1995, amends the Ministers and Secretaries (Amendment) (No. 2) Act 1977 (as amended in 1980) by providing for an increase in the maximum number of persons who may be appointed by the Government to be Ministers of State at Departments of State from 15 to 17.

CONSTITUTIONAL LAW

Regulation of Information (Services Outside State for Termination of Pregnancies) Bill 1995
This Bill, as presented by the Minister for Health on 22 February 1995, aims to specify the conditions under which certain information about pregnancy termination services outside the State may be made available in the State. It arises from the Fourteenth Amendment to the Constitution, which affirms the right to obtain or make available such information subject to such conditions as may be laid down by law. The Bill aims to provided that pregnant women who seek such information from doctors or other pregnancy counsellors receive it only in the context of full counselling on all of the available options, without any advocacy or promotion of abortion. The Bill only applies to information about pregnancy termination services (or their providers) outside the State which would be required by women in order to avail themselves of these services. Such information may not be provided in a notice in a public place or in a book, film, document or recording distributed without solicitation by the recipients. Information of a more general nature about abortion is not restricted. The Bill has been referred to the Supreme Court by the President under Article 26 of the Constitution.

CRIMINAL

Contempt Bill 1995 [Private Member's Bill]
This Bill, as presented by Mr Willie O'Dea, TD, aims to provide that a person shall not be guilty of contempt of court or of any other offence for refusing to disclose the source of information contained in any publication for which he is responsible unless it is established to the satisfaction of the court or tribunal in question that such disclosure is necessary to protect and vindicate the constitutional right of the individual or to protect the security of the State.

Proceeds of Crime Bill 1995 [Private Member's Bill]
This Bill, as introduced by Mr John O'Donoghue, TD aims to provide for the freezing and recovery of the proceeds of suspected, specified criminal activity and creates related criminal offences.

Criminal Law (Sexual Offences) Bill 1995 [Private Member's Bill]
This Bill, as introduced by Senator Cathy Horan, aims to extend the provisions of the Criminal Law (Rape) Act 1981 (as amended) to the prosecution and trial of offences concerning incest (under the Punishment of Incest Act 1908) and carnal knowledge of under-age females (contrary to the Criminal Law Amendment Act 1935). [See now Criminal Law (Incest Procedings) Bill 1995, below].

Criminal Law (Sexual Offences) (No. 2) Bill 1995
This Bill, as introduced by Mr John O'Donoghue, TD, aims to permit *bona fide* members of the press to attend at proceedings for offences contrary to the Punishment of Incest Act 1908. [See now Criminal Law (Incest Procedings) Bill 1995, below].

Criminal Law (Incest Proceedings) Bill 1995
This Bill, as presented by the Minister for Justice on 1 March 1995, aims to reverse the effect of the decisions of the Central Criminal Court on 1 and 17 February 1995 holding that s.5 of the Punishment of Incest Act 1908 precludes the revelation of the verdict and sentence (if any) in a case of incest.

People (Director of Public Prosecutions) v Brendan Hogan. Court of Criminal Appeal 1992 (O'Flaherty, Geoghan and Kinlen JJ) 12 January 1994. [1994] 2 ILRM 74
Accomplice evidence – Trial judge's charge to the jury – Warning as to danger of convicting an accused on basis of uncorroborated evidence of accomplice – Nature of corroboration required – Whether trial judge's direction to jury was defective given failure to set out reasons why accomplice evidence had to be treated with caution by a jury – Fact that accomplice had received reduction in sentence known to jury.

Christopher O'Connell v Director of Public Prosecutions and the Hon. Mr Justice Spain. Supreme Court (Finlay CJ, Blayney and Denham JJ) [1994] 2 ILRM 21
Preliminary examination – Discharge of accused by district judge in respect of offences expressed to be in contravention of regulations which had been repealed – Accused sent forward in respect of remaining charge – Addition of further charges to indictment by DPP – Two charges expressed to be in contravention of current regulations which replaced the regulations which had been repealed – Whether interference with judicial determination – Criminal Procedure Act 1967, S.8(2), 18.

CONSUMER

Package Holidays and Travel Trade Bill 1995
This Bill, as presented by the Minister for Transport, Energy and Communications on 10 February 1995, aims to give effect to EC Directive 90/314/EEC (of 13 June 1990) on package holidays, package travel and package tours. The purpose of

the Directive is to harmonise aspects of national provisions relating to package travel in the EC, with a view to improving the level of protection for customers and eliminating distortions of competition between the various Member States.

EMPLOYMENT

Adoptive Leave Bill 1993
This Bill, as passed by Dáil Éireann on 1 March 1995, aims to entitle female employees, and in certain circumstances male employees, to employment leave for the purpose of child adoption. It also extends to them the protection against unfair dismissal afforded by the Unfair Dismissals Act 1977.

ENVIRONMENT

Arterial Drainage (Amendments) Bill 1995 [Private Members Bill]
This Bill, as presented by Senator Brendan Daly, aims to amend and extend the Arterial Drainage Act 1945 to make provision for the execution of such works as may be found necessary to enable the protection of land or buildings in urban and other areas from damage resulting from inland and costal flooding. Provision is made for the maintenance of such works and for the payment of compensation to certain persons for damage resulting from flooding.

Environmental Protection Agency Act 1992 (Urban Waste Water Treatment) Regulations 1994 (SI No. 419 of 1994)
These Regulations, which give effect to the provisions of Council Directive 91/271/EEC (of 21 May 1991) concerning urban waste water treatment, prescribe requirements in relation to the provision of collecting systems and treatment standards generally and in sensitive areas. Ten water bodies are identified as sensitive areas. Provision is also made for monitoring procedures in relation to treatment plants and pre–treatment requirements in relation to industrial waste water entering collecting systems and urban waste water plants. Compliance by sanitary authorities with the Regulations will be on a phased basis from 31 December 1998 to 31 December 2005.

FAMILY

Family Law Bill 1994
This Bill, as passed by Dáil Éireann on 1 February 1995, aims to make further provision in relation to the jurisdiction of the courts to make preliminary and ancillary orders in cases where spouses become judicially separated under the law of the State or under the law of another state or where marriages are dissolved.

HEALTH AND SAFETY

Vital Statistics (Stillbirths) Regulations 1994. (SI No. 427 of 1994)
These Regulations, which replace the Vital Statistics (Foetal Deaths) Regulations 1956, provide for the collection of specified statistics on stillbirths which relate to children born weighing 500 grammes or more, or having a gestational age of 24 weeks or more, who show no signs of life. The Regulations came into force on 1 January 1995 and were made under the Stillbirths Registration Act 1994..

Medical Preparations (Licensing, Advertisement and Sale) (Amendment) Regulations 1994 (SI No. 439 of 1994)
These Regulations give effect to Council Directive 92/73/EEC (of 22 September 1992) widening the scope of Directives 65/65/EEC and 75/319/EEC on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products. Aditionally, provisions are laid down with regard to homoeopathic medicinal products. Effect is also given to Council Regulation (EEC) 2309/93 (of 22 July 1993) with particular regard to licences for medicinal products for human use granted in accordance therewith. The Regulations will come into effect on 1 October 1995 with the exception of the licensing provision in article 3(c) which came into effect on 1 January 1995.

Medical Preparations (Labelling and Package Leaflets) (Amendment) Regulations 1994 (SI No. 440 of 1994)
These Regulations give effect to article 7(2) of Council Directive 92/73/EEC (of 22 September 1992) widening the scope of Directives 65/65/EEC and 75/319/EEC on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products and laying down additional provisions on homoeopathic medicinal products. The Regulations will come into operation on 1 October 1995.

European Communities (Personal Protective Equipment) (CE Marking) Regulations (SI No 457 of 1994)
These Regulations amend the European Communities (Personal Protective Equipment) Regulations (SI No. 272 of 1993) as amended by the European Communities (Personal Protective Equipment) (Amendment) Regulations (SI No. 13 of 1994). They give effect to Directive 93/68/EEC (of 22 July 1993) amending Council Directive 89/686/EEC (of 21 December 1989) as amended by Council Directive 93/95/EEC (of 29 October 1993), on the CE conformity marking and assessment procedures for the technical harmonisation of the laws of the Member States. The Director of Consumer Affairs has powers of enforcement for these Regulations which require the manufacturer, or the manufacturer's authorised representative within the Community, to affix the revised CE conformity making on personal protective equipment. The Regulations came into operation on 1 January 1995. Personal protective equipment complying with the marking arrangements in force before this date shall continue to be allowed to be placed on the market until 1 January 1997.

European Communities (Safety of Toys) (Amendment) Regulations 1994 (SI No. 458 of 1994)
These Regulations amend the European Communities (Safety of Toys) Regulations 1990 (SI No. 32 of 1990). They give effect to Council Directive 93/68/EEC (of 22 July 1993) amending Council Directive 88/378/EEC (of 3 May 1988) on the CE conformity marking and assessment procedures for the technical harmonisation of the laws of Member States. The Regulations, which may be enforced by the Director of Consumer Affairs, require the manufacturer, or the manufacturer's authorised representative within the community, to affix the revised CE conformity marking on toys. The Regulations came into operation on 1 January 1995. Toys complying with the marking arrangement in force before this date shall continue to be allowed to be placed on the market until 1 January 1997.

European Communities (Infant Formulae) Regulations 1994 (SI No. 459 of 1994)
These Regulations give effect to Commission Directive 91/321/EEC (of 14 May 1994) and Council Directive 95/52/EEC (of 18 June 1992) on compositional, labelling and marketing requirements for infant formulae and follow–on formulae intended for infants in good health. The Regulations came into effect on 3 January 1995.

Health (Dental Services for Children) Regulations 1995 (SI No. 21 of 1995)
These Regulations extended eligibility for children's dental services up to the attainment of the child's fourteenth birthday.

PLANNING

Huntsgrove Developments Ltd v Meath County Council High Court (Lardner J) [1994] 2 ILRM 36
Planning and development – Principles governing revision of development plan

Consumer Affairs shall monitor all consumer charges by credit institutions and, for that purpose, would repeal s.28 of the Central Bank Act 1989.

European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (SI No. 27 of 1995)
These Regulations give effect to Council Directive 93/13/EEC (of 5 April 1993) on unfair terms in consumer contracts. A term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. 'Consumer' means a natural person who is acting for purposes which are outside his business. The Regulations will apply to all consumer contracts concluded after 31 December 1994. Cf. also (1995) 13 ILT 90.

EMPLOYMENT

Adoptive Leave Act 1995
The Adoptive Leave Bill 1993 was passed by both Houses of the Oireachtas on 9 March 1995 (cf. (1995) 13 ILT 91).

Adoptive Leave Act 1995 (Commencement) Order 1995 (SI No. 64 of 1995)
This Order brought the Adoptive Leave Act 1995 into operation on 20 March 1995.

ENVIRONMENTAL

Environmental Protection Agency Act 1992 (Established Activities) Order 1995 (SI No. 58 of 1995)
This Order, which should be read in conjunction with s.82(3) of the Environmental Protection Agency Act 1992, specifies the various dates (between 29 May 1995 and 1 March 1996) on or after which the established activities concerned are required to have applied to the Environmental Protection Agency for an integrated pollution control licence.

INQUESTS

Coroners (Amendment) Bill 1995
This private member's Bill, introduced by Mr Willie O'Dea, TD, aims to allow Coroners to bring in a verdict of suicide. It would also allow Coroners to be paid travelling, subsistence and out-of-pocket expenses as well as expenses for maintaining an office and secretarial staff.

INTERNATIONAL LAW

***John McElhinney v. Anthony Williams and Her Majesty's Secretary of State for Northern Ireland:* High Court (Costello J) [1994] 2 ILRM 115**
Constitution – Soverign immunity – Alleged assault by British soldier within the State – Scope of the doctrine of soverign immunity – International law principle of reciprocity – Right to bodily integrity – Right to claim redress in the courts – Constitutional recognition of principles of international law

Practice – Affidavit – Cross-examination of deponent – No need for cross-examination where court is not deciding controversial questions of fact

LOCAL GOVERNMENT

***Maurice Downey v. John O'Brien:* High Court (Costello J) [1994] 2 ILRM 130**
Negligence – Sale of shares owned by Waterford Harbour Commissioners – Purchase price determined by reference to net asset value of company – Life assurance policies valued in accordance with surrender value and not cost price – Provision for deferred taxation deducted in calculating net asset value – Standard Statement of Accounting Practice – Surcharge imposed by local government auditor on chairman of commissioners and general manager – Natural justice – Prior warning given by auditor to commissioners as to reservations regarding the transaction before imposing the charge – Local Government (Ireland) Act 1871, s.12 – Local Government (Ireland) Act 1902, s.20 – Companies (Amendment) Act 1986

***Dublin County Council v. West Link Toll Bridge Ltd:* High Court (Geoghegan J) [1994] 2 ILRM 204**
Rating – Agreement for establishment and operation of toll road – Whether defendant in occupation of rateable hereditaments – Whether tolls were privately occupied incorporeal hereditaments – Whether offices, stores and car parks ancilliary to tolls rather than public road – Whether tolls exclusively for public purposes and within exemption from rating – Poor Relief (Ireland) Act 1838, s.63 – Local Government (Toll Roads) Act 1979, s.9

***County Meath Vocational Education Committee v. David Joyce and Ors:* High Court (Flood J) [1994] 2 ILRM 210**
Planning and development – Respondents established camp site near school – Applicant sought injunction restraining unauthorised use of roadside near school – Local Government (Planning and Development) Act 1976, s.27

Housing Authority – Definition of homeless person – Housing requirements of persons who pursue nomadic way of life – Whether statutory obligation upon housing authority to provide housing or serviced sites for travelling persons – Housing Act 1966, s.111 – Housing Act 1988, ss.2, 9, 11, 13

PLANNING

Local Government (Planning and Development) Regulations 1995 (SI No. 69 of 1995)
These Regulations make a number of amendments to the Local Government (Planning and Development) Regulations 1994 (SI No. 86 of 1994). The changes made relate to exempted development, the requirements and procedures in respect of planning applications, Part X of the 1994 Regulations and prescribed forms.

