



Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

Tribute to Mr Justice John MacMenamin

**Delivered by Mr Justice Donal O'Donnell, Chief Justice, on the occasion
of the retirement of Mr Justice John MacMenamin on 25 November
2021**

I would like to welcome the family, friends, and colleagues of John MacMenamin here to the Supreme Court to celebrate both his birthday today, as well as his life and his career in the law.

At the risk of some self-parody let me start with a sporting reference. It is said, particularly now in the middle of a World Cup, that soccer has lost some of its magic and some of its soul and some writers hark back to a golden age when clubs had roots in their communities and when the highest praise for a player was that if they were not on the pitch they would have been on the terraces with their friends. Today, if we were not sitting here as members of the Supreme Court and colleagues of John MacMenamin, then we would be sitting there with you as his friends.

It is now no secret that John MacMenamin was born on 25th November, 1952. His father's family came from the Donegal/Fermanagh borderlands. His grandfather was born in England, was a member of the Gaelic League, and a believer that it was not just cultural, linguistic and political independence that needed to be achieved, but also economic freedom, which meant establishing indigenous industries in Ireland. He set up a textile business promoting Irish skills, and was for example, still making ties well into the 1980s, ties which, with the standard issue tweed jacket, were the uniform of choice of many national schoolteachers in the mid-20th century. His grandfather was of a generation that believed in the importance of the Irish economy, in Irish products and provided employment during the very difficult economic times, particularly in the 30s and 40s, and survived even the shock of Ireland's entry into the European Communities.

His mother was Oonagh MacDowell, and therefore, an aunt of Michael MacDowell SC, and as an only child John played with his cousins in their house, in which the roughhousing in the garden was nothing in comparison to the bruising arguments over the dinner table where John watched with amazement as the MacDowell children were encouraged to express their opinions no matter how outlandish or wrongheaded – and we can all see how, in that respect at least, this approach to child rearing has been an unqualified success. It was in the MacDowell household that John heard Tony MacDowell, Michael’s father, telling stories of his time at the Bar, before he had worked in the Revenue Commissioners, and which sparked in John an interest in the law. While still in secondary school, he met with Frank Clarke then attending Drimnagh Castle CBS, and these two intelligent, cultured and bookish young men went to UCD and tried to cultivate the image of young men from hard scrabble backgrounds, making their way and achieving success against all the odds.

UCD in the late 1960s and 70s was an extraordinary place. It was a university whose trajectory had mirrored the development of the State – it had little by way of resources, but was crammed with talent. Perhaps one of the most talented groups was that known colloquially as the BA/BLs who tended to congregate around the L&H. These were students who took a full undergraduate degree, normally in the Arts, and most commonly history, but sometimes economics or maths, and at the same time pursued a course of study by attending the law lectures in UCD and sitting the exams for the King’s Inns at the same time. In earlier generations this had included people like Tom Finlay, but John was in UCD around or just after the time of some remarkable people like Dermot Gleeson, Adrian Hardiman, Mary Finlay, Kevin Cross, Paul O’Higgins or the late Frank Callanan (all of whom, not coincidentally, became auditors of the L&H).

John always insisted on the critical importance, as he saw it, of having an undergraduate degree in what he considered a proper discipline like his beloved history. He maintained some scepticism and not to say disdain for the pure law degree – something that troubled me somewhat until I recognised it as a not so subtle putdown of his cousin Michael, and harking back I presume to some frank discussion over the MacDowell dinner table. For some time as an impressionable young barrister, I thought that John was telling me that there was really no future

for me at the Bar and I should think of another career. It was only later that I realised that the phrase "*you should have been an historian, O'Donnell*" was in fact his version of high praise.

Coming to UCD much later, I learned of prior generations by reputation. John, as I understood it, established himself as a sort of *éminence grise* in this highly talented group, a person who was in every important room but standing at the side observing and sometimes strategizing and nearly always amused.

It is now almost exactly 45 years since I first met John MacMenamin. I have it in my mind that he was standing at the side of another room, but in fact I believe he was chairing the adjudication of an early round of an Irish Times debate in Trinity College. He was dressed in a fashion which two decades later would come to be described as 'young fogey'; tweed jacket, collar and tie, horn rimmed glasses and luxuriant hair. In fairness, he was probably also getting a discount on the ties. As has now been demonstrated beyond argument, John is much older than me, and so I regard it as highly unfair that – to me at least – he still looks remarkably the same as he did on that dark February night. He drew me aside to offer some advice, accurate (if unsolicited) but generous and well meant, and over the past 45 years he has been offering me the same unsolicited advice, and for the last ten years sitting beside me on the Supreme Court. And during that time, and in spite of many, as they might say in diplomacy, provocations on my part, I cannot recall an angry word.

