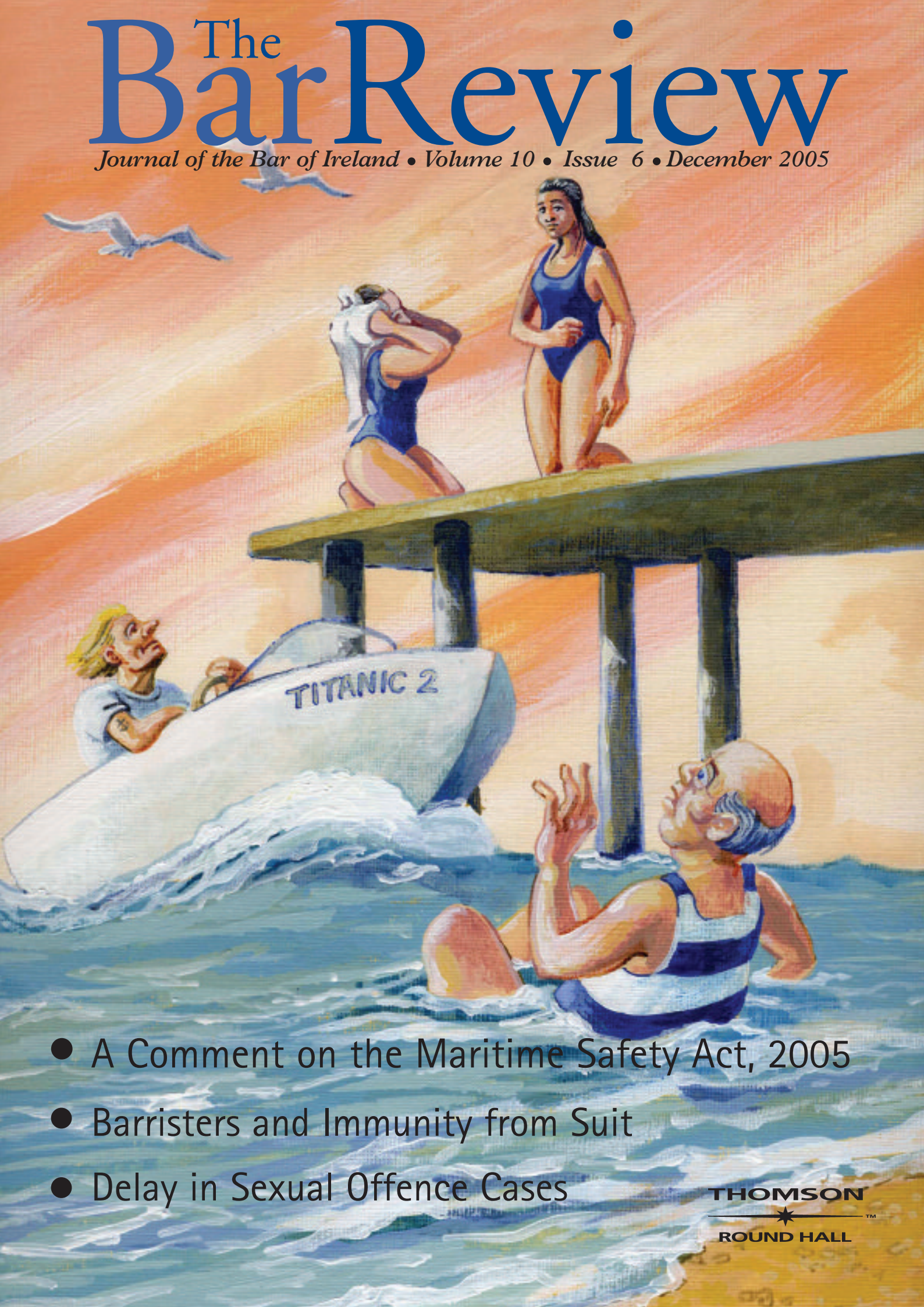
The Bar Review

Journal of the Bar of Ireland • Volume 10 • Issue 6 • December 2005



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The Bar Review

Volume 10, Issue 6, December 2005, ISSN 1339 - 3426

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The Bar Review is published by Thomson Round Hall in association with The Bar Council of Ireland.

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Thomson Round Hall
43 Fitzwilliam Place, Dublin 2
Telephone: + 353 1 662 5301 Fax: + 353 1 662 5302
Email: info@roundhall.ie web: www.roundhall.ie

Subscriptions: January 2005 to December 2005 - 6 issues
Annual Subscription: €188.00
Annual Subscription + Bound Volume Service €288.00

For all advertising queries contact:
Directories Unit. Sweet & Maxwell
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The Bar Review December 2005

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You Be the Judge Part II

The Politics and Processes of Judicial Appointments in Ireland[1]

Jennifer Carroll

This article is the second in a series taken from the author's M.A. thesis on the Irish Judiciary. This thesis set out to update the 1969 Paul Charles Bartholomew study on the social, economic and political backgrounds of Irish Judges by performing a similar study on the Judges of the High and Supreme Courts in Ireland in 2004. The results of this study are outlined in the first article of this series, available in the November 2005 edition of this publication.

Part of the original work done by Bartholomew was an analysis of the political circumstances surrounding the appointment of judges and accordingly, something similar was attempted in 2004. The author situated the study in the context of an analysis of how judges came to be appointed - the judicial selection system in Ireland. Recognising the subtleties and variances in perception of the author and contributors, this article attempts to present some limited findings on the political intricacies that exist in the appointment of Superior Court judges in Ireland today.

The article will focus on the process of judicial appointments and the efforts that have been made to reduce the element of political allegiances, or at least create a credible perception of same. In order to do this, it will examine the establishment of the Judicial Appointments Advisory Board (JAAB) and the functions and operation of the JAAB. It will assess the criteria for consideration by the Board and suggest some possible limitations of the Board. Essentially, this article will argue that the current remit of the Board, in recommending seven names to the Government in respect of each judicial vacancy, is much too wide for the JAAB to achieve its ostensible function, that of removing political patronage in appointments. This article will argue, based on the suggestions of its contributors, that it would be more appropriate for the Board to recommend only three names in respect of each vacancy.

Judicial Selection in Ireland

> "Judges in Ireland share a number of characteristics with their counterparts abroad: they are not elected and they enjoy substantial autonomy from control or scrutiny by elected representatives. In Ireland, the power of judges to interpret the constitution makes them even more powerful than judges in other countries.[2]"

Judicial selection in Ireland is by judicial appointment[3]. The President makes the formal appointment through the presentation of seals of office to those appointed. However this power, pursuant to Article 13.9 of the Constitution, is exercised "only on the advice of the government"[4]. In this way the actual power over selection of individuals for judicial appointments is considered to rest with the government of the day.

The Politics of Judicial Appointments

Historically, judicial appointments in Ireland were governed by the informal aspect of the appointments process - that of political allegiances. This element of judicial appointments dates back to before the formation of the state as, during the 19th century, many of the barristers appointed to the Irish Bench had either been Members of Parliament in the Westminster Parliament, or served as Attorney General or some other law officer in Ireland[5].

It is widely accepted that the influence of political allegiances on judicial appointments continued in post-1937 Ireland.

> "Because of the efforts of the first Cumann na nGaedheal government, most public appointments were excluded from political influence, but jobbery had become a feature of Irish politics in relation to the small range of posts that remained outside the purview of the Civil Service Commission and the Local Appointments Commission, posts such as local authority gangers, rate collectors, vocational teachers, government messengers, and - in a genteel way! - judges.[6]"

Gallagher[7] states that the process has been essentially informal but secret, and that political connections have played a major role. Gallagher[8] cites Ruairí Quinn[9] as saying that although judges are appointed by the government, in practice only the Taoiseach and Minister for Justice (together with other party leaders in the case of a coalition) are involved in the selection, the rest of the government simply being informed of the name of the chosen person. A record of support for the political party in power has been considered to be a consistent feature of those appointed. One contributor to the You Be the Judge study remarked that it was:

> *"...fairly universally understood that the system was political. On the other hand, this did not mean that the appointments were necessarily bad appointments. It's just that some individuals who might have been appointed were excluded on the basis of not being aligned with the party in power. But on the whole, the quality of the appointments was good and the system worked reasonably well."*

In his 1969 study of the Irish Judiciary, Bartholomew[10] was very clearly of the view that political allegiances had a substantial influence on

1 The author is deeply appreciative to all those that participated in and made contributions to this study. In particular the study could not have been completed without the support of The Honourable Mr. Justice Ronan Keane, Chief Justice and The Honourable Mr. Justice Joseph Finnegan, President of the High Court. The author is also grateful for the contributions made by Professor Tom Garvin, Head of Department of Politics, UCD; Dr. Garret Fitzgerald, Chancellor of National University of Ireland; Dr. Gerard Hogan FTCD Senior Counsel; Dr. Jacqueline Hayden, Department of Political Science, Trinity College Dublin; Mr. Brendan Ryan, Director, Courts Service; Professor Kevin McGuire, Fulbright Scholar, University of North Carolina. She would especially like to thank all of the Judges of the High and Supreme Courts in Ireland in 2004 for their time and interest in participating in the study, their helpful comments and suggestions on which it based, and their extraordinary generosity, kindness and welcome for a novice researcher with her myriad of errors!

2 Coakley and Gallagher (2004), Ch. 3
3 Bunreacht na hEireann Article 35.1
4 Byrne and McCutcheon (1996) pp. 118
5 Byrne and McCutcheon (1996) pp. 121
6 FitzGerald (2001) pp. 72
7 Coakley and Gallagher (2004) Ch. 3
8 Ibid, Ch. 3
9 Minister in the 1993-4 Government, Dáil Éireann; Select Committee on Legislation and Security, 1995, columns 937,981, 17 January 1995

judicial appointments. Some of his comments must be included in full to demonstrate the vehemence with which he puts forward his findings as regards the relationship between political allegiances and judicial appointments.

> "A general consensus exists that there are no promises of judgeships for party service and this same consensus holds that no appointments are made of those unqualified for the judicial posts...This is not to say that the best person available is always named but that usually those named are of judicial calibre.
>
> However, there is the very realistic point that, with rare exceptions, a person named as judge will be one who is favourably regarded by the Government perhaps out of gratitude for past services to the party or to the State. Even in the rare instance where an adherent of the opposition party is named, this may well be of indirect advantage to the Government party in that such a "non-partisan" appointment projects an image of objectivity to the public with concern for the quality of the courts, rather than considering only political and partisan factors.
>
> A judicial appointment does not "just happen". It is in a very real sense the finest and most desirable appointment that the Government can make. It is a status appointment.....The "inner circles" of the party and of the Government always have in mind potential appointees for judicial vacancies before they actually occur. In the instance of a vacancy on the High Court or Supreme Court, the Attorney General usually has the "first right of refusal" as it is called.[11]
>
> "The Minister for Justice makes up a list of prospects and presents it in Cabinet meeting. The "list" may contain a single name....No formal vote is taken at the Cabinet meeting; an informal agreement on a particular person evolves. If the Taoiseach...has a favourite, that man will get the job. Certainly no one has ever been named judge over the objections of the Taoiseach. The person chosen is then formally consulted and consent secured. Then the President, who has not been consulted on the appointment, is told the name of the appointee and the formal appointment is made by the President.[12]"

Bartholomew makes the point that a judicial aspirant might make his interest known very discreetly, perhaps long before any vacancy has occurred, and that such suggestions are not classed as direct "lobbying" of the members of the Cabinet[13].

Bartholomew continues:

> "One of the judges interviewed for this study made the statement that almost all judicial appointments are based on partisan political considerations. A former Taoiseach made the statement that "all things being equal" a person's politics is controlling in such appointments. All Irish governments have to a greater or lesser degree been politically motivated in the making of judicial appointments.[14]"

That is not to say that every appointment was made on a political basis - one contributor to this study commented that, to a large extent, the political element of appointments disappeared with some spectacular cross-party appointments in the late 1970's and early 1980's. He further commented that, although technically it is the Minister for Justice who makes the nomination, in reality the advice of the Attorney General has been persuasive because he tended to know the candidates.

Some of the judges in the 2004 study commented that it was very hard to know what factors affected judicial appointments because it can depend on factors like whether the Taoiseach of the day takes an interest. Some have left it entirely to the Attorney General. Furthermore, it was said that, in the past, the Minister for Justice had relatively little influence in High Court and Supreme Court appointments. However, it was believed by the contributors that this has changed, and the Minister for Justice is thought to be generally more active in judicial selection. It was further commented that a second factor could be whether it is a single party or coalition government in power. If it is a coalition, then there is the possibility that appointments could be even more political because they may be used to appease a junior partner in the coalition. It was commented that one should not be too dogmatic regarding the circumstances of judicial appointments - there are lots of different reasons why individuals are appointed. Other things being equal, it will be a government appointment.

Another judge commented that although there had been dramatic cross-party judicial appointments, there was simply no doubt but that the system prior to the establishment of the Judicial Appointments Advisory Board (JAAB) was entirely within the political gift. It was further commented that prior to the establishment of the JAAB, judicial appointments were all done on a "nod and a wink".

Judicial Appointments Advisory Board (JAAB)

The judicial appointments process in Ireland was substantially altered by the Courts and Court Officers Act 1995 which established the Judicial Appointments Advisory Board (JAAB). Section 13 of the 1995 Act provides for the creation of an advisory board for the purposes of "identifying persons and informing the Government of the suitability of those persons for appointment to judicial office." The JAAB consists of ten persons[15] - the Chief Justice; the Presidents of the High Court, Circuit Court and District Court; the Attorney General[16]; a practising barrister; a practising solicitor; and up to three nominees of the Minister for Justice.

The JAAB was introduced ostensibly to remove the taint of political patronage from judicial appointments. The shortcomings of the system whereby judges were appointed largely based on their political connections, has been much criticised over time[17]. However, it seems that the catalyst for the actual establishment of the JAAB in law was the political crisis that ensued in 1994 when the government of the day fell as a result of the reaction of the junior coalition Government partner to the Taoiseach's insistence on appointing a former Attorney General to the High Court, drawing intense public and media scrutiny to the judicial appointments process. It is felt that the incoming government was under severe pressure to reform the judicial selection system and responded with the establishment of the JAAB.

