GAZETTE

REGULARS

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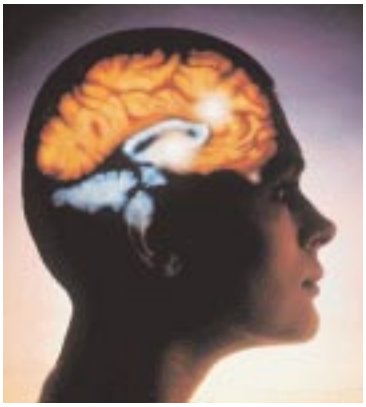

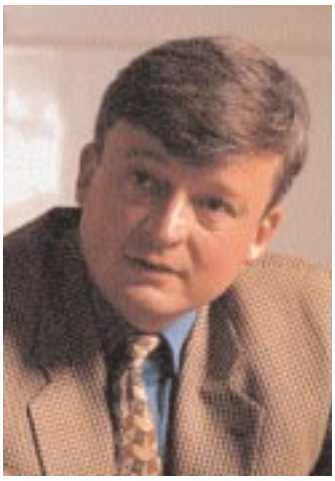

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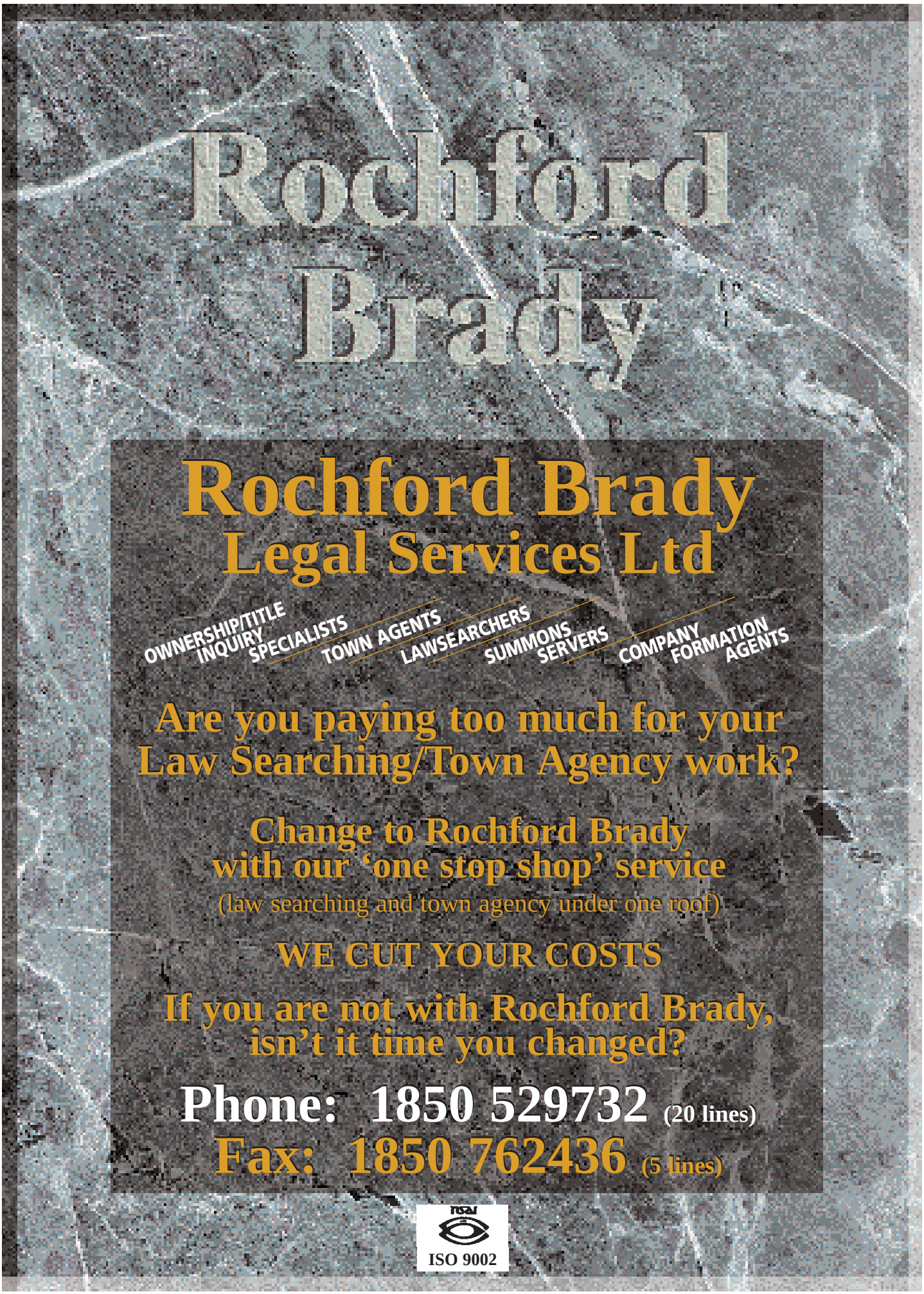

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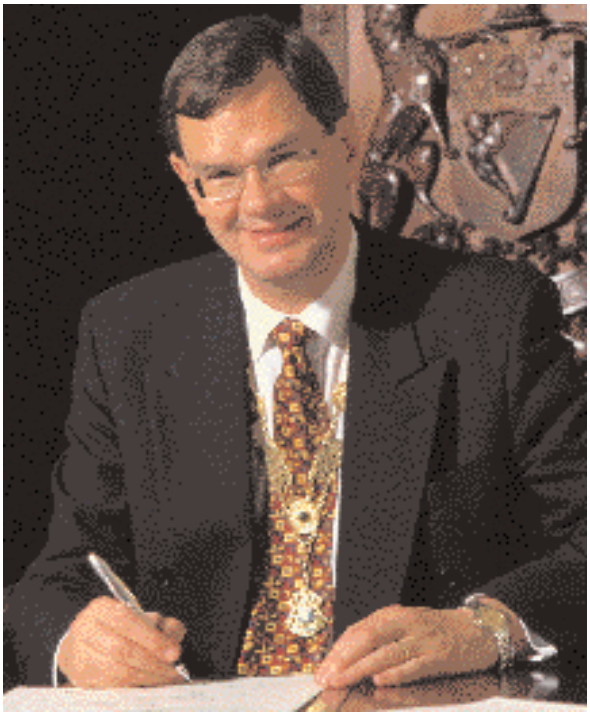


Education Policy Review Group

It is with great satisfaction that I come to the end of my year with the profession overwhelmingly endorsing the recommendations of the independent Education Policy Review Group. As you will all be aware, I urged acceptance of these recommendations and I am very pleased that the profession has responded positively and massively in favour of them. It is important that we all go forward together now so as to ensure the best possible education system for our successors and state of the art facilities for continuing legal education. I am particularly pleased that this vital development has had the benefit of both a full debate at a special general meeting and also a postal ballot enabling all our members to deliberate on the matter and express their view in a fully democratic fashion.

One of the recommendations is the establishment of a Curriculum Development Unit (CDU). I am confident that the CDU will be comprised of a wide mix of people, including solicitors in private practice and in the corporate and public services sector. I believe this unit will be visionary and conceptual in its approach to the education of our future solicitors so that the maximum opportunities will be available.

Last weekend I attended the Law Society of England and Wales annual conference in Bournemouth. One of the keynote speakers postulated a view with which I agree, that – while not forgetting the emphasis in legal training – the way forward is for the profession's training for (and approach to) practice to be radically changed to enable its members first to organise themselves and to promote themselves according to modern business principles and, secondly, to be better prepared to move out of the profession into general management if they wish or must.

The view was that, from the very beginning, as a significant part of our education and training our successors should be taught the basics of financial good practice and management, of marketing, of how IT can help them organise their practices. And there should be continuing development of these skills after qualification.

The Law Society through its Law School, its continuing legal education programmes and the practice management and technology committees is moving in this direction. I would urge that the pace quicken and that these issues receive greater attention when the CDU is established.

Criticism of the profession

Throughout my year, I have been consistent in conveying publicly on as many occasions as possible that we should not be criticised for doing our job and, particularly, we should not be criticised unfairly or with venom. Recently, lawyers were described in one Sunday paper as being 'like bankers in the way that they facilitate crime as a matter of routine, obstruct justice as a matter of principle, and inveigle large swathes of the population into acting in a disgraceful fashion. They are like all the other criminal elements that flourish in Ireland today, but they are worse, because they are more ambitious. There is a grandeur to their impertinences'.

These are, in my view, disgraceful and unworthy comments. They are quite untrue, and I do not believe that any section of society should have to put up with such enormously venomous diatribes. It is wrong that lawyers should be blamed for doing their job, for protecting the rights of individuals and securing justice. I repeat my previous message, that by denigrating lawyers in the manner in which this article does, and in the way it has happened in previous months, I believe public respect for the law itself is being collaterally damaged and this itself will have a pernicious effect over time which is dangerous for our whole society. Many lawyers strive passionately to achieve justice for their clients and are, in fact, the first bulwark to protect justice and the people. They are essential in any real democracy.

Thank you

As I have said in the *Annual report*, it has been a privilege and honour to be President of this great Society. When you receive this *Gazette*, Patrick O'Connor of Swinford will take up this honour. I wish him well in the many challenges that will face us in the year ahead. I have no doubt that he will rise to the challenges along with the excellent team of Council, officers, management and staff, and build on the progress that has been made.

Thank you.

Laurence K Shields
President

Why a *pro bono* scheme may not be enough

The proposal by John Costello for a formal *pro bono* scheme (*Gazette*, Aug/Sept, page 5) is laudable and to be supported. Yet, while such a scheme might work parallel to a State legal aid scheme, it should not be considered as a substitute for comprehensive legal aid.

There has been a complete absence of debate in recent times as to the adequacy or otherwise of the State's civil legal aid scheme. Possibly we have been lulled into silence, given that there is a scheme and it does work within its own limited terms of reference. The question is: should more be on offer?

The State's civil legal aid scheme now operates on a statutory basis under the *Civil Legal Aid Act, 1995*, in force since 11 October 1996. Whereas previously the Legal Aid Board operated on a non-statutory basis, the 1995 Act has enshrined the right to apply for legal aid and advice if certain criteria are satisfied.

While the provisions of the 1995 Act represent progress, there remain a number of shortcomings in the operation of the scheme:

- Clients are confined to the law centres (which is reminiscent of the old dispensary doctor system). The client must choose a lawyer from one of the law centres, usually the closest to home. This presents obvious geographical difficulties: for example, there are two law centres in Cork City, with nine solicitors to cover the entire city and county of Cork (plus a part-time service offered in Mallow some 22 miles away)
- There is no involvement of private sector solicitors, apart from a limited effort to involve solicitors in District Court family law cases since 1993, now confined to Dublin
- The scheme does not cover the appearance of solicitors at tribunals, which one would have thought was vital to the very people who will benefit most from such representation (for example, social welfare appeals and employment appeals tribunals). It is difficult to defend the exclusion of any area of the law from a legal aid scheme, particularly one which traditionally will affect the underprivileged perhaps more than any others
- Waiting lists are common and must be off-putting to those seeking assistance. According to the Legal Aid Board, delays of up to ten months can occur, although some reports put the figure as high as 19 months. The advent of divorce since February 1997 will have further lengthened the waiting time
- The Legal Aid Board undertakes negligible advertising and makes little attempt to inform the public of the service (see section 5(2) of the Act). Research in the UK in 1990 showed that only 45% of those asked to name any scheme which provided help with solicitors' costs mentioned legal aid, while seven out of ten people said that they did not understand the legal aid scheme. A similar survey should be carried out in this jurisdiction: surely lack of knowledge of the scheme remains a factor in depressing demand for services? Has the scheme ever been advertised on TV or in a consumer-friendly fashion in the other media?
- The means test continues to allow only those on a very low 'disposable' income to be recipients of legal aid or advice
- The law centres' work is almost entirely confined to the area of family law. The recently-released 1997 Legal Aid Board annual report indicates that a startling 90% of advice and legal aid was in the area of family law. The law centres offer a very good service in this field and have built up a recognised expertise, but do the underprivileged not require advice and aid in other areas of the law?

Real injustices

A fully comprehensive civil legal aid scheme might begin to tackle some of the real injustices affecting a large section of our population. For example, a recent UN report found that 23% of our adult population is functionally illiterate, while a recent report from the Simon Community on homelessness in Cork found that there are a growing number of homeless people who have been released from prison with nowhere to go. At first glance, these issues may not seem to fall within the remit of the traditional solicitors' practice; however, proceedings could conceivably be undertaken against the Department of Education to provide adequate grounding in the 'three Rs' or against the Department of Justice to force it to provide some sort of half-way housing.

It has been the political decision of successive governments to keep a tight rein on the legal aid scheme. The budget of the Legal Aid Board has certainly increased each year, sometimes quite substantially. More law centres have opened over the years (there are now 30 operating full-time) and the board currently employs 82 solicitors (with approval for eight more). But it is all relative: 90 solicitors out of 4,800 practising in the country overall? While accepting the limits of the law in tackling poverty, is there not a role for lawyers in highlighting the essentially political decision to offer a civil legal aid scheme which is very much confined to the area of family law?

Some further involvement of the private sector solicitors in partnership with the existing law centres seems inevitable. In order to curb a galloping increase in the cost of the legal aid scheme, it might be sensible to contract out or franchise legal aid (which has become the vogue in the UK since 1996 in an attempt to control the enormous legal aid spending there). The franchise model involves annual tendering by individual private sector law firms for particular types of legal work in different regions of the country. It would encompass a regular monitoring of the quality of the supplier, bid price, its expertise, innovation, range of service offered and commitment of the firm to the type of legal work sought.

It would also be worth considering an advertising and public education campaign, detailing the legal aid service which is available under the 1995 Act.

Furthermore, I believe that legal aid before all tribunals should be included in the scheme by Ministerial order under the 1995 Act.

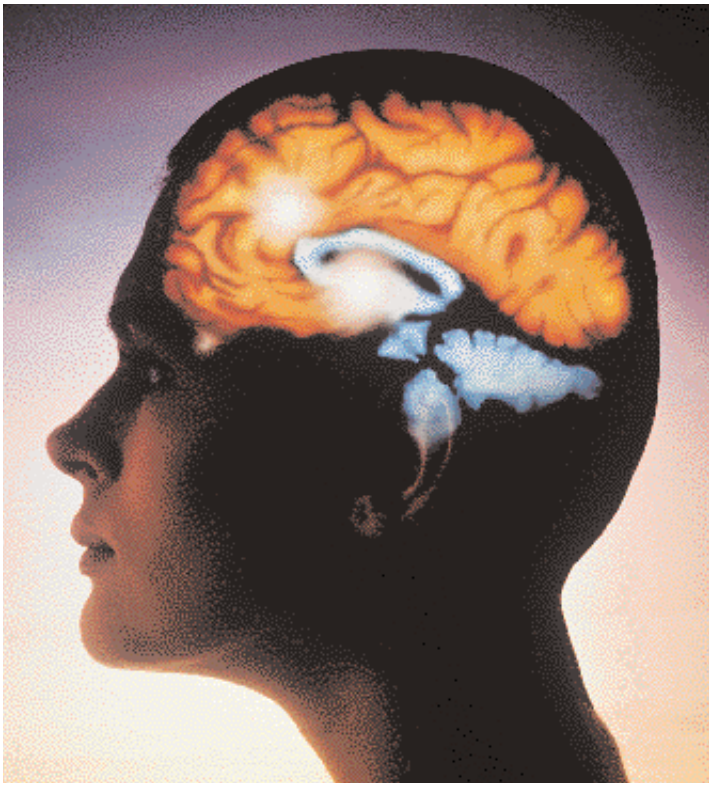
And, finally, there is a need for a Legal Services Research Commission – possibly headed by a High Court judge – to examine the extent of unmet need for legal services and to develop a programme to tackle this. The *Denham report* has recently provided a comprehensive review of the operation of the courts system; a similar review of access to lawyers and the courts is urgently needed. G

Ann FitzGerald is a partner in the Cork solicitors' firm FitzGerald & O'Leary.

When insanity just doesn't make sense

Mad Mark the tabloids called him. Mark Nash's recent convictions for murder suggest that the jury regarded the young Yorkshireman as 'bad' rather than mad. The truth no doubt lies somewhere in between.

This latest awful murder trial, following those of John Gallagher, Brendan O'Donnell and Patrick Granaghan, has again highlighted the need for reform of the laws relating both to criminal insanity and culpable homicide. Evidence presented at Nash's trial suggested that the accused was a young man from a disturbed background with an explosive and unpredictable temper. In the current climate of opinion, he was unlikely to persuade the jury that he should be excused for his acts, that he was in need of treatment rather than punishment.



Victorian attitudes

Our criminal insanity laws date from the Victorian age, with only minor updating. An inevitable hanging was the result of a murder conviction in those days. Although life imprisonment is the modern solution, there is still huge stigma attached to the verdict, and, perhaps worse, an indefinite sentence, with the life-long threat of recall to prison for any perceived misbehaviour following eventual release from custody.

Psychiatry was barely out of the womb when the *M'Naghten Rules* – the mid-19th Century definition of insanity – were conceived by the UK House of Lords. Modern psychiatry is far from being an exact science, but bears little resemblance to its ancient cousin, with its references to a 'defect of reason' and 'disease of the mind'.

The real difficulty with the application of the insanity defence is that today's psychiatrists tend to suggest that 'insanity' is a term which, strictly speaking, applies to a limited number of mental illnesses, treatable in nature, rather than to a broader set of mental disorders, such as, for example, personality disorder or psychopathy. Abnormal mental conditions falling outside these treatable categories will not therefore usually attract an insanity defence. Even gravely disturbed persons – such as Brendan O'Donnell, for example, undoubtedly was – will have difficulty in persuading a jury that the square peg of his particular disorder falls into the round hole of a mental illness, and thus avail of the defence.

There are moral imperatives in all of this. We, as a society, have taken the view that the full rigour of the criminal law should be reserved for people who are of full responsibility. Logically, then, it is presumably incumbent on our lawmakers to reserve punishment for those who deserve it, and to excuse those who through no fault of their own suffer from mental disorder to an extent that they lack 'ordinary' perception and control.

Ironically, there may be little distinction between the end result of a murder conviction and an insanity 'acquittal'. Each results in a committal to a long-term custodial institution, respectively prison or the Central Mental Hospital. The release date for each person will be determined by the Minister for Justice. Release dates tend to be conservatively decided in the case of proven killers. The Minister takes advice, which he or she is not obliged to act upon, from an ad hoc committee to which is delegated a fact-finding function, which considers applications for release in respect of the prisoner or patient. The ultimate responsibility lies with the Minister.

Criticism from judges

The all or nothing approach forced on accused people in insanity-type cases – that is, a conviction for murder or an acquittal by reason of insanity – has been the subject of an increasing amount of criticism from judges, practising lawyers and commentators over the last few years. In 1957, the *Homicide Act* was passed in Britain, allowing a mid-point defence of 'diminished responsibility'. This defence, applicable only in murder cases, applies, broadly, to persons suffering from such abnormality of mind as to substantially impair mental responsibility for their acts in relation to a killing. It refers to either short-term or longer-term conditions, and has the effect of reducing a murder charge to one of manslaughter, which of course carries a theoretical maximum sentence of life imprisonment.

In 1978, the Henchy Committee, chaired by the eminent judge, recommended that the diminished responsibility defence be introduced here. It has never been provided, despite much judicial and political comment over the intervening years. It is a clear lacuna in any modern system of criminal justice. It provides a humane mechanism for recognising that a person may not be of full legal responsibility for their acts, while preserving the full range of sentencing powers, up to the maximum in appropriate cases, for the most dangerous people.

Abolishing murder?

For that matter, should we now be thinking of abolishing the offence of murder completely? There is no logical reason why not. Many states of the USA have done so, and for perfectly good reasons. If we had a single, simple, offence of, say, culpable homicide, punishable by anything up to life imprisonment, then the judges could tailor the sentence according to the nature of the crime and the characteristics of the offender (bearing in mind that most homicides are one-off offenders).

Most people accused of murder contest the charge, if only because of the uncertain release date of a life sentence. If we had a more flexible sentencing regime, then the truly harsh sentences could be reserved for the worst cases. We could also, of course, extend the judicial options by introducing secure (or non-secure) hospital orders, such as those available under the English *Mental Health Acts*, to deal with appropriate cases.

No doubt the tabloid papers will continue to stigmatise the Mad Marks of this world. That, however, should be the spur to our legislators to enact long-overdue reforms of the law – not provide an excuse for continuing inaction. G

Dara Robinson is a solicitor with the Dublin solicitors' firm Garrett Sheehan and Company.

Loyalty to King and country

Edward VII, King of Great Britain and Ireland, and Defender of the Faith, breathed his last at 11.45pm on Friday 6 May 1910. On hearing the news, the President of the Law Society of Ireland, Richard A Macnamara, summoned a meeting of the Council for Monday 9 May 1910 so that the Council and the Society might give expression to their feelings at the death of His Majesty.

At the meeting, the Council 'deplored' the death of the King, which took place 'with such startling suddenness'. The President stated that Edward VII was a great and beloved monarch, a great diplomat, and his voice was ever raised in the cause of peace. The sympathy of the Council was offered to Her Majesty Queen Alexandra and to His Majesty King George who, though he had gained a crown, had lost a loving father.

The President then moved, and it was unanimously resolved, that the following telegrams be sent immediately:

To The Private Secretary,
King George V,
Marlborough House,
London.
The President and Council of the Incorporated Law Society of Ireland beg to offer to His Majesty the King their most respectful sympathy in his bereavement, and humbly to assure His Majesty of their feelings of loyalty and devotion to His Majesty's Throne and person.

To The Private Secretary,
Queen Alexandra,
Buckingham Palace,
London.
The President and Council of the Incorporated Law Society of Ireland beg to assure Her Majesty Queen Alexandra of their most profound sympathy in her bereavement, and of their deep sorrow for the calamity which has befallen the nation.

The following replies were received:

The President
Incorporated Law Society of Ireland,
Solicitors' Buildings,
Four Courts,
Dublin.
Queen Alexandra sends her sincere thanks for your kind expressions of sympathy in her sorrow.

Richard Macnamara,
Solicitors' Buildings,
Four Courts,
Dublin.
The King sincerely thanks you and the Council of the Incorporated Law Society of Ireland for the kind sympathy and loyal assurances you express.

The President of the Law Society received an invitation from His Excellency the Lord Lieutenant to attend the meeting of the Privy Council held on Monday 9 May 1910 for the proclamation of His Majesty King George V. The President attended the meeting and

was one of the signatories to the proclamation.

The following year, Frederick W Meredith, as President of the Law Society, informed the Council of the Society on 17 May 1911 that he had been honoured with an invitation to be present at Westminster Abbey upon the occasion of the coronation of Their Majesties King George V and Queen Mary on 22 June 1911.

The new regime

The Great War followed, then the 1916 Rising, the turbulent period of the Tan War, then the Civil War and the destruction of the Four Courts (including the Law Society headquarters) and the birth of a new legal order. Early in January 1922, Dublin solicitor Edmund J Duggan was appointed Minister of Home Affairs in the Provisional Government. Galway solicitor Patrick Hogan was appointed Minister for Agriculture, and Kevin O'Higgins, who had served his apprenticeship with a view to becoming a solicitor, was appointed Minister of Economics. All were warmly congratulated by the President and Council of the Law Society.

The President of the Law Society, PJ Brady, in his presidential address to the Half-Yearly Meeting on 16 May 1922 in Dublin's Molesworth Hall (the Four Courts, including the Law Society headquarters, still lying in ruins), stated that the Council took the earliest opportunity of communicating with the Provisional Government and, in particular, the Minister for Home Affairs whom, as a solicitor (together with the other solicitor members of the government), they heartily congratulated on their appointments to such responsible positions. The President expressed his and the Council's desire to assist the government 'by every means in their power whether in questions of legal administration or otherwise'.

We should not misinterpret the descriptions of loyalty described in this piece. There are no necessary inconsistencies in an institution like the Law Society adopting an exceedingly pragmatic approach to the incumbent authorities in the context of the Law Society's interests. G

Dr Eamonn Hall is Chief Legal Officer with Telecom Éireann plc.

Payback time for the banks?