I also have an image of John standing at the edge of a room, in this case a courtroom, as a student volunteer with FLAC when he spoke to the mother of a young man then being prosecuted, and suggested that perhaps the fact that the legal aid solicitors were on strike and had withdrawn their services might give rise to a constitutional action. It was entirely typical that he would have gone to his friend Frank Clarke, who was then a very young junior, and they assembled a team in the best traditions of the Law Library, approaching Rory O'Hanlon, Professor of Constitutional Criminal Law at UCD, and one of the most brilliant lawyers of his time. That case became the landmark case of *State (Healy) v. Donoghue* and produced perhaps three of the greatest judgments of its time, in

the High Court judgment of Mr Justice Sean Gannon, and in the Supreme Court of Mr Justice O'Higgins, Chief Justice, and Mr Justice Henchy.

John, I think is by instinct a believer in institutions and society and a person who, despite cutting his teeth in the bear pit of UCD debating and later the Law Library, prefers consensus to conflict. But as his FLAC involvement showed, he was no young conservative. It's hard to remember now, but it must have taken great courage to have been involved as a relatively young junior and with his friends Adrian Hardiman and Frank Clarke, in taking a prominent role in the campaign against the 8th Amendment in 1982. It is impossible to transport ourselves now back into that time, and difficult for anybody who did not live through it to imagine the intensity of feelings, the strong majority within the population, and even within the legal system, for the Amendment, the intensity and bitterness of the debate, and the demonisation of people that went with it. It was difficult for the young John MacMenamin, even then the quintessential nice guy and good colleague, to stand out against the collective tide then running strongly within the country and the legal community, but he did so.

John MacMenamin was influenced by a 60s culture which challenged the institutions of state, and which looked outside Ireland for inspiration. He was not like some of his historian friends whose reverence for the past led them to conservative disposition – or perhaps that is the other way around – but nor was he a person whose criticism of the system led him to seek the destruction of the institutions of state. Instead, and in many ways like his grandfather, he saw that there was a benefit to the creation and promotion of indigenous systems. He wanted to improve the system rather than destroy it. He was and is by disposition a reformer rather than a revolutionary. It is said that the dispute between Albert Camus, Jean Paul Sartre and Simone de Beauvoir could be illustrated by an argument as to whether in a colonial struggle for independence, it was morally acceptable that a bus carrying soldiers could be attacked even if an innocent woman was injured. Sartre and de Beauvoir agreed; Camus simply said – that woman could be my mother. And John, I think, would be unhesitatingly on the side of Camus.

But any attempt to place John by reference to the significant political and legal events of the last half century, in which he was a participant and observer, would still fail to capture the reality of the man, the lawyer and the judge. He has a wide circle of friends who cannot be pigeon-holed by political alignment, background, or areas of practice as lawyers. I think he chose his friends because he was attracted to talent, intelligence, good humour and tolerance, and the only things that tolerance did not extend to were boredom, puritanism and narrow certainty.

I will leave it to others to describe his career at the Bar, including his becoming in due course chairman of the Bar Council. I think for someone who is both a loyal and dutiful son, the pleasure at his success was inevitably tempered with sadness that neither of his parents lived to see him appointed to the High Court in 2004 and, in due course, to the Supreme Court in 2012, in each case on the same day as his friend Frank Clarke.

Now lawyers and judges spend an inordinate amount of mental energy in trying to define what is meant by a good judge. Sometimes it feels like one of those aspects of theoretical physics, where it is possible to identify a phenomenon in theory but much more difficult to glimpse it in real life.

John MacMenamin has always maintained an interest in academic study and is both an adjunct professor in Maynooth and judge in residence at DCU and it will, therefore, not surprise him to know that there is a burgeoning field of study which attempts to measure the standing of a judge largely by considering the subsequent life and citation of judgments. For most of us, it is a great relief to discover that most judgments disappear almost immediately below the waves, but some continue to be cited for decades, and indeed, for more than a century. In a recent study of the impact of one of the greatest Irish judges Chief Baron Christopher Palles, this technique was employed. I think John's natural scepticism for this approach was tempered when he discovered that one of the indicators of the longevity of Chief Baron Palles's reputation was the fact that some of his observations on the difficult question of the appointment of receiver by way of equitable execution over periodic payments, were not resolved until what was described as the authoritative judgment of the Supreme Court (MacMenamin J.)

in *ACC v. Rickard* in 2019. I think John's sense of mischief would enjoy the idea that future generations of lawyers might mistake him for a chancery lawyer.