PRACTICE AND PROCEDURE

***Sean O'Fearail v. Colm McManus:* Supreme Court (O'Flaherty, Egan and Denham JJ) [1994] 2 ILRM 81**
Solicitor coming off record – Contract of motor insurance – Solicitor instructed to act in respect of claim for assault and battery against injured party – Subsequent repudiation of liability by the insurance company – Rules of the Superior Courts 1986, O.7, r.3

***William Burke and Ors v. Central Independent Television plc:* High Court (Murphy J) Supreme Court (Finlay CJ, O'Flaherty, Egan, Blayney and Denham JJ) [1994] 2 ILRM 161**
Discovery – Privilege – Dicscovery of documents which might endanger human life – Television programme alleging connections with terrorist organisation – Action claiming damages for libel brought in respect of programme – Order for discovery – Claim that documents should not be produced because the disclosure of the information would endanger informers and undercover police officers—Whether discovery could be ordered on the basis that only lawyers involved in the case would inspect documents

Constitution – Balancing of Constitutional rights – Priority of right to life over right to resort to the courts and right to protection and vindication of good name

Defamation – Libel – Pleading – Distinction between plea of justification and defence of fair comment on matters of public interest – Plea of fair comment inappropriate where simply asserting that a purported statement of fact is accurate

REAL PROPERTY

Land Act 1965 (Additional Categories of Qualified Persons) Regulations 1995 (SI No. 56 of 1995)
These Regulations add to the list of qualified persons under s.45 of the Land Act 1965 persons whose principal place of residence is in a Member State of the European Communities or other

ADMINISTRATIVE LAW

Heritage Bill 1994
This Bill was passed by both Houses of the Oireachtas on 29 March 1995 (cf. (1995) 13 ILT 90).

European Communities (Award of Contracts by Entities Operating in the Water, Energy, Transport and Telecommunications Sectors) Regulations 1995 (SI No. 51 of 1995)
These Regulations relate to EEC Council Directive 93/38/EEC which governs the procedures for the procurement of supplies, works (both building and civil engineering) and services, by certain entities operating in the water, energy, transport and telecommunications sectors. In general, the procedures must be followed when the contract value exceeds the relevant thresholds in the Directive.

AGRICULTURE

European Communities (Introduction of Organisms Harmful to Plants or Plant Products) (Prohibition) (Amendment) Regulations 1995 (SI No. 50 of 1995)
These Regulations implement the provisions of Commission Directive 94/61/EC (of 15 December 1992) which extends the period of provisional recognition of certain protected zones of the Community to 1 July 1995, and corrects an error which occurs in the European Communities (Introduction of Organisms Harmful to Plants or Plant Products) (Prohibition) (Amendment) Regulations 1993 (SI No. 408 of 1993).

COMMERCIAL

Minerals Development Bill 1995
This Bill, as presented by the Minister for Transport, Energy and Communications on 9 March 1995, aims to make express statutory provision for the renewal of minerals prospecting licences and validate licences renewed to date since the enactment of the Minerals Development Act 1940, in effect to give statutory cover for the *status quo*. It also seeks to secure recoupment of the costs of the Minister for Transport, Energy and Communications in considering applications for State mining leases or licences or undertakings under the Minerals Development Acts 1940 - 1979, whether or not the applications are successful. Further, the penalties for offences under the 1940 Act are increased and made applicable to bodies corporate.

CONSTITUTIONAL

Freedom of Information Bill 1995
This private member's Bill, presented by Senator Dick Roche, aims to provide for public access to documents concerning decisions or actions taken by a public institution, subject to certain exceptions.

CRIMINAL

Criminal Law (Incest Proceedings) (No. 2) Bill 1995
This Bill, presented by Senator Maurice Manning, aims to address the immediate problems arising from the rulings of 1 and 17 February 1995 of the Central Criminal Court and, in particular, the ruling that s.5 of the Punishment of Incest Act 1908 precludes the revelation of the verdict and sentence (if any) in a case of incest. It is understood that the Criminal Law (Incest Proceedings) Bill 1995 (cf. (1995) 13 ILT 90), which has broadly the same effect as the present Bill, is to be withdrawn and that the present Bill, originating in the Senate, is the one which the government intends to pursue.

Criminal Justice Act 1994 (Commencement) Order 1995 (SI No. 55 of 1995)
This Order brought s.32(10) of the Criminal Justice Act 1994 into operation on 6 March 1995. The remainder of s.32 together with ss.57 and 58(2) were brought into operation on 2 May 1995.

***Director of Public Prosecutions v. Barry Byrne:* Supreme Court (Finlay CJ, O'Flaherty, Egan, Blayney and Denham JJ) [1994] 2 ILRM 91**
Summary offence – Prosecution – Dismissal of charge – Delay before trial – Whether such delay excessive – Whether such delay in breach of Article 38.1 of the Constitution – Whether delay without prejudice is ground for dismissal of charge – Constitution of Ireland 1937, Article 38.1

***People (Director of Public Prosecutions) v. John McKeever:* Court of Criminal Appeal (O'Flaherty, Lynch and Denham JJ) [1994] 2 ILRM 186**
Trial – Conviction – Application for leave to appeal against conviction and severity of sentence – Whether transcript of trial accurate – Whether manner in which majority verdict reached flawed – Whether failure to record all conversations with applicant amounted to a breach of Judges' Rules – Whether re-arrest immediately after release lawful – Courts of Justice Act 1924, s.33 – Criminal Justice Act 1984, s.10(3)

***Kieran Grennan v. District Judge Brian Kirby and the Director of Public Prosecutions:* High Court (Murphy J) [1994] 2 ILRM 199**
Procedure – *Autrefois acquit* – Grounds on which applicant's conviction quashed – Action of district judge of such a nature as to deprive him of jurisdiction to enter upon hearing of matter

Judicial review – *Certiorari* – Whether applicant in jeopardy of conviction or trial a nullity from outset – Whether applicant could plead *autrefois acquit* where conviction quashed by *certiorari* – Whether matter should be remitted to District Court

***Director of Public Prosecutions v. William Logan:* Supreme Court (Finlay CJ, Egan and Blayney JJ) [1994] 2 ILRM 229**
Assault contrary to common law – Offence capable of being prosecuted summarily or on indictment – Whether dispensation from six-month time limit pertaining to summary prosecution of an indictable offence applied – Petty Sessions (Ireland) Act 1851, s.10(4) – Offences Against the Person Act 1861, ss.42, 46, 47 – Courts of Justice Act 1924, s.77 – Criminal Justice Act 1951, ss.2, 7, 11.

CONSUMER

Consumer Credit Bill 1994
This Bill, as amended in the Select Committee on Enterprise and Economic Strategy, aims to revise and extend the law relating to consumer credit, hire-purchasing, hiring and moneylending and to enable effect to be given to Council Directive 87/102/EEC (of 22 December 1986) as amended by Council Directive 90/88/EEC (of 22 February 1990). To this end, it would repeal the Hire-Purchase Acts 1946 - 1980 and the Moneylenders Acts 1900 - 1989, repeal and amend certain provisions of the Sale of Goods and Supply of Services Act 1980 and amend and extend the Pawnbrokers Act 1964. The Bill would provide that the Director of

-ing land zoned for agricultural use under development plan – Proposal by third party to build rival shopping, leisure and residential complex nearby – Respondents agreeable in principle – Financial contribution plan – Decision to review plan subsequently taken by respondents and draft plan thereafter put on public display – Whether fair procedures adhered to by respondents in process of making their decision – Whether bias inherent in that process – Whether decision taken one of an administrative as opposed to a judicial nature – Whether applicant should have been consulted prior to actual decision being taken – Local Government (Planning and Development) Act 1963, ss. 20,21,26 (g) and (h)

KSK Enterprises Ltd v An Bord Pleanála and Ors. Supreme Court (Finlay CJ, O'Flaherty, Egan, Blayney and Denham JJ) [1994] 2 ILRM 1
Planning permission – Notice of motion seeking leave to apply for judicial review – Time limit – Whether application made in time by filing notice of motion in Central Office of the High Court – Notice of motion must be served on all respondents within time limit – Local Government (Planning and Development) Act 1992, s.19 (3) – Rules of the Superior Courts, 0.84.

Interpretation – Words and phrases – 'Application made by motion on notice' – Time limit – Whether application 'made' by filing of notice of motion in Central Office of the High Court – Whether requirement for service on all respondents – Local Government (Planning and Development) Act 1992, s.19 (3) – Rules of the Superior Courts, 0.84.

PRACTICE AND PROCEDURE

Civil Legal Aid Bill 1995
This Bill, as presented by Senator Maurice Manning, aims to put the Scheme of Civil Legal Aid and Advice on a statutory footing. That scheme is administered by the Legal Aid Board, a non-statutory body established in 1979 with funds provided by the exchequer, and aims to ensure that persons of limited means have access to justice in civil matters. Provision is made for the establishment of a Legal Aid Board, its membership, financing and the criteria to be considered by the Board when deciding on applications for legal aid and advice and the conditions under which such aid and advice will be made available.

James Fitzgearld v William Kenny and Or. Supreme Court (Finlay CJ, O'Flaherty, Egan, Blayney and Denham JJ) [1994] 2 ILRM 8
Evidence – Damages – Appeal on *quantum* – Personal injuries – Assessment on basis that plaintiff would remain a member of An Garda Síochána – Plaintiff dismissed shortly afterwards due to injuries sustained in accident – Exacerbation of plaintiff's physical and mental condition – Whether fresh evidence should be admitted – Basis of admission of fresh evidence.

Supreme Court – Evidence – Appeal on *quantum* – Assessment by High Court – Subsequent change in circumstances – Discretion of court whether fresh evidence should be admitted – Matters to be considered in exercise of discretion – Rules of the Superior Courts 1986, 0.58 r.8

REAL PROPERTY

AS v GS and Ors High Court (Geoghegan J) [1994] 2 ILRM 68
Priority – Whether claim for a property adjustment order amounts to a *lis pendens* – Whether volunteer bound by *lis pendens* irrespective of whether he has notice of it and irrespective of whether it has been registered – Judgments (Ireland) Act 1884, s.10

Family Law – Judicial separation – Family home – Interim order preventing registration of judgment mortgage – Family Home Protection Act 1976, s.5(1) – Judicial Separation and Family Law Reform Act 1989, ss.11(c), 15

TAX

Value-Added (Threshold for Advance Payment)(Amendment) Order 1994 (SI No. 342 of 1994)
Section 19(6) of the Value-Added Tax Act 1972, together with SI No. 345 of 1993, requires that an advance payment of VAT be made in December 1993 and subsequent years by any taxable person whose total annual VAT liability exceeds a threshold. This Order increases this threshold from £300,000 to £1,000,000 in respect of the advance payment to be made in December 1994 and subsequent years.

European Communities (Value-Added Tax) Regulations 1994 (SI No. 448 of 1994)
These Regulations insert a new section 15B into the Value-Added Tax Act 1972. The new section deals with the transitional arrangements applicable for the taxation of trade between Austria, Finland and Sweden, and Ireland, in the context of these countries' accession to the European Union on 1 January 1995. In effect, the Regulations introduce transitional measures which ensure that VAT at the point of entry applies to goods from Austria, Finland and Sweden which are dispatched prior to 1 January 1995 and are placed under a tax suspended import procedure in the State, but are not cleared through that procedure until after 1 January 1995.

Value-Added Tax (Refund of Tax) (No. 27) Order 1995 (SI No. 38 of 1995)
This Order allows for a full refund of the VAT paid on qualifying equipment for medical research purchased through voluntary donations with effect from 27 January 1994.

TORT

Defamation Bill 1995 [Private Members Bill]
This Bill, as presented by Mr Michael McDowell, TD, aims to implement the recommendations of the Law Reform Commission's reports on defamation and the crime of libel (December 1991). The principal reforms proposed are: (i) abolition of the distinction between libel and slander; (ii) plaintiffs will be required to prove that allegedly defamatory material is false; (iii) a speedy new remedy (the declaratory judgment) would be introduced in which damages would not be awarded, and (iv) publishers of defamatory material would not be liable to pay damages (other than for the financial loss) where reasonable care was exercised. In addition, the offence of criminal libel would be replaced with the new offence of criminal defamation and limited protection for journalists, editors and publishers would be provided in respect of the non-disclosure of sources.

Ciaran Foley v Independent Newspapers Ltd and Ors High Court (Geoghegan J) [1994] 2 ILRM 61
Defamation – Libel – Fair comment – Whether newspaper article libelled plaintiff – Whether article based on facts truly stated – Whether article contained imputations of corrupt or dishonourable motives – Whether fact of fundamental importance omitted from article – Appeal against assessment of damages by Circuit Court – Whether costs of defendant who was held not to have libelled plaintiff should be paid by other defendants – Discretion of court – Courts of Justice Act 1936, s,78 – Defamation Act 1961, s.23.

Constitution – Freedom of expression – Whether law of libel affected by constitutional guarantee – Obligation of State to vindicate good name of every citizen – Constitution of Ireland, Article 40.3.2, Article 40.6.1i.

European state which is a contracting party to the European Economic Area Agreement and bodies incorporated, having their registered office, central administration or principal place of business in those states.

Heatons Wholesale Ltd v. Anthony McCormack (County Registrar for the County of Roscommon): **High Court (Lynch J) [1994] 2 ILRM 83**
Landlord and tenant – Ground rents – Purchase of fee simple – Statutory right – Commercial property – Duty of respondent to determine dispute – Landlord and Tenant (Ground Rents) Act 1967, ss.3, 17 – Landlord and Tenant (Ground Rents)(No. 2) Act 1978, ss.7, 8

Statute – Interpretation – Effect of repeal of certain statutory provisions – Whether Acts of 1967 and 1978 are to be read as one – Meaning of 'and the act of 1967 shall apply accordingly' – Landlord and Tenant (Ground Rents)(No. 2) Act 1978, ss.1(2), 8

National Irish Bank Ltd v. Robert Graham and Ors: **Supreme Court (Finlay CJ, Egan and Blayney JJ) [1994] 2 ILRM 109**
Purchase of land – Execution of deed of mortgage by purchasers prior to taking possession – Composite transaction whereby land conveyed by vendor and mortgage executed in favour of lender who had advanced most of the purchase money – Purchaser acquiring equity of redemption – Definition of 'family home'—Family Home Protection Act 1976, ss.2, 3

International Mushrooms Ltd v. Commissioner of Valuation: **High Court (Keane J) [1994] 2 ILRM 121**
Rateable Valuation – Production of mushroom spawn in premises located in industrial estate – Whether premises were farm buildings – Whether premises were exempted as a construction affixed to land developed for agricultural purposes – Valuation (Ireland) Act 1852, ss.12, 14, schedule references nos. 1 and 2 – Valuation Act 1986, ss.2, 3

Hubert Murphy v. Allied Irish Banks Ltd: **High Court (Murphy J) [1994] 2 ILRM 220**
Trust – Investment – Sale of property by mortgagee – Surplus remaining after discharge of secured debt and costs of realisation – Surplus held by bank as trustee – Claim against trustee for interest on trust monies or profits of business carried on with trust monies – Liability of trustee for breach of trust determined by reference to least beneficial investment permitted – Appropriate interest rate having regard to court rate or bank deposit rate

Limitation of action – Breach of trust – Confirmation that trust money was being held – Running of time in respect of claim to interest on trust money – Rules as to acknowledgement inapplicable to claims for breach of trust – Statute of Limitations 1957, ss.43, 44

REVENUE

Airspace Investments Ltd v. M. Moore, Inspector of Taxes: **High Court (Lynch J) [1994] 2 ILRM 151**
Whether company carrying on trade—Company motivated by tax benefits to be obtained from transaction – Master tapes paid for partly with money borrowed from owner of tapes on basis that loan would not be repaid unless income produced from their exploitation exceeded a certain level – Extent of expenditure on machinery or plant for the purposes of trade – Capital allowances – Whether transaction had no justification in law and a device designed to obtain capital allowances – Income Tax Act 1967, s.241

SOCIAL WELFARE

Social Welfare Bill 1995
This Bill, as presented by the Minister for Social Welfare on 2 March 1995, aims to provide for the increases (effective from early to mid June 1995) in the rates of social welfare payments announced in the 1995 Budget and for a number of other alterations in social welfare schemes. The Bill also aims to provide for the introduction of an Adoptive Benefit Scheme and an extension of the Carer's Allowance Scheme to carers for incapacitated people aged 66 or over who are not in receipt of a social welfare payment. Rates of PRSI contributions are to be changed and the earnings threshold below which employees and the self-employed are exempt from liability for Health Contributions and the Employment and Training Levy is to be increased.