10 Bartholomew (1969) Ch. 2
11 Ibid pp. 32-33
12 Ibid pp. 33-34
13 Ibid pp. 34
14 Ibid pp. 35
15 Section 13 (2) of the 1995 Act
16 Section 18(3) states that where the Attorney General wishes to be considered for appointment to judicial office, he or she shall withdraw from any deliberations of the Board concerning his or her suitability for office.
17 Byrne and McCutcheon (1996) pp. 124 refer to Delaney (1975) The Administration of Justice in Ireland (4th edn, pp. 76-7) and the 1990 Fair Trade Commission, Report of Study into Restrictive Practices in the Legal Profession, pp.299 of which contained an explicit recommendation for the establishment of a Judicial Appointments Advisory Board.

Operation of the Judicial Appointments Advisory Board

The operation of the JAAB is set out by the Courts and Courts Officers Act, 1995. The basic premise is that any individual who wishes to be considered for a judicial posting must apply to the Board in writing, providing information as to their education, professional qualifications, experience and character[18]. This is a substantial change to the old system whereby one generally did not perhaps make anything more than very discreet musings as to their judicial ambitions.

There are minimum technical requirements that must be fulfilled before an individual can be considered for judicial appointment in Ireland. Prior to the establishment of the JAAB these requirements were governed by the section 29(2) of the Courts (Supplemental Provision) Act 1961. This states that an individual "who is for the time being a practising barrister or solicitor of not less than ten years standing" is qualified to be appointed as a judge of the District Court. This applied also to the appointment of persons to the District Court on a temporary basis[19]. Appointment to the remaining courts was reserved entirely for members of the Bar of the appropriate experience. Practising barristers of ten years standing were eligible for appointment to the Circuit Court[20]. Individuals who for the time being were practising barristers of twelve years standing were qualified for appointment to the High or Supreme Court[21].

The Courts and Courts Officers Act 1995 provided a significant change to the characteristics of the persons qualified for appointment to the Circuit, High and Supreme Courts. It provided that, in addition to a practising barrister of ten years standing, a practising solicitor of ten years standing was eligible for appointment to the Circuit Court[22]. Furthermore, the Act provided that a Circuit Court judge of four years standing could be appointed to the High or Supreme Court[23]. This was highly significant as it provided that a solicitor could become a judge of the Superior courts of Ireland, albeit indirectly through promotion from the Circuit Court. The first appointments of solicitors to the Circuit Court were made in July 1996[24].

The position of solicitors with respect to judicial appointments was further amended in the Courts and Court Officers Act 2002, which permits the direct appointment of Solicitors to the High Court. This statute is an important development in the analysis of the judicial appointments system in Ireland as, in theory, it considerably widens the pool of individuals entitled to apply to the Judicial Appointments Advisory Board for consideration for appointment to the Superior Courts. In practice however, it is arguably limited by section 8 of the 2002 Act, which provides that the potential appointee must have appropriate experience of superior court practice and procedure. It was commented in the course of this study that very few of the seven thousand solicitors practising in Ireland today actually exercised their right of advocacy in a manner currently thought to be consistent with being eligible for appointment under this provision. It might be contended that the effect of this is that Section 8 of the 2002 Act massively restricts the pool of potential Superior Court appointees and might continue to do so until either the legislation is amended; a greater number of solicitors exercise their rights of advocacy in the Superior Courts in the manner currently perceived to be necessary for the purposes of the fulfilling section 8 above; or until there is an authoritative interpretation of this provision that would remove any ambiguity as to what constituted "appropriate knowledge and appropriate experience of the practice and procedure of the Supreme Court and the High Court[25]".

To date there has only been one judge appointed to the High Court who at the time of their appointment was a practising solicitor. This High Court judge stated for quotation that he believed a major factor in his appointment to the High Court was his "experience of superior court advocacy[26]".

Procedures of the Judicial Appointments Advisory Board

The Judicial Appointments Advisory Board advertises annually to invite persons who wish to be considered for judicial appointments which may arise to submit their names to the Board. More recently the Board has published advertisements inviting applicants to submit their names in respect of specific judicial vacancies. Applicants provide details of their education, professional qualifications and details of their practice, experience and character. Applicants must also provide a tax clearance certificate and a statutory declaration that their tax affairs are in order.

The 2002 Annual Report of the JAAB[27] states that there is no statutory obligation on the Minister for Justice to request the Board to make a recommendation as to the filling of a particular judicial vacancy[28] and that since the establishment of the Board, the Minister has requested the Board to make such a recommendation in respect of every judicial vacancy that has arisen[29]. However, the 2003 Annual Report states that there have been individuals appointed by the government of the day who had not applied to the JAAB for consideration for nomination for judicial office[30].

It is within the discretion of the Board to call for interview any applicants who wish to be considered for judicial appointment[31]. However, in its Annual Report 2002, the Board stated that it:

> "...had not to date availed of its power either to arrange for the interviewing of applicants or to consult with other persons concerning the suitability of applicants.[32]"

It similarly had not done so in 2003. Nevertheless in both Reports, the Board noted its power to do so in the future. The Board also states that, to date, it has not availed of its power to engage in soundings with colleagues or experts in the area of law in which the potential interviewee has been practising but that it will do so where appropriate. The Board noted in its 2003 Annual Report that it had availed of its power to appoint sub-committee to deal with the large volume of applications for Circuit and District Court vacancies. The Board notes that this has greatly assisted them in the efficient conduct of their business but that the decision to recommend a particular candidate will

18 Section 16 (1) of the 1995 Act
19 Courts of Justice Act 1936, s. 51(1) cited in Byrne and McCutcheon (1996) pp. 118
20 Courts (Supplemental Provisions) Act 1961, s. 17(2)
21 Courts (Supplemental Provisions) Act 1961, s. 5(2)
22 Courts and Court Officers Act 1995, s. 30
23 Courts and Court Officers Act 1995, s. 28
24 Byrne and McCutcheon (1996), pp. 119
25 Courts and Court Officers Act 2002, s.8 (7) (b) (i) (II). Subsection (7) (b) (ii) continues that in determining what constitutes appropriate experience the JAAB "shall have regard, in particular, to the nature and extent of the practice of the person concerned insofar as it relates to his or her personal conduct of proceedings in the Supreme Court and the High Court whether as an advocate or as a solicitor instructing counsel or both".
26 As with all potentially attributable quotations in the thesis, permission to include this statement was sought and obtained by the author from the Honourable Justice concerned.
27 Judicial Appointments Advisory Board (2002) Annual Report
28 Judicial Appointments Advisory Board Annual Report 2002, pp.23
29 In accordance with Section 16 of the Standards in Public Office Act 2001
30 Judicial Appointments Advisory Board Annual Report 2003 pp. 13
31 Courts and Court Officers Act 1995, s. 14(2)(e)
32 Judicial Appointments Advisory Board Annual Report 2002

always remain with the Board.

Impact of the JAAB on the Politics of Judicial Appointments

It should be noted that the Government is not obliged to select the appointee from the Board's list of recommended candidates; it may select some other individual on the condition that a notice is published to that effect. Thus, the government is not in law constrained in its actions by the existence or recommendations of the JAAB. The only potential sanction is political. Gwynn Morgan[33] states that notwithstanding this, the Board demonstrated its independence in 1998 when the Government was about to appoint a candidate whom the Board did not consider suitable. Gwynn Morgan comments that the Board confidentially threatened to resign and the Government climbed down[34].

The Board also notes that it is not empowered by legislation to recommend applicants in any order of preference[35]. The Board notes that this may "render the recommendations less helpful, particularly where there are a relatively limited number of applications for a particular vacancy". It further states that it is "conscious of the difficulties which might result" from preferentially ranking candidates as to do so could place unjustifiable constraints on the exercise by the Government of a function which is exclusively assigned to it under the Constitution[36].

This view that the ranking of candidates by the JAAB would be unconstitutional has been the subject of criticism in the course of the You Be the Judge study. As things stand, the executive can appoint any qualified individual that they see fit. The only sanction is that if they do so, they must publish a notice of same in the Iris Oifigiuil to that effect. However, it was commented by one contributor to this study that, in practice, it is felt that the executive would not appoint someone who had been declined by the JAAB because it undermines the system to some extent and also because of the negative aura that would surround the judge in question after their appointment. Of course, there exists the entirely opposite situation whereby the government may make an approach to a suitably qualified individual who has not yet applied to the JAAB for consideration as a judicial candidate[37]. In any case the appointment by the executive of an individual outside the JAAB is constitutionality acceptable, with only a potential political sanction if the candidate is one who had been rejected by the JAAB.

It is the contention of the author that perhaps the preferential ranking of candidates for judicial appointment by the JAAB would not be unconstitutional, unless the practice developed to the point whereby the decision-making power in judicial appointments was actually taken from the government.

There is a very definite advisory capacity to the JAAB. It is not confined to identifying persons and informing the Government of the suitability of those persons for appointment to judicial office. The criteria are interpreted by the JAAB as a minimum standard and it has stated that it is not confined to simply "transmitting to the Minister the names of all those who meet the threshold requirements of eligibility and suitability[38]". The Board's function extends to the selection from those qualified candidates, individuals it is satisfied to recommend for appointment to the relevant vacancy. The powers of the JAAB extend to interviewing candidates and making enquiries to their professional bodies as to their character and suitability. It is the competent and appropriate body to perform this task. Its remit should be extended to give its recommendations greater weight in the ultimate selection of judges, either by preferentially ranking candidates, reducing the number of candidates recommended to three as discussed below, or both.

Limitations of the Judicial Appointments Advisory Board

The principal concern raised by the participants and contributors to the You Be the Judge study was that the JAAB was required to submit such a large number of recommended candidates to the government in respect of each judicial vacancy.

In the 2002 Annual Report[39] the JAAB recognises that a reduction in the minimum number of candidates would make the JAAB's recommendation more helpful, especially for vacancies where there was a limited number of applicants. However, it further commented that, particularly in the case of Circuit and District Court recommendations, to reduce the number of recommendations below seven would exclude candidates whom the Board would otherwise have "no difficulty in recommending". Perhaps, in order to recognise the varying number of vacancies and applicants between the lower and superior Courts, there is an argument for reducing the number of recommendations required by the JAAB on the Superior Courts to three candidates, while leaving it unchanged at seven for the lower courts where there are more applicants per vacancy. Many contributors suggested that it would be better for the JAAB to recommend only three names in respect of each judicial vacancy.

Court	Applicants	Appointments
Supreme Court	2	1
High Court	27	5
Circuit Court	91	3
District Court	98	5

Figure 3.1 - Applicants and Appointments for Judicial Vacancies in 2002, figures from the Judicial Appointments Advisory Board Annual Report 2002[40]

33 Gywnn Morgan, Selection of Superior Court Judges in Ireland
34 Ibid
35 Judicial Appointments Advisory Board Annual Report 2002, pp 23
36 Ibid, pp. 32
37 This has happened in at least three instances since the establishment of the JAAB and the author would be appreciative to be informed of any others.
38 Judicial Appointment Advisory Board Annual Report 2003, pp. 20
39 Judicial Appointments Advisory Board Annual Report 2002 pp. 23
40 One of the Appointments to the High Court was made in 2003 but the meeting confirming the recommendation was in December 2002 and has been so included in the Judicial Appointments Advisory Board Annual Report 2002.

Views of the JAAB from Contributors to the You Be the Judge study of the Irish Judiciary

In the course of the study, each judge and participant was asked their views on the Judicial Appointments Advisory system. Some of their comments have been included below[41]. It should be stated that twenty-two of the twenty eight personally interviewed judges in this study had been appointed through the JAAB system. The general response was that it was a good idea in theory, but that in practice, it had made very little change to the political patronage system of appointments which existed in Ireland.

> *"The first concern for any judicial appointment is invariably that the person is among the best available for appointment. Governments are interested in having judges of good professional standing because the superior courts exercise a constitutional role affecting the governance of the country. Therefore it is critical to have people of sound judgment."*

One participant commented that the JAAB is a good idea because it is a positive thing that the government is given advice on the suitability of candidates. Another made the point that the JAAB system is better because it enables checks on everyone's background and sets a basic standard in every appointment, but that it was still not good enough.

One contributor to the study stated a belief that the JAAB serves a useful purpose in that it screens applicants so that only suitably qualified individuals are considered for appointment.

Another contributor stated that there is a public perception that all judges are appointed by an independent board.

> *"While that is theoretically true, in the sense that there is a Judicial Appointments Board to whom anybody that aspires to a judicial appointment has to apply and notionally they are appointed by that board or at least they're recommended by that Board for appointment by the government. But the reality is very different because the Board are required to recommend seven people in respect of each vacancy and inevitably the government of the day pick their own supporter. There are exceptions to that rule - but very very often the government pick their own supporters. So the idea that people are appointed purely on merit is not necessarily true."*

One Judge made the comment that the JAAB was designed to redress what was perceived as a system based on political influence, and on the face of it the JAAB removes that possibility.

> *"But it is strange how the right names seem to get on the list. That is not to say that there are bad judges appointed but the JAAB has not removed the number of judges appointed for what seem like political reasons."*

A separate commentator stated that the JAAB is not necessarily a better system than what went before, it is still very fallible because essentially the government can still pick any of the names on the list and "let's face it, the pool is not that big". It was remarked that the JAAB is only a cosmetic change - the government can still appoint at will. Another observed that the JAAB is a complete waste of time - all it can do is knock out useless candidates but judges are still appointed politically. Another commented that the old system was based on a nod and a wink whereas now you have to declare your hand and apply for the job so it's a more transparent process.

Some participants and contributors specifically criticised both the number of candidates to be recommended and the Board's remit with respect to preferential ranking of candidates. One comment was made that "*seven names is far too many and some appointments are clearly very political*." Another commented that the JAAB system is an improvement, but there could be further improvements in the sense of how many names are sent up and whether they are sent up in order of preference.

> *"I think it might be desirable if they were. But it is an improvement. I don't think that people should be appointed on a political basis and I think anything that tries to make the system free from political influence is much better."*

One contributor summarised the issue thus:

> *"The JAAB is really just window dressing. It's not a problem with the people on it, rather it is a problem of its terms of reference. Appointments today are a political choice from a set of names, and maybe too many names. The JAAB needs more remit and more power."*

Gwynn Morgan[42] notes that further criticisms of the JAAB process is that it does not apply to the selection of the Chief Justice or the Presidents of the other courts. He further comments that the JAAB process does not apply where the government selects a judge from a lower court for a vacancy on a higher court.