From: Richard E McDonnell, Co Louth

I note that the Council has decided to accept the Conveyancing Committee's recommendation that the Society should not seek what it refers to as 'extra' payment from lending institutions for the work done by us in domestic conveyancing transactions 'because of the risk that this would unacceptably increase the liability of borrowers' solicitors'.

The word 'extra' is surely superfluous as we are not being paid at all for such work. It seems to me that furnishing a certificate of title constitutes an open cheque in that if virtually anything ever transpires to be wrong with a title, the courts seem quite willing to make solicitors liable. How being paid a fee for dealing with the vast amount of paperwork, phone calls (from clients and to various departments of each lending agency), and the general harassment that the processing of home loans now involves can possibly expose us to any greater risk than already exists is beyond me.

I note that the Society feels that we should spend further millions of pounds building a new Law School. Could I suggest that the banks and building societies for which, it seems, we are to continue carrying out work free of charge indefinitely might be approached with a view to their funding the acquisition of the new building? I imagine that one year's fees forgone by solicitors nationwide for such work would cover the cost of the new premises.

Bad medicine

From: Ronan W Holland, Dublin

I am dismayed at the escalating fees being charged by doctors for medical reports. I was recently informed by a consultant that he would be charging £200 for a first report and £160 for a second report as recommended by the Irish Hospital Consultants Association.

I am sure there are many practitioners who will agree that something needs to be done to keep these fees under control and at reasonable levels. There was previously an agreement as to the level of fees between the professional bodies and the Irish Insurance Federation. The Law Society should strive to reach agreement with the appropriate bodies on the level of these fees which seem at the moment to be spiralling out of control

What heavy gang?

From: Patrick Cooney, Athlone

In the August/September issue of the *Law Society Gazette* (*Viewpoint*, page 4), Michael Farrell writes: '… we had the Sallins mail train case along with allegations of brutality being used to secure confessions'.

To complete that picture, and in fairness to the Gardai involved, it should be noted that following exhaustive court procedures none of the allegations of brutality stood up in court and no statement was excluded on the grounds of ill treatment. These facts are sometimes overlooked.

A world beyond the Pale

From: Fiona Buckley, Cork City

We have just been asked to vote in the election for members of the Council of the Law Society. On the voting paper, there are 20 candidates presenting themselves for election. Of those 20, 13 are solicitors practising in Dublin City. There are no candidates from Cork, Limerick or Galway cities.

Indeed, out of those 20, 15 are from Leinster, two from Connaught, three from Munster and none from Ulster. Clearly, this does not reflect the spread of solicitors throughout the Republic of Ireland.

I would be very interested to read other members' views as to what has led to this gross imbalance in the candidates who are prepared to put themselves forward for election. I myself have been of the view over the last few years that the Law Society is biased in favour of those practising in Dublin. I fully accept that any Society has to have a headquarters and, perhaps understandably, the headquarters is in Dublin City.

I would be of the view, though, that the Society in terms of convenience and accessibility serves its Dublin members far better than those who do not practise there. I assume, without having any figures for practising solicitors, that at least 50% of the profession practises outside Dublin. Why is it that so many of the meetings and CLE lectures take place at times that are completely impractical for solicitors such as myself to attend? There cannot be many of the profession in areas such as Cork for whom it is feasible to travel to Blackhall Place to attend either a meeting or a two-hour lecture at 5pm mid-week.

After all, we all pay the same rates for our practising certificates.

Altogether now

From: Patrick O'Connor, Foxford, Co Mayo

I recently had the honour, as Senior Vice-President of the Law Society, to represent the solicitors' branch of the legal profession at the joint protestant religious service held in St Michan's Church to celebrate the beginning of the new law year. It was a fitting and appropriate service.

Ireland's Constitution and laws apply to all people, regardless of religious beliefs. The courts interpret and apply the Constitution and laws of Ireland without regard to the religious beliefs of those who appear before them whether they be litigants, lawyers, or otherwise.

No fewer than six religious services were held to celebrate the beginning of the new law year. Should not the beginning of the law year in Ireland be celebrated by a non-denominational service? Such a service might rotate between the different churches and other places of worship in Dublin, or alternatively (and preferably, I suggest) in the Four Courts building itself.

One service to celebrate the beginning of the new law year would send a signal from lawyers in this country to the world, and particularly to those living in Northern Ireland, that we live in a non-sectarian, united, open and tolerant society.

Dumb and dumber

From: Dermod Morrissey-Murphy, Limerick

I was acting for a plaintiff some years ago and I was in the course of dictating his statement of claim when I stated *inter alia* the following: *'Because of the injuries sustained by the plaintiff, he has become sexually impotent as a result of which he suffers from neurotic tendencies'*.

When it was typed and placed on my desk, I noted the following translation of the above: *'Because of the injuries sustained by the plaintiff, he has become sexually impudent as a result of which he suffers from erotic tendencies'*.

Needless to say, had I not spotted this error the value of the plaintiff's claim would have been considerably reduced.

From Michael Cody, Carlow

I enclose a copy of a draft finance certificate from a deed of transfer of the family home by a husband and wife as part of their separation agreement. I acted for the husband and received this draft from the wife's solicitor:

'It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds ... and that the husband and wife were lovely and were married to each other as husband and wife'.

From: Liam Irwin, Irwin Kilcullen & Company, Cork

The following is the text of an absolutely genuine letter which I received many years ago from someone from whom I was trying to recover a debt. There is a certain roguish charm about it and it certainly had the desired effect in as much as my clients gave up all hope of recovering anything from the gentleman in question. Perhaps you may wish to publish it to demonstrate that our job does have its lighter moments.

'Dear Sir,

I am very sorry not to have written to you sooner but my whole trouble is that I am still broke down with that machine I was telling you about that it cost £1,000 to overhaul. The pump went on strike in it at Christmas. It will cost £150 to repair at Cassidy's of Dublin. I have not a bob on me at the moment. I am waiting for a few farmers to pay up, they haven't got any money, they are waiting for grant money, and the Land Project Office across the street from ye say they will not have any money till the end of the month, so where am I.

I am trying to get in to Whiddy Island driving one of their machines and that is the reason I did not write you, as I was hoping I would be able to send you some few pounds if I got a job there.

I got married at Christmas, but that cost me nothing, as I had nothing to spend. My sister came from America for the occasion. I would ask her for money but I know she is broken now with myself.

Thanking you for all your kindness.

PS If you know anyone with work for a traxcavator bulldozer, I would work for half nothing for them if they would redeem the pump out of Cassidy's for me. Please do not send any more letters to ...'

From: Nicholas Hughes, Cork

The following is an absolutely true incident.

Acting for a public body, I dealt with two difficult motions in the Supreme Court. In each case, my opposition represented themselves. As I was leaving the court, an elderly barrister caught my sleeve and in a superb imitation of Edith Evans said: 'To have one lay litigant may be a misfortune, but to have two seems like carelessness'. He was right, but he did not know the half of it.

Liam Irwin wins the bottle of champagne this month

A bottle of the finest champagne will go to the reader who sends in the funniest contribution to *Dumb and dumber* each month.

our examples of the wacky, weird and wonderful to the Editor, *Law Society Gazette*, Blackhall Place, ublin 7 or you can fax us on 1 671 0704.

BRIEFLY

LawLink adds two new databases

LawLink has added two new databases to its on-line service. Working in association with publisher Bart Daly, LawLink has launched a current awareness service which will track new developments in the law and produce them in a manageable form. The *Irish Weekly Law Reports* (IWLR) will be available free on the service this month and next month. Also this month, LawLink will publish hearing lists for the Eastern Circuit Court on a pilot basis.

Vintage crack at wine fair

The Law Library is planning an evening of vintage crack at its Christmas wine fair on Thursday 26 November between 2pm and 9pm at 145 Church Street, Dublin 7. Solicitors and friends are welcome. The fair will be a chance to stock up for Christmas at trade prices. Suppliers exhibiting will include Findlater's, Burgundy Direct, Febvre, Fitzgerald's, Mitchell's, Nicholson's and Searson's.

Y2K courses for *Italax* users

Software supplier IVUTEC plans to run a number of short training courses to prepare the users of its practice management software *Italax* for the Year 2000. Training administrator Aveen Murphy told the *Gazette* that the courses will be run next January. 'We have spoken with our users and they have repeatedly asked us to give them the opportunity to go on short, affordable training courses', she said.

Milestone on track

PC Consultancy Milestone Systems is now distributing Equitrac Corporation's range of cost recovery products. The two products, *AlphaFax* and *AlphaCopy* track the cost of faxing and photocopying for clients, allowing you to calculate accurately the cost of these services and pass them on. Dublin-based Milestone also supplies products for tracking telephone and laser printing costs.

Examiner and *Western People* scoop Law Society *Justice Media Awards*

Two of the top *Justice Media Awards 1998* were awarded to journalists from outside the Pale. The *Examiner* and *Western People* were overall winners in the newspaper categories, leaving their Dublin-based competitors in the shade.

The awards were presented by Minister for Justice, John O'Donoghue, and the President of the Law Society, Laurence K Shields, at a ceremony in Blackhall Place recently. The winners in each of the four categories won a Dublin Crystal *Joyce* plate and a £500 cheque, with the runners-up receiving a certificate of merit and a cheque for £100.

Writer and broadcaster Vincent Browne (centre) accepts his *Justice Media Award* from Justice Minister John O'Donoghue and President Laurence K Shields

The overall winners in the **Daily Newspapers** category were Pat Brosnan and TP O'Mahony of the *Examiner* for their series of three articles on the role of the Supreme Court and how its decisions have shaped policy and law in modern Ireland. The Adjudication Panel was particularly impressed by the combination of depth of analysis and lightness of touch which made this series both readable and informative.

Certificates of merit went to:

- Michael Foley of the *Irish Times* for his two articles on the impact of the *Freedom of Information Act*
- Sam Smyth of the *Irish Independent* for a piece on the fundamental role played by Hepatitis C victim Brigid McCole's solicitors, called *Heroic lawyers did their country some service*.

The winner of the *Justice Media Award* in the category of **Non-Daily Newspapers** went to Denis Daly of the *Western People* for his article on the discredited petition system which, until four years ago, allowed the Minister for Justice to cut or remove fines and other penalties imposed by the courts.

Three certificates of merit were awarded in this category:

- Kevin MacDermot of *Ireland on Sunday* for an article on the administration of justice called *Justice system in the dock*
- Matt Cooper of the *Sunday Tribune* for an article on the vagaries of sentencing called *The injustice of it all*
- Ted Harding of the *Sunday Business Post* for an article on whether we really need more prison spaces, entitled *Jails may be just easy answer*.

In the **Magazine Category**, the *Justice Media Award* went to *Consumer Choice*, which also won in 1992, the competition's first year. Sally Roden won her award for an article explaining the different rights and entitlements of married and co-habiting couples.

In the **Radio and TV Broadcast** category, the *Justice Media Award* went to writer and broadcaster Vincent Browne for his RTE radio show *Tonight with Vincent Browne*. The panel particularly liked the way his show teased out some of the more problematic aspects of the *Freedom of Information Act*.

A certificate of merit was awarded to:

- Joe Little of RTE for his television news report in which he interviewed the parents of the girl at the centre of the *C case*
- Sinead Wylde for her piece on Cork Campus Radio on the work placement of UCC students on death row in the United States
- Fergal Ryan of Today FM for a piece on the role of expert witnesses.

The awards were relaunched this year after a gap of four years. The competition aims to reward outstanding journalism in the printed or electronic media which contributes to the public's understanding of the law, the legal system or any specific legal issue.

Compensation Fund payouts

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Council at its meeting in September: Dermot Kavanagh, 2 Mary Street, New Ross, Co Wexford – £2,892; Michael Owens, 5 Lower Main Street, Dundrum, Dublin 14 – £3,819.

Members vote 76% in favour of new education centre

The recommendations of the Education Policy Review Group, including the recommendation to build a £5 million state of the art education centre at Blackhall Place, were overwhelmingly approved in a postal vote of members by a ratio of three to one. This followed the earlier endorsement which the recommendations received from last month's special general meeting of the Society and, earlier still, from the Law Society Council.

Reacting to the result of the postal ballot, Law Society Director General Ken Murphy said: 'The voice of the profession has now been clearly heard, and this utterly decisive majority puts the issue beyond further question. This was one of the most important decisions that the members have taken in decades. It is a declaration of confidence in the future, and reveals a determination by the profession that the Society's training of new solicitors will continue to be of the highest quality'.

Men at work: scrutineers count the votes cast in the recent postal ballot (seated from left: Andrew Donnelly, Colm Price, Walter Beatty and Michael Staines. Standing: Adrian O'Gorman)

Results of the postal ballot

Total valid poll:	1,878
In favour:	1,437
Against:	441

The next step will be the invitation of tenders for the actual construction of the new education centre. Work will begin as soon as possible. The target for completion of the building remains June 2000, with the first students starting the newly-redesigned professional course in September of that year.

Law Society Council elections

The Law Society has a new Council and a new President, with Pat O'Connor set to take office this month. O'Connor was deemed to be elected to his post after serving as Senior Vice-President for a year.

The following members were provisionally elected, the number of votes received by each appears after their names:

Name	Votes
1 Michael Peart	1,486
2 Gerard Griffin	1,425
3 Donald Binchy	1,408
4 Elma Lynch	1,344
5 John Shaw	1,277
6 John Fish	1,276
7 Anne Colley	1,249
7 Keenan Johnson	1,249
9 Philip Joyce	1,215
10 Michael Irvine	1,188
11 Niall Farrell	1,174
12 James McCourt	1,093
13 Walter Beatty	1,092
14 James MacGuill	1,091
15 Orla Coyne	1,077

The following candidates were not provisionally elected:

16 Boyce Shubotham	965
17 Patricia McNamara	869
18 Stuart Gilhooly	694
19 Sean O'Ceallaigh	625

As there was only one candidate nominated for each of the two relevant provinces, there was no election and the two candidates for these seats were returned unopposed as follows:
Leinster: John Harte
Ulster: James Sweeney.

Four members appointed to district bench

Four more solicitors are on the district bench around the country following the latest round of judicial appointments. One of the new judges is a woman, Mary Devins. A graduate of University College Dublin, she was a member of Armstrong and Devins of Wine Street, Sligo. She qualified in Michaelmas 1972.

David R Anderson of Dublin firm Gerrard Scallan & O'Brien, Kerry solicitor James O'Connor, and Limerick man Tom O'Donnell of Holmes O'Malley Sexton have also been appointed to the district bench.

BRIEFLY

O'Rourke to address business breakfast

Public Enterprise Minister Mary O'Rourke will address this month's *New Horizons* business breakfast at the RDS in Ballsbridge, Dublin, on Thursday 12 November. The theme will be *The telecommunications industry*. For more information, contact Geraldine Hynes at the Law Society (tel: 01 670200).

13 barristers take silk

13 barristers took silk last month. The new senior counsel are: Bernard Barton SC, Frank Callanan SC, Michael Cush SC, John A Edwards SC, James Gilhooly SC, Felix McEnroy SC, Joseph McGettigan SC, Declan McGovern SC, Noel McMahon SC, James F O'Leary SC, Desmond O'Neill SC, Stephen Roche SC, and John Whelan SC.

Four Courts to smoke out the weed

The Four Court authorities want to smoke out lawyers who have been lighting up there and flouting its tobacco ban. High Court President Frederick Morris recently wrote to the Law Society asking it to remind solicitors that the Four Courts is a public building and smoking is banned there. Morris pointed out that Gardai on duty there noticed that solicitors are lighting up despite the rule, and also leaving the Round Hall floor littered with butts.

Hostile bids destined for court

Almost every hostile takeover bid in this country will end up in court, a leading commercial practitioner warned recently. Arthur Cox partner Stephen Hegarty told the *Annual Irish Mergers and Competition Workshop* recently that takeover activity was increasing rapidly. He pointed out that when the 15-month-old Irish Takeover Panel is faced with a contested bid for a company, it could find itself in a situation where its decisions would be judicially reviewed.

Top gun

Despite initial reservations, Pat O'Connor has followed in his father's footsteps: first he became a solicitor, now he's been elected President of the Law Society. Here he talks to Conal O'Boyle about his career to date and his plans for his year in office

'If you ever stop loving and enjoying what you're doing, either take a sabbatical or consider a career change'. That's the advice the Law Society's new President, Pat O'Connor, would give to anyone entering the solicitors' profession today. Ironically enough, O'Connor himself thought of joining the mile-high club rather than following two generations of his family into the law.

'Around 1968', he says, 'I thought I would like to be an airline pilot so I applied to Aer Lingus, but they weren't taking on any trainee pilots that year. When I told my father of my ambition, he was a little taken aback because he had wanted me to become a solicitor and to carry on the line. So he said to me: "If you want to become an airline pilot, go ahead and do it, but just do one thing for your own sake: have the security of knowing that you have a profession behind you. Go to university first, get your qualifications, and then become a pilot. If things don't work out, then you'll have two choices in life"'.

Smooth passage

O'Connor took his father's advice, started out with the law and has stuck with it ever since. So far, at least, he has few regrets about his thwarted ambition and has run into very little turbulence in the course of his career. He flew through college, served his apprenticeship, and was on the Roll of Solicitors at the age of 21.

'Looking back on it, I think it was too young', he says, 'but at the time I was delighted. I suppose I enjoyed being a young qualified solicitor with a bit of money to spend'. With the benefits of hindsight, the new President would recommend that would-be solicitors today should have a little more life experience before they are admitted to the Roll.

Following qualification, O'Connor went to work in the Dublin firm Hayes & Sons, an experience he says that will stand to him forever ('I owe an enormous debt to Adrian Glover and the staff at Hayes's for training me to be a practising solicitor'). Since 1976, he has been back in his native Mayo, practising full-time in the family firm P O'Connor & Son.

In the course of his professional career, O'Connor has become a notary public for counties Mayo, Sligo, Roscommon and Galway and coroner for Mayo East, but he regards his greatest professional achievement as simply qualifying as a solicitor. One case that gave him particular pleasure was a wrangle over fishing rights on the River Moy a number of years ago where some landowners objected to the use of their lands by anglers and fishermen. The case ran for three and a half days in Castlebar Circuit Court. The farmers, represented by O'Connor, won the first round but lost in what might well be the longest Circuit Court appeal ever heard in the West of Ireland. The appeal lasted nearly ten days before Mr Justice Ronan Keane, who ruled substantially in favour of the appellants.

The point about cases like this, says O'Connor, is that it gives 'a great insight into human nature and into the real issues facing small landowners and farmers in the country – the issues that they feel are important to their livelihood are not necessarily the issues that we as lawyers might think should be important.

'To go to court and to win is important', he adds, 'but to go to court and to have a client satisfied that they got a good hearing and had a professional presentation of their case – win, lose or draw – is extremely satisfying. I just love it'.

Solid foundation

This kind of attitude may be just what the Law Society needs as it faces into the next millennium. The new President believes that the decision on whether or not to invest in a new education centre is central to the Society's ability to meet the challenges of the future.

'Some 25 years ago the Council of the Law Society had the vision to buy and equip Blackhall Place', he says. 'I think that single achievement laid a very solid foundation for the profession into the future. We now have our own building, our own place, and it is identifiable. The next stage, the construction of a new education centre, is to a certain extent the final phase of what was started all those years ago. Once you house your profession, you have to have a place to educate and train those who are coming into it'.

No serious competition

Unlike so many latter-day legal Cassandras, O'Connor does not believe that the solicitors' profession is in imminent danger of imploding under the sheer weight of numbers entering it nor that it is facing any serious competition from other professions.

'I think there is a tremendous future for the legal profession. We will have more lawyers rather than less because, as society becomes more complex and more regulated, it will inevitably develop a need for more lawyers.

'I have heard stories from colleagues in the larger urban areas that accountants pose a threat to solicitors. They don't. We will always have the march on any other profession because we are trained to deal with legal issues and concepts and to apply legal principles to all the things that affect us in life.

'The solicitors' profession has a very rosy future provided that it understands where it's going and doesn't get involved in too many diverse issues. In the past, there was an attempt to broaden the areas of work that solicitors became involved in, such as auctioneering and insurance agencies. That may suit some individuals but not the profession in general. I think we need to focus on our core service areas and to market those services effectively'.

As one of the first recipients of the Q Mark, it's not surprising that O'Connor is a strong advocate of customer care as a means of gaining competitive advantage. He believes that the profession is increasingly losing its old-fashioned image and today almost universally embraces modern management tools and quality systems.

'There used to be a perception that solicitors

Pat O'Connor Fact File

Born: 22 October 1952
Lives: Foxford, Co Mayo
Family: Married to Gillian, four children (Katie, William, James, Christopher)
Occupation: Solicitor (admitted to Roll of Solicitors in 1974), notary public for Mayo, Sligo, Roscommon, Galway, coroner for Mayo East. Principal of the firm P O'Connor & Son, which employs seven solicitors and 14 other staff in its Swinford and Kiltimagh offices
Education: Secondary: Glenstal Abbey; third level: BCL (Hons) from UCD, 1970-73, LLB (Hons) from UCG (1992-94)
Law Society career: Elected to Council every year since 1978. Junior Vice-President 1993, Senior Vice-President 1997, President of the Law Society for year 1998/99. Has served as chairman of the Education, Registrar's, Professional Purposes (now Professional Guidance), Joint Law Clerks Labour and Annual Conference committees. Has been a member of nearly all the Society's committees in his 20 years on Council
Interests: Tennis, golf, yachting, fishing, swimming, walking
Other information: Author of *Handbook for coroners in the Republic of Ireland* and *The Royal O'Connors of Connaught*. Former member of Fine Gael National Executive. His father, Thomas V O'Connor, was President of the Law Society 1972/73

were not good at looking after their clients or at providing customer care. That is changing. Certainly the larger and medium-sized offices have had to change so that the needs of their commercial clients would be looked after, but the smaller practices are beginning to change too and are putting much greater emphasis on looking after the individual clients. I think you will see an increasing number of solicitors going down the Q Mark and ISO 9000 route because it enhances and evaluates objectively the service they are giving'.

One change that O'Connor is not so keen to see is a unified legal profession, and he doesn't think it will happen in his lifetime or even in his children's. 'I don't think it would be in the public interest', he says. He is, however, keen to promote closer co-operation between barristers and solicitors, particularly in the field of education. 'I think that there is a great waste of resources on both sides of the legal profession in providing what is in many respects a similar type of education and training. I accept that there are some differences between solicitors and barristers, but at the end of the day they are both going to end up as lawyers', he says.

Among the issues he will have to face in his year as president is the perennial lament from some quarters that the Law Society is not doing enough for its members. O'Connor believes that this is largely a reaction to the dichotomy in the Society's dual role as regulator of the profession and as its representative body.

Changing the balance

'It's very difficult for an organisation like the Law Society to wear two hats. I think while there is a perception that we have tended in the past to emphasise the regulatory side rather the representational side, major strides have been made in the last two or three years, particularly with the appointment of Director General Ken Murphy, who is a solicitor and who understands the solicitor's mind. The balance has changed very dramatically so that we are now more representational than regulatory – but the regulatory side is something that we will have to carry on with it. It is a consequence and hallmark of a self-regulating profession.'

One of the goals he has set himself for his term of office is to improve the Law Society's image among its members. The starting point, he says, will be to tell the profession about the large number of services the Society already provides and which they may be unaware of.

'I would hope that during my year that we will be able to convey to my colleagues what the benefits of being a member of the Law Society actually are. After all', he points out, 'they are the ones who are paying for the running of the Society.

'My twin goals are, firstly, to try to get all members of the Law Society to visit Blackhall Place, whether on a working or social occasion, and to become regular users of its facilities. Secondly, I want to see a start made on the new education centre that has just been endorsed by the profession by a three to one majority. I hope that as many of the profession as possible will come and join me at our annual conference in 'magical Mayo' next year.