European Communities (Social Welfare) Regulations 1995 (SI No. 25 of 1995)
These Regulations provide for the payment of Health and Safety Benefit, which is a social insurance payment, to a woman who: is pregnant; has recently given birth; is breastfeeding or has been awarded health and safety leave under s.18 of the Maternity Protection Act 1994 and satisfies the contribution conditions. The Regulations came into operation on 30 January 1995. Cf. also (1995) 13 ILT 67.

Social Welfare (Consolidated Payments Provisions)(Amendment) Regulations 1995 (SI No. 26 of 1995)
These Regulations prescribe the amount of reckonable weekly earnings a claimant must have to qualify for Health and Safety Benefit and provide for the payment of reduced rates of benefit to claimants whose reckonable weekly earnings are below this prescribed amount. The Regulations also contain general provisions relating to claims and payments and include overlapping benefits provision where a person is entitled to Health and Safety Benefit and another social welfare payment at the same time.

TORT

Occupiers' Liability Bill 1994
This Bill, as introduced by the Minister for Equality and Law Reform and amended in the Select Committee on Legislation and Security, aims to amend the law relating to the liability of occupiers of premises (including land) in respect of dangers existing on such premises for injury or damage to persons or property while on such premises by replacing the existing common law rules.

TRANSPORT

European Communities (Merchandise Road Transport) (Amendment) Regulations 1995 (SI No. 67 of 1995)
These Regulations amend the format of various affidavits which must be submitted with an application for a Road Freight Carrier's Licence. The existing Regulations with regard to good repute are also amended. The Regulations came into operation on 24 March 1995 in respect of offences alleged to have been committed or applications for the grant of a licence duly received on or after that date.

European Communities (Road Passenger Transport)(Amendment) Regulations 1995. (SI No. 68 of 1995)
These Regulations amend the various affidavits which must be submitted with an application for a Road Passenger Transport Operator's Licence. The existing Regulations with regard to good repute and enforcement are also amended. The Regulations came into operation on 24 March 1995 in respect of offences alleged to have been committed or applications for the grant of a licence duly received on or after that date.

ILT DIGEST

OF LEGISLATION AND REPORTED CASES

Compiled by DAVID BOYLE

ADMINISTRATIVE LAW

Heritage Act 1995 (No. 4 of 1995)
This Act came into effect on its signature by the President on 10 April 1995. Cf. (1995) 13 ILT 119.

Ethics in Public Office Bill 1994
This Bill, presented by the Tánaiste and amended in the Select Committee on Finance and General Affairs, aims to provide for the disclosure of interests of holders of certain public offices (including members of the Houses of the Oireachtas) and designated directors of and persons employed in designated positions in certain public bodies. It also aims to provide for the appointment by each such House of a committee, and for the establishment of a commission to investigate contraventions of the proposed legislation and to establish guidelines to ensure compliance therewith. It also aims to provide for the prohibition of the retention of valuable gifts by holders of certain public offices and the amendment of the Prevention of Corruption Acts 1889 - 1916.

***Eugene Dudley v. An Taoiseach, the Government of Ireland, Dáil Éireann and the Attorney General* High Court (Geoghehan J) [1994] 2 ILRM 321**
Judicial review – Whether declaratory relief is obtainable against Dáil Éireann and the Taoiseach – Whether judicial review of the conduct of the government could be granted – Electoral Act 1923, s. 53 – Electoral Act 1992, s.39(2)

Constitution – Whether there is a constitutional obligation to hold a by-election within a reasonable time of a vacancy occurring – Constitution of Ireland 1937, Articles 16.7, 40.1

AGRICULTURE

European Communities (Welfare of Calves) Regulations 1995 (SI No. 90 of 1995)
These Regulations lay down standards for the protection of calves kept in intensive or other systems of rearing or fattening and give effect to Council Directive No. 91/629/EEC (of 19 November 1991). The Regulations set down rules for the accomodation of calves and the conditions to be met by the owner or person in charge of the calves to assure their health and welfare. The Regulations came into operation on 25 April 1995.

European Communities (Welfare of Pigs) Regulations 1995 (SI No. 91 of 1995)
These Regulations lay down standards for the protection of pigs kept in intensive or other systems of breeding, rearing or fattening and give effect to Council Directive No. 91/630/EEC (of 19 November 1991). The Regulations set down rules for the accomodation of pigs and the general conditions to be met to assure their health and welfare. The Regulations came into operation on 25 April 1995.

COMPETITION

***Dermot Donovan and Ors v. Electricity Supply Board* High Court (Costello J) [1994] 2 ILRM 325**
Abuse of a dominant position – Monopoly supplier of electrical power – Electrical contracting services market – Whether conditions for supply and self-regulatory body's rules affecting competition – Restrictions on admission to trade association – Subsequent removal of restrictions – Supply of electrical power to installations covered by completion certificate – Requirement that works carried out by non-registered contractors had to be certified by inspector employed by the association – Effect of notification to Competition Authority – Competition Act 1991, ss. 4, 5, 6, 7 – EC Treaty, Articles 85, 86

CONSTITUTIONAL

Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995 (No. 5 of 1995)
This Act (see (1995) 13 ILT 90) came into effect on 12 May 1995 on the President's signature, and in accordance with the decision of the Supreme Court in *In Re the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995*, Supreme Court, 12 May 1995 (for full text of judgment, see *Irish Times*, 13 May 1995).

***James Howard and Ors v. Commissioners of Public Works in Ireland, Ireland and the Attorney General* High Court (Lynch J) [1994] 2 ILRM 301**
Separation of powers – Determination in previous set of proceedings that Commissioners of Public Works had no power to develop site as a visitor centre – Injunction restraining such development – Statute subsequently conferring power on state authorities to engage in development – Whether an injustice done to the persons who brought the original proceedings to restrain the development – Whether an unconstitutional incursuion by the Oireachtas into the judicial domain – State Authorities (Development and Management) Act 1993, ss.2(1), (2), (3) – Constitution of Ireland 1937, Articles 6, 34, 40, 43

Practice – Order granting injunction drafted in excessively absolute terms which failed to take into account possibility of grounds for injunction being subsequently removed – Need for order amending or vacating earlier order – Inability of a court in a sepatate set of proceedings to alter order

***District Judge Liam Oliver McMenamin v. Ireland, the Minister for Justice and the Attorney General* High Court (Geoghegan J) [1994] 2 ILRM 368**
Remuneration of Judges – Duty of State to make salary and pension arrange-ments for judges which ensure the independence of the judiciary – Constitutional duty to secure pension rights for district judges which are not irrational or wholly inequitable – Constitutional obligation to alter and update mechanism in the light of changed circumstances if necessary – Reduction in amount of pension payable to district judges designed to meet costs of retirement and death gratuities – Changed circumstances resulting in disparity between the benefit received by way of gratuity and the amount lost by way of reduction in pension – Courts (Supplemental Provisions) Act 1961 – Courts of Justice and Court Officers (Superannuation) Act 1961, s.2 – Constitution of Ireland 1937, Articles 35, 36

Equality – Difference between Circuit Court judges and District Court judges regarding number of years service required in order to qualify for full pension – Whether unfair discrimination – Whether inequality between judges as human persons – Constitution of Ireland 1937, Article 40.1

Separation of powers – Refusal by court to declare enactment unconstitutional – Declaration as to breach by State of its constitutional obligations – Need for legislation to remedy breach – Inability of court to require the introduction of legislation which would remedy breach

Jeremiah Anthony Cahalane v. His Honour Judge Anthony J Murphy and the Director of Public Prosecutions **Supreme Court (Finlay CJ, O'Flaherty, Egan, Blayney and Denham JJ) [1994] 2 ILRM 383**

Trial of offences – Trial in due course of law – Judicial Review – Offences against the Revenue – Preparation of charges – delay in charging the applicant and returning for trial – Whether delay excessive and unconscionable – Prejudice – Death of potential witnesses – Hardship caused by revocation of licence to carry on business – Constitution of Ireland 1937, Articles 38, 40 – Finance Act 1983, ss.92(2)(4), 94(2)(a)(d)(e), 95(5) – Finance Act 1988, s.9(1)

CONSUMER

The **Package Holidays and travel Trade Bill 1995** has been amended in the Select Committee on Enterprise and economic Strategy. Cf. (1995) 13 ILT 90.

CONTRACT

Declan Kelly v. Cruise Catering Ltd and Or **Supreme Court (O'Flaherty, Egan and Blayney JJ) [1994] 2 ILRM 394**

Postal rule – Contract made by post between plaintiff who was in Ireland and company in Norway – Place where contract was made – Contract signed by plaintiff and posted in Ireland to company in Norway – Whether acceptance complete when put in post box

Practice – Procedure – Action for breach of Contract – Application to serve originating summons out of the jurisdiction – Whether Ireland was place where contract was made – *Forum non conveniens* – Comparitive cost and convenience of proceedings in this jurisdiction as to opposed to place of defendant's residence – Rules of the Superior Courts 1986, O.11, r.1(e)(i), O.11, r.2

CRIMINAL

The **Criminal Law (Incest Proceedings)(No. 2) Bill 1995** was passed by Seanad Eireann on 27 April 1995. Cf. (1995) 13 ILT 118

Transfer of Sentenced Persons Bill 1995

This Bill, as presented by the Minister for Justice, aims to provide for the transfer between the State and places outside the State of persons for the time being detained in prisons, hospitals or other institutions under orders made in the course of the exercise by courts and tribunals of their criminal jurisdiction. The enactment of the Bill will allow the State to ratify the European Convention on the Transfer of Sentenced Persons (1983) and to give effect to the Agreement on the Application among Member States of the European Communities of the Council of Europe Convention (1987).

Criminal Law (Bail) Bill 1995

This private member's Bill, introduced by Mr John O'Donoghue, TD, aims to regulate the law regarding the admission of accused persons to bail and to provide for the duties and responsibilities of bailspersons.

H v. Director of Public Prosecutions and the Commissioner of An Garda Síochána **Supreme Court (O'Flaherty, Egan and Denham JJ) [1994] 2 ILRM 285**

Judicial review – *Mandamus* – Director of Public Prosecutions – Failure to initiate prosecution – Whether discretion reviewable – Grounds of review – Whether private citizen can compel Director to provide reasons for failure to initiate prosecution – Whether director obliged to provide witness statements and documents to facilitate private prosecution

EMPLOYMENT

Adoptive Leave Act 1995 (No. 2 of 1995)

This Act is now in force with effect from 20 March 1995. Cf. (1995) 13 ILT 91 and (1995) 13 ILT 119.

ENVIRONMENT

Environmental Protection Agency (Licensing)(Amendment)(No.2) Regulations 1995. (SI No. 76 of 1995)

These Regulations amend article 23 of the Environmental Protection Agency (Licensing) Regulations 1994 to provide for the availability for inspection or purchase of documents related to applications for licences, revised licences or review of licences. The Regulations also require that any written report by or for the Agency for the purposes of a licence determination or decision will also be made available for inspection or purchase, over an extended period, following the making of the determination or decision.

EUROPEAN COMMUNITIES

European Communities (Amendment) Bill 1995

This Bill, as presented by Senator Maurice Manning, aims to amend s.4 of the European Communities Act 1972 in order to reflect the decision to establish the Joint Committee on European Affairs by transferring the Statutory functions exercised by the Joint Committee on Foreign Affairs in relation to the supervision of EC secondary legislation to the Joint Committee on European Affairs.

Ailish Young v. Pharmaceutical Society of Ireland, the Minister for Health, Ireland and the Attorney General **High Court (Murphy J) [1994] 2 ILRM 262**

EEC Treaty – Freedom of establishment – Recognition of pharmacy qualifications – Directive planning limitation on recognition of qualifications in order to prevent influx of pharmacists from member states where geographical distribution licensing systems operate into member states where there are no such rules – Registration of person who obtained recognised pharmacy qualifications in another member state – Regulations implementing directive – Registration did not entitle such a person to act as a pharmacist in respect of a pharmacy which had been in operation for less than three years – Whether limitation permitted by directive – Whether limitation inconsistent with right of establishment – Directive making it easier for persons to take up and pursue activities of self-employed persons – Limitation on facility rather than basic right of establishment – Pharmacy Act (Ireland) 1875, ss. 22A, 30 – Pharmacy Act 1962, s. 2(3A) – EEC Treaty 1957, Articles 54, 54, 57 – Council Directive 85/433/EEC – European Communities (Recognition of Qualifications in Pharmacy) Regulations 1987 – European Communities (Recognition of Qualifications in Pharmacy) Regulations 1991

HEALTH AND SAFETY

European Communities (Efficency Requirements for New Hot Water Boilers Fired with Liquid or Gaseous Fuels)(Amendment) Regulations 1995 (SI No. 72 of 1995)

The purpose of these Regulations is to give legal effect to Council Directive 93/68/EEC (of 22 July 1993) insofar as it relates to Council Directive 92/42/EEC (of 21 May 1992) on efficency requirements for new hot water boilers fired with liquid or gaseous fuels. They amend the European Communities

(Efficency Requirements for New Hot Water Boilers Fired with Liquid or Gaseous Fuels) Regulations 1994 (SI No. 260 of 1994). The Regulations came into effect on 23 March 1995.