Other Possible Reforms of the Judicial Selection System in Ireland

The Constitution Review Group[43] discussed the possibility of an open cross-examination similar to the public questioning of a U.S. Supreme Court candidate by the U.S. Senate Judicial Committee before the Senate confirmation vote. The Irish Constitutional Review Group largely disapproved of the U.S. Senate confirmation hearing system in the following terms:

> "The contemporary U.S. experience of public hearings...(shows that) such a process could create a situation where opposition groups or the media could attempt to discredit a candidate selected by the Government as a means of discrediting the Government...Finally, the intense public scrutiny of candidates is likely to deter the sort of people who would be suitable appointees."[44]

A similar view is offered by the 20th Century Task Force, an American

41 All comments have been included without reference or allusion to their respective owners. They are the comments of the judges, lawyers, academics, politicians and other contributors to this study. They are included to give the reader a fuller flavour of the views expressed to the author in the course of this study, not just for any anecdotal value but in the genuine belief that the firsthand comments of those that have participated in the JAAB process are of value to any political study of its efficacy. The JAAB is an instrument for recruitment, screening and partial selection of potential Judges. It is therefore an organ of the state, independent in operation of the government but working on its behalf in function. It merits scrutiny in terms of its processes and efficacy, if not necessarily its output, which is and should remain the prerogative of the executive of the day.

42 Gwynn Morgan, Selection of Superior Court Judges in Ireland

43 Constitution Review Group (1996)

44 Constitution Review Group (1996) pp. 180-181

body comprised of lawyers, public officials and scholars. They studied the U.S. Supreme Court confirmation process and made suggestions for its reform[45]. They argue that the existing system is "dangerously close to being like the electoral process" and that it is:

> "...very much a national referendum on the appointment with media campaigns, polling techniques, and political rhetoric that distract attention from, and sometimes completely distort, the legal qualifications of the nominee"[46].

Malleson[47] comments that the US Senate confirmation hearings of federal judicial appointments before the Judiciary Committee are widely condemned for bringing politics into the judicial process. However, she contends that the principle that a senior judge who may contribute to the formation of national policy-making should attend a public interview has much to recommend it. She further notes that a similar process is carried out for judges appointed to the Constitutional Court in South Africa who attend a public interview before the Judicial Service Commission.

It was the contention of the study that a process which overtly politicises the selection of judges is inherently questionable. The Supreme Court confirmation process has become one of the most contentious aspects of American politics representing a seismic struggle between the President and the Senate over the ideological composition of the Court[48].

In the US context, there may be other influences affecting the decision of a Senator to confirm or reject a Supreme Court nominee such as "Constituent Influence" experienced by individual Senators when voting to confirm or reject the President's Supreme Court nominee[49]. This theory argues that while traditionally Senate confirmation votes are determined by the individual Senators' partisan loyalties, the constituency concerns of the Senator may prove to be extremely important. This is especially true if the nomination is made by a "weak" President - one who is not elected, who faces a Senate controlled by the opposition or who is in their terminal year of office[50]. Facing such a situation, strategic considerations will favour the nomination by the President of candidates who have the perceived support of a particular political constituency important to key "swing" Senators.

Overby et al.[51] conducted a study of Senators' voting behaviours in the Supreme Court nomination of Clarence Thomas. This was a highly salient case which involved a clearly identifiable political constituency important to key "swing" Senators - the African-American constituency. Overby et al. found that Senators with a large African-American constituency who would soon be up for re-election were significantly more likely to confirm Thomas' nomination, irrespective of their partisan commitments, thus illustrating how the appointments process can become highly politicised. Consider President Reagan's statement to the nation in 1987:

> "Tell your Senators to resist the politicisation of our court system. Tell them you support the appointment of Judge Bork."

That study demonstrates the wider impact these political concerns may have on those individuals that make the initial choice of Supreme Court candidate. Indeed it affects the composition of the Supreme Court itself, as the ideological relationship between the President, the nominee and the Senate will play a key role in the President's decision of who to shortlist for nomination[52].

> "Constituent Influence" is unlikely to occur in the same manner in the Irish context for three reasons: firstly, the Senate is largely appointed by the government in addition to its elected members; secondly, there is not the same identifiable liberal/conservative ideological divide on the Irish Courts, in the Irish political system or indeed in Irish society as a whole; and thirdly, given the small, relatively homogenous population of Ireland, it is arguable that clearly identifiable constituent groups based on race or religion have not yet manifested themselves as political forces capable of influencing the government's selection of judicial appointee. As the Constitution Review Group state, it is more likely that opposition groups or the media would oppose the candidate as a method of discrediting the government[53].

The Constitutional Review Group further commented on the cross-examination of judicial nominees thus:

> "In addition, attempts have often been made to ascertain the value systems of candidates prior to appointment. This tendency is not helpful because it proceeds from an assumption that the candidate for judicial office ought to reflect in office some predetermined views considered suitable by those making the appointment.[54]"

In addition, such cross-examination of the candidate may relate chiefly to the salient public issues of the day. It has been shown in Ireland that public attitudes towards major social issues change substantially over time. One contributor to this study commented that perhaps some of the things a judge would have said ten years ago would never be said now, in the light of changing social attitudes.

The issue of judges stating their personal views has been the subject of much debate in the United States over the past year. The U.S. Supreme Court declared that under the Constitution's first amendment, judicial candidates have the right to give their opinions on disputed legal or political topics[55]. As a result, they can conduct their campaigns in the same way as a person running for the state's legislature would, giving their views in public on issues such as abortion or the proper limit on personal injury awards. It is thought this might come close to actually saying outright how they would rule on a specific case[56] which is inherently at odds with the principle of judicial independence.

45 Maltese (1995)
46 Ibid
47 Malleson (1999) Ch. 4
48 Johnson and Roberts (2004)
49 Overby, Henshcen, Walsh and Strauss (1992)
50 Maltese (1995)
51 Overby, Henshcen, Walsh and Strauss (1992)
52 Nemacheck and Wahlbeck (1998)
53 Constitution Review Group (1996) pp. 180-181
54 Constitutional Review Group (1996)
55 The White Case 2002
56 The Economist (2004)

One alternative method of judicial selection to the appointments process used in Ireland is judicial election[57]. Judicial election is common in the United States where 87% of judges stand for election[58]. The author is not of the view that direct democratic input into the selection of judges is desirable. Electoral processes can impinge on judicial independence and create an electorally accountable role for judges, not in keeping with the ethos of blind justice and autonomy. As one contributor in this study noted on the subject of judicial election:

"I don't agree with electing judges. You have to elicit support and be populist, which is not necessarily compatible with being a good judge."

Conclusion

This is the second in a two-part series taken from the author's M.A. thesis on the Irish judiciary "You Be the Judge". This article has examined the politics of judicial appointments in Ireland, including Bartholomew's comments from his study of the Irish Judiciary in 1969 and the comments of the contributors in the 2004 study. It is overwhelmingly the view that political allegiances were historically central to judicial appointments and that in reality, nothing has really changed.

The contributors to this study recognise the purpose of the Judicial Appointments Advisory Board in seeking to reduce this political element of appointments but comment that while the JAAB provides a very important screening process, it is essentially only a cosmetic change when it comes to the impact of the new system on the traditional pattern of judicial appointments based on politics. This article has set out the processes of the JAAB and argues that it has an important advisory function, recognised in its powers and procedures, but perhaps not quite as well recognised in its remit. Seven names per vacancy is too many where the pool of potential applicants is in reality very small, especially in the case of more senior appointments. The author recommends this be reduced to three, and that serious consideration be given to the preferential ranking of candidates by the JAAB.

Of course there is a perfectly legitimate argument against this - the JAAB is an organ of the liberal democratic political system itself of our creation. We popularly elect those that make the final appointment decisions. There is evidence of fairly spectacular cross-party appointments dating back to the 1970's at the very least. Furthermore, if you look at the results of the 2004 study, you will see that in contrast to Bartholomew's 1961 results, there are fewer judges that claim to be supporters of one political party or another, reflecting the general breakdown of support for the two larger parties in Irish politics over time, and the dispersion of support for smaller parties or the creation of a large group of candidate or issue-dependent voters.

Nevertheless, the author is of the view that the JAAB is an improvement on the overwhelmingly political appointments system that went before. The system was consciously and deliberately changed by the executive in the face of public disquiet in 1994 so as to place some objective assessment on the qualities and suitability of candidates for judicial office. The JAAB, through its composition and operations, provides the best option for guiding the executive in these enormously important appointments, without going so far as to improperly take the decision out of the executive's hands, or risk the politicisation of appointments in the public domain. For these reasons, the author is of the view that the remit of the JAAB should be extended to recommending only three candidates in respect of each vacancy. The fragile transparency that is the basis and success of the democratic model must require it so.●

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57 The question of election as a method of judicial selection was analysed in some depth in the thesis proper but is extraneous for the purposes of this article, other than to state the view that it is massively inappropriate in the Irish context.

58 The Economist (2004)

Judge Day book

Copies of the book Mr Justice Robert Day (1746-1841):the Diaries (1801-29), and the Addresses (Charges) to Grand Juries (1793-1810) by Gerald O'Carroll are still available from the author at 8 The Green, Huntsfield, Dooradoyle, Limerick 353(0)61 303387, *geraldocarroll@eircom.net*; or Polymath Press, c/o Polymath's Booksellers, Courthouse Lane, Tralee, 353 (0)66 7128148

The Book of Judge Day's life is a chronological arrangement of his Diaries and Charges. All of the collected Charges are reproduced here (rare and extremely expensive to buy), plus the famous Day Diaries filled with the British and Irish judiciary and the political and social world of the Revolutionary and Regency eras.

List price 65 euros, publication offer 45 euros continues:

A Comment on the Maritime Safety Act, 2005.

Glen Gibbons BL

Introduction

The *Maritime Safety Act, 2005* passed by the Oireachtas on the 29th June 2005 is a positive legislative development in Irish maritime law.[1] The Act is divided into six parts; Part 2 deals specifically with personal[2] and recreational craft[3] and Part 3 deals more generally with vessels (which includes both types of craft)[4]. The remaining Parts relate to maritime safety regulations and amend existing statutes. The purpose of this article is to discuss various aspects of the *Maritime Safety Act, 2005* such as fixed payments notices and also to outline the large number of criminal offences created under the Act.

Fixed Payment Notices

By including fixed penalty notices, the 2005 Act exemplifies the cross-fertilisation of an idea that originated under the *Road Traffic Act, 2002*.[5] Controversially, the idea behind fixed payment notices is to allow the payment of a fine in lieu of a criminal prosecution. Section 16 of the 2005 Act introduces fixed payment notices in relation to the offences stated in sections 6, 8, 10, 11 and 12 (all of which are described *infra*).[6] The 2005 Act is also used as a vehicle to insert fixed term notices into earlier statutes governing maritime law. In this regard, the 2005 Act amends the *Merchant Shipping Act, 1992*[7] in respect of regulations (concerning fishing, passenger crafts and pleasure crafts) and the *Harbours Act, 1946*,[8] the *Fisheries Harbour Centres Act, 1968*,[9] the *Canal Act, 1986*[10] and the *Shannon Navigation Act, 1990*[11] in respect of bye-laws.

Recovery of Prosecution Costs

Another interesting aspect of the 2005 Act is the ability of a prosecutor to reclaim prosecution costs. Like fixed penalty payments, the recovery of prosecution costs is an emerging and increasingly popular concept with the Irish legislature and other legal bodies. See for example, section 12 of the *Environmental Protection Agency Act, 1992*[12], section 48(18)(b) of the *Safety, Health and Welfare at Work Act, 1989*[13] and a recommendation of the Law Reform Commission concerning the recovery of prosecution costs by the Revenue Commissioners.[14]

Section 19(2) of the 2005 Act states that "any costs of an authority incurred in connection with the prosecution of a person for an offence under this Part [Part 2] for which the person is convicted may be recovered by the authority, in a court of competent jurisdiction, as a debt due and payable by the convicted person to the authority". Section 19(3) also provides that any fine due as a result of summary prosecution prosecuted by an authority under Part 2 be paid to that authority. For Part 3 offences, section 44 states that the Minister for Communications, Marine and Natural Resources ("Minister") may recover the costs of a prosecution of an offence covered under that Part.[15]

Authorised Persons

The 2005 Act contains many other interesting aspects such as the important functions assigned to authorised persons. The pertinent provision for Part 2 is section 17 that allows for a local authority, the Minister, Waterways Ireland, a harbour authority, a harbour company and Irish rail to appoint such officials. Section 17(9) states that every authorised person shall be furnished with a warrant upon their appointment and that when exercising their functions under Part 2 shall produce such a warrant upon request (unless they are in uniform). Their powers under Part 2 include ordering in certain circumstances as described *infra*, that a person cease using a craft and to remove crafts from the water;[16] to stop, board and inspect craft[17]; to arrest[18]; to seize and detain craft[19] and more specifically to seize unseaworthy crafts.[20]

An authorised person may also be assisted by "...such persons as the authorised persons considers necessary".[21] Also noteworthy is the potential for an authorised person to act outside his geographical jurisdiction where there is agreement with another authority.[22]

Section 39 is the pertinent provision for Part 4. It allows the Minister to appoint such persons as he/she sees fit as an authorised person. Similar to section 17 of Part 2, a warrant must be produced by a non-uniformed authorised person upon request and also an assistant may be appointed.[23] The powers of an authorised person include the power to seize unseaworthy vessels[24]; issue directions[25], to stop, board and inspect vessels[26] and also to arrest.[27]