'I am looking forward to my year as President. I intend to try to meet as many of the profession as possible and to be as good and capable a representative as I can be for them'. G

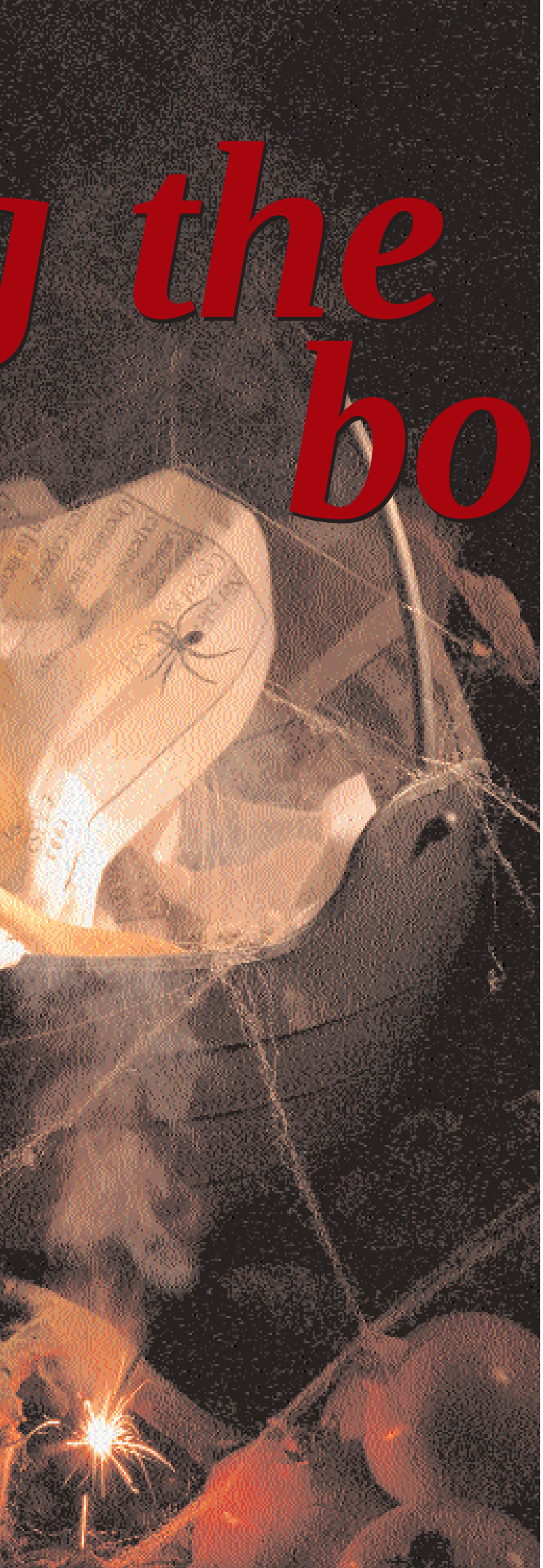
Cooking

The *Criminal Justice (Fraud Offences) Bill* is due to be published in January, but recent events have shown that, where corporate fraud is concerned, neither the Government nor the public at large seem to know what is really going on. Pat Igoe discusses the likely contents of the Bill that is being flagged as a major overhaul of our hopeless anti-fraud legislation

'Fraud is infinite in variety: sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue; and then sometimes it is modest and retiring. It would be honesty itself if it could only afford it. But fraud is fraud all the same'.

A dictum for our times? The words of Lord MacNaughten ring through the years since he uttered them in the Appeals Court in 1896. It can be called fraud or white-collar crime or paperwork crime. And, as Irish people now believe, it does indeed come in many forms and from unexpected directions.

In the context of the Ireland of the 1990s, at least we can comfort ourselves that it is neither new nor exclusively Irish. One of the best-known frauds ever was the South Sea Bubble of 1720, an imaginative exercise in market manipulation. The largest-ever known was the Bank of Credit and Commerce International (BCCI) fraud at the start of this decade where an



g the books

estimated £800 million was lost to depositors. Neither fraud was Irish.

But there the comfort ends. The words of a latter-day Irish jurist, the late Mr Justice Niall McCarthy of the Supreme Court, written in 1990, are now sadly hollow: 'Dublin has a number of advantages for those seeking financial services: in its location, in its use of the English language, and happily thus far in its lack of production of what are termed City scandals'.

Long-awaited and overdue legislation is scheduled to be published next January. The *Companies Act, 1963*, the *Planning Act* of the same year, the *Succession Act* of 1965 and the *Unfair Dismissals Act, 1977* were significant pieces of law that made a difference. Will the urgently-awaited *Criminal Justice (Fraud Offences) Bill* also provide some answers to a society that is now demanding fair and open dealing and the dropping of the term 'golden circle' from our lexicon?

Fundamental and far-reaching reform?

The Bill will spearhead our anti-corruption and anti-fraud laws into the 21st Century. It will update and consolidate the law. It has been promised by a succession of Ministers for Justice, including Padraig Flynn and Nora Owen. The Government's proposals on 'zero tolerance' for white-collar theft will be brought before the Dáil and the people by the Minister for Justice, John O'Donoghue TD.

We are promised 'a fundamental and far-reaching reform of the law on fraud and dishonesty'. The legislation will also 'ensure that this vital area of the criminal law fully reflects modern conditions', according to the Department of Justice.

Apart from the succession of disclosures of suspected serious financial misdeeds, brought for one reason or another to the Irish public's attention over recent years, the extent of fraud and the size of the 'black economy' in this country have been cause for serious concern. By their very nature, their size is unknown. But they are acknowledged as being as corrosive as they are secretive – to the economy, to the political system and to social cohesion. Their cost is incalculable.

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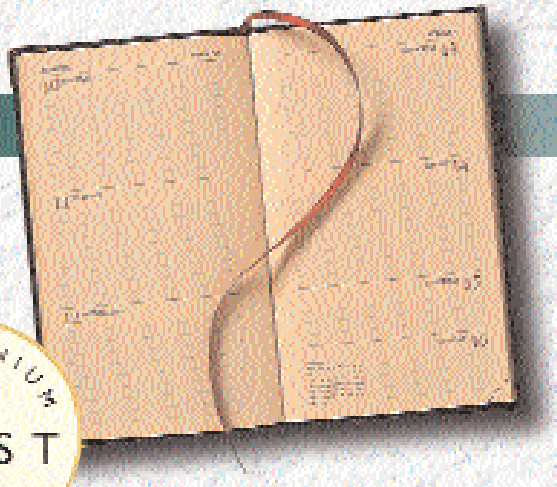

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Last year, Gabriel Fagan, an economist with the European Monetary Institute and the Central Bank, attempted to identify the extent of our secretive black economy. He concluded that, depending on the technique employed, estimates suggested that each year it amounted to at least £1 billion and could be as high as three times that figure – which is equivalent to £250 to £750 for every man, woman and child in the country.

The black economy and fraud are inextricably and symbiotically linked. But, unlike most other crimes, even their existence can be difficult to identify and even more difficult to prove. Hence the significance of Minister O'Donoghue's Bill.

Clearing house for hot money

Mr Justice Paul Carney spoke some years ago about 'jurisdiction shoppers' in the context of international fraud. The fight against corruption and fraud is no longer local, particularly with Irish membership of the European Union and the freedom of money to flow between countries. Apart from dealing home-grown fraudsters, the authorities here need effective legislation to protect Ireland from being used as an easy option by international criminals. According to the *Irish Times* earlier this year, Ireland is in danger of becoming a clearing house for hot international money, with an estimated £20 billion being 'flushed' through Irish non-resident companies.

Few commentators would disagree that effective anti-fraud legislation in Ireland is overdue. The new Bill will be measured on whether it tackles the gaping shortcomings both in our laws and in our court procedures. The world has moved on from the era of the *Larceny Acts* from 1861 and the *Forgery Act* of 1913.

Mr O'Donoghue has promised that the Bill will create a new offence of theft. This will replace a complicated range of both old statutory and common law crimes, including larceny, embezzlement and obtaining by false pretences. He also promises that the Bill will create new crimes 'to deal with dishonest behaviour not properly covered by existing legislation'.

Interested observers, both at home and abroad, will be watching to see the extent to which the Minister heeds the advice of both the Law Reform Commission and the Government Advisory Committee on Fraud, both of which reported almost six years ago. In June 1992, the then Minister for Justice, Padraig Flynn, promised that the *Report on fraud* (produced in just five months because of the urgency of the problem) was 'not going to be left to gather dust'. Many of its recommendations may at last reach the statute book along with the recommendations of the Law Reform Commission.

The Commission made 71 recommendations, including adopting many provisions of England's 1968 *Theft Act*. Seven others may also be highlighted as interesting:

- That any auditor of a company's accounts who discovers fraud should be required to report it to the Gardai
- The creation of a distinct new offence of controlling a company when dishonesty was committed by an officer of the company (this may be particularly relevant to those who are in effective control of large companies)
- That powers of questioning fraud suspects, similar to those available to the Serious Fraud Office (SFO) of England, Wales and Northern Ireland, be introduced here. The director of the SFO, Rosalind Wright, has noted that these powers 'have proved to be a vital tool in getting to the heart of complicated frauds'
- That the Gardai should be empowered to arrest without warrant for all offences of dishonesty
- That accountants should be available to juries in complicated fraud trials to explain accountancy procedures
- That modern information technology, including computer terminals and other aids, be used to help juries understand complicated issues in fraud trials. It is well established that confusion and ignorance are of considerable benefit to those suspected of fraud
- That lawyers take training in accountancy and information technology and that judges attend seminars on such matters. It might be added that judges, lawyers, members of a jury or the men and women on a Clapham omnibus would require the abilities of a learned polymath, and an equal amount of patience, to fully understand all of the legal, accounting, sociological and psychological aspects of many of these complex crimes.

The recommendations of the Government Advisory Committee on Fraud range from the establishment of a Garda National Bureau of Fraud Investigation (to replace the Garda Fraud Squad) to the curtailment of the right to silence where explanations could reasonably have been given earlier, and also giving the courts the right to impose unlimited fines 'to punish serious fraud and to provide a credible deterrent'.

The bureau has been established, but it does not publish annual reports so its effectiveness cannot be assessed or compared with that of the SFO in London. The SFO is staffed primarily by lawyers and accountants, with the assistance of seconded police officers. It is not a branch of the police. It publishes an annual report each year which is presented to the British Parliament.

Reimbursement and disgrace

The recommendation of unlimited fines aims to impose a meaningful deterrent to paperwork crime. It seeks to make fraud a non-profitable exercise. Civil actions with a lower burden of proof and perhaps more realistic chances of success may be considered to complement criminal prosecutions. Their objective would be reimbursement of embezzled monies and the disgrace of the perpetrator.

If Mr O'Donoghue's Bill does address a major, illicit growth sector in the Irish economy, this will be viewed as significant but not sufficient. Unless the new legislation is enforced, it will simply take the place of the 1992 Advisory Committee *Report on fraud* on the shelf gathering dust.

To enforce the new law, the Minister might take counsel of the Director of Public Prosecutions, Eamonn Barnes. Mr Barnes has long since been calling for an efficient and cohesive prosecution system without delays and 'absurd duplication of work'. The new law should be one of the major pieces of the current Government's legislative programme. We are told that it will deal with 'the present-day realities of fraud'.

But do the articulate criminals, who probably steal more from the community in one day than all of our handbag snatchers take in a lifetime, really believe that it will tilt the balance against them? Do the rest of us? It is a massive task. The jury is still out. G

Pat Igoe is principal of Dublin solicitors' firm Patrick Igoe and Company.

Leave it to the

When is an expert not an expert? When the other side's legal team takes them apart on the witness stand and discredits their evidence. With a new statutory instrument (SI 391) on the use of expert evidence just signed into law, Conal O'Boyle looks at the role of experts in the court system and talks to those in the know about the use and abuse of expert witnesses

The increasing litigiousness of Irish society means that expert evidence is becoming ever more central to the conduct of a court case. But where can you find an expert witness when you need one? And how can you be sure that your expert is not only suitably qualified but won't wilt under cross-examination?

In contrast to Britain, where there are two professional bodies representing experts (which some might say is one too many), there is no central register of expert witnesses in Ireland, nor any sure means of picking a good one – apart from word of mouth among the legal community or the expert's own high profile. But this may be no bad thing, according to James McCourt, chairman of the Law Society's' Litigation Committee.

'If you have a directory of experts', he says, 'you will end up with a publication of some kind that will invite people to promote themselves and their services upon payment of a fee, not unlike the yellow pages. We have explored the idea in a limited form before and we believe that, although the present system may be imperfect, we would achieve nothing by having a directory because the people who would be in it are already well-known to the profession at large'.

The Law Society maintains a limited register of experts in relation to medical negligence matters. 'That's where it's most needed', explains McCourt. 'One of the hardest things in this country is to get one medical practitioner to swear up against another. We have medical practitioners who are willing to put themselves on a panel and who may at some time in the future be called upon to examine someone and to offer an opinion as to whether one of their colleagues may have been negligent or not at an earlier date'.

Apart from the medical experts, he adds, solicitors would probably choose an expert on the basis that they might be, say, the best engineer in their locality, are professionally qualified and competent, and are known to the judge as being honest. The Law Society's Library also has a copy of an expert witness directory produced by the Law Society of England and Wales (see ***Useful sources of information*** panel).

No access to information

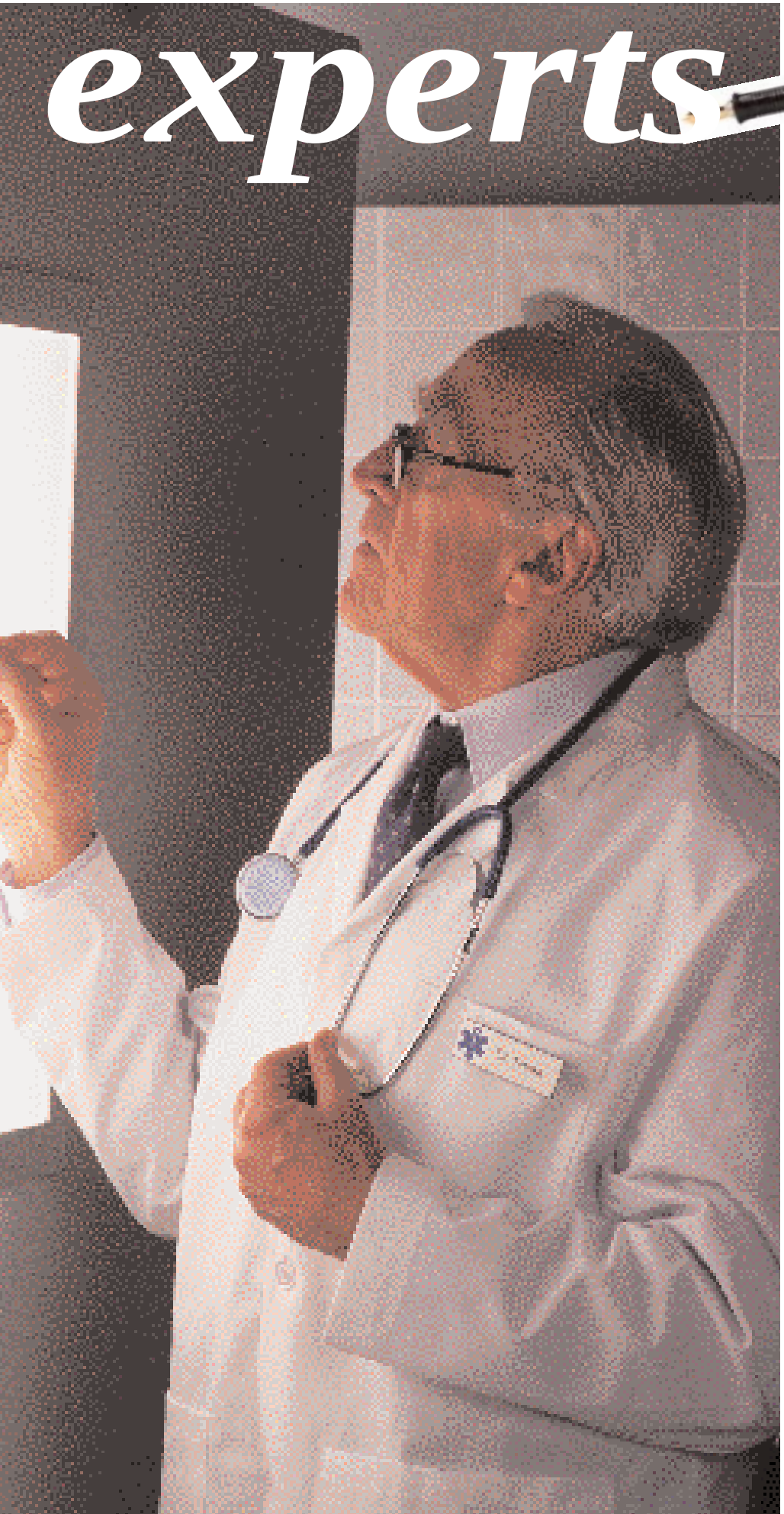
Dublin solicitor Caroline Conroy is managing director of La Touche Bond Solon, a firm that specialises in training expert witnesses on how to prepare expert reports and give evidence in court. Perhaps not surprisingly, she would like to see some form of central register for experts in this country.

'There's just no access to information on experts here, particularly experts in unusual areas', she says. 'I think that's something that needs to be looked at'.

Conroy also looks forward to the day when some organisation akin to the UK Academy of Experts may be set up here. 'There's no professional body setting standards for experts in Ireland, whereas in England you have the Academy and the Institute. To become a member of the Academy, you have to have certain references and also recommendations from lawyers who have used you'.

Almost anybody who has a recognised qual-

experts



ification and expertise in a certain field can hold themselves out as experts, although as James McCourt points out: 'In most personal injury cases, the expert witness is going to be the doctor or the engineer. The doctor won't have been chosen by the plaintiff: he will be the registrar or the person in charge of the accident and emergency department that admitted the patient – which is as it should be.

'When it comes to selecting engineers and so on, the solicitor can have an input into that. But when it comes to doctors, the practitioner should have no input whatsoever'.

The only other input they should have, he adds, is in arranging for independent medical examinations by insurance companies. These are always carried out under what are called 'the usual terms', and McCourt believes it has now become necessary to remind solicitors of what this actually means. Basically, the opposing legal team is entitled to have your client medically examined but is not entitled to ask anything that touches on liability. *(A Litigation Committee practice note on this area can be found on page 35 of this issue of the* Gazette.*)*

Perhaps it's the result of the rather broad definition of an expert, but many expert witnesses can run into trouble during cross-examination, as Caroline Conroy can testify. 'When they're giving evidence in court, experts can be pulled out of their area of expertise very easily and can start going into areas that should be left to others, usually because they want to impress the court or don't want their evidence to be undermined'.

Many seem quite unprepared for the likeli-

hood that their 'expert assessment' might be challenged by the other side's legal team. 'Sometimes they just don't understand the rules within the adversarial system', says Conroy. 'They don't understand that the first thing a good cross-examining barrister is going to do is to attack their credibility. They take things personally. They often don't realise that once they put themselves out there as an expert they stand to have their expertise and credibility challenged – that's how the system is supposed to work'.

Perhaps to avoid this very problem, or perhaps it's just the comfort of the familiar, some legal teams tend to use the same experts over and over again. And some expert witnesses get themselves reputations as hired guns who will turn up to the opening of an envelope.

Same old faces

According to James McCourt: 'The same old faces do turn up again and again but they tend to turn up with the same teams, with solicitor x retaining the same counsel in every case and the same psychiatrist or specialist. I believe that dilutes the effectiveness of their evidence because we all know them. Not only can the opposition see them coming, but the judge can too. They come in with big built-up cases and they don't get beyond the starting blocks'.

Caroline Conroy believes that one of the main benefits of giving training to expert witnesses is that they will then start to appreciate that their duty is first and foremost to the court, not to the plaintiff or defendant.

'Some don't fully understand their role as an independent expert. This misconception occurs because at the outset they are brought in to advise a lawyer on whether a case should be brought or not', she explains. 'Then they are used as a tool for presenting the evidence to the court, and that can be somewhat confusing for them'.

Caroline Conroy: 'some experts do end up as advocates'

The fact that their fees are being paid by one side in the case can also affect their sense of independence, she says. 'Some of them do end up as advocates, or are used as advocates by the lawyers, which is a very dangerous thing. They don't see that their role is to remain independent at all times, and that they must be balanced, fair and must look at both sides of the argument. Their role is to assist and educate the court. They are not there to win the case'.

McCourt agrees that expert witnesses can be partisan, but believes it is up to the opposing counsel and the judge to keep them focused on their true role. 'But', he adds, 'the majority of expert witnesses will simply call it as they find it; if they find a building or stairs or a system of work in breach of statute, they simply explain how and why they've reached that conclusion. That's factual information for the benefit for the court. Sure, it may seem to be pushing the plaintiff's case, but if the engineer hadn't reached that conclusion in the first instance, he wouldn't be in court'.

The use of expert witnesses and reports underwent a radical shake-up last year when Statutory Instrument 348 of 1997 was introduced with minimal consultation with the legal profession. Among other things, the new SI ended the traditional 'ambush' approach to the use of experts in personal injuries litigation by stipulating that lawyers for both parties would have to exchange in advance the lists of witnesses to be called and copies of all expert reports. Following intensive lobbying from the Law Society and the Bar Council, a new statutory instrument (SI 391 of 1998), replacing SIs 348 and 471 of 1997, was signed into law on 14 October.

Caroline Conroy believes that the new rules will make lawyers consider more carefully the use of experts in litigation and will lead to higher standards of expert evidence. 'What you're going to find is that probably fewer cases will come before the courts; more will be settled on the basis of expert evidence. The exchange of reports means the expert evidence is going to be out on the table so it's going to be very important that these reports will be clear, polished, well presented – and honest'.

But the Litigation Committee's James McCourt is not so sure that the new statutory instrument will have a radical effect on the system. 'I don't think it changes things with expert witnesses', he says. 'I believe that every report written in contemplation of legal

THE EXPERT'S VIEW
Counting the cost

Forensic accountants take to the witness box in cases where there is money at stake. According to Peter Johnson, a partner with James Hyland & Co, their job essentially involves establishing a link between what the client believes caused the loss of cash and the actual loss itself.

'Typically we would be involved in any cases where there is a loss of earnings or income', he explains. 'We are often called in on personal injury cases where someone is claiming for loss of earnings or a business with a breach of contract'.

In all these cases, the two basic strands of their task are quantifying the loss involved and establishing a causal link between it and the defendant's actions. Johnson gives the example of a case where a client has bought a piece of equipment or machinery for a specific purpose, and he loses business because it fails in some way.

In that situation, the expert draws an economic model of the industry in question, calculates the projected losses and links them to the fault. To do this, he needs to go through the documentary evidence of the problem and any other relevant material. Similarly, in the case of personal injuries at work, a forensic accountant will need to see the accident book.

Johnson stresses that to do this work effectively and draw up a comprehensive report, the job must be started as soon as possible. 'The best advice I can give lawyers is to give instructions early: rushing out a report in two or three weeks may not do your client justice', he warns.

The reports themselves need to be clear and understandable to the court, while evidence needs to be objective and independent. Johnson points out that it is in this area that specialised training is most useful.

James McCourt: 'the majority of experts will simply call it as they find it'

proceedings ought to be straight and honest and address the issues'.

The Litigation Committee is currently studying the new SI in detail with a view to teasing out how the new rules can best operate in practice, McCourt adds. 'Our first reaction is that the new SI is a much more user-friendly document than its predecessor, but a definitive article on this subject by the Litigation Committee will appear in the December issue of the *Gazette*'.

Which leaves only one question: how come experts can never seem to agree on even the simplest things? But then, as Conroy helpfully points out: 'Sometimes you can't get judges to agree on certain points! Experts disagree; lawyers disagree. As professionals we tend to disagree'.