INTELLECTUAL PROPERTY

***Phonographic Performance (Ireland) Ltd v. William Cody and Or* High Court (Keane J) [1994] 2 ILRM 241**
Copyright – Causing sound recordings to be heard in public without the payment of equitable remuneration to the copyright owner – Property rights of copyright owner – Copyright Act 1963, ss.17(4)(b), 31, 32, 60(4) – Constitution of Ireland 1937, Articles 40.3.2, 43.1

Practice – Pleading – Inconsistent alternative defences – No prejudice, embarassment or delay to the plaintiff – Rules of the Superior Courts 1986, O.19, r.27

Practice – Proof of facts by affadavit instead of oral evidence – proof of copyright in sound recordings and ownership of that copyright – Witnesses residing outside jurisdiction – Rules of the Superior Courts 1986, O.39, r.1

PLANNING AND DEVELOPMENT

Local Government (Planning and Development)(No. 2) Regulations 1995 (SI No. 75 of 1995)
These Regulations amend the Local Government (Planning and Development) Regulations 1994 (SI No. 86 of 1994) to provide for the making available for public inspection of documents relating to planning appeals and other matters determined by An Bord Pleanála. In any such case received by An Bord Pleanála on or after 10 April 1995, the documents, including the inspector's report, will be available for inspection for a period of five years commencing on the third working day following the day on which An Bord Pleanála makes its decision. It will be possible also to obtain a copy of all or part of any such document, except a plan or other drawing or a photograph.

PRACTICE AND PROCEDURE

***Eileen Galvin v. Mary Graham-Twomey* High Court (O'Flaherty J) [1994] 2 ILRM 315**
Discovery – Defamation – Claim that plaintiff libelled in letters sent by defendant to third parties but which plaintiff had not seen – Whether discovery can be used to allow a party to plead a cause of action which has hitherto not been pleaded

***Angelo Fusco v. Edward O'Dea* Supreme Court (Finlay CJ, Egan and Blayney JJ) [1994] 2 ILRM 389**
Discovery – Extradition proceedings – Whether discovery could be obtained against a third party who was outside the jurisdiction – Circumstances in which discovery could be obtained against a foreign government – Extradition Act 1965 – Rules of the Superior Courts 1986, O.11, O.31, r.29

Public international law – State immunity – Whether order for third party discovery could be made against soverign state

ROAD TRAFFIC

Road Traffic Bill 1995
This Bill, as presented by Senator Maurice Manning, aims to amend the disqualification requirements of s. 26 of the Road Traffic Act 1961 (as inserted by s. 26 of the Road Traffic Act 1994).

Road Traffic Act 1994 (Commencement) Order 1995 (SI No. 86 of 1995)
This order brought ss. 40, 41 and 47 of the Road Traffic Act 1994 into operation on 19 April 1995 and s. 43 of the same Act into operation on 1 June 1995.

Road Traffic Act 1994 (Section 41) Regulations 1995 (SI No. 89 of 1995)
These Regulations give effect to the provisions of s. 41 of the Road Traffic Act 1994 and outline the procedures governing the detention, removal, storage and subsequent release or disposal of vehicles detained under that section. The Regulations came into effect on 19 April 1995.

Road Traffic Act 1961 (Section 103)(Offences) Regulations 1995 (SI No. 87 of 1995)
These Regulations, which replace previous Regulations made under the Road Traffic Act 1961, declare the offences to which s. 103 of that Act applies. The Regulations also provide the form of notice which may be affixed to a vehicle or given to a person by a member of the Garda Síochána or Authorised Person who alleges that an offence has been committed. The Regulations also prescribe the amounts which a person, who is liable to be prosecuted, may pay as an alternative to the institution of a prosecution. The Regulations came into effect on 1 June 1995.

Local Authorities (Traffic Wardens) Act 1975 (Section 3)(Offences) Regulations 1995 (SI No. 88 of 1995)
These Regulations, which replace previous Regulations made under the Local Authorities (Traffic Wardens) Act 1975, declare the offences to which s. 3 of that Act applies. The Regulations also prescribe the form of notice which may be affixed to a vehicle or given to a person by a traffic warden employed by a local authority. The Regulations also prescribe the amounts which a person, who is liable to be prosecuted, may pay as an alternative to the institution of a prosecution. The Regulations came into effect on 1 June 1995.

SOCIAL WELFARE

Social Welfare Act 1995 (No. 3 of 1995)
The various sections of this Act come into force on the dates as provided for in the Act. Cf. (1995) 13 ILT 120.

TAXATION

Finance Bill 1995
This Bill, as presented by the Minister for Finance, proposes various changes in the taxation code, largely based on the Minister's 1995 Budget.

TRANSPORT

Road Transport Act 1978 (Section 5) Order 1995 (SI No. 84 of 1995)
The purpose of this Order is to exempt certain types of road transport operations performed in Ireland by Russian carriers of passengers and hauliers from the requirements to be authorised by licence or permit. This gives formal effect to an international road transport agreement between Ireland and the Russian Federation.

Road Transport (International Carriage of Goods by Road)(No. 2) Order 1995 (SI No. 85 of 1995)
The purpose of this Order is to allow the Russian transport authorities to issue permits on Ireland's behalf for access by Russian hauliers to Ireland. This gives formal effect to an international road transport agreement between Ireland and the Russian Federation

TRUST LAW

***In the Matter of the Estate of Mary Davoren, Deceased* High Court (Murphy J) [1994] 2 ILRM 276**
Certainty of objects – Will – Interpretation—Residuary bequest – Trust for education of persons chosen by trustees – Class consisting of children, grandchildren and descendants of specified persons – Meaning of the term 'descendants' – Closing of class – Rule against perpetuities – Rule against perpetual trusts

ILT DIGEST

OF LEGISLATION AND REPORTED CASES
Compiled by DAVID BOYLE

ADMINISTRATIVE LAW

Harbours Bill 1995
This Bill, as presented by the Minister for the Marine, aims to provide for the setting up of State commercial companies to manage and operate the ports of Arklow, Cork, Drogheda, Dublin, Foynes, Galway, New Ross, Shannon, Waterford and Wicklow. These ports are, at present, managed by harbour authorities in accordance with the Harbours Act 1946. The Bill further aims to provide for the setting up of a State commercial company to manage and operate Dun Laoghaire harbour which is, at present, managed by the Department of the Marine. The Bill also aims to define the functions of the companies to be established and to revise the law relating to pilotage.

AGRICULTURE

Diseases of Animals Act 1966 (First Schedule) (Amendment) (No. 2) Order 1995 (SI No. 97 of 1995)
This Order extends the definition of animal in the Diseases of Animals Act 1966 to include all animals not already covered in the First Schedule to the Act.

Diseases of Animals (Protection of Animals During Transport) Order 1995 (SI No. 98 of 1995)
This Order lays down the standards for the protection of animals during transport and gives effect to Council Directive No. 91/628/EEC (of 19 November 1991). The Order makes general provision for the welfare of animals, including rest periods and stipulations for feeding and watering, during transport by road, rail, sea or air and requires that the persons who are entrusted to transport animals possess the necessary knowledge to care for these animals. The Order came into operation on 2 May 1995.

European Communities (Protection of Animals at Time of Slaughter) Regulations 1995 (SI No. 114 of 1995)
These Regulations lay down standards for the protection of animals at the time of slaughter and give effect to Council Directive No. 93/119/EC (of 22 December 1993). The Regulations set out the rules for the treatment of animals prior to death and for humane methods of slaughtering animals both within slaughterhouses and in other locations such as farms in order to ensure that animals are spared avoidable pain and suffering. The Regulations came into operation on 1 June 1995.

COMPANY

In the Matter of Don Bluth Entertainment Ltd **Supreme Court (Finlay CJ, Egan and Blayney JJ) [1994] 2 ILRM 436**
Examinership – Liquidation – Borrowings by examiner – Liability incurred during protection period – Foreign currency debt – Loan made in US dollars – Whether debt should be converted into its Irish pound equivalent as of the date of commencement of liquidation or date on which it is to be discharged – Payment in full of remuneration, costs and expenses of examiner – Priority over other debts – Companies (Amendment) Act 1990, ss. 10, 29

In the matter of Gilt Construction Ltd **High Court (O'Hanlon J) [1994] 2 ILRM 456**
Winding-up – Voluntary liquidation – Whether court should halt voluntary liquidation – Conversion into a court liquidation – Basis on which court should replace voluntary liquidator – Companies Act 1963, s. 280

Clandown v. Brid Davis **High Court (Morris J) [1994] 2 ILRM 536**
Winding-up petition – Interlocutory injunction – Whether petitioner a creditor of the company – Whether company disputing claim on *bona fide* grounds – Whether injunction to restrain publication of petition should be granted

CONSTITUTIONAL

F v. F, Ireland and the Attorney General **High Court (Murphy J) [1994] 2 ILRM 401**
Family – Marriage – Decree of judicial separation – Whether granting decree on ground that no normal marital relationship had existed for period of one year constituted too low a threshold – Whether decree amounted to an impediment to reconciliation – Whether the grant of right of residence in family home to one spouse amounted to an unjust attack on the other spouse's property rights – Presumption of constitutionality – Family Home Protection Act 1976 – Family Law Act 1988 – Judicial Separation and Family Law Reform Act 1989, ss. 2(1)(f), 16(a) – Constitution of Ireland 1937, Articles 40.3.2, 41

Interpretation – Natural law – Rights which are superior to positive law – Whether the court can be asked to choose between differing views of the different religious denominations as to the nature and extent of natural rights – Rights deriving from the relationship of marriage – Whether such rights are absolute – Constitution of Ireland 1937, Article 40.3

Practice – Hearing of pro-ceedings *in camera* – Judicial Separation and Family Law Reform Act 1989, s. 34

Anthony Heaney and Or v. Ireland and the Attorney General **High Court (Costello J) [1994] 2 ILRM 420**
Right to silence – Right against self-incrimination – Statutory power to require that person in custody should

account for movements and give information if demanded by Garda – Person guilty of criminal offence if fails or refuses to answer questions – Nature and scope of common law right to silence – Whether common law right had attained constitutional protection – Validity of restrictions placed on exercise of right – Principal of proportionality – Measures required to combat offences of a subversive nature which threaten State – Whether obligation to account for movements interfered with presumption of innocence – Whether right to silence an unenumerated right – Offences Against the State Act 1939, s. 52 – Constitution of Ireland 1937, Articles 38, 40.1, 40.3.1

***Daniel Francis Larkin v. Edward J O'Dea* High Court (Morris J) [1994] 2 ILRM 448**

Extradition – Arrest – Re-arrest and detention – Validity of order of district judge authorising re-arrest of applicant – Evidence – Admissability – Whether citizen's rights protected if extradited to a jurisdiction where evidence obtained in violation of his constitutional rights might be given – Fair procedures – Constitution of Ireland 1937, Article 40.4 – Criminal Justice Act 1984, ss. 4, 10(1) – Extradition Act 1965

***Z v. Director of Public Prosecutions* Supreme Court (Finlay CJ, O'Flaherty, Egan, Blayney and Denham JJ) [1994] 2 ILRM 481**

Right of an accused to receive a fair trial according to law – Essential elements of trial of criminal offence – Circumstances in which pre-trial publicity constituted such an obstacle to a fair trial that an accused could demand the abandonment of trial – Whether there was a real or serious risk of an unfair trial – Removal of any risk by appropriate directions to jury – Constitution of Ireland 1937, Article 38

Practice – Hearing of application otherwise than in public – Courts (Supplemental Provisions) Act 1961, s. 45(1)(a) – Constitution of Ireland 1937, Article 34.1

CRIMINAL

Criminal Justice Act 1994 (Section 32 (10)(a)) Regulations 1995 (SI No. 104 of 1995)

Section 32 of the Criminal Justice Act 1994 provides for certain measures to be taken to prevent money laundering (cf (1995) 13 ILT 119 for commencement). These Regulations prescribe certain bodies to be designated bodies for the purposes of s. 32 of the Act. The regulations came into effect on 2 May 1995.

Criminal Justice Act 1994 (Section 32 (10)(b)) Regulations 1995 (SI No. 105 of 1995)

Section 32 of the Criminal Justice Act 1994 provides for certain measures to be taken to prevent money laundering (cf (1995) 13 ILT 119 for commencement). These Regulations prescribe the accept-ance of deposits and other repay-able funds from the public as an activity to which s. 32(2) of the Act applies. The Regulations came into effect on 2 May 1995.

Criminal Justice Act 1994 (Section 32 (10)(d)) Regulations 1995 (SI No. 106 of 1995)

Section 32 of the Criminal Justice Act 1994 provides for certain measures to be taken to prevent money laundering (cf (1995) 13 ILT 119 for commencement). These Regulations presecribe certain states and countries for the purposes of s. 32(6) of the Act. The Regulations came into effect on 2 May 1995.

***O'B v. Judge Michael Pattwell and the Director of Public Prosecutions* Supreme Court (O'Flaherty, Egan and Denham JJ) [1994] 2 ILRM 465**

Procedure – Preliminary examination – Statement of charges – Applicant charged with common law rape and unlawful carnal knowledge of girl under fifteen – Whether applicant liable to punishment in respect of same act – Aditional charge added by district judge – Whether district judge restricted to adding counts only in substitution for existing count – Interpretation Act 1937, s. 14 – Criminal Procedure Act 1967, ss. 6(1), 8(2)

COMMERCIAL

Stock Exchange Bill 1994

This Bill, presented by the Minister for Finance, has been amended in the Select Committee on Finance and General Affairs. It aims to repeal the Stock Exchange (Dublin) Act 1799 and the Stockbrokers (Ireland) Act 1918 and to make provision for the establishment, supervision and regulation of stock exchanges and their member firms and to provide for related matters.

Minerals Development Bill 1995

This Bill was passed by Dail Eireann on 24 May 1995 (Cf (1995) 13 ILT 119.)

Investment Intermediaries Bill 1995

This Bill, as presented by the Minister for Finance, aims to enable the Minister for Enterprise and Employment and the Central Bank to act as supervisors for investment business firms. It is envisaged that the Minister for Enterprise and Employment will be the supervisor for investment intermediaries offering investment services other than insurance services, who do not have discretionary control over client funds and who deal only in certain defined investment products. The Central Bank is the intended supervisor for other investment business firms. The Bill aims to meet obligations arising from the EU Investment Services and Capital Adequacy Directives.

CONSUMER

Package Holidays and Travel Trade Bill 1995

This Bill was passed by Dáil Éireann on 24 May 1995. (Cf (1995) 13 ILT 90.)

ENERGY

European Communities (Minimum Stocks of Petroleum Oils) Regulations 1995 (SI No. 96 of 1995)
These Regulations give effect to Council Directives 68/414/EEC and 72/425/EEC and revoke the European Communities (Minimum Stocks of Petroleum Oils) Regulations 1974 - 1977. Under the Council Directives, Member States are required to maintain minimum stocks of petroleum oil products. Up to now, responsibility had been placed on oil importers and oil consumers to maintain minimum oil reserves. These Regulations provide for the establishment of a national stock holding agency to whom that responsibility will now be devolved. The Regulations provide that the costs incurred by the agency will be funded by a levy on oil sales and collected by the agency from oil companies based on market share (as calculated by the Minister in accordance with the Regulations). The Regulations came into effect on 1 June 1995.