1 The Act came into operation one month after the date of its enactment (other than sections 53, 55 and Part 6).
2 Section 5 defines personal watercraft as meaning a craft (other than a recreational craft) of less than 4 metres in length which uses an internal combustion engine having a water jet pump as its primary source of propulsion, and which is designed to be operated by a person or persons sitting, standing or kneeling on, rather than within the confines of, a hull.
3 Section 5 defines recreational craft as a craft of not more than 24 metres in length (measured in accordance with the ISO standard EN ISO 8666:2002 - Small craft - Principal data) intended for sports and leisure purposes.
4 Section 46(1) defines a vessel as including any ship or boat and any other vessel used in navigation and personal watercraft and recreational craft.
5 See in particular section 11 and Pierse, Road Traffic Law Vol. 1. (First Law 3rd ed.) at 364-365.
6 The *Maritime Safety Act 2005 (Fixed Payment Notices) Regulations 2005* (S.I. 390/2005) sets out the relevant form in relation to notices pursuant to section 16.
7 See section 47.
8 See section 52.
9 See section 54.
10 See section 56.
11 See section 57.
12 Section 12 states: "where a person is convicted of an offence under this Act committed after the commencement of this section, the court shall, unless it is satisfied that there are special and substantial reasons for not so doing, order the person to pay to the Agency the costs and expenses, measured by the court, incurred by the Agency in relation to the investigation, detection and prosecution of the offence, including costs and expenses incurred in the taking of samples, the carrying out of tests, examinations and analyses and in respect of the remuneration and other expenses of directors, employees, consultants and advisers."
13 Section 48(18)(b) states: "If the commission of the offence is proved and the first person charged proves to the satisfaction of the court that he used all diligence to enforce the relevant statutory provisions and that the other person whom he charges as the actual offender committed the offence without his consent, connivance or wilful default, that other person shall be summarily convicted of the offence and the first person shall not be guilty of the offence, and the person convicted shall, in the discretion of the court, be also liable to pay any costs incidental to the proceedings".
14 The Law Reform Commission *Report on a Fiscal Prosecutor and a Revenue Court (LRC 72-2004)* discusses the topic at pp 70-74. The Commission recommended that: "(a) Where a person is convicted of a revenue offence, the court may, if it is satisfied that there are special or substantial reasons for so doing, order the person to pay to the Revenue Commissioners specific and ascertainable exceptional expenses (excluding remuneration and usual expenses), which have been incurred by the Revenue Commissioners in relation to the prosecution of the offence, such expenses to be measured by the court. (b) In exercising the discretion conferred by paragraph (a), the court may have regard to regard to (i) the imposition of penalties or interest the Revenue Commissioners in relation to proceedings against the accused arising from the same facts (ii) the means of the accused."
15 Section 44 states: "Any costs of the Minister incurred in or in connection with the prosecution of a person for an offence under this Part for which a person is convicted may be recovered by the Minister as a debt due and payable to the Minister by the convicted person."
16 See section 8.
17 See section 11.
18 See section 13.
19 Pursuant to section 14.
20 See section 21.
21 See section 17(10).
22 See section 17(12).
23 See section 39(2) and (3).
24 See section 21.
25 See section 38.
26 See section 40.
27 See section 41.

Not least due to its opaqueness, the legislative power of an authorised person to appoint assistants is concerning. What functions is an assistant entitled to carry out? For example, what would be the assistant's role in relation to an arrest situation? It also seems odd that a member of the Garda Síochána may appoint an assistant when investigating acts covered by Part 3 but not acts covered by Part 2.

Criminal Offences

(a) Part 2: Personal Watercraft and Recreational Craft:

A multitude of offences are created under the *Maritime Safety Act, 2005.* Part 2 of the Act legislates for the use personal watercraft and recreational craft and introduces a number of offences therein. Section 6 of the 2005 Act allows for the introduction of bye-laws by local authorities, harbour authorities and Waterways Ireland in relation to the use of watercrafts and recreational crafts, for example, in relation to a maximum speed limit at which craft may be operated.[28]

It is an offence under Part 2 for a person, without reasonable excuse, not to comply with a requirement by a member of the Garda Síochána or an authorised person to cease operating a craft; or a requirement to remove (or caused to be removed) a craft from the water or allow a member of the Garda Síochána or an authorised to remove such a craft. Requirements by such officials may only be made upon the grounds as stated in section 8(1), for example, where it is prohibited to use a craft in such waters.[29]

Section 15 of the Act introduces a welcome development with the provision of prohibition orders in relation to the operation of personal and recreational crafts. In relation to prohibition orders, the section states that a person who is convicted within a period of two consecutive years of a second or subsequent offence created under Part 2 or of an offence under section 23 (i.e. the careless navigation or operation of a craft), or an offence under section 24 (i.e. the dangerous navigation or operation of a craft) may be subject to a prohibition order as an additional penalty. The geographical scope of the order is Irish waters[30] and its temporal scope is generally a maximum of two years but in relation to section 24 offences it is 'for such period as the court sees fit'.[31] A person who operates a craft in Irish waters while prohibited is liable upon conviction to a fine not exceeding €5,000 and/or 3 months imprisonment.[32]

Other offences created under Part 2 include:

* operating a craft without reasonable consideration for others or at an unreasonable speed;[33]
* failure to stop when requested by a member of the Garda Síochána/authorised person or failure to give a name and address or providing a false or misleading one to a member of the Garda Síochána/authorised person[34] and
* obstruction of a member of the Garda Síochána/authorised person.[35]

(b) Part 3: Vessels:

Section 20 prohibits the sailing of unseaworthy vessels to such an extent that the life of any person is likely to be or is endangered. In such a case, the person in command or in charge, the owner of the vessel or "...any person sending her to sea, who knows or could have discovered by the exercise of ordinary care that the vessel is in such an unseaworthy state" is liable upon summary conviction to a fine not exceeding €5,000 and/or 6 months imprisonment and upon conviction on indictment to a fine not exceeding €250,000 and/or 2 years imprisonment.[36]

It is also proscribed to navigate or operate a vessel without due care and attention to persons in or on Irish waters or on adjacent land (where such land is within the State).[37] The more serious offence of dangerous navigation or operation of a vessel is dealt with under section 24. Section 24 states:

> (1) A person shall not in Irish waters navigate or operate a vessel in a manner (including at a speed) which, having regard to all the circumstances of the case (including the condition of the vessel or class of vessel, the nature, condition and use of the waters and the amount of maritime traffic, or number of people, which or who then actually are, or might reasonably be expected then to be, on or in those waters) is dangerous to persons in or on those waters or land, within the State, adjacent to those waters.[38]

Section 26 allows for a defence to these two offences. For the defence to operate, the defendant must establish that:

* he/she was acting under direct instructions from the person in command or in charge of the vessel concerned or a person in charge of him/her and it was not unreasonable in the circumstances to so act, or
* he/she had been instructed by that person to perform a task which he/she could not reasonably perform or had not been adequately instructed to perform, or
* he/she took all reasonable steps to avoid the collision or incident to which the prosecution relates but due to the nature of the vessel and the service for which it was intended, or the weather, tidal or navigational conditions prevailing at the time of the collision or incident, it was not possible to stop the vessel or change course in time to avoid the collision or incident and it was not reasonable to do so.[39]

Section 27 creates another serious criminal offence of conduct endangering vessels, structures or individuals.[40] Section 27 is applicable to the master or another member of the crew of an Irish ship in waters anywhere or any other vessel while in Irish waters.[41] Like sections 28, 30, 31, 32, 33 of the Act, this wide jurisdictional scope to include acts committed by or on an Irish ship regardless of where it is in the world is indicative of the legislature's serious

28 Section 7 sets out the procedure for the creation of bye-laws. One should also note section 18 of the 2005 Act states that any bye-laws introduced pursuant to section 6 do not apply to craft operated in the course of duty of the authority concerned, the Garda Síochána, the Defence Forces, the Revenue Commissioners, the Central Fisheries Board or a Regional Fisheries Board (within the meaning of the *Fisheries Act, 1980*), the Irish Coast Guard, the Commissioners of Irish Lights, or the Royal National Lifeboat Institution or any craft involved in bona fide law enforcement, emergency or rescue missions. The maximum penalty for breaching bye-laws created under section 6(1)(ii), (iii) and (iv) is €1,000. For a breach of a bye-law created under section 6(1)(i), the maximum penalty is €1,000 for a first offence and €2,000 for any further offence(s). See section 6(2).

29 See section 8 for the limitations on the Garda Síochána and authorised persons in exercising such a requirement. The penalty for this offence is a fine not exceeding €2,000.

30 Section 2 defines Irish waters as including the territorial seas, the waters on the landward side of the territorial seas, and the estuaries, rivers, lakes and other inland waters (whether or not artificially created or modified) of the State.

31 A person may in certain circumstances apply to the court to remove the order. See section 15(2) and (3).

32 See section 15(4).

33 Section 10(2) states that a person upon summary conviction is liable to a fine not exceeding €1,000.

34 Section 11(3) states that a person upon summary conviction of a first offence may be liable for a fine not exceeding €1,000 and for subsequent offences, a fine not exceeding €2,000 and/or imprisonment not exceeding one month.

35 Section 12 stated that a person upon summary conviction is liable to a fine not exceeding €5,000 and/or imprisonment not exceeding 3 months.

36 Section 20(3) allows a defence where (a) the vessel going out to sea or into waters in an unseaworthy state was, under the circumstances, reasonable and justifiable, or (b) the defendant has used all reasonable means to ensure the vessel was seaworthy.

37 A person who, without reasonable excuse, contravenes section 23(1) is liable on summary conviction to a fine not exceeding €5,000 and/or one month imprisonment.

38 The penalties for a summary conviction under section 24 is a maximum €5,000 fine and/or 6 months imprisonment. Where the contravention causes death or serious bodily harm to another person, the penalty for a conviction on indictment is maximum fine of €100,000 and/or 5 years imprisonment.

39 Section 25 excludes from the sections 23 and 24 offences, a crew member, other than the skipper, who is not helming a pleasure craft that is a yacht or sailing boat powered wholly or mainly by sail.

40 Section 27 states:

> (2) If a person to whom this section applies, while on board his or her vessel or in her immediate vicinity-
> (a) does any act which causes or is likely to cause-
> (i) the loss or destruction of or serious damage to his or her vessel or machinery, navigation equipment or safety equipment on board the vessel,
> (ii) the loss or destruction of or serious damage to any other vessel or any structure, or
> (iii) the death of or serious injury to any person,
> or
> (b) omits to do anything required-
> (i) to preserve his or her vessel or machinery, navigation equipment or safety equipment on board the vessel from being lost, destroyed or seriously damaged,
> (ii) to preserve any person on board his or her vessel from death or serious injury, or
> (iii) to prevent his or her vessel from causing the loss or destruction of or serious damage to any other vessel or any structure, or the death of or serious injury to any person not on board his or her vessel, and the act or omission was deliberate or amounted to a breach or neglect of duty or the person to whom this section applies was under the influence of alcohol or a drug or any combination of drugs or drugs and alcohol at the time of the act or omission, that person is, subject to *subsection* (4), guilty of an offence.

41 The penalties upon summary conviction are a fine not exceeding €5,000 and/or 6 months imprisonment and upon conviction on indictment to a fine not exceeding €100,000 and/or 2 years imprisonment. Like the offence of dangerous navigation or operation of a vessel, an explicit defence is created for under section 27. Section 27(4) states the following as defences: (a) that the defendant could have avoided committing the offence only by disobeying a lawful command; (b) that in all the circumstances the loss, destruction, damage, death or injury in question or, as the case may be, the likelihood of it being caused either could not reasonably have been foreseen by the defendant or could not reasonably have been avoided by him or her, or (c) if the act or omission alleged against the defendant constituted a breach or neglect of duty, the defendant took all reasonable steps to discharge that duty.

stance on such behaviour.

Also of note and a positive development is the introduction of anti-social behaviour offences (sections 28-33) relating to alcohol, drugs and disruptive behaviour. In relation to alcohol offences, it is regrettable that a more objective standard such as a maximum alcohol blood level was not adopted by the legislature. Indeed this lack of objectivity was criticised by a party spokesperson on Communications, Marine and Natural Resources during the course the Bill's enactment.[42]

These anti-social behaviour offences may be summarised as follows:

* where a person in command or other crew member in charge or another member of the crew of a vessel operates or controls the vessel or carries out any task or duty in relation to such operation or control while they are under the influence of alcohol or drugs *to such an extent as to be incapable of properly controlling or operating the vessel or carrying out the task or duty;*[43]
* more generally, where such a person is *intoxicated to such an extent that his ability to carry out his duties is impaired;*[44]
* where any person is *under the influence of alcohol or drugs to such an extent that they could affect the safety of persons or create a disturbance or serious nuisance on board the vessel or affect the safety of other persons* using Irish waters or constitute a nuisance to such persons;[45]
* where a person, without justification, *engages in behaviour that is likely to cause serious offence or annoyance to any person* on board a vessel, at any time after having been requested by a member of the crew of the vessel to cease such behaviour;[46]
* where a person *engages in behaviour of a threatening, abusive or insulting nature* whether by word or gesture with intent to cause a breach of the peace or being reckless as to whether a breach of the peace might be occasioned;[47]
* where a person through any *deliberate or reckless action or by reason of being under the influence of alcohol or drugs puts at risk or endangers the safety, security or seaworthiness of the vessel or the lives or safety of persons* on board.[48]
* Where a passenger who *without reasonable excuse fails to comply with a reasonable order of a master (or an authorised uniformed person)* of a passenger ship[49]/boat[50]/vessel concerning safety or security or for the purpose of section 30(2) of the Act.[51]

Offences are also created to tackle the failure of vessels to carry a copy of appropriate nautical information whilst at sea,[52] to deal with the unlawful interference by a vessel with other vessels that are entering or leaving or a port or harbour (or attempting to enter/leave)[53] and for providing false/forged information relating to the weighing of a goods vehicle, trailer or semi-trailer (prior to it being loaded onto a ship).[54]

Failure by a person (without reasonable excuse) to comply with directions issued by the Minister (or an authorised person) is also proscribed. The purposes for issuing directions and the scope of such directions are stated in section 38. An example of a direction listed under section 38(3) is a requirement to move a vessel in, out of, or beyond Irish waters or to a specified place.[55] Furthermore, a similar offence to section 11(3) of Part 2 is created under section 40 i.e. failure by a person without reasonable excuse to stop a vessel when requested to do so by a member of the Garda Síochána/authorised person and refusal to give a name or address or furnishing a false or misleading one to such an official.[56] The final offence created under Part 3 is the failure to deliver a certificate of competency to the Minister where such a certificate has been suspended/cancelled.[57]

Importantly, section 45 states that a prohibition or requirement under Part 3 in relation to a vessel or a person on board and sections 21, 40 and 41 do not apply to a warship, naval auxiliary or other vessel in the service of the Defence Forces or the navy or military of another state; or a vessel being used for coast guard, customs or police or rescue purposes.