Some of the many cases that John MacMenamin gave judgment in and which will undoubtedly be cited for many years to come are the *Tristan Dowse* case in the High Court on the position of a child adopted by Irish parents abroad; the *Baby Ann* case, one of the most traumatic case a judges could encounter, involving future custody of a child placed with prospective adoptive parents where the natural parents had revoked their consent; in the Supreme Court, *Simpson v. Governor of Mountjoy Prison* on the practice of slopping out in prisons; *Luximon and Balchand* on the right of a person who had come to Ireland under scheme permitting long term work and study; his joint judgment in *UCC v. ESB*; in *Zalewski v WRC* and many more. All of these judgments have in common an intense engagement with the facts and a distrust of bright line rules.

But the attempt to measure judicial quality by reported judgments can only be a limited guide. Most judges do not produce many written judgments. The qualities of good judges which are recognised within the profession are much more than the ability to write an essay on a legal topic which stimulates academic discussion. A large part of the reputation of Chief Baron Palles was built on his day to day behaviour in court in the handling of clients, solicitors, counsel and his colleagues, and which is never recorded, but which goes a long way to establish that elusive collective judgment by the profession and indeed, a judge's colleagues, as a good judge.

On any scale, John scores very highly. He was a very good High Court judge, but membership of a collegiate court brings particular challenges and particular demands. People outside the Supreme Court, even within the judiciary, do not necessarily always recognise that the Supreme Court in particular is an engine which runs on the fuel of disagreement. Disagreements as to result, the theory as to language, are all unavoidable, and at some level necessary if we are to avoid group-think. But disagreement, especially among intelligent high achieving individuals, who have been trained to believe that their opinion is right, and moreover, on issues that by definition may be considered to be extremely important, can if unchecked be corrosive as we have seen in other jurisdictions.

It is easy for that disagreement to become more fractious than even a particularly lively MacDowell dinner table during the 1960s. It is really important therefore, that there are judges like John MacMenamin who are almost constitutionally incapable of taking offence and whose first instinct is always constructive, and who is always interested in and sympathetic to the concerns of his colleagues.

Another area which goes largely unseen and unmeasured is out of court activity such as involvement in judicial education and outreach. John was always a key member of the Judicial Studies Committee and prepared to go anywhere to discuss the work of the courts in Ireland. In particular, since his days on the Bar Council (if not earlier) he has been enthusiastic in establishing and building contacts in Northern Ireland, first with practising lawyers and latterly with the judiciary. All of these engagements were facilitated by his good humour and extraordinary range of knowledge.

I do remember one case discussing a *voisinage* agreement on mussel fishing which involved some discussion on the nature of mussels and their legal ownership if any, and which took a decided turn when Adrian Hardiman observed that sturgeon were royal fish at common law which belonged to the sovereign, and not to be outdone, his old UCD history colleague added his understanding that swans were also owned by the Crown. That was when I hit on the idea of a new career as the manager of a pub quiz team of *galacticos* – I felt confident that we could also cover racing, and would be comfortable on classical music. I am trying to find someone to cover the inevitable round on James Bond films.

Particularly in modern times when the Supreme Court only hears cases which by definition are of general public importance, it can be easy to see cases as only vehicles for important and sometimes difficult issues of doctrine and legal theory. But John was always sceptical of theory. Perhaps more than anyone else, he saw individual cases in human terms, with real people, real concerns, and to whom the outcome, rather than the legal principle, is the critically important thing, and if that sometimes meant a blurred outcome and a compromise on costs, then so be it. As you know by now, anyone who labours under the burden of not having had an undergraduate education in law would not necessarily recognise that his instinct had led him to the true genius of the common law. As Oliver Wendell

Holmes put it, *"it is the merit of the common law that it decides the cases first and determines the principles afterwards"*.

For John MacMenamin in the end, it has always been about the woman on the bus, and we have all been the better for that. And so, on behalf of the institutions which he has at times protected, challenged, reformed, and improved, on behalf of his many, many friends in the judiciary past and present, and for 45 years' of good humour, fun, friendship and a lot of unsolicited advice, I would like to thank him and wish him well.