ENVIRONMENT

Arterial Drainage (Amendment) (No. 2) Bill 1995
This Bill, presented by Senator Maurice Manning and passed by Seanad Eireann on 17 May 1995, aims to amend and extend the Arterial Drainage Act 1945 and to provide for related matters, including the prevention or relief of localised flooding including flooding in urban and residential areas. (The Arterial Drainage (Amendment) Bill 1995 (cf. (1995) 13 ILT 91) was defeated at its second stage.)

Waste Bill 1995
This Bill, as presented by the Minister for the Environment, aims to establish a modern and comprehensive legislative frame-work for the prevention, manage-ment and control of waste. The Bill would provide for improved public sector organisational arrangements for waste planning, management and control, involving new or redefined roles for the Minister for the Environment, the Environmental Protection Agency and local authorities. Provision would also be made for measures designed to require or promote prevention, minimisation and recovery of waste as well as a flexible statutory framework for implementing national and international (including EU) requirements on waste management.

EUROPEAN COMMUNITIES

European Communities (Amendment) Act 1995 (No. 6 of 1995)
This Act was signed by the President on 23 May 1995. (Cf (1995) 13 ILT 146.)

HEALTH AND SAFETY

Dangerous Substances (Amendment) Regulations 1995 (SI No. 103 of 1995)
These Regulations extend the definition of container used in the Dangerous Substances (Retail and Private Petroleum Stores) Regulations 1979, the Dangerous Substances (Oil Jetties) Regulations 1979, the Dangerous Substances (Petroleum Bulk Stores) Regulations 1979 and the Dangerous Substances (Conveyance of Petroleum by Road) Regulations 1979. The present regulations provide for the use of any packaging that is referrred to in Marginals 2305, 2306 and 2307 of the ADR Agreement and meets the relevant requirements of Appendix A.5 or Appendix A.6 of that agreement, as published by the UN in 1995 (ECE Trans/110 Vols I & II). The Regulations came into operation on 2 May 1995.

LEGAL EDUCATION

Solicitors Acts 1954 - 1994 (Apprenticeship and Education) (Amendment) Regulations 1995 (SI No. 102 of 1995)
These Regulations provide, *inter alia*, for a change in the term of service under indentures of apprenticeship of persons or specified categories of persons seeking to be admitted as solicitors. The most significant feature of this change is that the new two year period of apprenticeship as required by the Solicitors (Amendment) Act 1994 will not now commence until the person seeking admission as a solicitor is deemed to have successfully completed the Law Society's Professional Course. To this end, the Regulations amend the Solicitors Acts 1954 and 1960 (Apprenticeship and Education) Regulations 1991 in relation to the requirements for becoming bound by indentures of apprenticeship and in relation to the required courses of education or training (or both) and the required examinations for persons seeking to be admitted as solicitors. The Regulations came into operation on 1 May 1995.

LOCAL GOVERNMENT

***Garden Village Construction Co. Ltd v. Wicklow County Council* Supreme Court (Egan, Blayney and Denham JJ) [1994] 2 ILRM 527**
Planning and Development – Refusal of extension to period of planning permission – Requirement that substantial works should have been carried out pursuant to planning permission – No works carried out on land subject to the planning permission – Whether works carried out on adjoining land which would benefit the land subject to planning permission could be regarded as having been carried out pursuant to the planning permission – Local Government (Planning and Development) Act 1963, s. 24 – Local Government (Planning and Development) Act 1982, s. 4

ROAD TRAFFIC

Road Traffic Act 1995 (No. 7 of 1995)
This Act was signed by the President on 25 May 1995. (Cf (1995) 13 ILT 147.)

PRACTICE AND PROCEDURE

Civil Legal Aid Bill 1995
This Bill was passed by Seanad Eireann on 15 June 1995. (Cf (1995) 13 ILT 92.)

Solicitors (Interest on Clients' Moneys) Regulations 1995 (SI No. 108 of 1995)
These Regulations rescind the Solicitors Professional Practice, Conduct and Discipline Regulations 1986. They require solicitors, to whom regulations made under s.66 of the Solicitors Act 1954 (as substituted by s.76 of the Solicitors (Amendment) Act 1994) apply, who hold money for or on account of a client to account to that client for interest thereon, save where the amount of such interest would be less than £75.00. The Regulations came into operation on 3 May 1995.

***Bus Eireann v. Insurance Corporation of Ireland plc* High Court (Morris J) [1994] 2 ILRM 444**
Limitation of actions – Fatal accident – Deceased not covered at time of accident – Claim to recover damages from insurer in lieu of deceased – Appropriate limitation period – Whether claim against insurer created new cause of action with separate limitation period – Civil Liability Act 1961, s. 9 – Road Traffic Act 1961, ss. 56, 76

Negligence – Road traffic accident – Damage to property – Insurance – Cover held in excess of statutory minimum – Claim against insurer – Whether limited to statutory minimum – Statute – Interpretation – Road Traffic Act 1961, ss. 56, 76

***Paddy Madigan v. Radio Telefís Éireann* High Court (Kinlen J) [1994] 2 ILRM 472**
Judicial review – Broadcasting – Elections – Television coverage – Independent candidates – Participation in election programmes – Criteria used by broadcasting authority – Whether compatible with statutory obligations – Whether fair, objective and impartial – Test of unreasonableness – Purpose of judicial review proceedings- – Broadcasting Authority Act 1960, s. 18 – Broadcasting Authority (Amend-ment) Act 1976, s. 3(1)

SOCIAL WELFARE

Social Welfare (No. 2) Bill 1995
This Bill, as presented by the Minister for Social Welfare, aims to provide for the necessary changes in the Social Welfare Code so as to ensure that no spouse will be disadvantaged in terms of his or her social welfare entitlements as a result of his or her legal status being changed from married, separated or deserted to divorced.

Social Welfare (Subsidiary Employments) Regulations 1995 (SI No. 80 of 1995)
These Regulations consolidate the existing provisions relating to subsidiary employments and provide for amendments to existing references necessitated by the Social Welfare (Modifications of Insurance) (Amendment) Regulations 1995. They specify certain categories of employment as being of a subsidiary nature and not the principal means of livelihood. The Regulations came into operation on 6 April 1995.

Social Welfare Act 1995 (Section 11)(Commencement) Order 1995 (SI No. 93 of 1995)
Section 11 of the Social Welfare Act 1995 provides for the payment of Adoptive Benefit, subject to certain PRSI conditions, to people granted adoptive leave under the provisions of the Adoptive Leave Act 1995 (as to which, cf (1995) 13 ILT 91). This Order brought s. 11 into operation with effect from 19 April 1995.

Social Welfare (Consolidated Payments Provisions)(Amendment) (No. 2) Regulations 1995 (SI No. 94 of 1995)
These Regulations provide for the maximum and minimum rates of Adoptive Benefit at the same rates as those currently applying to Maternity Benefit (ie. £158.90 and £74.20). The regulations came into effect on 19 April 1995.

TAXATION

Finance Act 1995 (No. 8 of 1995)
This Act was signed by the President on 2 June 1995 and will come into effect on various dates provided for in the Act. (Cf (1995) 13 ILT 147.)

***T G Brosnan (Inspector of Taxes) v. Leeside Nurseries Ltd* High Court (Murphy J) [1994] 2 ILRM 459**
Corporation Tax – Relief for manufactured goods – Cultivation – Manufacturing process – Whether cultivated plants were manufactured – Finance Act 1980, Part I, Chapter VI, s. 39

TORT

Occupiers' Liability Bill 1994
This Bill was passed by Dáil Éireann on 10 May 1995. (Cf (1995) 13 ILT 121.)

***Dermot Barry v. Nitrigin Eireann Teo and Or* High Court (Costello J) [1994] 2 ILRM 522**
Employers' liability – Health and safety – Factory – Noise exposure – Whether exposure to noise causing deafness – Whether employer in breach of statutory duty – Employer providing hearing protection – Whether hearing protection reducing employee's exposure to noise levels – Whether employer in breach of common law duty of care to employee – Factories (Noise) Regulations 1975, Regulations 4(1), 7(1).

ILT DIGEST

OF LEGISLATION AND REPORTED CASES

Compiled by DAVID BOYLE

ADMINISTRATIVE LAW

Ethics in Public Office Bill 1994
This Bill was passed by Dáil Éireann on 14 June 1995. Cf. (1995) 13 ILT 145.

An Bord Bia (Amendment) Bill 1995
This Bill, as presented by the Minister for Agriculture, Food and Forestry, aims to increase the membership of An Bord Bia and to provide that one ordinary member shall be appointed on the nomination of the Minister for the Marine.

Electoral (Amendment) Bill 1995
This Bill, as presented by the Minister for the Environment, aims to revise the Dail constituencies in the light of the 1991 Census returns and to implement the recommendations contained in the Report of the Dail Constituency Commission (dated 27 April 1995). The Bill, if passed, will fix at 166 the number of members of Dail Eireann after the next dissolution which is the same number as at present and is the number recommended by the Commission.

Electoral (Amendment) (No. 2) Bill 1995
This private member's Bill, as introduced by Ms Mary Wallace, TD, aims to aid the greater participation of people with disabilities in the electoral process by: (i) requiring (where possible) the location of polling stations in buildings which are accessible to wheelchair users; (ii) replacing the current special voter system with an extension of the postal voting system to people who, through physical illness or disability, are unable to attend at a polling station and, (iii) the inclusion of breach of secrecy of the postal ballot in the list of electoral offences.

AGRICULTURE

European Communities (Retirement of Farmers) Regulations 1995 (SI No. 129 of 1995)
Article 13 of the Farmers Retirement Scheme provides that the annuity payable under the Scheme may be increased from time to time to take account of any increase in the Consumer Price Index. These Regulations increase the amount of the annuity from £3,504 to £3,592 for a married person whose spouse is alive and from £2,340 to £2,399 for a single person, widow or widower with effect from 1 May 1995.

COMMERCIAL

Casual Trading Bill 1994
This Bill, which was presented by the Minister for Enterprise and Employment, has been passed by Dáil Éireann. It aims to provide for the control and regulation of casual trading and introduces new provisions concerning the granting and display of casual trading licences.

Investment Intermediaries Act 1995 (No. 11 of 1995)
This Act was signed by the President on 22 June 1995. Cf. (1995) 13 ILT 177.

Stock Exchange Act 1995 (No. 9 of 1995)
This Act was signed by the President on 1 June 1995. Cf. (1995) 13 ILT 177.

Industrial Development Bill 1995
This Bill, as presented by the Minister for Enterprise and Employment, aims to amend the Industrial Development Act 1993 in order to remove certain restrictions on the operations of Forbairt and IDA Ireland. It is intended to permit these bodies to invest monies in funds aimed at the development of industry in general, as opposed to investment in specific companies. The Bill also aims to provide for the establishment and functions of County Enterprise Boards.

Netting of Financial Contracts Bill 1995
This Bill, as presented by the Taoiseach, aims to make provision for the enforceability of netting, between two parties only, in relation to financial contracts in accordance with the terms of a netting agreement. Provision would also be made for the enforceability of setoff by those parties of the amounts due under such netting agreements in accordance with the terms of a master netting agreement and for the setoff of money or the proceeds of collateral provided solely in relation to any netting agreement or any master netting agreement in accordance with the terms of each.

CONSTITUTIONAL

Fifteenth Amendment of the Constitution Bill 1995
This private member's Bill, as introduced by Mr John O'Donoghue, TD, aims to amend Article 40.1 of the Constitution by the addition of the following text after Article 40.1:
'Any person charged with an indictable offence may be remanded in custody pending trial if, on the hearing of an application for bail, the judge is satisfied that there is a probability that the person will commit a class of criminal offence which is also an indictable offence if admitted to bail.

2° Any person remanded in custody pending trial by reason of a judge being satisfied that there is a probability that the person will commit a class of criminal offence which is also an indictable offence if admitted to bail shall not be remanded in custody for that reason for any single period greater that ninety days.'

***James Tuohy v. Daniel J Courtney and Ors* Supreme Court (Finlay CJ, Egan, Blayney and Denham JJ) [1994] 2 ILRM 503**

Limitation of actions – Whether limitation of actions interferes with constitutional right of access to the courts – Right to litigate an unenumerated right – Whether right to litigate also constitutes a property right – Right of the Oireachtas to balance the need for certainty against the hardship suffered by individuals whose rights of action are extinguished without their becoming aware of them – Constitution of Ireland 1937, Articles 40.3.1, 40.3.2 – Statute of Limitations 1957, ss. 11(1)(a), (2)(a)

Locus standi – Plaintiff's standing to challenge provisions of the Statute of Limitations 1957 – Whether plaintiff had been aware of cause of action within the impugned limitation period

Practice – Appeal – Jurisdiction of the Supreme Court in reviewing findings of primary fact made by a trial judge – Whether evidence to support findings of trial judge

***Poul John Aamand v. Judge Peter Smithwick and the Attorney General* Supreme Court (Finlay CJ, O'Flaherty, Egan, Blayney and Denham JJ) [1995] 1 ILRM 61**

Criminal law – Enquiry – Extradition – Penal statute – Strict construction – Whether European Convention on Extradition 1957 incorporated in its entirity into Irish law – Mandatory effect of article 7.2 of the convention – Place of commission of offence outside the territory of the requesting country – Application of Part II of the Extradition Act 1965 – Whether sufficient correspondence of offences – Extradition Act 1965, ss. 8, 10, 29(1) – European Convention on Extradition 1957, article 7 2 – Extradition Act 1957 (Part II)(No. 23) Order 1989 – Constitution of Ireland 1937, Article 40.4.2

Statute – Interpretation – Strict construction – Mandatory effect of article 7.2 of the convention – Extradition Act 1965, ss. 8, 10 – Extradition Act 1965 (Part II)(No. 23) Order 1989

***Úna Mhic Mhathúna and Or v Ireland and the Attorney General* Supreme Court (Finlay CJ, Egan, Blayney, Denham and Costello JJ) [1995] 1 ILRM 69**

Marriage – Family – Tax and social welfare allowances for dependant children – Equity before the Law – Benefits received by married parents living together with dependant children as compared to those received by other parents – Abolition of tax free allowances for dependant children – Increase of children's allowances – Whether failure by the State to increase total value of allowances for such children in line with inflation constituted invidious discrimination against married parents or an attack against the family – Function of the court in determining challenge to constitutional validity of a statute – Role of the Oireachtas in managing the nation's finances – Income Tax Act 1967, ss. 138(1), 141 – Social Welfare Act 1973, s.8 – Finance Act 1979, s. 4 – Social Welfare (Consolidation) Act 1981, s. 197 – Finance Act 1986, ss. 3, 4 – Social Welfare (Social Assistance Allowance) Regulations 1973, r. 7 – Constitution of Ireland 1937, Articles 40.1, 41.1, 41.2, 41.3.1°

CONSUMER

Consumer Credit Bill 1994

This Bill has been passed by Dáil Éireann. Cf. (1995) 13 ILT 119.