Now that's something we can all agree on. G

Useful sources of information on expert witnesses

Chartered Institute of Management Accountants
44 Upper Merrion St
Dublin 2
Tel: 01 678 5133

Association of Chartered Certified Accountants
9 Leeson Park
Dublin 6
Tel: 01 491 0466

Institute of Bankers in Ireland
Nassau House
Nassau St
Dublin 2
Tel: 01 679 3311

Institution of Engineers of Ireland
22 Clyde Rd
Dublin 4
Tel: 01 668 4341

Directory of Expert Witnesses 1998
Law Society of England & Wales/FT Law & Tax
21-27 Lamb's Conduit St
London WC1N 3NJ
England
ISBN: 0-75200-507-3

Association of Consulting Engineers of Ireland
51 Northumberland Rd
Dublin 4
Tel: 01 660 0374

Irish College of General Practitioners
Corrigan House
Fenian St
Dublin 2
Tel: 01 676 3705

Royal Institute of Architects of Ireland
8 Merrion Square
Dublin 2
Tel: 01 676 1703

Institute of Chartered Accountants in Ireland
87-89 Pembroke Road
Ballsbridge
Dublin 4
Tel: 01 668 0400

Irish Hospital Consultants Association
Heritage House
Dundrum Office Park
Dublin 14
Tel: 01 298 9123

Irish Insurance Federation
39 Molesworth St
Dublin 2
Tel: 01 676 1820

Irish Law Times Expert Witness Directory 1998
Roundhall Sweet & Maxwell
4 Upper Ormond Quay
Dublin 7
ISSN: 0021-1281. Price £9.95

La Touche Bond Solon
20 Upper Merrion St
Dublin 2
Tel: 01 662 3404

Academy of Experts
2 South Square, Gray's Inn
London WC1R 5HP
England
Tel: 0044 171 637 0333

Expert Witness Institute
11 Haymarket
London SW1Y 4BP
England
Tel: 0044 171 930 7878

Irish Medical Organisation
10 Fitzwilliam Place
Dublin 2
Tel: 01 676 7273

THE EXPERT'S VIEW
Sudden impact

Everybody knows that accidents happen, but courts often have to find out how. Impact analysis is the science of establishing what happened in the vital seconds before a car crash or some other calamity that has left somebody with a claim.

Mark Jordan of Mayo-based Jordan M & Associates specialises in this area. A mechanical engineer with a PhD in impact analysis, he will visit the scene of an accident, take measurements and reconstruct the events on computer to – in his own words – 'establish culpability or "exculpability"'.

Jordan will produce a report and give evidence on the basis of his findings, as well as attending consultations with insurers and loss adjusters. He regularly deals with both branches of the legal profession, and says he finds that while all lawyers are seeking information, the demands of solicitors and barristers are very different.

'Solicitors tend to look for supporting arguments for their client's case, while barristers look for the complete picture', he says. 'Barristers want to know what surprises the other side is likely to come up with'.

While he frequently gives evidence and provides reports for lawyers and insurers, he feels that training expert witnesses is not a good idea, saying that it's a form of coaching. Instead, he argues that the courts are looking for a simple and objective explanation of the technical background to an accident.

Jordan stresses that delivering technical information in an understandable fashion is central to his job, and advises lawyers not to be fazed by jargon when they cross-examine an expert. 'If they are not making themselves understood, insist that they do', he says.

Taking the initia

law ref

Earlier this year the Law Society's newly-established Law Reform Committee launched its *Focus on law reform* survey which aimed to identify anomalies in the law and to suggest suitable areas for reform. Owen McIntyre looks at the committee's work so far and at the priority areas it has selected for its current programme

The Law Society's Law Reform Committee was established in November last year to identify and focus upon specific areas of law in need of updating and reform. We aim to contribute to improving the quality, fairness and effectiveness of Irish legislation in a number of selected areas. We also seek to represent the views of the Law Society's members in relation to a number of legislative initiatives and to enhance the Society's contribution to the development of Irish law. More generally, we aim to build relationships between the Law Society and senior policy-makers and others involved in the review of law and policy.

In order to identify specific areas of law upon which to focus, the committee surveyed all Law Society members and a wide selection of voluntary and community groups, inviting them to identify anomalies in the law and to suggest suitable areas for reform. The *Focus on law reform* survey was despatched to the Society's members in January and to voluntary organisations in February and, to date, approximately 200 responses have been received, ranging across the entire spectrum of law and practice. As it would not be possible to pursue all of the areas suggested, we have found it necessary to identify three priority areas for law reform for our current programme:

- Domestic violence
- Adoption, and
- Mental health.

These recommendations have been approved by the Council of the Law Society. We have replied to each respondent, informing them of our plans and thanking them for their submissions. Where possible, we have referred suggestions relating to other areas of law to the Society's relevant specialist committees and many other suggestions have been retained on file to be re-examined when setting future law reform programmes.

Throughout August of this year, Law Reform Committee representatives held exploratory meetings with senior officials in the relevant government departments concerning each of the selected priority areas and, in September, we submitted outline recommendations for legislative reforms. We continue to monitor developments in each area and to liaise closely with these departments with a view to making more detailed submissions as and when appropriate.

As a first step, the committee will draft comprehensive position papers on each area, draw-

Law Reform Committee chairman James MacGuill addresses the law reform reception hosted by the Law Society at Blackhall Place during the summer

tiv n orm

Questionnaire on domestic violence

1. For how many barring applications or safety applications do you act each year?
   ☐ *5-10* ☐ *10-20* ☐ *20 +*

2. How long is the return date on a barring/safety summons from the issuing of the summons to the hearing date?
   ☐ *7 days* ☐ *21 days* ☐ *42 days* ☐ *Other*

3. In cases grounded by evidence of 'physical abuse', is such evidence:
   ☐ **Evidence of applicant**
   ☐ **Medical evidence**
   Report/oral evidence [delete as appropriate]

4. Are 'physical' grounds necessary to secure the relief in your court area?
   ☐ **Always** ☐ **Sometimes** ☐ **Generally**

5. In cases grounded by emotional abuse/neglect/addiction of spouse, is the evidence:
   ☐ **Evidence of applicant only** ☐ **Medical/other evidence**

6. Will the court deal with maintenance and access contemporaneously and without need to issue separate proceedings?
   ☐ **Yes** ☐ **Sometimes** ☐ **Never**

7. Do health board social workers provide section 40 reports?
   ☐ **Yes** ☐ **Sometimes** ☐ **Never**

8. Delay in obtaining such reports:
   ☐ *6 weeks* ☐ *12 weeks* ☐ *Longer*

9. Does the district judge interview children?
   ☐ **Yes** ☐ **No** ☐ **Sometimes**

10. Are the factors needed to adduce the grounds for obtaining a barring order/safety order different for spouses than for non-spouses?
    ☐ **Yes** ☐ **No**

11. When applying for interim barring orders are evidence and corroboration necessary?
    ☐ **Yes** ☐ **No**

12. How long is the return date on an interim barring order from the issuing of the summons to the hearing date?
    ☐ *7 days* ☐ *21 days* ☐ *42 days* ☐ *Other*

13. After the grant of a barring order on grounds of domestic violence, does access to children result in further problems?
    ☐ **Often** ☐ **Rarely** ☐ **Never**

Please return by 27 November 1998 to: Owen McIntyre, Parliamentary and Law Reform Executive, Law Society of Ireland, Blackhall Place, Dublin 7 (tel: 01 671 0711, fax: 01 6710704).

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Director General

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ing on all available empirical data and incorporating comparative examination of selected legal systems. These position papers will be forwarded to policy-makers to support the Society's recommendations for reform in each area. It is also intended that these papers be published in the *Gazette*. Any further submissions or additional information of relevance to the debate on each of the priority areas would be very welcome.

Domestic violence

Recommendations for reform in the area of domestic violence include:

1) Extension of the protection offered by the existing remedies under the *Domestic Violence Act, 1996*:
   - removal of the six-month residential requirement where an unmarried cohabitee applies for a safety order (section 2(1)(a)(ii))
   - removal of the six-month cohabitation requirement where the sole ownership or tenancy rights vest in the cohabitee applying for a barring order (section 3(b))
   - introduction of a category of 'associated persons' who are entitled to apply for protective orders, for example, a victim where the couple have children in common but do not cohabit
   - extension of the availability of protective orders to protect a victim from abusive relations or persons other than the victim's adult child, such as a son-in-law
2) Express provision of statutory criteria to be considered by the courts when deciding whether to make orders under the 1996 Act
3) Provision of detailed guidance as to the sufficiency of grounds for the grant of a protective order and clarification as to the circumstances in which it would be more appropriate for the courts to grant a barring order rather than a safety order and *vice versa*
4) Provision of guidance as to the relevance and effect of the *O'B v O'B* [1984] IR 182 (SC) judgment, in the context of the new definition of 'welfare' contained in the 1996 Act
5) Amendment of the District Court rules to provide for an automatic early return date for interim barring orders made *ex parte*, to provide for the respondent to be served personally with the order in such cases and to require that the respondent be provided with a note of the evidence given at the initial hearing.

Adoption

Recommendations for reform in the area of adoption include:

1) Provision of access to birth certificates for adopted persons at the age of 18
2) Establishment of a centrally-regulated contact register whereby adopted persons and birth parents who so wish can obtain information about each other. However, the wishes of parties to the adoption process who would rather maintain confidentiality would be respected
3) Removal of certain anomalies in the current legislative scheme, for example:
   - where the birth mother of a non-marital child may be required to adopt her own child when in a new relationship, or
   - where someone married to a spouse with a child from a previous marriage cannot adopt this child as it is a child from a marriage, even where the other birth parent is deceased.
4) The introduction of a code of conduct for adoption agencies dealing with, among other things, suitable training and qualifications for staff, the mai records, the treatment of clie complaint/appeal mechanisn so on
5) Amendment to facilitate va ing degrees of 'open adoptio practice where preferred
6) Extension of the civil lega aid scheme to cover adopters and charitable adoption agencies
7) General consolidation of all existing legislation in the are

Mental health

Recommendations for reform in the area of mental health include:

1) Establishment of a statutory right of access to a lawyer for involuntarily detained patients
2) Extension of the civil legal aid scheme to cover proceedings arising out of involuntary detentions, including hearings of the Mental Health Review Board
3) Streamlining of procedures for the admission of a ward of court to an approved centre and co-ordination of the wardship procedure with the mental health care procedures
4) Introduction of procedural safeguards where mentally ill people come before the civil courts as respondents in applications for court orders, for example, a duty on the court to inform the local authority where a mentally ill person is subject to an eviction order
5) Introduction of safeguards for the interests of detained patients who are unfit to give consent to medical treatment and procedures for such cases
6) Amendment of the *Powers of Attorney Act, 1976* to permit a donee exercising enduring power of attorney to take medical care decisions on behalf of the donor
7) Introduction of 'adult care orders' for mentally ill adults who do not qualify as 'dependent' persons under the *Child Care Act, 1991* and provision for 'custody'-type orders to be made in respect of mentally ill adults
8) Extension of the time period, from six months to 12 months, within which a mentally ill child may make an application for provision out of a parent's estate under section 117 of the *Succession Act, 1965*. Imposition of a statutory obligation on personal representatives to notify the health board/Office of Wards of Court where a mentally ill child is a beneficiary under a will or could make a section 117 claim
9) Rationalisation and updating of definitions relating to mental health legislation, such as 'mental disorder', 'treatment', 'approved d so on, and co-ordination with of legislation such as wardship.

e outline recommendations listed bove are very provisional in nature and require further devel- pment through research and consultation with policy-makers, practitioners and others with an active interest in, and in-depth knowledge of, each area. Our final recommendations reform in each area will be set out in the published position papers.

It is our intention to publish each of these papers to coincide with major developments in the legislative process. For example, over the next few months a draft *Mental Health Bill* is due to be published by the Department of Health and Children, while the Department of Justice, Equality and Law Reform intends to report on a research project into the operation of the *Domestic Violence Act, 1996*. Also, in the New Year, the Department of Health and Children expects to embark upon a consultation exercise leading to the publication of two *Adoption Bills*.

We would hope to take on a very active role on behalf of the Society in the debate on each area by publishing our final recommendations, supported by detailed legal argument and by making representations to senior policy-makers.

As a first step, we invite solicitors with experience of the* Domestic Violence Act, 1996 *to complete the brief questionnaire included in this article and to return it to the Parliamentary and Law Reform Executive at the Law Society of Ireland not later than Friday 27 November 1998. G

Owen McIntyre is the Law Society's Parliamentary and Law Reform Executive.

Mitigating ci

A recent House of Lords decision clarified the difference between tax avoidance and tax mitigation. Niall O'Hanlon analyses the judgment and looks at the chances of the Irish courts introducing the same concept here

People have always transferred assets out of this jurisdiction to avoid income tax. Section 806 of the *Taxes Consolidation Act, 1997* (formerly section 57 of the *Finance Act, 1974*), as amended by section 12 of the *Finance Act, 1998*, is designed to combat this. A recent House of Lords decision – *Inland Revenue Commissioners v Willoughby* ([1997] STC 995) – throws new light on the equivalent UK provisions (section 739 of the *Income and Corporation Taxes Act 1988*).

It sets out the residency requirements which must be satisfied before liability to tax arises under the section and, more importantly, highlights the distinction between tax avoidance and tax mitigation. Of course, it must be remembered that while the provisions of section 806 and section 739 are similar, the *Willoughby* decision is persuasive only.

Section 806(3) – as amended by section 12(1) of the *Finance Act, 1998* – states that the section applies to individuals resident or ordinarily resident in the State who, either alone or with associated operations, try to avoid income tax by transferring assets out of the jurisdiction so that the relevant income is paid to persons resident or domiciled out of the State.

Broadly, section 806 imposes income tax liability in one of two circumstances:

1) *'Where as a result of such a transfer (either alone or in conjunction with associated operations), the transferor has power to enjoy, immediately or in the future, any income of a person resident or domiciled out of the State, that income is deemed to be the income of the transferor for all Irish income tax purposes* (sub-section 4), *or*
2) *Where, whether before or after any such transfer, the transferor receives or is entitled to receive any capital sum, the payment of which is in any way connected with the transfer or any associated operation. The relevant income of the foreign person is deemed to be the income of the transferor for all Irish income tax purpose'* (sub-section 5).

In the *Willoughby* case, the taxpayer, Professor Willoughby, lived for many years in Hong Kong and was neither resident nor ordinarily resident in the UK. He retired from his position as Professor of Law at the University of Hong Kong in 1986 and returned to England, becoming resident and ordinarily resident in the UK in May 1987. He wanted to make extra provisions for his retirement and so took out three off-shore personal portfolio bonds.

The parties did not dispute that this was a transfer of assets for the purposes of section 739 of the *Income and Corporation Taxes Act 1988* (the UK equivalent of section 806). But the premium on the first bond was taken out when both the taxpayer and his wife lived outside the UK. The House of Lords upheld the taxpayer's contention that section 739 only applied to asset transfers by individuals who are ordinarily resident in the UK at the time of the transfer.

But the tax planning opportunities presented by this decision have been reduced by section 12 of the *Finance Act, 1998*, sub-section (1)(a)(ii) of which inserts a new sub-section (5A) into section 806. This provides, *inter alia*, that: 'Nothing in sub-section 3 shall be taken to imply that the provisions of sub-sections 4 and 5 apply only if (a) the individual in question was resident or ordinarily resident in the State at the time when the transfer was made'.

However, *Willoughby* is not entirely without significance because, although section 12(2) states that the section shall apply irrespective of when the transfer or associated operations took place, the section applies only to income earned on or after 12 February 1998.

Mitigation or avoidance

The House of Lords' view of the distinction between tax avoidance and tax mitigation is perhaps of greater long-term significance. The House gave its views on this area in a consideration of section 741 of the UK legislation which is similar to section 806(8) of the Irish Act.

Section 806(8) states that the charging provisions of the section shall not apply where the individual shows, in writing or otherwise, to the satisfaction of the Revenue Commissioners:

1) *'That the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them was effected, or*
2) *That the transfer and any associated operations were* bona fide *commercial transactions and were not designed for the purpose of avoiding liability to taxation'.*

Obviously a clear understanding of what does and does not constitute 'avoiding liability' to taxation is vital to an appreciation of the ambit of sub-section 8. The taxpayers' right to organise their affairs to minimise their liabilities was

ircumstances

How long can the Irish gamble on the legitimacy of tax avoidance schemes?

recognised in *Ayrshire Pullman Motor Services and Ritchie v Inland Revenue Commissioners* (14 TC 754) where Lord Clyde held: '*No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. [He is] ... entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Inland Revenue*'.

But with the growth of aggressive tax-planning strategies, the House of Lords in a series of seminal decisions – including *WT Ramsey Ltd v Inland Revenue Commissioners, Eilbeck (Inspector of Taxes) v Rawling* ([1981] STC 174) and *Furniss (Inspector of Taxes) v Dawson* ([1984] STC 153) – developed the doctrine of fiscal nullity, and held that it was appropriate to look at the substance of transactions over their legal form.

The Supreme Court declined the opportunity presented in *McGrath v McDermott* ([1978-1987] Vol III ITR 683) to adopt the House of Lords approach, following which section 86 of the *Finance Act, 1989* (now section 811 of the *Taxes Consolidation Act, 1997*) was enacted.

Therefore, the House of Lords' view in *Willoughby* must be considered in the context of the different approaches adopted by the Irish and UK courts to the question of tax avoidance generally. Notwithstanding such a caveat, the pronouncements of Lord Nolan provide an interesting insight to what would presumably be the House of Lords' approach in interpreting section 806(8).

The House of Lords' view

A distinguishing characteristic of Willoughby's off-shore bonds was that the purchaser retained the ability to choose, switch and manage the investments in the fund to which the bond was linked. The Inland Revenue argued that the bonds had been purchased for the purpose of avoiding tax by contrasting the position of a UK resident who directly owned the underlying investments with one who profited from the investments through the medium of a personal portfolio bond.

The former would be liable for tax on the income from the investments at the basic and higher rate, and potentially capital gains tax (CGT) on the investments' disposal. The latter would pay CGT only when the bond matured or some other specified chargeable event. In dismissing the Inland Revenue's argument, Lord Nolan stated:

'*It was submitted on behalf of the Inland Revenue that tax avoidance was to be distinguished from tax mitigation. The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. Where the taxpayer's chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation), it follows that tax avoidance must be at least one of the taxpayer's purposes in adopting that course, whether or not the taxpayer has formed the subjective motive of avoiding tax*'.

He went on to hold that it would be absurd in the context of the section to describe as tax avoidance the acceptance of an offer of freedom from tax which Parliament had deliberately made. To the extent that his pronouncements represent a refinement by the House of Lords of the doctrine of fiscal nullity, their general applicability in the Irish context may be doubted. But it remains to be seen, insofar as section 806 is concerned, whether the term tax mitigation will enter the lexicon of Irish jurisprudence. G

Niall O'Hanlon BA (Hons) (Acct & Fin), LLM (Comm Law), ACA, AITI is a practising barrister specialising in general commercial and taxation law and is a consultant to the Law Society's Law School.

Council report

Report on Council meeting held on 24 September 1998

Solicitors (Amendment) Bill, 1998

The Council considered and approved a number of proposed amendments to the *Solicitors Acts* which, it was agreed, should be sought in the *Solicitors (Amendment) Bill, 1998*.

The purpose of the proposed amendments was to ensure (a) that all parties to a disciplinary tribunal hearing would be served with the same documentation at the same time following its conclusion, (b) that the Society would be entitled to receive and publish all relevant information in relation to the outcome of disciplinary inquiries, and (c) that solicitors who persistently failed to respond to the Society in relation to complaints would be required to pay a contribution towards the costs incurred by the Society in dealing with those complaints arising from the failure of solicitors to respond to correspondence. The Director General reported that the Bill was expected to be considered by the Seanad shortly after the resumption of the Oireachtas in early October.

Proposed designation of solicitors pursuant to section 32 of the *Criminal Justice Act, 1994*

The President reported that draft regulations designating solicitors had been received from the Department of Justice and that the Society had written requesting clarification of the phrase 'information subject to legal privilege'. It was agreed that the matter would be fully debated at the Council meeting to be held on 5 November.

Statutory Instrument No 348 of 1997

The Director General reported that the amending rules had been forwarded to the Minister on 28 July for his signature and were expected to come into operation shortly. Gerard Griffin suggested that the rules should provide for a 'lead in' time of at least one month. The profession had, quite rightly, been critical in the past of the introduction of rules and regulations without any prior notification and, in his view, the Society should be in a position to give advance warning of the operative date.

Denham Working Group: judicial accountability

The Council discussed a request from Mrs Justice Susan Denham for a submission on the issue of judicial accountability, which was under consideration by the working group. John Harte said that, in other jurisdictions, the relevant monitoring committee was composed entirely of members of the judiciary which, in his view, was not the correct approach in the current climate of openness and transparency. He also believed that any system of judicial accountability should apply to all courts, and not just to the higher courts. In addition, he strongly believed that any committee charged with monitoring the behaviour of judges and dealing with complaints should include members of the solicitors' profession and members of the public.

Hugh O'Neill noted that the US system provided for a review after six years and suggested that a similar review procedure should be considered by the working group. Niall Casey said that there should be a greater emphasis on pre-qualification training. Patricia McNamara cautioned against any procedures which would erode the fundamental principle of judicial independence.

The Director General noted that there was a growing trend around the world to seek to set a balance between independence and accountability and matters dealt with in other jurisdictions were not purely confined to the conduct in court of members of the judiciary or their treatment of lawyers or clients appearing before them, but also included bias and political actions by judges. The President undertook to forward the Council's views to Mrs Justice Denham.

Incorporation of solicitors' practices

The Council considered two reports on the legal and taxation implications of incorporation, which had been commissioned by the Society, and discussed what further steps should be taken on the issue. Michael Irvine said that section 70 of the *Solicitors (Amendment) Act, 1994* enabled the Society to make regulations providing for the incorporation of solicitors' practices and, in his view, the Society should proceed to do so.

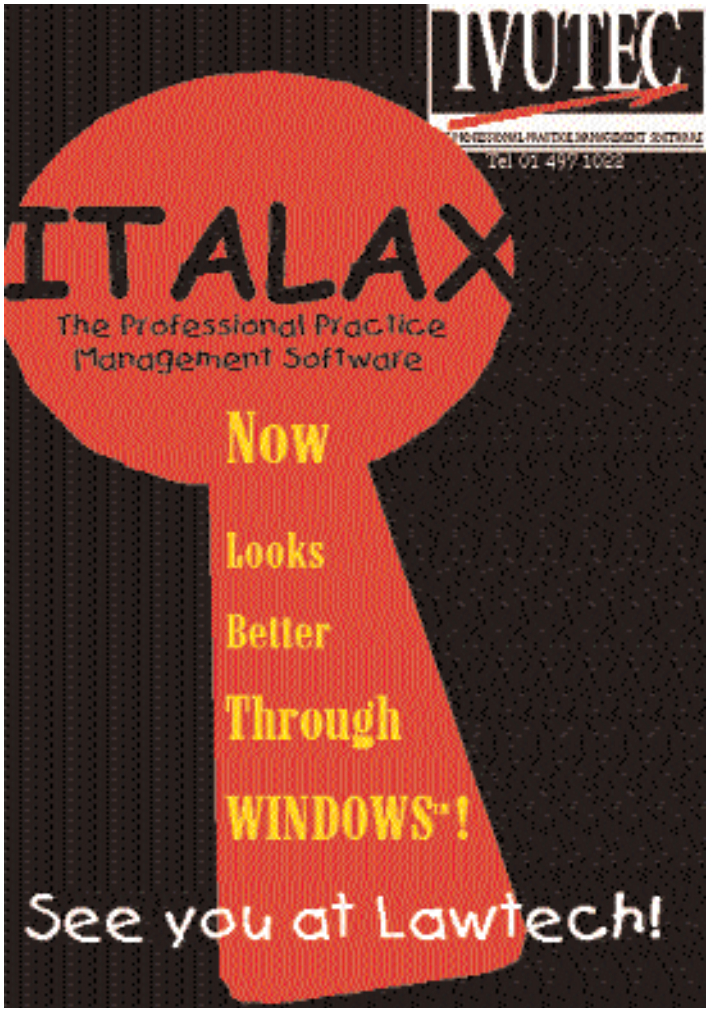
Michael V O'Mahony noted that section 70 of the 1994 Act required the concurrence of the Minister for Justice, after consultation with the Minister for Enterprise, Trade and Employment, with the regulations. Michael Irvine proposed that discussions should be immediately opened with the relevant departments in relation to the possibility of incorporation. Once the profession had secured the right to incorporate, it would be a matter for each practice to decide whether or not to avail of that right. The Council approved this course of action.