Part 4: Safety Regulations

Part 4 of the Act deals with safety regulations, pleasure craft regulations and fishing regulations and *inter alia* amends the *Merchant Shipping Act, 1992* with increased monetary penalties for a breach thereof for all three types of safety regulations.[58] Interestingly though and somewhat against the general tenure of the 2005 Act is the removal of the possibility of conviction on indictment for a breach of fishing regulations (which existed under the 1992 Act).[59]

Conclusion

The *Maritime Safety Act, 2005* is a welcome addition in the main to the Irish statute book. It is comprehensive and innovative in many aspects. However, some provisions such as those relating to authorised persons and being under the influence of alcohol may be subject to criticism for the reasons stated. One final issue that should be addressed is in relation to the issue of fines. The Irish legislature routinely fails to index fines and the 2005 Act is no exception.[60] Many of the fines under the 2005 Act have a low maximum threshold, for example operating a craft without reasonable consideration may result in a maximum fine of €1,000.[61] In order for the deterrence and punitive value of these fines to be maintained as each year passes, they should perhaps be subject to a bi-annual review by the Minister or his department.●

42 Mr. Broughan TD of the Labour Party stated at the second stage of the Bill that "While the measures introduced in this Bill to deal with alcohol consumption and marine activities are most welcome, the establishment of a maximum alcohol blood level...would have immensely strengthened the legislation...". See 603(2) *Dáil Debates* at 336.

43 Upon summary conviction, a person is liable to a maximum fine of €5,000 and/or three months imprisonment. See section 28.

44 See section 29(2). Upon conviction such a person is liable to a maximum fine of €5,000.

45 See section 30. Upon conviction such a person is liable to a maximum fine of €5,000 and/or 3 months imprisonment.

46 See section 31. Upon conviction such a person is liable to a maximum fine of €2,000.

47 See section 31. Upon conviction such a person is liable to a maximum fine of €5,000 and/or 6 months imprisonment.

48 See section 32. Upon conviction such a person is liable on summary conviction to a maximum fine of €5,000 and/or 6 months imprisonment. On conviction on indictment, the maximum fine is €100,000 and/or 2 years imprisonment. It is a defence under section 32(3) for the defendant to show that he could have avoided committing the offence only by disobeying a lawful command.

49 This is defined under section 33 as a ship carrying more than 12 passengers.

50 See section 2 of the *Merchant Shipping Act, 1992* for definitions of "passenger" and "passenger boat".

51 See section 33. Section 33(2) states that a direction shall not be given to a passenger in relation to anything which is a task of the crew which would be unreasonable to carry out. Upon conviction a person is liable to a maximum fine of €500.

52 See section 34. Upon conviction the master and owner of a vessel may be liable on summary conviction to a maximum fine of €5,000.

53 See section 37. Upon conviction a person in command or in charge of such a vessel may be liable on summary conviction to a fine not exceeding €5,000 and for a conviction on indictment to a fine not exceeding €250,000.

54 See section 22 of the Act. Section 22(4) states that upon conviction a person may be subject to a fine of not exceeding €5,000 and/or 1 month imprisonment.

55 Upon summary conviction, a person may be liable to a maximum fine of €5,000 and upon conviction on indictment to a maximum fine of €250,000.

56 Upon a first conviction a person is liable to a maximum fine of €1,000 and for subsequent offences a maximum fine of €2,000 and/or one month imprisonment.

57 Such a certificate (issued under the section 3 of the *Merchant Shipping (Certification of Seaman) Act, 1979)* may be suspended or cancelled upon conviction of any offence under Part 3 as an additional penalty. Section 42(4) states that failure to deliver such a certificate may result upon summary conviction in a maximum fine of €500.

58 See section 47 of the 2005 Act.

59 See section 19(5)(b) of the 1992 Act.

60 This need not occur. See again for example, the Law Reform Commission *Report on a Fiscal Prosecutor and a Revenue Court* (LRC 72-2004). Appendix A of the Report contains draft legislation with section 6 having an index-linked provision.

61 See section 10.

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 10, Issue 6, December 2005

A directory of legislation, articles and acquisitions received in the Law Library from the 10th October 2005 up to 22nd November 2005.

Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

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2nd stage- Seanad

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2nd stage - Dail

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1st stage -Dail

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Committee-Dail

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2nd stage - Dail [p.m.b]

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Committee - Dail

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2nd stage - Seanad

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2nd stage- Dail

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2nd stage - Dail

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1st stage- Dail

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1st stage - Dail

National economic and social development office bill 2002
2nd stage - Dail

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1st stage - Dail

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Planning and development (amendment) bill 2004
1st stage - Dail

Planning and development (amendment) bill 2005
Committee - Dail

Planning and development (amendment) (no.2) bill 2004
1st stage -Dail

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Committee - Seanad

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1st stage - Dail

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2nd stage - Dail [p.m.b]

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1st stage - Dail

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2nd stage - Seanad (*Initiated in Dail*)

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1st stage - Seanad

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2nd stage- Dail [p.m.b]

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2nd stage - Dail

Sea-fisheries and maritime jurisdiction bill 2005
1st stage - Dail

Sea pollution (miscellaneous provisions) bill 2003
Committee - Seanad

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Committee - Dail

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Committee - Seanad

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2nd stage - Dail

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1st stage- Dail

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2nd stage- Dail

Waste management (amendment) bill 2003
2nd stage - Dail [p.m.b]

Water services bill 2003
Committee - Seanad

Whistleblowers protection bill 1999
Committee - Dail

Abbreviations

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Society of Ireland
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland

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A Bar to Recovery? Barristers, Public Policy, and Immunity from Suit

Ray Ryan BL and Des Ryan*

Introduction

In the last nine months alone, no less than three appellate courts in other common law jurisdictions have given detailed consideration to negligence claims against barristers. From the perspective of Irish lawyers, it is instructive to analyse the differences of approach and reasoning of the three appellate courts in these cases, and to assess their potential relevance in an Irish context. In this article, we sketch a brief background to the immunity of suit conferred upon barristers at common law. We then analyse developments in 2005 in England, Australia and New Zealand. Lastly, we consider the likely future development of the law on this point in Ireland, with reference to relevant decisions from both the Irish courts and the European Court of Human Rights.

The decision of the House of Lords in February 2005 in the case of *Moy v. Pettman Smith (a firm)*[1] is a significant one, for it marks the first occasion on which the House considered the precise scope of the advocate's liability in negligence since its landmark decision in *Arthur JS Hall & Co (a firm) v. Simons.*[2] As is well known, it was in *Arthur JS Hall* that the House of Lords abolished in respect of civil litigation[3] the immunity from suit in negligence enjoyed by barristers, thus overruling its earlier decision in the case of *Rondel v. Worsley.*[4] In so doing, the House was merely following suit in a consistent trend throughout the common law world: in the graphic phrase of Lord Steyn, "the cards are now stacked"[5] against the immunity in the majority of common law jurisdictions.

However, what remained unclear after *Arthur JS Hall* was whether plaintiffs would face a high hurdle in making out a negligence claim against counsel. With its recent decision in *Moy*[6] the House of Lords has arguably signalled a note of caution about the bringing of negligence actions against barristers and has demonstrated the difficulties facing plaintiffs in such cases. This case is also important for the consideration afforded by their Lordships to the more specific question of whether a settlement negotiated by a barrister, which ultimately proves unsatisfactory to the client, can give grounds for bringing a negligence action against the barrister. On this point, too, *Moy* constitutes very cogent authority which may prove of the utmost persuasive significance should the question fall to be considered at superior court level in this jurisdiction.

More generally, it is worth recording the recent observations of two Antipodean appellate courts on the question of advocates' immunity. In March 2005, in decisions which were delivered within just two days of one another, both the High Court of Australia and the New Zealand Court of Appeal considered the question of whether advocates enjoyed an immunity from suit in negligence -and arrived at diametrically opposed conclusions. The High Court of Australia held that the immunity should be preserved, whereas the New Zealand Court of Appeal ruled that the immunity had no place in the modern law of negligence.

Barristers' Immunity from Suit: Background and Traditional Justifications

The immunity is of a very long lineage. It is often traced to two decisions dating from the middle of the nineteenth century: *Swinfen v. Lord Chelmsford,*[7] and the Irish case of *Mulligan v. McDonagh.*[8] In the former case, Chief Baron Pollock appeared to rest the immunity on counsel's inability to sue for fees owing, arising from the non-contractual relationship between barrister and client (the 'inability to sue for fees' argument). In 1964, in the celebrated judgment of the House of Lords of *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*[9] the rule was established that irrespective of contract, if someone possessing a special skill undertakes to apply that skill to assist another person who relies upon such skill, a duty of care will arise.

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1 [2005] U.K.H.L. 7; [2005] 1 W.L.R. 581.
2 [2002] 1 A.C. 615.
3 It should be noted that the members of the Appellate Committee in *Arthur JS Hall* were divided on the question of whether the immunity ought to be retained in respect of work the barrister had performed in a criminal trial, lest a negligence action be used as a "collateral attack" on a criminal conviction. Controversially, a majority of the House elected to abolish the immunity in this type of case also.
4 [1969] 1 A.C. 191. It should however be noted that the scope of the much-criticised *Rondel* case had been significantly limited by the House of Lords' decision in *Saif Ali v. Sydney Mitchell & Company* [1980] A.C. 198 in which a majority of the House held that a barrister could be held liable in negligence in advising the plaintiff in the selection of particular defendants in litigation arising from a road traffic accident.
5 This phrase appears in the leading opinion of Lord Steyn in *Arthur JS Hall v. Simons* [2002] 1 A.C. 615 at 683, and is taken up by Kirby J. in his dissenting opinion in *D'Orta-Ekenaike v. Victoria Legal Aid* [2005] H.C.A. 12, [211].
6 [2005] U.K.H.L. 7; [2005] 1 W.L.R. 581.
7 (1860) 5 H. & N. 890.
8 (1860) 2 L.T. 136.
9 [1964] A.C. 465.

Nevertheless, a unanimous House of Lords in *Rondel v. Worsley*[10] upheld the immunity of suit for barristers on considerations of "public policy".[11] In *Rondel*, the appellant had obtained the services of the respondent barrister to defend him on a dock brief, and alleged that the respondent had been negligent in conducting his defence. The chief rationale for upholding the immunity was captured by Lord Morris of Borth-y-Gest when he stated that: "It would be a retrograde development if an advocate were under pressure unwarrantably to subordinate his duty to the court to his duty to the client"[12] (the 'overriding duty to the court' argument).

Apart from the barrister's inability to sue for fees and his or her overriding duty to the court, several other arguments have, since the mid-nineteenth century, been mounted to support the immunity.[13] By way of a third justification, it is often said that imposing a duty of care would impact adversely on the way in which litigation is conducted. Counsel, in order to shield against liability, would feel constrained to advance every conceivable argument on behalf of his or her client, with an inevitable increase in length and cost of proceedings and a resulting detrimental effect both on the parties to the litigation and on the efficiency of the courts system (the 'defensive advocacy' argument).

A fourth argument traditionally advanced in favour of the immunity is the so-called 'cab rank' principle[14] that a barrister must accept any brief which he or she is available to conduct, thus denying counsel the opportunity to avoid representing individuals who would be more likely than others to subsequently sue in negligence (the 'cab-rank' argument).

Fifthly, there is the consideration that at the core of the advocate's role is the duty to take difficult strategic decisions within very tight time constraints, such as making a tactical 'on-the-spot' decision as to the conduct of questioning in a trial when faced with an uncooperative witness, or being obliged to make a decision as to a settlement offer literally at the door of the court. The unique pressures and heavy responsibility involved in advocacy require, on this argument, that the advocate be immune from suit in negligence (the 'heat-of-the-courtroom' argument). Indeed, it is important to bear in mind that, although the House of Lords in the landmark *Arthur JS Hall* case overruled *Rondel v. Worsley* and abolished the immunity, their Lordships were careful to stress that in a negligence action against a barrister, the court must have regard to the unique pressures facing the practitioner at the Bar. Thus Lord Hobhouse said that one of the protections of the advocate was that the standard of care to be applied in any negligence action was "the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time-constrained circumstances".[15] Lord Hope, for his part, cautioned that it "could not be stressed too strongly that a mere error of judgment on [the barrister's] part will not expose him to liability for negligence".[16] We shall see presently that this 'heat-of the courtroom' concern received strong consideration by the House of Lords in its recent decision in *Moy*, discussed below.

What is noticeable about all of the above rationales is that they originate from a consideration of the unique position of the advocate and of his or her role vis-à-vis the client, the court and the administration of justice. However, one other argument in favour of the immunity stems from an entirely different starting point. This is the 'finality principle' argument, which supports the immunity on the grounds that it prevents dissatisfied clients from re-opening disputes and thus undermining the role of the courts in providing finality in controversies. Interestingly, the High Court of Australia has recently rested its support for the immunity on this 'finality' argument, essentially rejecting all others. Against the backdrop of these different rationales for the immunity, we now consider the three recent appellate cases in which this very issue has provoked vastly different judicial responses.

The Approach of the House of Lords in *Moy v. Pettman Smith*

In *Moy*, it was alleged that a barrister, Ms Perry, had negligently failed to give realistic advice as to the consequences for her client of rejecting a settlement offer made by a defendant health authority in clinical negligence litigation. As a result of rejecting the settlement offer, the client was ultimately obliged to accept a much lower figure in settling the claim. The barrister's advice which had led to the rejection of the settlement offer was premised upon the assumption that the trial judge would allow further evidence to be admitted at a later stage, an assumption which was to prove incorrect. It should be noted that this advice was literally given at the door of the court. Two facets of this advice should be distinguished: in addition to advising her client as to what course of action to take, Ms Perry also had to provide him with an adequate explanation of the ramifications of that course of action. As Baroness Hale put it succinctly in her opinion in *Moy*: "Ms Perry had two decisions to take at the door of the court: what advice to give her client and how full an explanation to give him."[17]

10 [1969] 1 A.C. 191.
11 Ibid., at 227 *per* Lord Reid.
12 Ibid., at 251.
13 For valuable discussion see Roxburgh, "*Rondel v. Worsley*: The Historical Background" (1968) 84 L.Q.R. 178; and Roxburgh, "*Rondel v. Worsley*: Immunity of the Bar" (1968) 84 L.Q.R. 513.
14 On the cab rank principle generally see Cooke, "Competition in the cab-rank and the challenge to the independent Bar" (2003) 8 Bar Rev. 148 (Part 1) and 197 (Part 2).
15 [2002] 1 A.C. 615, at 737.
16 Ibid., at 726.
17 [2005] U.K.H.L. 7, [27].