CONTRACT

***William Neville and Sons Ltd v. Guardian Builders Ltd* Supreme Court (Finlay CJ, Blayney and Denham JJ) [1995] 1 ILRM 1**

Frustration – Licence agreement – Need to purchase land from local authority in order to gain access to plot of land – Agreements to purchase land subject to conditions regarding access by third party – Whether supervening event had occurred which changed the nature of the outstanding contractual obligations from what the parties could reasonably have contemplated at the time of the contract's execution – Whether parties should be discharged from further performance of the contract

CONVEYANCING

Stamp Duty (Particulars to be Delivered) Regulations 1995 (SI No. 144 of 1995)

These Regulations specify the particulars to be delivered to the Revene Commissioners in respect of certain transfers and leases of land. The Regulations will affect instruments executed on or after 1 September 1995.

CRIMINAL

Transfer of Sentenced Persons Bill 1995

This Bill has been passed by Dáil Éireann. Cf. (1995) 13 ILT 146.

Sexual Offences (Jurisdiction) Bill 1995

This private member's Bill, as introduced by Mr Eoin Ryan, TD and Mr John O'Donoghue, TD, aims to extend the criminal law of the State to try sexual offences against children committed elsewhere, but which if committed in this State would constitute a criminal offence, by citizens of the State or by persons ordinarily resident in the State.

Criminal Procedure Bill 1995
This private member's Bill, as introduced by Mr John O'Donoghue, TD, aims to provide for the prompt hearing of criminal trials and to establish a new procedure for the preparation for trial of indictable offences.

Domestic Violence Bill 1995
This Bill, as presented by the Minister for Equality and Law Reform, aims to amend the law on the protection of persons from violence in the home. It proposes to extend the law on 'barring orders' and 'protection orders' (at present confined to spouses and their children) to wider classes of person including cohabitants and their children. The Bill also aims to give the court power to order long term protection orders (to be known as 'safety orders'), to give new powers to the health boards to apply for orders under the Bill, to increase penalties and to give new powers of arrest to the Gardaí in dealing with cases of domestic violence.

***People (Director of Public Prosections) v. M.* Supreme Court (Finlay CJ; O'Flaherty, Egan, Blayney and Denham JJ) [1994] 2 ILRM 541**
Appeal – Sentence – Severity – Buggery and indecent assault – Whether sentence excessive – Principles of sentencing – Constitutional rights of an accused person – Guilty plea – Recognition of offender's personal circumstances – Prospect of rehabilitation – Reduction of sentence in mitigation – Offences Against the Person Act 1861, ss. 61, 62 – Criminal Law (Rape) (Amendment) Act 1990, ss. 2, 4

ENERGY

Energy (Miscellaneous Provisions) Bill 1995
This Bill, as presented by the Minister for Transport, Energy and Communications, aims to implement a wide variety of proposals relating to the prodution, supply, sale, transmission, distribution and use of certain forms of energy and matters incidental to those activities.

EUROPEAN COMMUNITY

***Bosphorus Hava Yollari Turzim v. Minister for Transport and Ors* High Court (Murphy J) [1994] 2 ILRM 551**
Legislation – Council Regulation – Impounding aircraft in which a majority or controlling interest held by Yugoslav person or undertaking – Aircraft leased by Yugoslav undertaking to Turkish company – Aircraft impounded in Ireland – Nature of 'interest' – Whether interest in posession – European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro)) Regulations 1993 – Council Regulation 990/93/EEC

Legislation – Regulation – Interpretation – United Nations Security Council Resolution basis for regulation – Whether judicial or academic interpretation of resolution of assistance – Teleological or schematic approach – United Nations Security Council Resolution 820/1993 – Council Regulation 990/93/EEC

FAMILY

M.P.D. v. S.M.B. High Court (Budd J) [1995] 1 ILRM 30
Custody – Child abduction – Wrongful removal and detention of child by mother outside child's country of habitual residence – Application by father for return of child – Whether father acquiesed in child's removal – Whether there was a grave risk that return would cause physical or psychological harm to the child – Child Abduction and Enforcement of Custody Orders Act 1991 – Hague Convention on the Civil Aspects of International Child Abduction 1980, articles 3, 12, 13

INTELLECTUAL PROPERTY

European Communities (Term of Protection of Copyright) Regulations 1995 (SI No. 158 of 1995)
The purpose of these Regulations is to harmonise the term of protection of copyright and certain related rights with that of other EU Member States in accordance with Council Directive 93/98/EEC (of 29 October 1993). The Regulations, which do not have the effect of shortening any term of protection which is already running, came into effect on 1 July 1995.

HEALTH AND SAFETY

Irish Medicines Board Bill 1995
This Bill, as presented by the Minister for Health, aims to provide for the establishment of the Irish Medicines Board and to transfer to this Board the authority (currently exercised by the Minister for Health) for licensing human medicines and granting permissions to conduct clinical trials.

Safety, Health and Welfare at Work (Signs) Regulations 1995 (SI No. 132 of 1995)
These Regulations implement Council Directive 92/58/EEC on the minimum requirements for the provision of safety and/or health signs at work. The provisions of the Regulations extend to all places and they relate to signs referring to a specific object, activity or situation which provide information or instructions about safety and/or health at work by means of a signboard, a colour, an illuminated sign, an acoustic signal, a verbal communication or a hand signal. The Regulations came into effect on 1 June 1995 and revoked the European Communitie's (Safety Signs at Places of Work) Regulations 1980.

Safety, Health and Welfare at Work (Construction) Regulations 1995 (SI No. 138 of 1995)
These Regulations implement Council Directive 92/57/EEC on the minimum safety and health requirements at temporary or mobile construction sites. They revoke the Construction (Safety, Health and Welfare) Regulations 1975 and 1988. The Regulations apply to all construction projects as well as to the

maintenance of buildings. They place obligations on clients and designers to ensure that health and safety is taken into account before any construction work begins. Contractors must ensure that the work on the site is properly co-ordinated and carried out in a safe manner. The main requirements for the protection of the safety, health and welfare of persons working on construction sites are also prescribed. The Regulations came into effect on 6 June 1995.

The Food Safety Advisory Board (Establishment) Order 1995 (SI No. 155 of 1995)
This Order, made under the Health (Corporate Bodies) Act 1961 establishes the Food Safety Advisory Board.

LOCAL GOVERNMENT

Local Government (Delimitation of Water Supply Disconnection Powers) Bill 1995
This Bill, as presented by the Minister for the Environment and passed by Dail Eireann, aims to amend the Local Government (Sanitary Services) Act 1962 by providing that before a domestic supply of water may be discontinued for non-payment of a water charge, a sanitary authority must follow a clearly defined set of notification procedures and obtain a water discontinuance order from the District Court.

PRACTICE AND PROCEDURE

Civil Legal Aid Bill 1995
This Bill has been passed by Seanad Éireann. Cf. (1995) 13 ILT 92.

SOCIAL WELFARE

Social Welfare (No. 2) Bill 1995
This Bill has been passed by Dáil Éireann. Cf. (1995) 13 ILT 179.

Social Welfare Act 1995 (Section 14)(Commencement) Order 1995 (SI No. 112 of 1995)
This Order brings s. 14 of the Social Welfare Act 1995 into effect. Section 14 extends the definition of a qualified child for the purpose of paying child dependant increases with long-term social welfare payments, to include 21 year olds who are in full-time education. The section came into effect in respect of the various payments involved from different dates between 27 April 1995 and 3 May 1995.

TAXATION

Vehicle Registration Tax (Repayments in Certain Cases) Regulations 1995 (SI No. 154 of 1995)
These Regulations lay down the conditions governing the issue of certificates of destruction and the issue of repayments under the provisions of s. 135B of the Finance Act 1992, inserted by s. 98 of the Finance Act 1995. Provision has been made to repay £1,000 of Vehicle registration tax to any person who becomes the registered owner of a new category A vehicle and who owned and scrapped a category A vehicle which is at lease 10 years old. The Regulations came into effect on 1 July 1995 and will expire on 31 December 1996.

TORT

Occupier's Liability Act 1995 (No. 10 of 1995)
This Act was signed by the President on 17 June 1995. Cf. (1995) 13 ILT 121.

TOURISM

Tourist Traffic Act (No. 13 of 1995)
This Act enables Bord Fáilte Éireann to delegate to a contractor the majority of its inspection and associated functions and powers under the Tourist Traffic Acts 1939 - 1987 in relation to registration and grading of tourist accommodation and under the Intoxicating Liquor Act 1988 in relation to special restaurant licences. The Act was signed by the President on 5 July 1995.

TRUST LAW

Powers of Attorney Bill 1995
This Bill, as presented by Senator Maurice Manning, aims to enable individuals to grant powers of attorney over their property (to be known as 'enduring powers of atorney') which will take effect if they become mentally incapable (in contrast to the situation at common law where a power of attorney is automatically revoked in that event). The Bill proposes a number of safeguards in relation to this measure and various other changes to the general law governing powers of attorney.

ILT DIGEST

OF LEGISLATION AND REPORTED CASES

Compiled by DAVID BOYLE

ADMINISTRATIVE

An Bord Bia (Amendment) Act 1995 (No. 20 of 1995)
This Act was signed by the President on 20 July 1995. Cf (1995) 13 ILT 201.

Electoral (Amendment) Act 1995 (No. 21 of 1995)
This Act was signed by the President on 20 July 1995. Cf (1995) 13 ILT 201.

Ethics in Public Office Act 1995 (No. 22 of 1995)
This Act was signed by the President on 22 July 1995. Cf (1995) 13 ILT 145.

Heritage Act 1995 (Establishment Day) Order 1995 (SI No. 177 of 1995)
This Order appoints 10 July 1995 as the day on which the Heritage Council is established.

AGRICULTURE

European Communities (Importation of Cattle from the United Kingdom) Regulations 1995 (SI No. 152 of 1995)
These Regulations implement article 1 of Commission Decision 94/474/EC (of 27 July 1994) and make it an offence to import cattle from the United Kingdom except in accordance with that Decision. Procedures to be followed when calves are imported from the UK are also laid down. The Regulations came into operation on 26 June 1995.

COMMERCIAL

Casual Trading Act 1995 (No. 19 of 1995)
This Act was signed by the President on 18 July 1995. Cf (1995) 13 ILT 201.

Minerals Development Act 1995 (No. 15 of 1995)
This Act was signed by the President on 17 July 1995. Cf (1995) 13 ILT 119.

Industrial Development Bill 1995
This Bill has been amended in the Select Committee on Enterprise and Economic Strategy. Cf (1995) 13 ILT 201.

Netting of Financial Contracts Act 1995 (No. 25 of 1995)
This Act was signed by the President on 1 August 1995. Cf (1995) 13 ILT 201.

European Communities (Further Discontinuation of Certain Trade with Serb Controlled Areas of Bosnia-Herzegovina) Regulations 1995 (SI No. 163 of 1995)
These Regulations further prohibit certain trade with Serb controlled areas of Bosnia-Herzegovina, as provided for in Council Regulation (EC) No 2471/94, and provide for penalties for infringement of the prohibition.

European Communities (Deposit Guarantee Schemes) Regulations 1995 (SI No. 168 of 1995)
These Regulations provide for depositors to be compensated for 90% of their deposits up to a maximum equivalent of ECU 15,000. The scheme established under the Regulations applies to all deposits in any currency (including the ECU) at a branch in the EU of any credit institution authorised in Ireland. The scheme must be in a position to pay within three months of either the Central Bank determining that the credit institution is unable to repay deposits due to its financial situation, or a court making a ruling, for reasons directly related to a credit institution's financial circumstances, that suspends depositors' ability to make claims against the institution. The Regulations came into effect on 1 July 1995.

European Communities (Accounts) (Form) Regulations 1995 (SI No. 178 of 1995)
These Regulations prescribe a form for use in the return of information to the Companies Registration Office in compliance with Regulation 20 of the European Communities (Accounts) Regulations 1995 (SI No. 396 of 1993). The Regulations came into operation on 6 July 1995.

CONSTITUTIONAL

***Maura Maguire v. Paul Drury and Ors* High Court (O'Hanlon J) [1995] 1 ILRM 108**
Right to privacy – Freedom of expression – Freedom of the press – Interlocutory injunction – Plaintiff seeking to restrain the publication of material relating to breakdown of relationship between herself and her husband and matter concerning the plaintiff and her children arising from judicial separtation proceedings – Whether court had jurisdiction to restrain publication of material which could be harmful to children of marriage – Whether plaintiff had established a fair question to be tried – Balance of convenience – Constitution of Ireland 1937, Articles 40,41

***Thomas Clancy v. Irish Rugby Football Union and Or* High Court (Morris J) [1995] 1 ILRM 193**
Fair procedures – Natural Justice – Rugby player precluded from playing for new club for specified period – Hearing of application – Decision by sub-committee – Whether valid delegation of powers – Whether improper decision – Introduction of new regulations – Whether retrospective effect – Whether regulations an interference with right to freedom of association (Cf also (1995) 13 ILT 171)

CONSTRUCTION

Building Regulations Advisory Body Order 1995 (SI No. 190 of 1995)
This Order appoints the Building Regulations Advisory Body under s.

14 of the Building Control Act 1990. The Order appoints the chairman and members of the Body for the period expiring 31 May 1998.

CONSUMER

Package Holidays and Travel Trade Act 1995 (No. 17 of 1995)
This Act was signed by the President on 17 July 1995. Cf (1995) 13 ILT 90. (Cf. also (1995) 13 ILT 212.)

Consumer Credit Act 1995 (No. 24 of 1995)
This Act was signed by the President on 31 July 1995. Cf (1995) 13 ILT 119.