Investment business and investor compensation regulations

The Council considered and approved draft regulations governing the provision of investment business services by solicitors to their clients. Michael V O'Mahony outlined the background to the regulations, which reflected obligations contained in the *Investment Intermediaries Act, 1995* and the *Investor Compensation Act, 1998*. He noted that the regulations would allow solicitors to engage in investment business services, investment advice and insurance intermediary services which were incidental to the provision of legal services to clients. If a solicitor wished to provide non-incidental services, he would be required to register with the Central Bank and indemnify himself, in terms of fidelity bonding and indemnity insurance, equal to the amount of cover provided by the Compensation Fund or standard professional indemnity insurance. The purpose of the regulations was to allow solicitors to continue to provide investment and insurance intermediary services to clients and to earn commission therefrom, provided those services were incidental to legal services. At the same time, the regulations sought to protect the Compensation Fund from claims in relation to non-incidental services.

The President said that, as a result of the new legislative requirements, solicitors who wished to continue to earn commission from investment work would have the option of registering with the Central Bank as an authorised investment business firm or obtaining a letter of appointment directly from the relevant financial product provider. He noted that Irish Pensions Trust, trading as Solicitors Financial Services, would also provide a means for the placing of investments, in compliance with the statutory provisions.

Contd on page 36



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(House & Home January/February 1997)

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- *Maintenance Free colour plaster exterior*

FINAL PHASE NOW RELEASED

Committee reports

CRIMINAL LAW

Criminal legal aid scheme: tax clearance certificates

The Department of Justice has advised the Criminal Law Committee that, as from 1 January 1999*, practitioners on the Criminal Legal Aid Scheme Panel will be required to submit a tax clearance certificate in order to be eligible for the assignment of new cases under the criminal legal aid scheme.

Immediately following the introduction of regulations under the *Criminal Justice (Legal Aid) Act, 1962*, which will provide that solicitors operating under the criminal legal aid scheme will require a tax clearance certificate, practitioners will be supplied with the appropriate application form by the courts division, Department of Justice, Equality and Law Reform. This form must then be submitted to the Collector General on or **before 15 November 1998***. When the certificate is issued by the Revenue, the practitioner should immediately forward same to the County Registrar for noting before the 1 January 1999 implementation date. Where a solicitor has applied to the Collector General on or **before 15 November 1998*** but where, due to delays in the clearance procedure or where a certificate has been refused and the matter remains unresolved on 1 January 1999, the solicitor's name will remain on the panel until such time as the certificate issues or the matter in dispute has been determined. However, where application to the Collector General has been made **after 15 November 1998*** and a certificate has not issued for whatever reason, the solicitor's name will be removed from the panel.

** Regulations are expected to be introduced in November 1998 to set these application and implementation dates. The above dates are the anticipated dates at the time of going to press. Practition-ers should check the next issue of the* Gazette *or should contact the Department of Justice to confirm the relevant dates.*

CONVEYANCING

The Conveyancing Committee is seeking the views and experiences of practitioners in relation to the non-use of registered post by both the Land Registry and the Revenue Commissioners. The committee is trying to ascertain the frequency with which land certificates and/or original stamped title documents are lost while being returned by ordinary post by either the Land Registry or the Revenue Commissioners. The committee would also like to hear from practitioners who have experienced difficulties in having such lost title documents reconstituted, including any difficulties they have encountered with their clients in having their fees in connection with the reconstitution of title paid by the clients. Details should be sent to the secretary of the committee at the Law Society before the end of November 1998.

CRIMINAL LAW COMMITTEE FORUM

Offences Against the State (Amendment) Act, 1998

Blackhall Place, Friday 27 November 1998, 6.30pm

Chairman:
Judge Gerard Haughton
Speakers:
Barra McGrory, Solicitor (Northern Ireland)
Michael Farrell, Solicitor
Michael Lanigan, Solicitor
Registration & coffee: 6pm
Seminar fee: £25 (solicitors), £20 (apprentices)

This seminar will be of interest to all criminal law practitioners as it will provide an overview of the new Act and will examine its application to terrorist and non-terrorist offences. It will also focus on the possible implications for solicitors when advising clients in relation to certain provisions of the Act. Human rights and civil liberties issues will also be highlighted.

APPLICATION FORM

Name _____

Practice name & address _____

_____

Please reserve _____ place(s). I enclose £ _____

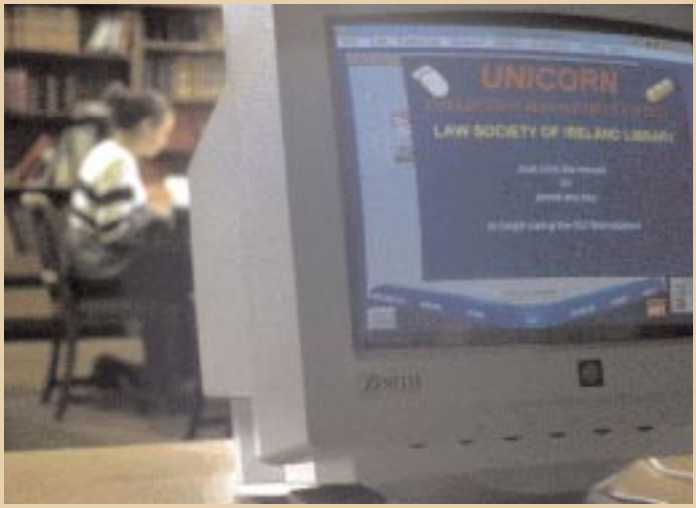
Please return to: Colette Carey, Solicitor, Criminal Law Committee, Law Society, Blackhall Place, Dublin 7, no later than 25 November 1998

Computerisation of Law Society Library

Following a year and a half of intensive cataloguing, indexing and data inputting, the library's textbook catalogue and indexes to recent legislation and case law are now searchable on PCs in the library. The software used is the Unicorn Collection Management System.

The database holds records of the following materials:

- **Monographs.** All text books, reports, lectures, seminar proceedings, government reports and annual reports held by the library, with details of author, title, publisher, date, subject, keywords
- **Legislation** (since 1 January 1997). **Bills** before the Oireachtas with details of date of introduction; Minister, senator or private member introducing the Bill; whether or not there is an accompanying explanatory memorandum; a note of the main provisions of the Bill; subject; additional keywords if necessary; and a 'present position' date field, updated to show its current status. **Acts** with many of the above fields, including the note of the main provisions, plus a 'date enacted' field and a 'commencement date/s' field updated where necessary as commencement orders are made. **Statutory instruments** with fields showing enabling Act/s and section/s, a note of the main provisions of selected SIs; subject and keywords; and EU legislation implemented.
- **Case law.** The index to the reserved written judgments of the Supreme Court and High Court is being put on retrospectively. Currently records of judgments from 1994 to-date are on the database, with fields showing title of case; the court; judge; record no; subject; keyword summary; and citation where the case is reported in the law reports. Judgments of the European Court of Justice and opinions of the Advocate General, received since 1 January 1997, are included with details of title; court; record no; very brief keyword details and subject; citation when reported.



Updating of the catalogue, including the legislation records, is done on a daily basis. New material is recorded on the system as soon as it is received.

Searching the catalogue can be by word or phrase in any of the indexed fields referred to above, or specifically by author, title or subject. A search can be made of the whole database across all materials, or confined to particular record types, for example, textbooks only, or CLE lectures, or statutory instruments, or Irish judgments, or confined to the three broad record categories (monographs, legislation or case law).

Print-outs can be had of any section of the catalogue.

The catalogue is now searchable in the library and members are welcome to come in and use it. It is proposed to hold short training sessions at lunchtime and at 4.30pm each day over a two week period 9-20 November. Those interested should contact the library in advance to arrange a time.

Library services include: lending of textbooks, bibliographical and case law searching, providing copy documents such as journal articles, case reports, unreported judgments, Acts, statutory instruments, EU regulations and directives, precedent forms and practice notes.

Textbook loans

The membership records and those apprentices on current Law School professional and advanced courses are held on the library computer, and the circulation system for textbook loans has been running since the beginning of September. Loan periods are for ten working days, renewable if the item is not requested by another member, and three working days for certain reserved student textbooks. Overdue notices issue automatically. Reports can be run on usage of books, books not returned, frequent offenders etc. The system is working satisfactorily and is already resulting in a faster turnaround of books.

It is intended that members will shortly have dial-in access to the catalogue using ID and Pin numbers via the Law Society's website. Further details will be published as soon as this service is available.

In addition to the library catalogue, the library holds a range of hard copy and CD-ROM indexes to legislation, case law, journal articles and EU materials. On-line computer access to other sources is available via the Lexis database and the Internet.

Margaret Byrne,
Librarian.

Practice notes

Lodgment of deposit cheques pending exchange of contract

The Conveyancing Committee has been asked for its view on the rights and obligations of a solicitor acting for a vendor in a sale who receives from the purchaser's solicitor a contract for sale in a form acceptable to the vendor, accompanied by a cheque for the agreed deposit, so that all that remains for the contract to become effective is for it to be signed by or on behalf of the vendor and exchanged.

The committee is of the view that the vendor's solicitor should negotiate the cheque and hold the proceeds on trust for the purchaser pending the exchange of contracts, or, if the vendor declines to proceed to an exchange, until the purchaser requires the amount of the deposit to be returned.

The committee is satisfied that the negotiation of the cheque for the deposit does not derogate from a vendor's position of not being bound until contracts are exchanged. A vendor is entitled to know that the deposit has been validly tendered, which requires the clearance of the cheque. It is clearly more efficient to arrange to have the deposit cheque cleared as soon as possible in order to avoid delay after the vendor has signed.

The position where the contract is returned with amendments on which the vendor's instructions must be obtained is more obviously one in which the vendor cannot be bound by the negotiation of the deposit cheque in advance of the exchange of contracts.

The proceeds of the deposit cheque may not strictly speaking be clients' monies since the purchaser is not a client of the vendor's solicitor. The proceeds are, however, 'trust money' and must be held by the vendor's solicitor as such. They are not held by the vendor's solicitor as stakeholder until such time as the contract comes into effect. In acknowledging the receipt of the contract and deposit, the vendor's solicitor should advise the purchaser's solicitor that the deposit cheque is being negotiated and that the proceeds will be held by the vendor's solicitor in trust for the purchaser pending the parties becoming contractually bound.

The proceeds of the deposit cheque should be paid either:

- Into a trust bank account kept solely for money subject to the particular trust, or
- Into a client bank account.

Conveyancing Committee

Personal injury cases: Medical examination on 'the usual terms'

By custom and practice and, as a result of an agreement between the Law Society and the Irish Medical Organisation (IMO), what have come to be known as 'the usual terms' on which a plaintiff in a personal injury case, through their solicitor, consents to a medical examination taking place by a doctor on behalf of the defendant, have come to be formulated as follows:

1) **The defendant's doctor will not question the plaintiff on any matters which do not have a direct bearing on the medical aspects of the case.** Under no circumstances should the plaintiff be questioned on any matters relating to the issue of liability, for example, whether the plaintiff was wearing a seat belt or not.
2) **The plaintiff's doctor will attend at the medical examination by the doctor on behalf of the defendant, which shall take place at the consulting rooms of whichever doctor is agreed between them.** This is one of the terms that is more honoured in the breach than the observance. The usual procedure now is that the doctors communicate by telephone and the plaintiff's doctor furnishes his notes to the defendant's doctor to enable the latter to prepare his medical report following his examination of the plaintiff.
3) **The defendant will pay a consultation attendance fee to the plaintiff's doctor at a rate agreed usually between the insurance companies and the relevant representative medical bodies for the plaintiff's doctor's attendance.** This fee is payable whether such consultation be by physical presence or on the telephone and for the furnishing of the plaintiff's notes to the defendant's doctor or whatever information he may choose to give him concerning the plaintiff's injuries and so on.
4) **The defendant will pay the plaintiff's travelling, subsistence and other expenses incurred by the plaintiff's in attending the defendant's examination.** In the case of a medical examination of a child, these expenses will include the attendance of at least one of the infant plaintiff's parents or guardian or some other person *in loco parentis.*

Such expenses may also have to include the cost of taxis where public transport might not be appropriate due either to the medical condition of the plaintiff or the inaccessibility of the plaintiff's residence to public transport.

Subsistence would include the cost of at least two, or up to three, meals depending upon the circumstances. If the plaintiff has to stay overnight for any reason (for example, the taking of x-rays or the length of the defendant's medical examination), then the overnight expenses of the plaintiff, and in the case of an infant plaintiff also of their parent or guardian, would be considered appropriate and reasonable.

Practitioners should note that the evidence of the medical advisor/doctor acting on behalf of a defendant at the trial of an action for personal injuries is confined to the issue of damages. No evidence of any statement or otherwise made by the plaintiff to the examining doctor on behalf of the defendant relating to the issue of liability should be given. This was enunciated in the Northern Ireland case of *McDowell v Strannix & Anor* – KBD before Sheil J on 15 February 1951 (Northern Ireland) and practitioners are recommended to read the full judgment in the case as it is important that the ratio for the decision on the issue should be clearly appreciated and understood.

Litigation Committee

PRACTICE NOTE

Revision of Law Society *Requisitions on title* – 1996 edition

The Conveyancing Committee has made the following revisions to the 1996 edition of the Law Society's *Objections and requisitions on title* and same will be incorporated in the next reprint of the *Requisitions* which is due shortly.

1. **Front page of the *Requisitions*:**
   a) The words 'RSI No:' have been added under both 'Vendor' and 'Purchaser' on the front page. (Please note that this amendment will also be incorporated in the next reprint of the *Conditions of sale*)
   b) At the foot of the page the word '(Revised)' has been inserted after the word 'Edition'.
2. **Requisition 15 Voluntary dispositions/bankruptcy:**
   The old paragraph c has been deleted and the old paragraph d has been renumbered as 'c'.
3. **Requisition 16.7 and 16.9:**
   The figure of £100,000 has been changed to £150,000 in both paragraphs.
4. **Requisition 27.6.b:**
   The old sub-paragraph b has been deleted and replaced with a new sub-paragraph b as follows:
   '(Save where the retention permission relates only to a change of use and there were no conditions attached to said permission or was granted in respect of a private house more than ten years ago) satisfactory evidence from an architect/engineer that the drawings submitted on the application for retention correctly shows the structure(s) as built and that the conditions (if any) attached to the retention permission have been complied with'.
5. **Requisition 30.1:**
   The word 'commencement' in the fifth line has been replaced with the word 'construction'.

Practitioners are recommended to make a note of these revisions and incorporate same when raising *Requisitions on title*, including those practitioners who use the CORT computerised version of the *Requisitions*.

Conveyancing Committee

PRACTICE NOTE

Practitioners should familiarise themselves with the recently enacted *Economic and Monetary Union Act, 1998*. This Act provides for various matters relating to the introduction of the euro as the national currency on 1 January 1999. Among the more relevant provisions are those relating to the redenomination and renominalisation of share capital.

Although companies are not obliged to convert share capital denominated in Irish pounds into euros during the transitional period between 1 January 1999 and 31 December 2001, it is expected that many will do so. This will require an ordinary resolution to be passed by the members. If redenomination is not undertaken voluntarily by a company during the transitional period, it will occur automatically on 1 January 2002 without the need for a members' resolution. The Act provides that the redenomination (whether during the transitional period or on 1 January 2002) must occur at the level of total share capital or any part of the total issued or to be issued share capital, and that the nominal value in euro of each share is to be calculated by dividing the total value of the share capital by the number of shares so that the nominal share value is expressed in unrounded euro amounts.

Redenomination is likely to yield rather awkward figures representing the authorised and issued share capital and the nominal par value of shares. The process by which these figures may be adjusted to achieve more convenient and workable monetary amounts is known as renominalisation. It will be possible for companies to renominalise their share capital and share par values by ordinary resolution before 30 June 2003, provided that there is an appropriate adjustment in distributable reserves or through the introduction of additional capital. Where renominalisation leads to a decrease in the authorised or issued share capital, a special resolution is necessary to the effect that there shall be transferred to a Capital Conversion Reserve Fund an amount equal to the aggregate amount of the capital reduced.

Copies of all resolutions must be filed at the Companies Registration Office within 15 days of their passing.

Company and Commercial Law Committee

Contd from page 31

Report on the Society's complaints-handling procedures

The Council considered a report by Francis D Daly on the Society's complaints-handling procedures. Mr Daly said that, having conducted a review of the current procedures, in conjunction with previous reports by the Lay Members of the Registrar's Committee, he believed that it was necessary for the Society to take action in relation to its complaints-handling procedures and, particularly, to address delays occurring in dealing effectively with complaints. He said that some elements of his report could be immediately implemented, while work could commence on others, including the introduction of in-house complaints procedures in solicitors' firms, similar to the Rule 15 system in England and Wales. Martin Harvey complimented Mr Daly on a well-structured report, which was full of good sense. He agreed with Mr Daly's view that it was unacceptable that the Society should have to pursue solicitors for responses to complaints. He suggested that the profession should be made aware of the relevant statistics in relation to failure to respond and consequent delays should be clearly outlined.

Gerard Griffin suggested that the Society should identify those solicitors who persistently failed to respond to correspondence and consider introducing a 'penalty points' system, while providing a support and advisory service to those in need of assistance. Patrick Glynn urged that the Society would seek to encourage colleagues to assist others, both on a formal and informal basis. Keenan Johnson suggested that an independent panel of solicitors who would be willing to assist colleagues with difficulties might be established and a list circulated to all members as an aid to colleagues who found themselves the subject of a client's complaint. Anthony Ensor suggested that, if no response was received to the first letter from the Society, the Society should offer to provide the names of solicitors who would be willing to assist. The Council unanimously approved Mr Daly's report on complaints-handling and appointed a Task Force, to be chaired by Mr Daly and to include John Shaw and Linda Kirwan, with the power to co-opt, to implement the recommendations as soon as possible.

Presentation to Michael V O'Mahony, Past President

The Council noted that Michael V O'Mahony was retiring from the Council, after many years of distinguished service. As a mark of recognition for his commitment to the work of the Society, the Council and the profession over many years, particularly in the drafting of legislation, the President presented Mr O'Mahony with a gift bearing the following inscription: *'The Master Draftsman – Presented to Michael V O'Mahony by Laurence K Shields, President of the Law Society 1997/98, on behalf of the Council, Management and Staff of the Society, to mark his retirement from the Council on 24 September 1998, in appreciation and recognition of his extraordinary contribution to the Society'.* G

LEGISLATION UPDATE: 11 SEPTEMBER – 19 OCTOBER 1998

SELECTED STATUTORY INSTRUMENTS

Air Navigation and Transport (Amendment) Act, 1998 *(Commencement) Order 1998*
Number: SI 327/1998
Contents note: Appoints 11/9/1998 as the commencement date for the Act.

Air Navigation and Transport (Amendment) Act, 1998 *(Vesting Day) Order 1998*
Number: SI 326/1998
Contents note: Appoints 1/1/1999 as the vesting day for the purposes of the Act.

Building Regulations Advisory Body Order 1998
Number: SI 348/1998
Contents note: Appoints the Building Regulations Advisory Body under s14 of the *Building Control Act, 1990*.

Defence (Amendment) Act, 1998 *(Commencement) Order 1998*
Number: SI 366/1998
Contents note: Appoints 1/10/1998 as the commencement date for the Act.

Dublin Docklands Development Authority Act, 1997 *(Extension of Custom House Docks Area) Order 1998*
Number: SI 344/1998
Contents note: Extends the Custom House Docks Area in an easterly direction to include the area bounded generally by the River Liffey, Guild Street, New Wapping Street and Lower Sheriff Street.

European Communities (Environmental Impact Assessment) (Amendment) Regulations 1998
Number: SI 351/1998
Contents note: Amend the *European Communities (Environmental Impact Assessment) Regulations 1989 to 1996*, and provisions relating to environment impact assessment in the *Local Government (Planning and Development) Acts, 1963 to 1998* and in a number of other Acts. The amendments restate provisions relating to the information to be contained in an environmental impact statement and exemptions from the requirement to prepare such a statement. The regulations extend the provisions concerning the furnishing of additional information relating to an environmental impact assessment and also include provisions relating to applications for planning permission involving an environmental impact statement, where the proposed development may have effects on another EU Member State.
Commencement date: 18/9/1998
Leg implemented: Dir 85/337

European Communities (Motor Vehicles Type Approval) Regulations 1998
Number: SI 371/1998
Contents note: Give effect to two EU directives: 98/12/EC (braking devices of certain categories of motor vehicles and their trailers) and 98/14/EC (type approval of motor vehicles and their trailers). Amends SI 305/1978 and insert a new schedule to those regulations listing all relevant EU directives dealing with the type approval of motor vehicles, their trailers and components which have been implemented.
Commencement date: 12/10/1998
Leg implemented: Dir 98/12; Dir 98/14

Europol Act, 1997 *(Certain Provisions) (Commencement) Order 1998*
Number: SI 345/1998
Contents note: Appoints 1/10/1998 as the commencement date for all sections of the Act, other than s2, insofar as it relates to the 1996 protocol and the 1997 protocol, and s10(1).

Housing (Travellers Accommodation) Act, 1998 *(Commencement) Order 1998*
Number: SI 328/1998
Contents note: Appoints 11/9/1998 as the commencement date for all sections of the Act, other than sections 6, 19, 20 and 25.

Investor Compensation Act, 1998 *(Appointment of Members of Investor Compensation Company) Regulations 1998*
Number: SI 352/1998
Contents note: Set out the bodies and persons nominated by the Minister for Finance, with the consent of the Minister for Enterprise, Trade and Employment, to be members of the Investor Compensation Company Ltd in accordance with s17 of the *Investor Compensation Act, 1998*.
Commencement date: 14/9/1998

Investor Compensation Act, 1998 *(Section 18(4)) (Prescription of Individuals) Regulations 1998*
Number: SI 350/1998
Contents note: Prescribe individuals to be appointed to the Board of the Investor Compensation Company to represent the interests of clients of investment firms in accordance with s18(4) of the *Investor Compensation Act, 1998*.
Commencement date: 18/9/1998

Occupational Pension Schemes (Disclosures of Information) (No 2) Regulations 1998
Number: SI 349/1998
Contents note: Regulate the disclosure of financial and other information by occupational pension schemes. Revoke on a phased basis the existing regulations relating to disclosure and replace them with these regulations.
Commencement date/s: various – see SI

Rules of the Superior Courts (No 3) (Freedom of Information Act, 1997) 1998
Number: SI 325/1998
Contents note: Insert order 130 into the *Rules of the superior courts* to provide for applications and appeals to the High Court under the *Freedom of Information Act, 1997*.
Commencement date: 21/9/1998

Rules of the Superior Courts (No 4) (Review of the Award of Public Contracts) 1998
Number: SI 374/1998
Contents note: Insert order 84A into the *Rules of the superior courts* to prescribe procedures in relation to the review by the High Court of the award or a decision to award a public services, public supply, public utilities or public works contract.
Commencement date: 19/10/1998

Rules of the Superior Courts (No 5) (Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997) 1998
Number: SI 381/1998
Contents note: Insert order 131 into the *Rules of the superior courts* to provide for applications and appeals to the High Court under the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997.*
Commencement date: 20/10/1998

Rules of the Superior Courts (No 6) (Disclosure of Reports and Statements) 1998
Number: SI 391/1998
Contents note: Revoke and replace *Rules of the superior courts (No 7)* (SI 348/1997) and *Rules of the superior courts (No 8) (Disclosure and Admission of Reports and Statements) (Amendment) 1997* (SI 471/1997). Provide for an addition to order 39 of new rules 45 to 51 in relation to the disclosure of reports and statements pursuant to s45, *Courts and Court Officers Act, 1995*. The rules apply to all existing proceedings which were instituted on or after 1/9/1997.

Rules of the Superior Courts (No 7) (Appeals from the Hepatitis C Compensation Tribunal) 1998
Number: SI 392/1998
Contents note: Insert order 105A into the *Rules of the superior courts* to prescribe procedures in relation to appeals against decisions (including awards) of the Hepatitis C Compensation Tribunal pursuant to the *Hepatitis C Compensation Tribunal Act, 1997.*
Commencement date: 23/10/1998

Taxes Consolidation Act, 1997 *(Section 284(3A)) (Commencement) Order 1998*
Number: SI 321/1998
Contents note: Appoints 4/9/1998 as the commencement date for s284(3A) of the *Taxes Consolidation Act, 1997*, as inserted by s23 of the *Finance Act, 1998* (capital allowances for certain sea fishing boats).