At first instance, the judge held that counsel was not negligent on either of these two points. The majority of the Court of Appeal refused to interfere with the judge's finding that counsel had not been negligent in her assessment of the prospects of success of the application to adduce the further evidence, but went on to hold that she had been negligent in failing to give the claimant sufficiently detailed advice about the risks attendant upon rejection of the offer of settlement.[18] Ms Perry appealed to the House of Lords, arguing *inter alia* that the Court of Appeal had imposed too onerous a burden in negligence. The House of Lords agreed and relieved counsel of liability both in relation to the advice to reject the settlement and the adequacy of her explanation to the client. Delivering the leading opinion of the House, Lord Carswell cautioned that the abolition of the immunity from suit brought about by *Arthur JS Hall* must not be permitted to "stifle advocates' independence of mind and action in the manner in which they conduct litigation and advise their clients".[19] Perhaps a more compelling argument for setting the negligence threshold to a high standard is a plea to the reality of the 'heat-of-the courtroom' argument -demonstrated *par excellence* in *Moy* -that in the cut and thrust of litigation, barristers are constrained by the tightest of time pressures, often obliged to deliver crucial advice literally at the door of the court. Thus, Lord Carswell confessed that it would be "surprising if every such piece of advice were reasoned with as much comprehensive precision as may be applied in hindsight by an appellate tribunal which has had the benefit of extensive argument and leisurely reflection".[20] In an important passage, his Lordship stated that he would be "slow to hold advocates to blame in cases such as the present if they concentrated on giving clear and readily understood advice to their clients about the course of action they recommended".[21] To this justification for a high threshold in negligence claims was added the familiar argument of a fear of "defensive advocacy". The approach taken by the House of Lords in *Moy* appears to suggest that, despite the abolition in *Arthur JS Hall* of the immunity from suit of barristers, the courts will indeed be slow to uphold negligence claims relating to advice given to a client about the course of action to be adopted.

A Difference of Opinion between the High Court of Australia and the New Zealand Court of Appeal

Meanwhile, just one month after the decision of the House of Lords in the *Moy* case, the High Court of Australia was invited to reconsider its earlier 1998 decision in *Giannarelli v. Wraith*,[22] where the immunity from suit in negligence had been upheld. In *D'Orta-Ekenaike v. Victoria Legal Aid*[23], the Court was confronted with the choice of following its own earlier decision and maintaining the immunity, or altering Australian law so as to bring it into line with the departure taken by the House of Lords in *Arthur JS Hall*. In a judgment that may well prove persuasive in other jurisdictions including Ireland, the High Court of Australia has now ruled, by a majority of six to one, that the immunity from suit in negligence enjoyed by barristers should be retained.

With refreshing clarity, the High Court rejected each of the first five arguments summarised above which have been advanced in favour of retaining the immunity. Thus the 'inability to sue for fees' argument was disposed of by the majority as being "at most, of marginal relevance",[24] since it could not support the immunity of the solicitor-advocate; the same reasoning was employed to dismiss the 'cab-rank' rationale. The perceived conflict between the duty owed by the advocate to the court and to the client (the 'administration of justice' rationale, relied upon by the House of Lords in *Rondel v. Worsley*) was rejected as being just that -merely *perceived*. Since the duty to the court would always be paramount, it was illusory to speak of a conflict.[25] Similarly, fears about 'defensive advocacy' which would result from an abolition of the immunity were thought by the majority judges to have some force, but to be insufficiently potent to "provide support in principle"[26] for the continuation of the immunity. Lastly, the 'heat-of-the-courtroom' argument was (perhaps somewhat surprisingly) dismissed as being "distracting and irrelevant".[27] Notwithstanding this rejection of the traditional justifications for the immunity, the Court nonetheless concluded that the immunity could be justified having regard to considerations of the promotion of the administration of justice and to "rule of law" concerns, explaining that "[c]hief attention must be given to the nature of the judicial process and the role that the advocate plays in it".[28]

The importance of finality in legal matters was heavily stressed. Since the primary function of the courts is to ensure the "quelling of controversies",[29] the Court reasoned that this principle of finality would be undermined by abolishing the immunity. While the finality principle is subject to exceptions -such as, most obviously, the appeal process- these must be confined to "narrowly defined circumstances".[30] McHugh and Callinan JJ. each issued separate concurring opinions. In his dissenting opinion, Kirby J. called for the abolition of the immunity, urging that *Arthur JS Hall* should be followed.

By way of complete contrast, in the case of *Lai v. Chamberlains*[31] - in a judgment handed down just two days before *D'Orta-Ekenaike* - the New Zealand Court of Appeal abolished the immunity in that jurisdiction, at least as regards negligence in conducting civil proceedings. In so doing, the Court overruled its well-known decision over thirty years previously

18 [2002] E.W.C.A. Civ. 875, [60].
19 [2005] U.K.H.L. 7, [59].
20 Ibid., at [60].
21 Ibid., at [65].
22 (1998) 165 C.L.R. 543.
23 [2005] H.C.A. 12.
24 Ibid., at [25].
25 Ibid., at [26].
26 Ibid., at [29].
27 Ibid., at [28].
28 Ibid., at [30].
29 Ibid., at [32].
30 Ibid., at [34].
31 (Unreported, New Zealand Court of Appeal, 8th March 2005, N.Z.C.A. 17/03).

in *Rees v. Sinclair*[32] (where it had followed the lead of the House of Lords in *Rondel v. Worsley*). Hammond J., who delivered the leading opinion in *Lai*, was clearly unconvinced by the traditional rationales supporting the immunity, but acknowledged that there was force in the 'finality' argument. However, the argument was, according to Hammond J., better addressed by other facets of the legal system, such as an increasingly sophisticated doctrine of abuse of process, and did not warrant the retention of the immunity. Significantly, Hammond J. expressed his concern that the continuation of the immunity might erode public confidence in the accountability of legal professionals and, by extension, public confidence in the administration of justice.

Anderson P. issued a trenchant and eloquent dissent in which he cautioned that to abolish the immunity would be to engender a significant increase in vexatious claims brought by "querulous, vainly hopeful, desperate or vengeful litigants"[33]; further, Anderson P. stressed the importance of the 'cab-rank' rule in protecting vulnerable minorities -"the unpopular, the despised, the outcasts"[34] - and feared that this rule would become eroded by the abolition of the immunity.

These two conflicting approaches of the High Court of Australia and the New Zealand Court of Appeal prompt a number of observations. First, insofar as it espouses the finality rationale for upholding the immunity, the approach of the High Court of Australia in *D'Orta-Ekenaike* can be criticised. As Cane[35] shrewdly notes, the finality principle only applies to disputes and claims that are resolved by a court order. Thus, strictly speaking, it is possible to read the judgment as restricting the ambit of immunity only to those cases in which a decision has been made by a court, and therefore not immunising advocates from suit as a result of other conduct which, prior to *D'Orta-Ekenaike*, was presumed to have been protected. The classic example would be the conduct of an advocate in negotiating a settlement agreement on behalf of a client which, though not involving a court decision, places significant pressure upon the advocate - as graphically demonstrated by the *Moy* case in the House of Lords, discussed above. While it seems doubtful that the majority in *D'Orta-Ekenaike* intended any such restriction (and even more doubtful that, if they had, they would have introduced it only by implication), Cane is correct to state that in this regard the judgment "leaves the law in a state of considerable confusion".[36] By contrast, Todd[37] praises the approach to the finality rationale in the judgment of the majority in *D'Orta-Ekenaike*, which he regards as making "an undeniably powerful case for retaining it [the immunity]".[38] Nonetheless, Todd favours the approach of the majority of the New Zealand Court of Appeal in *Lai v. Chamberlains*, arguing that concerns about finality can be answered through "judicious development of the principles governing abuse of the court process".[39] It is useful to keep in mind these sharply divergent approaches when turning to assess the question of whether barristers enjoy an immunity from suit in Irish law.

Appraisal: The Likely Position in Irish Law

As the recent decisions of other common law courts discussed above indicate, the question of whether barristers enjoy an immunity from suit in negligence is one which continues to divide appellate courts. The competing choices facing the Irish courts are indeed stark. Will the *volte face* taken by the House of Lords in *Arthur JS Hall* persuade the Irish courts to follow English law and abolish the immunity, or will the rule of law concerns, so recently invoked by the High Court of Australia to justify retaining the immunity, deter the Irish courts from following the House of Lords on this matter? On the one hand, it will be of interest to the Irish observer that the immunity conferred on the Bar in the *Rondel* case has been approved in Ireland. Thus in *W. v. Ireland (No. 2)*[40] Costello P. (albeit in a passage that was strictly obiter) appeared to regard as settled law the existence of the immunity from suit of barristers in this jurisdiction.[41] The former Chief Justice, Keane C.J., expressed the view many years ago[42] that the existence of the immunity may be warranted by reference to Article 34 of the Constitution, going as far as to state that "[i]t can be fairly confidently assumed that the decision in *Rondel's* case will be followed".[43] As against this, however, there have emerged in the last number of years some (albeit very tentative) indications that *Arthur JS Hall* may perhaps be followed in Irish law. In the Supreme Court case of *E.O'K. v. D.K.*[44] where the immunity from suit of witnesses was upheld, *Arthur JS Hall* was cited by Murray J. (as he then was) but his Lordship made no comment as to its applicability in Irish law.

It is thus difficult to decipher the precise extent to which *Arthur JS Hall* may be endorsed in Irish law. This entire question might have arisen -but ultimately did not- in the recent case of *McMullen v. McGinley*,[45] a case involving a professional negligence claim against solicitors. It is noteworthy that in argument before the Supreme Court in that case, counsel for the respondent apparently conceded that barristers in this jurisdiction did *not* enjoy an immunity from suit. However, Murray C.J. was not afforded an opportunity to decide upon this point, as the case proceeded on the basis that no negligence claim was being made against the barrister.

Thus, against this background of conflicting opinion voiced in the last year alone in other jurisdictions, and given that the Irish jurisprudence

32 [1974] 1 N.Z.L.R. 180.
33 (Unreported, New Zealand Court of Appeal, 8th March 2005, N.Z.C.A. 17/03), at [101].
34 Ibid., at [106].
35 Cane, "The new face of advocates' immunity" (2005) 13 Torts L. J. 93, 97.
36 Ibid., at 102.
37 Todd, "Barristers' Negligence" (2005) 13 Tort L. Rev. 69, 73.
38 Ibid.
39 Ibid.
40 [1997] 2 I.R. 141.
41 Ibid., at 158-159.
42 Keane, "Negligence of Barristers" (1967) 2 Ir. Jur. (ns) 102.
43 Ibid., at 103.
44 [2001] 3 I.R. 568.
45 [2005] I.E.S.C. 10 (Unreported, Supreme Court, 15 March 2005).

to date has espoused no clear endorsement of *Arthur JS Hall*, it is difficult to predict likely future developments in this jurisdiction. However, regardless of which approach ultimately commends itself to the Irish courts, one can say with confidence that the traditional policy justifications for retaining the immunity appear increasingly unconvincing. It has been seen above that these traditional policy justifications did not withstand scrutiny in the House of Lords' historic decision in *Arthur JS Hall;* and neither the High Court of Australia in *D'Orta-Ekenaike* nor the New Zealand Court of Appeal in *Lai* accepted these rationales as having sufficient potency to justify retaining the immunity. However, there is force in the 'finality' rationale espoused in *D'Orta-Ekenaike* and it may well be that such a principle will commend itself to Irish judges in the future. In the event, however, that *Arthur JS Hall* is followed in this jurisdiction, it is submitted that the threshold for establishing negligence on the part of counsel ought to be a high one indeed. In this context, the recent House of Lords' decision in *Moy* has provided most instructive guidance as to the setting of that threshold. The case is, we suggest, strong authority for the proposition that the demands of policy in this sphere require that the threshold will not be easily crossed.

Implications of the European Convention on Human Rights

Regard must be had, too, to the implications of the European Convention on Human Rights (ECHR) for the continued operation of the immunity from suit of barristers. In particular, would the retention of the immunity in Irish law give rise to a violation of Article 6(1) ECHR, which enshrines the right to a fair trial and, by extension, access to the courts? While the position is far from clear, it is submitted that the better view is that it would not. The jurisprudence of the European Court of Human Rights accepts limitations on the right of access to a court for overriding reasons of public policy. The right may be limited by law, provided (i) that the limits are not such as to impair the essence of the right, (ii) that such limits pursue a legitimate aim, and (iii) that the means employed are proportionate to that purpose.[46] As is well known, the judgment of the European Court in *Osman v. United Kingdom*,[47] which might have appeared to provide support for the argument that the immunity would be in breach of Article 6, has now been thoroughly undermined by, inter alia, the Court's later ruling in *Z v. United Kingdom*.[48] While the Court in its landmark *Steel and Morris* judgment of February 2005 rightly pointed out that the Convention is intended to guarantee "practical and effective"[49] rights, as opposed to enshrining theoretical and illusory guarantees, it is important to bear in mind that even on a strike-out application, there will be a *hearing* to determine what the policy requires in the particular case. On one view, this is all that Article 6 requires, with the decision about what the policy *is* or *should be* remaining solely within the purview of the domestic courts.[50]

Conclusion

It can be seen from the foregoing that the question of whether or not the advocate should enjoy immunity from suit continues to provoke sharply divergent responses in the common law jurisidictions. In an age in which it is assumed that professional service-providers must automatically owe a duty of care in negligence to those availing of their services, it is salutary to remember that the very *existence* of such a duty remains hotly contested when the professionals concerned are barristers operating in the unique conditions of practice at the Bar. The question remains far from settled across the common law world. Indeed, focusing on the three comparative cases studied in this article, it seems unlikely that *Moy, D'Orta-Ekenaike* or *Lai* represent the last word on the subject in England and Wales, Australia and New Zealand[51] respectively. In view of the emergence of the new rationale for retaining the immunity - the desirability of ensuring finality in litigation - this seems not a little ironic! ●

46 See for example Ashingdane v. United Kingdom (1985) 7 E.H.R.R. 528; Steel and Morris v. The United Kingdom (2005) 41 E.H.R.R. 22.

47 (2000) 29 E.H.R.R. 245.

48 (2002) 34 E.H.R.R. 3.

49 (2005) 41 E.H.R.R. 22, at [59].

50 An important recent case explaining this principle is the decision of the House of Lords in *Brooks v. Commissioner of Police of the Metropolis and ors* [2005] U.K.H.L. 24; [2005] 1 W.L.R. 1495.