CONTRACT

***Lac Minerals Limited v. Chevron Mineral Corporation of Ireland and Ors* High Court (Murphy J) [1995] 1 ILRM 161**
Construction – Right of pre-emption – Inconsistency between time within which right of pre-emption could be exercised and amount of time to be specified in notice informing party of its right of pre-emption – Distinction between right of pre-emption and machinery pertaining to its exercise

Equity – Rectification – Remedy not available to person who is not a party to the contract and who does not derive any estate under that agreement – Requirement of nexus between person seeking rectification and the document in respect of which rectification is sought

Company – Separate legal personality – Lifting the corporate veil – Companies within group treated as single entity

CRIMINAL

Criminal Law (Incest Proceedings) Act 1995 (No. 12 of 1995)
This Act was signed by the President on 5 July 1995. Cf (1995) 13 ILT 118

Transfer of Sentenced Persons Act 1995 (No. 16 of 1995)
This Act was signed by the President on 17 July 1995. Cf (1995) 13 ILT 146

EMPLOYMENT

Adoptive Leave (Referral of Disputes and Appeals)(Part V) Regulations 1995 (SI No. 195 of 1995)
These Regulations prescribe procedures to be followed in relation to the hearing of disputes and appeals by a rights commissioner or by the Employment Appeals Tribunal under Part V of the Adoptive Leave Act 1995. The Regulations came into operation on 20 July 1995.

Adoptive Leave (Calculation of Weekly Remuneration) Regulations 1995 (SI No. 196 of 1995)
These Regulations prescribe the method of calculating wekly remuneration for the purpose of redress in the form of compensation under Part V of the Adoptive Leave Act 1995. The Regulations came into operation on 20 July 1995.

***Tony McAuliffe v. Minister for Social Welfare* High Court (Barr J) [1995] 1 ILRM 189**
Class – Whether a contract of service or for services – Tests to be applied – Social Welfare (Consolidation) Act 1993, s. 271

ENVIRONMENT

Arterial Drainage (Amendment) Act 1995 (No. 14 of 1995)
This Act was signed by the President on 17 July 1995. Cf (1995) 13 ILT 178.

European Communities (Mechanically Propelled Vehicle Emission Control) Regulations 1995 (SI No. 192 of 1995)
These Regulations prohibit the issue of first licences for certain new vehicles from 1 January 1997 unless the vehicles conform to the air polutant emission control requirements of Directive 91/441/EEC as amended by Directive 94/12/EEC. Exceptions are made, in accordance with Directive 93/81/EEC, for certain 'end of series' vehicles for a limited period subject to specified conditions. It is also permitted to issue first licences prior to 1 January 1997 where vehicles conform to the requirements of either Directive 93/59/EEC or 94/12/EEC

EQUITY

***AIB Finance Limited v. Sligo County Council* High Court (Morris J) [1995] 1 ILRM 81**
Incomplete gift – Money lodged by deceased in account in joint names – Deceased retaining dominion and control over the money – Intention of deceased that other party should be entitled to the money on his death – Whether arrangement gave rise to a resulting trust

FAMILY

***P. v. B.* Supreme Court (Hamilton CJ, Egan and Denham JJ) [1995] 1 ILRM 201**
Custody – Child abduction – Wrongful removal and detention of child by mother outside its country of habitual residence – Application by father for return of child – Whether father acquiesced in child's removal – Undertakings by father relating to the welfare of the child – Whether it was appropriate for trial judge to impose conditions on the return of the child to the country of its habitual residence – Requirement that court should act expeditiously to secure return of child to country of habitual residence – Child Abduction and Enforcement of Custody Orders Act 1991 – Hague Convention on the Civil Aspects of International Child Abduction 1980, articles 12, 13

FISHERIES

Fisheries (Amendment) Bill 1995
This Bill, as presented by the Minister for the Marine, aims to amend the Fisheries Acts 1959 - 1994. Its principal provision aims to provide that the Minister for the Marine may, by order, following a request from a

fisheries board or after consideration by him of a report of a person appointed by him to examine the management and organisation of a board and the performance by it of its functions, appoint a Commission to carry out such and so many of the functions of that board as he may determine.

HEALTH AND SAFETY

European Communities (Export and Import of Certain Dangerous Chemicals)(Pesticides)(Enforcement) (Amendment) Regulations 1995 (SI No. 183 of 1995)

These Regulations serve to implement the provisions of Council Regulation (EC) No. 3135/94 which extends the scope of Council Regulation (EEC) No. 2455/92. In particular, the list of chemicals which have been banned or severely restricted to certain uses by Commmunity legislation, owing to their effects on health and the environment, is extended. The Regulations came into operation on 1 August 1995.

INTERNATIONAL LAW

***Governor and Company of the Bank of Ireland v. Michael John Meeneghan and Or* High Court (Costello J) [1995] 1 ILRM 96**

Private international law – Enforcement of penal, revenue or public law of foreign state – Charge of evasion of UK value-added tax – Order granted by English court restraining the accused from disposing or dealing with assets – Monies in bank account in Ireland – Whether lawful for bank to pay out monies – Interpleader proceedings brought by bank – Distinction between recognition and enforcement of penal law of foreign state

LOCAL GOVERNMENT

Local Government (Delimitation of Water Supply Disconnection Powers) Act 1995 (No. 18 of 1995)

This Act was signed by the President on 18 July 1995. Cf (1995) 13 ILT 204.

Housing (Sale of Houses) Regulations 1995 (SI No. 188 of 1995)

These Regulations govern the sale by housing authorities of tenanted dwellings to tenants. Under s. 26 of the Housing (Miscellaneous Provisions) Act 1992, the sale of such a dwelling is made in accordance with a tenant purchase scheme adopted by the housing authority. A sale can be made either in fee simple or by way of shared ownership lease. A tenant purchase scheme must comply with the provisions of the Regulations which, *inter alia*, set out the basis for the determination of the purchase price of a dwelling, prescribe certain conditions attaching to a sale and the terms of a shared ownership lease. Where a housing authority sells a dwelling, other than a tenented dwelling, the Regulations require the authority to obtain the consent of the Minister to the sale unless it is made at the best price reasonably obtainable.

***J Wood and Co. Limited v. Wicklow County Council* High Court (Costello J) [1995] 1 ILRM 51**

Planning and development – Compensation – Refusal of planning permission – Statutory interpretation – Application for planning permission made before commencemant of 1990 Act and decision refusing permission made after commencement – Whether compensation to be determined under 1963 Act or 1990 Act – Manner in which compensation should be assessed – Whether reasons for refusal of planning permission precluded the payment of compensation – Interpretation Act 1937, s. 21(1)(c) – Local Government (Planning and Development) Act 1963, ss. 26, 55, 56 – Local Government (Planning and Development) Act 1990, ss. 3, 11, Third Schedule

***Mark Keogh and Ors v. The Mayor, Aldermen and Burgesses of the County Borough of Galway* High Court (Carney J) [1995] 1 ILRM 141**

Planning and development – Development plan – Duty of planning authority to notify citizens of development plan – Mandatory consultation process – Proposed halting sites listed in development plan – Attempt by local authority to establish halting site at another location which was not mentioned – Local Government (Planning and Development) Act 1963, s. 39(2)

PRACTICE AND PROCEDURE

Civil Legal Aid Bill 1995

This Bill has been amended in the Select Committee on Legislation and Security. Cf (1995) 13 ILT 92.

***John Lovett t/a Lovett Transport v. Robert Grogan t/a PS Travel and Ors* Supreme Court (Finlay CJ, Egan and Denham JJ) [1995] 1 ILRM 12**

Injunction – Statute – Private individual entitled to enforce legislation through injunction – Injunction to protect pliantiff's constitutional right to earn a livlihood – Test to be applied by court in exercise of discretion to grant injunction where infringement of constitutional right – Licence required to operate road passenger service – Defendants not holding licences – Whether person has to own bus concerned in order to run 'road passenger service' – Road Transport Act 1932, ss. 2, 7, 12

***Mary O'Brien v. Ireland, the Attorney General and the Minister for Defence* High Court (O'Hanlon J) [1995] 1 ILRM 22**

Discovery – Privilege – Reports of UN and military inquiries into death of soldier in Lebanon – Power of the Oireachtas to enact legislation conferring privilege of exemption from production on specified categories of documentary and other evidence – Defence Act 1954 – Diplomatic Relations and Immunities Act 1967, s. 9 – Rules of Procedure (Defence Forces) 1954 – Defence Force Regulations 1982 – Convention on the Privileges and Immunities of the United Nations 1946, article II, s. 4

Irish Press plc v. Ingersoll Irish Publications Limited **Supreme Court (Finlay CJ, Egan and Blayney JJ) [1995] 1 ILRM 117**

Security for costs – Appellant without sufficient assets – Appeal raising point of law of public importance – Refusal of order for security for costs – Discretion of the court – Rules of the Superior Courts 1986, O. 58

Stay on order of the High Court – Order directing transfer of shares and payment of damages – Whether compliance with order would render appeal moot – Survival of company dependant on transfer of shares – Balance of convenience

Tony Gregory v. District Judge Windle and Ors **High Court (O'Hanlon J) [1995] 1 ILRM 131**

Judicial review – Constitution – District Court – Powers to bind to the peace – Requirement to provide sureties – Imposition of imprisonment in default – Whether power to bind to the peace repugnant to the Constitution – Right to personal liberty – Common law powers of district judges – Whether carried over on the enactment of the Constitution – Dublin Police Act 1842, s. 14(13) – Courts (Supplemental Provisions) Act 1961, s. 54 – Constitution of Ireland 1937, Article 50

REAL PROPERTY

ICC Bank plc v. Richard Verling and Ors **High Court (Lynch J) [1995] 1 ILRM 123**

Mortgage – Clause providing that mortgagor could not lease or part with posession without prior written consent of mortgagee – Lease granted without consent of mortgagee – Whether mortgagee estopped from asserting invalidity of lease by virtue of delay or acquiescence – Conveyancing Act 1881, s. 13

Injunction – Mandatory interlocutory injunction – Length of lease such that interlocutory injunction requiring lessee to give up posession would effectively dispose of action – Need for plaintiff to show more than an arguable case – Strong *prima facie* case – Undertaking in damages given by plaintiff sufficient to compensate lessee – Balance of convenience

SOCIAL WELFARE

Social Welfare (No. 2) Act 1995 (No. 23 of 1995)

This Act was signed by the President on 25 July 1995. Cf (1995) 13 ILT 179.

TAXATION

Finance Act 1994 (Designation of Urban Renewal Areas) Order 1995 (SI No. 179 of 1995)

This Order declares certain areas throughout the country to be designated areas for the purposes of incentive tax reliefs for urban renewal provided for in the Finance Act 1994. The incentives are comprised of certain capital allowances for commercial buildings, accelerated capital allowances for certain industrial buildings, reliefs for the construction, conversion and refurbishment of rented residential accommodation, owner-occupier allowance for residential premises and double rent allowance for traders in respect of new leases of certain buildings in the designated areas. The Order also declares certain streets and parts of streets in Dublin, Cork, Galway, Limerick and Waterford to be designated streets for the purpose of incentive tax reliefs for the provision of residential accommodation in commercial and industrial premises fronting onto designated streets. In addition, the Order declares certain areas in Dublin, Cork and Galway to be enterprise areas for the purpose of incentive tax reliefs for enterprise areas provided for in the Finance Act 1994 (as amended). Finally, the Order specifies the period in which these tax incentives are available in the designated areas, designated streets and enterprise areas.

Finance Act 1994 (Commencement of Sections 93 and 96 (a)) Order 1995 (SI No. 184 of 1995)

This Order brings ss. 93 and 96 (a) of the Finance Act 1994 into force with effect from 7 July 1995.

TOURISM

Tourist Traffic Act 1995 (No. 13 of 1995)

This Act was signed by the President on 5 July 1995. Cf (1995) 13 ILT 204.

TORT

Michael Deighan v. Ireland, the Attorney General, the Minister for Justice and the Minister for Finance **High Court (Flood J) [1995] 1 ILRM 88**

Judicial Immunity from suit – Plaintiff tried summarily and convicted on charge of contempt of court – Judge acting within his jurisdiction – Whether a judge could be liable in a civil action for acts done or things said in the course of a trial – Whether pleadings disclosed a cause of action

Vicarious liability – Whether the State could be vicariously liable for actions of judges – Vicarious liability only possible where there is primary liability

James Vincent Furlong v. Waterford Co-operative Society **Supreme Court (O'Flaherty, Egan and Blayney JJ) [1995] 1 ILRM 148**

Negligence – Personal injury – Damages for loss of earnings to date – Absence of differential taking into account plaintiff's abiltiy to perform light work in the future – Damages for pain and suffering

Practice – Appeal – Credibility of plaintiff put in issue at trial of action – Findings of primary fact made by trial judge – Assessment of damages by trial judge – Whether damages for pain and suffering within appropriate scale

ILT DIGEST

OF LEGISLATION AND REPORTED CASES

Compiled by DAVID BOYLE

ADMINISTRATIVE

Harbours Bill 1995

This Bill has been amended in the Select Committee on Enterprise and Economic Strategy. (Cf. (1995) 13 ILT 176.)

Statistics (Census of Building and Construction) Order 1995 (SI No. 230 of 1995)

This Order enables the taking of a statutory census of building and construction relating to the years 1994 to 1999. The scope of the census is defined and a requirement is made that returns be furnished to the Central Statistics Office covering all undertakings in respect of which the prescribed forms have been issued. The Order came into operation on 23 August 1995 and shall expire on 22 August 2000.

AGRICULTURE

European Communities (Common Agricultural Policy) (Scrutiny of Transactions) (Amendment) Regulations 1995 (SI No. 218 of 1995)

These Regulations deal with the changes to the European Communities (Common Agricultural Policy)(Scrutiny of Transactions) Regulations 1994 required by Council Regulation (EC) No. 3094/94. These Regulations, *inter alia*, revise the definition of 'records' which are to be kept by persons in receipt of Community funds under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and allow officials of the Commission of the European Communities to participate in scrutinies under those Regulations.

National Milk Agency (Members) Regulations 1995 (SI No. 234 of 1995)

This Regulation fixes the number of ordinary members of the National Milk Agency. There shall be one member representing each of the following interests: those of consumers, retailers and distributors. In addition, four members shall represent the interests of processors and five the interests of producers.

CONSTITUTIONAL

Fifteenth Amendment of the Constitution (No. 2) Bill 1995

This Bill, as presented by the Minister for Equality and Law Reform, aims to amend Article 41 of the Constitution by the substitution of the following text for Article 41.3.2°:

'A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –

i. at the date of the institution of the proceedings, the spouses have lived apart from one aother for a period of, or periods amounting to, at least four years during the previous five years,
ii. there is no reasonable prospect of a reconciliation between the spouses,
iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
iv. any further conditions prescribed by law are complied with.'