Prepared by the Law Society Library

ILT digest

of legislation and superior court decisions

Compiled by David P Boyle

ADMINISTRATIVE

Sale of National Stud land to be permitted

A portion of the land (amounting to 21.66 hectares) attached to the National Stud Farm in Co Kildare will be severed from the farm by the construction of the Kildare bypass. A Bill removing reference to the National Stud Farm from the *State Property Act, 1954* has been introduced. If passed, this legislation will permit the sale of the severed land.

State Property Bill, 1998

COMMUNICATIONS

Anti-monopoly legislation proposed

A private member's Bill has been introduced which seeks to:

- Implement article 3a of the *EU Broadcasting Directive*, and
- Define limits of cross-ownership of differing media by providing that a person or company cannot have a direct or indirect interest in more than 25% of two different media markets.

Broadcasting and Other Media (Public Right of Access and Diversity of Ownership) Bill, 1998

CONTRACT

Whether sufficient acts of part performance

- In ascertaining whether there were sufficient acts of part performance, it was necessary to show that the other party was aware of what was being done, whether by standing by and not doing anything or by more active participation.

The plaintiff and the defendant were at all material times the owners of a joint fishery in Co Donegal. In February 1984, the plaintiff and the defendant agreed to run the fishery as a joint fishery in accordance with a set of rules drawn up by the defendant. There was no particular agreement as to the number of persons entitled to receive licences. The plaintiff, unhappy at the number of people being permitted to use the river, sought to agree a new agreement with the defendant limiting numbers. The plaintiff then instituted proceedings seeking to restrain the defendant from issuing more than a specified amount of licences under a concluded agreement between the parties. The defendant submitted that there was no concluded agreement, nor were there sufficient acts of part performance to make the agreement enforceable. The High Court found that there was an enforceable agreement between the parties. In allowing the appeal and refusing the relief sought, it was held that:

- Where a question arises which has not been covered by the parties to the agreement it must be answered in the light of the proper construction of the contract
- The essential question is whether the parties have left over some matter to be determined which can only be determined by themselves. An agreement to enter into an agreement is not a concluded agreement. In these circumstances there was no concluded agreement
- In ascertaining whether there were sufficient acts of part performance, it was necessary to show that the other party was aware of what was being done, whether by standing by and not doing anything or by more active participation
- In granting a decree for specific performance it was essential: that there was a concluded contract; that the plaintiff had acted in such a way that showed an intention to perform that contract; that the defendant induced such acts or stood by while they were being performed; and that it would be unconscionable and a breach of good faith to allow the defendant to rely upon the terms of the *Statute of Frauds* to prevent performance of the contract
- The detriment to the plaintiff must be the result of what the plaintiff did with the defendant standing by and not detriment to the plaintiff as a result of what the defendant does with the plaintiff standing by
- Even if there had been a concluded oral agreement as claimed, there were no acts on the part of the plaintiff which showed an intention to perform that contract.

Mackey v Wilde (Supreme Court), 17 December 1997

CRIMINAL

Decommissioning

Sections 5 and 6 of the *Decommissioning Act, 1997* came into force on 30 June 1998 and regulations have been made governing the decommissioning of arms and the functions of the Independent International Commission in relation to such decommissioning.

Decommissioning Act, 1997 *(Sections 5 and 6) (Commencement) Order 1998* and Decommissioning Act, 1997 *(Decommissioning) Regulations*

1998 (SI Nos 215 and 216 of 1998)

New anti-terrorism measures in force

Legislation was signed on 3 September 1998 by the Presidential Commission (the President being absent outside the jurisdiction) which makes the following provisions:

- A court may draw inferences from the failure of a person accused of membership of an unlawful organisation to answer material questions
- An offence is created relating to the recording or collecting of information likely to be useful to members of an unlawful organisation in the commission of an offence
- The period of detention under section 30 of the *Offences Against the State Act, 1939* may be extended for a further 24 hours on application by the Gardaí to the District Court
- Giving instruction in the making or use of firearms becomes an offence in the absence of lawful authority or reasonable excuse
- Fines for the possession of firearms with intent to endanger life or cause damage to property or in suspicious circumstances become unlimited, and
- A property forfeiture order may be made in respect of the property of a person convicted of certain terrorism-related offences.

The legislation came into operation on 3 September 1998.

Offences Against the State (Amendment) Act, 1998 (No 39 of 1998)

Conviction for possession of incriminating document quashed

- The courts have to interpret restrictive legislation in a restrictive fashion.

Section 2 of the *Offences Against the State Act, 1939* defines an incriminating document as one '*issued or emanating from an unlawful organisation or appearing to be so issued … or appearing to aid and abet any such organisation or calculated to promote the formation of an unlawful organisation'*.

The applicant applied for leave to appeal his conviction for being in possession of an incriminating document pursuant to section 2 of the 1939 Act. The document in question was a video cassette. In granting leave to appeal and quashing the conviction, it was held that:

- The document on the balance of probabilities was not issued by an unlawful organisation, nor did it emanate from one. It appeared from a concession made by the prosecution witnesses that it had emanated from French radio/television
- The document was a documentary on the Provisional IRA which gave the IRA a platform to express certain views but which also contained, although not to the same extent, condemnation of the organisation
- While within the document there was what appeared to be an extract from a document issued by the Provisional IRA, the court was dealing with a crime which was set into restrictive legislation which had to be interpreted in a restrictive way
- The legislation in question touched on the background of constitutional rights which guaranteed freedom of expression and the court could not be satisfied on the basis of the evidence placed before it that this was a document which appeared to aid or abet the Provisional IRA.

Director of Public Prosecutions v McGavigan (Court of Criminal Appeal), 10 November 1997

FAMILY

Guardianship order does not alter child's place of residence

- A child's place of habitual residence, for the purposes of the *Hague convention*, cannot be altered by a court in another jurisdiction granting a temporary order appointing an individual in that jurisdiction as the child's guardian.

The plaintiff sought an order enforcing an order made by the English High Court granting to him the interim care and control of his infant son E and compelling the defendant to return E to the jurisdiction of the courts of England and Wales. By order of the court, the claim was amended so as to include a claim for the return of the child pursuant to the *Hague convention*. E had been born outside marriage and his mother had died. The defendants were E's maternal grandmother and aunt. The latter, the first-named defendant, had been appointed guardian of the child by the Irish Circuit Court on the same day as the English High Court had ordered E's return. In making an order under the *Hague convention* for the return of the child, it was held that:

- The father of an illegitimate child in England had no custody rights unless and until he obtained such rights from a court. Therefore, the court had to assume that the removal of the child to Ireland by the defendant was lawful
- At all material times the child had enjoyed a habitual residence in England. The Irish Circuit Court order did not have any effect on residence. It was a temporary order until a particular date and, as such, could not have the effect of altering residence
- While section 40 of the *Adoption Act, 1952* provided that a child could not be sent abroad without the approval of his guardian, the section did not have any application in the present proceedings because it would not have been contemplated as applying to a child merely because the child was in Ireland as distinct from being resident in Ireland
- The expert evidence adduced by the defendant fell far short of establishing that as a matter of probability, long-term serious psychological damage would be caused to E by merely taking him to England for the purposes of court proceedings to determine custody issues. Any danger of even some damage could be removed by suitable undertakings being given as to what was to happen when the child was brought to England.

AS v EH (Geoghegan J), 20 November 1997

INDUSTRIAL RELATIONS

Interlocutory relief granted to employer regarding picket

- Where a defendant has not established that they were entitled to rely on section 19(2) of the *Industrial Relations Act, 1990*, the application falls to be decided on the basis of ordinary principles applicable to applications for interlocutory injunctions.

The plaintiff was a building company which contracted to construct a building to be completed on 14 August 1998, after which date it would be subject to penalty clauses for default on its part in performing the contract. The defendant included, *inter alia*, the union and former workers on the site. The core issue between the parties was that the defendant objected to the plaintiff's practice of sub-contracting blocklaying and bricklaying work on its construction sites and of not employing blocklayers and bricklayers directly. On 17 November 1997, a picket was placed at the entrance to the site. The effect of the picket was the obstruction of the entrance to the site resulting in no work whatsoever being carried out on the site and the fact that the plaintiff was unable to obtain deliveries of materials. The plaintiff

sought interlocutory relief restraining the defendant from, *inter alia*, engaging in industrial action. The defendant contended that the court was precluded from granting the relief sought by virtue of section 19 of the *Industrial Relations Act, 1990*. One of the preconditions to section 19 concerns the holding of a secret ballot. In restraining the defendant from watching or besetting or picketing the site and from interfering with access to or egress from the site, it was held that:

- There was no evidence before the court as to the outcome of the secret ballot conducted by the union and in particular there was no evidence that the outcome favoured picketing the site
- The defendant had not established that it was entitled to rely on section 19(2) and the plaintiff's application fell to be decided on the basis of ordinary principles applicable to applications for interlocutory injunctions
- Expressing no view on the strength of the contending submissions, there was a fair issue to be tried between the parties as to whether section 11 was available to the defendant
- The balance of convenience lay in favour of granting the injunctions. Damages would not be an adequate compensation for the loss suffered by the plaintiff between then and the trial of the action as the plaintiff would suffer both monetary loss and damage to its goodwill and reputation, whereas damages would adequately compensate the defendant.

G&T Crampton Limited v Building and Allied Trades Union (Laffoy J), 20 November 1997

PLANNING & DEVELOPMENT

Supermarket no longer exempted development

With effect from 10 June 1998, a change of use of any premises the retail floor space of which exceeds 3,000 square metres shall not be exempted development.

Local Government (Planning and Development) (No 2) Regulations 1998 (SI No 194 of 1998)

Traveller accommodation legislation comes into effect

All the provisions of the *Housing (Traveller Accommodation) Act, 1998* (other than sections 6, 19, 20 and 25) came into effect on 11 September 1998.

Housing (Traveller Accommodation) Act, 1998 *(Commencement) Order 1998* (SI No 328 of 1998)

Court order does not amount to planning permission

- A court order allowing completion of a structure pending the outcome of proceedings does not amount to a planning permission.

The plaintiffs appealed an order of the High Court of 20 January 1995 whereby their claim was dismissed. They sought certain declarations, including: a declaration that they had obtained planning permission by default; a declaration that an order made by the Wicklow County Manager on 29 January 1987 refusing them planning permission was null and void; and a declaration that planning permission should be deemed to have been given on or about 19 January 1987. In dismissing their appeal, it was held that:

- The High Court had accepted the defendant's evidence that it had notified the plaintiffs of its decision to refuse planning permission. There was credible evidence on which the High Court had been entitled to draw those conclusions and the court could not now interfere with them
- The plaintiffs had misinterpreted the defendant's letter of 27 November 1986. Rather than giving outline permission for a one-storey building of the kind which now stood on the land, the letter had been a helpful intimation of the kind of building which might, provided all the planning requirements were met, prove acceptable to the defendant
- There was no planning permission for the one-storey building which stood on the land
- The liberty given by the High Court on 20 January 1995 to complete the roof on the building did not amount to any form of planning permission but was designed to save a loss which would befall the plaintiffs in the event of their being obliged to leave a roofless structure open to the elements.

Child and Child v Wicklow County Council (Supreme Court), 3 December 1997

PRACTICE & PROCEDURE

New bankers' books rules

With effect from 9 June 1998, new District Court rules reflect the provisions of section 7a of the *Bankers' Books Evidence Act 1879*, as amended by section 131 of the *Central Bank Act, 1989* and section 14 of the *Disclosure of Certain Information for Taxation and Other Purposes Act, 1996*.

District Court (Bankers' Books Evidence) Rules 1998 (SI No 170 of 1998)

New form of barring order

With effect from 26 June 1998, new District Court rules prescribe an amended form of barring order.

District Court (Domestic Violence) Rules 1998 (SI No 201 of 1998)

Extension of disability under *Statute of Limitations*?

A private member's Bill has been presented which seeks to extend the definition of disability under the *Statute of Limitations* (as amended) to accommodate circumstances arising out of childhood abuse.

Statute of Limitations (Amendment) Bill, 1998

Res judicata considered in bail application

- An application cannot be considered *res judicata* where it involves evidence which is being tendered for the first time.

The applicant attempted to renew an application for bail in the High Court on the basis that there had been a change of circumstance, in that he could now undertake to the court to reside at an address in this jurisdiction until his trial. The High Court ruled the matter *res judicata*. The applicant appealed and, in remitting the matter to the High Court for reconsideration, it was held that:

- The applicant had wished to tender new evidence and that meant the matter could not be regarded *res judicata*
- Having heard the evidence it was open to the High Court judge to decide whether it justified, as the applicant claimed, a reduction in the amount of the surety.

Director of Public Prosecutions v Gray (Supreme Court), 10 November 1997

Limitation to law on maintenance and champerty

- While the law relating to maintenance and champerty still subsisted, it could not be extended in such a way as to deprive people of their constitutional right of access to the courts to litigate reasonably stateable claims.

The applicant had applied to the High Court for an order to stay and/or dismiss the respondents' proceedings against her on the grounds that they were commenced in consequence of an unlawful agreement or arrangement in the nature of savouring of maintenance and champerty. Her application was dismissed in the High Court and she appealed to the Supreme Court. Between 1983

and 1989, the respondents had invested their savings in a hotel which had failed, causing them financial ruin. From March 1988 to May 1989, the applicant had been the plaintiff's solicitor. In 1995, the respondents instituted proceedings against the applicant seeking damages for alleged negligence. Between 1983 and 1993, the respondents also incurred a liability in the sum of £275,620 to another solicitor (M) who acted for the respondents. Of that sum, £164,300 remained due on foot of a judgment granted in 1993, and the balance was due for work done since 1993. The respondents claimed the sum of £275,620 against the applicant. The applicant contended that the inclusion of sums due to M in the proceedings against her amounted to M having an interest in the outcome of the action inconsistent with his position as solicitor for the respondents. The applicant contended that the proceedings were an abuse of process and should, therefore, be stayed until such time as the matters giving rise to the abuse of process had been brought to an end. The applicant argued that champertous agreements entered into by solicitors had always been regarded as contrary to public policy. In dismissing the appeal, it was held that:

- It was clear from the authorities that the law relating to maintenance and champerty still existed in the State
- While the law still subsisted, it could not be extended in such a way as to deprive people of their constitutional right of access to the courts to litigate reasonably stateable claims
- Even if M was maintaining the respondents' action in a champertous and unlawful manner, the court doubted that that in itself would amount to a defence to the respondents' claim, much less entitle the applicant to stifle the respondents' claim *in limine* on the motion to stay or dismiss in advance of a plenary trial
- The inclusion in the respondents' claim of the items of special damage in respect of costs due to M did not contravene section 68 of the *Solicitors' (Amendment) Act, 1994*
- If at the plenary trial, the applicant was successful in her defence and it was established that M had maintained the proceedings in a champertous fashion, it would be open to the applicant to sue M directly for all the damage suffered by her including any costs awarded to her and not recovered or recoverable from the respondents
- The applicant was not entitled to have the respondents' claim dismissed in advance of the plenary trial.

O'Keeffe v Scales (Supreme Court), 11 December 1997

No appeal of High Court affirmation of Circuit Court decision

- There cannot be an appeal from a decision of the High Court affirming a decision of the Circuit Court.

The applicant brought proceedings in the Circuit Court seeking a declaration that the applicant was the tenant of certain premises, which action was dismissed. The applicant then appealed that decision to the High Court. Before the Circuit Court appeal was disposed of, the applicant instituted proceedings in the High Court. On 14 May 1991, the High Court (Hamilton P) held that the plenary summons claiming possession of certain premises was *res judicata* as it was putting in issue that which had been determined in the Circuit Court proceedings. As there were extant proceedings, namely the Circuit Court appeal, the applicant was offered the choice to amalgamate both proceedings but chose not to do so. On 13 November 1995, the High Court (Budd J) heard and dismissed the Circuit Court appeal. The applicant appealed the High Court decision of 14 May 1991 to the Supreme Court. In dismissing the appeal, it was held that that the appeal was an attempt to circumvent settled jurisprudence that there cannot be an appeal from a decision in the High Court affirming a decision of the Circuit Court.

MacGairbhith v The Occupants (Supreme Court) *ex tempore*, 4 November 1997

Procedure for freedom of information applications

New rules make provision, with effect from 21 September, 1998, in regard to applications and appeals to the High Court under the *Freedom of Information Act, 1997. Rules of the superior courts (No 3)* (Freedom of Information Act 1997*) 1998* (SI No 325 of 1998)

Limited third party discovery granted

- It was reasonable to infer that there were personal contacts of communications from the third party to the Law Society in relation to the subject matter of their enquiries and that a written record was made for some of those communications. It was reasonable to infer that some of those documents might well put the applicant on a train of enquiry which would be material in relation to the present proceedings.

The applicant sought third-party discovery from a firm of accountants. The High Court refused the application on the ground that it had not been established that there were any documents in the possession of the third party which might be relevant to the proceedings. The applicant appealed to the Supreme Court. In allowing the appeal to a limited extent only, it was held that:

- The third-party took on something of an investigative role which could have resulted in the generation of material documentation under their power, control or procurement
- It was reasonable to infer that there were personal contacts of communications from the third-party to the respondent in relation to the subject matter of their enquiries and that a written record was made for some of those communications
- It was reasonable to infer that some of those documents might well put the applicant on a train of enquiry which would be material in relation to the present proceedings
- There was no need for the limited third party discovery order to go beyond requiring the third-party to make an affidavit within whatever period would be reasonable
- In so limiting the order, the court was doing justice both to the applicant and the third party.

Kennedy v Law Society of Ireland (Supreme Court), 28 November 1997

PRISONS

Remand prisoner had been adequately protected

- The law did not expect a prison authority to guarantee that a prisoner would not suffer injury from the action of another prisoner during a term of imprisonment, and a balance had to be struck between precautions which were acceptable and those which were excessive.

The plaintiff was a remand prisoner. On the day he was incarcerated, a fellow prisoner threw a bucket of boiling water over him causing him to suffer severe injuries. The plaintiff contended that the first-named defendant failed to put him into protective custody despite his request. He further argued that the first-named defendant was aware of the violent nature of the attacker and had both failed to segregate him and allowed him access to buckets of boiling water. In dismissing the plaintiff's claim, it was held that:

- The court did not accept that the plaintiff requested that he be placed in protective custody as it would have been illogical for the first-named defendant to refuse such a request, had one been made

- The law did not expect a prison authority to guarantee that a prisoner would not suffer injury from the action of another prisoner during a term of imprisonment
- A balance had to be struck between precautions which were acceptable and those which were excessive
- The history of the attacker did not suggest that he was so dangerous that the prison authorities should have recognised a need to segregate him from other prisoners.

Bolger v Governor of Mountjoy Prison (O'Donovan J), 12 November 1997

REAL PROPERTY

Gazumping to be curbed?

A private member's Bill has been introduced which would, if passed:

- Seek to prevent vendors, including builders, who have received a booking deposit in relation to a residential property, from selling it to another purchaser for an increased price within a period after payment of the booking deposit
- Set time limits for the furnishing of contracts and the return of same with contract deposit
- Provide for fines and imprisonment for persons breaching the provisions of the legislation, and
- Permit the award of compensation by the court to disappointed purchasers.

Home Purchasers (Anti-Gazumping) Bill, 1998

REFUGEES

Mandamus refused in application for judicial review

The applicant appealed against a decision of the High Court of 18 February 1997 which refused her application for judicial review. She sought an order of *mandamus* directing the respondent to consider her application for refugee status in accordance with the *United Nations convention on the status of refugees of 1951* and a declaration that she was entitled to have her application for refugee status determined in accordance with the agreement and procedures agreed between the respondent and the United Nations High Commissioner for Refugees as set out in a letter dated 13 December 1985 from the respondent to the Commission for Refugees. Her appeal was dismissed on the following grounds:

- The respondent accepted she was bound by the procedures described in the letter of 13 December 1985. The acceptance by the respondent of those obligations was, however, subject to one qualification, in that it was maintained in this case that there was an international understanding that a person seeking asylum was under an obligation to seek it in the 'first safe country' where he had an opportunity to do so
- It was unnecessary for the court to investigate the existence of such an understanding as the applicant did not dispute that the terms of the said letter were required to be read in the light of such an understanding and were qualified *pro tanto*
- The correspondence indicated that the respondent carried out an appropriate inquiry and afforded the applicant an adequate opportunity of being heard in relation to the decision affecting her rights
- It had been made patently clear on the respondent's behalf that no investigation was taking place on the substantive issue on the applicant's right to asylum; rather, the investigation had centred on the duration of the applicant's stay in the UK. This and other facts that had been ascertained and established were put to the applicant formally in the context of a possible deportation order being made against the applicant and she had been invited to make whatever observations she thought fit and had availed of that opportunity
- The respondent had carried out a proper inquiry as to whether the UK was the 'first safe country' for the purpose of a substantive inquiry into the applicant's claim for refugee status and such inquiry had been held in accordance with the provisions of the letter of 13 December 1985 and the requirements of constitutional and natural justice.

Anisimova v Minister for Justice (Supreme Court), 28 November 1997

SUCCESSION

Removal of executrix

- The removal by the court of the appellant as executrix of the testator's estate was a very serious step to take which required serious misconduct and/or serious special circumstances on the part of the executrix to justify such a drastic step and, as such, overrule the wishes of the testator.

The applicant was the sole-surviving executrix named in the testator's will and probate was granted to her. The testator possessed 265 preference shares in Dunne's Holding Company at the time of her death. According to the articles of association of that company, each preference share was worth £1. Hence the valuation of the testator's shares was £265. The testator's shares were purchased by the other holders of preference shares, except for the applicant. The respondent disputed that the applicant should continue to act as executrix of the testator's estate and he applied to the High Court for her removal. The applicant was removed as executor of her deceased sister's (that is, the testator's) estate by the High Court. She appealed to the Supreme Court, which appeal was allowed:

- The factors referred to by the trial judge were no reason at all why the applicant, a sister of the testator, should have contemplated renouncing rather than extracting probate. They were factors which existed prior to the testator's death who nevertheless chose the applicant to be her executrix
- The removal by the court of the applicant as executrix was a very serious step to take which required serious misconduct and/or serious special circumstances on the part of the executrix to justify such a drastic step and as such overrule the wishes of the testator
- There was no valid basis for the respondent feeling frustrated and excluded from what he considered were his legitimate concerns
- The respondent's objections to the applicant based on her valuation of the testator's preference shares were without any substance whatsoever
- The applicant was administering the testator's estate with the advice and assistance of reputable solicitors, and nothing had been done which was in any way improper or which justified the respondent's distrust
- The applicant had done nothing wrong in her capacity as executrix of the testator's estate, and as such there were no grounds which would justify the removal of the applicant as executrix of the testator's estate.

Dunne v Heffernan (Supreme Court), 26 November 1997

TAXATION

VAT waiver rules changed

New regulations, deemed to have come into effect on 26 March 1997:

- Amend regulation 4 of the *Value-Added Tax Regulations 1979* to provide for the back-dating of a waiver of exemption for VAT on short-term lettings of immovable property in specified circumstances, and
- Amend the same regulation 4 to take account of the changes to VAT on property contained in the *Finance Act, 1997* to section 7(3) of the *Value-Added Tax Act, 1972*, which deals with the calculation of the amount due on the cancellation of a waiver.

Value-Added Tax (Waiver of Exemption) (Amendment) Regulations 1998 (SI No 228 of 1998)

Identity cards for tax inspectors

As and from 1 July 1998, provision has been made (under section 858 of the *Taxes Consolidation Act, 1997*) for a new type of identity card for officers of the Revenue Commissioners which will show the functions and powers which the officer identified is entitled to exercise. The production of the card will be taken as evidence of the officer's authorisation for the purposes of the specified statutory provisions shown on the card.

Taxes Consolidation Act, 1997 (Section 858) *(Commencement Order 1998)* (SI No 212 of 1998)

TORT

Tour operator's duty of care

- The duty of care extends to all matters concerning the safety, well being and comfort of tourists which by the nature of the relationship between the tourists and those providing the service would or should be known to the latter but not to the former.