51 Indeed, the authors note that, at the time of writing, an appeal is being taken against the Court of Appeal decision in *Lai* to the newly-created Supreme Court of New Zealand.

Clarifying The Law On Delayed Prosecutions For Sexual Offences

Brian Conroy BL

Introduction

The judicial review of prosecutions for sexual offences on the ground of delay is perhaps the single most contentious area of Irish law today. No other issue has been argued before the Supreme Court in as many recent cases. In no other field is a High Court decision as likely to be appealed.

The present situation exists because the case law in this area is inconsistent and uncertain. This uncertainty in the application of the law is symptomatic of a wider problem: neither judges nor practitioners appear to be sure about why proceedings should be restrained on the ground of delay. Is there something inherently wrong with charging somebody with an offence long after it was allegedly committed? Or does such a delay only become wrong when it deprives an accused of his right to a fair trial? To put it another way, is there a constitutional right to an expeditious trial or just a right to a fair trial? The law in this area cannot become settled until this issue is resolved.

I propose to begin this piece by setting out the cornerstone of the law in this area, the test set out by Keane J. (as he then was) in the Supreme Court in the case of *P.C. v. D.P.P.* [1999] 2 I.R. 25. The precise nature of the difficulties that the confusion discussed above has caused will then be discussed. Given that the Supreme Court is due to pronounce upon at least three more "sex delay" cases this term, it would appear opportune to conclude by examining whether it might be possible for the Court to dispel this confusion by stating a coherent rationale to underpin the case law on delay.

The *P.C.* Test

In *P.C v. D.P.P.*, Keane J appeared to begin his discussion of the applicable test by adopting a forthright position on the reason why delayed proceedings are problematic, stating that "the paramount concern of the court [in these cases] will be whether it has been established that there is a real and serious risk of an unfair trial."[1] This suggests that a delay only becomes objectionable where it impinges on an accused's right to a fair trial, and thus that there is no inherent problem with a delayed trial in itself.

However, Keane J. went on to state that the first stage of the inquiry in these cases should be to ask whether the length of the delay is such that a trial should not be allowed to proceed, "even though it has not been demonstrated that the capacity of the accused to defend himself or herself will be impaired."

Keane J. then referred to the question of whether "blame can be attached to the prosecuting authorities", i.e. whether there has been sufficient "prosecutorial delay" to justify stopping the proceedings.

The court is then supposed to ask "whether...as a matter of probability...assuming the complaint to be truthful, the delay in making it [the complaint] was referable to the accused's own actions."

According to Keane J., the fourth and final stage of the inquiry, even where it can be shown that the delay is due to the applicant's own actions, "will be whether the degree to which the accused's ability to defend himself has been impaired is such that the trial should not be allowed to proceed."

Difficulties with the *P.C.* test

Stage 1: The length of the delay in itself

In *P.C.*, Keane J. recognised the possibility that proceedings could be restrained on the basis of the length of the delay alone. This stage of the inquiry seems to be unrelated to the court's "paramount concern" of establishing whether there is "a real and serious risk of an unfair trial", and is focused only on the impact of the delay on a purported independent constitutional right to an expeditious trial. However, there does not appear to be any Irish decision where the "length of the delay in itself" ground for restraining proceedings has been applied.

In the case of *P.M. v. Malone* [2002] 2 I.R. 560, a three-judge Supreme Court did indicate that a prohibition order could be granted in a case where there had been a long period of delay prior to charges being brought during which the applicant was under suspicion, even in the absence of any alleged risk of an unfair trial. In that case the stress and anxiety caused to the complainant by the delay was weighed against the public interest in having serious offences prosecuted, with the Court (*per* Keane C.J.) concluding that the balance lay in favour of granting a prohibition order. Keane C.J. emphasised that this matter was unrelated to the question of whether the applicant would obtain a fair trial, indicating that no such balancing would be required where a real and serious risk of an unfair trial had been shown.

In *P.L. v. D.P.P.*, Supreme Court, Unreported, 20th December 2004,

1 At p.68.

Fennelly J. argued vehemently in the context of the debate on presumptive prejudice that no trial could be restrained on the basis of pure delay alone, while the position of the other two judges on the Supreme Court (Hardiman and Geoghegan JJ.) on this matter was not entirely clear. The stance of the Supreme Court on this matter has now been clarified somewhat as a result of the decision of a three-judge Court in *T.S. v. D.P.P.*, Supreme Court, Unreported, 22nd June 2005, where both Hardiman and Fennelly JJ. appeared to agree with McCracken J., who rejected "the proposition that the passage of time alone would be grounds for the prohibition of a trial."

The decision in *P.M. v. Malone* has never been overruled and that case clearly does accept that a trial can be prohibited purely on the basis of stress and anxiety. But it is arguable that even a case where a court did restrain proceedings on the basis of stress and anxiety caused to the applicant by a delay would simply constitute an application of the principle that proceedings cannot be brought against a person who is unfit to stand trial. It appears that the length or otherwise of the delay in itself would only be of ancillary relevance, with the mental and physical health of the applicant being determinative.

Hence the balance of the authorities seem to indicate that criminal proceedings in this jurisdiction cannot be restrained purely on the ground of a long delay in initiating proceedings. If there is an independent constitutional right to an expeditious trial under the Irish Constitution, therefore, this right does not entail the consequence that any proceedings which are initiated a given period after the alleged commission of an offence must be restrained. Indeed, if it did, then the legislature would surely have extended the Statute of Limitations to include criminal cases.[2] Accordingly, it is submitted that the inclusion of the "length of the delay in itself" stage within the *P.C.* test serves only to confuse matters, since it gives the impression that there is a basis on which proceedings can be restrained which does not exist in reality.

Stage 2: Prosecutorial Delay

Keane J. specifically referred to prosecutorial delay within his formulation of the *P.C.* test, and it is apparent that criminal proceedings can be restrained on this ground alone. Numerous judgments of the superior courts restate the principle set out in the judgment of Geoghegan J. in the High Court in *P.P. v. D.P.P.* [2000] 1 I.R. 403, where he stated that even if there is a relatively short period of blameworthy delay on the part of the prosecuting authorities after the complaint, "the court should not allow the case to proceed and additional prejudice need not be proved."[3]

It appears that a court should begin measuring prosecutorial delay from the date on which a complaint is first made to a party authorised by the State to investigate it. Hence any pre-complaint delay is not of prime relevance. [4] Importantly, in the case law on prosecutorial delay, judges appear to place more emphasis on whether any delay was "blameworthy" than on the applicant's right to a fair trial. The focus is on the State's failure to ensure that the matter is dealt with expeditiously between complaint and trial, rather than on the prejudice to the applicant. It is thus submitted that the court's inquiry here is concerned not with the paramount question of whether there is a real and serious risk of an unfair trial, but with whether there has been a breach of a separate and independent constitutional right to an expeditious trial which is triggered when the prosecuting authorities of the State take seisin of the matter.

The above reading of the right to an expeditious trial in Irish constitutional law is consistent with the interpretation given by the American Supreme Court to the right to speedy trial set out in the Sixth Amendment to the US Constitution. In that jurisdiction, it is well established that the operation of the right to a speedy trial is triggered only once the State has laid an indictment against the accused or the accused has been arrested and held to answer a criminal charge.[5] An accused there who complains of an excessive delay between the alleged commission of an offence and the indictment will have no option but to rely on the "due process" entitlement to a fair trial set out in the Fifth Amendment to the US Constitution, rather than on the right to a speedy trial.

Stage 3: Is the delay referable to the applicant's own actions?

The third stage of the *P.C.* test purports to ask "whether...as a matter of probability...the circumstances were such as to render explicable the inaction of the alleged victim from the time of the offence until the initiation of the prosecution." This stage of the test would seem to assume that there is something inherently wrong with initiating criminal proceedings a long time after the alleged commission of an offence, since it posits that such a delay requires an explanation.

In considering whether a delay in complaining is explicable, the courts have often looked to whether expert evidence shows that the applicant exercised dominion over the complainant by virtue of his position or the relationship between them. For example, in the early case of *B. v. D.P.P.* [1997] 3 I.R. 140, the Supreme Court refused to interfere with Budd J.'s conclusion on the basis of expert evidence that the applicant had exercised dominion over the complainants (his daughters) by virtue of their relationship and that this explained the delay in reporting his conduct.

This third stage of the *P.C.* test has become a very controversial one, with the courts exhibiting increasing scepticism about the reliability of expert psychiatric or psychological evidence in recent cases. The controversy over such evidence came to a head in two decisions delivered by the Supreme Court in the summer of 2000. In one of those cases, *J.O'C v. D.P.P.* [2000] 3 I.R. 478, the Court refused to accept that the evidence of a consultant psychologist showed the delay to be referable to the applicant's actions, and Hardiman J. (who dissented on the substantive issue but agreed with the other members of the Court on this point) characterised this psychologist's examination of the complainant as "gravely inadequate".[6] Then in *J.L. v D.P.P.* [2000] 3 I.R. 122, the Supreme Court rejected the expert psychological evidence that had been adduced

2 As McCracken J. acknowledged in *T.S. v. D.P.P.*, where he stated that "it must be remembered that time limits on prosecutions is primarily a matter for the legislature, which in its wisdom has determined that there should be no time limits in the case of indictable offences."

3 At p.411; see *J.M. v. D.P.P.*, Supreme Court, Unreported, 28th July 2004, for an example of a case where the Supreme Court considered the issue of prosecutorial delay in some detail.

4 Although the following extract from the decision in *P.P.* (at p.411) does indicate that a long pre-complaint delay is a factor which should encourage a judge in his discretion to take a strict view of any prosecutorial delay: "I think that where there has been a long lapse of time, as in these prosecutions for sexual offences, between the alleged offences and the date of complaint to the guards, it is of paramount importance, if the accused's constitutional rights are to be protected that there is no blameworthy delay on the part of either the guards or the Director of Public Prosecutions."

5 The US Supreme Court has stated that it requires "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." (*U.S. v. Marion* (1971) 404 U.S. 307, at p.320.)

before the High Court, with Hardiman J. expressing the view that judges should be particularly cautious of psychiatric evidence relating to repressed memory.

In consequence of this line of case law, massive amounts of court time have been devoted to questioning and testing experts' opinions on the reasons for any delay in making a complaint. In *T.S. v. D.P.P.*, McCracken J. seemed to make this inquiry even more rigorous, since his judgment there rejected the view that an expert can explain a delay on the basis of its reasonableness, requiring instead that "a significant psychological or psychiatric disorder" be shown. But there appears little justification for according such importance to this inquiry, since its result is not determinative either way.

It is well established that a trial can be allowed to go ahead even in circumstances where the delay is not explained, if the court is satisfied that there is no real or serious risk of an unfair trial. Such a situation seems to have arisen in the *J.O'C* case itself, where a 3-2 Supreme Court majority refused to grant the relief sought despite the fact that the delay had not been adequately explained, on the basis that no prejudice to the applicant's prospect of a fair trial had been shown. Conversely, the fact that a delay has been explained will not prevent a trial from being prohibited where the court decides that there is a real or serious risk that it will be unfair: see *P.O.C v. D.P.P.* [2000] 3 I.R. 87 and *P.P. v. D.P.P.*

The above suggests to this writer that, aside from placing expert witnesses in a situation where they feel they have to come up with a legally justifiable excuse for the complainant's conduct, as well as creating unnecessary headaches for lawyers and the judiciary, this stage of the *P.C.* test has no real role to play in these cases. If the ultimate question remains whether there is a real risk of an unfair trial, there should be no reason to ask for an explanation for the delay in complaining. It appears that, in Ireland, as in the United States, there is no independent constitutional right to an expeditious trial other than that applying from the moment when the prosecuting authorities of the State take seisin of the matter. Hence, a delay in complaining should not require an explanation, because it is not wrong in itself, but is only problematic insofar as it impinges on an applicant's right to a fair trial.

The above statement of principle entails a reasonably obvious proviso. There may be cases where the reason for the failure of the alleged victim to complain promptly will become relevant to the paramount question of whether there is a real risk of an unfair trial. This could arise, for example, where the applicant makes the argument that a complainant has waited for years to concoct a case against him, which is not capable of being answered. It almost goes without saying that a court would be fully justified in requiring a delay in complaining to be explained in such a case.

Stage 4: Specific and presumptive prejudice

The final stage of the *P.C.* test posits the question of whether "the degree to which the accused's ability to defend himself has been impaired is such that the trial should not be allowed to proceed." This has been interpreted in the later case law as raising the issue of whether there is sufficient "specific" or "presumptive" prejudice to restrain proceedings. This stage squarely raises the court's paramount concern of whether there is a real risk of an unfair trial.

Specific prejudice relates to a particular impairment of the applicant's capacity to defend himself caused by the delay. The two most common examples of specific prejudice seem to be: (1) where a potential defence witness has died or is otherwise unavailable due to the passage of time since the alleged incident (the Supreme Court restrained the proceedings in *M.K. v. Groarke*, Unreported, 25th June 2002, primarily on this ground); and (2) where a key argument made in his defence by the applicant cannot be confirmed or rebutted because of the passage of time since the incident (this last appears to have been the basis for the Supreme Court's decision to restrain the proceedings in *J.L., P.O'C. v. D.P.P.* and *P.L. v. D.P.P.*). There has been no difficulty of principle with the specific prejudice aspect of the test in the case law, and the question of whether such prejudice exists has been treated as primarily a question of fact within the remit of the judge at first instance.

Presumptive prejudice seems to involve a situation where the applicant can raise no specific example of a gap in the evidence available to him arising from the delay, but there is a general difficulty in rebutting the prosecution's claims arising from the length of delay combined with the nature of the allegations and the evidence. Unlike specific prejudice, this issue has been the subject of controversy in the case law. The debate has centred on whether presumptive prejudice can arise simply as an implication or presumption from the fact that there has been a long period of delay, or is required to be shown on the particular facts of each case. Here again, a broader question seems to lie below the surface: is a long delay in initiating proceedings wrong in itself or does it only become wrong when the applicant can show that it impinges on his right to a fair trial?