***Daniel Francis Larkin v. Governor of St Patrick's Institution* and *Daniel Francis Larkin v. Edward J. O'Dea* Supreme Court (Hamilton CJ, Costello P, O'Flaherty, Blayney and Denham JJ) [1995] 2 ILRM 1**

Extradition – Fair Procedures – Re-arrest – Validity of order authorising re-arrest of applicant – Admissability of statements obtained during period of detention – Whether a person's constitutional rights would be vindicated if extradited to a jurisdiction where evidence obtained in violation of constitutional rights would be admissable – Extradition Act 1965, ss. 9, 47 – Criminal Justice Act 1984, ss. 4, 10(1)

***In the Matter of Article 26 of the Constitution and in the Matter of the reference to the court of the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill 1995* Supreme Court (Hamilton CJ, O'Flaherty, Egan, Blayney and Denham JJ) [1995] 2 ILRM 81**

Bill – Validity – Right to life of the unborn child – Right to life of the mother – Bill regulating circumstances in which information relating to services provided in other states for the termination of pregnancies may be made available in the State – Whether provision of Constitution allowing for information to be made available took precedence over natural law – Constitution of Ireland 1937, Article 40.3.3°

Natural law – Supremacy of the text of the Constitution – Power to amend Constitution in a manner inconsistent with natural law

***Stephen Walsh v. Governor of Limerick Prison* Supreme Court (O'Flaherty, Egan and Blayney JJ) [1995] 2 ILRM 158**

Detention – Convicted prisoner – Failure of prison authorities to permit consultation with legal advisers outside the hearing of prison staff – Whether inquiry under Constitution should be ordered – Whether breach of prison rules could render applicant's detention unlawful – Constitution of Ireland 1937, Article 40.4

CONSUMER

Package Holidays and Travel Trade Act 1995 (Commencement) Order 1995 (SI No. 235 of 1995)
This Order fixes 1 September 1995 as the day on which s. 5 of the Package Holidays and Travel Trade Act 1995 (cf. (1995) 13 ILT 90) came into operation and 1 October 1995 as the day on which the rest of the Act came into operation.

Approved Bodies (Fees) Regulations 1995 (SI No. 236 of 1995)
These Regulations set an application fee of £250 for bodies which are applying to be approved bodies for the purpose of ss. 23 and 24 of the Package Holidays and Travel Trade Act 1995 (cf. (1995) 13 ILT 90). The maximum period for which such approval may be granted is set at two years. The Regulations came into operation on 1 September 1995.

CRIMINAL

People (DPP) v. Noel Fowler **Court of Criminal Appeal (O'Flaherty, O'Hanlon and Barr JJ) [1995] 1 ILRM 546**
Indictment – Alternate counts – Charge of stealing – Charge of handling stolen property – Evidence – Direction on one count – Second count put to jury – Whether there was sufficient evidence to put both counts to the jury – Effect of withdrawing count of larceny – Contents of trial judge's charge to the jury – Larceny Act 1916, ss. 33 and 40(5) – Larceny Act 1990, ss. 3, 4(b) and 8

Director of Public Prosecutions v. Eric Spratt **High Court (O'Hanlon J) [1995] 2 ILRM 117**
Case stated – Person charged under Road Traffic Acts – Failure of prosecutor to adduce evidence of compliance with regulations governing information to be given to persons in custody by the member in charge of a garda station – Whether regulations apply to persons arrested under Road traffic Acts – Whether evidence of compliance with the regulations a requisite proof to such prosecution – Whether any non-compliance rendered custody of the accused unlawful and in breach of the accused's constitutional rights—Whether resulting evidence rendered inadmissable – Whether accused prejudiced by any non-compliance – Road Traffic Act 1961, s. 49(6) – Criminal Justice Act 1984, s. 7 – Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, regs. 2(1), 8, 9, 11

Dolores Bowes v. His Honour Judge Devally and the Director of Public Prosecutions **High Court (Geoghegan J) [1995] 2 ILRM 148**
Sentence – Conviction for posession of drugs – Money found in room at time of arrest – Whether order directing forfeiture of money permissable – Whether property related to particular offence – Misuse of Drugs Act 1977, ss. 3, 30 – Misuse of Drugs Act 1984, s. 6

EUROPEAN COMMUNITY

Teresa Tate v. Minister for Social Welfare, Ireland and the Attorney General **High Court and** ***Esther Robinson and Ors. v. Minister for Social Welfare, Ireland and the Attorney General*** **High Court (Carroll J) [1995] 1 ILRM 507**
Effect of community law within the State – Directive – Direct effect – Failure by State to implement directive within prescribed period – Whether compensation payable in respect of failure to implement directive which has direct effect

FAMILY LAW

B. v. R. **High Court (Costello P) [1995] 1 ILRM 491**
Husband and wife – Marriage – Validity – Declaratory proceedings – Parties married to each other in a civil ceremony in the United States – Second marriage subsequently celebrated by the parties in Ireland – Whether second marriage a bigamous marriage – Failure to comply with legal formalities under the Registration of Marriages (Ireland) Act 1863 – Offences Against the Person Act 1861, s. 27 – Registration of Marriages (Ireland) Act 1863, s. 11

O'R. v. B. **High Court (Kinlen J.) [1995] 2 ILRM 57**
Husband and wife – Nullity – Capacity to enter into a normal marital relationship – Whether petitioner capable of entering into caring and considerate relationship – Whether petitioner can rely on his own incpacity to enter normal marital relationship in circumstances where his spouse has not repudiated the marriage bond

INTERNATIONAL LAW

ACT Shipping (PTE) Limited v. Minister for the Marine, Ireland and the Attorney General **High Court (Admiralty)(Barr J) [1995] 2 ILRM 30**
Public international law – Ship in distress – Right of sanctuary at nearest maritime state – Rights arising from customary international law – Whether such rights part of Irish domestic law – Whether sole and exclusive right of Oireachtas to make laws for the State inhibits the adoption of such customary international law into Irish domestic law – Constitution of Ireland 1937, Articles 15(2), 29(3)

LICENSING

Thomas O'Rourke and Or. v. Grittar **Supreme Court (Hamilton CJ, O'Flaherty and Blayney JJ) [1995] 1 ILRM 532**
Application for new licence for sale of intoxicating liquor for consumption off premises – Applicant offering the extinguishment of two ordinary publican's seven day on-licences in return for the grant of an off-licence – Whether on-licence and off-licence of the same character – Licensing (Ireland) Act 1902, s. 2 – Intoxicating Liquor Act 1927, s. 1 – Intoxicating Liquor Act 1960, s. 13

LOCAL GOVERNMENT

Local Government Act 1994 Commencement Order 1995 (SI No. 245 of 1995)
This Order brings s. 22 of the Local Government Act 1994 into operation with effect from 19 September 1995.

East Wicklow Conservation Community Limited v. Wicklow County Council and Or. **High Court (Costello J) [1995] 2 ILRM 16**
Powers of county manager – Proposal for waste disposal site – Elected members of county council passing resolution that proposed site should be rejected – Refusal by county manager to comply with resolution – Whether county manager bound by direction – Local authority which has exercised power to collect house refuse under a duty to provide place where it can be deposited – Pubiic Health (Ireland) Act 1878, ss. 52, 55 – City and County Management (Amendment) Act 1955, ss. 2, 3

Partick McNamara v. An Bord Pleanála and Ors **High Court (Carroll J) [1995] 2 ILRM 125**
Planning and Development – Grant of permission for landfill site for municipal waste – Amendment of plans – Removal of sand and gravel below water line – Whether environmental impact statement adequate – Whether newspaper notice of application adequate – Matters left by An Bord Pleanála to be decided between the developer and the planning authority – Whether abdication of responsibility and wrongful delegation of powers – Conditions relating to traffic – Whether *ultra vires* – Whether substantial grounds – European Community (Environmental Impact Assessment) Regulations 1989, Schedule 1, Part II, s. 2(d)

PRACTICE AND PROCEDURE

Countyglen plc v. John Carway and Ors. **High Court (Murphy J) [1995] 1 ILRM 481**
Injunction – Mareva – Company – Former director – Allegations of fraud, breach of duty and breach of trust – Application to preserve assets of specified defendants pending trial of the issues – Whether fair, serious question to be tried – Whether real and substantial risk of removal of assets – Affidavits sworn by defendants – Failure to disclose assets and failure to deal with allegation that assets might be removed or dissapated – Inferences to be drawn – Territorial scope of Mareva order – Whether order should be limited to assets within the jurisdiction of the court

Teresa Tate v. Minister for Social Welfare, Ireland and the Attorney General **High Court and** ***Esther Robinson and Ors. v. Minister for Social Welfare, Ireland and the Attorney General*** **High Court (Carroll J) [1995] 1 ILRM 507**
Limitation of actions – Whether claim for damages against State in respect of its failure to implement a directive statute-barred – Whether failure to observe community law amounts to a tort – Statute of Limitations 1957, s. 11(2)

Best v. Wellcome Foundation Limited **High Court (Murphy J) [1995] 1 ILRM 554**
Costs – Plaintiff unsuccessful in High Court but succeeding in Supreme Court on appeal – Supreme Court order awarding costs against defendant – Whether interest should run only from date of taxation of costs – Courts Act 1981 – Debtors (Ireland) Act 1840, ss. 25, 26, 27 – Rules of the Superior Courts 1986, O. 42 r. 15

Agritex Limited v. Patrick J. O'Driscoll and Ors carrying on practice as P.J. O'Driscoll and Sons Solicitors **High Court (Lynch J) [1995] 2 ILRM 23**
Solicitor – Taxation of costs – Whether a solicitor who has delivered a bill of costs can deliver a different bill when taxation of those costs is sought – Attorneys and Solicitors (Ireland) Act 1849, s. 2 – Rules of the Superior Courts 1986, O. 99 r. 29(5)

Partick McNamara v. An Bord Pleanála and Ors **High Court (Carroll J) [1995] 2 ILRM 125**
Judicial review – Planning and development – Application for leave to seek judicial review – Grant of permission for landfill site for municipal waste – Whether substantial grounds – Test to be applied – Local Government (Planning and Development) Act 1963, s. 82 – Local Government (Planning and Development) Act 1992, s. 19(3) – Rules of the Superior Courts 1986, O. 84

Words and phrases – 'Substantial grounds' – Applications to seek judicial review in planning and development matters – Test to be applied – Local Government (Planning and Development) Act 1963, s. 82 – Local Government (Planning and Development) Act 1992, s. 19(3) – Rules of the Superior Courts 1986, O. 84

Voluntary Purchasing Groups Inc. v. Insurco International Limited and Or **High Court (McCracken J) [1995] 2 ILRM 145**
Setting aside of *ex parte* order – Application for an *ex parte* order while appeal in the substantive matter is still pending – Costs – Foreign Tribunals Evidence Act 1856, ss. 1, 5 – Rules of the Superior Courts 1986, O. 39 rr. 39-44, O. 52 r. 3

Dolores Bowes v. His Honour Judge Devally and the Director of Public Prosecutions **High Court (Geoghegan J) [1995] 2 ILRM 148**
Judicial Review – *Certiorari* – Application to quash order directing forfeiture of monies – Applicant convicted of posession of drugs – Application seeking to quash part only of District and Circuit Court order – Whether order severable – Remission of matter to Circuit Court judge – Rules of the Superior Courts 1986, O. 84 r. 26(4)

B. & S. Limited v. Irish Auto Trader Limited **High Court (McCracken J) [1995] 2 ILRM 152**
Injunction – Passing off – Car sale magazine – Entry into Irish market of Irish edition of UK magazine –

Whether passing off – Application for interlocutory injunction – Whether serious issue to be tried – Balance of convenience – Factors to be taken into account – Potential damage to each party – Possible confusion between two publications

SOCIAL WELFARE

Teresa Tate v. Minister for Social Welfare, Ireland and the Attorney General **High Court and** ***Esther Robinson and Ors. v. Minister for Social Welfare, Ireland and the Attorney General*** **High Court (Carroll J) [1995] 1 ILRM 507**

Directive providing for equality as between men and women in relation to social welfare entitlements – Failure by State to implement directive within prescribed period – Failure by State to pay equal benefits retrospectively as from the date on which directive should have been implemented – Compensation calculated so as to take into account delay in providing for equality of benefits – Social Welfare (No. 2) Act 1985 – European Communities (Social Welfare) Regulations 1992 – Council Directive 79/7/EEC

TAXATION

Tobacco Products (Tax Stamps) Regulations 1995 (SI No. 233 of 1995)

These regulations lay down conditions governing the collection of excise duty on tobacco products by means of tax stamps, and the resultant obligations on manufacturers, importers and tax representatives. The Regulations came into operation on 4 September 1995.

TORT

Sean Hussey v. Francis Joseph Plunkett Dillon and Ors. practising under the name and style of Gerrard Scallan & O'Brien **Supreme Court (Egan, Blayney and Denham JJ) [1995] 1 ILRM 496**

Negligence – Concurrent wrongdoers – Settlement by one set of defendants – Whether claim as against other set of defendants is satisfied – Bankruptcy adjudication – Negligence and breach of contract claim against solicitors – Whether claim for special damages included in settlement – Action against second firm of solicitors – Whether both firms of solicitors concurrent wrongdoers – Whether the plaintiff was estopped from maintaining his claim and the defendants discharged from any liability to the plaintiff – Whether plaintiff's claim restricted to special damages – Civil Liability Act 1961, ss. 2, 11, 16

ACT Shipping (PTE) Limited v. Minister for the Marine, Ireland and the Attorney General **High Court (Admiralty)(Barr J) [1995] 2 ILRM 30**

Negligence – Refusal of sanctuary to ship – Damages – Ship in distress – Refusal of minister to allow ship access to Irish territorial waters – Rights of sanctuary under customary international law – Development of right of sanctuary in light of modern concerns – Risk of pollution or blockage of port access – Review of decision of minister – Grounds for review – Whether decision flew in the face of reason and common sense – Whether decision taken pursuant to statute or to rights of State pursuant to customary international law – Oil Pollution of the Sea (Amendment) Act 1977, ss. 2, 3 – International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969

Gerard Conlon v. Times Newspapers Limited **High Court (Murphy J) [1995] 2 ILRM 76**

Defamation – Motion to strike out proceedings for failure to show reasonable cause of action or for being unsustainable and bound to fail – Questions to be decided at preliminary stage not whether words are 'capable' of being defamatory but whether it is 'arguable' that they are capable of such a meaning

B. & S. Limited v. Irish Auto Trader Limited **High Court (McCracken J) [1995] 2 ILRM 152**

Passing off – Elements of tort – Car sale magazine – Entry into Irish market of Irish edition of UK magazine – Whether serious issue to be tried as to claim for passing off

TRUST

John Stacey (an Infant) and Or v. John Branch **High Court (Murphy J) [1995] 2 ILRM 136**

Duties of trustee – Duty of investment – Action for breach of trust – Construction of trust deed – Property to be transferred to beneficiary when he attained a certain age – Pending that event trust deed conferred on the trustee a right to deal with the property as he in his absolute discretion saw fit – Trustee put caretaker into property for substantial perod of time without any obligation to pay rent – Evidence that substantial amount of rent could have been realised if the property had been leased.