The first-named defendant was a tour operator and the second-named defendant was a travel agent. The plaintiff and her sister booked a holiday in Cyprus with the first-named defendant through the agency of the second-named defendant. The brochure of the first-named defendant contained details of a short cruise to Israel but the plaintiff was informed by the second-named defendant that the cruise was bookable only from Cyprus. The cruise included, *inter alia*, a coach tour through Bethlehem. The plaintiff went on the cruise and, near Bethlehem, was struck by a stone thrown through the window of the coach injuring her. She instituted proceedings for damages against the first-named defendant and the second-named defendant alleging breach of contract and of the duty of care owed to her. The High Court found that there was a breach of the duty of care and found for the plaintiff. The defendants appealed to the Supreme Court on the issue as to whether or not a warning should have been given to the plaintiff concerning the state of unrest which then existed in and around Bethlehem. In allowing the appeal, it was held that:

- The duty of care in tort arises from the proximity created by the contractual relationship. This duty of care extends to all matters concerning the safety, well being and comfort of the tourists which by the nature of the relationship between the tourists and those providing the service would or should be known to the latter but not to the former
- The standard of knowledge to be attributed to the tourist is that of someone who, having decided to go on holiday to a particular area, might be expected to have gained from advertisements or news items relating thereto. The standard of knowledge to be attributed to someone in the travel industry is that of the person on the spot, providing the service
- A tour operator is not entitled to assume knowledge on the part of its customers which it acquires in its capacity as a tour operator
- Although the ultimate responsibility for the safety of the tourists must lie with the tour operator, the travel agent must also familiarise itself with the conditions likely to be met by such person
- The test is what a reasonably prudent tour operator exercising reasonable care would consider it necessary to inform those travelling with it.

McKenna v Best Travel Limited (Supreme Court), 18 November 1997

Causal link in drowning not established

- The onus of proof was on the plaintiff to establish a causal connection between the difficulty in obtaining the life buoy and the death of the deceased by drowning.

On 16 June 1987 a group of men, including the deceased, were drinking at the quayside of the River Lee in Cork. The deceased jumped into the river and shortly thereafter he got into difficulties. Nearby there were at least three life buoys, all of which had been secured with wire to prevent vandalism. The other men who were with the deceased gave evidence that they were unable to release the life buoys. The plaintiff instituted proceedings against the defendant in negligence and lost in the High Court. In dismissing the appeal, it was held that:

- The onus of proof was on the plaintiff to establish what had happened, to bring home some fault to the defendant and to establish a causal connection between the difficulty in obtaining the life buoy and the death of the deceased
- The main witnesses to the tragedy were not in a position to give the trial judge a coherent account of what happened and the trial judge was unable to reach any conclusion of fact. In such circumstances there was no reliable evidence to bring any form of negligence causing this accident

O'Driscoll v Cork Corporation (Supreme Court), 18 December 1997

TRANSPORT

Road transport of dangerous goods to be changed

A Bill has been presented which aims to put in place enabling powers for the making of regulations to:

- Allow the State to accede to the European arrangement concerning the international carriage of dangerous goods by road
- Implement Directive 94/55/EC on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road, and
- Implement Directive 95/50/EC on uniform procedures for checks on the transport of dangerous goods by road.

Carriage of Dangerous Goods by Road Bill, 1998

TRIBUNALS

Change in terms of reference

A Bill, which has been passed by Dáil Éireann, seeks to permit the Houses of the Oireachtas to change the terms of reference of a tribunal by resolution, subject to the consent of the tribunal.

Tribunals of Inquiry (Evidence) (Amendment) (No 3) Bill, 1998 G

News from the EU and International Affairs Committee

Edited by TP Kennedy, Legal Education Co-ordinator, Law Society of Ireland

Regulation No 4064/89 on the control of concentrations between undertakings

The essential purpose of the *Merger control regulation* is to give the EC Commission's Merger Task Force exclusive jurisdiction in the EU territory over large mergers where structural change occurs because previously independent undertakings lose their independence or identity through merger or by coming under common control. The regulation employs the term 'concentration' to describe mergers (article 21(2) gives the Commission exclusive competence, subject to certain exceptions, over concentrations that have a 'Community dimension').

The idea is that large concentrations (that is, 'Community dimension'-sized concentrations) should be regulated exclusively by the Commission. This is the 'one-stop shop' principle. Smaller concentrations, on the other hand (that is, those that are not sufficiently large to have a 'Community dimension'), will fall within the regularity competence of the national merger authorities of the Member States concerned.

As the appraisal criteria of the regulation were unclear in some respects, the Commission introduced a series of initiatives aimed at 'improving the transparency and legal security of all decisions taken in application of the regulation' (Commission Notice 94/C 385/02, para 1). The Commission envisaged in its report (Doc COM (93) 385 final, as amended by COM (93) 385 final/2) to the Council of Ministers of 28 July 1993 that formal guidance on the interpretation of article 3 of regulation (EEC) No 4064/89 could enable firms to establish more quickly whether and to what extent their operations may be covered by Community Merger Control in advance of any contact with the Commission's services. In order to further this aim, the definition in article 3 of the term 'concentration' has been elaborated upon by a Commission notice on the concept of a concentration (Commission Notice 98/C 66/02) and explains how the Commission has interpreted article 3 in the light of its experience in applying the regulation since September 1990.

However, despite the efforts of the Commission notice, legal certainty and the practical usefulness of Regulation 4064/89 could benefit from the increased Commission guidance in this context. Although it is clear that the main difficulty is the absence of detailed information on the interpretation of key issues, the Commission notice goes no further than a previous 1994 notice (which it replaces) in alleviating uncertainty in this area.

According to recital 23 to the regulation, the concept of a concentration is defined as covering only operations which bring about a lasting change in the structure of the undertakings concerned. Article 3(1) of the regulation provides that such structural change is brought about either by a merger between two previously independent undertakings or by the acquisition of control over the whole or part of another undertaking.

The definition of concentration, therefore, focuses on the existence in the change in *control*. It is therefore important to consider the criteria necessary to determine what constitutes a change in control. The regulation defines a change in control in article 3(3) as follows: 'For the purposes of this regulation, control shall be constituted by rights, contracts or any other means which either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking in particular by:

a) Ownership or the right to use all or part of the assets of an undertaking
b) Rights or contracts which confer decisive influences on the composition, voting or decisions of the organs of an undertaking'.

A concentration may therefore arise either as a result of a straightforward merger between independent undertakings or as a result of a change of control, associated with more sophisticated transactions. A typical concentration will involve an undertaking acquiring control of another undertaking. However, the notion of concentration also covers situations where a change in the nature or quality of control in an undertaking occurs, as where one controlling shareholder in a joint venture sells out to another shareholder or a third party.

Article 3(1)(b) of the regulation provides that a concentration occurs in the case of an acquisition of control. The key issue, therefore, is whether the rights which one undertaking acquires over another undertaking are sufficient to confer on it 'the possibility of exercising decisive influence'.

Although increasing importance is attached to the issue of decisiveness, this is an area of merger control in which it is not easy to set out definite and precise parameters. It has been left to the Commission in its decisions to give a detailed interpretation of the meaning of decisive influence. An analysis of the decisions to date would seem to indicate that the Commission considers that it is not necessary that an acquiring firm has the ability to manage *all* aspects of the other firm on a day-to-day

basis. It is enough that the right to take the strategic decisions of that undertaking is acquired.

However, the Commission has helpfully clarified some issues. For example, it has made it clear that veto rights which are designed only to protect the financial interests of minority shareholders do not confer control. Rather, the regulation is concerned with whether the relevant undertakings have acquired influence over the business strategy of an undertaking. Yet for accuracy we must turn once again to the decisions of the Commission. It has been made clear that the Commission considers that in certain circumstances an undertaking can acquire control over another when it holds less than 51% of the other undertaking's voting shares but nevertheless has the *de facto* ability to control or direct the strategic decisions of that company. Such ability may be acquired with the purchase of a significant minority shareholding, where the remaining shareholdings are widely dispersed. Given that it is most unlikely that all the smaller shareholders will be present or represented at the AGM, the acquisition of a significant minority block of shares may enable their holder to exercise effective control over the meeting.

In *Arjomari/Wiggins Teape Appleton* (M4) (1991) 4 CMLR 854, the Commission found that a 39% shareholding gave rise to decisive influence where the remaining shares were dispersed among 107,000 other shareholders, none of whom held more than 4% and three of whom held more than 3% of the issued share capital. This is apparently based on the idea that dispersal results in low attendance at general meetings, and that in the absence of any formal mechanism between the smaller shareholders, they are unlikely because of their large number to reach agreement on a combined exercise of their powers. So in considering whether or not a shareholding of a certain size gives rise to the possibility of exercising a decisive influence, the Commission may consider what percentage of the votes historically cast at general meetings it represents (para 14 of the notice).

Nevertheless, this approach, as many legal commentators have noted, creates uncertainty to the extent that it leaves open the question of the precise level at which it may be considered that a minority shareholder enjoys decisive influence, taking into account 'the varying levels of possible dilution'. While it is accepted that the concept of a concentration is predominantly an economic one, and that the regulation accordingly focuses on the substance of the transaction concerned and its effect on the behaviour of the undertakings (and not its form), it would have been expedient to highlight a few guiding factors to determine whether the acquisition of a minority holding constitutes a notifiable transaction – that is, a change in control. Although each case must be examined on its own merits, it is submitted that the following factors might have provided guidance:

- The nearer that a holding approaches 50% plus one share, the more likely it will confer control
- A 25% interest will not in normal circumstances be sufficient to establish decisive influence. As seen in *ConAgra/IDEA* (M24), the veto rights normally connected to minority shareholdings are – at least in the European Community – insufficient to control. For holdings less than 25%, control will not therefore exist in the absence of a shareholder agreement granting the owner of the minority holding exceptional veto rights over the company's strategic decision making process, and
- To determine whether or not a holding will result in the acquisition of control it is necessary to examine the distribution of the remaining shares.

To remain tight-lipped on this obviously grey area of the regulation is to increase concerns for advisors who may be asked whether the acquisition of a minority holding constitutes a notifiable transaction. Furthermore, it may be argued that this lack of clarity undermines the concept behind the Commission notice, which is to help create legal certainty with respect to a class of agreements and to decrease the necessity for individual notification.

Although the notice provides a great deal of helpful information with regard to the assessment of joint ventures and so forth, practitioners face a number of recurring interpretative difficulties and ambiguities when assessing a concentration under article 3.

Legal certainty and the practical usefulness of Regulation 4064/89 could benefit from increased Commission guidance in this context. G

Erin Barrett is an apprentice solicitor with solicitors Lee McEvoy.

RECENT DEVELOPMENTS IN EUROPEAN LAW

COMPETITION

The Commission has recently adopted a communication on the application of competition rules to vertical restraints (agreements between producers and distributors). The Commission is proposing the adoption of a very wide block exemption regulation exempting from the application of article 85 almost all vertical restraints. The regulation will set out market share thresholds; it will apply to companies which fall below such thresholds.

CONSUMER PROTECTION

Further curbs proposed on tobacco advertising and sponsorship

Detailed negotiations have been taking place in the EU concerning the prohibition of tobacco advertising and sponsorship. The result of these negotiations is *Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products* (OJ 1998 L213/9).

Article 3(2) of the directive bans all forms of advertising and sponsorship of tobacco products within the EU. It lays down minimum standards only; Member States are free to impose tighter restrictions. There are a small number of exclusions from the general ban. These are: communications intended exclusively for professionals in the tobacco trade; presentation of tobacco products and prices at point of sale; advertising aimed at purchasers in establishments specialising in the sale of tobacco products; and the sale of publications containing advertising for tobacco products, provided that the publications are published and printed outside the EU and are not principally intended for the EU market.

Article 6(1) provides that the prohibitions are to be implemented by each Member State by 30 July 2001. The article allows for implementation to be deferred by one year in respect of press advertising and for two years in respect of sponsorship. Member States can postpone the prohibition of sponsorship for a further period not extending beyond 1 October 2006.

LANGUAGE LABELLING

Directive 79/112 on labelling of foodstuffs requires the information included in labels attached to foodstuffs to be clearly expressed. The problem of language came before the Court of Justice in *Re Goerres*. The defendant operated a food store in Germany. He was prosecuted and fined under the German legislation implementing the directive, as certain items in the shop were labelled only in English, French or Italian. The implementing legislation provided that the foodstuffs had to be labelled in German or some other 'easily intelligible language'. The defendant argued that the directive prevented a Member State from insisting that foodstuffs be labelled in a particular language. He also argued that, even if this was wrong, sufficient labelling steps had been taken in that a sign had been erected in the shop setting out the necessary information in German. The court rejected both defences. It held that the directive did not prevent domestic law from demanding that labelling be in a language easily understood by potential purchasers. The erecting of an adjacent sign was insufficient as the purpose of the directive was to protect not just the purchasers of foodstuffs but also its ultimate consumers.

EMPLOYMENT

Gender discrimination

In *Grant v South West Trains* (C-249/96) [1998] ICR 449 (*Gazette*, April, 39), the ECJ held that the *Equal pay directive* did not outlaw discrimination on the grounds of sexual orientation. It held that same-sex partners of employees were not entitled to travel concessions given to partners of opposite sex. In *R v Secretary of State, Ex parte Perkins*, 16 July 1998, *The Times*, Lightman J in the English High Court applied *Grant*. Perkins had been dismissed from the Royal Navy on the grounds of his homosexuality. He sought a judicial review on the basis that the policy was to dismiss homosexuals from the armed forces was contrary to the *Equal treatment directive*. Lightman J had initially referred the question of the scope of the directive to the ECJ. The administrator of the ECJ asked the judge to consider whether in light of the ruling in *Grant* the reference should be withdrawn. Lightman J held that the case was covered by *Grant*. He did not accept argument that *Grant* was confined to the *Equal pay directive*. He ruled that the word 'sex' should be interpreted in the same way in both directives.

LEGAL PROFESSION

The European Commission has threatened to bring an action against Italy concerning its admissions test for EU-qualified lawyers. The Commission argues that this test is too bureaucratic and too difficult. Those sitting this examination are required to take papers on more subjects than those faced by Italians during the qualification process. A similar action has recently been initiated against France.

New *Acquired rights directive*

The *Acquired rights directive* (77/187/EEC) safeguards the rights of employees on the transfer of a business. This directive has given rise to much case law and general controversy. After four years of negotiation, the Council had adopted a new *Acquired rights directive* (98/50/EC). This endeavours to solve some of the problems revealed in the litigation on the original directive. The 1998 directive adds to the 1977 directive and substitutes some of its provisions. The amendments and substitutions reflect much of the case law and also attempt to resolve problems posed by conflicting court decisions. Member States are required to implement the amendments in the new directive by 17 July 2001.

Scope of the directive

Article 1.2 limits the application of the directive to situations where the undertaking to be transferred is within the EU. The directive leaves it to individual states to define 'employee'. However, article 2.2 provides that a state is not to exclude a person from the protection of the directive by reference to the number of hours worked, part-time status or the fact that he works under a fixed-term contract.

Transfer of an 'undertaking'

The directive applies to the transfer of an undertaking, business or part of a business, to another employer as a result of a legal transfer or merger (article 1.1a). This reproduces the language of the original directive, which gave rise to differing interpretations. Article 1.1b goes on to provide that there is a transfer only where what is transferred is 'an economic entity which retains its identity, meaning an organised group of resources which has the objective of pursuing an economic activity, whether or not the activity is central or ancillary'. This follows a somewhat restrictive interpretation taken in some of the Court of Justice decisions on the 1977 directive. The transfer of an activity, rather than assets is not caught by the directive.

Public bodies

The 1977 directive applied to both private and public undertakings. Article 1.1c refines the definition of public undertakings and confirms that the directive applies to public bodies engaged in economic activities, whether or not for gain. However, the directive stipulates that it does not apply to any administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities. In applying the directive for the future, a distinction will have to be drawn between economic activities and administrative functions.

Effects of a transfer

Article 3 concerning the effects of a transfer remains substantially unchanged. The transferee remains liable for the accrued rights and liabilities of the transferor. Article 3.2 now gives states the power to require the transferor to notify the transferee of all rights and liabilities known to the transferor before the transfer. Article 3.4 allows states to include pension, invalidity and related rights within their implementing legislation.

Exceptions

Article 4 retains the exception providing that a dismissal for 'economic, technical or organisational reasons' is permitted. Article 4a adds a new exception. Member States can provide that protection is available even where the transferor is subject to insolvency proceedings in the course of which its assets are being transferred. Domestic law can provide that the transferee is not to be responsible for the transferor's liabilities to the employees accrued prior to the insolvency so long as there are sufficient guarantee arrangements in favour of the employees from the transferor.

Remedies

The directive provides a right of enforcement to individual employees who had been dismissed or whose terms of employment had been altered after a transfer or to a trade union which had not been consulted. A new article 7a extends the right of enforcement to all employees and representatives of employees. G

Family law convention

The *Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters* (OJ 1998 C221/1) was recently adopted by the Council of Ministers. It sets out rules for determining jurisdiction in family law disputes within the European Union and requires courts of Member States to recognise and enforce judgments in other Member States. It parallels the *Brussels* and *Lugano conventions* which set out similar rules for civil and commercial matters. The convention is to enter into force when it is adopted by individual Member States. As with the other conventions, it has a protocol which allows the Court of Justice to give preliminary rulings on references from national courts. There is also a detailed explanatory report prepared by Prof Borras.

Scope. The convention applies in civil proceedings relating to divorce, legal separation or marriage annulment and parental responsibility for the children of both spouses.

Jurisdiction. There are two sets of rules dealing with jurisdiction. The first of these sets out a number of choices for jurisdiction in the case of divorce, separation or annulment. Jurisdiction is given to the courts of the Member State in whose territory the spouses are habitually resident; or the spouses were last habitually resident is one of them still resides there; or the respondent is habitually resident; or in the event of a joint application, either spouse is habitually resident; or the applicant is habitually resident and has been so for a year prior to the application; or the applicant is habitually resident, has been so for six months prior to the application and is resident or domiciled there. Alternatively, the courts of the Member State of which both parties are nationals, or are domiciled on a long-term basis, has jurisdiction.

The second set of rules deals with parental responsibility cases. A court with jurisdiction over the divorce or separation had jurisdiction in a matter relating to parental responsibility where the child was habitually resident in its territory. Even if the child is not habitually resident in that state, the court still has jurisdiction if the child is habitually resident within the EU, one of the spouses has parental responsibility and the spouses have accepted the jurisdiction of the court. In the case of child abduction by one of the spouses, the convention defers to the *Hague convention on child abduction of 1980*.

Jurisdictional conflicts. Applying the above rules, the courts of more than one state may have jurisdiction. To resolve any conflict, the convention provides for a rule similar to that found in articles 21 and 22 of the *Brussels convention*. The court first seized of the matter is given exclusive jurisdiction. Other courts are required to stay their proceedings until the court first seized satisfies

itself that it has jurisdiction to hear the matter.

Judgments. As in the *Brussels convention*, a judgment given in the courts of one Member State is to be recognised in all others. The convention also provides that a foreign judgment coming under the convention's provisions is not to be reviewed as to its content. In particular, the recognition of a divorce, separation or annulment granted in one Member State is not to be refused simply because the law of the state in which recognition is sought would not have recognised a divorce, separation or annulment on that basis.

Defences. There are a small number of defences to automatic recognition. These are very similar to the defences in the Brussels convention to recognition and enforcement. These defences are: where a judgment is irreconcilable with the public policy of the recognising state; a judgment given in default of appearance where the respondent was not duly served; a judgment which is irreconcilable with an earlier judgment given in that state or given elsewhere. G

Conferences and seminars

Academy of European Law
Contact: (Tel: 0049 651 937370)

Topic: *Community rules on State aid*
Date: 30 November and 1 December
Venue: Trier, Germany

Topic: *Combating corruption in the European Union*
Date: 3-4 December
Venue: Trier, Germany

Topic: *Mutual recognition of educational and professional qualifications in Europe*
Date: 3-4 December
Venue: Brussels, Belgium

Topic: *Current developments in European distribution law*
Date: 7-8 December
Venue: Trier, Germany

Topic: *Biotechnology in the single market*
Date: 22 January 1999
Venue: Edinburgh

AIJA (International Association of Young Lawyers)
Contact: Gerard Coll (tel: 01 6761924)

Topic: *Annual congress 1999*
Date: 22-27 October 1999
Venue: Brussels, Belgium

British Institute of International and Comparative Law
Contact: Valerie Echard (Tel: 0044 171 3232016)

Topic: *Civil redress for human rights violations abroad: the UK dimension*
Date: 4 December
Venue: London, England

Topic: *Issues arising in the renegotiation of the* Brussels *and* Lugano *conventions*
Date: 8 December
Venue: London, England

Topic: *United Nations working group on the peaceful settlement of disputes: prospects for the 21st Century*
Date: 11-12 December
Venue: London, England

Topic: *Current problems in international arbitration*
Date: 19 January 1999
Venue: London, England

Topic: *Legal problems in the regulation of vertical restraints*
Date: 12 February 1999
Venue: London, England

Computer and Telecommunications Law Review
Contact: Christian Roth (tel: 0044 171 8398391)

Topic: *European telecoms regulations and competition law*
Date: 30 November and 1 December
Venue: London, England

Hawksmere
Contact: (Tel: 0044 171 8248257)

Topic: *International product liabilities*
Date: 8 December
Venue: London, England

IBC
Contact: (Tel: 0044 171 453 5492)

Topic: *Pricing in Europe and EC competition law*
Date: 9 December
Venue: Brussels, Belgium

IIR
Contact: (Tel: 0044 171 915 5055)

Topic: *Mastering the legal challenges of EMU*
Date: 2 December
Venue: London, England

Law Society of Scotland
Contact: (Tel: 0044 141 5531930)

Topic: *50th anniversary conference*
Date: 8-10 July 1999

Solicitors' European Group
Contact: (Tel: 00 44 1905 724734)

Topic: *Vertical restraints and other competition reform projects*
Date: 13 January 1999
Venue: London, England

Topic: *Future of takeover regulation in the UK and the European view*
Date: 8 February 1999
Venue: London, England

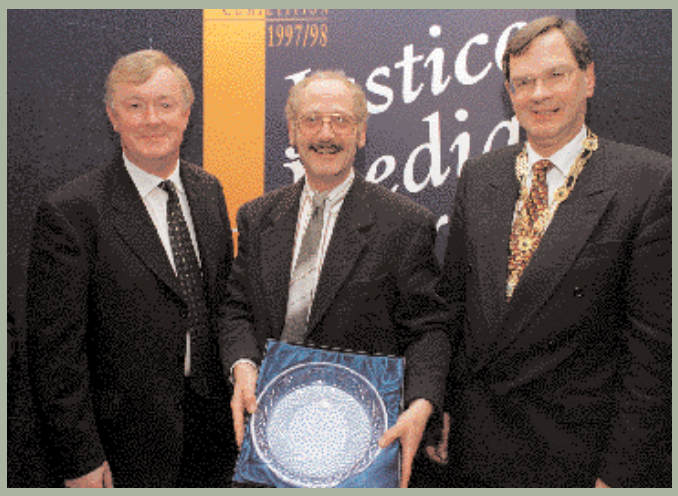
Topic: *Litigation in Luxembourg*
Date: 26 April 1999
Venue: London, England

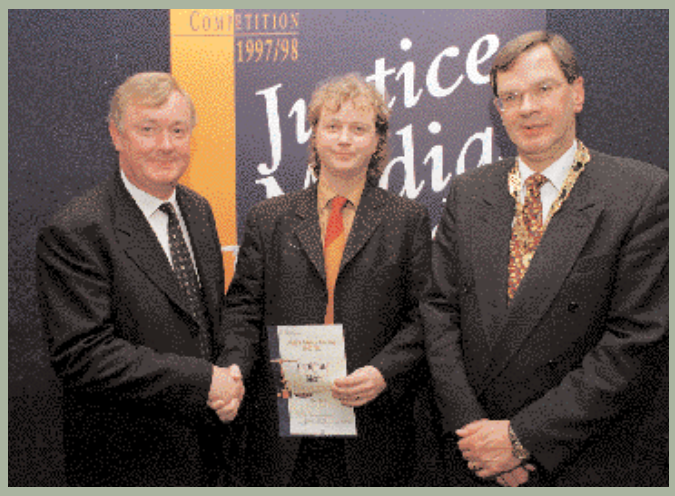
Topic: *The new merger rules one year on and other recent developments*
Date: 18 May 1999
Venue: London, England

Topic: *Public procurement policy in the Community*
Date: 16 June 1999
Venue: London, England

Topic: *Broadcasting, pay-per-view and sports competition law*
Date: 6 July 1999
Venue: London, England

Justice Media Awards 1998





Pictured at the Justice Media Awards ceremony in Blackhall Place last month were: (top left) Pat Brosnan of *The Examiner* who, together with his colleague TP O'Mahony, won the *Justice Media Award* in the daily newspaper category; (top right) Denis Daly of the *Western People* who won the *Justice Media Award* in the non-daily newspaper category; in the magazine category the *Justice Media Award* went to *Consumer Choice* (above left), whose editor Kieran Doherty picked up the *Justice Media Award* for journalist Sally Roden; and (above right) *Sunday Tribune* editor Matt Cooper, who picked up a certificate of merit

All the presidents' wives: the wives of past presidents of the Law Society pictured at a recent lunch in their honour, hosted by Helen Shields

Law Society President Laurence K Shields and Director General Ken Murphy concluded their programme of visits to bar associations around the country with visits to the Wexford (above), Waterford (top right) and Longford (right) bar associations. The pair visited a total of 27 bar associations over the course of the last year

LAW SOCIETY OF IRELAND

CHANGE OF MAIN PHONE/FAX NUMBERS

With immediate effect

New numbers:
Law Society phone: **672 4800**
Law Society fax: **672 4801**

Law School phone: **672 4802**
Law School fax: **672 4803**

Anyone for tennis?