The decision of a three-judge Supreme Court in *P.L. v. D.P.P.* left the law on presumptive prejudice in some confusion. There Hardiman J. held that the proceedings should be restrained because of presumptive prejudice stemming from the delay which rendered it difficult to isolate any "useful island of fact or factual matrix" relating to the commission of the offence. Fennelly and Geoghegan JJ. refused to align themselves with this conclusion on the facts, with Fennelly J. in particular rejecting in fairly trenchant terms the view (which he seemed to attribute to Hardiman J.) that a long delay in itself could lead to a presumption of prejudice.[7]

The more recent Supreme Court decision in the *T.S.* case has clarified matters, with all three judges on the Court there appearing to affirm both McCracken J.'s point that a delay can never give rise to "an irrebuttable presumption of prejudice which would lead to an unfair trial" and Hardiman J.'s view that presumptive prejudice can arise "simply from the length of the time lapse combined with the absence of other sources of information."

Set out thus, it seems clear that the inquiry as to presumptive prejudice is focused on precisely the same question as that regarding specific prejudice: whether the applicant can show that there is a real and serious risk of an unfair trial. The only difference between the two inquiries is that the focus with presumptive prejudice is on the general nature of the allegations and the evidence rather than on specific aspects of the evidence. Hardiman J. did refer in *T.S.* to the possibility of a restraining order being granted on the ground of presumptive prejudice in a case where the delay is so long and the allegations so vague that the applicant is not able to identify any specific prejudice accruing against him, stating that "the final prejudice to accrue may be that of not being able to *demonstrate* prejudice." However, the best

6 At p.527.

7 Although, particularly in light of the *T.S.* decision, it does not appear that Hardiman J. did in fact intend to express any such view.

interpretation of this *dictum* may be that it is not intended to show that prohibition can be granted without a real and serious risk of an unfair trial being made out, but rather that an applicant may succeed where he cannot demonstrate specific prejudice but he is able to show prejudice of a more general nature.

Read in light of the above, the term "presumptive prejudice" seems a misnomer, since it wrongly implies that prejudice can in some sense be "presumed" from a delay without being shown. It is hardly surprising that the use of such a misleading term has led to confusion about what is required for the applicant to succeed on the presumptive prejudice ground. Accordingly, it is submitted that a less loaded term such as "general prejudice" should be used, since it would better describe the inquiry that is actually being undertaken in these cases.

Conclusion

The following five propositions seem to flow logically from the preceding analysis of the case law:

(1) The law on delay in sexual offences is primarily about safeguarding an applicant's constitutional right to a fair trial.

(2) Criminal proceedings cannot be restrained purely on the basis of a long delay between the alleged commission of an offence and the trial.

(3) There is an independent constitutional right to an expeditious trial, but this right only applies to blameworthy delays occurring after the State's prosecuting authorities have taken seisin of the matter.

(4) There is no need for a complainant to explain a delay in reporting a matter to the State's prosecuting authorities, since this is generally irrelevant to the question of whether there is a real risk of an unfair trial. This should not preclude a court from requiring a delay in complaining to be explained where it is relevant on the facts of a particular case.

(5) The applicant can show that there is a real and serious risk of an unfair trial by citing either specific or general prejudice. Specific prejudice can be demonstrated by pointing to a particular gap in the evidence that exists as a result of the delay. General prejudice exists where it can be shown that the applicant's capacity to defend himself at trial has been impaired by a long delay combined with the nature of the allegations and the evidence.

These propositions have the benefit of being clear, although this writer would not presume to suggest that they are necessarily right. If the flood of these cases is ever to be reduced to a trickle, a similarly clear rationale for the law on "sex delay" ought to be stated by the Supreme Court, whether it resembles that set out above in content or otherwise.●

The Central Criminal Court The Limerick Experience

The Honourable Mr. Justice Paul Carney

Paper delivered on 20th October, 2005, to the Faculty of Law, University College, Cork

The paper was written to be delivered at a conference in King's Inns a couple of years ago. The circumstances which gave rise to its not being given on that occasion are detailed in an article in the current issue of the Journal of the Institute of Judicial Studies. Re-reading the paper for the first time in a couple of years, I cannot for the life of me understand what all the fuss was about. This is the banned paper:-

This time last year there was such a backlog of murder cases from Limerick awaiting trial in the Central Criminal Court that we would never be without a Limerick murder trial at hearing. A murder trial may involve over one hundred witnesses, many of them members of An Garda Síochána, proving preservation of a scene, service of tea and biscuits pursuant to the Treatment of Persons in Custody Regulations and negativing ill-treatment of prisoners in custody.

In the normal run of cases, these witnesses will be dispensed with by agreement between the parties. We were told, however, at the Fennelly Commission that in conditions of backlog and delay such agreement would not be forthcoming because legal teams feared that they might not ultimately be in the case due to another case running on and might be blamed by their successors for making an erroneous concession. In this situation, it seemed that for the foreseeable future it would not be possible to police the streets of Limerick due to manpower being tied up in Dublin. Accordingly, it was decided that the Limerick problem would be tackled in Limerick with the Central Criminal Court sitting outside Dublin for the first time since the foundation of the State.

There was a lead-in time to the first sitting to avoid clashes with the Circuit and District Courts and to summon a Central as distinct from Circuit Court panel of jurors. During this time I was told on a daily basis, by almost everyone I met, how the venture could not succeed:-

* No jurors would come to court
* No jury would convict
* The jurors would all know the accused
* There would be insufficient jurors in the county
* The juries would be intimidated

I was reminded on a daily basis of the advertising slogan of some decades ago for the failed Guinness Light - "They said it couldn't be done".

The first murder trial in Limerick was heard at sittings in July, 2003. Counsel agreed that a juror coming from certain areas connected with the case should justify a challenge for cause shown. In fact there was not the slightest difficulty in empanelling juries for any case at these sittings. The jury panel seemed to me to have a steely determination to reverse the city's bad press.

The case ran quickly. When the jury retired to consider its verdict the large press and television corps retired to the pub without leaving anyone behind to keep nix. Nix was in fact on this occasion holding the prosecution brief. The jury returned unexpectedly early, in under two hours, with a unanimous guilty verdict. Evidence of character and antecedents and victim impact evidence was taken immediately and sentence was imposed without a single member of the press pack having returned from the pub. On the way back to Dublin, I listened with some amusement to reconstructed descriptions on the car radio of the return of the jury, the evidence given and the reaction of the parties to conviction and sentence.

The second murder trial went as smoothly as the first with again a unanimous guilty verdict returned in under two hours. On this occasion, the press took no chances but the television cameras had now abandoned us.

The third trial in the July sittings was a rape which resulted in a unanimous acquittal. This was in line with the norm, the majority of contested rape trials resulting in acquittals.

The most significant event to occur during the July sittings was that on July 30th, the District Court returned five accused for trial for the murder of Kieran Keane and the attempted murder of Owen Treacy. Up to recently, that case would have taken its turn to come on for trial in Dublin in two years time. I doubt if the case could have been held together over such a protracted period of time. This was a case entirely dependent on the evidence of one witness who was being, and still is, being perfectly openly threatened with death, who wore body armour in court as evidenced by the dull thud whenever he beat his breast and who was minded in court by two armed guards, wearing radio sets on their faces, as they inferentially told us, to keep in communication with each other within the courtroom if shooting or whatever broke out.

Being in Limerick at the time, I was able to take immediate seisin of the case the day after the return for trial, adjudicate on applications for

separate trials, applications for change of venue and fix a date for trial at the start of the following legal term in Limerick.

In relation to the July sittings in Limerick, there was no difficulty in empanelling jurors. As I indicated, the body language of the array seemed to me to be expressing a determination to bring the rule of law back to the city of Limerick.

When the feud case came on next term, however, the situation was entirely different. The court itself has no function in relation to security, which is a matter for the guards. There was obviously a lot of media interest in the Keane trial and a Sunday newspaper reported that there would be a ring of steel around the courthouse. The County Registrar conveyed his concern to the Gardaí that the security, in his view, should be as low-key as possible to avoid causing anxiety to the jury panel and to future jury panels in both the Central and Circuit Criminal Courts.

About ten days before the trial, 72 jurors out of 429 summoned had indicated that they would attend and with there being 42 challenges available as of right and the projected length of the trial, the County Registrar decided to summon another 100 jurors. The day before the projected trial, I took suddenly ill and had to be replaced for jury selection by Mr. Justice Butler. I am advised by the County Registrar that the area around the courthouse was cordoned off. A Garda boat and water unit were on in and under the river, a Garda helicopter was in the air, sniffer dogs were in the ground and snipers were on the roof and the jury panel were searched with metal detectors. The County Registrar found a significant increase in the number of medical certificates presented and for women they mainly stated "stress and anxiety" as the cause for unfitness to serve. It was not found possible on that occasion in Limerick to swear a jury and the trial was transferred to Dublin where I was in a position to take over the trial again.

In view of what had occurred in Limerick, the enormous press hyping about the impossibility of swearing a jury to try it and the well-publicised projections that the case would take at least eight weeks, the registrar decided to double the number of jurors summoned. This proved completely unnecessary as a jury was empanelled in Dublin without the slightest difficulty. No juror sought to resile from service when his or her name came out of the box. This was surprising in the light of the hysterical press coverage about the failure to empanel a jury in Limerick. The trial moved to Cloverhill Courthouse where the security was relatively low-key. The jury seemed to me to be relaxed and conscientious in their demeanour and six weeks later brought in their unanimous verdicts of guilty against all accused.

It is ironic that a practice such as the placing of snipers on the roof of the Old Bailey and other court buildings in England, which has been criticised from time to time in relation to the trial of Irishmen as being over the top, should have the effect in this jurisdiction of intimidating jurors against turning up.

The most important feature of the Keane trial to my mind was that the timescale achieved by the accident of my being present in the county at the time of the return for trial enabled a timetable to be adopted which kept the trial together. If it had followed the traditional path I do not believe it would have held together.

The statutory provision which abolished preliminary examination in the District Court directs that an accused person should appear before the court of trial within 42 days of arrest. If this is effected, a trial could take place in every case within ten weeks of the arrest which in many cases would be within ten weeks of the crime. In respect of a number of cases, because they appeared to me to be of such national importance, I tried to impose this timescale on the parties but was resisted by both the prosecution and the defence. These cases were each resolved at a much later stage by pleas of guilty. The leisurely approach insisted upon by the parties gratuitously increased the suffering of the victims' families who, of course, are not parties nor afforded any status under the law as it now stands and therefore cannot influence the time scale or anything else for that matter. Making a judge available to give an immediate trial to every accused after return for trial would produce guilty pleas at an earlier stage and the judges so assigned could be returned to other areas after the plea was delivered to the judge in charge of the list. They would in effect be cardboard judges whose immediate availability, if needed, would make what was going to happen in any event, happen at a much earlier stage.

Another case from Limerick although heard in the Dublin list was the one where the witnesses developed collective amnesia and the accused, another member of the Keane family, upon being acquitted, made the gesture which was undoubtedly the most photographically reproduced one of 2003. Instant law reform was demanded, in particular the importation of a Canadian model. In principle I would be against instantaneous, extreme reactions to unpredicted, isolated events. If the unexpected never happened we would be operating a system of show trials.

In my view, the best solution to the problem came from a humble witness in a recent murder trial relating to an execution-style killing on the High Street in Tallaght. A man was executed at point blank range, within feet of a witness, by a gunman who did not make any attempt to conceal his identity. As the gunman, at leisure, left the scene in a car, he made a gesture towards the witness which could have been interpreted as menacing. The guards came on the scene immediately and sought to take the witness to the Garda Station to make a statement. The witness said to the guards that he had been much too traumatised to spend several hours in a Garda Station making a statement. They could video what he had to say and convert it into a written statement at a later stage and he would sign it then. The guards could take it or leave it on this basis, he said. What the witness proposed was done and it worked very successfully. At the trial, which resulted in a conviction for murder, the video tape was called for by the defence and, to the best of my recollection, was shown to the jury.

It is also a matter for the Director of Public Prosecutions to decide in respect of which witnesses he should seek to perpetuate testimony by the depositions procedure.

In addition to the cases to which I have already referred, while I was dealing with the Keane/Treacy murder in Cloverhill, Mr. Justice White dealt with a case in Limerick which resulted in two murder convictions.

Accordingly, in respect of the July to December period of 2003, nine persons are now serving life sentences for murder in respect of murder cases originating in Limerick. This seems to me to be no mean response to the Guinness Light theorists.

The only incident since in any way intimidatory of juries was one in which grieving parents of a deceased called to give victim impact evidence, so attacked a jury for returning only a manslaughter verdict that one female juror became faint and had to be helped from court and the rest visibly blanched.

The court has resumed trying predominately murder cases in Limerick and cases awaiting trial from that city and county are being picked off one by one. It is my intention to continue with this exercise until a point is reached when I am in a position to hold a white gloves ceremony in the interests of the morale of the good citizens of the city and county of Limerick. I myself would see no difficulty in such a ceremony being justified in respect of course only of the cases in which the Central Criminal Court has jurisdiction within the current year. The presentation of white gloves would of course only represent one brief moment frozen in time but would be highly symbolic and I would hope demonstrate progress to the people of Limerick and to the Nation.

In an article in the Irish Times in 1994 entitled "The White Gloves are Off" Chief Justice Ronan Keane said:-

> "When I was called to the bar in 1954, it was customary when there was no crime to be tried by a jury, for the county registrar to present the circuit judge with a pair of white gloves. This would prompt some complimentary remarks from the bench on the law-abiding qualities of the people of the county and the efficiency of the gardai. Perhaps in a courthouse somewhere there is a pair of yellowing gloves wrapped in tissue paper awaiting the return of those idyllic times."

There is also anecdotal reference to the practice in the late Judge MacKenzie's book "Lawful Occasions- The Old Eastern Circuit" which illustrates that the practice of actually presenting the judge with gloves may have fallen by he wayside and been replaced by the presentation of an empty box, in which the gloves would previously have been placed. Judge MacKenzie describes the practice in the courthouse in Wicklow where he appeared as a young barrister in 1942 before Judge Michael Comyn who presided over the Eastern Circuit.

> "There being no criminal trials for that session, the county registrar, Michael O'Dwyer, stood up, bowed and said, 'There are no indictments m'Lord.' He handed the judge a dingy box. This box was supposed to contain white gloves a custom from time immemorial. Michael received the gift graciously and Mr. Angel, his crier, promptly handed it back."

If I succeed in achieving my objective I shall be perfectly happy to fund the purchase from Eade and Ravenscroft of a set of ceremonial white gloves. I believe that those which emanate from the Oxford Circuit are particularly ornate and incorporate a yellow border. ●

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