The Irish Law Society recorded its third consecutive victory against the Law Society of England and Wales in this year's tennis fixture which took place in London on Saturday 19 September. The tennis was played in glorious sunshine on the superbly maintained grass courts at the Bank of England grounds in Roehampton, which each year plays host to the Wimbledon qualifying competition.

The fixture comprised three rounds of men's doubles, and the Law Society of Ireland was represented by Michael Doran, Frank Egan, James Flynn, Maurice Joy, Henry Lappin and Donnough Shaffrey. The score was an emphatic 13 sets to 5 in favour of the Irish, who easily outlasted their English and Welsh counterparts in the off-court entertainment also.

• The Law Society of Ireland was invited to participate for the first time in June 1997 in the Biennial European Lawyers' Tennis Tournament in London. The Irish team greatly upset the expectations of the other participating nations by defeating Italy, England and Germany to win the event.

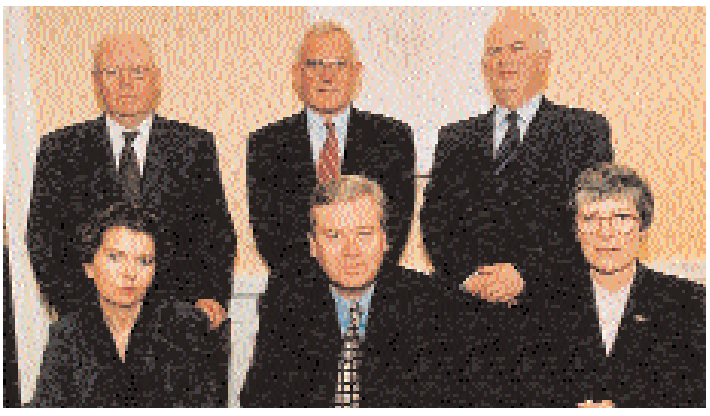
(Seated, left to right) Law Society President Laurence K Shields, Cliona O Tuama, President of the Irish Solicitors' Bar Association, London, at a meeting in London's Irish Club last month

The team from Sherlocks law searchers who won the recent Soccer Blitz organised by the Law Society's Younger Members' Committee at Blackhall Place. The victors are pictured with Law Society President Laurence K Shields and the chairman of the Younger Members' Committee Stuart Gilhooly

Members of the Conveyancing Committee Task Force who produced the Law Society's new *Conveyancing handbook* that has recently been sent out to every solicitors' practice in the country. *(From left)* Robert Potter-Cogan, Deirdre Fox, task force chairman Brendan McDonnell, Martin Archer and John Tarpey

Attorney General David Byrne SC congratulates Hugh Sheridan on his appointment as State Solicitor for Sligo

Law Society President Laurence K Shields presents a cheque to Sabha Greene, Resources Manager of Free Legal Aid Centres, on behalf of the Law Society. Over £10,000 has been collected for FLAC by the Society since January



The Attorney General and members of the Law Reform Commission recently met to discuss a second programme of law reform (the first was compiled in 1976). *(Front row, l-r)* Hilary Delaney BL, Attorney General David Byrne SC, solicitor Patricia Rickard-Clarke. *(Back row, l-r)* Dr Turlough O'Donnell QC, Mr Justice Vivian Lavan, President of the LRC, and Arthur Plunket BL

LOST LAND CERTIFICATES

Registration of Title Act, 1964

An application has been received from the registered owners mentioned in the schedule hereto for the issue of a land certificate as stated to have been lost or inadvertently destroyed. A new certificate will be issued unless notification is received in the Registry within 28 days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

(Register of Titles), Central Office, Land Registry, Chancery Street, Dublin

(Published 6 November 1998)

Regd owner: Daniel McLoughlin, Crossmakellegher, Ballyconnell, Co Cavan and Gortnaleck, Ballyconnell, Co Cavan; Folio: 25372; Lands: (1) Kilnavert, (2) Corneen and (3) Gortnaleck; Area: (1) 29.875 acres, (2) 0.488 acres, (3) 11.219 acres; **Co Cavan**

Regd owner: Michael McQuillan; Folio: 3564F; Lands: Annaghlee; Area: 0.619 acres; **Co Cavan**

Regd owner: Michael and Anne Fitzgerald; Folio: 20626F; Property: part of the Townland of Monacnapa situate to the west side of Mangerton Terrace, Town of Blarney, in the Barony of Muskerry East, County Cork; **Co Cork**

Regd owner: John Lynch; Folio: 26411; Property: in the Townland of Garrynagranoge situate in the Barony of Orrery and Kilmore and County of Cork; **Co Cork**

Regd owner: Joseph Sheehan and Phyllis Sheehan (deceased); Folio: 8990F; Lands: Property in the townland of Drom South situate in the Barony of Bear and County of Cork; **Co Cork**

Regd owner: Anne-Marie and Laurence Byrne; Folio: 39980; Property: part of the lands of Ballymah situate in the Barony of Cork; **Co Cork**

Regd owner: Donegal Creameries Plc (formerly Donegal Co-Operative Creameries Limited and prior thereto Taughboyne Co-Operative and Agricultural Dairy Society Limited), Moness, St Johnston, Co Donegal; Folio: 8076; Lands: Moness; Area: 0 acres 0 roods 31.5 perches; **Co Donegal**

Regd owner: Moira Wade, Ardmalin, Malin Head, Co Donegal and 7 Maybrook Mews, Pennyburn, Derry, also 440 Carnhill Estate, Derry; Folio: 3163F; Lands: Ardmalin; Area: 0 acres 1 rood 0 perches; **Co Donegal**

Regd owner: Gordon Allen and Cora Allen of Site 297 Grangemore, Raheny, Dublin, 32 Grangemore Avenue, Raheny, Dublin; Folio: 23981L; Lands: property situate to the west side of Grange Road in the parish of Baldoyle and District of Kilbarrack; **Co Dublin**

Regd owner: Brian Whelan and Margaret Whelan both of 10 Emmett Street, Sallynoggin, Dun Laoghaire, County Dublin; Folio: 48827L; Lands: property known as 10 Emmet Street, situate on the East side of Emmet Street in the parish of Monkstown and Borough of Dun Laoghaire; **Co Dublin**

Regd owner: Martin O'Sullivan; Folio: 118780F; Lands: property known as Site 66 Prospect View, Stocking Lane, Rathfarnham, Townland of Newtown, Barony of Uppercross; **Co Dublin**

Regd owner: Roebuck District Utility Society Limited; Folio: 15933; Lands: property situate in the Townland of Roebuck and Barony of Rathdown; **Co Dublin**

Regd owner: Joan Clarke and Martin Kelly both of 3 Annamoe Park, Cabra, Dublin 7; Folio: 110020F; Lands: property known as 3 Annamore Park, in the parish of Grangemore and District of North Central; **Co Dublin**

Regd owner: Edward Campion, Mary Campion and Loughlin Campion all of Glenfarne, Castleknock Road, County Dublin; Folio: 40459F; Lands: property situate in the Townland of Castleknock, Barony of Castleknock; **Co Dublin**

Regd owner: Brendan O'Reilly and Vivien O'Reilly both of 24 Esmondale, Naas, County Kildare; Folio: DN014053; Lands: A plot of ground situtate on the north side of Lorcan Avenue in the parish and district of Santry and city of Dublin; **Co Dublin**

Regd owner: Michael Langan (deceased) Rawfee, Headford, County Galway; Folio: 31256; Lands: Townland of Headford (situate on the north side of High Street in the town of Headford); Area: 0a 1r 7p in the Barony of Clare; **Co Galway**

Regd owner: Bridie Goode (deceased), Moher, Ballinasloe, County Galway, 47640; Folio 47640; Lands: Townland of (1) Moher and (2) Moher; Area: (1) 10a 2r 15p; 0a 0r 0p; in the barony of Clonmacnowen; **Co Galway**

Regd owner: Chemoran Limited, 30 Lower Leeson Street, Dublin 2; Folio: 53950; Townland of Carrowmoneash; Area: 0a 1r 20-1/2p; **Co Galway**

Regd owner: Margaret O'Donoghue; Folio: 9094; Lands: Townland of Knockaninane West, Barony of Magunihy; Area: two roods and two perches; **Co Kerry**

Regd owner: Daniel McCarthy; Folio: 17329F; Lands: Townland of Urdan District of Tralee, **Co Kerry**

Regd owner: Margaret Phelan; Folio: 14093; Lands: Prop 1: Carraguan, Prop 2: Ballygowan; Area: Prop 1: 14a 2r 37p, Prop 2: 10a 1r 20p; **Co Kilkenny**

Regd owner: Bridget Doherty (deceased), Chapel Street, Charlestown, County Mayo; Folio: 12776; Lands: Townland of Lowpark, Barony of Costello, Area: 0a 0r 5p; Ref: MMcD/HB/SDO/353; **Co Mayo**

Regd owner: Eva Mildred Wilson, Cornasoo, Dunraymond PO Co Monaghan; Folio: 12767; Lands: Cornasoo; Area: 20.156 acres; **Co Monaghan**

Regd owner: Leo and Julia Marren, Carrowmore, Croghan, Boyle, Co Roscommon; Folio: 13361; Lands: Townland of Carrowmore, Barony of Boyle, Area: 14a 0r 0p; **Co Roscommon**

Regd owner: Gabriel McSharry, Tonaphubble, Sligo; Folio: 17365; Lands: Townland of Clogher Beg, in the Barony of Carbury; Area: (1) 24a 3r 5p, (2) 15a 1r 30p; Ref: 98/159/RW/LH; **Co Sligo**

Regd owner: Martin Kerins, c/o Rochford, Gallagher & Company, Ballymote, Co Sligo; Folio: 23989; Lands: Townland of (1) Carrowkeel, (2) Chaffpool, (3) Leitrim South, (4) Leitrim South, (5) Leitrim South, (6) Carrowkeel in the Barony of Leyny; Area: (1) 9a 3r 15p, (2) 7a 2r 30p, (3) 23a 2r 11p (4) 3a 1r 26p, (5) 18a 1r 0p, (6) 6a 1r 31p; Ref: MD/KEA/001; **Co Sligo**

Regd owner: John Joseph Walsh; Folio: 6993; Lands: Townland of Blackknock, Barony of Middlethird; Area: 1 roods and 12 perches; **Co Waterford**

Regd owner: Eileen Whelan, Newcourt, Killotteran, County Waterford formerly Catherine Street, Waterford; Folio: 4340; Lands: Townland of Bawndaw; Area: 20 acres 2 perches; **Co Waterford**

Regd owner: Joseph Gerard O'Shea; Folio: 8954; **Co Wicklow**

WILLS

Connell, Michael, deceased, late of Castlehackett, Belclare, Tuam, Co Galway. Would any person having knowledge of a will executed by the above named deceased, who died on 23 August 1998, please contact Gleeson & Kean, Solicitors, High Street, Tuam, Co Galway, tel: 093 24082, fax: 093 24088

Connolly, Sarah, deceased, late of 16 Macken Street, Dublin. Would any person having knowledge of an original will of the above named deceased, who died on 12 August 1988, please contact O'Neill Regan & Co, Solicitors, 12 Carysfort Avenue, Blackrock, County Dublin, tel: 2882100, fax: 2833627

Conry, Celia (D), late of 22 Ranelagh Road, Dublin 6. Any solicitor having a will for the late Celia Conry, who died on 9 March 1998, might please notify O'Connor & Co, Solicitors, 196 Upper Salthill, Galway, tel: 091 525346, fax: 091 526474, DX 4 538 Galway, Mary St. File ref: LO'C/IA 2036

Curley, Michael, deceased, late of 2 Hymany Park, Ballinasloe, Co Galway. Would any person having any knowledge of a will executed by the above named deceased, who died on 18 May 1998, please contact FM Fitzgerald & Co, Solicitors, Kiltartan House, Forster Street, Galway, tel: 091 565601, fax: 091 567488, reference: NF/4349

Darcy, William (known as Tony), deceased, late of 72A Summerhill, Dublin 1. Would any person having knowledge of the whereabouts of the will of the above named deceased, who died on 19 August 1998, please contact JF Proctor & Company, Solicitors, 230 Swords Road, Santry, Dublin 9, tel: 8422919, fax: 8422793

Foley, Joseph, deceased, late of 52 Connaught Street, Dublin 7. Will anybody having knowledge of the whereabouts of the will of the above named deceased, who died on 21 June 1998, please contact Padraig E Halpenny and Company, Solicitors, 16 Inns Court, Winetavern Street, Christchurch, Dublin 8, tel: 6797884 or 6797066

Hennessy, Mary T, deceased, late of Maelclye, Annacarty, County Tipperary. Would any person having any knowledge of a will executed by the above named deceased, who died on 31 July 1998, please contact Michael J Breen & Co, Solicitors, Main Street, Roscrea, County Tipperary, tel: 0505 22155, fax: 0505 22394

Joy, William, deceased late of Buncurrig, Ballyheigue, Co Kerry. Would any person having knowledge of a will executed by the above named deceased, who died on 23 September 1998, please contact Patrick Mann & Company, Solicitors, 25/26/27 Ashe Street, Tralee, Co Kerry, tel: 066 24843 or fax: 066 23138

Keating, Maureen, deceased, late of 187 Oranmore Road, Ballyfermot, Dublin 10. Would any person having knowledge of a will executed by the above named deceased, who died on 1 June 1998, please contact John Sherlock & Company, Solicitors, 4 Tower Road, Clondalkin, Dublin 22, tel: 4570846, fax: 4571156

McDermott, Isabella, deceased, late of 12 Garden Village Drive, Kilpeddar, County Wicklow, and formerly of 36 Kilmacud Park, Stillorgan, County Dublin. Would any person having knowledge of the existence of a will (made after 18 March 1988) executed by the above named deceased, who died on 6 September 1998, please contact Margaret Behan of Behan & Company, Solicitors, Irish Permanent House, 12 Lower Kilmacud Road, Stillorgan, County Dublin, tel: 2832106

McManus, Michael, deceased, late of Larkfield, Manorhamilton, Co Leitrim. Would any person having knowledge of a will executed by the above named deceased, who died on

19 June 1995, please contact Michael Shiel & Co, Solicitors, 13 Upper Main Street, Letterkenny, Co Donegal, tel: 074 29900, fax: 074 29901

Moore, Kathleen, or Moore, John Joseph both late of 12 Blackquire Vills, Phibsboro, Dublin 7. Would any person having knowledge or the whereabouts of the making of a will of either of the above named, please contact Sherrys, Solicitors, Palmerstown Avenue, Dublin 20

Morrissey, Patrick, deceased, late of Kilbeg, Kill, Co Waterford. Would any person having knowledge of the whereabouts of a will dated 12 September 1980 executed by the above named deceased, who died on 21 July 1998, please contact T Kiersey & Company, Solicitors, 17 Catherine Street, Waterford, tel: 051 874366, 051 870390

EMPLOYMENT

Wanted – solicitor with minimum three years' post-qualification experience for general practice. Excellent prospects for suitable candidate. Apply in writing with CV to MC Dolan & Co, Solicitors, Ridge House, 1 Conyngham Road, Dublin 8

Solicitor seeks PQE in Dublin area. Practical experience and involvement considered more important than remuneration. Reply to **Box No 90**

Solicitor required for busy South Eastern practice. Minimum of two years' post-qualification experience in conveyancing, probate and litigation essential. Apply in writing with comprehensive CV to Thomas J. Kelly and Son, Solicitors, 35 South Street, New Ross, Co Wexford

Solicitor – seven years' PQE in general practice and seeks position in Dublin. Preference litigation and matrimonial work. **Box No 91**

Locum solicitor required from February to September 1999, reply in writing to Ita Gray, Ernest J Cantillon & Co, Solicitors, 39 South Mall, Cork

Partnership buy-in/out sought by solicitor of ten years' standing with strong PI lit background. Would also like to hear solicitor intending sole practice with a view to partnership. Reply in absolute confidence to **Box No 92**

Assistant solicitor (Co Galway) required for probate, conveyancing and tax-related matters. Experience essential. Modern office. Excellent conditions. Apply **Box No 93**

Experienced solicitor required for temporary position in busy Waterford City practice. Mainly conveyancing with some litigation work. Apply in confidence with CV and references to **Box No 94**

Locum solicitor required for busy County Galway office from early January, for a period of three to four months to cover maternity leave. Experience in litigation and conveyancing essential. Apply to **Box No 95**

MISCELLANEOUS

Northern Ireland agents for all contentious and non-contentious matters. Consultation in Dublin if required. Fee sharing envisaged. Offices in Belfast, Newry and Carrickfergus. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry, tel: 080 1693 61616, fax: 080 1693 67712

Personal injury claims, family law, criminal law and property law in England and Wales. We have specialist departments in each of these areas, and offices in London (Wood Green and Camden) and Birmingham. One of our staff is in Ireland for one week in every month. Legal aid available to clients that qualify. Contact David Levene & Company, Ashley House, 235-239 High Road, Wood Green, London N22 4HF, England, tel: 0044 181 881 7777, fax: 0044 181 889 6395, and The McLaren Building, 35 Dale End, Birmingham B4 7LN, tel: 0044 121 212 0000, fax: 0044 121 233 1878

London solicitors will advise on UK matters and undertake agency work. All areas. Corporate/private clients. Ellis & Fairbairn, 26 Old Brompton Road, South Kensington, London SW7 3DL, tel: 0044 171 589 0141, fax: 0044 171 225 3935

Agents – England and Wales. We are willing to act as agents for Irish solicitors in civil and criminal litigation. Contact: Olliers, Solicitors, Alderman Downward House, 2/3 The Birtles, Civic Centre, Wythenshawe, Manchester M22 5RF, tel: 0044 161 437 0527, fax: 0044 161 437 3225

Northern Ireland solicitors. Will advise and undertake NI-related matters. All areas corporate/private. Agency or full referral of cases as preferred. Consultations in Dublin or elsewhere if required. Fee sharing envisaged. Donnelly Neary & Donnelly, 1 Downshire Road, Newry, Co Down, tel: 080 1693 64611, fax: 080 1693 67000. Contact KJ Neary

Northern Ireland solicitors providing an efficient and comprehensive legal service in all contentious/non-contentious matters. Dublin-based consultations and elsewhere.

GAZETTE

ADVERTISING RATES

Advertising rates in the *Professional information* section are as follows:

- **Lost land certificates** – £30 plus 21% VAT
- **Wills** – £50 plus 21% VAT
- **Lost title deeds** – £50 plus 21% VAT
- **Employment miscellaneous** – £6 per printed line plus 21% VAT (approx 4/5 words a line)

All advertisements must be paid for prior to publication. Deadline for December Gazette: 20 November. For further information, contact Catherine Kearney or Andrea MacDermott on 01 671 0711.

Fee apportionment. ML White, Solicitors, 43-45 Monaghan Street, Newry, County Down, tel: 080 1693 68144, fax: 080 1693 60966

Seven day publican's licence for sale. Further particulars: P O'Connor & Son, Solicitors, Swinford, County Mayo. Tel: 094 51333, Telefax: 094 51833, e-mail:poconsol@iol.ie, Ref: BD/P/W.31 3/G

Seven day publican's licence for sale. Apply Marren & Company, Solicitors, Mullingar, tel: 044 43826

Change of address – Bohan Solicitors have moved to new premises. The new address is 16 Fitzwilliam Square, Dublin 2, tel: 6779722, fax: 6779993

TITLE DEEDS

Folio 14619
County Donegal
Registered owner: Madge Diver of Boyoughter, Lettermacaward, County Donegal
In the matter of the *Registration of Title Act, 1964* and the application of Rose McCready for registration as owner with an absolute title
Application No AP/DC/W7646/96

To whom it may concern (and in particular the next of kin of the above mentioned Madge Diver)

Take notice that Rose McCready of Derryleconnell, Doochary, County Donegal, has lodged an application under section 49 of the above Act to be registered as full owner with an absolute title of the above mentioned folio lands. The map may be inspected at this registry.

All persons objecting to such registration are hereby required to file their objections in writing duly verified within one calendar month from the date of publication of this notice.

In the absence of objection or in the event of any objection not being sustained, registration will be effected.

Dated 25 September 1998
Denis Connolly, Assistant Principal, Land Registry

Corporate and Public Services Solicitors Association

Annual Conference

Weekend of
20 to 22
November,
1998

Dunraven Arms,
Adare, Co. Limerick.

Topics

- Stress Management
- Data Protection ñ the new rules
- Banking Regulation
- Developments in Financial Services and

Chaired by

Des O'Malley, T.D.

John F. Daly
Chairman, ICL
Computers Ireland

In association with
Irish Business Law

For details and registration, contact
Suzanne Healy, NTMA, Treasury
Building, Grand Canal Street, Dublin 2.
Tel: 01 - 676 2266
Fax: 01 - 676 6582
E-mail: shealy@ntma.ie

Speakers

Professor Ciaran O'Boyle
Professor of Psychology
Royal College of Surgeons

Don McAleese
Partner
Matheson Ormsby Prentice

Ultan Stephenson
Partner
McCann FitzGerald

Sonja Foley
Financial Regulator
Central Bank of Ireland
Securities & Exchanges Supervision

John Breslin
Barrister and Lecturer in Banking Law at University College Dublin.
Author of Banking Law in the Republic of Ireland

WHERE THERE'S A WILL THIS IS THE WAY...

When a client makes a will in favour of the Society, it would be appreciated if the bequest were stated in the following words:

*"I give, devise and bequeath the sum of **X** pounds to the Irish Cancer Society Limited to be applied by it for any of its charitable objects, as it, at its absolute discretion, may decide."*

All monies received by the Society are expended within the Republic of Ireland.

"Conquer Cancer Campaign" is a Registered Business Name and is used by the Society for some fund-raising purposes. The "Cancer Research Advancement Board" allocates all Research Grants on behalf of the Society.

IRISH CANCER SOCIETY

5 Northumberland Road, Dublin 4. Tel: (01) 668 1855

IRISH KIDNEY ASSOCIATION

Donor House,
156 Pembroke Road,
Ballsbridge, Dublin 4.
Tel: 01 -668 9788/9
Fax: 01 - 668 3820

The Irish Kidney Association was formed in 1978 to:

1. Promote the general welfare of persons suffering kidney failure - financial and psychological.
2. To give advice and guidance to parents and relatives.
3. To arrange lectures, conferences and meetings pertaining to kidney disease.
4. To support research projects into the causes and effects of inherited disorders and kidney failure.
5. To print and distribute the Multi-Organ Donor Card and actively promote public awareness of organ failure.

REMEMBER US WHEN MAKING A WILL!

Certified by the Revenue Commissioners as a charity: 6327

OUR FINANCIAL ASSISTANCE IS NATIONWIDE